Federal Court  Cour fédérale

Date: 20200401

Docket: T-1193-19

Citation: 2020 FC 471

Ottawa, Ontario, April 1, 2020

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

WALTER CHEECHAM

Applicant

and

FORT MCMURRAY NO. 468 FIRST NATION BAND COUNCIL

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the June 20, 2019 decision of Fort McMurray No. 468 First Nation [FMFN] preventing (banning) the Applicant Walter Cheecham [Mr. Cheecham] from entering the FMFN band council office for six months (until December 20, 2019).

[2] He is challenging this decision on the grounds of procedural fairness and jurisdiction. The Respondent FMFN argues Mr. Cheecham's application is moot because the ban was withdrawn and in any event the six month ban would have expired December 20, 2019.

I. Preliminary issue

[3] The Respondent disputed some of the background material about conflict at FMFN featured at paragraphs 6-26 of Mr. Cheecham's argument. The Respondent says these allegations are irrelevant and immaterial. I have considered these submissions as they explain the situation within FMFN. But generally this factual background is immaterial as the application relates only to the decision to ban Mr. Cheecham from FMFN premises not the specifics of why he was banned. For that reason the details related to present and past conflicts in the band will not be mentioned as it could only fan the flames.

II. Facts

[4] Mr. Cheecham is a member of FMFN. The FMFN band administration building is located on the Gregoire Lake 176A reserve.

[5] Mr. Cheecham has been a long-time critic of the leaders of FMFN including the current chief Ronald Kreutzer Sr. (who was elected in 2011 and was most recently re-elected in 2018) and the FMFN CEO Bradley Callihoo [the CEO]. Mr. Cheecham has a longstanding dispute with Chief Kreutzer over the Chief's remuneration and more recently over Mr. Cheecham's petition for the Chief to resign.

[6] Mr. Cheecham had a confrontation with the CEO on June 11, 2019. Mr. Cheecham had previously made a request to see band council resolutions which were stored in the band office. A plan was agreed to and he was going to do so in the presence of the Chief and Council. On the agreed date and time Mr. Cheecham attended the band office alongside another band member, Velma Whittington, to review the band council resolutions.

[7] When he arrived at the band council office on June 11, 2019, there was an incident between Mr. Cheecham and the CEO which the Applicant describes as a "confrontation" and the Respondent describes as an "altercation." The CEO ultimately prevented Mr. Cheecham from viewing the records on this particular day because the Chief and Council were not in attendance as was planned for this meeting. Later that day Mr. Cheecham's legal counsel emailed the Chief and Council asking to view a specific resolution authorizing payment of legal fees in a defamation action. The next day (June 12) he obtained an electronic copy of this resolution from FMFN Councillor Samantha Whalen.

[8] On June 20, 2019, Mr. Cheecham received a letter signed by the Chief and Council that read:

> The Fort McMurray #468 First Nation has zero-tolerance with respect to any types of abuse involving employees, members and clients.
>
> On June 11, 2019 you were involved with altercation with one of our employees where you demonstrated abusive behavior. This behavior and actions are unacceptable: as s a result of your abusive behavior and the safety of employees and members, you have been banned from Fort McMurray #468 First Nation Office building for a period of 6 months.
>
> Further consequences will be taken should you wish not to comply with this ban [*errors in original*].

[9] This effectively banned Mr. Cheecham from the band office for 6 months (until December 20, 2019).

[10] Mr. Cheecham's legal counsel requested reasons from the band but the CEO indicated in an email on June 20 to "please speak to your client he is well aware of his behavior." The CEO further indicated the decision to ban Mr. Cheecham had been a decision by the quorum of Chief and Council and that it was a "final" decision. Mr. Cheecham later followed up with a letter written by his legal counsel on June 24, 2019 but received no response.

[11] On July 22, 2019, Mr. Cheecham applied for judicial review of the June 20, 2019 decision banning him from the band council office.

[12] Even though he was still banned from the FMFN office, Mr. Cheecham made a second request to view additional band council resolutions. The council accommodated Mr. Cheecham and brought the resolutions to the building next door which belonged to a band-owned corporate entity, where Mr. Cheecham viewed the resolutions alongside the band council but without the CEO on August 19, 2019.

