

Date: 20080623

Docket: T-1445-06

Citation: 2008 FC 794

Vancouver, British Columbia, June 23, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**MATTHEW HENDERSON
and JOSEPH ANTOINE**

Applicants

and

**SIOUX VALLEY DAKOTA
NATION CHIEF AND COUNCIL, and
SIOUX VALLEY DAKOTA NATION**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Mr. Matthew Henderson and Mr. Joseph Antoine (the “Applicants”) commenced this application for judicial review relative to Board Council Resolution No. 290/06/018 (“BCR ‘018”) dated March 30, 2006 that was passed by the Sioux Valley Dakota Nation Board Council (the “Council”). The effect of BCR ‘018 was to dissolve the Sioux Valley Dakota Nation Election Appeal Committee of which the Applicants were members.

II. Background

[2] The Applicants are members of the Sioux Valley Dakota Nation. On or about March 7, 2006, each was appointed to the Sioux Valley Dakota Nation Election Appeal Committee. The appointments were made prior to an election for Chief and Council which was scheduled for March 29, 2006.

[3] The election was held on March 29, 2006. Kenneth Whitecloud was elected Tribal Chair Person. Donna Elk, Francis Elk, Warren Hotain, Denise McKay and Neil Wanbdiska were elected Councillors. The webpage for the Sioux Valley Dakota Nation provided that the 2003 Sioux Valley Dakota Nation Oyate Custom Election Code (the "Code") was "in effect" for the election. The Code provides for an Election Appeal Committee. Sections 7 and 8 of the Code are relevant and provide as follows:

7. Appeal Committee.

- a. During the tenth (10th) following each Band Election the Council shall appoint three (3) Appeal Officers to serve as the Appeal Committee for the immediately following next Band Election and for a period of one hundred (100) days thereafter.
- b. In consideration of the Appeal Officers accepting their appointment by the Council, and serving in their office, they shall be paid such honorarium, as determined by Tribal Chair Person and the Council within thirty (30) days following their appointment.
- c. The Appeal Committee shall conduct all appeals provided for and to be carried out pursuant to the Election Code. They shall also exercise such other functions as may be attributed to them by the Council.
- d. In the event any Appeal Officer is unable, unwilling or dies prior to the period of one hundred (100) days following a Band Election, the

two (2) remaining Appeal Committee Members and the Electoral Officer shall replace the vacancy.

8. Band Election Appeals.

- a. Within 30 days after a Band Election, any candidate of the Band Election or any Elector who gave or tendered his vote at the Band Election who has reasonable grounds for believing that:
 - i. there was corrupt practice in connection with the Band Election; or
 - ii. there was a violation of this Custom Election Code that might have affected the result of the Band Election; or
 - iii. an Elector nominated to be a candidate in the Band Election was ineligible to be nominated

may lodge an appeal by paying a fee of \$100.00 and delivering to the Electoral Officer an Appeal Notice as provided by in Schedule “6” to this Custom Election Code.

- b. Where an appeal is received by the Electoral Officer pursuant to Section 8.a., that office shall, within seven (7) days of the receipt of the appeal, forward a copy of said appeal, together with all supporting documents to each Candidate and to the Appeal Committee.
- c. Any Candidate may, within fourteen (14) days of the receipt of the copy of the appeal forward to the Electoral Officer a written answer to the particulars set out in the appeal together with all supporting documents relating thereto.
- d. The Appeal Committee may, if the material that has been filed is not adequate for deciding the validity of the Band Election complained of, conduct such further investigation into the matter as the Appeal Committee deems necessary, in such manner as he or she deems expedient.
- e. Such investigation may be held by the Appeal Committee or by any person designated by the Appeal Committee for the purpose. Where the Appeal Committee designates a person to hold such an investigation that person shall submit a detailed report of the investigation to the Appeal Committee for its consideration.

