Federal Court  Cour fédérale

Date: 20200206

Docket: T-1282-19

Citation: 2020 FC 208

Ottawa, Ontario, February 6, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

WILLIAM GORDON GLENDALE IN HIS CAPACITY AS CHIEF OF BAND COUNCIL OF THE DA'NAXDA'XW FIRST NATION AND AS A MEMBER OF THE HEREDITARY CHIEFS COUNCIL AND MICHAEL JACOBSON-WESTON AND ANNIE GLENDALE IN THEIR CAPACITY AS COUNCILLORS OF THE DA'NAXDA'NW FIRST NATION

Applicants

and

BILL PETERS, NORMAN GLENDALE, ROBERT DUNCAN

Respondents

ORDER AND REASONS

I. Nature of the Matter

[1] This proceeding involves a motion seeking an order pursuant to Rule 51 of the *Federal Courts Rules* allowing an appeal of a prothonotary's order.

[2] This appeal is part of a larger scheme of proceedings, in which two groups within Da'naxda'xw First Nation in British Columbia [DFN] seek to establish their control over DFN's governance. Suffice to say that this is not a straightforward case.

[3] The Applicants are the band council known in this file as the "Glendale Council" [Glendale Council] and the Respondents are known as the "Hereditary Chiefs Council" [HCC].

[4] There are two parallel applications, both managed by Prothonotary Ring [Prothonotary]. In this application, T-1282-19, the Glendale Council asserts authority to govern DFN over the HCC. In T-1725-19, the HCC asserts authority to govern DFN over the Glendale Council.

[5] In this proceeding, the HCC appealed the October 30, 2019 Order of the Prothonotary dismissing their motion to disqualify JFK Law Firm [JFK Law] from acting on behalf of the Glendale Council due to a conflict of interest. They ask this Court for an order setting aside the Prothonotary's decision and removing JFK Law as solicitors for the Glendale Council.

[6] Since an appeal was filed in relation to the October 30, 2019 Order of the Prothonotary, and since there were motions for interlocutory relief brought by each of the parties against the other, I agreed to hear both motions. In both motions for interlocutory relief, both parties sought

to deny the authority of the other and establish their own authority until the final determination of the matter. I heard both motions for interlocutory relief on November 28 and 29, 2019, and dismissed both motions on December 6, 2019 in a decision reported as 2019 FC 1568.

[7] I heard the appeal of the October 30, 2019 Order of the Prothonotary on December 3, 2019 and reserved my decision.

[8] For the reasons that follow, the appeal is dismissed.

II. Background

[9] DFN is a small community with a small on-reserve population. Many of the people involved in this proceeding have familial relationships to one another. For many years, DFN's governance was not in issue. Until 1987, it was governed by the terms of the *Indian Act*, RSC 1985, c I-5. From 1987 until 2016, it was governed by a band council pursuant to an unwritten custom.

[10] However, this changed in 2016, when two DFN members expressed a desire to change the governance structure before this Court in file T-1908-16 [2016 Application]. The matter was mediated through a Dispute Resolution Conference on May 25, 2017 and a subsequent consent order from Justice Lafrenière was issued on the following day, which mandated the HCC to develop a governance code for DFN. The 2016 Application continues to be held in abeyance. Unfortunately, governance issues have again arisen as evidenced by this application, and T-1725-19 and the various motions heard by this Court.

[11] According to the HCC, JFK Law has allegedly been involved in a number of matters for DFN, including:

1. Pre-2017: Treaty Negotiations with the Federal Government on behalf of DFN;

2. Involvement in the 2016 Application;

3. Ms. Karey Brooks, a lawyer at JFK Law, communicated with DFN several times between April 26, 2017 and 2019 regarding legal matters, and the HCC say that DFN considered JFK Law to be engaged in a "solicitor-client" relationship with DFN.

III. The Prothonotary's October 30, 2019 Order

[12] The Prothonotary's October 30, 2019 Order summarized the facts and positions of the parties toward resolving two issues: (1) whether JFK Law was in breach of its duty not to act against a former client in a related matter, and (2) whether JFK Law risked breaching its duty of confidentiality.

[13] On the first issue, the HCC submitted that JFK Law must be disqualified due to a conflict of interest that came from continuing to represent DFN in matters related to the 2016 Application and then representing the Glendale Council in this application.

[14] On the second issue, the HCC argued that there is a distinct risk that JFK Law will use confidential information to the prejudice of the DFN. The Glendale Council denied that, arguing that JFK Law had not received any material that could cause prejudice to the HCC in this proceeding.

