Federal Court  Cour fédérale

Date: 20190327

Docket: T-1510-18

Citation: 2019 FC 380

Ottawa, Ontario, March 27, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

DAVID LEDOUX, KELLIE LEDOUX and LOUIE TANNER

Applicants

and

GAMBLER FIRST NATION, GAMBLER FIRST NATION ELECTION COMMITTEE, GORDON LEDOUX, CHARLENE TANNER and CURTIS DUCHARME

Respondents

ORDER AND REASONS

[1] On May 31, 2018, the Gambler First Nation held an election. This has spawned a legal challenge, which is a reflection of an ongoing dispute within the First Nation between two factions vying for control. This dispute is now before this Court. Regrettably, rather than getting on with the hearing of the main dispute, the parties have brought interlocutory motions. This decision addresses these two interlocutory motions.

I. Background

[2] In the May 2018 election, David Ledoux was elected Chief, and Kellie Ledoux and Louis Tanner were elected as Councillors of the Gambler First Nation. Shortly thereafter, one of the losing candidates, Gordon Ledoux, filed an appeal of the election results with the Gambler First Nation Election Committee, as provided for in the Gambler First Nation Band Custom Election Law.

[3] On July 14, 2018, the Election Committee overturned the election results, and ordered that a new election be held. The Committee purported to disqualify David Ledoux from standing for election in this new contest. On August 13, 2018, the Applicants filed an application for judicial review, seeking to quash the decision of the Election Committee. On August 31, 2018, the second election was held, and Gordon Ledoux was elected as Chief, while Charlene Tanner and Curtis Ducharme were elected as Councillors.

[4] Since that time, however, the Applicants have continued to act as the elected Chief and Council for Gambler First Nation. They remain in control of the day-to-day operations of the First Nation, as well as its bank account.

[5] On August 8, 2018, the Applicants amended their notice of application to add the Election Committee, as well as Gordon Ledoux, Charlene Tanner, and Curtis Ducharme as named respondents. The application for judicial review is now a Specially Managed Proceeding

pursuant to Rule 383, and the Case Management Judge has held four case management conferences seeking to move the proceeding to a hearing.

II. Issues and Analysis

[6] On December 20, 2018, two interlocutory motions were filed in this matter:

1. The Applicants seek a declaration that they shall have control over the administration, governance, and financial affairs of the Gambler First Nation, pending the determination of the judicial review application;
2. The Respondents seek an order removing Adam Touet and the W Law Group as solicitors in this matter because they are in a conflict of interest.

These motions were heard together, and this decision deals with both of them.

[7] It would be an understatement to say that the situation before the Court is troubling and regrettable. Two factions are fighting for control of the Gambler First Nation. On the limited record before me, it appears that one faction may have ignored the basic precepts of the rule of law, and now seeks to solidify its control through an order of the Court. On the other hand, serious questions have been raised about the electoral appeals process and the way the second election was conducted. The faction that "won" the second election now brings a motion which can only have the effect of prolonging the litigation, thereby delaying a resolution for the community. Despite the efforts of the Case Management Judge, neither the Applicants nor the Respondents seemed to be inclined to expedite the hearing of the main dispute prior to the hearing of these motions. Rather they have chosen to bring interlocutory proceedings. The

interests and welfare of the First Nation seem to have been eclipsed by the personal battle between the two groups. The Court is now in the middle of this.

A. *The Control Motion*

[8] The Applicants' motion seeks the following relief:

> A declaration that matters such as the day to day administration, provisions [*sic*] of essential services, ordinary payable accounts, management of administrative staff, urgent acts to safeguard the rights of membership, subscribing of insurance, legal matters (except those regarding this application for judicial review), and any and all further matters related to the administration and governance of the Gambler First Nation shall be decided upon by the Council and Chief pursuant to the election of May 31, 2018, until further order of the Federal Court.

[9] The Applicants request, in essence, interlocutory injunctive relief to preserve the *de facto* status quo pending the determination of their application for judicial review.

