Date: 20050810

Docket: T-1313-05

Citation: 2005 FC 1097

Toronto, Ontario, August 10, 2005

PRESENT: THE HONOURABLE MR. JUSTICE LEMIEUX

BETWEEN:

EUGENE ESQUEGA, BRIAN KING, GWENDOLINE KING, HUGH KING SR., RITA KING, WAYNE KING, LAWRENCE SHONIAS AND OWEN BARRY

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

Introduction

[1] The applicants are the nine councillors of the Gull Bay First Nation Council (the Council) who were elected at an election held on November 8, 2004 in accordance with the *Indian Band Election Regulations* (the Regulations) but whose election was set aside by the Governor-in-Council by Order-in-Council P.C. 2005-1289 dated June 28, 2005 (the Order-in-Council) made pursuant to paragraph 79(c) of the *Indian Act* (the Act) on the grounds that in accordance with paragraph 14(c)

of the Regulations the Minister of Indian Affairs and Northern Development (the Minister) has reported that three persons nominated as candidates for election to the office of councillor were ineligible to be candidates as they did not reside on the reserve at the time of their nomination as required by subsection 75(1) of the Act.

[2] The applicants move this Court for:

(a) an interim injunction prohibiting the holding of the Gull Bay First Nation (the First Nation) by-election for Council scheduled for August 12, 2005 pending final determination of the Applicants' application for judicial review of the Order-in-Council;

(b) an order reinstating the nine (9) councillors pending final determination of the Applicants' judicial review of the Order-in-Council;

(c) In the alternative, an Order reinstating the six councillors who were not found to be ineligible and who may form a quorum of the Council for continuing the work of Council pending final determination of the Applicants' judicial review application of the Order-in-Council.

[3] The relevant provisions of the Act are subsection 75(1) and section 79 which read:

> 75(1) No person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.
> …

79. The Governor in Council may set aside the election of a chief or councillor of a band on the report of the Minister that he is satisfied that
(a) there was corrupt practice in connection with the election;
(b) there was a contravention of this Act that might have affected the result of the election, or
(c) a person nominated to be a candidate in the election was ineligible to be a candidate.

[4] The relevant provisions of the Regulations are sections 12 to 14 which read

Election Appeals

12.(1) Within 45 days after an election, a canadidate or elector who believes that
(a) there was corrupt practice in connection with the election,
(b) there was a violation of the Act or these Regulations that might have affected the result of the election, or
(c) a person nominated to be a candiate in the election was ineligible to be a candidate,
May lodge an appeal by forwarding by registered mail to the Assistant Deputy Minister particulars thereof duly verified by affidavit.
(2) Where an appeal is lodged under subsection (1), the Assistant Deputy Minister shall forward, by registered mail, a copy of the appeal and all supporting documents to the electoral officer and to each candidate in the electoral section in respect of which the appeal was lodged.
(3) Any candidate may, within 14 days of the receipt of the copy of the appeal, forward to the Assistant Deputy Minister by registered mail a written answer to the particulars set out in the appeal together with any supporting documents relating thereto duly verified by affidavit.
(4) All particulars and documents filed in accordance with the provisions of this section shall constitute and form the record.
13.(1) The Minister may, if the material that has been filed is not adequate for deciding the validity of the election complained of, conduct such further investigation into the matter as he deems necessary, in such manner as he deems expedient.
(2) Such investigation may be held by the Minister or by any person designated by the Minister for the purpose.
(3) Where the Minister designates a person to be hold such an investigation, that person shall submit a detailed report of the investigation to the Minister for his consideration.
14.Where it appears that
(a) there was corrupt practice in connection with an election,
(b) there was a violation of the Act or these Regulations that might have affected the result of an election, or
(c) a person nominated to be a candidate in an election was ineligible to be a candidate,
The Minister shall report to the Governor in Council accordingly.

FACTS

[5] Three members of the First Nation, Claudette Marie Penagin, Cecilia Penagin and Marie Poile appealed the election on the grounds some successful candidates were not eligible as they did not reside on the reserve at the time of nomination, on voting regulations breaches and on the actions of one of the scrutineers. These appeals were verified by affidavits.

[6] Those successful candidates challenged in the three appeals on grounds of ineligibility were Gwendoline King, Brian King, Rita King, Wayne King, Hugh King, Eugene Esquega and Alec King. These individuals responded to the appeals by filing affidavits and documents in support of their residence. These response affidavits are dated either the 24 or 25 of January, 2005 and February 4, 2005 in respect of Hugh King.

