Federal Court Cour fédérale

Date: 20201123

Docket: T-1108-20

Citation: 2020 FC 1082

Ottawa, Ontario, November 23, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

PHILIP NARTE, DANTE NARTE, TINA SAM, MURRAY SAM, ROSALIA GLADSTONE, TERRY ST. GERMAIN JR. AND RAEANNE RABANG

Applicants

and

ROBERT GLADSTONE, MICHELLE ROBERTS, RONALD JR. MIGUEL, BONNIE RUSSELL AND TANYA JAMES

Respondents

ORDER AND REASONS

[1] The applicants seek declarations and a writ of *quo warranto* to remove the respondents from their positions as chief and councillors of Shxwhá:y Village First Nation, as well as other ancillary orders.

[2] In the context of this application, the respondents bring motions to add Shxwhá:y Village as a respondent and to disqualify Boughton Law as counsel for the applicants, because of a conflict of interest.

[3] I am granting the motion to add Shxwhá:y Village as a respondent, as its presence is necessary for a complete determination of the matter. I am, however, dismissing the motion to disqualify Boughton Law. This is not a classical situation of conflict of interest involving potential misuse of confidential information or divided loyalty. The other allegations of impropriety made by the respondents pertain mainly to the merits of the application and do not justify the disqualification of the lawyers. Lastly, it is unlikely that members of Boughton Law will be required to provide evidence.

I. Context

[4] Shxwhá:y Village First Nation [Shxwhá:y Village] is a First Nation regulated by the *Indian Act*, RSC 1985, c I-5, and the *First Nation Land Management Act*, SC 1999, c 24. It has adopted an election code, a membership code and a land code. The respondents are the current Chief and Councillors of Shxwhá:y Village. The applicants are members of Shxwhá:y Village. Some of them were previously members of the council.

[5] On March 12, 2020, Della Terra Soil Management Solutions Ltd. [Della Terra] began an action against Shxwhá:y Village in the British Columbia Supreme Court. The action related to a landfill permit that Shxwhá:y Village granted to Della Terra in 2017. In this action, Della Terra

is represented by Boughton Law Corporation [Boughton Law]. A few days after the action was instituted, Shxwhá:y Village council terminated the permit.

[6] Shortly afterwards, one of the applicants, who is employed by Della Terra, approached members of the council to complain about the termination of the permit. Subsequently, the applicants retained Boughton Law to ask the council to call a membership meeting. As the council refused to do so, the applicants took it upon themselves to call a membership meeting on July 18, 2020. This meeting was chaired by Mr. Wally Oppal, Q.C., of counsel with Boughton Law. Resolutions were adopted by members present in person or by Zoom and members who gave proxies, removing the respondents from council, appointing Deloitte as interim manager and ordering various investigations in Shxwhá:y Village's affairs. The respondents dispute the validity of this meeting on several grounds.

[7] The applicants began this application for judicial review on September 16, 2020. They are represented in these proceedings by Boughton Law. They seek declarations and a writ of *quo warranto* effectively removing the respondents from Shxwhá:y Village council and orders that an election be held, that Deloitte Restructuring Inc. be appointed interim manager of Shxwhá:y Village and be entrusted with the conduct of the election and that the respondents provide the applicants with certain communications with their lawyers. The notice of application contains an elaborate discussion of the legal grounds for such remedies. These grounds include the respondents' failure to provide Shxwhá:y Village members with financial information required by the Land Code and to submit to annual drug testing as required by the Election Code. It is unclear whether the applicants intend to argue that the resolutions adopted at the July 18 meeting

have independent effect and should be enforced by this Court. One paragraph of the application suggests that the applicants seek to "affirm[] their decision to remove the personal respondents," but at the hearing of this motion, their counsel stated that the application really focuses on the failure to submit drug test results.

[8] It is not seriously in dispute that Della Terra is paying for the applicants' legal fees, although the precise arrangements are not in evidence.

[9] Two different teams of lawyers from Boughton Law are assigned to the Della Terra action and this application. The applicants have provided evidence that Boughton Law set up an "ethical wall" intended to prevent access to the applicants' confidential information by members of Boughton Law not assigned to this case, in particular those assigned to the Della Terra matter.

