Federal Court Cour fédérale

Date: 20210512

Docket: T-1108-20

Citation: 2021 FC 433

Ottawa, Ontario, May 12, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

PHILLIP NARTE, DANTE NARTE, TINA SAM, MURRAY SAM, ROSALIA GLADSTONE, TERRY ST. GERMAIN JR. AND RAEANNA RABANG

Applicants

and

ROBERT GLADSTONE, MICHELLE ROBERTS, RONALD JR. MIGUEL, BONNIE RUSSELL, TANYA JAMES AND SHXWHÁ:Y VILLAGE FIRST NATION

Respondents

JUDGMENT AND REASONS

[1] The applicants seek to remove the respondents from the council of Shxwhá:y Village First Nation. They fault the respondents for failing to disclose financial information and to provide yearly drug test results. They held a meeting of Shxwhá:y Village members at which

resolutions removing the respondents were adopted. They now apply to the Court for orders removing the respondents and calling a new election.

[2] I am dismissing the application. Elections were scheduled to be held within three weeks of the hearing with respect to four of the five council seats, rendering the matter moot with respect to them. More generally, given the manner in which it was convened and the low number of members who attended, the purported membership meeting did not express the broad consensus of the community and its resolutions have no legal effect. Moreover, the applicants are funded by a private commercial entity that has a dispute with Shxwhá:y Village. Their motivation and conduct disentitles them from any remedy.

I. Background

[3] Shxwhá:y Village First Nation [Shxwhá:y Village] is a First Nation regulated by the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] 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.

[4] 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.

[5] 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 Restructuring Inc. [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.

[6] 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 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.

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

II. Mootness

[8] In advance of the hearing of this case on March 25, 2021, I directed the parties to address the issue of mootness, as the record showed that an election was scheduled for March 27, two

days later. At the hearing, I was informed that the election was postponed to April 17, 2021. Nevertheless, after hearing the parties on the issue, I indicated that I considered the matter partly moot and that I would provide reasons later. These are my reasons.

[9] A matter is moot when "the required tangible and concrete dispute has disappeared and the issues have become academic": *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353 [*Borowski*]. Courts do not normally expend scarce judicial resources to hear moot cases. For example, in *R ex rel Tolfree v Clark*, [1944] SCR 69, the Supreme Court of Canada refused to hear a challenge to legislation extending the duration of the Legislative Assembly of Ontario, as an election had been called by the time the matter reached the Court. In the context of First Nations governance disputes, this Court has refused to hear challenges to an election or to the removal of councillors where a subsequent election has been called or has taken place: *Salt River First Nation v Martselos*, 2014 FC 981 at paragraph 24; see also *Bill v Pelican Lake Appeal Board*, 2006 FCA 397 at paragraph 11.

[10] Here, four of the five council seats were up for election on April 17. As a result, any controversy with respect to those four seats is effectively moot. The term of the fifth councillor, Ms. Bonnie Russell, expires on March 31, 2022. The matter is not moot with respect to her. In practical terms, this means that remedies related to the holding of a general election, such as the appointment of a receiver-manager, are now moot in their entirety. Other issues will be reviewed in relation to Councillor Russell alone.

[11] Nonetheless, according to *Borowski*, courts have discretion to hear moot matters. In that case, the Supreme Court highlighted three considerations that are relevant to the exercise of this discretion: the adversarial nature of the judicial process, the need to promote judicial economy and the adjudicative role of the courts; see also *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 at paragraph 16. Taking these factors into account, I do not see any reason to hear issues related to the calling of a general election despite their mootness.

III. Legal Effect of July 18, 2020 Meeting

[12] The applicants' main argument is that the resolutions adopted by the participants in the July 18 meeting were effective in removing the respondents from their positions on the Council. They frame the issue as follows in their written submissions:

> The applicants request a writ of *quo warranto*, affirming their decision to remove the personal respondents from the offices of Chief and Councillors, and a declaration that they were duly removed from office.