[7] On February 25, 2005, the Director, Band Governance, at Indian Affairs and Northern Development (IANC) requested the IANC's Regional Director – Ontario Region to retain the services of an independent third party to investigate the residency of the challenged candidates and confirm whether or not the scrutineer handled the ballot papers after the close of the polls on election day. The investigator selected was I.L. Dyck.

[8] Mr. Dyck carried out his investigation by conducting interviews and taking photographs. He prepared an investigator's report dated April 26, 2005. He found:

> (a)"Rita King does not live in the First Nation's community and has not been ordinary resident there since before the time she was nominated for Councillor."
> (b)"Brian King may, on occasion, stay in this house on the reserve when it is convenient to him but it is not his place of ordinary residence. When he looks after the business at Kings Landing during the summer months he stays in one of the cottages at the Landing. This is not on reserve."
> (c)"Gwendoline King was not ordinarily resident at the time she was nominated as Councillor nor is she resident in the Gull Bay First Nation now."
> (d)"Eugene Esquega appears to meet the interpretation of "ordinary resident"contained in Section 3 on the Indian Band Election Regulations."
> (e)"Wayne King resides in the Gull Bay First Nation Reserve most of the time and he uses it as his home base. He goes to Thunder Bay on Band business and to visit his girl friend (common-law) at least one day a week but the benefit of the doubts goes in his favour."
> (f) Ronald King and Alec King are father and son. The Investigator concluded they live at the reserve and they have a unit in Thunder Bay "which is used by the family whenever they have to go to Thunder Bay for shopping, business and relaxation but it is not their ordinary residence."

[9] In terms of the scrutineer he wrote:

> The degree of handling of ballot papers by Hilda King is inconclusive. A further investigation which could locate her and give me the opportunity to interview her could be time consuming and not cost effective at this time unless I am authorized to do so.

[10] Officials at INAC considered the investigator's report and, in turn, prepared a report dated May 30, 2000 to the Minister.

[11] The INAC Report to the Minister set out the investigation report's findings on eligibility to be nominated as candidates for councillor. The INAC report concluded, as had the Investigator, to the ineligibility of Rita King, Brian King and Gwendoline King.

[12] The INAC Report set out two possible resolutions:

> 1. That the Minister recommend that the election of all nine councillors be set aside.
> 2. That the Minster recommend that the election of only the three councillors who were ineligible be set aside.

[13] The INAC Report provided the following rationale for setting aside the election of all nine councillors:

> This recommendation is supported by the fact that the election for all councillors was inherently flawed. Had the votes cast for the three ineligible persons been cast for other candidates, the result of the election could have been significantly different. Should the election of all councillors be set aside, the community would not have a functioning leadership until such time as an accelerated election for these positions could be held (approximately 40 days). It is not uncommon for a First Nation to find itself without elected leadership as a result of an election being set aside by the Governor in Council. The provisions for an accelerated election contained in the IBER were designed to address this very situation. Essential services would continue to be delivered to community members by the third party manager.

[14] The INAC Report contained the following rationale for the second solution:

> This solution would allow the band council to maintain a quorum and continue to govern. It would then be left to the council to decide whether a by-election is held to fill the vacant positions. However, this option presupposes that the councillors who remain in office would have been elected anyway had the ineligible candidates not appeared on the ballot. This is a supposition that cannot be made. Furthermore, this solution limits the number of positions for which candidates can vie to only three.

[15] The INAC Report recommended the following to the Minister:

> Recommendation
> We recommend that the Minister, in accordance with paragraph 14(c) of the IBER, report to the Governor in Council that three persons nominated to be candidates for councillor were ineligible to be candidates. The Minister should further recommend that the election of all councillors, held on November 8, 2004, be set aside. Subsequently, an accelerated election will have to be held.

> The election for councillor was inherently flawed and could have had a very different outcome had it not been. Candidates should be given an opportunity to vie for all nine positions at another election. This presents, in our view, the most equitable solution.

ANALYSIS

[16] I deal with two preliminary matters raised by counsel for the Respondent.

[17] I do not accept Counsel for the Respondent's argument, the Applicants failed to name all proper Respondents. He argues all persons who appealed the election and all candidates to the scheduled by-election should have been named as Respondents.

