

Date: 20090109

Docket: T-1582-08

Citation: 2009 FC 25

Ottawa, Ontario, January 9, 2009

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

**CHRIS BIRD and MIKE BEAVER in their capacity as
COUNCILLORS OF THE SALT RIVER FIRST NATION #195
also known as SALT RIVER INDIAN BAND #759**

Applicants

and

**CHIEF FRIEDA MARTSELOS and
SALT RIVER FIRST NATION COUNCIL**

Respondents

REASONS FOR ORDER AND ORDER

[1] The Applicants, Chris Bird and Mike Beaver, are councillors of the Salt River First Nation (SRFN). They object to actions taken by the Respondents, SRFN Chief Frieda Martselos and the SRFN Council, in the passing of a SRFN Band Council Resolution that authorized the payment of large sums of SRFN funds to, or to the family members of, Chief Martselos and Councillors Brad Laviolette and Gloria Laviolette. In an application for judicial review (the Application) filed

October 14, 2008, the Applicants are seeking a number of remedies related to these matters, including:

- a writ of *quo warranto* with respect to the payment, on or about September 11, 2008, September 16, 2008 and subsequent unknown dates, of certain SRFN funds to Chief Martselos and others;
- an order quashing a Band Council Resolution (BCR) passed by the Respondent SRFN Council on September 10, 2008, which BCR purportedly authorized the payment of certain SRFN funds to Chief Martselos and others; and
- an injunction restraining Chief Martselos or her lawyers from receiving, handling or disbursing certain SRFN funds.

[2] In this motion, brought in writing pursuant to Rule 369 of the *Federal Courts Rules*, the Applicants seek the following:

1. A direction that *quo warranto* is properly claimed in the Application;

2. An Order, pursuant to Rule 318, that the Respondents forward to the Registry and the Applicants a certified copy of the following material:

All records from August 25, 2008 to date pertaining to, relevant to or connected with the payment or transfers of SRFN funds evidenced by the following cheques to the ultimate recipients of such funds or any part thereof: SRFN cheque #2206 dated September 11, 2008 in the amount of \$74,332.14; SRFN cheque #2258 dated September 16, 2008 in the amount of \$526,834.38; and SRFN cheque #2375 dated September 26, 2008 in the amount of \$1,000,000; including all correspondent to and from the SRFN and/or SRFN lawyers with respect to such payments, and all trust ledgers and file notes or records of Parlee McLaws LLP with respect to such payments.

3. An Order, pursuant to s. 18.1(2) of the *Federal Courts Act*, extending the time for filing the Notice of Application to October 14, 2008;
4. A direction, pursuant to Rule 304(1) permitting the Applicants to serve their Notice of Application on November 6, 2008; and
5. Leave to file the affidavits of Chris Bird, Mike Beaver and Delphine Beaulieu in support of their Application beyond the 30-day time limit provided for in Rule 306.

[3] In the reasons that follow, I will briefly outline the background to the Application and this Motion and then deal with each of the motion requests.

I. Background

[4] Frieda Martselos was elected into the position of Band Chief on August 25, 2008. On August 26, 2008, the Council of the SRFN met and voted (four to three) to have the Chief run the day-to-day operation of the Band Office, and to have a special meeting of the membership of the SRFN.

[5] On September 9, 2008, the Special Membership Meeting was held. According to the affidavits submitted by the Respondents, at least 55 members were present at the meeting. Quorum is 40 plus one.

[6] Several motions were passed by the members present. In particular, one stated that the SRFN would fully reimburse Chief Martselos for her legal and all other costs and expenses incurred by her to take the court actions that had been necessary as to be reinstated as Chief of the SRFN Council and her lost wages as Chief during her suspension from May 1, 2007 to August 25, 2008. The motion also provided that the SRFN would develop compensation packages for individuals who had spent funds in the court and also to determine whether one of the former Chiefs was paid his wages as an elected Chief for his term.

[7] On September 10, 2008, the Council of the SRFN met and passed a band council resolution (BCR) that all motions passed and adopted at the Special Membership Meeting were accepted and adopted by the Chief and Council as Resolutions of the Council of the SRFN. Chief Martselos and

Councillors Brad Laviolette and Gloria Laviolette participated at this meeting, voting in favour of the resolution, which passed by four (or five) votes to two.

