Federal Court  Cour fédérale

Date: 20090602

Dockets: T-1979-08
T-155-09

Citation: 2009 FC 568

Docket: T-1979-08

BETWEEN:

ALEX JAMES ROBINSON

Applicant

and

BETTY LOU HALCROW,
EVA MUSWAGON,
ROSEANN MUSWAGON,
MARILYN MILES,
GERALDINE MCLEOD,
PIMICIKAMAK CREE NATION WOMEN'S COUNCIL

Respondents

Docket: T-155-09

AND BETWEEN:

ALEX JAMES ROBINSON

Applicant

and

CHRISTIE SCOTT, CHIEF ELECTORAL OFFICER OF PIMICIKAMAK CREE NATION, PIMICIKAMAK CREE NATION EXECUTIVE COUNCIL, CROSS LAKE BAND OF INDIANS BAND COUNCIL, AND RONNIE BEARDY, DONALD MCKAY, EUGENNIE MERCREDI, SHIRLEY ROBINSON, ALLAN ROSS, GRACE ROSS, GARRISON SETTEE AND ZACHEUS TROUT, ELECTED MEMBERS OF COUNCIL

Respondents

HARRINGTON J.

REASONS FOR ORDERS

[1] To understand the motions by the Pimicikamak Cree Nation ("PCN") Executive Council and Cross Lake Band of Indians Band Council to intervene in T-1979-08, and for leave to file a late appearance in T-155-09, it is necessary to set out the background in some detail.

[2] Last August, Alex James Robinson, in accordance with Band Custom, was elected Chief of the Executive Council of the PCN. Although the record is not yet fully developed, as I understand it, the PCN, situated in Northern Manitoba, is governed by a traditional form, comprising four councils, the Council of Elders, Women's Council, Youth Council and the Executive Council. The *First Written Law* and *Election Law* have both been reduced to writing.

[3] According to Pimicikamak Law, the Executive Council fulfils the role of "Chief and Council" for the purposes of the *Indian Act*, and dealings with Indian and Northern Affairs Canada (INAC). The Band is known to INAC as the Cross Lake Band of Indians. As Chief of the Executive Council of the PCN, Mr. Robinson is also Chief of the Cross Lake Band of Indians Band Council.

[4] Shortly after his election, Chief Robinson was charged with the criminal offence of obstruction of justice. Under section 109 of the *Election Law*, the Chief or Councillor shall vacate office by, among other things, "…permanent incapacity as determined by the Women's Council…". The Women's Council determined Chief Robinson to be permanently incapacitated because of the charge against him, and declared the office of Chief vacant.

[5] Chief Robinson filed an application for judicial review of that decision in docket T-1979-08. The respondents are the PCN Women's Council and its five councillors, Betty Lou Halcrow, Eva Muswagon, Roseann Muswagon, Marilyn Miles and Geraldine McLeod.

[6] The respondents had ten days to file a notice of appearance. They failed to do so and apparently have no intention of ever appearing. Furthermore, the Women's Council, as the federal board or tribunal whose decision is under review, failed to produce the record on which it based its decision, although duly called upon to do so under Rule 317 of the *Federal Courts Rules*.

[7] Chief Robinson sought and obtained an expedited hearing of his judicial review, which was set down for hearing in Winnipeg on May 25, 2009.

[8] Turning now to docket T-155-09, following the decision of the Women's Council, Christie Scott, Chief Electoral Officer, declared Garrison Settee as Acting Chief. He had run second to Chief Robinson in the August 2008 election. Chief Robinson filed an application for judicial review of that decision. The relief sought included a declaration that the decision was invalid, a declaration that Garrison Settee was not the Acting Chief, and an injunction prohibiting Ms. Scott from

conducting a by-election until a final decision was issued in T-1979-08. In addition to Ms. Scott, the other named respondents are the PCN Executive Council, the Cross Lake Band of Indians Band Council, and their councillors (apart, of course, from Mr. Robinson himself).

[9] Again, no appearance was filed and Ms. Scott did not produce the tribunal record on which her decision was based, notwithstanding that she was duly called upon to do so.

[10] Ms. Scott pressed on and scheduled a by-election for Chief of the Executive Council for April 2, 2009. It bears mentioning that, by this time, the criminal charges against Chief Robinson were permanently stayed.

[11] Chief Robinson sought an interlocutory injunction to forestall that election. Despite the fact that the respondents had not appeared, I ordered that they be personally served. This caused Mr. Tapper to file a Notice of Appearance on behalf of the "Respondent". I gave Mr. Tapper leave to appear for the purposes of contesting the injunction, adding that if there was an intention to contest the merits of the applications for judicial review, the respondents would have to move to be relieved of their default to appear within time.

