Federal Court of Appeal | Cour d'appel fédérale

Date: 20121030

Docket: A-450-11

Citation: 2012 FCA 269

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

FORT MCKAY FIRST NATION CHIEF AND COUNCIL

Appellants

and

MIKE ORR

Respondent

Heard at Edmonton, Alberta, on April 16, 2012.

Judgment delivered at Ottawa, Ontario, on October 30, 2012.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Council of the Fort McKay First Nation decided to suspend the respondent, Mr. Orr, without pay from his office as a councillor and to remove him from directorships in certain corporations. The Council did so upon hearing of a sexual assault charge against Mr. Orr. Those charges remain pending. In addition to that, the Council had received complaints that Mr. Orr had sent explicit text messages and photographs to the alleged victim of the sexual assault and to another woman. The Council expressed its decision in a resolution dated July 13, 2011.

[2] Mr. Orr brought an application for judicial review of the Council's decision to suspend him from Council. He argued that, in these circumstances, the Council lacked jurisdiction under the Fort McKay First Nation's *Election Code*. He also argued that the Council acted in a procedurally unfair manner.

[3] The Federal Court (*per* Justice Near) allowed the judicial review, set aside the resolution and restored Mr. Orr to his office of councillor pending the outcome of his criminal trial: 2011 FC 1305. The Federal Court held that the Council's resolution failed to include particulars of Mr. Orr's conduct that it relied upon in making its decision, as required by the *Election Code*. It added that the decision to suspend Mr. Orr as a councillor was not supported by any ground set out in the *Election Code*. Finally, although not deciding the matter, it expressed concern that the Council had not acted in a procedurally fair manner.

[4] The Chief and Council appeal to this Court. For the reasons that follow – reasons that differ somewhat from those of the Federal Court – I would dismiss the appeal with costs.

A. The Facts

[5] Mr. Orr was re-elected on April 5, 2011 as a councillor for the Fort McKay First Nation. In the next three months, the events described at the outset of these reasons took place. These

culminated in the resolution passed by the Council on July 13, 2011. At the time the Council passed the resolution, the charge of sexual assault against Mr. Orr remained pending.

[6] The Council's resolution reads as follows:

> WHEREAS: A quorum of the Fort McKay First Nation Council met on the 13 day of July 2011;
>
> AND WHEREAS: Pursuant to their inherent right to self-government, and pursuant to the powers granted to Chief and Council under the *Indian Act*, the Chief and Council are empowered to make decisions on behalf of the membership of the Fort McKay First Nation;
>
> AND WHEREAS: The Chief and Councillors hold the shares of all corporate entities within the First McKay Group of Companies in trust for the Fort McKay First Nation and are responsible for the appointment and removal of Directors;
>
> AND WHEREAS: Councillor Mike Orr has been charged with serious criminal offences and is being sought for arrest by the Royal Canadian Mounted Police;
>
> THEREFORE BE IT RESOLVED THAT:
>
> 1. Effective immediately, Mike Orr is suspended as a Councillor without pay, and this suspension will remain in place until all charges against him are resolved; and
>
> 2. Effective immediately, Mike Orr is removed as a Director of all corporate entities within the Fort McKay Group of Companies and joint ventures.

[7] Properly characterized, the Council's resolution is a decision that Mr. Orr should be suspended without pay as a councillor.

B. Analysis

(1) The standard of review

[8] The Federal Court judge held that the standard of review of correctness applied to the Council's decision regarding its "jurisdiction" to suspend Mr. Orr from his office as councillor. The parties agree with the Federal Court judge in this respect.

[9] We are to adopt the standard of review worked out in an earlier case if it is "satisfactory": *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 62, [2008] 1 S.C.R. 190. There is authority from this Court to suggest that correctness is the standard of review for decisions made under a section that is "jurisdictional" in nature: *Martselos v. Salt River Nation #195*, 2008 FCA 221 at paragraphs 28-32.

