Federal Court  Cour fédérale

Date: 20170614

Docket: T-744-17

Vancouver, British Columbia, June 14, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CHIEF PAUL MICHEL

Applicant

and

ADAMS LAKE INDIAN BAND
COMMUNITY PANEL

Respondent

ORDER

UPON considering the Applicant's motion, filed on June 5, 2017, which states that it seeks an interlocutory injunction, pursuant to Rule 373 of the *Federal Courts Rules*, SOR/98-106 and s 18.1 and s 44 of the *Federal Courts Act*, RSC, 1985, c F-7 declaring the removal of Chief Paul Michel ("Chief Michel") from the office of Chief of Adams Lake Indian Band ("Adams Lake" or "Band") to be null and void and restoring Chief Michel to his elected position of Chief for Adams Lake, requiring Adams Lake to recognize him in the office of Chief and to pay him his pay as duly elected Chief and to expedite the hearing of the judicial review, with solicitor-client costs. And, regardless of the Applicant's demand for declaratory relief, in his written

submissions, he seeks only that an interlocutory injunction be granted pending determination of the underlying judicial review and that the matter be addressed on an expedited basis;

AND UPON considering the evidence and the submissions contained in the motion records filed by the Applicant and the Respondent;

AND UPON hearing oral submissions of both parties in Vancouver, British Columbia, on Tuesday, June 13, 2017;

AND UPON considering that in order to succeed on this motion, the Applicant must satisfy the tri-partite test set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-McDonald*") that: (a) there is a serious issue to be tried; (b) the applicant would suffer irreparable harm if the relief sought is not granted; and (c) the balance of convenience favours the applicant. The burden is on the Applicant to establish that the three elements of the test have been satisfied (*Ah-Wah-Oo Tribe v Campbell River Indian Band Council*, 2005 FC 903 at para 7). The threshold for a serious issue is not high and the Applicant need only show that there is an issue to be adjudicated and that the issue is not "frivolous and vexatious" (*RJR-McDonald* at paras 55 and 83; *Napaokesik v Shamattawa First Nation Membership Committee*, 2012 FC 153 at para 23 ("*Napaokesik*")). The tripartite test is conjunctive, and the Applicant accordingly must satisfy all three elements before this injunction can be granted (*Montana First Nation v Rabbit*, 2011 FC 420 at para 22);

AND UPON considering that on December 15, 2016 the Applicant was elected to the office of Chief of Adams Lake in a by-election held in accordance with the *2014 Adams Lake Secwepemc Election Rules*, approved June 19, 2014 ("Election Rules"). On or about May 5 2017, Nelson Leon ("Mr. Leon"), an unsuccessful candidate in the December 2016 by-election delivered to the Community Panel a petition ("Petition") in the form of a sworn affidavit in

which he alleged that the Applicant, who then held the office of Chief, had breached the Oath of Office and the Election Rules and should accordingly be removed from office. The Petition was signed by 10 electors, including Mr. Leon. By way of explanation I note that, pursuant to s 9.2 of the Election Rules, the Community Panel is constituted and consists of five elected members of the Band which decides, by a majority, all appeals and petitions brought to dispute an election or to remove a Band Council member from office;

AND UPON considering that on May 16, 2017, the Applicant attended before the Community Panel and alleged bias and conflict of interest against each of the five panel members in respect of their consideration of the Petition and demanded that they all resign by the end of the following day. The members of the Community Panel did not resign. On May 19, 2017, the Applicant commenced an application for judicial review in this Court in relation to the purported decision of the Community Panel, made on or about May 17, 2017, that members of the Community Panel were not biased against the Applicant. The Community Panel completed the proceedings in respect of the Petition and, by its decision of June 4, 2017, the Applicant was removed from office of Band Chief.

AND UPON considering that the Applicant's evidence in support of this motion was his own affidavit sworn on May 24, 2017. The Respondent filed its Motion Record on Friday, June 9, 2017 which contained the affidavits of four members of the Community Panel who considered the Petition: Lynn Kenoras, Maryann Yarama, David Nordquist and Sandra Lund as well the affidavit of Debra Sloat, the Human Resources Manager for the Band. Subsequent to the filing of the Respondent's Motion Record, and on the day prior to the hearing of the injunction motion, the Applicant attempted to file a Response Motion Record containing additional written submissions and a supplementary affidavit of Chief Michel sworn on June 10, 2017. The Rules

do not contemplate the filing of a Response Motion Record or supplementary affidavit in reply. At my direction the Registry did not accept the Response Motion Record for filing and the Applicant was advised that its admissibility could be raised at the hearing before me. This was not pursued;

