Federal Court  Cour fédérale

Date: 20141016

Docket: T-2035-14

Citation: 2014 FC 990

Ottawa, Ontario, October 16, 2014

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

BRADLEY COURCHENE, PETER COURCHENE, REVEREND RICHARD BRUYERE, CYNTHIA BUNN, LILLIAN SPENCE, WAYNE M. FONTAINE, AND JOHN COURCHENE

Applicants

And

SAGKEENG FIRST NATION ALSO KNOWN AS FORT ALEXANDER BAND AND ACTING CHIEF DERRICK HENDERSON, COUNCILLOR JOSEPH GERALD DANIELS, COUNCILLOR LYLE MORRISSEAU AND COUNCILLOR KIRBY SWAMPY

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The applicants seek to overturn a decision of the Chief and Council of the Sagkeeng First Nation to hold a second vote of its membership on an important draft law, namely, the Sagkeeng 2014 Hydro Accord Law. If passed, the law would implement an agreement between the First Nation and Hydro Manitoba dealing with financial compensation for lands affected by hydro-electric dams ($39 million), future contracts (up to $100 million), additional lands, and shoreline protection and enhancement.

[2] The law was defeated on the first vote on June 14, 2014 by a show of hands (265-120). The population of the First Nation is 7,565.

[3] For a number of reasons, the Chief and Council decided to convene a second vote, which is scheduled for October 17, 2014. That is the decision under review here.

[4] The applicants argue that the decision is unreasonable primarily because it offends the First Nation's Process Law, an instrument that describes how new laws may be enacted. On their application for judicial review, they ask me to overturn the decision. In addition, they have requested an interim injunction preventing the vote from taking place.

[5] In my view, the decision was not unreasonable. The Chief and Council had concerns about the first vote in terms of the limited number of prior consultations with the community, the presence of a number of persons at those meetings who impeded communication about the Accord's contents, the relatively few number of voters who participated, and the casting of votes by a show of hands. Accordingly, it decided to conduct a more intensive education program with

the First Nation's membership, and to encourage a greater number of voters, particularly by persons off the reserve, by allowing secret ballots. In my view, this was a reasonable response in the circumstances.

[6] Therefore, I would dismiss this application for judicial review. It follows that I would also dismiss the request for an interim injunction.

II. Factual Background

[7] The First Nation and Manitoba Hydro entered into a 10-year agreement in 1997 dealing with the impact of a number of generating stations. Manitoba Hydro provided compensation totalling over $3 million.

[8] In 2005, in anticipation of the expiry of the first agreement, negotiations began on a possible second accord. The First Nation created a "Hydro Advisory Group" of 20 members to address its concerns and consult with its membership. Many meetings and consultations took place, resulting in a Draft Hydro Accord in February 2014. Ancillary instruments were also realized – the Sagkeeng Legacy Trust, and the Consolidated Revenue Fund Law. These documents were approved in principle by the First Nation Council in May 2014. After further information sessions were held, educational materials were disseminated, and media communications were broadcast, all three instruments were to be put to a vote at a Lawmakers Assembly on June 14, 2014.

[9] As mentioned, the law implementing the agreement was rejected.

[10] The First Nation's Council was aware of what some of the community's concerns were and communicated them to Manitoba Hydro. They included lack of consultation, inadequate compensation, the lengthy duration of the agreement, insufficient shoreline protection, and an absence of subsidized electricity. Manitoba Hydro, while disappointed by the result of the first vote, refused to alter the agreement, but agreed to leave the matter open until October 31, 2014 in order to permit a second vote on it.

[11] The Chief and Council decided to enhance its communication with the First Nation's members and to proceed with a second vote on October 17, 2014.

III. Preliminary Questions about the Evidence

[12] Each party challenges the evidence of the other. The respondents allege that the applicants' evidence is replete with opinion, conjecture, and argument. The applicants maintain that the respondents' evidence relies heavily on hearsay, and that an adverse inference should be drawn therefrom.

