

Federal Court



Cour fédérale

Date: 20120203

Docket: T-73-12

Citation: 2012 FC 153

Ottawa, Ontario, February 3, 2012

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**CHIEF JEFFREY NAPAOKESIK
COUNCILLOR LIBERTY REDHEAD,
COUNCILLOR ERNIE REDHEAD,
COUNCILLOR SANDY MILES AND
COUNCILLOR HOWARD CANABIE**

Applicants

and

**SHAMATTAWA FIRST NATION
MEMBERSHIP COMMITTEE AS
REPRESENTED BY ELIE HILL,
SAM MILES, VERONICA MILES,
CELINE MILES, MABEL MILES-TAKER,
DEANNA REDHEAD, JOHN DOE AND
RICHARD ROE**

Respondents

REASONS FOR ORDER AND ORDER

UPON the Applicants' motion for an interim injunction staying the effect of the meeting of the Shamattawa First Nation Membership Committee which took place on January 9, 2012 and other injunctive remedies including the prohibiting of the holding of elections for Chief and

Councillor and in the alternative the reinstatement of the Applicants to their position of Chief and Councillors pending the final determination of the application for judicial review;

AND UPON reviewing the material filed by and upon hearing submissions of counsel for the Applicants and counsel for the Respondents;

AND UPON considering that the motion for injunctive relief may only succeed if the Applicants meet the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311: (i) that there is a serious issue to be tried (ii) that they would suffer irreparable harm if the relief sought is not granted; and (iii) that the balance of convenience is in their favour;

AND UPON considering the following:

[1] The chronology of procedural events leading up to this hearing were set out by the Case Management Judge, Roger R. Lafrenière, Esquire, in his Reasons for Order and Order issued on January 26, 2012 replicated in the following paragraphs.

[2] On January 10, 2012, the Chief and Councillors of the Shamattawa First Nation (SFN), commenced an application for judicial review of a decision by the Shamattawa First Nation Membership Committee (SFNMC) dated January 9, 2012 purportedly removing the Applicants from the office of Chief and Council of the SFN. The Applicants concurrently filed a motion seeking an interim injunction prohibiting the holding of an election for the offices of Chief and four Councillors, scheduled to be held on January 18, 2012, an interim injunction staying the effect of

the meeting of the SFNMC which took place on January 9, 2012, or alternatively an order reinstating the Applicants to their position pending final determination of the application for judicial review. The Applicants also requested that the motion be heard on an expedited basis.

[3] By Order dated January 17, 2012, Mr. Justice Leonard Mandamin declined to fix a date for the hearing of the motion because the Respondents had not been provided two clear days to file responding material and no notices of appearance had been filed by any of the Respondents to the application for judicial review. Mr. Justice Mandamin ordered that the application continue as a specially managed proceeding and directed the Applicants could reapply to fix a date for hearing of the Applicants' motion upon service of their motion record on the Respondents, and completion of any requirements arising in case management.

[4] The Notice of Application and the Applicants' motion record was served on the Respondents on January 14, 2012. The Respondents filed separate Notices of Appearance on January 20, 2012.

[5] A case management conference was held by teleconference on January 26, 2012. In attendance were Norman Boudreau, solicitor for the Applicants, and the Respondents, Eli Hill, Sam Miles, Veronica Miles, Mable Miles-Taker, and Deanna Redhead. The Respondents agreed that since most of them did not have telephone or fax number, they could be contacted in the future through Eli Hill at his phone number (204)-565-2898 or by e-mail at elihill458@hotmail.com.

[6] On January 25, 2012, after the close of business, Mr. Hill communicated a request via voice mail that the case management conference be adjourned. This request was reiterated during the case management conference as Mr. Hill advised that the Respondents had consulted with a lawyer with the Public Interest Law Centre in Winnipeg, but had yet to retain her services. The request was denied since the Respondents had ample time to retain counsel and could not provide a sufficient reason to delay the fixing of hearing date of the Applicants' motion.

[7] The Case Management Judge fixed the date of February 1, 2012 for the hearing of the Applicants' Notice of Motion for injunctive relief.

Adjournment Request

[8] On January 30, 2012, the Respondents' counsel wrote advising he had been retained on January 27, 2012 and requesting an adjournment of the hearing in order to become acquainted with the issues and documentation and have the opportunity to meet with the Respondents. I refused the request was refused as the Case Management Judge had considered and refused a request for an adjournment by the Respondents on January 26, 2012 and no exceptional or new circumstances had been advanced justifying an adjournment.

[9] At the commencement of the hearing of the Notice of Motion on February 1, 2012, counsel for the Respondents renewed the request for an adjournment. The Respondents counsel submitted that as a result of his review of the materials filed and lengthy discussions with his clients, he is of the view the Applicants' material requires an answer. He requested the Notice of Motion be

adjourned to the week of February 14, 2012 to enable him to prepare and file the Respondents' material.

