

Federal Court



Cour fédérale

Date: 20151209

Docket: T-718-15

Citation: 2015 FC 1374

Edmonton, Alberta, December 9, 2015

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

DANIEL MERCREDI

Applicant

and

MIKISEW CREE FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns the resignation by a Councillor of the Mikisew Cree First Nation, and whether the conduct of the Council with respect to the resignation was reasonable.

I. **The Resignation Scenario**

[2] The following facts are uncontested: on March 17, 2015, in the course of a Council meeting, Councillor Coutoreille gave oral notice that he was resigning as a Councillor effective April 17, 2015; on March 31, 2015, he submitted a written notice confirming his oral notice; and on April 15, 2015, in the course of a Council meeting, he withdrew his written notice of resignation, and, as a result, the Council removed the agenda item to set a By-election for his seat.

[3] Thus, on the evidence, the Council took the position that the submission of Councillor Coutoreille's written resignation did not immediately result in his removal from office. This is so because, after the written notice was submitted he remained on Council, attended the April 15th meeting, and during the course of that meeting, withdrew his resignation and the Council accepted the withdrawal. As a result, the resignation scenario had no effect on Councillor Coutoreille's tenure on Council; he remained in office throughout.

[4] By the present Application, the Applicant, who is a Councillor of the Mikisew Cree First Nation, challenges "the decision dated on or about April 15, 2015 rescinding the letter of resignation from Councillor Edward Courtoreille" (Notice of Application, p. 3). The Applicant argues that once a resignation is given by written notice, a By-election must immediately occur and, therefore, the failure of Council to call a By-election upon receiving Councillor Coutoreille's written resignation had the effect of rescinding that written resignation.

[5] The Council argues that an interpretation of the legislation approved by the members of the Mikisew Cree First Nation which governs its elections supports a finding that the Council's actions were reasonable.

II. *The Customary Election Regulations of the Mikisew Cree First Nation (1996) (Regulations)*

[6] The *Regulations* is the legislation which is at the centre of both the Applicant's and the Council's arguments.

[7] The Preamble to the *Regulations* reads as follows:

The Mikisew Cree First Nation has the inherent Aboriginal right and authority to govern relations among the People of the Mikisew Cree First Nation and between the First Nation and other governments;

The Aboriginal Right of the Mikisew Cree First Nation to Self-government was recognized and affirmed in Treaty No. 8 entered into between Her Majesty The Queen in The Right of Canada and the Mikisew Cree First Nation;

The customs, traditions, and practices of the Mikisew Cree First Nation in regard to Self-government have been established with the consent and participation of the People of the Mikisew Cree First Nation;

The current customs and traditions of the Mikisew Cree First Nation require democratic, fair, and open elections for the leadership;

The Mikisew Cree First Nation now desires that the customs and traditions of the Nation in relation to the Election of the Chief and Councillors be incorporated and recorded in written customary elections regulations and procedures; and

On April 1, 1998, the electors met in the community of Fort Chipewyan and a majority of the Electors present approved by vote the adoption of the Customary Election Regulations of the Mikisew Cree First Nation as outlined herein;

The MIKISEW CREE FIRST NATION, by and with the advice and consent of its members, enacts as follows: [...]

[Emphasis added]

[8] The following are the provisions of the *Regulations* which address resignation by a Council member:

13.0 RESIGNATIONS

13.1 Notice of Resignation

The Chief or a Councillor may resign from office by submitting a Written Notice of Resignation to Council.

13.2 The Notice of Resignation must state the effective date of the resignation, but in any event, it must not be more than thirty (30) days from the date the Notice is delivered to the Council.

[...]

2.0 DEFINITIONS

Unless otherwise expressly stated, in these regulations:

[...]

b) "By-election" means an election held for the office of Chief or Councillor to replace a person who has died, resigned or has been removed from that office.