[18] The Attorney General is the proper party as it is the validity of the Order-in-Council which is in issue and the by-election scheduled for August 12, 2005 is the direct and sole consequence of the Order-in-Council. The persons suggested as Respondents may apply to intervene on the hearing of the judicial review application and could have applied to intervene on the hearing of the injunction application.

[19] Furthermore, I do not accept counsel for the Respondent's suggestion the award of an interim injunction in the circumstances of this case will grant the Applicants their ultimate remedy. An interim injunction here would not invalidate the Order-in-Council but would simply restore the status quo pending judicial review of the validity of the Order-in-Council.

(1) The test

[20] The test to obtain an interim injunction is well known and has been set out in the leading case of *RJR-MacDonald Ihe v. Canada* (*Attorney General*) [1994] 1 S.C.R. 311. An applicant must satisfy the three prong test of serious issue, irreparable harm and balance of convenience.

(a) <u>Serious Issue</u>

[21] In *Bonspille v. Mohawk Council of Kanesatake,* [2003] 1 F.C. 521 (T.D.) I wrote the following at paragraphs 25 and 26 about the need in the circumstances of an application to reinstate the chairperson and a member of the five person Kanesatake Mohawk Police Commission who had been advised they were no longer members of that body which had been set up in 1997 under a tripartite agreement between Canada, Quebec and the Mohawk Council concerning the establishment, maintenance and supervision of a police force on the Kanesatake Reserve:

> [25] For the purpose of this interim injunction application, I am prepared to adopt the *Woods* [*N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294 (H.L.)] exception to the serious-issue-to-be-tried test formulated in *RJR-MacDonald, supra*. In that case, the Supreme Court of Canada said once satisfied that the application for interim relief is neither vexatious nor frivolous; the motions judge should proceed to consider the second and third tests.
> [26] The *Woods* exception requires a motions judge to engage in a more extensive review of the merits. It applies here because, at least in part, what is being sought by the applicants is interim reinstatement on the Commission pending the hearing of an interlocutory application.

[22] Counsel for the applicants alleges four serious issues which meet the *prima facie* serious issue test:

(1) The process leading up to the making of the Order–in-Council was flawed because it breached the principles of natural justice or procedural fairness. She cited the following examples:

   (a) The non-disclosure of relevant information or the gathering of such information after the applicants' had filed their responding affidavits to the appeal affidavits and this in violation of subsection 12 (2) of the Regulations.
   (b) The investigator did not thoroughly conduct his investigation. He only interviewed selected people. He did not interview the Chief of the First Nation whose election was not contested and did not interview the other Council members who were elected but whose election was not contested. He did not interview Hugh King who was forced to live in Thunder Bay because of housing problems in the Reserve.
   (c) Non-disclosure for comment by the Applicants of the Investigator's Report.
   (d) Non-disclosure of the INAC Report to the Minister.

(2) The Order-in-Council is invalid in so far as it purports to set aside the election of those applicants whose eligibility was not challenged. The Order-in-Council was made pursuant to section 79(c) of the Act which permits the setting aside of the election of an individual person if that person was ineligible to be a candidate. Section 79(c) does not permit the setting aside of the election of a person who was eligible. The Order-in-Council was not made under paragraph 79(b) of the Act. Furthermore the record in this case shows that the appeals, the responses, the investigation and the INAC Report to the Minister mainly centered on the ineligibility of certain candidates to run for election.

(3) A legal issue arises on what is the proper test to be applied to the concept of residence in section 75 of the Act versus the concept of ordinary residence in Section 3 which is the test used by the Investigator.

(4) Whether section 75(1) of the Act which requires persons nominated for the office of councillor "to reside" on the Reserve is compatible with Section 15 of the *Charter of Rights and Freedoms* in the light of the Supreme Court of Canada's decision in *Corbiere v. Canada* (*Minster of Indian and Northern Affairs,* [1999] 2 S.C.R. 203.

[23] In my view Counsel for the Applicants has made out a strong *prima facie* case that the Order-in-Council is invalid on the grounds advanced before this Court.

[24] Counsel for the Respondent did not seriously challenge the factual underpinning to the Applicant's fairness argument. It is conceeded the Investigator's report was not disclosed to the Applicants for comment nor was the INAC Report.

[25] This Court has already held in *Morin v. Canada* (*Minister of Indian and Northern Affairs*), [1998] F.C.J. No. 82 that the non-disclosure of an investigator's report leading to the setting aside of a Band election violates the principles of fairness.