[13] To assess this argument, I must first ascertain whether the applicants can ground the legal effect of the July 18 resolutions in Shxwhá:y Village's written laws, in particular its election code or membership code. I find that they cannot. Thus, I must then review the possibility that these resolutions have independent legal effect, because they reflect the will of Shxwhá:y Village's membership. While I recognize that this is possible in theory, the manner in which the meeting was convened and conducted does not allow me to find that the resolutions override existing Shxwhá:y Village laws or have independent legal effect.

A. *Lack of Authority for Meeting*

[14] For a large number of First Nations including Shxwhá:y Village, the *Indian Act* states that the Council is chosen according to "custom," which is in effect a reference to Indigenous law. This Court has been prepared to recognize Indigenous laws that attract the broad consensus of the community: *Bigstone v Big Eagle*, [1993] 1 CNLR 25 (FCTD) at 34 [*Bigstone*]. This broad consensus may be expressed by majority vote or "by a course of conduct which expresses the First Nation's membership's tacit agreement to a particular rule": *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 at paragraph 36, [2019] 4 FCR 217. The parties do not challenge the validity of Shxwhá:y Village's election code. I will assume that it reflects the membership's broad consensus. Absent arguments to the contrary, I will also assume that the membership code was validly enacted pursuant to section 10 of the *Indian Act*. Neither the election code nor the membership code provide any authority for the July 18 meeting.

[15] The applicants assert that authority for the July 18 meeting can be found in section 16 of Shxwhá:y Village's membership code, which states that a special meeting of the members may be called to deal with membership issues not addressed by the membership code. The applicants have not provided me with a copy of the membership code. It stands to reason, however, that where a membership code uses the phrase "membership issues," this refers to issues regarding a person's status as a member of the First Nation, not any issue that may be of concern to the First Nation's members. At the hearing, counsel for the applicants did not seriously attempt to persuade me otherwise. Therefore, the July 18 meeting was not authorized by section 16 of the membership code.

[16] What the applicants were attempting to do at the July 18 meeting was a recall of the duly elected members of the Council. The election code sets out a process for achieving this purpose. Section 10 provides:

> Any elected may be removed at will by those persons who elected or appointed him by majority vote whenever it is in the best interests of the Shxwhá:y Village or for cause. (See Appendix A - Removal of Councillors) [*sic*]

[17] Appendix A to the code lays out a detailed procedure for the removal of councillors. The procedure begins with a special membership meeting, convened with 30 days' notice and requires a 55% majority of the electors present. It is not necessary to give a full account of the procedure, which may involve an investigation committee, nor to attempt to resolve in advance difficulties of interpretation that might arise. Suffice it to say that the applicants did not purport to adhere to this process.

[18] Thus, the legal effect of the July 18 resolutions cannot be anchored in Shxwhá:y Village's written laws.

B. *"Will of the People"*

[19] The applicants, however, put the issue on a different footing. According to them, the resolutions adopted at the July 18 meeting express the will of Shxwhá:y Village's membership. They would themselves constitute a form of Indigenous law that can displace decisions made according to the election code, including the results of the previous election.

[20] Assessing such a contention involves delicate issues. As this Court has recognized as early as *Bigstone*, the *Indian Act* does not set out any precise requirements for the recognition of Indigenous laws described as custom, even where they are adopted through some kind of democratic process. For this reason, we consider the totality of the circumstances surrounding a purported expression of the will of the people to determine whether the outcome truly reflects a broad consensus of the community: *McLeod Lake Indian Band v Chingee* (1998), 165 DLR (4th) 358 (FCTD); *Taypotat v Taypotat*, 2012 FC 1036, at paragraphs 29-35, aff'd 2015 SCC 30.

[21] Particular care must be taken where the alleged Indigenous law would displace existing written laws enacted by the First Nation. First Nations may choose to enact written laws to provide a measure of stability and certainty to their governance and to make these laws more easily accessible to their own members and to outsiders, such as this Court, who may have to apply them. These benefits should not be set aside every time a group of members call a meeting and purport to express the will of the people.