II. Adding Shxwhá:y Village as a Respondent

[10] The respondents seek to add Shxwhá:y Village as a respondent to the application. They say that it should have been named in the application and that its presence is necessary, because it will be affected by several of the orders sought by the applicants. The applicants agree, but insist on three conditions: that a third party represent Shxwhá:y Village, that it not be represented by the same counsel as the respondents and that the respondents' legal fees in this application not be paid by Shxwhá:y Village. The respondents disagree with these conditions.

[11] As a result of discussions between the parties, there is no longer any real dispute that Shxwhá:y Village should be added as a respondent, and I agree with that position. Rule 104 of the *Federal Courts Rules*, SOR/98-106, provides as follows:

104 (1) At any time, the Court may	**104** (1) La Cour peut, à tout moment, ordonner :
[…]	[…]
(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party […].	b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance […].

[12] As the relief sought in the application includes an order appointing Deloitte Restructuring as Shxwhá:y Village's interim manager, the presence of Shxwhá:y Village is necessary for a complete determination of the matter.

[13] I do not agree that this order should be made on the conditions proposed by the applicants. These conditions are grounded in an alleged conflict of interest between the respondents and Shxwhá:y Village. Yet, the respondents are Shxwhá:y Village's current council. In the usual course of business, it is for the council of a First Nation to give instructions to counsel representing the First Nation.

[14] The fact that the applicants are seeking to remove the respondents does not alter the situation. If I understand the applicants' argument correctly, they submit that the council is

already “defunct” and that the respondents are merely usurping the First Nation’s legitimate authority. This issue, however, will have to be decided on the merits. Until this Court decides otherwise, the respondents are Shxwhá:y Village’s council. Indeed, the first two conditions sought by the applicants are simply a restatement of one remedy they are seeking on the merits, namely, the appointment of a manager. The applicants have not shown that it is necessary to make these orders now to avoid some irreparable harm. There is even less reason to attach them as conditions to an order that is independently justified.

[15] The applicants also ask me to impose a condition preventing the respondents from having their legal fees paid by the First Nation. I decline to do so.

[16] In *Seedling Life Science Ventures LLC v Pfizer Canada Inc*, 2017 FC 826 at paragraph 22, my colleague Prothonotary Mireille Tabib stated that “The manner in which [the Plaintiff] chooses to fund a litigation it has every right to bring is of no concern to the Court or to the Defendant.” Nonetheless, I recognize that the funding of legal fees in First Nation governance disputes may give rise to delicate issues. The fact that a First Nation funds the legal fees of only one party to such a dispute may give rise to an imbalance: *Knebush v Maygard*, 2014 FC 1247 at paragraph 59, [2015] 4 FCR 367; *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at paragraph 21 [*Whalen*]. Moreover, one could conceivably argue that candidates for public office or incumbents should bear the cost of litigation related to their personal qualifications for office or contested elections.

[17] In the current state of this Court's case law, it is difficult to state general rules in this regard. To clarify the matter, First Nations may wish to adopt policies or enact laws regarding the indemnification of their officers who are involved in legal proceedings. In the interim, litigation funding issues are usually addressed when parties are asking the Court to award costs. At that stage, the Court may take into account the fact that a litigant's legal fees are paid by the First Nation: *Whalen*, at paragraph 27.

[18] In this case, as the applicants' legal fees are funded by Della Terra, their arguments about the imbalance resulting from Shxwhá:y Village paying the respondents' legal fees ring hollow. The applicants have not convinced me that there is any reason to issue an order restricting the payment of the respondents' legal fees. The issue may be revisited when the Court is called upon to award costs after rendering judgment on the merits of the application.

III. Removing Boughton Law

[19] The respondents seek to remove Boughton Law as counsel for the applicants. They argue that Boughton Law is in a conflict of interest. Representing both Della Terra and the applicant would give rise to an appearance of impropriety and a risk of misuse of confidential information. Moreover, the likelihood of Mr. Oppal being called to testify would require Boughton Law to step down.

[20] I disagree with the respondents. This is not a classical situation of conflict of interest involving adverse interests, confidential information or divided loyalty. Whether Della Terra's funding of the applicants' case is improper is an issue for the merits, not a ground of

disqualification of the applicants' counsel. The same can be said of the respondents' arguments regarding the role of Mr. Oppal and other Boughton lawyers at the July 18 meeting. Neither is there any likelihood of Mr. Oppal or his colleagues being called to testify.