- f. In all deliberations, proceedings, investigations and hearings the rules of natural justice and fairness will apply.
- g. The Appeal Committee shall render its determination within sixty (60) days after a Band Election is held.
- h. During the time that the Appeal Committee is making its determination and if required by the circumstances of the appeal, the Appeal Committee is empowered to declare on an interim basis which Candidates for Tribal Chair Person and/or Councillor will sit in their respective offices.
- i. Appeal deliberations, proceedings, investigations and hearings may not be made and presented with legal counsel.
- j. The Appeal Committee may set aside the Band Election of a Tribal Chair Person or a Councillor if the Appeal Committee is satisfied that:
 - i. there was corrupt practice in connection with the Band Election;
 - ii. there was a violation of these Rules that might have affected the result of the Band Election; or
 - iii. an Elector nominated to be a candidate in the Band Election was ineligible to be nominated in accordance with these Rules.
 - iv. The determination and decision of the Appeal Committee shall for all purposes be final and binding on the Sioux Valley Dakota Oyate, on all Eligible Nominees in a Band Election and on all Electors. No appeal from the said determination and decision may be launched.

[4] The Applicants commenced their application for judicial review on August 9, 2006, following an Order of Mr. Justice Teitelbaum on August 7, 2006 in which the Applicants' motion for an extension of time to commence this application was granted.

[5] The Respondents appealed from the decision to extend the time and by Order dated June 12, 2007, the Federal Court of Appeal dismissed the appeal.

[6] The Applicants filed a joint affidavit, sworn on August 8, 2006. They filed a further affidavit sworn on March 30, 2007, in reply to the affidavits filed on behalf of the Respondents. According to the evidence of the Applicants, including the transcripts of their cross-examinations, the Respondent Council dismissed the Election Appeal Committee on March 30, 2006, following the passage of BCR '018. In their evidence upon cross-examination, each of the Applicants characterized the dissolution of the Election Appeal Committee as a corrupt election practice.

[7] The Applicants initially requested a hearing date on August 17, 2006. However, the Respondents' appeal from the Order of Justice Teitelbaum was still outstanding and further, the Respondents had not yet filed their record.

[8] A hearing was scheduled on January 28, 2008, to be held at Winnipeg, Manitoba on March 12, 2008. Up to that date, the Respondents had not filed their Respondents' Application Record, having failed to meet the timelines established by Prothonotary Lafrenière in his Order of August 16, 2007. By letter to the Registry of the Court dated January 21, 2008 Counsel for the

Respondents advised that they had been unable to obtain instructions from their clients. On February 11, 2008, Counsel for the Respondents filed a Notice of Motion seeking leave to withdraw as Counsel for the Respondents.

[9] The motion on behalf of Counsel for the Respondents was initially set for hearing in Winnipeg on March 12, 2008, but was adjourned until March 18, 2008, to allow Counsel for the Respondents to submit better affidavit evidence in support of their motion to withdraw.

[10] The motion again came on for hearing before this Court by video-conference on March 18, 2008. At that time, Counsel for the Respondents advised that matters had been resolved between Counsel and the Respondents, and that the motion for leave to withdraw was no longer an issue. By Order dated March 19, 2008, that motion was dismissed.

[11] The Respondents' Application Record was filed on April 3, 2008. The parties requested a Case Management Conference which was held by teleconference on April 8, 2008. At that time, Counsel for the Respondents advised that the Respondents were prepared to consent to an order allowing the substance of the Application for judicial review that is, an order quashing BCR '018. The Respondents reserved their right to address the issues of remedy and costs. An Order was filed on April 17, 2008 quashing BCR '018 and reserving the issues of remedy and costs until the hearing scheduled for May 20, 2008.

[12] The Applicants filed their initial record on October 20, 2006. This record included the original affidavit sworn by the Applicants on August 8, 2006. There were a number of documents attached as exhibits, including the “Custom Code Governing Sioux Valley Dakota Oyate Election”, an “Offer of Resolution” prepared by the Applicants dated April 3, 2006, a letter dated April 10, 2006 immediately terminating the employment of the Applicant Matthew Henderson with Sioux Valley Dakota Nation, a letter dated May 26, 2006 from Sioux Valley Dakota Nation to the Applicant Joseph Clayton Antoine imposing an indefinite suspension of his employment.