[12] I granted the injunction. Among other things, in my order of March 13, 2009 I said: "It is neither frivolous nor vexatious to submit that a criminal charge does not constitute permanent incapacity within the meaning of the Pimicikamak Cree Nation Law."

[13] Since then Mr. Tapper has clarified his mandate. He acts only for the PCN Executive Council and the Cross Lake Band of Indians Band Council. Pursuant to Rule 109 of the *Federal Courts Rules*, they seek leave to intervene in T-1979-08. In T-155-09 they move for an extension of time pursuant to Rule 8, in order to appear to contest the merits of the application.

[14] The two motions were heard by videoconference on Friday, May 22, 2009 and were taken under advisement. Thus, in any event, the hearing of the judicial review in T-1979-08 was adjourned *sine die*.

THE ISSUES

[15] The first issue is whether Mr. Tapper truly represents the two Councils for which he purports to act. Mr. Trachtenberg, on behalf of Chief Robinson, submits that Mr. Tapper's mandate was given to him by a sub-group, and there is no evidence that appropriate meetings were called and proper resolutions passed.

[16] The second issue is whether leave to intervene should be granted in T-1979-08. Was the application made in a timely manner and will the intervention assist the Court in deciding the merits of the dispute?

[17] In T-155-09 the issue is whether the Councils should be relieved of their default to file a timely appearance. Did they have an intention to contest the application for judicial review and is there some merit to their position?

[18] Finally, procedural issues arise such as production of the tribunals' records, and whether the two applications should be joined, or at least heard on the merits, one immediately after the other, by the same judge.

SOLICITOR/CLIENT MANDATE

[19] Chief Robinson's point is that the *Indian Act* requires considerable formality, and without evidence of duly called meetings and duly executed resolutions, Mr. Tapper has no mandate to appear on behalf of the PCN Executive Council and the Cross Lake Band of Indians Band Council. If he is correct, the result is that both applications would proceed on an *ex parte* basis, unless a further delay were granted to allow the Councils to cross every "T" and dot every "I".

[20] The most relevant evidence is the affidavit of Ryan Castel, a member of the PCN and Assistant Executive Director of the Cross Lake Band. Following several meetings of the PCN's Executive Council, he was instructed to contact Mr. Tapper for the purposes of opposing the proceedings taken by Chief Robinson. According to his affidavit, there were several meetings involving six of the nine members of the Council. Excluded were Chief Robinson and his sister Shirley (who has filed an affidavit on his behalf). No mention is made of the ninth Council member. According to his evidence, Band Council Resolutions are not required in order to put into action the decisions made as those decisions are made by consensus.

[21] Mr. Castel was not cross-examined. I find the situation analogous to the rule established by the House of Lords in *Browne v. Dunn* (1893), 6 R. 67. The barrister who intends to put in doubt a person's testimony must give that person an opportunity to offer an explanation. Mr. Castel was not

cross-examined with respect to notices, if any, given of the meetings, and the practice with respect to resolutions. Even if Chief Robinson and his sister had been called to the meetings, they would have found themselves in a conflict and would have had to excuse themselves when it came to appointing counsel to contest his applications for judicial review. At this stage I accept that Mr. Tapper has been properly retained.

LEAVE TO INTERVENE IN T-1979-08

[22] Chief Robinson finds himself somewhat in a Catch-22 situation. He named the Women's Council as respondent, but objected to certain affidavits filed by their members. His position is that the role of the decision-maker, except on issues of jurisdiction, should simply be limited to filing the tribunal record. Who, then, is to take up their cause?

[23] It is obvious that there is a division among Band Members as to the role of Chief Robinson. The Women's Council opposes him, the Council of Elders supports him. The broad position taken by those opposed to Chief Robinson is that a criminal charge brings dishonour upon the Band. The Women's Council also claims there were other reasons to declare him permanently incapacitated, but it is difficult to comment thereon as the full record is not before the Court. For instance, the nature of his obstruction of justice charge has never been set out. The Women's Council's resolution refers to an RCMP report which they apparently have, but have not yet produced.

[24] Since Chief Robinson takes the position that the Women's Council should not be the one to defend its position, it seems appropriate that the motion for intervention be granted. The authorities are set out by the Federal Court of Appeal in *Boutique Jacob Inc. v. Paintainer Ltd.*, 2006 FCA 426,

357 N.R. 384. In that case, a number of ocean carriers sought to intervene in the Court of Appeal on various points of law relating to combined transport bills of lading and provisions of the *Railway Act*. The ocean carrier who was a defendant at trial was successful and, as the appeal did not pertain to it, did not intend to participate. In granting leave, Mr. Justice Nadon pointed out that not all the factors set out in *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (QL) need be met. However in this case, they are.