[21] Before explaining my reasons for so concluding, it is useful to provide a brief summary of the rules applicable to lawyers' conflicts of interest.

[22] Lawyers are officers of the Court. Thus, the Court has the power to scrutinize the relationship between lawyers and the parties they represent to ensure that there is no conflict of interest. In doing so, the Court seeks to strike a balance between, on the one hand, promoting public confidence in the administration of justice and protecting lawyers' clients and, on the other hand, protecting the parties' right to choose the counsel who will represent them before the Court: *Canadian National Railway Co v McKercher* LLP, 2013 SCC 39 at paragraph 22, [2013] 1 SCR 649 [*McKercher*]. More specifically, the Court's intervention seeks to safeguard the lawyer's duties of confidentiality and effective representation towards their clients: *McKercher*, at paragraphs 23-26.

[23] To this end, the Supreme Court of Canada has developed a "bright line rule," first articulated in *R v Neil*, 2002 SCC 70 at paragraph 29, [2002] 3 RCS 631 [*Neil*]:

> The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client — *even if the two mandates are unrelated* — unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

[24] In *McKercher*, at paragraph 35, the Court explained that the bright line rule applies to legal, not commercial or strategic interests. Once the bright line rule applies, conflict of interest is presumed and no further contextual inquiry is needed.

[25] When the bright line rule is not engaged, the Court may nevertheless review the circumstances to determine if there is a "substantial risk" that the lawyer's representation of the client would be adversely affected, for example because there is a risk that confidential information is misused or that the lawyer is in a situation of divided loyalty: *McKercher*, at paragraph 38.

[26] A lawyer in a conflict of interest will normally be disqualified where this is necessary to prevent misuse of confidential information or a situation of divided loyalty: *McKercher*, at paragraph 62. In other situations, determining the appropriate remedy depends on the assessment of all relevant circumstances: *McKercher*, at paragraph 64; see also *Neil*.

A. *Adverse Interests*

[27] There is no classical conflict of interest in this case. The bright line rule is not engaged. While Della Terra and the applicants are both currently represented by Boughton Law, they do not have directly adverse legal interests. If anything, their interests appear to be aligned. The applicants are not suing Della Terra or vice versa. The remedies the applicants seek in this case will not have a direct impact on Della Terra's legal rights. Della Terra may have a commercial or strategic interest in the applicants' case. As the Supreme Court of Canada said in *McKercher*,

however, commercial or strategic interests do not give rise to conflicts resulting in the disqualification of lawyers.

[28] The next step is to ask whether there is a substantial risk of misuse of confidential information or a situation of divided loyalty. The respondents say that should the applicants succeed in their plan to remove the respondents and be elected in their stead, Boughton Law would then represent both parties in the Della Terra action. This scenario, however, is hypothetical and would materialize only after this application is concluded. There is no need to disqualify Boughton Law from acting in this application to prevent harm that could materialize only later.

[29] The respondents also argue that Boughton Law is unable to represent the applicants effectively because it cannot give them advice contrary to Della Terra's interests, for example with respect to the disclosure of confidential information to Della Terra. This is also hypothetical. There is no indication that any contentious issue has arisen between Della Terra and the applicants. By way of analogy, in an insurance case, a lawyer who represents both the insurer and the insured cannot give advice to the insured about a dispute with the insurer, such as a dispute about coverage. Until such a dispute arises, however, there is no impediment to the joint representation of the insurer and insured: Alice Wooley, *Understanding Lawyers' Ethics in Canada*, 2nd ed (Toronto: LexisNexis, 2016) at 272.

[30] Moreover, according to the respondents, allowing Boughton Law to represent the respondents would result in confidential information belonging to Shxwhá:y Village finding its

way into Della Terra's hands. However, what information would be at risk and how it would be transmitted remains unclear. The applicants are not current members of Shxwhá:y Village council and have no access to confidential information—indeed, their basic complaint is that the current council keeps them in the dark. The parties have not explained how perfecting this application could lead to the disclosure of confidential information. If the applicants seek to elicit confidential information from the respondents, the Court may impose conditions to ensure that it is not improperly disseminated.