AND UPON considering that the serious issue that the Applicant has raised on this motion was limited, in his written submissions, to the statement that the threshold to be met on this branch of the test is low and that "there are serious issues to be determined in this appeal including the reduction [*sic*] of the reasonable apprehension of bias determination that were before the Federal Court on this judicial review". When appearing before me counsel for the Applicant submitted that this motion for an injunction is inter-related with and must be considered in the context of two other decisions of the Community Panel which were upheld before this Court but are now on appeal before the Federal Court of Appeal (Dockets A-467-16 and A-42-17) as well as a meeting of the Band, to be held on June 14, 2017, which the Federal Court of Appeal instructed be held to determine what legal firm should be counsel for the Band in one of the appeals before it (Docket A-42-17). While I am not persuaded by these arguments, I do note that the affidavits filed by the Respondents all address and dispute the Applicant's allegations of bias and conflict of interest, which issue is the basis of the Applicant's application for judicial review. It is generally not the role of this Court on an interlocutory injunction application to conduct a prolonged examination of the merits of the matter and I am satisfied that these allegations give rise to a serious issue particularly as, subsequent to the Applicant's demand that the Community Panel resign because of his allegations, the Community Panel continued its consideration of the Petition and removed the Applicant from his elected office as

Chief. Whether or not the members of the Community Panel were biased or in conflicts of interest will be determined on the merits at the judical review of this matter;

AND UPON considering, however, that more problematic is that even if there is a serious issue, the Applicant must demonstrate with clear and non-speculative evidence that irreparable harm will result (*Lake St Martin First Nation v Woodford*, [2000] FCJ No 1242 (FCTD) at para 6). The Applicant's May 24, 2017 affidavit addresses his allegations of conflict of interest and bias and his demand, which he states was supported by Elders, that the elected Community Panel resign. However, his evidence does not address in any way irreparable or any harm to him or to the community arising from his removal from office. His written submissions do suggest that upon his removal a by-election must, pursuant to the Election Rules, be held immediately unless the injunction is granted. The Election Rules, which are provided as Exhibit A to the affidavit of Lynn Kenoras, state that in the event that the office of Chief becomes vacant, a by-election shall be held within sixty days on a date to be set by the Electoral Officer (s 27.1), which would be by August 3, 2017. In that regard, the Court has advised the parties that an expedited hearing date will be provided, July 31, 2017, thus the matter will be heard in advance of the 60 day period within which a by-election is to be held with respect to the Chief's position. However, as pointed out by the Applicant, in the absence of agreement or an injunction, there is nothing to prevent a by-election being held in the interim. In that event, a situation could arise where another person could be elected to the office of Chief and, subsequently, if the removal of the Applicant is not upheld by this Court, the specter of further disarray in Band governance and unnecessary expense;

AND UPON further considering, as submitted by the Respondent, that the affidavit of Lynn Kenoras notes that apart from the Chief, five councillors remain in office and under the

Election Rules, a quorum is four councillors. This is significant as in *Councillors Georgina Johnny, Brandy Jules and Ronald Jules v Adams Lake Indian Band*, March 3, 2017, Docket A-42-17 (FCA), relied on by the Applicant, Justice Rennie made a finding of irreparable harm in the context of disruption and uncertainty in the governance of the Band's affairs where removal of three councillors would have led to a situation where no quorum could be established and the Band could not discharge any of its official business. Unlike that matter, the Applicant's affidavit evidence does not contain sufficient information to establish that his removal from the office of Chief while the application for judical review is disposed of will have significant repercussions for him or will prevent the Band Council from discharging its duties. However, the loss of elected office has been found to constituent irreparable harm (*Assiniboine v Meeches*, 2013 FCA 114 at para 23 ("*Assiniboine*"); *Napaokesik* at para 28). And, of greater concern is the impact on the community arising from a potential by-election prior to the resolution of the application for judical review and the further expense and disarray this will entail. Given the circumstances, I am satisfied that irreparable harm is established;

AND UPON considering that the Applicant's written submission in respect of the balance of convenience favouring the granting of the injunction is that if an injunction is not granted, and an election proceeds, the right to have this judicial review determined will likely be meaningless with the costs to the Band being great in terms of governance of the Band and in terms of financial issues. I agree that the public interest of the Band must be taken into account and that this factor weighs in favour of the Applicant in this matter (*Martselos v Salt River First Nation #195*, 2007 FC 613 at para 10-14, *Assiniboine* at para 29);

AND UPON concluding that the Applicant has, for the reasons above, met the conjunctive tri-partite test for the granting of an interlocutory injunction;

AND UPON noting that, prior to this hearing the Court requested, in light of the potential availability of an expedited hearing date, that the parties consult as to the possibility of Chief Michel being reinstated and the by-election being suspended, on consent, until the decision in the judicial review is rendered. Regrettably, the parties were not able to reach agreement. Therefore, I will also order that the matter be heard on an expedited basis and, as previously canvassed with the parties, it will be set down to be heard in Vancouver at 9:30 am on July 31, 2017. Given this, it will also be necessary to abridge the timing of the next steps in the matter.

THIS COURT ORDERS that:

i) The motion for an interlocutory injunction is granted until the underlying application for judicial review has been determined by this Court or otherwise ordered;

ii) The application for judicial review shall be heard on an expedited basis, in Vancouver at 9:30 am on July 31, 2017 for a duration not to exceed 3 hours with the requirement to file a requisition for hearing waived;

iii) The parties shall, on or before June 15, 2017 provide a mutually agreed abridged timeline for all of the next steps in the proceeding. If the parties are unable to agree, as case management judge, I will set the abridged dates for the next steps;

iv) Costs shall be in the cause.

"Cecily Y. Strickland"
Judge