[25] The proposed interveners are directly affected by the outcome. There is a justiciable issue and a veritable public interest. There is no other reasonable or efficient means to submit the question to the Court, particularly as the position of the proposed interveners would not be adequately defended by the respondents, who do not intend to appear. In my view, the interests of justice are better served by the intervention, as Chief Robinson's case should not be decided on the merits in a vacuum. Others within the Band do not share his view of the meaning of permanent incapacity. Natural justice dictates that they have a right to be heard.

[26] I will deal with the timeliness of the intervention within my reasoning with respect to the late appearance in T-155-09.

EXTENSION OF TIME IN T-155-09

[27] The two leading decisions of the Court of Appeal are *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, 63 N.R. 106 and *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399, 167 F.T.R. 158. As per *Grewal*, the fundamental consideration is that justice be done between the parties. Consideration should be given to the reasons for the delay

and whether there is an arguable case on the merits. *Hennelly* inquires whether there was a continuing intention to pursue the application, whether it has some merit, whether prejudice arises by remedying the default, and whether there is a reasonable explanation for the delay.

[28] As a result of the interlocutory injunction, there is no prejudice to Chief Robinson. Again we need go no further than Mr. Castel's unchallenged affidavit for the reasons for the delay. The Council for many years had used another attorney. He was approached but said he was unable to act by direction of his firm due to funding issues. A retainer cheque was refused. Furthermore, in an effort to achieve consensus, there was much discussion as well as disruption, division and controversy within the Band, which required many meetings of the various Councils to determine which action to take.

[29] I am satisfied on the facts of this case that the Councils should be relieved of their default to appear. There is clearly a heartfelt difference of opinion as to the meaning of "permanent incapacity". The meaning of words cannot be considered in a vacuum; rather, they should be considered within the fabric of the Band itself. Since the differences which exist have not been resolved within the Band, they should be publicly aired in a court of law.

PROCEDURAL ISSUES

[30] The Councils are given leave to file a Notice of Intervention in T-1979-08 and a Notice of Appearance in T-155-09, both by June 16, 2009.

[31] Hopefully, the Councils have some influence upon the two decision-makers, the Women's Council and Ms. Christie Scott, so that they will provide their respective tribunal records as requested by Chief Robinson in his two applications, and as required under Rule 317. If they do not produce certified copies of the requested material by June 28, 2009 or seek directions pursuant to Rule 318, Chief Robinson has a choice. He may either seek an order or press on, on a very limited record. He himself produced the Women's Council's Resolution in T-1979-08. The subsequent affidavit of Gwendolen Solmundson, Mr. Tapper's assistant, is hearsay and obviously incomplete.

[32] Chief Robinson shall have until July 10, 2009 to serve and file his supporting affidavits and documentary exhibits. To the extent he wishes to rely upon affidavits already in the record, it is not necessary to reproduce them as long as it is clearly stated that he intends that they form part of the record on the application for judicial review on its merits.

[33] The affidavits of the PCN Executive Council and Cross Lake Band of Indians Band Council shall be served and filed by July 24, 2009. The above paragraph also applies thereto. Thereafter, cross-examinations on affidavits and the production of the parties' records shall follow the delays set out in Rules 308 and following.

[34] The two applications are clearly related. If the decision of the Women's Council is set aside, Chief Electoral Officer Scott's decision becomes moot. On the other hand, if that decision is not set aside, it does not necessarily follow that her decision to call a by-election was inevitably the correct one. It follows that T-155-09 should not be stayed pending the outcome of T-1979-08. Pursuant to Rule 105, the two applications shall be heard one immediately after the other. Nothing herein

prevents the parties from requesting that these applications be specially managed, and that the case manager alter the schedule set out herein and amend the order with respect to consolidation of proceedings.

"Sean Harrington"
Judge

Ottawa, Ontario
June 2, 2009

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1979-08
STYLE OF CAUSE:	Robinson v. Betty Lou Halcrow et al
AND DOCKET:	T-155-09
STYLE OF CAUSE:	Robinson v. Christie Scott et al

MOTIONS HEARD BY WAY OF VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND WINNIPEG, MANITOBA

DATE OF HEARING:	May 22, 2009
REASONS FOR ORDERS:	HARRINGTON J.
DATED:	June 2, 2009

APPEARANCES:

Murray N. Trachtenberg	FOR THE APPLICANT IN T-1979-08 AND T-155-09
Robert Tapper, Q.C.	FOR THE RESPONDENTS IN T-1979-08 AND T-155-09

SOLICITORS OF RECORD:

Posner & Trachtenberg Barristers & Solicitors Winnipeg, Manitoba	FOR THE APPLICANT IN T-1979-08 AND T-155-09
Tapper Cuddy LLP Barristers & Solicitors Winnipeg, Manitoba	FOR THE RESPONDENTS IN T-1979-08 AND T-155-09