[31] The respondents highlight the fact that the applicants, in a letter sent by their counsel on May 7, 2020, asked Shxwhá:y Village to disclose large categories of financial and contractual information, which could include information pertaining to the Della Terra action. I note, however, that the application for judicial review does not seek any order for the disclosure of these documents. The respondents have not explained how the applicants could receive this information in the course of this application for judicial review.

B. *Repute of the Administration of Justice*

[32] The respondents argue that lawyers may be disqualified not only in situations of actual conflict of interest, but also where there is an appearance of impropriety that would bring the administration of justice into disrepute. In this case, the appearance of impropriety would result from the collusion between Della Terra and the applicants, and Boughton Law's role in the organization of the July 18 meeting. I reject these submissions.

[33] Promoting respect for the administration of justice is one of the goals of the rules developed by the courts regarding conflicts of interest. Thus, a lawyer may be disqualified in situations beyond those leading to divided loyalty, misuse of confidential information or the lawyer being called to testify. In other words, the categories of conflict of interest are not closed. This does not translate, however, into an invitation to engage into a wide-ranging review of the conduct of a party and its lawyers, with few criteria to structure the inquiry.

[34] While courts have a residual power to disqualify lawyers outside of the classical categories of conflict, this power should be used sparingly and reserved for the most obvious cases. In fact, the only case the respondents cited in which this power was exercised is *781332 Ontario Inc v Mortgage Insurance Co of Canada* (1991), 5 OR (3d) 248 (Ont Ct Gen Div). The substantive part of the reasons for judgment in this case is brief and does not explain the nature of the impropriety that led to a law firm's disqualification, beyond the fact that the law firm engaged in a strategy apparently designed to circumvent a judgment of the court. It is difficult to generalize from this case.

[35] I will simply add that it stands to reason that the alleged impropriety grounding a motion for disqualification cannot pertain to the merits of the case or the conduct of the party itself. If it were otherwise, motions to disqualify would become a manner of short-circuiting the usual process and obtaining an advance decision on the merits of the case. The disqualification of the lawyer must also be an effective manner of preventing the continuance of the alleged impropriety—the remedy must cure the wrong. If it does not, this suggests that the alleged impropriety is a matter for the merits.

[36] The first ground of impropriety invoked by the respondents is collusion between the applicants and Della Terra. Given this collusion, this application would not arise from a legitimate governance dispute. It would rather be a mere attempt by Della Terra to use the applicants as a means to further its commercial interests. I will not provide my opinion on this question at this stage of the process, because it is an issue for the merits. It is not, however, a reason to disqualify Boughton Law. According to the respondents, collusion would be improper because it involves Della Terra, a private business with commercial interests adverse to those of the First Nation, in a dispute about eligibility to retain public office in the same First Nation. Yet, collusion of this kind would be equally objectionable if different law firms represented Della Terra and the applicants. If Boughton Law is disqualified and the applicants pursue the matter with a different law firm, the alleged impropriety remains—the remedy does not match the wrong.

[37] The respondents' second ground is that Boughton Law, and Mr. Oppal in particular, would have acted improperly at the July 18 meeting, by failing to reveal they were counsel for the applicants. For the purposes of this motion, I will assume this allegation to be true.

[38] Even if Mr. Oppal did not disclose that he was a member of Boughton Law, who were counsel for the applicants, it does not follow that he and other Boughton Law staff were pretending to act as Shxwhá:y Village officials, as the respondents are arguing. According to the evidence, the applicants had made it known on a Facebook group comprising more than 50 Shxwhá:y Village members that they were "teaming up" with Della Terra. The invitation to attend the meeting was sent by one of the applicants personally. The text of the proposed

resolutions removing the chief and council from office was appended to the invitation. The day before the meeting, the council posted a notice on its Internet page and sent it by email to members, to the effect that the proposed meeting was an "unofficial membership meeting that does not follow Shxwhá:y Village laws or customs." Given these circumstances, everyone must have realized that the meeting was convened by the applicants acting in their personal capacity and not by the council and that the applicants' purpose was to unseat the current council.