[13] In my view, the circumstances do not permit an overly technical evaluation of the evidence. Most of the evidence before me was assembled in the span of a few days. Therefore, I would expect that, on the one hand, some relevant evidence was likely missed or could have been obtained from more knowledgeable affiants. On the other hand, with more time, some of the affidavits could have been edited to remove irrelevant and infelicitous comments.

[14] It would be unfair to both parties, in my view, to apply strict rules about the admissibility of evidence in these circumstances. Rather than scrutinize each party's evidence line by line, I will simply rely on the evidence before me that appears to be relevant and reasonably reliable.

IV. Was the decision to hold a second ratification vote unreasonable?

[15] The applicants present two main arguments. First, they maintain that the Process Law does not permit a second vote on a draft law unless that law has been revised after the first vote. In addition, they submit that a vote by secret ballot is inconsistent with the First Nation's traditions and, therefore, cannot be approved under the Process Law, which is meant to embody the First Nation's customary practices.

[16] The applicants asserted in their Notice of Application and in their Memorandum of Fact and Law that the applicable standard of review was reasonableness. However, in their reply memorandum, they asserted that the proper standard is correctness. They maintain that their position evolved based on further consideration of the issues in play here.

[17] There may be some support in the authorities for the applicants' latter position. I need not decide that question given that, in my view, it is inappropriate to consider it. The Notice of Application advised the respondents of the position the applicants proposed to advance. Their memorandum of fact and law confirmed and elaborated on that position. The respondents, naturally, conceded that that applicable standard of review was reasonableness and presented no argument on the point.

[18] In my view, it would be unfair to entertain the applicants' recently-evolved submission that the appropriate standard of review is correctness. It would be inconsistent with the position they have already advanced and it would preclude the respondents from addressing the substance of their argument. In fact, the respondents (and the Court) received the applicants' new submissions in reply the night before the hearing. Further, the applicants' new argument is clearly not a proper subject for a reply submission (*Canada (Minister of National Revenue v Sumanis* [1994] FCJ No 1556, para 4; *Lioubimenko v Canada* [1994] FCJ No 485, at para 4). Therefore, I will apply a standard of review of reasonableness.

[19] The applicants submit that the Chief and Council unreasonably construed the Process Law as permitting a second vote on a rejected draft law. I disagree.

[20] I note that the Process Law is not a comprehensive code. It is clearly meant to set out general principles and procedures, not precise details. For example, it says nothing about how a vote should be taken – by show of hands, or by secret ballot, or otherwise.

[21] Further, the Process Law says nothing about what should be done where a vote on a draft law is contested, or where there are concerns about fairness or the reliability of the results. These matters fall to the Chief and Council for decision, and their conclusions are reviewed on a standard of reasonableness.

[22] The Process Law states that a draft law is prepared by the Executive Council (Chief and Council), submitted for public consultation, revised accordingly, and then submitted to the

Lawmakers Assembly for acceptance or rejection (s 3 – See Annex for provisions cited). Where, as here, a draft law has been rejected, the Executive Council may revise and resubmit it to the Lawmakers Assembly (s 4).

[23] The applicants argue that the respondents have no grounds for resubmitting the draft law to the Lawmakers Assembly because it has not been revised since the last vote. Manitoba Hydro clearly rejected any revision to the Accord underlying the draft law. Therefore, they say, the vote scheduled for October 17, 2014 will simply be a repeat of the June 14, 2014 vote, which is not contemplated under the Process Law.

[24] In my view, the Process Law simply does not contemplate the situation that has arisen here. A vote has been taken on the proposed agreement with Manitoba Hydro, but the Chief and Council reasonably concluded that there were problems with that process as outlined above. The Process Law contains nothing that addresses that situation. In my view, holding a second vote, after further consultation and educative sessions with the community, is not an unreasonable response. While the Process Law states that the Chief and Council may revise and resubmit a draft law to the Lawmakers Assembly, it does not say that it cannot resubmit a draft law where there are concerns about the process leading to, and the outcome of, a first vote.