[13] Copies of BCR ‘018 and Band Council Resolution 290/06/015 (“BCR ‘015”) were also attached as exhibits. The former is the subject of the within proceedings and provides as follows:

WHEREAS: The Sioux Valley Dakota Oyate has elected Kenneth Whitecloud as Chief of Sioux Valley Dakota Nation;

WHEREAS: The Sioux Valley Dakota Oyate have elected the following as Council representatives of Sioux Valley Dakota Nation; Donna Elk, Francis Elk, Warren Hotain, Denise McKay and Neil Wanbdiska;

WHEREAS: The Sioux Valley Dakota Nation Chief and Council hereby dissolve the current Appeals Committee and will be accepting applications for a new appeals committee to be appointed by Wednesday, April 5, 2006. Employees of Sioux Valley Dakota Nation entities will not be considered.

THEREFORE BE IT RESOLVED: That the Sioux Valley Dakota Oyate recognize this Band Council Resolution as passed by the Sioux Valley Dakota Nation Chief and Council.

[14] BCR ‘015 relates to the governance of the Sioux Valley Dakota Nation after the March 2006 election and provides as follows:

WHEREAS: The Sioux Valley Dakota Oyate has elected Kenneth Whitecloud as Chief of Sioux Valley Dakota Nation;

WHEREAS: The Sioux Valley Dakota Oyate have elected the following as Council representatives of Sioux Valley Dakota Nation; Donna Elk, Francis Elk, Warren Hotain, Denise McKay and Neil Wanbdiska;

WHEREAS: The Sioux Valley Dakota Nation Chief and Council will serve the Sioux Valley Oyate as full-time elected officials unless a newly revised Custom Election Code is adopted and states otherwise.

THEREFORE BE IT RESOLVED: That the Sioux Valley Dakota Oyate recognize this Band Council Resolution as passed by the Sioux Valley Dakota Nation Chief and Council.

[15] For their part, the Respondents filed the affidavits of Mr. Kenneth Whitecloud sworn November 8, 2006, Denise Pearl McKay sworn November 22, 2006, Donald J. Sheldon, Q.C. sworn December 27, 2006 and the unsworn affidavit of Andrew Sioux which affidavit was originally submitted as part of a motion record filed January 4, 2007.

[16] By Order dated August 16, 2007, Prothonotary Lafrenière directed the Respondents to file their record. They did not do so nor did they seek an extension to file their record in time for the hearing to proceed as scheduled on March 12, 2007. Instead, Counsel for the Respondents sought leave to withdraw as the legal representatives of the Respondents.

[17] By Order issued on March 19, 2008, the Respondents were directed to file their record by April 4, 2008. They did so and that record includes the affidavits of Mr. Whitecloud, Ms. MacKay, Mr. Sheldon and Mr. Sioux, as well as the transcripts of the cross-examination of the Applicants.

[18] The Applicants obtained leave to file a Reply Affidavit, after receipt of the Respondents' affidavits. The Applicants' Reply Affidavit, sworn on March 30, 2007, refers to receipt of two complaints relative to the March 30, 2006 Band election. Copies of these complaints were annexed as exhibits to the Reply Affidavit. The two complaints alleged improprieties with respect to the March 30, 2006 election and, in one case, characterized the passage of "BCR, dated Mar/06 [sic]" as a corrupt practice.

[19] The Applicants are seeking injunctive relief requiring the reconstitution of the Election Appeal Committee that was disbanded as a result of BCR '018. They submit that they ought to be allowed to perform the work for which they were appointed to their Election Appeal Committee: They argue that their reinstatement is essential for the maintenance of respect for due process of the law for the Sioux Valley Dakota Nation and other First Nations.

[20] For their part, the Respondents argue that the whole matter is moot, since a band council election for the Sioux Valley Dakota Nation was held in March 2008. They submit that no purpose would be served by reconstituting the election Appeal Committee to which the Applicants were appointed in 2006. To the contrary, they argue that such a situation would cause confusion for the

community and potentially jeopardize every resolution passed by the Respondent Chief and Council during their term in office.