[15] The Prothonotary started with the first issue. She cited *McLean v Suhr*, 2018 FC 1000 at para 30 [*McLean*], where this Court confirmed that a lawyer may not represent another party in a proceeding against a former client in a matter arising out of or closely related to the initial retainer. For the Prothonotary, this applied whether or not confidential information was at risk. She then quoted *Brookville Carriers Flatbed GP Inc v Blackjack Transport Ltd*, 2008 NSCA 22 [*Brookville*], and section 3.4-10 of the Law Society of British Columbia's *Code of Professional Conduct for British Columbia* (and its commentary), both seemingly for the definition of what constitutes a "related matter". In *Brookville* at para 17, the Nova Scotia Court of Appeal found that a related matter was one that, "involved the lawyer taking an adversarial position against the former client with respect to the legal work which the lawyer performed for the former client on a matter central to the earlier retainer".

[16] The Prothonotary was not persuaded that JFK Law was acting "against the DFN" in this Application, as the HCC alleged; in fact, she declined to decide whether DFN was a client of JFK Law. This was because both parties purported to represent DFN, and who represented the DFN was a "central issue in the 2019 Application and it is premature and inappropriate to determine that issue on this motion". She went on to note that the Notice of Application did not name the DFN as a party and did not request remedies against DFN as a governing body or collectively. Instead, the Notice of Application challenged only the actions of "purported authority" that the HCC had taken—namely, Gordon Glendale's suspension and governance tasks "on behalf of" DFN. It is an Application requesting declaratory relief, which in substance, is in the nature of *quo warranto* against the HCC as individuals.

[17] The Prothonotary noted that orders in the nature of *quo warranto* are individual remedies by nature, citing *Marie v Wanderingspirit*, 2003 FCA 385 at paras 18 and 20. Moreover, because the Application only challenges *individual rights to authority*, it cannot be against DFN itself. The Prothonotary further noted that JFK Law's position has never changed between any proceedings—it has always taken the position that the band council is the lawful authority of the DFN.

[18] In dealing with the second issue, the Prothonotary cited *Macdonald Estate v Martin*, [1990] 3 SCR 1235 [*Martin*] for the Supreme Court's well-known two-part test on whether a new matter will place a lawyer in a conflict of interest. However, because the Prothonotary found earlier that JFK Law was not acting against DFN, but rather individuals, she found no conflict of interest or risk that confidential information would be used against DFN.

[19] Accordingly, the Prothonotary dismissed the HCC's motion.

IV. Issues and Standard of Review

[20] The HCC submits that the Prothonotary made three errors in her decision: first, that she erred in law by applying the incorrect legal test for assessing conflicts of interest and disqualifying counsel; second, that she erred in principle by failing to take certain evidence of JFK's previous representation into account; and third, that she erred in law by assuming certain facts were true.

[21] The HCC submits that the issues are as follows:

1. Did the Prothonotary err in law in dismissing the HCC's motion for disqualification of JFK Law?

2. Is JFK Law in a conflict of interest on this judicial review, such that they should be disqualified from acting as counsel on the application?

[22] The Glendale Council submits:

1. Did Prothonotary Ring make a reversible error of law or a palpable and overriding error in determining a question of fact or a question of mixed fact and law?

2. If so, is JFK Law in a disqualifying conflict of interest?

[23] The parties are in general agreement as to the applicable standard of review. As this motion is made under Rule 51 of the *Federal Courts Rules*, SOR/98-106, and reviews a prothonotary's order, the Court will apply the standard of review as given in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]. The Federal Court of Appeal has recently approved of this standard in the context of a prothonotary's decision in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 79 [*Hospira*]. That is, "palpable and overriding error" for questions of fact and questions of mixed fact and law; and "correctness" for questions of law (*Hospira* at para 66). Therefore, I will afford substantial deference to the aspects of the Prothonotary's decision that relate to the facts and the application of the law to the facts. I will afford no deference to the Prothonotary's determinations of the applicable law.

[24] Therefore, the issues are (1) whether the Prothonotary committed an error of law, or a palpable and overriding error of mixed fact and law or fact, and (2) if so, whether there is a disqualifying conflict of interest.