[8] Following the resolution, three sets of withdrawals were made from a SRFN account at the Bank of Montreal by way of cheques:

1. September 11, 2008 – \$74, 332.14 was transferred or paid to Chief Martselos;
2. September 16, 2008 - \$526,834.38 was transferred or paid to Chief Martselos; and
3. September 26, 2008 - \$1,000,000 was transferred to Chief Martselos' lawyers, Parlee McLaws LLP.

[9] The Applicants allege that no specific authority for such payments was given by the SRFN Council. They allege that the monies in question have gone to Chief Martselos and to 10 other SRFN members, whose identities the Respondents have refused to disclose. The Applicants suspect that some of the recipients include those who made the motion at the September 9, 2008 Special Membership Meeting to establish the compensation program.

[10] In an SRFN Band Council meeting held on November 25, 2008, the first two of the three challenged payments were discussed by members of Council. It was subsequently ratified by a quorum of disinterested members of Council at a duly convened Council meeting held on November 25, 2008. Chief Martselos did not participate in the vote to ratify.

II. Analysis

A. *Quo warranto*

[11] The Applicants seek a direction of this Court that *quo warranto* is properly claimed in the Application.

[12] As I understand the Application and the materials filed by the Applicants in this motion, the real issue is whether the Respondents had the authority to discuss, vote on and pass a resolution that potentially allowed them and their family members to receive SRFN funds. The decision being challenged is the one that was made on September 10, 2008 to pass a resolution that adopted all the motions that were passed and adopted at the Special Membership Meeting, including the motion to compensate SRFN individuals for their court costs in various proceedings before this Court and Chief Martselos for her lost wages. Although, in their submissions, the Applicants focus on three specific payments made by way of cheque to Chief Martselos and Parlee McLaws following the passing of the September 10, 2008 BCR, the judicial review seeks to quash any and all payments made by virtue of this resolution.

[13] In my view, the writ of *quo warranto* is not properly claimed in this motion. The *quo warranto* remedy is available to challenge the right of a public official to hold the office (See *Balfour v. Norway House Cree Nation*, 2006 FC 213, [2006] 4 F.C.R. 404 at para. 21, *Salt River First Nation 195 (Council) v. Salt River First Nation 195*, 2003 FCA 385, 312 N.R. 385 at para. 20). There is also jurisprudence that states that the remedy of *quo warranto* does not extend to cases of

alleged illegalities or alleged abuses committed by the public office holder in connection with his or her functions (*Re Bruce et al. and Reynatt et al.*, [1979] 2 F.C. 697, 104 D.L.R. (3d) 11 (F.C.T.D.) at para. 14).

[14] Justice Walsh also stated in *Re Bruce*, above, that the remedy is, above all, discretionary and that it would not be available if the relief sought could be obtained through alternative remedies such as mandamus or an injunction. In this case and as is sought by the Applicants in their Application as an additional remedy, an injunction may be available and appropriate. If indeed the resolution was improperly passed on September 10, 2008, then an injunction can be issued to prevent future payments from SRFN funds and monies already lost can be recovered by way of a claim for damages. The Applicants' only attempt to respond to this point is that *quo warranto* is preferable because it prevents the SRFN Council from passing any future BCRs allowing similar payments to the recipients. In my view, this is not a sufficient justification for widely expanding the parameters of the *quo warranto* remedy.

[15] I also reject the Applicants' argument that the present case is analogous to *The Queen v. Wheeler*, [1979] 2 S.C.R. 650, in which case the Supreme Court of Canada granted *quo warranto*. Although that case also dealt with a situation of a conflict of interest, the main issue was the eligibility of an official to be elected or to continue to hold his office. The present case is distinguishable in that it focuses on alleged abuses committed by SRFN Councillors who properly (at least for the purposes of this Application) hold office. As such, *quo warranto* is not available in the same way as was used in *Wheeler*, above.