[10] The Applicant opposed the request for an adjournment noting the Case Management Judge heard and refused the Respondents' request for an adjournment on January 26, 2012 and set the hearing of this motion for February 1, 2012. The Applicants' counsel submits his clients have been pressing for a hearing of this injunction for some time submitting there is a need to stabilize governance of the SFN.

[11] In reply, Respondents' counsel submits he was not in receipt of a supplementary affidavit sworn and filed January 27, 2012. However, that affidavit was served on the Respondents on January 27, 2012 by email to the Respondent Eli Hill pursuant to the Case Management Judge's January 26, 2012 Order.

[12] I refused the Respondents' request for an adjournment and directed the notice of motion hearing to proceed. My reasons for doing so are:

- a. The Applicants' request for an expedited hearing of the Notice of Motion was twice refused in order to provide the Respondents with the full notice period and the opportunity to respond. The Respondents were served and have had the benefit of notice since January 14, 2012. The Respondents were involved in the events leading to the Applicants' application for Judicial Review and this Motion for injunctive relief and are fully acquainted with the facts.

- b. The Respondents' request for an adjournment was heard and refused by the Case Management Judge on January 26, 2012 and the Respondents were on notice to be ready to proceed with the hearing on February 1, 2012. No exceptional circumstances have arisen nor any new developments in the situation except those of the Respondents own making, namely the holding of an election notwithstanding to the Applicant's challenge to the decision of the SFNMC to remove the Chief and Council and hold new elections.
- c. The Respondents' retained counsel on January 27, 2012 four days before the hearing date for this Notice of Motion. Although the Respondents were served with the supplementary affidavit of Chief Napaokesik on January 26, 2012, they did not provide that document to their own counsel notwithstanding they had time to do so.
- d. The uncertainty created by the SFNMC decision to remove the Chief and Council and hold an election of a new Chief and Councillors jeopardizes the stability of the SFN governance and is a matter that ought to be heard in a timely fashion.

[13] I turn now to the Applicants' Notice of Motion for injunctive relief.

Request for Interim Injunction

[14] Briefly, the events in Shamattawa leading to the application for judicial review are set out in the following paragraphs.

[15] Mr. Jeffrey Napoakesik was elected Chief of SFN on August 10, 2010 for a two year term which ends in August 2012.

[16] The Respondents, who describe themselves as concerned band citizens and are described here as the Shamattawa First Nation Membership Committee, called a membership meeting on January 2, 2012 to address concerns of certain SFN members.

[17] According to Mr. Napoakesik, neither he nor any member of Council were invited to the meeting. Although he did not attend the meeting on January 9, 2012, Mr. Napoakesik listened to the proceedings which were broadcast over the local radio airwaves.

[18] During the meeting, the members in attendance were told that the Chief and Councillors had failed to stop the consumption of alcohol on reserve, failed to provide a recreation centre for the youth on reserve, failed to ensure construction of housing on reserve, created a debt in the community, and each gave \$1,700.00 to their wives. According to Mr. Napoakesik, the allegations made against his administration during the meeting were false. He was not provided an opportunity to defend himself and his reputation against the allegations that were made against his leadership.

[19] A vote was held resulting in the removal of the Applicants from their offices as Chief and Council. After the vote was taken, the Respondent, Mr. Eli Hill, announced that there would be a nomination meeting for the positions of Chief and four Councillors. On January 11, 2012, the

nomination meeting took place. According to the Applicants, they were not allowed to attend the nomination meeting. In addition, they were precluded from running in the election.

[20] On January 20, 2012, Mr. William Miles, was elected in the election that was held for the position of Chief of SFN. It is unclear whether the Chief-elect will be assuming the position of Chief while the present proceedings are outstanding. An election for the positions of the four Councillors had been scheduled to be held on January 27, 2012.

[21] Chief Napaokesik reported in his supplementary affidavit on January 26, 2012, that Mr. William Miles called for a public meeting in Shamattawa. The meeting was attended by 48 members of the SFN. At the onset of the meeting Mr. Miles proposed that that the Shamattawa Election Custom Code be put in writing, that consultation with the membership take place, that the drafted Custom Election Code be reviewed by legal counsel and ratified by the membership. The Election Custom Code would provide that all band members including the Applicants could run in the election. In exchange the Applicants would withdraw the application in Federal Court. Mr. Miles further proposed that Daniel Redhead be the Electoral Officer in charge of following through with the above process.

[22] Chief Napaokesik reported that the general consensus of the meeting was that the motion was accepted except for four band members, two of whom are Respondents in this matter, Eli Hill and Celine Miles. Two other members, Eugene Moose and Valerie Miles, also voted against the motion. Chief Napaokesik stated it was unclear to him if two other Respondents, Veronica Miles and Deanna who were present at the meeting, voted for or against the motion. Notwithstanding the

acceptance of the motion, Chief Napaokesik stated the Respondent Eli Hill intended to proceed with the nomination and election of four councillors.

Serious Issue

[23] The threshold for a serious issue is not high. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 the Supreme Court of Canada set out that an applicant must show that there is an issue to be adjudicated and that the issue is not “frivolous and vexatious”.