[10] However, later holdings of this Court and the Supreme Court of Canada have arguably undercut the basis for correctness review outlined in *Martselos*. The Supreme Court has recently suggested that the characterization of a legislative provision as "jurisdictional" for the purposes of judicial review should be avoided: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paragraph 34. It has also recently queried whether any "true questions of jurisdiction" warranting correctness review exist: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. Our Court has held that so-called "jurisdictional" issues are usually issues of interpreting legislative wording, a matter on which

reasonableness is the standard: *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223. Indeed, on issues of interpreting legislative wording, there is a "presumption" that the standard of review is "reasonableness": *Alberta Teachers' Association*, at paragraph 34.

[11] As noted above, the parties do not take issue with the standard of review adopted by the Federal Court. I am not bound by the parties' willingness to adopt a standard of review of correctness: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152. In light of the foregoing analysis, in my view the applicable standard of review is reasonableness.

[12] In the circumstances, however, the distinction between the two standards of review is most narrow. If the Council's decision to suspend Mr. Orr as a councillor by way of resolution alone cannot be supported by the words of the *Election Code* or any other source of power, the decision cannot be said to be acceptable or defensible on the law. I now turn to this issue.

(2) The power of the Council to suspend Mr. Orr by way of resolution alone

(a) Did the Council have an "inherent power" to suspend Mr. Orr by way of resolution alone?

[13] The Chief and Council argue that the Council had the power to suspend Mr. Orr from office by way of resolution alone under an "inherent power".

[14] In the view of the Chief and Councillor, the "inherent power" was properly exercised here. Council had to take steps to protect itself against vicarious liability for sexual harassment and to take steps as a proper fiduciary to protect band members. On that, it is not immediately clear to me how the suspension of Mr. Orr as a councillor would achieve those ends.

[15] The Federal Court held that Council's power to make this resolution exists only under the Fort McKay First Nation's *Election Code*. The Federal Court found that the resolution was not supported by an inherent power. The Federal Court stated as follows (at paragraphs 19 and 20):

> Based on previous determinations by this Court, the [Chief and Council] has asserted that the Council may retain the inherent power to suspend as rooted in custom to ensure harmony in the community so long as the Band's legislation has not "covered the field" (See *Whitehead v. Pelican Lake First Nation*, 2009 FC 1270, 2009 CarswellNat 4625 at para. 41; *Lafond v. Muskeg Lake Cree Nation*, 2008 FC 726, 2008 CarswellNat 1882 at para. 10)
>
> While this may have been relevant in other instances, I fail to see its application to the present case. Given the relatively broad and specified causes for suspension in the *Election Code* related to conduct in office, I must find that the legislation has "covered the field" in this area and does not give rise to additional inherent or customary powers to suspend.

[16] I agree with the Federal Court that the provisions of the *Election Code* on the removal or suspension of councillors oust any inherent power that may exist on those subjects and "covers the field."

[17] Even if a custom or inherent power exists, it may be ousted by express legislative language: *Lafond v. Muskeg Lake Cree Nation*, 2008 FC 726, 330 F.T.R. 60. Here, in my view, even assuming a custom or inherent power exists, for the reasons explained above, the *Election Code* ousts it.

[18] The *Election Code* sets out very detailed, carefully constructed, and precisely worded provisions regulating when and how councillors may be removed or suspended. It would be surprising if such demanding regulation could be so easily circumvented by relying upon an undefined, general, inherent power, as the Chief and Council suggest.

[19] The democratic backdrop of the provisions of the *Election Code* also undermines the suggestion that Council could simply act on its own based on an inherent power. As we shall see, relevant provisions of the *Election Code* require a democratic vote of the electors of the First Nation before a suspension or removal will be effective. These provisions must be interpreted in light of the fact that a councillor holds office on the basis of a majority vote of the electors of the First Nation. A paragraph in the preamble to the *Election Code* stresses that "the culture, values and flourishing of the Fort McKay First Nation [are] best advanced by…the selection and removal of leadership on the basis of democratic principles." The relevant provisions of the *Election Code* and that paragraph in the preamble have been democratically adopted: they came into force only after a majority of the electors of the First Nation ratified the *Election Code*.