[26] For other examples of the requirements of fairness in terms of ineligibility findings to stand to the office of a councillor to a Band election see *Sound v. Swan River First Nation*, 2002 FCT 602, *Duncan v. Behdzi Ahda First Nation Band* (*Council*), 2002 FCT 581; *Samson Indian Band v. Bruno*, 2005 FC 1140 and *Frank v. Bottle,* [1993] F.C.J. No. 670.

[27] In the human rights context it has been held fairness requires an investigator's report be disclosed before the Canadian Human Rights Commission decides a complaint. See *Radulesco v. Canada* (*Human Rights Commission*), [1984] 2 S.C.R. 407 and an investigation of a complaint must be thorough see, *Slattery v. Canada* (*Human Rights Commission*, [1994] 2 F.C. 574.

[28] I am also of the view the matters of statutory interpretation raised by Counsel for the Applicants raise strong *prima facie* questions whether under section 79 (c) of the Act the Govern-in-Council can set aside the election of eligible candidates and whether the concept of "residence" was properly applied. I make no comment on the strength of the Charter issue as this point was not pressed before me.

[29] The Applicants will suffer irreparable harm if the injunction is not granted; damages do not provide remedies for the loss of elective office. I adopt the words of Justice MacKay in *Frank v. Bottle, supra*, where he stated at paragraph 27 "The office of Chief is political, filled by a valid election, with the attendant responsibilities that transcend any concept that he is an employee of the Tribe, just as is the office of council member" (emphasis mine)

[30] Other instances where this Court has held irreparable harm has been made out in similar circumstances see *Gabriel v. Mohawk Council of Kanesatake,*2002 FCT 483; *Bonspille v. Mohawk Council of Kanesatake*, *supra*, and *Sound v. Swan River First Nation, supra*.

[31] Counsel for the Respondent cited *Dodge v. Caldwell First Nation of Point Pelee*, [2003] FCT 483 to show that the Applicants would not suffer irreparable harm because all of the Applicants are candidates for the office of councillor in the elections scheduled for August 12, 2005 and accepted as such by the Electoral Officer including the three applicants found ineligible by INAC.

[32] In my view *Dodge*, *supra*, is not applicable. It is not a case where a person was divested from office after being elected. The issue in *Dodge* was whether an election had been properly called. The situation at hand is identical to *Sound*, *supra*.

[33] Finally, the balance of convenience favours the Applicants. Reinstatement to office in the case of individuals who were democratically elected to office pending judicial review of eligibility where a strong *prima facie* case has been made out that the judicial review has a strong chance of success simply restores the status quo on an interim basis. Further, reinstatement permits the urgent business of the Gull Bay First Nation to be carried out. It would be contrary to the public interest not to have a functioning First Nation government pending final determination of judicial review. That there is urgent business which needs urgent attention is amply shown in the evidence: wholly inadequate housing, water treatment issues and electricity concerns to name a few.

[34] Counsel for the Respondent mentioned the fact there was a third party Manager in place. I see nothing in Franco Crupi's affidavit to the effect that his functions as the third party Manager replace the need for a properly functioning Council. His affidavit is to the contrary.

[35] Postponing the upcoming election arising solely from the setting aside of Council election held November 2004 is also appropriate where that setting aside faces a serious challenge as to its validity.

[36] I cite the following cases which have endorsed the view that reinstatement and postponing of scheduled election in circumstances similar to the situation at hand are:

Frank v. Bottle, *supra*,; *Samson Indian Band v. Bruno*, *supra*,; *Gabriel v. Mohawk Council of Kanesatake*; *Bonspille*,;*supra,*; *Francis v. Mohawks of Akwesane Band* [1993] F.C.J. No. 369,; *Duncan, supra* and *Sound, supra*.

[37] For the above reasons, this motion is granted.

ORDER

THIS COURT ORDERS that

1. The holding of the Gull Bay First Nation by-election for Council scheduled for August 12, 2005 is prohibited pending final determination of the Applicants' Application for Judicial Review of Order-in-Council 2005-1289;
2. The nine (9) Gull Bay First Nation Councillors, duly elected on November 8, 2004 are restored to office pending final determination of the validity of Order-in-Council 2005-1289.
3. Costs to the applicants in any event of the cause on a party-party basis on a scale at column IV. There is nothing in the record to justify solicitor-client costs.

4. The hearing of the Judicial Review application must be expedited and counsel for the parties shall consult and propose to the Court a scheduling order on or before August 18, 2005.

"François Lemieux"

JUDGE

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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