Federal Court  Cour fédérale

Date: 20131015

Docket: T-1581-12

Citation: 2013 FC 1039

Ottawa, Ontario, October 15, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MERVIN D. GRANDBOIS

Applicant

and

COLD LAKE FIRST NATION CHIEF AND COUNCIL

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mervin D. Grandbois (the "Applicant") seeks an order of *mandamus* to require the Chief and Council of Cold Lake First Nation ("CLFN", collectively the "Respondents") to comply with a decision of CLFN's Appeal Committee (the "Appeal Committee"). In its decision of September 18, 2010, the Appeal Committee directed that a new election be called, delayed the new election by four months so that the CLFN's Election Law of May 27, 1986 (the "Election Law") could be amended, struck certain provisions of the Election Law, and held that all members of the CLFN over the voting age were eligible to vote.

[2] In his Notice of Application, the Applicant also seeks a mandatory injunction requiring that the election be held, and costs on a solicitor-client basis.

[3] On October 23, 2012, Justice Russell denied the Applicant's motion for a mandatory injunction or order of *mandamus* on the grounds that the Applicant could not bypass judicial review and seek a mandatory injunction or order of *mandamus* in a motion. Justice Russell also noted that the Applicant had not provided a sufficient evidentiary basis to establish grounds for granting either a mandatory injunction or an order of *mandamus*.

[4] CLFN held an election for Chief on June 16, 2010, and an election for councillors on June 30, 2010. These elections were held pursuant to the Election Law. Various problems with the election were alleged, including the failure to properly include non-resident CLFN members and procedural irregularities.

[5] Five members of the CLFN appealed the election results, pursuant to the Election Law. On September 18, 2010, the Appeal Committee, composed of members of a neighbouring First Nation, allowed the appeal. The Appeal Committee found that the non-inclusion of Bill C-31, that is non-resident band members, on the voter's list was unconstitutional and not saved by section 1 of the *Charter of Rights and Freedoms*, Part I to the *Constitution Act*, 1982, c. 11 (U.K.), Schedule B (the "Charter"). The Committee ordered a new election but delayed it by four months in order to allow for the Election Law to be amended.

[6] The Appeal Committee also struck sections 1(L), 4(E), 5(G) and 6(C) of the Election Law on the basis that they offended section 24(1) of the Charter and were not saved by section 1. The Appeal Committee further declared that all CLFN members of voting age were eligible voting members and had the right to run for political office. The decision stated that the Appeal Committee presumed that it had the authority to declare a Charter remedy as a "court of competent jurisdiction", and that if it had exceeded its jurisdiction, its decision was subject to judicial review.

[7] In January 2011, the Chief and Council received a legal opinion written by a Mr. James Duke which advised that the officials did not have to step down because the Appeal Committee had exceeded its jurisdiction. This legal opinion was distributed to the CLFN membership at a band meeting in February 2011. Meetings and workshops were held from October 2010 to March 2011 to work on amendments to the Election Law. Community consultations took place in November and December 2011.

[8] In her affidavit filed in this application, Ms. Judy Nest, a member of the CLFN states that it became clear through these meetings that it would be difficult to make progress in this way. The Chief and Council hired community members to take the draft door-to-door to explain the proposals. Ms. Judy Nest also states that the Council intended to hold a referendum on amendments in March 2013, and that the next election for Chief and Council is scheduled for June 2013.

[9] There is one issue arising in this application, that is whether the Applicant is entitled to an order of *mandamus*. The test for granting such an order is set out in *Apotex Inc. v. Merck & Co. and*

Merck Frosst Canada Inc. (1993), 162 N.R. 177 and requires an applicant to establish the following elements:

1. there must be a public legal duty to act;
2. the duty must be owed to the applicant;
3. there is a clear right to performance of that duty, in particular:
    (a) the applicant has satisfied all conditions precedent giving rise to the duty:
    (b) there was
        (i) a prior demand for performance of the duty;
        (ii) a reasonable time to comply with the demand unless refused outright; and
        (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
4. where the duty sought to be enforced is discretionary, the following rules apply:
    (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
    (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
    (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to 'irrelevant", considerations;
    (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

(e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

5. no other adequate remedy is available to the applicant;
6. the order sought will be of some practical value or effect:
7. the court in the exercise of its discretion finds no equitable bar to the relief sought;
8. on a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

[10] Each party raised the question as to the jurisdiction of this Court to grant the relief sought, albeit in different ways.

[11] The Applicant frames the issue of jurisdiction in terms of the status of the Election Committee as a "federal board, commission or other tribunal" whose decisions are subject to judicial review by this Court. He relies on the decision in *Felix v. Sturgeon Lake First Nation* (2011), 398 F.T.R. 88 at paragraphs 12-17 and *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at paras. 21-23.

[12] The Respondents deal with the issue of jurisdiction in terms of the authority of the Appeal Committee to make an order that gives rise to a "public legal duty to act". In other words, the Respondents question the scope of the authority conferred on the Appeal Committee and whether its decision can give rise to a "public legal duty" for action by the Respondents.

[13] In my opinion, the Respondents have correctly identified the issue of jurisdiction. This application for judicial review does not involve "review" of the Appeal Committee's decision as such, but an examination of the scope of the Committee's decision-making authority and the effect of the decision that it made in this case.

