

Federal Court



Cour fédérale

Date: 20140415

Docket: T-1903-11

Citation: 2014 FC 364

Ottawa, Ontario, April 15, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**ERIC JOSEPH, MARGARET JOSEPH,
PAULA MOON, GERALDINE FITCH**

Applicants

and

**THE DZAWADA'ENUXW (TSAWATAINEUK)
FIRST NATION BAND COUNCIL and
THE DZAWADA'ENUXW (TSAWATAINEUK)
FIRST NATION**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] At paragraph 67 of my Reasons for Judgment in this matter, cited as 2013 FC 974, I stated:

What is the appropriate remedy?

At the hearing, the parties asked for the opportunity to make further submissions on remedy after being informed of the decision on the merits due to the complexity of this case. They shall be

given the opportunity to do so as well as to make any submissions on costs. I remain seized to deal with these matters and any other remaining matters.

[2] The applicants have moved for an order that:

(a) Sections 4 and 92 of the Dzawada-Enuxw First Nation Election Code 2011, ratified September 13, 2011, are declared invalid pursuant to s 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

(b) An order in the nature of *mandamus* compelling the Respondent Dzawada-Enuxw (Tsawataineuk) First Nation Band Council to hold an election under the Dzawada-Enuxw First Nation Election Code 2011 within 120 days of the date of this Order.

(c) In the alternative, an order directing the Dzawada-Enuxw (Tsawataineuk) First Nation Band Council to amend the Dzawada-Enuxw First Nation Election Code 2011 within 120 days of the date of this order.

(d) The Respondents are to pay to the Applicants the costs of these proceedings assessed at Column III.

[3] The parties have made written submissions with respect to the motion.

I. Factual Background

[4] The applicants challenged three sections of the Dzawada'Enuxw First Nation Election Code 2011 (the Election Code 2011), claiming the residency requirements in these sections breached section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the Charter).

[5] The sections in issue are:

3. In this code...

“resident” refers to the residential status of an “on reserve” candidate who is considered to have his or her residence on Gwa-yee reserve. A person’s residence is interpreted by the following rules:

- a. a residence is the place a person normally eats and sleeps;
- b. a person can only be resident in one place at one time, and a person is resident in that place until another place of residence is acquired.
- c. a person must be resident on the Gwa-yee reserve for a minimum of one (1) year prior to the elections.

4. The council shall consist of one Chair and 4 councillors.

- a. the Office of resident councillors for which there are three positions;
- b. the Office of a non-resident councillor for which there is one position; and
- c. the Office of resident council Chair for which there is one position.

...

92. Any elector who:

- a. is resident on the Gwa-Yee Reserve or any other Dzawada’enuxw Reserve shall be eligible to be nominated for the position of Office of council Chair;
- b. is resident on the Gwa-Yee Reserve or any other Dzawada’enuxw Reserve shall be eligible to be nominated for a position of Office of resident councillor; or
- c. is non-resident on the Gwa-Yee Reserve or any other Dzawada’enuxw Reserve, shall be eligible to be nominated for the position of Office of non-resident councillor.

[6] In my decision, I concluded that the Election Code 2011 restrictions violated section 15 of the *Charter* and were not saved by section 1.

II. Issues

[7] The issues are as follows:

1. What remedy should be granted in this matter?
2. Should costs be awarded?

III. Analysis and Decision

[8] The applicants have requested an order immediately declaring that sections 4 and 92 of the Election Code 2011 are invalid and compelling the respondent, Dzawada'Enuxw (Tsawataineuk) First Nation Band Council, to hold an election under the Election Code 2011 within 120 days. In the alternative, the applicants seek an order directing the Dzawada'Enuxw (Tsawataineuk) First Nation Band Council to amend the Election Code 2011 within 120 days.

[9] The respondents submit that the appropriate remedy in this case is the suspension of the declaration of invalidity of the residency provisions for a period of eight months from the date of the declaration and an order that an election must occur within twelve months from the date of the declaration.

Issue 1 - What remedy should be granted in this matter?

[10] I have reviewed the submissions of the parties including the submitted case law. I am of the view that the respondents should be given an opportunity to redraft the offending provisions of their Election Code 2011. As well, I would note that an election is to be held on or before April 19, 2015 which is three years from the date of the last election. When the period of time for changing the offending provisions has passed, the election date will be even closer. I therefore see no sense in ordering a new election. I do not believe there is sufficient reason to believe that the present Council cannot or will not attend to the business of making Election Code 2011 comply with the *Charter*.

[11] I would further note that the applicants suggested a 120 day period for the Band Council to make the provisions of the Election Code 2011 comply with the *Charter*. Based on the evidence before me, I am of the opinion that this time period is reasonable.

[12] In order for this amending process to take place, I am of the view that a declaration of invalidity of the residence provisions of the Election Code 2011 should be suspended for a period of 120 days.

[13] I retain jurisdiction to deal with any issues that may arise from these Reasons for Judgment and Judgment.

Issue 2 - Should costs be awarded?

[14] I have considered the submissions of the parties with respect to costs. The applicants seek their costs to be assessed at Column III of Tariff B under the *Federal Court Rules*, SOR/98-106. The respondents submit there should be no order as to costs.

[15] The general rule is that costs follow the event but the Court has a discretion to vary this general rule. I see no reason to do so in this case. I would note that costs were granted by me in *Hartley Bay Indian Band v Hartley Bay Indian Band (Council)*, 2005 FC 1030 at paragraph 66, [2005] FCJ No 1267, [2006] 2 FCR 24 and *Esquega v Canada (Attorney General)*, 2007 FC 878 at paragraph 101, [2007] FCJ No 1128, [2008] 1 FCR 795.

JUDGMENT

THIS COURT ORDERS that:

1. The application for judicial review is allowed.
2. Subsections (a), (b) and (c) of section 4 and all of section 92 of the Dzawada'Enuxw First Nation Election Code 2011 are declared invalid pursuant to subsection 52(1) of the *Charter*.
3. The declaration of invalidity is suspended for 120 days from the date of this judgment.
4. The April 2012 election will not be set aside.
5. The applicants shall have their costs of the application to be assessed according to Column III of the Table to Tariff B.
6. I retain jurisdiction to deal with any issues that may arise from these Reasons for Judgment and Judgment.

"John A. O'Keefe"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1903-11

STYLE OF CAUSE: ERIC JOSEPH, MARGARET JOSEPH, PAULA MOON,
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DZAWADA'ENUXW (TSAWATAINEUK) FIRST
NATION

MOTION IN WRITING **CONSIDERED AT OTTAWA, ONTARIO**

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'KEEFE J.

DATED: APRIL 15, 2014

APPEARANCES:

Greg J. Allen FOR THE APPLICANTS

Krista Robertson FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Hunter Litigation Chambers FOR THE APPLICANTS
Barristers and Solicitors
Vancouver, British Columbia

Janes Freedman Kyle Law FOR THE RESPONDENTS
Corporation
Barristers and Solicitors
Vancouver, British Columbia