[39] Thus, seen in context, the respondents' allegations of impropriety appear mainly targeted at the validity or lawfulness of the July 18 meeting. This issue may very well be crucial on the merits of the application for judicial review, depending on how the applicants choose to argue it. It does not, however, create an appearance of impropriety on the part of Boughton Law. The applicants sought the advice and assistance of Boughton Law to organize the July 18 meeting. Perhaps the advice given was incorrect and the meeting was legally ineffective. But there is nothing in the evidence that suggests that Boughton Law acted in a way that would bring the administration of justice into disrepute. Simply put, lawyers are not disqualified merely because they helped their clients take certain steps that the opposing party argues are illegal. Giving incorrect advice is not, in and of itself, an impropriety leading to disqualification.

C. *Lawyer as Witness*

[40] Lastly, the respondents argue that Boughton Law ought to be disqualified because Mr. Oppal will be a witness in the proceedings. I disagree with this submission, as there is no reason to believe that his testimony will be needed.

[41] *Essa (Township) v Guergis; Membery v. Hill*, 1993 CanLII 8756, 15 OR (3d) 573 (Ont Div Ct) [*Essa*], is often cited as an authority on the approach to be taken where it is alleged that a lawyer should be disqualified because he or she will need to testify. Caution must be exercised before acceding to such demands, especially at an early stage of the proceedings, when it is not known with any degree of certainty whether the lawyer will be called as a witness. The Court listed a number of factors relevant to the assessment. This list was quoted with approval by the Federal Court of Appeal in *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133. The factors include the stage of the proceedings, the likelihood that the witness will be called and the significance of the evidence.

[42] The respondents' argument that Mr. Oppal will be required to testify must be assessed in light of the principle that it is for the applicants to make their case as they see fit. While the notice of application contains allegations regarding the July 18 meeting chaired by Mr. Oppal, counsel for the applicants stated, at the hearing of this motion, that they did not intend to argue that the resolutions adopted at the meeting have independent legal effect. If that is correct, what took place at the July 18 meeting may simply be irrelevant to the issues the Court will have to decide on the merits and there would be no need for anyone to provide evidence in this regard.

[43] Even assuming the contrary position, there would be no need to call Mr. Oppal or other Boughton Law witnesses. More than 50 Shxwhá:y Village members were in attendance, including a person sent by the respondents to observe the proceedings. For the purposes of this motion, both parties provided extensive affidavit evidence regarding the conduct of the meeting. Each party's affiants may be cross-examined if need be. There is no reason to believe that this

evidence will be insufficient to decide the application. In particular, I fail to understand the respondents' assertion that relevant evidence would pertain not only to what Mr. Oppal did, but also to why he did it, and that he alone can explain this. I also fail to understand how Mr. Oppal's testimony would be needed to cure the alleged shortcomings of the recording of the meeting—other persons present can do this just as well.

[44] Thus, the most important *Essa* factors do not favour Boughton Law's disqualification. This distinguishes this case from *Woessner v The Queen*, 2017 TCC 124, invoked by the respondents. In that case, the judge concluded that there was a high likelihood the lawyer would be called as a witness, that his testimony was of vital importance to the issues at bar and that the evidence could not be adduced through other witnesses.

IV. Disposition and Costs

[45] For the foregoing reasons, I will allow the motion to add Shxwhá:y Village First Nation as a respondent to this application. I will not impose the conditions requested by the applicants. I will also dismiss the motion to disqualify Boughton Law from representing the applicants.

[46] As success is divided, no costs will be awarded.

ORDER in T-1108-20

THIS COURT ORDERS that:

1. The motion to add Shxwhá:y Village First Nation as a respondent to this application is granted.
2. The motion to disqualify Boughton Law from representing the applicants is dismissed.
3. There is no order as to costs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1108-20
STYLE OF CAUSE:	PHILIP NARTE, DANTE NARTE, TINA SAM, MURRAY SAM, ROSALIA GLADSTONE, TERRY ST. GERMAIN JR. AND RAEANNE RABANG v ROBERT GLADSTONE, MICHELLE ROBERTS, RONALD JR. MIGUEL, BONNIE RUSSELL AND TANYA JAMES
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DATED:	NOVEMBER 23, 2020

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