V. Parties' Submissions

A. *HCC's Submissions*

[25] The HCC summarizes the law on lawyers' duties of loyalty, which includes the duty to avoid conflicts of interest. They cite *Martin* as the applicable test for determining whether such a conflict of interest exists. They also cite *Brookville* as the applicable test for a breach of the duty of loyalty. They state that the duty to maintain confidentiality can create a conflict of interest and cite *Martin* at 1260–1261 for the applicable test of whether a disqualifying conflict is created—namely, when the lawyer receives confidential information attributable to a solicitor-client relationship and where there is a risk that the confidential information will be used to prejudice a client. They note that, if confidential information is present, then there is a rebuttable presumption of risk; and that the "overriding policy" around the test is that the reasonably informed person would be satisfied that no use of confidential information would occur.

[26] Next, the HCC alleges that the Prothonotary erred by applying a "pleadings-only" test which has no basis in law. They allege that she did not properly consider the scope of JFK Law's retainer agreements—past and previous. Their argument is roughly summarized as follows: If the Glendale Council *is* found to be the governing body of DFN, then JFK Law is acting for DFN. If the HCC is found to be the governing body of DFN, then JFK Law has acted *against* DFN. Either way, they are acting in a proceeding that is related to DFN and may place themselves in a

conflict of interest. For the HCC, failing to consider the positions of both sides was an error that justifies this Court setting aside the October 30, 2019 Order. Further, they claim that, in any case, they are a "band council in waiting" with sufficient "related third-party" status in proximity to DFN to give rise to a conflict of interest. They rely on *Orr v Alook*, 2014 ABQB 141 at paras 12-14 [*Orr*] for this proposition.

[27] The HCC alleges that the facts show that JFK Law has breached its duty of loyalty because it now "attacks and undermines" the work that it has done in a previous retainer. In the 2016 Application, it worked with DFN to build a new governance structure. Now, the HCC's position is that JFK Law works to attack that very structure—the HCC. The HCC should not be put in a position that it must defend itself from the very law firm that helped to create it.

[28] The HCC further alleges that JFK Law is in breach of its duty of confidentiality. They state that the relationship between JFK Law's previous work for DFN and the HCC is so closely related that "JFK Law is now acting against the DFN itself." Therefore, any confidential information in JFK Law's possession is presumed to prejudice the HCC and creates a conflict of interest. The Glendale Council's submissions fail to satisfy the standard of "a reasonably informed person of the public being satisfied that no use of confidential information would occur," per *Martin* at 1259–1260.

[29] The HCC seeks costs of this motion and the motion below in any event of the cause.

B. *Glendale Council's Submissions*

[30] The Glendale Council contests each of the HCC's allegations.

[31] The Glendale Council submits that the Prothonotary made no errors with respect to the evidence. They note that the Supreme Court in *Housen* explicitly stated that a failure to mention a relevant factor in depth, or at all, is not a sufficient basis for a reviewing court to reconsider the evidence; and the evidence is presumed to have been considered in its entirety (*Housen* at paras 39, 72). They cite *Van de Perre v Edwards*, 2001 SCC 60 at para 15, which was cited in *Housen*, as authority that it is only when there is a reasoned belief that the trial judge [or, here, Prothonotary] has forgotten, ignored, or misconceived evidence in a way that affected his or her conclusion, that there is a reviewable error. They hold that the HCC has not provided evidence that this standard has been met.

[32] With regard to how the Prothonotary treated the pleadings, the Glendale Council argues that for the purpose of the disqualification motion before the Prothonotary, the pleadings filed in this application are facts and that the standard of review is palpable and overriding error. They state that the Prothonotary did not claim that the facts advanced in the 2019 Application were "presumed to be true", but rather she relied on them as facts only toward the nature of the pleadings themselves—in the remedies sought, the nature of the application, etc. They note that the Prothonotary explicitly avoided deciding facts that would need to be determined at the hearing.

[33] The Glendale Council contends that the HCC inappropriately rely on contested facts to support their claim of a conflict of interest, such as "JFK Law is acting against the DFN, JFK Law is acting against a related third party ("band council in waiting"), JFK Law is attacking its previous work, and JFK Law is taking an adversarial position against its former client." Based on the Prothonotary's refusal to determine who is in charge of the DFN, or either party's relation to the DFN, the HCC cannot argue that they are a related third party. Further, the Glendale Council argues that there has been no "attack on JFK Law's previous work" because it is contested whether "JFK Law's previous work" actually gave the HCC any governance powers. It is premised on the assumption that the HCC is a governing body of the DFN, which is not yet decided.