16.0 BY ELECTIONS

16.1 Date of By-election

a) Subject to s. 16.1 (b) [inapplicable], in the event the Chief or a Councillor dies, resigns or is removed from office and there is more than ninety (90) days remaining in his or her term of office, the Council will:

(i) Within five (5) days of the effective date of the resignation or removal, set the date for the By-election to fill the vacant office and appoint an Electoral Officer to conduct the By-election.

(ii) The By-election must be held within twenty one (21) days of the effective date of the death, resignation, or removal of the Chief or Councillor.

[Emphasis added]

[9] At this juncture, it is necessary to confirm that, in determining the present Application, the Council's conduct will be judged only according to the content of the *Regulations*.

[10] In argument, the Council asserts that, in addition to the *Regulations*, unwritten customs and traditions govern the resignation of Councillors from the Council. Relevant to the present Application, the Council maintains that, once the Council receives a written notice of resignation from a Councillor in accordance with the *Regulations*, the Council must pass a motion accepting the resignation of the Councillor for the resignation to take effect. On the evidence, in each of 2005 and 2006, the Council passed such a motion accepting the written resignation of a Councillor (Memorandum of Fact and Law of the Respondent, paras 4 and 5).

[11] Given that the Preamble to the *Regulations* expresses that the *Regulations* are a complete codification of the customs of the Mikisew Cree First Nation, an issue arises as to whether the unwritten custom advanced by the Council is enforceable. I find that it is inappropriate to pass judgment on the issue because the unwritten custom was not applied in the present case. On March 31, 2015, when Councillor Coutoreille submitted his written notice of resignation, the Council did not formally adhere to the custom it advances by passing a motion of approval (Memorandum of Fact and Law of the Respondent, para 9).

III. The Applicant's Argument

[12] The Applicant argues that, being a third level of government recognized by s. 35 of the *Constitution Act, 1982*, the Mikisew Cree First Nation is analogous to Federal, Provincial and Municipal Governments and, by the terms of the *Regulations*, has committed itself to the principles of democracy in the Canadian Constitution. As a result, democracy requires that a Councillor act independently to represent the people who elected him or her. The voters are the persons that the resignation affects and the Council cannot interfere with the democratic principles by somehow having the right to determine if a resignation is effective or not. This would improperly violate each voter's democratic rights. Thus, once a resignation is given, the provisions of s.16 of the *Regulations* apply and a By-election must occur.

[13] Support for the argument is the fact that the democratic principle advanced is enforced, by statute, with respect to officials elected to the Parliament of Canada, the Legislatures of the Provinces, and Municipal governments.

IV. The Council's Argument

[14] In response to the mandatory democratic principle argument advanced by the Applicant, the Council takes the position that the First Nation is in a different position from government entities in Canada for the following reason:

Unlike Government entities in Canada, MCFN is a recognized Band under the *Indian Act*, RSC 1985, C 1-5, the Government of Canada has recognized the inherent right of self-government as an existing Aboriginal right pursuant to s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. The right of MCFN to self-government was recognized and

affirmed in Treaty No.8 entered into between Her Majesty the Queen in Right of Canada and MCFN.

The *Indian Act* is the primary legislative instrument applicable to the governance and management of Indian Bands. Chief and Council elections may be governed by the provisions of the *Indian Act* or by Band custom. Section 74(1) of the *Indian Act* gives the Minister of Indian and Northern Affairs (now known as The Minister of Indigenous and Northern Affairs) the statutory authority to require a Band to conduct elections in accordance with the procedures prescribed in the *Indian Act*. This declaration must be done by way of a Ministerial Order. Those Bands not subject to a Ministerial Order, such as MCFN, are free to select their Chief and Council in accordance with their own customary election procedures and regulations. MCFN chose to partially codify their election procedures in its Customary Election Regulations ("CER") leaving all non-codified governing policies and procedures to be decided pursuant to Chief and Council's inherent powers, along with application of unwritten custom, tradition and the common law. (*Crow v Blood Band*, 107 FTR 270, 1996 CarswellNat 53 (FCTD) at paras 4, 9, 10,11,17 and 18)