[13] The issue of Mr. Cheecham's ban was discussed at the August 28, 2019 band meeting where the Chief and Council decided to withdraw the ban. Then, on September 6, 2019, the Chief and Council wrote a letter to Mr. Cheecham's legal counsel which said the ban is withdrawn as "there have been no further issues of confrontation" and "over 2-months have elapsed since the ban was imposed." They told Mr. Cheecham that they are currently updating

band bylaws and policies and told him that they will "address all issues regarding disorderly conduct which will be applied if any future confrontation occurs."

[14] After receiving the letter withdrawing the ban, Mr. Cheecham continued with his judicial review application. On August 16, 2019, there was at a case management conference before Prothonotary Ring. Mr. Cheecham declined the option presented by the Prothonotary to set an expedited hearing date to avoid mootness issues.

[15] The Applicant seeks the ban to be quashed and a redetermination of the ban to be made by a new decision-maker, along with a declaration that his procedural fairness rights were breached.

III. Issues

[16] The issues are:

A. Is Mr. Cheecham's application moot?

B. If the application is not moot, was there a breach of Mr. Cheecham's procedural fairness rights?

C. Alternatively, if the application is not moot, did the Chief and Council lack jurisdiction to ban Mr. Cheecham from the band council office?

IV. Analysis

A. *Is Mr. Cheecham's application moot?*

[17] I indicated to the parties that I would hear the mootness arguments and reserve on that decision but I would also like to hear on the merits. That way if I determined that the matter was not moot then counsel, band members and myself would not have to return at a later date to hear the arguments on the merits.

[18] Both parties agree that the two-step test from *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] is the applicable test for analyzing mootness. The Federal Court of Appeal summarized this test in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10:

> As the leading authority on mootness – the Supreme Court's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353-363, 1989 CanLII 123 – makes clear, the mootness analysis proceeds in two stages. The first question is whether the proceeding is indeed moot: whether a live controversy remains that affects or may affect the rights of the parties. If the proceeding is moot, a second question arises: whether the court should nonetheless exercise its discretion to hear and decide it.

[19] As noted in *David Suzuki Foundation v Canada (Attorney General)*, 2019 FC 411 at para 90 [*Suzuki*], "time, circumstances, or other changes" may render a decision moot. For instance, "if it can be established that subsequent decisions have caused the concrete dispute to effectively disappear, then an application on judicial review may serve no practical purpose if granted" (*Suzuki* at para 95).

[20] Mr. Cheecham contends that the withdrawal of the ban should not render the application moot. Mr. Cheecham says the ban was only withdrawn because "the Respondent has attempted to evade judicial review of the Decision." Mr. Cheecham argues even if the application is moot, this Court should exercise its discretion to hear this case because it is of practical significance.

[21] He emphasizes what he describes as continuing adversarial relationship between the band and its members, including his argument that two elders were banned like he was. He says he is at an economic disadvantage compared to the band and the six-month nature of the ban means it would otherwise be "evasive of review" as it always takes longer to get the matter heard than six months.

[22] The Respondent's view is that the matter is moot. They argue that because the ban was lifted in September any live controversy has been resolved, and in any event the ban would have expired on December 20, 2019. For both these reasons, the Respondent says this matter is clearly moot.

[23] On the second branch of the *Borowski* test, the Respondent notes a decision on the merits of this case would not be an effective use of judicial resources, particularly because Mr. Cheecham was offered the ability to have an expedited hearing and chose not to take this path. Further, the Respondent rejects Mr. Cheecham's position that a judicial decision on his ban would have a significant practical effect on the rights of other FMFN members, as the mere fact that a pronouncement by the court may be relevant in future litigation against the band by other applicants is not a sufficient live controversy. The Respondent's position is also that if the Court

makes pronouncements on issues that are no longer live controversies, this will just create further disputes about the parameters and application of these pronouncements.

(1) *Borowski* step one: Live controversy that affects the rights of the parties

[24] It is clear that the relief Mr. Cheecham is seeking – an overturning of the decision banning him from entering the FMFN band office – is no longer the basis of a live controversy and has not been for going on for the last 7 months (September 6, 2019). I agree with the Respondent that there is no tangible dispute between the parties now that the ban is no longer in effect since September and would have expired in December if it had not been lifted earlier.

[25] Mr. Cheecham's position is that there is a continuing adversarial tone in the letter withdrawing the ban. I do not agree that the letter withdrawing the ban is adversarial in tone. Even if it was adversarial, in *Borowski* the Court said "if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot." This is precisely what has happened with the withdrawal of the ban.