[14] The power of the Appeal Committee derives from the Election Law of May 27, 2010. Clause 15 of that Law addresses the "Appeals Committee". Sections (A), (C) and (E) of that Law are relevant to the present application and provide as follows:

> A. The Appeal Committee shall respect and follow the Cold Lake First Nations Election Law.
>
> […]
>
> C. The Appeal Committee shall deal with the appeals at a public meeting of the electors of the Cold Lake First Nations.
>
> […]
>
> E. The Appeal Committee can ask any person from Cold Lake First Nations to make comments upon the appeal and to have a clear position on the traditional laws of the Cold Lake First Nations people.

[15] Clause 14 deals with appeals in general. Sub-clauses (A), (C) and (G) are relevant and provide as follows:

> A. Any protest for the election of the Chief and Council must be made within thirty (30) days of the election.
>
> […]
>
> C. All protests must outline the reasons for the appeal based upon the traditional election law of the Cold Lake First Nations.

> […]
>
> G. All appeals shall be final at the completion of the review by the committee.

[16] These provisions authorize the Appeal Committee to "deal" with appeals "at a public meeting". They do not authorize the Committee to make a decision. The Appeal Committee is directed to "respect and follow" the CLFN Election Law but no specific remedies are identified, for implementation after an appeal.

[17] The Respondents argue that the jurisdiction of the Appeal Committee is limited to the areas over which the CLFN assigned it authority, through the Election Law. In this regard, the Respondents rely on the decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 at paragraphs 55 and 60.

[18] The Respondents also rely on the decision in *R. v. Conway*, [2010] 1 S.C.R. 765 at paragraphs 81-82 where the Supreme Court of Canada held that if a tribunal has explicit or implied jurisdiction to determine questions of law, it can consider and apply the Charter, including Charter remedies, unless it is clearly shown that the legislation intended to exclude the Charter from the tribunal's jurisdiction.

[19] In my opinion, the arguments advanced by the Respondents as to the lack of jurisdiction of the Appeal Committee to grant the remedies that it did and to order a new election are more persuasive than the submissions advanced by the Applicant. The defining characteristic of an order of *mandamus* is that it is a discretionary remedy whose availability depends on whether the

Applicant can meet the cumulative elements for that remedy. Both the Applicant and the Respondents agree that the test to be met is the one established by the Federal Court of Appeal in *Apotex*.

[20] In my opinion, the Applicant has mistakenly focused on the status of the Appeal Committee as a "federal board, commission or other tribunal" as defined in subsection 2(1) of the *Federal Cours Act*, R.S.C. 1985, c. F-7, without going further into the substantive question as to the powers of that Committee.

[21] The decision in *Rio Tinto Alcan* is relevant because it highlights the obligation for a tribunal, such as the Appeal Committee, to assess the limits of its powers. It must conduct that assessment by reference to its enabling legislation, in this case the Election Law. I refer to paragraph 60 of *Rio Tinto Alcan* where the Supreme Court of Canada said the following:

> 60 […] A tribunal has only those powers that are expressly or implicitly conferred on it by statute. … The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

[22] This case is unlike the situation in *Meeches v Meeches* (2013), 447 N.R. 168 at paragraph 45, where the Federal Court of Appeal said: "[t]he Election Act is clear and unambiguous as to the authority of the Election Appeal Committee, which is set out in multiple provisions throughout the Act." This Election Law at issue in this case is not clear and unambiguous.

[23] In my opinion, having regard to the broad language of the Election Law, the role of the Election Committee is limited to respecting and following the Election Law and to identifying the traditional laws of the CLFN.

[24] There is no evidence in the record about those traditional laws and the relationship, if any, with the Election Law and the role of the Election Committee.

[25] If the role of the Election Committee is limited to an administrative or advisory, that is discretionary, role, then its decision cannot give rise to a "public legal duty to act". In these circumstances, it follows that the remedy of *mandamus* is not available to the Applicant. In my opinion, my finding as to the lack of a public legal duty to act is dispositive of this application, however, I will briefly address some of the elements of the *Apotex* test which the Applicant failed to establish.

[26] There is no evidence that the Applicant was entitled to performance of the duty. He did not submit evidence that he demanded performance of the duty, within a reasonable time for compliance and there is no evidence of an alleged refusal, either express or implied, by the Respondents to perform the duty. The evidence of Ms. Nest shows that the CLFN membership authorized the Respondents to stay in office and to amend the Election Law.

[27] In any event, there would appear to be no practical benefit in granting the remedy sought, even if the Applicant had met his burden of showing the existence of a public legal duty to act. According to the affidavit of Ms. Nest, revision of the Election Law has been in process since

September 2010. As well, a referendum was supposed to be held in March 2013, followed by new elections in 2013.

[28] Again, I agree with and accept the Respondents' submissions that the Applicant unduly delayed his pursuit of relief. He filed this Application for Judicial review nearly two years after the decision of the Election Committee and more than two years after the commencement of the Respondents' three year terms. I agree that there is no evidence of harm if the status quo is maintained. While I acknowledge the possibility that there were procedural irregularities with the June 2010 election, it seems that many of the problems flow from the Election Law as it stood in 2010. Amendment of the Law could eliminate the source of the problem.

[29] In the result, the application for *mandamus* is dismissed with costs to the Respondents on the basis of Column III of Tariff B, pursuant to the *Federal Courts Rules*, SOR/98-106. I am not persuaded that solicitor and own clients costs are justified in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for mandamus is dismissed with costs to the Respondents on the basis of Column III, Tariff B of the *Federal Courts Rules*, SOR/98-106.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Priscilla Kennedy	FOR THE APPLICANT
Daniel Hagg, Q.C.	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Davis LLP Barristers and Solicitors Edmonton, Alberta	FOR THE APPLICANT
Daniel W. Hagg Professional Corporation Edmonton, Alberta	FOR THE RESPONDENTS