[10] The test for interlocutory injunctions has recently been summarized by the Supreme Court of Canada in *R v CBC*, 2018 SCC 5 at para 12:

> In *Manitoba (Attorney General) v. Metropolitan Stores Ltd*. and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd*. At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from

> the granting or refusal of the interlocutory injunction, pending a decision on the merits. [Footnotes omitted]

(1) Serious Issue

[11] Normally the question of whether there is a serious question to be tried is a low threshold; the moving party must only establish that the claim is not frivolous or vexatious. Where, however, the Court concludes that granting the injunction would, in effect, give the applicants the relief they seek in the underlying judicial review, a more probing examination is required, and the applicants must establish a strong *prima facie* case (*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 312 at pp 338-39).

[12] While I am inclined to the view that here the declaration sought would give the Applicants the relief they seek – at least on a temporary basis – it is not necessary for me to resolve this question because of the conclusion I reach on the second and third elements of the test.

(2) Irreparable Harm

[13] The Applicants claim that they would suffer irreparable harm if the injunction is not granted. In their written submissions, the Applicants assert that "this Court has previously found that the position of Chief and Council carry high prestige and stature; therefore the loss of such positions is not a loss that can be remedied through damages. Through the unauthorized election, the Competing Faction [referring to the individual Respondents] has attempted to strip the Applicants of their elected positions."

[14] In addition, the Applicants assert that the Gambler First Nation would suffer irreparable harm because of the uncertainty caused by the electoral dispute. They claim that third parties are not certain whether the Applicants or the individual Respondents are the proper governing body for the First Nation, and that this may cause delays in obtaining financing, advancing discussions regarding economic development, as well as impairing efforts to resolve or advance existing claims on behalf of the First Nation. The Applicants have filed a letter from the lawyer who has represented the First Nation in these matters, expressing concern about the impact of any delay. The letter does not, however, point to any specific current, urgent practical problem associated with the ongoing uncertainty.

[15] I am not persuaded. The Applicants' own evidence states that they have continued to occupy the positions of Chief and Council for the Gambler First Nation in the intervening period since the decision of the Elections Committee. They have simply "occupied the field," and there is no evidence of any current threat to their *de facto* leadership. This situation is distinguishable from the facts of the decisions cited by the Applicants, where there were current or anticipated efforts to remove the elected leaders from their positions or to prevent them from standing for election.

[16] In addition, the Applicants assert that the First Nation will suffer irreparable harm due to the prolonged uncertainty about who are the duly elected Chief and Council. This argument overlaps with the considerations relating to the third element of the test for an interlocutory injunction: the balance of convenience.

(3) Balance of Convenience

[17] I find there are three problems with the Applicants' argument about the impact of prolonged uncertainty on the interests of the First Nation. First, the Applicants do not speak for the First Nation in this proceeding. They purport to have "recognized" the authority of the individual Respondents to act on behalf of the First Nation in regard to this proceeding (I will have more to say about this below). In this proceeding, the Applicants speak only for themselves.

[18] Second, there is no evidence of any decision or action involving third parties that is or has been delayed or thrown into doubt because of the ongoing uncertainty. The affidavit of the Applicant David Ledoux asserts that there is concern, but points to few specific instances of any real or practical problems. There is correspondence from an outside body asking whether the Applicants have the lawful authority to instruct the First Nation, but no indication that the particular question persists, or is causing ongoing practical difficulty.

[19] Third, "[c]laims of gridlock, chaos and uncertainty because two groups claim to be chief and council do not lie in the mouths of the applicants. Applicants for injunctive relief appearing before the Court are assumed to abide by the rule of law" (per Justice Marshall Rothstein in *Lake St Martin First Nation v Woodford* (2000), 99 ACWS (3d) 198, 2000 CanLII 16045 (FC TD) at para 7 [*Lake St Martin*]). Justice Rothstein continued:

> The only way gridlock, chaos and confusion will arise is if the unsuccessful applicants refuse to abide by the results of the election pending determination of the judicial review or appeal. Gridlock, chaos and confusion caused by unsuccessful applicants for an interlocutory injunction refusing to abide by the Court[']s decision does not constitute irreparable harm.