III. Discussion and Disposition

[21] The availability of relief in an application for judicial review is discretionary. Subsections 18(1) and 18(3) of the *Federal Courts Act*, R.S.C. 1985, c.F-7 is relevant and provides as follows:

Extraordinary remedies, federal tribunals

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

...

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may

Recours extraordinaires : offices fédéraux

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

...

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont

be obtained only on an application for judicial review made under section 18.1. exercés par présentation d'une demande de contrôle judiciaire.

[22] In the present case, the remedy sought by the Applicants is injunctive in nature. Specifically, they describe that relief in the Application for judicial review as follows:

- a) ...
- b) A mandatory injunction requiring the Respondents and all of the Respondents' members, employees and agents to permit the Applicants to carry out and execute all of the duties, investigations, proceedings, hearings, and powers as the circumstances may require in their capacity as the Election Appeal Committee of Sioux Valley Dakota nation pursuant to the Sioux Valley Dakota Oyate Custom Election Code dated September 30, 2003, and that the Respondents be enjoined from interfering with the Applicants acting in this capacity in any way;
- c) A mandatory injunction extending the 100-day term of the Applicants as Election Appeal Officers and the 30-day limit for the receipt of complaints in respect of the election to commence as of the date of the signing of the requested Order of this Honourable Court declaring the Sioux Valley Dakota Nation Band Council Resolution No. 290/06/018, dated March 30, 2006, to be void and of no effect, if that should be granted by this Honourable Court.

[23] The test for granting injunctive relief is well-established. It is a tripartite and conjunctive test, requiring an applicant to establish that there is a serious issue for trial, that denial of the relief sought would cause irreparable harm and that the balance of convenience favour the granting of the relief sought; see *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[24] I am prepared to find that the matter raises a serious issue, if only on the basis that the Respondents consented to the setting aside of BCR '018. However, I am far from persuaded that the Applicants have adduced sufficient evidence to show the existence of irreparable harm.

[25] In the course of the cross-examination upon their joint affidavit, each Applicant referred to harm to the community resulting from the dissolution of the Election Appeal Committee. Mr. Henderson described the replacement of the Committee as a “corrupt practice” contrary to the Election Code.

[26] For his part, Mr. Antoine testified about the conduct of the election as being designed “more to harm all the community”, at page 9 of his cross-examination.

[27] Neither Applicant demonstrated that he had suffered or would suffer irreparable harm in relation to the passage of BCR '018. The fact that each Applicant sustained changes in his respective status was not advanced as a ground of this Application for judicial review. In any event, according to his evidence, Mr. Henderson has pursued a complaint before Human Resources Development Canada in that regard.

[28] The broad and generalized statements of the Applicants, in their cross-examinations, about harm to the community do not establish irreparable harm. The submissions of Counsel in a similar vein do not answer the legal requirements of non-speculative evidence in order to establish irreparable harm, where injunctive relief is sought. In that regard, I refer to the decision in *Eli Lilly and Co. v. Apotex Inc.* (1996), 69 C.P.R. (3d) 455 (F.C.A.).

[29] In *Edgar v. Kitsoo Band (Council)*, 228 F.T.R. 161, the Court noted that it is the nature of the harm suffered, not its magnitude, that identifies the harm as irreparable.

[30] Further, there must be evidence that the alleged irreparable harm is personal to the Applicants; see *Beausejour v. Yekooche First Nation*, 2003 FC 1213, [2003] F.C.J. No. 1958 and *Dodge v. Caldwell First Nation of Point Pelee*, 2003 FCT 36, [2003] F.C.J. No. 45.

[31] Since the Applicants have failed to establish the second essential part of the tripartite, conjunctive test for obtaining injunctive relief, it is not necessary to address the third issue, that is balance of convenience. The injunctive relief sought by the Applicants is denied.

[32] However, there are a few matters of practice to be addressed.