[24] The Applicants say their dismissal from the positions of Chief and Councillors because of allegations of misconduct without an opportunity to answer those allegations raises a serious issue about a breach of procedural fairness. Counsel for the Respondent does concede there is a serious issue to be tried.

[25] I agree there is a serious issue to be tried which is not frivolous or vexatious. Procedural fairness requires that a person who would be affected by a decision should have notice and an opportunity to make representation. *Orr et al v Fort McKay First Nation et al* 2011 FC 37

Irreparable Harm

[26] The Applicants must establish that they would suffer irreparable harm if the relief sought is not granted. The irreparable harm which would occur is neither speculative or hypothetical. *Canada (Attorney General) v. Canada Information Commissioner* 2001 FCA 25. Irreparable harm refers to the nature of the harm rather than its magnitude. *RJR-MacDonald* at para 59

[27] The Applicants say they were not allowed to attend the SFCMC meeting and defend themselves against the allegations raised. They say their reputations would be harmed if the SFNMC decision stands.

[28] In my view, the irreparable harm relates to the removal of the Applicants from office. The Applicants were elected to their respective positions of Chief and Councillor by the SFN membership. They are responsible for the governance of the SFN. Their removal from office jeopardizes the exercise of that responsibility. Aside from the allegations raised, there is no evidence before me that would justify interference with the Applicant's exercise of their governance responsibilities for which they were elected.

[29] I conclude that the Applicants have established irreparable harm.

Balance of Convenience

[30] Finally, the Applicants must show the balance of convenience is in their favour.

[31] The Applicants were elected for a two year term that expires in August 2012. The Chief provided affidavit evidence that the SFN has moved out of third party management to co-management, in other words the SFN has assumed greater responsibility for administering their own affairs. He states the SFN has achieved a surplus of \$100,000 this fiscal year. The Applicants submit the SFN governance will be harmed if there are two competing Chiefs and Councils.

[32] I find that the balance of convenience favours the Applicants. First, the Applicants were elected for a two year term. Their continuing in office pending the judicial review of the SFNMC decision maintains the status quo and they will continue to discharge the responsibilities they assumed upon being elected to office.

[33] On the other hand, the Respondents, are on notice that the basis for their actions, the SFNMC decision, is being challenged in Court. The person elected Chief after that election appears to have acknowledged the uncertainty about the validity of his election and proposed an internal means of resolving the conflict.

[34] More importantly, public interest considerations favours the status quo pending the hearing to the judicial review of the SFNMC decision. Government agencies, federal and provincial, would have certainty in their dealings with the SFN in the interim. Businesses and individuals would be

able to continue dealing with the SFN with a measure of predictability. SFN electors would continue to know that when they elect their leadership, it is for a definite term of office.

[35] I find that balance of convenience favours the Applicants and maintenance of the status quo while the application for the judicial review is pending.

Community Dispute Resolution

[36] Having come to my decision that it is appropriate to grant injunctive relief, I want to acknowledge that there appears to be a capacity among the membership of the SFN to find a way to resolve the dispute themselves. Accordingly, my order will provide that reasonable measures to resolving the dispute undertaken by SFN members should be encouraged. In that respect I will remain seized of this matter and prepared to hear and give effect to measures that will resolve the controversy that are lawful and fair to all.

[37] The application for injunctive relief is granted on terms set out in my following order.

ORDER

THIS COURT HEREBY ORDERS that:

1. the January 9, 2012 decision of the Respondent Shamattawa First Nation Membership committee purporting to remove the Applicants from office is hereby stayed pending further order of this Court;
2. the Applicants continue to be lawful elected Chief and council of Shamattawa First Nations pending the final determination of the Applicant's Notice of Application for Judicial Review filed on January 10, 2012 or the completion of their term of office;
3. an interlocutory injunction, expiring upon the final determination of the Applicants' Motion for Judicial Review, preventing any person, save and except the Applicants, from holding themselves out as Chief or as a Councillor of the Shamattawa First Nation is granted; and
4. costs of this motion shall be in the cause.

As the Judge who heard the Notice of Motion for interlocutory relief, I remain seized of this matter and therefore further **DIRECT** that:

5. that this Order may be varied upon application to myself to accommodate any process required or reasonably requested to be undertaken by any person with a view of assisting the Shamattawa First Nation to internally resolve the within dispute and any conflict to its governance.

"Leonard S. Mandamin"

Judge

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-73-12

STYLE OF CAUSE: CHIEF JEFFREY NAPAOKESIK et al
v. SHAMATTAWA FIRST NATION et al

**MOTION HELD VIA VIDEOCONFERENCE ON FEBRUARY 1, 2012 FROM
OTTAWA, ONTARIO AND IN WINNIPEG, MANITOBA**

**REASONS FOR ORDER
AND ORDER:** MANDAMIN J.

DATED: FEBRUARY 3, 2012

APPEARANCES BY:

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Mr. T.G. Frohlinger FOR THE RESPONDENTS

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