Date: 20051216

Docket: T-1846-05

Citation: 2005 FC 1703

Ottawa, Ontario, December 16, 2005

PRESENT: THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER

BETWEEN:

SIMON AWASHISH and
CHANTAL AWASHISH and HUBERT CLARY

Applicants

and

OPITCIWAN ATIKAMEKW BAND COUNCIL
and JEAN-PIERRE MATAWAW and MARTIN AWASHISH and
MARIA CHACHAI and RÉGINA CHACHAI and
PAUL AWASHISH and FERNAND DENIS-DAMÉE and
BONIFACE AWASHISH

Respondents

and

THE ATTORNEY GENERAL OF CANADA

Third Party

REASONS FOR ORDER AND ORDER

TREMBLAY-LAMER J.

[1] This is a motion for an order of interlocutory injunction brought under section 18.2 of the *Federal Courts Act*, R.S.C., (1985) c. F-7 and sections 359 *et seq*. of the *Federal Court Rules, 1998* SOR/98-106.

[2] The applicant Simon Awashish had been elected as Chief of the Band Council of the Opitciwan Atikamekw (the "Band Council") on February 13, 2003. However, as a result of the elections on July 18 and 19, 2005, in which the applicant ran for re-election, the following respondents were elected: Jean-Pierre Matawaw, as Chief, Martin Awashish, as Vice-Chief, and Maria Chachai, Régina Chachai, Paul Awashish, Fernand-Denis Damée and Boniface Awashish, as councillors.

[3] Following this election, five complaints were filed before the Appeal Committee under the Band Council Electoral Code. On September 15, 2005, the Appeal Committee cancelled the elections held on July 18 and 19, 2005. It ordered new elections and decreed that the status quo be maintained in the meantime by reinstating of the former members of the Band Council.

[4] Following this decision, the Band Council Elections Committee held a general meeting on September 21, 2005, at which time it rejected the decision rendered by the Appeal Committee and declared valid the elections held on July 18 and 19, 2005.

[5] First of all, the respondents invoked the matter of the jurisdiction of this Court. The respondents claimed that the application for judicial review concerned the decision made on September 21, 2005 by the assembly of Band members and not the decision rendered by the Band Council. In effect, the decision rendered on September 21, 2005 was made by the assembly of Band members. Sections 74 *et seq.* of the *Indian Act*, R.S.C. (1985), c. I-5 concerning elections of the Chief and Band Council do not apply to the Opticiwan Atikamekw Band. On September 21, 2005, the assembly acted within its inherent authority in compliance with custom. When acting according

to custom, the assembly has all powers. It is not a “federal board” within the meaning of section 2 of the *Federal Courts Act*.

[6] I do not accept this argument. The general assembly was convened by the Band Council Elections Committee, which had been appointed under paragraph 16.2 of the Electoral Code. Contrary to what the respondents allege, there is strong evidence showing that the Electoral Code represents the custom of the Band.

[7] The applicable custom when a Band Council is to be chosen in cases not governed by section 74 of the *Indian Act, ibid.,* “must include practices for the choice of a council generally acceptable to members of the band upon which there is a broad consensus”: *Bigstone v. Big Eagle* (1992), 52 F.T.R. 109; *Bone v. Indian Band No. 290 of Sioux Valley* (1996), 107 F.T.R. 133. In this case, the Electoral Code was validly adopted by resolution following consultations with the community on May 31, 2005.

[8] I also underline the fact that in *Sparvier v. Cowesses Indian Band,* [1993] 3 F.C. 142 (T.D.), it was decided that an Indian Band Council elected in compliance with custom is subject to the jurisdiction of the Federal Court, just like an election held under the *Indian Act, supra*. Accordingly, the Federal Court has jurisdiction to hear this matter.

[9] As regards the merits of this motion, it is settled law that the test to be applied when deciding to grant an injunction is the three-stage test described by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311. The applicants must

show that (1) there is a serious issue to be tried; (2) irreparable harm will be caused if the injunction is not granted; and (3) the balance of convenience is clearly in their favour. The three elements of the test must be proven by the applicants for relief to be granted.

[10] I am satisfied there is strong *prima facie* evidence of the illegality of the decision made on September 21, 2005. Although paragraph 19.12 of the *Electoral Code* specifies that the decision rendered by the Appeal Committee is final, the Election Committee convened a general assembly, which reversed the Appeal Committee's decision, contrary to the procedure under the *Electoral Code*. As I wrote in *Gabriel v. Mohawk Council of Kanesatake*, [2002] F.C.J. No. 635 (T.D.), at paragraph 21: "Any electoral process that does not respect the Code does not appear to represent the generally-accepted practice and should not be viewed as the custom of the Band".

[11] As far as irreparable harm is concerned, in *Gabriel v. Mohawk Council of Kanesatake, ibid.*, I was of the opinion that the prestige that comes with the office of Chief could not be compensated by an award of damages and that, for this reason, the loss of this position constituted irreparable harm:

> [26] . . . The jurisprudence makes it clear that the office of Chief is political and that the law concerning wrongful dismissal does not provide for remedies for loss of elective office. This was recognized by my colleague MacKay J. in *Frank v. Bottle et al* (1993), 65 F.T.R. 89 at paras. 27-28 where he said:
>
> > In my view the law concerning wrongful dismissal, and damage awards for that, deals with situations of employer-employee relations and it does not provide for remedies for loss of elective office. The Chief is not an employee of Council nor in my view can he be considered an employee of the Tribe. The office of Chief is political, filled by valid election, with attendant responsibilities that transcend any concept that he is an employee of the Tribe, just as is the office of council member.