[26] In assessing whether there is a live controversy, it is helpful to consider how a remedy would actually help Mr. Cheecham if he is successful on the merits. Mr. Cheecham claims a "judicial decision would have a significant practical effect on the rights of the Applicant as well as the rights of other dissenting FMFN members" but I do not accept this position particularly when it is considered that this Court would either be overturning a nonexistent ban or sending the academic question back for re-determination. Much like Justice Walker recently found in

1397280 Ontario Ltd. v Canada (Employment and Social Development), 2020 FC 20 at para 16 after a subsequent decision was issued: “There remains no tangible and concrete dispute or 'live controversy' between the parties. Any consideration of the Original Decision would be academic.”

[27] Mr. Cheecham does say that there are “reoccurring” issues for other FMFN members. However those members are not parties to this case and they could apply for judicial review of any future decisions including banning them from attending the band office. Each case comes before the Court on different facts; for example, FMFN Councillor Samantha Whalen was successful in her judicial review application in *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732, which took on a very different context considering she was an elected official and the Chief and Council lacked authority to suspend her in the way that they did. Furthermore, as noted in the case cited by the Respondent *Tamil Co-operative Homes Inc. v Arulappah*, [2000] OJ No 3372 (Ont CA), potential future litigation is insufficient to raise a live controversy.

[28] I also reject Mr. Cheecham’s argument that the Chief and Council were *functus officio* and could not rescind the decision as it was final. This decision has been validly withdrawn by a quorum of Chief and Council despite the email by the CEO that the band’s initial decision was “final”, because as noted in the decision to withdraw the ban, circumstances have changed and tensions have cooled. It is uncontested fact that Mr. Cheecham is now free to enter the band office since September.

[29] Alternatively, even if I am wrong about the *functus officio* argument concerning the withdrawal, the ban would have expired in December 2019. Mr. Cheecham's rights would no longer be affected now that it is April 2020 and the ban was only temporary.

[30] There is no live controversy concerning the ban and therefore the application is moot.

(2) *Borowski* step two: Court's discretion to nonetheless hear the matter

[31] Due to my finding on the first step of the *Borowski* test, the remaining question is whether I should nonetheless exercise my discretion to decide the matter on its merits. As noted above, I am to consider (i) the existence of a remaining adversarial context, (ii) judicial economy, and (iii) the Court's proper role.

(i) Existence of an adversarial context

[32] I give some credit to Mr. Cheecham's position on the first factor of stage two of the *Borowski* test where I am to consider whether there is a remaining adversarial context. As Justice Sopinka found at this stage of the test in the *Borowski* decision itself, "I have little or no concern about the absence of an adversarial relationship. The appeal was fully argued with as much zeal and dedication on both sides as if the matter were not moot."

[33] In the present case, the adversarial relationship involves the authority of the band council to ban members from attending the band council office. The adversarial relationship is also presented as previous litigation by Councillor Whalen and the broader tensions between the first

nation government and certain citizens. The Applicant says that the warning he received about future violence in the September 6, 2019 withdrawal of the ban led to a further dispute between the parties about the severity of Mr. Cheecham's actions and whether the ban was initially justified or not, which also shows continuing animosity.

[34] While the Respondent correctly indicates Mr. Cheecham is now able to access the band office, it is clear there is ongoing tension with allegations of fiscal mismanagement and personal animosity between Mr. Cheecham and the CEO. Furthermore, Mr. Cheecham has filed evidence about the temporary bans of other band members to support his argument that I should make a decision on the merits.

[35] On the other hand, I do not agree that just because other members have been banned in the past that I should hear on the merits of this application. The role of judicial review is not to set precedent for hypothetical future cases, and this factor of continued adversarial context will still have to be considered in the context along with the following two factors.

[36] As I found previously in *Suzuki* at paragraph 97 (citing *Kozarov v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185), "even if there is a possibility that the issue may reoccur, that does "not in itself warrant our hearing a moot case." It is preferable to wait to determine the question if and when a "genuine issue" arises, as will be discussed below (see *Suzuki* at para 122).