[20] In the case at bar, I find that the situation is even more egregious than that described by Justice Rothstein in *Lake St Martin*. Here, the Applicants won the election, but lost the appeal before the duly constituted Elections Committee. They have a litany of complaints against the conduct of the Elections Committee, and they have launched an application for judicial review to overturn its decision. The Applicants have not, however, brought an application to stay the decision of the Election Committee, or to seek to delay or stop the second election. Instead, they have simply ignored these events, and have continued to act as *de facto* Chief and Council. They now come before this Court seeking equitable relief, effectively to cement their raw assertion of power pending the determination of their application for judicial review.

[21] This Court will not give effect to the Applicants' request for relief. In *Spence v Bear*, 2016 FC 1191, Justice Glennys McVeigh cited the decision of Justice Rothstein in *Long Lake Cree Nation v Canada (Indian and Northern Affairs)* (1995), 56 ACWS (3d) 781, [1995] FCJ No 1020 (QL) (FC TD), for the proposition that elected officials in First Nations "must operate according to the written law, customary law, the *Indian Act* or whatever law is applicable and cannot take matters into their own hands. It is for the protection of the band members and not the protection of the Chief and Council that following the rule of law is sacred" (para 37).

[22] Here, the Applicants, having taken the law into their own hands, ask the Court to validate their actions through the granting of injunctive relief. I refuse to do so. In my view, the Applicants do not come before the Court with clean hands. Therefore they should not obtain the relief they seek.

[23] The Applicants' motion for a declaration that they are to "control" the affairs of the Gambler First Nation pending the resolution of their application for judicial review is dismissed.

B. *The Disqualification Motion*

[24] The Respondents have brought a motion seeking to remove Adam Touet and the W Law Group as solicitors representing the Applicants in this matter, because they are in a conflict of interest.

[25] Mr. Touet and the W Law Group have represented – and continued to represent – the Gambler First Nations in a number of other litigation matters. On September 20, 2018, the individual Respondents, acting as the newly-elected Chief and Council, sent a letter to the W Law Group terminating its retainer on behalf of the Gambler First Nation. It is unclear what practical effect this letter may have had on the law firm and its conduct of these other matters.

[26] In this case, the law firm represents the Applicants in bringing interlocutory relief and an application for judicial review against the Gambler First Nation, and others, as named respondents. The Respondents submit that this is a clear breach of the "bright line" rule against conflicts affirmed by the Supreme Court of Canada in *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 [*McKercher*].

[27] The Applicants argue that the law firm representing them is not in a conflict, because their legal interests are not directly adverse to those of the Gambler First Nation; they say that their legal dispute is with the Gambler First Nation Elections Committee, and that they named

the First Nation as a "nominal" respondent simply in order to comply with the *Federal Courts Rules*, SOR/98-106. In view of this, the Applicants submit that they have not run afoul of the rules set out in *McKercher* – there is no direct conflict, there is no evidence that any confidential information relevant to the elections dispute is at risk of being wrongfully used, and they met their duty of candour.

[28] I agree with the Respondents' assertion that one of the core difficulties in this matter is the challenge of squaring the position of two competing factions, both of whom purport to speak for – and act on behalf of – the Gambler First Nation, with the reality that there is only one Gambler First Nation, and it cannot act on its own. It acts through the embodiment of its elected Chief and Council.

[29] The challenge is perhaps best captured in the following statement, from the written submissions of the Applicants on this Motion:

> In order to move this matter forward, the Applicants have conceded limited authority to the individual Respondents so that the First Nation may receive instructions. Naturally, this task would fall to the individual Respondents, who as members of the competing fraction [*sic*], would want to uphold the Election Committee's decision… This is accomplished by virtue of the fact that Gordon Ledoux is only being recognized as Chief of the First Nation for the limited purpose of instructing it in these judicial review proceeding [*sic*] and then only for purely practical purposes.

[30] To put the matter clearly and succinctly: the *de facto* Chief and Council, who are running the Gambler First Nation and currently control its daily operations and bank account, purport to "recognize" the individual Respondents' authority to act for the Gambler First Nation for the

purposes of defending the interlocutory proceedings and application for judicial review launched by the *de facto* Chief and Council. This is a bizarre state of affairs, made even more so by the fact that the law firm that has acted – and appears to continue to act – for the First Nation in other litigation matters, is now representing the *de facto* Chief and Council in their legal proceeding against the First Nation.