[34] The Glendale Council argues that there has been no breach of confidentiality and the HCC have not identified a reviewable error in that regard. The Glendale Council notes that JFK Law represents individual members of the Nation in these proceedings, not DFN itself. They claim that to hold that JFK Law is disqualified, due to past work for DFN, would disqualify members of the DFN from bringing proceedings against other members of the DFN. They cite *Smallboy v Roan*, 2001 ABQB 927 and *Clayton v Lower Nicola Indian Band*, 2011 BCSC 525.

[35] Further, the Glendale Council argues that there are other reasons to uphold the Prothonotary's decision, such as those established by the Supreme Court in *Canadian National Railway Co. v McKercher LLP*, 2013 SCC 39 at para 65: disentitling behavior of the moving party, significant prejudice to the new client's interests, and the "good faith" of the law firm in

accepting the conflicting retainer. The Glendale Council argues that all three factors militate toward dismissing the motion.

[36] Finally, the Glendale Council admonishes the conduct of the HCC for sharing information related to confidential mediation information and JFK Law's retainer information. They claim that the confidential mediation information relates to discussions in 2017 that eventually resolved the matter. The mediations were conducted according to Rule 388 of the *Federal Courts Rules* and should not have been released. Further, the retainer information should have been either returned to JFK Law or made confidential. The Glendale Council alleges that it may be a breach of solicitor-client privilege to have released it. They seek solicitor-client costs in any event of the cause and ask for this Court to dismiss the HCC's motion.

VI. Analysis

[37] I find that the Prothonotary did not make a palpable and overriding error in dismissing the HCC's motion to disqualify JFK Law. I also find that the Prothonotary applied the facts, to the extent that she was able to under the circumstances, to the correct legal principles in deciding the motion.

[38] Rule 125 of the *Federal Courts Rules* permits the Court to remove a solicitor of record where there is a conflict of interest. Although the words of Rule 125 appear to relate to motions about solicitors removing *themselves* from the record, there is authority that a Court may use this Rule to remove counsel where there is a conflict of interest (see *Jonathan Boutique Pour Hommes Inc. v. Jay-Gur International Inc.*, [2000] FCJ No 2097; see also *McLean* at para 26).

[39] I also find that the Prothonotary deserves some "elbow room" or deference in which to make her decision based on the facts before her (*Hospira* at para 102-103). As the case management judge, the Prothonotary is "intimately familiar with the history, details and complexities" of this matter (*C. Steven Sikes, Aquero LLC v Encana Corporation Fccl Ltd*., 2016 FC 671 at para 13).

[40] It is useful to summarize relevant excerpts of the Prothonotary's order. At paragraph 37 of her decision, she found through the pleadings that the nature of the dispute was a challenge to the power of the HCC by a group of individuals, not a matter involving DFN itself. The Prothonotary explicitly declined to decide whether DFN was a former client of JFK Law. From this "nature of the matter" finding, she found that there was no breach of JFK Law's duty not to act against a client in a related matter (para 40); and also that JFK Law did not breach its duty of confidentiality (para 43).

[41] As the background of the proceedings described above illustrate, this is a difficult situation. In light of the difficulties presented in the motion before the Prothonotary, I find that the approach she employed was sound. As the case management judge, the Prothonotary was well aware of the temptation, or the danger, of making certain findings of fact at this early stage of the proceedings. As stated above, I am not convinced that she made a palpable and overriding error.

[42] The HCC relies on *McLean* as authority that a "pleadings only" approach creates a risk that clever applicant/plaintiff counsel will avoid conflicts of interest by tailoring their named

parties to ones that would not produce a conflict. I am not persuaded by the HCC's submissions under these particular circumstances.

[43] In fact, I am persuaded by the Glendale Council's argument that the case works against the HCC. *McLean* was an application for judicial review of an electoral officer's decision. Justice Mandamin found that the applicant's counsel was in a conflict of interest because he had acted both for and against Tallcree First Nation, privy to confidential information along the way. Justice Mandamin noted that the applicant in that case had previously tried to tailor his pleadings at paragraphs 42–43:

> In my ruling on the Applicants' motion for injunctive relief in 2018 FC 962, I found the role of the Electoral Officer in the preparation of the election voters list was inextricably intertwined with the role of the Tallcree membership clerk or the Tallcree administrator […] I directed the Chief and Council and the Tallcree First Nation be added as Respondents. Mr. Rath, in structuring the Application to avoid the appearance of a conflict of interest, failed in his duty to the Applicants to name proper parties.