(Supplemental Memorandum of Law of the Respondent (SMLR), paras 10 and 11)

[15] The Council takes the position that the *Regulations* support its conduct in the resignation scenario by deriving the ordinary and plain meaning of the terms used (see: *Testawich v Duncan's First Nation Chief and Council*, 2014 FC 1052 at para 23):

The words and language utilized in section 13.2 of the CER are precise and unequivocal: a resignation must state the effective date of the resignation and that date cannot be more than thirty days from the date of delivery of the written notice of resignation to Council. By its clear and unambiguous language this section contemplates a date for delivery of a written notice of resignation to Council and an effective date of the resignation, and that these dates may differ. To attempt to argue that the effective date is the same as the delivery date, or that a Councillor has resigned immediately despite stating a later effective date of resignation in his or her written notice of resignation, would ignore the plain and ordinary meaning of the wording of the CER, the applicable principles of statutory interpretation and would result in a contradiction that would create an entirely illogical interpretation

of what was intended. If the "effective date" and the "date the Notice is delivered to Council" were meant to be one and the same event resulting in an immediate resignation of a Councillor, only one phrase would be used in the CER, rather than two different phrases, each with a specific meaning and distinct purpose.

[...]

The 18 day gap between Councillor Edward Courtoreille's written notice of resignation and the effective date of his resignation is not merely an administrative or transitional period, because the use of the phrase "effective date" has a specific meaning, separate and apart from the use of the phrase "date the Notice is delivered to Council". This is further supported by the wording of section 16.1 (a)(i) of the CER, which states that a date for a by-election cannot be set by Council until five days after the "effective date" of resignation, not five days after "the date Notice is delivered to Council". If the "effective date" merely permitted an administrative or transitional period, a by-election could be called within five days after "the date the Notice is delivered to Council", rather than five days after "the effective date" of resignation when the Councillor had actually resigned. To fail to distinguish between the "effective date" and "the date the Notice is delivered to Council" would not accord with the plain and ordinary meaning of the clear and unequivocal language utilized in the CER.

(SMLR, paras 18 and 20)

[16] Indeed, Councillor Courtoreille understood the *Regulations* provided that his resignation would actually take place on the date he selected as its "effective" date. The written notice of resignation states: "I will continue to fulfill my commitment to the Mikisew Cree First Nation until the effective date stated in this notice of resignation" (Exhibit "C" to the Affidavit of Edward Courtoreille, Respondent's Record, p. 82).

V. Conclusion

[17] With respect to decisions related to the interpretation of First Nation election regulations, the standard of review is reasonableness (*Testawich v Duncan's First Nation Chief and Council*,

2014 FC 1052 at para 16 citing *Fort McKay First Nation v Orr*, 2012 FCA 269 at paras 10 - 11; *D'Or v St Germain*, 2014 FCA 28 at paras 5 - 6.). I find that the Council's conduct is a reflection of its interpretation of the *Regulations*. Therefore, the issue is whether the Council's conduct was reasonable.

[18] I do not accept the mandatory constitutional argument advanced by the Applicant. I agree that the Mikisew Cree First Nation's elections are to be conducted according to democratic principles, but I do not agree that the content of those principles must include the existing practice of written resignation leading to immediate By-election created by Federal and Provincial statutes as argued by the Applicant. While the Mikisew Cree First Nation is a third order of government in Canada, it has the right and responsibility to determine its own democratic governance structure. In the present case that structure is created by the *Regulations* and, therefore, if a reasonable interpretation of the *Regulations* can be found, there is no need to search further for precedents that might offer assistance in finding a reasonable interpretation. In my opinion, a reasonable interpretation exists in the argument advanced by the Council.

[19] As a result, I find that the Council's conduct with respect to Councillor Courtoreille's resignation was reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present Application is dismissed.

2. The issue of costs will be determined by a separate order on argument yet to be presented.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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