[31] The Applicants assert that they are not in breach of the bright line rule, because their legal fight is not with the First Nation, but rather it is with the Election Committee. The Respondents argue that the individual Respondents and the Elections Committee are not actively participating in these proceedings; the only party that is actively opposing the application and motion brought by the Applicants is the Gambler First Nation.

[32] I find this entire affair to be troubling. As I noted during the hearing, the Applicants' request for costs in this motion underlines the difficulties all parties face in this situation. If I dismiss this motion for disqualification, and decide to award costs against the First Nation in favour of the Applicants, I would in practice be making an order that would require the *de facto* Chief and Council, who control the bank account, to direct the staff of the First Nation to give effect to the instructions of the individual Respondents to comply with the costs order. This would involve the Applicants instructing the staff to direct the payment of funds of the First Nation to the very counsel who represent the Applicants in these proceedings. While this may not, technically, breach the bright line rule as it is set out in *McKercher*, it underlines the difficult situation that the law firm has put itself in, and raises serious questions regarding the duty of loyalty owed by a lawyer to his or her client.

[33] On the other hand, if I give effect to the Respondents' motion, the removal of the W Law Group at this stage can only have the effect of further delaying these proceedings, and leaving the unsatisfactory state of affairs hanging over the membership of the Gambler First Nation for an even longer period. This is contrary to the public interest, logic, common sense, and the orderly administration of justice.

[34] For these reasons, I have come to the conclusion that it is not in the interests of justice to give effect to the Respondents' motion, in the particular circumstances of this case, and despite my misgivings about the situation that counsel for the Applicants have placed themselves in.

III. Costs

[35] The Applicants sought a costs award against the individual Respondents, not against the First Nation. They argued that without the discipline of potential cost consequences, the individual Respondents would not have an incentive to move this litigation forward. Once again, I do not find that it lies in the mouths of the Applicants to make such a claim, given that they have simply taken control of the finances of the First Nation, such that the defence of the proceedings on behalf of the Gambler First Nation appears to be being paid for by the individual Respondents.

[36] In exercise of my discretion under Rule 400, I decline to award costs to either party on these motions.

IV. Conclusion

[37] The Applicants' motion for a declaration that they are to control the affairs of the First Nation pending the resolution of their application for judicial review is dismissed. The Respondents' motion to disqualify Mr. Touet and the W Law Group is also dismissed. No costs are awarded on either motion.

[38] This Application for judicial review is a specially managed proceeding. At the hearing before me, the parties agreed to take steps to expedite the hearing of the underlying application for judicial review. The parties are directed immediately to confer to discuss a timetable to get this proceeding back on track, and shall, within ten (10) days, provide a jointly proposed timetable to the Case Management Judge, as well as their earliest availability for a Case Management Conference. It is in the interests of the Applicants, the Respondents, but most especially the members of the Gambler First Nation, that this matter be resolved without further delay.

ORDER in T-1510-18

THIS COURT ORDERS that:

1. The motion brought by the Applicants for "control" over the finances and affairs of the First Nation pending resolution of its application for judicial review is dismissed.

2. The motion brought by the Respondents to disqualify Mr. Touet and the W Law Group from continuing to represent the Applicants in this proceeding is dismissed.

3. No costs to either party on either motion.

4. The parties are directed to immediately confer to discuss a timetable to get this proceeding back on track, and shall, within ten (10) days, provide a jointly proposed timetable to the Case Management Judge, as well as their availability for a Case Management Conference.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1510-18
STYLE OF CAUSE:	DAVID LEDOUX, KELLIE LEDOUX AND LOUIE TANNER v. GAMBLER FIRST NATION, GAMBLER FIRST NATION ELECTION COMMITTEE, GORDON LEDOUX, CHARLENE TANNER AND CURTIS DUCHARME
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DATED:	MARCH 27, 2019

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