[20] At a more basic level, the Chief and Council have not demonstrated the existence of any custom or inherent power that bears upon the issue of suspending councillors. The onus lies on the Chief and Council to establish this: *Whitehead v. Pelican Lake First Nation*, 2009 FC 1270 at paragraph 40, 360 F.T.R. 274; *Francis v. Mohawk Council of Kanesatake*, 2003 FCT 115 at paragraph 21, 227 F.T.R. 161.

[21] Therefore, I conclude that the Council's power to suspend Mr Orr by way of resolution alone is not supported by an inherent power. The issue before us, then, is whether the Council's decision to suspend Mr. Orr from his office of councillor by way of resolution alone can be supported on a reasonable reading of the relevant provisions of the *Election Code*.

(b) The relevant provisions of the *Election Code*

[22] In the alternative to their submission that the resolution was supported by an inherent power, the Council and Chief submit that the resolution was supported by the powers granted to the Council under the *Election Code*.

[23] The parties agree that the provisions in the *Election Code* dealing with the suspension and removal of councillors are sections 100 to 103. These sections read as follows:

Part 10
Suspension, Removal and Vacancy of Office

100 Vacancy of Office

100.1 The office of a chief or councillor automatically becomes vacant when:

100.1.1 the chief or councillor dies; or

100.1.2 the chief or councillor is convicted of a criminal office.

101 Removal or suspension of a chief or councillor

101.1 A chief or councillor may be removed or suspended from office by a vote of the electors according to the process set out in this Code.

101.2 The process for removal of a chief or council [sic] may be commenced by:

101.2.1 resolution of the council; or

101.2.2 petition of the electors

101.3 The resolution of the council or the petition, as the case may be, must include the particulars of cause for the removal or suspension of the chief or councillor, including cause on the basis that the chief or councillor has:

101.3.1 missed three consecutive council meetings without notice or reasons;

101.3.2 ceased to meet the eligibility requirements for nomination;

101.3.3 engages in drunk, drug related, disorderly or inappropriate conduct at council meetings, general meetings, special meetings or other public functions in which the chief or councillor are present as representatives of the first nation and which would tend to bring the reputation of the first nation into disrepute;

101.3.4 uses or misappropriates first nation funds or converts first nation property to his own use, including the funds or property of related business corporation or entities which are owned or controlled, in whole or in part, by the first nation;

101.3.5 engaged in gross financial mismanagement such that the first nation is burdened with substantial unnecessary debt;

101.3.6 breached Part 8 of this Code and the breach has resulted in adverse effect to the first nation; or

101.3.7 such further or other conduct which is sufficiently serious to warrant cause in all the circumstances.

102 Petitions

102.1 A petition for the removal of a chief or councillor shall include:

102.1.1 the name of the chief or councillor sought to be removed or suspended; and

102.1.2 the grounds on which the petition is signed, with reference to the relevant sections of this Code.

102.2 A petition for the suspension or removal of any chief or councillor is valid if:

102.2.1 the petition has been signed by no loss than twenty five (25%) percent of the electors;

102.2.2 the petition consists of one or more pages, each of which contains an identical statement of the purpose of the petition;

102.2.3 the petition includes, for each petitioner:

102.2.3.1 the printed surname and printed given names or initials of the petitioner;

102.2.3.2 the petitioner's signature;

102.2.3.3 the mailing address, street address, or land description at which the petitioner resides;

102.2.3.4 the date on which the petitioner signs the petition;

102.2.3.5 each signature on the petition must be witnesses by an adult person who has signed opposite the signature of the petitioner; and

102.2.3.6 if the petition has attached to it a signed statement of a person stating that they are the representative of the petitioners and that inquiries about the petition may be directed to them.

103 Vote of the electors

103.1 Upon receipt of a petition meeting the requirements of section 101 or upon the resolution of the council, the chief shall call a special meeting for the purpose of conducting a vote for the removal or suspension of a councillor. In the case of a vote which affects the chief, the council shall, by resolution, call the special meeting.

> 103.2 Upon the declaration of a voting result, the affected member of council shall be deemed to have been removed from office and ceases to be entitled to all rights and privileges associated with that office.
>
> 103.3 No voting result shall be valid unless the vote has been conducted by secret ballot at a special meeting at which a majority of electors have attended.