> . . . Without determining the issues which are not before the Court, in my view, he would have no claim in damages for wrongful dismissal and probably no realistic monetary claim for loss of reputation.

See also *Jock v. Canada* , [1991] 2 F.C. 355 at para. 51 (T.D.) where Teitelbaum J. explained that as elected officials, the grand chief and chiefs are not deputies or servants and thus cannot be dismissed at the will of someone else.

[27] Therefore, if I did not grant an injunction and the applicant subsequently succeeded with his application for judicial review, he would not be entitled to the relief normally available to employees who have been dismissed. This, in my view, constitutes irreparable harm.

[28] Further, the position of Grand Chief is a prestigious one. In the words of MacKay J. "[t]he position of Chief is one of great honour within the Tribe . . . ." (*Frank v. Bottle et al, supra*, at para.26).

[29] The Grand Chief acts as a spokesperson for the Council and the community. This is a very important role, as he can speak out on various policies and issues affecting the community and have a considerable impact on public opinion. Loss of prestige cannot be compensated in damages.

[12] This reasoning also applies in this case, because the role of Chief confers a certain prestige to the incumbent, as the Chief is something of a representative of the Band Council and the community.

[13] In *Attorney General of Canada v. Gould*, [1984] 1 F.C.1133 (C.A.), Mahoney J.A. mentioned that, in deciding a motion for an interlocutory injunction, the balance of convenience requires that the status quo be preserved or restored pending final decision on judicial review (*Gould, ibid.,* at page 1140).

[14] Likewise, in this case, I am of the opinion that the balance of convenience warrants maintaining in office the persons who validly held elected positions at the time the elections were

called, until the Federal Court renders a decision on the application for judicial review. This is, moreover, the solution suggested by the appeal committee.

[15] Contrary to the respondents' claims, I do not feel that the withdrawal of the incumbents from the positions of Chief and councillors of the Band council will result in much unrest within the community. First of all, the respondent Jean-Pierre Matawaw is facing a criminal charge of sexual assault under subsection 271(*2*) of the *Criminal Code*. Paragraph 14.7 of the Electoral Code automatically suspends a chief charged with an offence under the *Criminal Code*. Therefore, he presently cannot hold office and, in my opinion, this may cause more instability than a return to the previous status quo. Simon Awashish, as well as a sufficient number of elected councillors, affirmed in their affidavits to be willing to hold office until new elections are held, so as to ensure proper management and administration of the Band Council.

[16] For these reasons, I conclude that the applicants have met the requirements of the test for the issue of an interlocutory injunction.

[17] Following the presentation of the motion last December 6, the parties jointly requested that the Court suspend its decision for one week to allow them to try to reach an agreement. Unfortunately, no agreement was reached.

[18] In conclusion, it is not up to the Court to determine if it is preferable for a general election to be immediately called to elect a new Band Council. However, it is important to stress how

important it is for everyone to work together to attain the community's goals. No injunction or application for judicial review can replace cooperation between Band members.

ORDER

THE COURT ORDERS:

[1] The motion for an interlocutory injunction is allowed. The status quo existing prior to the decision made on September 21, 2005 is restored.

[2] The following respondents are removed from their functions within the Opticiwan Atikamekw Band Council (the "Band Council"): Jean-Pierre Matawaw, Martin Awashish, Maria Chachai, Régina Chachai, Paul Awashish, Fernand Denis-Damée and Boniface Awashish, who were illegally declared elected as a result of the elections held on July 18 and 19, 2005.

[3] The applicant Simon Awashish is reinstated to his functions as Chief of the Band Council, and Maria Chachai, Fernand Denis-Damée, Marc Awashish, Hubert Clary, Denis Clary, Pete Chachai, Louis-Michel Dubé, Johny Chachai and Charles Jean-Pierre are reinstated to their functions as councillors of the Band Council until the Court renders a decision on the application for judicial review.

[4] The respondents Jean-Pierre Matawaw, Martin Awashish, Maria Chachai, Régina Chachai, Paul Awashish, Fernand Denis-Damée and Boniface Awashish will render account to the applicants

in their capacity as Chief and councillors of the Band Council of the complete administration of the Band Council on July 19, 2005, specifically to:

a. Disclose and produce within seven days of this order the originals of all decisions made, resolutions adopted or acts performed in the alleged exercise of their authority within the Band Council, including all related documents;
b. Within seven days of this order, give an accounting of all funds, advantages and amounts of money received or paid in the exercise of their powers in their own name or in the name of the Band Council;
c. Disclose and produce within seven days of this order all the documents in the respondents' possession or control concerning the administration of the Band Council;

[5] With costs against the respondents.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1846-05
STYLE OF CAUSE:	SIMON AWASHISH, CHANTAL AWASHISH, HUBERT CLARY and OPTICIWAN ATIKAMEKW BAND COUNCIL, JEAN-PIERRE MATAWAW, MARTIN AWASHISH, MARIA CHACHAI, RÉGINA CHACHAI, PAUL AWASHISH, FERNAND DENIS-DAMÉE, BONIFACE AWASHISH
PLACE OF HEARING:	Québec
DATE OF HEARING:	December 6, 2005
REASONS FOR ORDER AND ORDER BY:	THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER
DATED:	December 16, 2005

APPEARANCES:

Benoît Amyot	FOR THE APPLICANTS
Pierre-A. Gagnon	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

CAÏN, LAMARRE, CASGRAIN, WELLS Roberval, Quebec	FOR THE APPLICANTS
BEAUVAIS, TRUCHON Québec, Quebec	FOR THE RESPONDENTS