[44] If the HCC felt that the Glendale Council had done the same, they were free to bring a motion before this Court to have DFN added to the pleadings through Rule 104 of the *Federal Courts Rules*. They did not do so. I therefore find that this "pleadings only" analysis does not bring about the danger that the HCC suggests.

[45] The Prothonotary committed no error in how she analyzed the pleadings. From a review of the Prothonotary's order, it is clear that she went beyond a consideration of the "pleadings" as she clearly reviewed and summarized the submissions of both parties. Although the HCC claims

that she was obliged to look at the various retainer agreements, they have failed to cite legal authority for this position.

[46] Further, as the Prothonotary noted, JFK Law's position has stayed the same in both the 2016 Application and this application: it is that the Glendale Council is DFN's lawful governing authority. Where a given issue proves dispositive, there is no need to continue the analysis.

[47] I mention for the sake of completeness that I am also not convinced that there will be much, if any, prejudice to the HCC from having JFK Law continue to represent the Glendale Council in the underlying application. The determination of who the proper or lawful governing authority of DFN is will be made strictly on the facts before the presiding Justice. Much if not all of the facts relied on by the parties have been thoroughly argued before the Prothonotary and before me in the motions for interlocutory relief and in this appeal. The Court has taken extreme care not to taint the matter by delving into findings of facts that are contested or in making findings of fact that could be determinative of the underlying application.

[48] The HCC has made lengthy submissions on whether JFK Law is in breach of its duties of loyalty and confidentiality. As I have found that the Prothonotary did not err in finding that the dispositive issue was whether DFN was involved in the proceedings at all—via the pleadings—there is no need to discuss these issues.

VII. Conclusion

[49] The HCC's appeal of the Prothonotary's October 30, 2019 order is dismissed.

[50] Regarding costs, I note that the Glendale Council has made lengthy arguments about the HCC releasing confidential and privileged material in the affidavit of Ms. Mannila. They classify this conduct as sufficiently reprehensible to justify an award of solicitor-client costs for this motion.

[51] This Court has full discretion over costs by virtue of Rule 400 of the *Federal Courts Rules*. The Glendale Council correctly notes that solicitor-client costs are only awarded in circumstances where a party has displayed reprehensible, scandalous, or outrageous conduct (*Louis Vuitton Malletier SA v Lin*, 2008 FC 45 at para 23).

[52] Ms. Mannila's affidavit contains information about the mediation leading up to the creation of the HCC, as well as Karey Brooks' opinions during those mediations. The mediations were confidential because they were conducted according to the *Federal Courts Rules* respecting dispute resolution services, per Rule 388:

Confidentiality	**Confidentialité**
388 Discussions in a dispute resolution conference and documents prepared for the purposes of such a conference are confidential and shall not be disclosed.	**388** Les discussions tenues au cours d'une conférence de règlement des litiges ainsi que les documents élaborés pour la conférence sont confidentiels et ne peuvent être divulgués.

[53] Justice Lafrenière's order made it clear that the order was a result of a dispute resolution conference.

[54] Ms. Manila's affidavit also contains information about the 2017 retainer relating to the 2016 Application. The HCC obtained it through her control/access to DFN's financial files. I agree that the HCC should have pursued options for protecting the information, such as an order to have it made confidential. Unfortunately, this information is now in the public record.

[55] While these breaches are clearly serious and inappropriate, I do not find them significant enough to qualify as "reprehensible, scandalous, or outrageous". Awarding solicitor-client costs is only appropriate in extremely rare and flagrant circumstances. The release of the mediation information was tailored toward the motion and only a limited amount of information was released.

[56] I award only ordinary costs to the Glendale Council.

ORDER in T-1282-19

THIS COURT ORDERS that:

1. The appeal of the Prothonotary's October 30, 2019 order is dismissed.

2. The Glendale Council, the Applicants in T-1282-19, are granted costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1282-19
STYLE OF CAUSE:	WILLIAM GORDON GLENDALE IN HIS CAPACITY AS CHIEF OF BAND COUNCIL OF THE DA'NAXDA'XW FIRST NATION AND AS A MEMBER OF THE HEREDITARY CHIEFS COUNCIL AND MICHAEL JACOBSON-WESTON AND ANNIE GLENDALE IN THEIR CAPACITY AS COUNCILLORS OF THE DA'NAXDA'NW FIRST NATION v BILL PETERS, NORMAN GLENDALE, AND ROBERT DUNCAN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	DECEMBER 3, 2019
ORDER AND REASONS:	FAVEL, J.
DATED:	FEBRUARY 6, 2020

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