

Federal Court



Cour fédérale

Date: 20180313**Docket: 18-T-19****Vancouver, British Columbia, March 13, 2018****PRESENT: The Honourable Mr. Justice Simon Fothergill****BETWEEN:****NELSON LEON****Plaintiff/Moving Party****and****PAUL MICHEL****Defendants****and****ADAMS LAKE INDIAN BAND****Responding Party****ORDER**

UPON THE MOTION brought in writing by Nelson Leon for an order extending the time in which to commence an application for judicial review pursuant to s 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 369 of the *Federal Courts Rules*, SOR/98-106;

AND UPON reading the materials filed;

AND CONSIDERING the following:

Mr. Leon is a former Chief of the Adams Lake Indian Band [ALIB].

In June 2014, when Mr. Leon was Chief of the ALIB, the Chief and Council approved the *2014 Adams Lake Indian Band Custom Election Regulations* [2014 Regulations].

Mr. Leon was defeated in a by-election by Paul Michel, who became Chief on December 15, 2016. The election of Mr. Michel and several councillors resulted in petitions to the ALIB Community Panel and protracted litigation before this Court and the Federal Court of Appeal (see *Michel v Adams Lake Indian Band Community Panel*, 2017 FC 835; *Johnny v Adams Lake Indian Band*, 2017 FC 156; rev'd 2017 FCA 146; *Johnny v Adams Lake Indian Band*, 2016 FC 1399; rev'd 2017 FCA 147).

On November 7, 2017, the ALIB Chief and Council passed a Band Council Resolution [BCR] approving the *2017 Adams Lake Indian Band Custom Election Regulations* [2017 Regulations].

On November 30, 2017, Mr. Leon and others communicated their position to members of the ALIB that the 2017 Regulations were invalid because they had not been

approved in accordance with the prescribed procedure. Mr. Michel rejected this position in a statement issued on December 5, 2017.

Mr. Leon says that, due to “scheduling issues further complicated by the holiday season”, he was unable to book an appointment with legal counsel to discuss his options until January 8, 2018. He says that this was when he first learned that he should challenge the BCR by means of an application for judicial review in this Court.

The time in which to challenge the BCR expired on December 7, 2017. Mr. Michel and the ALIB oppose the request for an extension of time.

A request for an extension of time in which to commence an application for judicial review requires the Court to consider the following (*Canada (AG) v Larkman*, 2012 FCA 204 at para 61 [*Larkman*]):

- (a) did the moving party have a continuing intention to pursue the application?
- (b) is there some potential merit to the application?
- (c) has the respondent been prejudiced by the delay?
- (d) does the moving party have a reasonable explanation for the delay?

The importance of each question depends on the circumstances of the case. Not

all questions must be resolved in favour of the applicant. The overriding consideration is that the interests of justice be served (*Larkman* at para 62).

Mr. Leon says he first sought legal advice regarding the validity of the 2017 Regulations on October 27, 2017, before they were approved. He also conducted his own research before meeting with legal counsel on January 8, 2018. He says this demonstrates a continuing intention to pursue the application.

Mr. Leon maintains that the proposed application has merit. He argues, among other things, that the ALIB Chief and Council failed to adhere to the prescribed amendment process, held band meetings without adequate notice, and behaved in a manner that gives rise to a reasonable apprehension of bias.

Finally, Mr. Leon states that Mr. Michel and the ALIB will suffer no prejudice if the extension of time is granted. He does not elaborate on this assertion, beyond noting that Mr. Michel did not seek re-election on March 3, 2018.

Mr. Michel and the ALIB deny that Mr. Leon had a continuing intention to pursue the application. They maintain that the prescribed procedures were followed, and note that Mr. Leon nominated candidates to run in the election on March 3, 2018 in accordance with the 2017 Regulations. They say that many of Mr. Leon's complaints have been previously addressed by this Court and the Federal Court of Appeal in the litigation that arose from the by-elections in December 2016.

Mr. Michel and the ALIB assert that prejudice will inevitably result if the outcome of the election that took place on March 3, 2018 is jeopardized.

Assuming, without deciding, that Mr. Leon has demonstrated a continuing intention to pursue an application for judicial review of the BCR dated November 7, 2017, and that the application has at least some potential merit, I am not persuaded that he has provided a reasonable explanation for his delay in seeking an extension of time. Mr. Leon was present at the meeting of the ALIB on October 30, 2017, when the amendments to the 2014 Regulations were finalized. He was also present at the meeting on November 7, 2017, when the BCR approving the 2017 Regulations was passed. He did not consult legal counsel until January 8, 2018, approximately two months after the BCR was passed. It is unreasonable to suggest that this delay was wholly due to unspecified "scheduling issues complicated by the holiday season".

Even after Mr. Leon consulted legal counsel on January 8, 2018, he delayed a further month and a half before filing this motion for an extension of time on February 22, 2018. Mr. Michel notes that Mr. Leon is familiar with the timelines of proceedings before this Court given his tenure as Chief and his involvement in prior litigation.

Moreover, I am satisfied that the ALIB will suffer serious prejudice if the motion for an extension of time is granted. In addition to an extension of time, Mr. Leon's notice of motion seeks an order that band elections be conducted pursuant to the 2014 Regulations until the application is determined by this Court. Mr. Leon did not seek an injunction to prevent the election from proceeding on March 3, 2018, and it has now

taken place. It would be contrary to the interests of justice to cast doubt upon the outcome of that election by permitting the 2017 Regulations to be challenged so long after they were approved by the ALIB Chief and Council.

THIS COURT ORDERS that the motion for an extension of time in which to commence an application for judicial review of the Band Council Resolution dated November 7, 2017 is dismissed with costs.

"Simon Fothergill"

Judge