(ii) The need to promote judicial economy

[37] The importance of judicial economy was explained by Justice Manson in *Azhaev v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 219 at paragraph 23:

> …*Borowski* does refer to judicial economy in another way: to resolve ongoing uncertainty in the law to facilitate the expeditious resolution of similar cases in the future (*Borowski* at para 35). The Applicant's argument for this Court to exercise its discretion is based largely on this principle. He argues that it will help future litigants, including himself, to develop the jurisprudence on what "personal exigencies" justify a deferral of removal. However, the Court in *Borowski* at para 36 specifically warned against the application of this factor in the manner suggested by the Applicant:
>
> > The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

[38] The emphasis on judicial economy weighs heavily against a decision on the merits of Mr. Cheecham's case. *Borowski* notes that "[t]he concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it." I find this is not the case here.

[39] *Borowski* referred to cases that could otherwise evade judicial review, and how they might be worth deciding on the merits if they are of a "recurring nature but brief duration." Even if the bans are becoming a problematic trend with FMFN members, there have only been four temporary bans throughout 2018 and 2019, and judicial review is capable of being expedited in a fast enough fashion to hear the merits before the issues are moot as is the case here. This is not a

case that has evaded review due to the nature of the case but rather Mr. Cheecham was reportedly given the opportunity to expedite his hearing by Prothonotary Ring to avoid mootness issues, and opted not to do so. He is now insisting upon a hearing on the merits of the case even though the ban has been overturned for over six months and he has not articulated a clear need for a remedy.

[40] The FMFN council have recently been subject to judicial review in *Whalen*, so I do not find judicial economy is best served by rendering a full decision on the merits of this very narrow issue of a lifted and expired ban on an individual. I also accept the Respondent's view that making pronouncements on issues that are no longer live controversies can lead to further questions about the parameters and application of those pronouncements, when really a future application for judicial review is best decided on the facts of that future case.

(iii) The roles of the judiciary and the band council

[41] The third factor also weighs against Mr. Cheecham. By pronouncing when FMFN can temporarily ban its members, this Court would be rendering a judgment that would intrude into the legislative sphere of the band council. The Court's role on judicial review is not to create general precedents to govern future interactions, but rather to scrutinize the actual decisions under review.

[42] The Applicant conceded at the hearing that there was not much case law on housekeeping-type decisions by band councils. The cases cited typically dealt with banishment, suspensions of councillors, or other governance decisions which, it could be argued, do not

equate to a temporary short ban from a band office. For this Court to interfere with the routine decision to temporarily ban a band member from its office especially given that the ban was already overturned would be an unnecessary intrusion upon day-to-day band council matters. An intrusion by this Court could create a problematic precedent if every housekeeping decision was reviewed in Court even if moot.

(iv) Weighing these factors

[43] Together, these three factors on the second stage of the *Borowski* test suggest this application to overturn the ban is not an appropriate case for this Court to exercise its discretion to determine the merits of Mr. Cheecham's application. The ban has been withdrawn and would in any event have expired by now. A remedy would have no practical effect on Mr. Cheecham's case. Considerations of judicial economy and the proper role of courts vis-à-vis band councils also support this conclusion.

[44] As Justice Southcott found in *Gladue v Duncan's First Nation*, 2015 FC 1194 at paragraphs 39–42, a case where a band councillor was challenging a suspension for misconduct but the suspension was rescinded shortly after judicial review was launched:

> A decision by the Court on the merits of the moot issues will not have any practical effect on the rights of the parties. These issues also cannot be characterized as being of a recurring nature but brief duration or, for that reason or others, raising important questions which might otherwise evade review by the Court. Nor do they raise issues of public importance. The declarations sought by the Applicant relate to narrow issues surrounding the internal governance of the Council in the context of particular disagreements among its three members. There is no indication that those issues will resurface between the parties or that, if they

> did, they would not then be capable of review and determination in the context of a live controversy.
>
> …It is accordingly my conclusion that this application is moot and that this is not an appropriate case for the Court to exercise its discretion to decide the substantive issues argued by the Applicant.

[45] Therefore, I conclude that this application is moot.

[46] Accordingly I would dismiss this application for judicial review.

[47] Costs will be awarded to the Respondent in the lump sum amount inclusive of disbursements and taxes in the amount of $3,000.00 payable forthwith.

JUDGMENT in T-1193-19

THIS COURT'S JUDGMENT is that

1. This application is dismissed; and

2. Costs are awarded to the Respondent to be paid by the Applicant forthwith in the amount of $3,000.00.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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