[16] On a related note, I observe that a differently constituted meeting of disinterested members of the SRFN Council on November 25, 2008 ratified the intended purpose of two of the challenged payments. The Applicants submit that the November 25, 2008 ratification of the September 10, 2008 BCR was also likely arrived at without legal authority and that it should be considered under the present Application. The decisions made at the November 25, 2008 meeting would, in my opinion, constitute a separate order or decision. As set out in Rule 302, “an application for judicial review shall be limited to a single order in respect of which relief is sought.” The Applicants should not be permitted to include, as part of their original Notice of Application, any and all subsequent actions made by the SRFN Council or attempt to circumvent Rule 302 by characterizing their requested remedy as a writ of *quo warranto*.

[17] In sum, I am not persuaded that the Applicants have raised facts upon which a remedy of *quo warranto* is available.

B. *Rule 317 Request*

[18] Presumably relying on Rule 317, the Applicants have requested copies of certain records (listed above) within the possession of the Respondents. In this Motion, the Applicants request that, pursuant to Rule 318, I order the Respondents to provide certified copies of those records.

[19] The Respondents have agreed to provide the names of those persons who benefited from the compensation program, if the affected persons consent. However, the Respondents object to

providing anything further. I agree with the Respondents, except that I do not believe that the consent of the beneficiaries is required.

[20] The Applicants' main concern in their judicial review application is whether certain individuals have illegitimately received SRFN Band funds. The source of their concern stems from the September 10, 2008 Council meeting where the Council passed a BCR adopting all motions that were approved at the September 9, 2008 membership meeting. Those motions allowed for reimbursement for court fees and lost wages to Chief Martselos and others. The Applicants claim that, by virtue of a conflict of interest, certain individuals who benefited from the resolution should not have been able to vote in favour of the resolution on September 10, 2008. As such, they submit, the resolution is without legal authority.

[21] Based on this characterization of the Application, I fail to see why documents pre-September 10, 2008 or post-September 10, 2008 relating to the payments by way of the two cheques to Chief Martselos would be relevant to the main conflict of interest issue. It has already been established that those cheques were made in order to reimburse the Chief for her court fees in getting reinstated as Chief and her lost wages. Insofar as we know that she was the recipient of the payments for the identified two purposes, the other documents relating to these payments are irrelevant.

[22] Similarly, I share the Respondents' concerns with respect to the documents relating to the payment to the law firm. The key issue is whether certain Councillors were conflicted out of voting in favour of the compensation program. To determine whether there is a conflict of interest, the only

necessary information from that which has been requested by the Applicants is material that identifies whether certain individuals did indeed receive a benefit flowing from the resolution and subsequent payment to the law firm. Thus, apart from an accounting of the names of those persons who benefited from the compensation program—information which the Respondents are apparently prepared to provide—I would reject the Applicants’ request under Rule 317 and decline to make an Order as requested.

[23] I am not persuaded that the consent of the beneficiaries of the compensation program need be obtained before release of their names for purposes of this judicial review. To permit some persons to refuse to disclose their names would create a situation where the substance of the judicial review – that is, whether certain councillors voted in the presence of a conflict of interest – could not be determined.

[24] In sum, I am prepared to order only that the Respondents provide to the Applicants a list of the names of those individuals who received funds pursuant to the September 10, 2008 resolution.

C. *Extension of Time to file Notice of Application*

[25] The Applicants filed their Notice of Application on October 14, 2008. They seek a four-day extension of the 30-day period allowed for their judicial review application in respect of the September 10, 2008 decision.

[26] In order to justify an extension of time, the Applicants must satisfy the test set out in *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 at pages 399-400 by showing: 1) a continuing intention to pursue his or her application; 2) that the application has some merit; 3) that no prejudice to the respondent arises from the delay; and, 4) that a reasonable explanation for the delay exists. (See also *Peace Hills Trust Co. v. Saulteaux First Nation*, 2005 FC 1364, 281 F.T.R. 201 at para. 52).