[25] In my view, therefore, the Chief and Council reasonably concluded that the proper course in the circumstances was to put the matter to a second vote after further consultations and information-sharing.

[26] The Chief and Council also decided that it would be better to proceed by way of a secret ballot, rather than a show of hands, given that there may have been some discomfort on the part of certain members in publicly displaying how they were voting on such a contentious issue. The applicants argue that this decision was unreasonable as it is contrary to the traditional way of voting in the community.

[27] I disagree.

[28] In the circumstances, described above, the Chief and Council had grounds to be concerned about the poor attendance at, and the reliability of the outcome of, a publicly-recorded vote.

[29] Further, the method of voting on any draft law is not set out in the Process Law. The vote on the 1997 agreement with Manitoba Hydro was conducted by a show of hands and, on that basis, so was the June 14, 2014 vote. But nothing precluded the Chief and Council from scheduling a vote by secret ballot. Secret ballots are not unknown in the First Nation – they are used in the elections for Chief and Council. The fact that a show of hands was used in past votes on a Manitoba Hydro agreement does not mean that all future agreements must be decided the same way, or that a show of hands cannot continue to be the way other matters are voted on.

[30] Here, there were specific and valid concerns about the voting method used on the first vote. Therefore, I cannot conclude that the decision to hold a secret ballot was unreasonable.

Contrary to the applicants' submissions, holding a vote by secret ballot would not violate the Process Law or the First Nation's customary practices.

V. Conclusion and Disposition

[31] The decision of the Chief and Council of the Sagkeeng First Nation to hold a second vote on the Sagkeeng 2014 Hydro Accord Law was not unreasonable in all the circumstances. Accordingly, I must dismiss this application for judicial review, with costs.

[32] As the applicants' request for an interim injunction was founded on that underlying application for judicial review, it follows that their request must be denied.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, with costs.

2. The applicants' request for an interlocutory injunction is denied.

"James W. O'Reilly"
Judge

Annex

The Process Law

Sagkeeng Onakomgawin

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Process

3. A law may be made as follows:

(a) the Anicinabek may, by Resolution at a Lawmakers Assembly, direct that a law shall be made;

(b) a draft law shall be prepared by the Executive Council in accordance with the Assembly Resolution;

(c) the draft law shall be submitted to public consultation;

(d) the draft law shall be revised by the Executive Council as deemed appropriate in response to the public consultation;

(e) the draft law shall be submitted to a Lawmakers Assembly for acceptance or rejections;

(f) if the draft law is accepted by the Lawmakers Assembly, the Executive Council shall formally adopt it as a law;

(g) the Government Secretary shall then certify and proclaim the law under Seal of the Nation.

Further revision

4. The Executive Council may revise and resubmit to a Lawmakers Assembly a draft of a law which was rejected.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2035-14
STYLE OF CAUSE:	BRADLEY COURCHENE, PETER COURCHENE, REVEREND RICHARD BRUYERE, CYNTHIA BUNN, LILLIAN SPENCE, WAYNE M. FONTAINE, AND JOHN COURCHENE v SAGKEENG FIRST NATION ALSO KNOWN AS FORT ALEXANDER BAND AND ACTING CHIEF DERRICK HENDERSON, COUNCILLOR JOSEPH GERALD DANIELS, COUNCILLOR LYLE MORRISSEAU AND COUNCILLOR KIRBY SWAMPY
HEARING HELD VIA TELECONFERENCE BETWEEN :	
OTTAWA, CALGARY AND WINNIPEG	
DATE OF HEARING:	OCTOBER 14, 2014
JUDGMENT AND REASONS:	O'REILLY J.
DATED:	OCTOBER 16, 2014

APPEARANCES:

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