[33] As noted above, the Applicants swore and filed joint affidavits. The *Federal Courts Rules*, SOR/98-106 (the “Rules”) do not contemplate the filing of joint affidavits. In this regard, I refer to Rule 80(1) which provides as follows:

80(1) Form of affidavits – Affidavits shall be drawn in the first person, in Form 80A.	80(1) Forme – Les affidavits sont rédigés à la première personne et sont établis selon la formule 80A.
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[34] The Respondents submitted a Memorandum of Fact and Law in their record that was filed on April 3, 2008. The following three paragraphs were presented as the facts:

1. This is an application for judicial review of a resolution passed by Sioux Valley Dakota Nation dissolving the Sioux Valley Appeal Committee.
2. On March 29th of 2006, the Sioux Valley Dakota Nation Election occurred.
3. Since the 2006 election, a new election in Sioux Valley was held on March 28, 2008 and a new Tribal Chair Person and Council have been elected.

[35] The heart of the Respondents’ argument was set out in paragraphs 5 and 9 of their Memorandum of Fact and Law as follows:

5. The Applicant’s case has been rendered moot as a newly elected Tribal Chair Person and Council now hold office in Sioux Valley.

...

9. The Applicants’ have brought this application asking this Honourable Court to declare Band Council Resolution No. 290/06/018 is void and of no further effect. This relief is sought to permit the Applicants to return to their position and carry out and execute all of the duties and powers as the Election Appeal Committee in hearing complaints regarding the March 29, 2006

election. Pursuant to provision 8(j) of The Custom Election Code governing Sioux Valley Dakota Elections, the Appeal Committee, after hearing and investigating complaints, “may set aside the Band Election of a Tribal Chair Person or a Councillor” if the Appeal Committee finds justification for doing so.

[36] The Respondents filed no affidavit with respect to the March 2008 elections. Upon an application for judicial review in this Court, evidence is generally given by means of affidavit; see Rules 306 and 307. In the course of the hearing, I commented on the absence of an affidavit from one or more of the Respondents concerning the elections of March 2008. In response, Counsel for the Respondents said that the “fact” of the March 2008 was uncontested by the Applicants. He referred to Rule 3 of the Rules as operating to justify the absence of a further affidavit to address what was a relevant fact, as far as the Respondents were concerned.

3. General principle –

These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

3. Principe général –

Les présentes règles sont interprétées et appliquées de façon à permettre d’apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[37] The Respondents are misguided in their view of Rule 3. That Rule does not excuse failure to comply with the Rules governing applications for judicial review. In these proceedings, evidence is generally provided by way of affidavit. It is certainly not submitted in the Memorandum of Fact and Law.

[38] The only substantive argument raised by the Respondents both in their Memorandum of Fact and Law and upon the hearing of this matter on May 20 is that the application is moot. In this

regard, they rely on the decision of the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[39] In my opinion, the issue of mootness does not arise in relation to a remedy. The doctrine has been developed in response to the use of judicial resources in adjudicating a proceeding where no live controversy exists between the parties. The “live controversy” in the present case has been resolved as a result of the consent order that was issued on April 17. That Order granted the substantive relief sought by the Applicants. The availability of other relief lies with the discretion of the Court.

[40] For the reasons set out above, the requested injunctive relief will not be granted.

[41] Finally, there is the question of costs. Counsel filed written submission in this regard and also addressed the issue at the hearing on May 20. The Applicants seek recovery of costs on a solicitor-client basis or, alternatively, on a lump sum basis in the amount of \$30,000.

Unsurprisingly, the Respondents resist an award of costs on either solicitor-client basis or in the amount of \$30,000.

[42] In order to determine how best to exercise my discretion to award costs in this matter, pursuant to Rule 400, I issued a Direction asking the Applicants to provide evidence as to the total disbursements and legal fees that were charged in connection with this proceeding. Accordingly, the question of costs remains under reserve.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the request for injunctive relief is dismissed. Costs will be the subject of a further Order.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1445-06

STYLE OF CAUSE: MATTHEW HENDERSON and JOSEPH ANTOINE v.
SIOUX VALLEY DAKOTA NATION CHIEF AND
COUNCIL, and SIOUX VALLEY DAKOTA NATION

PLACE OF HEARING: Winnipeg, Manitoba

DATE OF HEARING: May 20, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** HENEGHAN J.

DATED: June 23, 2008

APPEARANCES:

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