[27] Applying these factors to the case before me, I first observe that there is an arguable case as to the existence of a conflict of interest that might invalidate the Council's actions on September 10, 2008. This is relevant to the Applicants' application for declaratory relief, certiorari and an injunction. Second, the Respondents do not seem to have suffered any prejudice arising from the four-day delay. Third, the Applicants have provided a reasonable explanation for the delay; specifically, they were unable to commence the action until they received copies of the minutes of the membership meeting of September 9, 2008, which minutes set out the details of the resolution that was passed on September 10, 2008. These factors sufficiently justify the granting of an extension.

[28] In the circumstances, I am persuaded that an extension of time should be granted.

D. *Service of Notice of Application*

[29] Rule 304 of the Federal Courts Rules provides that a Notice of Application is to be served on all respondents within 10 days after the issuance of a notice of application. In this case, there was some irregularity in the service of the Notice.

[30] Having reviewed the circumstances of the service and upon being satisfied that there is no prejudice to the Respondents, I am prepared to direct that service of the Notice of Application has been effected in accordance with the Rules.

E. *Filing of Further Affidavits*

[31] In support of their Application, the Applicants have prepared affidavits of Chris Bird, Mike Beaver and Delphine Beaulieu. The Applicants submit that, while the affidavits were served within the 30-day limit, problems were encountered in filing them with the Court within the 30-day limit. Iolanda Organ, a legal assistant for the Applicants' counsel, seems to take responsibility for this lapse.

[32] Having reviewed the circumstances and noting that the Respondents do not object to the late filing, I am prepared to permit the late filing of the affidavits.

III. Conclusion

[33] In summary, I conclude that the Motion should be disposed of as follows:

1. The Court declines to direct that *quo warranto* is properly claimed in the Application for Judicial Review;
2. The Respondents will be ordered to provide, within ten days of this Order, a list of those persons who have received compensation payments under the compensation scheme approved at the Special Membership Meeting held on September 9, 2008 and as subsequently approved by BCR on September 10, 2008;
3. No other records requested by the Applicants are required to be provided to the Respondents;
4. An extension of time, to October 14, 2008, for filing of the Notice of Application will be granted;
5. An extension of time, to November 6, 2008, for the serving of the Notice of Application will be granted;

6. Leave will be granted to file the affidavits of Chris Bird, Mike Beaver and Delphine Beaulieu. The affidavits are to be served and filed within thirty (30) days of the date of these Reasons for Order and Order.

[34] The parties should now be able to carry on with the substance of the Application. Once the Applicants have served and filed their affidavits, it is expected that the parties will adhere to all further time limits established by the *Federal Courts Rules*.

[35] In light of the mixed success on this motion, I will exercise my discretion and decline to award costs of this motion to either party. Each party will bear its own costs.

ORDER

THIS COURT ORDERS that:

1. The Respondents are to provide, within ten days of this Order, a list of those persons who have received compensation payments under the compensation scheme approved at the Special Membership Meeting held on September 9, 2008 and as subsequently approved by BCR on September 10, 2008;
2. No other records requested by the Applicants are required to be provided to the Respondents;
3. An extension of time, to October 14, 2008, for filing of the Notice of Application is granted;
4. An extension of time, to November 6, 2008, for the serving of the Notice of Application is granted;
5. Leave is granted to file the affidavits of Chris Bird, Mike Beaver and Delphine Beaulieu; such affidavits and any other Applicants' affidavits are to be served and filed within thirty (30) days of the date of this Order;

6. Subsequent to the filing of the Applicants' affidavits, all relevant time requirements set out in the *Federal Courts Rules* are to be observed; and

7. Each party will bear its own costs of this motion.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1582-08

STYLE OF CAUSE: CHRIS BIRD and MIKE BEAVER in their capacity as
COUNCILLORS OF THE SALT RIVER FIRST NATION
#195 also known as SALT RIVER INDIAN BAND #759

v.

CHIEF FRIEDA MARTSELOS and
SALT RIVER FIRST NATION COUNCIL

**MOTION IN WRITING WITHOUT PERSONAL APPEARANCE OF PARTIES,
CONSIDERED AT OTTAWA, ONTARIO**

**REASONS FOR ORDER
AND ORDER:** SNIDER J.

DATED: January 9, 2009

APPEARANCES:

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David C. Rolf FOR THE RESPONDENTS

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