(c) Interpreting the relevant provisions of the *Election Code*

[24] Mr. Orr made two submissions on the issue of the power of the Council to suspend him as a councillor by way of resolution alone. First, he submits that sections 100-103 do not allow the Council to suspend him from office by way of resolution alone. Second, there was no cause for his suspension under section 101.3 of the *Election Code*.

[25] The Federal Court judge found that there was no cause for his suspension under section 101.3. He did not deal with the first submission.

[26] In particular, the Federal Court judge found that Mr. Orr's conduct was not "sufficiently serious to warrant cause in all the circumstances" within the meaning of section 101.3.7. The Federal Court judge did not view section 101.3.7 as regulating the private conduct of councillors. The Federal Court drew a distinction (at paragraph 31) between "events in [a councillor's] personal life" and "[the councillor's] position in public office."

[27] The *Election Code* does not expressly support the distinction drawn by the Federal Court judge. Further, other provisions of the *Election Code* suggest that such a distinction does not exist.

[28] The *Election Code* identifies as intrinsic to the role of councillor the concepts of honour, integrity and service as a role model. In particular, certain sections in the *Election Code* draw a clear connection between a councillor's conduct and public confidence in government. Section 91.1.6 states that the Council must act according to its "responsibility as a role model and representative of the first nation." Section 97.1.1 states that the Council must "represent the interests of the first nation with honour and integrity."

[29] These sections support the view that the potential breadth of the wording in section 101.3.7 of the *Election Code* – "sufficiently serious to warrant cause in all the circumstances" – could be given full effect by the Council. It follows that the Federal Court judge wrongly narrowed the meaning of the words, and that it was open to the Council to take the view that, if established by the evidence, Mr. Orr's conduct could fall within section 101.3.7.

[30] This does not end the matter. There is Mr. Orr's first submission to consider, namely that the Council did not have the power to suspend him from office by passing a resolution alone.

[31] In my view, this submission must be accepted. Various portions of sections 100-103 of the *Election Code* do not allow the Council to suspend Mr. Orr from office by passing a resolution alone. Several provisions of the *Election Code* support this:

- Under section 101.1, a "councillor may be removed or suspended from office by a vote of the electors according to the process set out in this Code." There has been no vote of electors.

- Section 103.1 describes the requirement of a vote of electors. It provides that upon resolution of the Council calling for a councillor's suspension, the Chief must call a special meeting of electors "for the purpose of conducting a vote for the suspension of a councillor."

- Sections 101.2 and 101.2.1 provide that the "process for removal" of a councillor is only "commenced" by a resolution. That process is completed by the vote of electors in section 103.1.

- The requirement of a vote of electors is underscored by a preamble in the *Election Code*, namely that "the culture, values and flourishing of the Fort McKay First Nation [are] best advanced by…the selection and removal of leadership on the basis of democratic principles."

- Under section 100.1 of the *Election Code*, a councillor automatically loses his or her office in two circumstances: upon death or upon conviction of a criminal offence, not upon a criminal charge.

[32] Therefore, I conclude that Council did not have the power to suspend Mr. Orr as a councillor by way of resolution alone. It follows that in doing so it reached an outcome that was outside the range of the acceptable and defensible. Its decision to suspend Mr. Orr as a councillor by way of resolution alone is unreasonable. The decision must be quashed.

[33] Given my conclusion on this point, it is not necessary to consider whether the Chief and Council accorded Mr. Orr sufficient procedural fairness in deciding to suspend him as a councillor.

D. Proposed Disposition

[34] I would dismiss the appeal with costs.

"David Stratas"
J.A.

“I agree
J.D. Denis Pelletier J.A.”

“I agree
Johanne Gauthier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-450-11
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE NEAR DATED DECEMBER 5, 2011, NO. T-1180-11	
STYLE OF CAUSE:	Fort McKay First Nation Chief and Council v. Mike Orr
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 16, 2012
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Pelletier J.A. Gauthier J.A.
DATED:	October 30, 2012

APPEARANCES:

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Priscilla Kennedy	FOR THE RESPONDENT

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