[22] Thus, it would appear that members of First Nations who wish to challenge the authority of their leaders must first use existing procedures created for this purpose. If these procedures are unworkable, a members' meeting may express the broad consensus of the community, but only if a substantial proportion of the membership participates and adequate procedural safeguards are in place. These requirements are especially important in the context of the increasing membership of many First Nations, which includes a large number of members residing outside the community. Justice Marshall Rothstein, then a member of the Federal Court of Appeal, alluded to these requirements in *Marie v Wanderingspirit*, 2003 FCA 385 at paragraph 15:

> The appellants argue that the "will of the people" must be respected and it is the people who are entitled to choose their Chief and Councillors. Of course, that is correct. However, the "will of the people" must be manifested in a process that accords with the Band's election custom and with electoral due process.

[23] In the present case, the applicants did not use the procedure set forth in the election code. The meeting they called was affected by significant procedural shortcomings, namely, proxy voting and the lack of proper notice. The level of participation in the meeting falls well short of a broad consensus.

[24] The applicants obtained proxies from about 85 Shxwhá:y Village members. After verification by their counsel, 53 of these proxies were considered valid. Those proxies were all voted in favour of the resolutions. In all cases, the proxies constituted the majority of votes cast. For example, resolution no. 2, which purported to remove the respondents, received favourable votes from 23 members present, 8 on-line participants and 53 proxies, whereas 3 members present abstained and two on-line participants voted against.

[25] Respondents Robert Gladstone, Michelle Roberts and Bonnie Russell affirm, in their affidavits, that proxy voting never took place in Shxwhá:y Village and that it is not authorized by its custom. The applicants have not been able to point to any Shxwhá:y Village law that authorizes proxy voting.

[26] Moreover, we know little about the circumstances in which these proxies were solicited and given. The affidavits sworn by some of the applicants do not provide any information as to the solicitation for proxies. In *Pahtayken v Oakes*, 2009 FC 134 at paragraph 44, aff'd 2010 FCA

169, my colleague Justice James Russell made remarks that are equally applicable to the case at hand, even though the case involved a petition instead of proxies:

> There is no evidence that it has been Nekaneet custom to have members sign such petitions at election time, and such a petition can only be understood in the context of this dispute. […]
>
> There is no evidence to reassure the Court that this petition has any value or legitimacy as an expression of the understanding or the will of the people who signed it. What was the procedure for signing it? What was the information and educative process that preceded it? What were the safegrounds surrounding the signing? Who authorized it? Who organized it? What means did they use to secure the signatures or to ensure that the signators voted freely in accordance with their consciences? We know most of these things about the Referendum Vote. We know none of them about the petition.

[27] Given the lack of authority for the use of proxies and the lack of evidence regarding the circumstances in which these proxies were obtained, I will ignore these votes in ascertaining whether the July 18 resolutions represent the broad consensus of the members of Shxwhá:y Village.

[28] Another shortcoming of the July 18 meeting is the lack of proper notice. In her affidavit, Ms. RaeAnna Rabang, one of the applicants, states that she sent an e-mail to 56 members and that she posted a written notice of the meeting at the council's administrative office, approximately 30 days before the meeting. Shxwhá:y Village, however, has a little over 300 members of voting age, many of whom reside in the United States. We simply do not know whether the large majority of the members learned of the meeting sufficiently in advance.

[29] What we know, however, is that 26 or 27 members participated in person. The number of online participants is unclear, but I note that according to the minutes, no more than 25 members voted online on any of the resolutions. The presence of these members at the meeting does not give rise to an inference, as the applicants argue, that the absent members received notice. If anything, it proves that the applicants invited their supporters.

[30] To summarize, given the conditions in which the July 18 meeting was held, the resolutions adopted thereat are not supported by a broad consensus of the community. Quite simply, 31 members cannot decide to oust the council in a community of more than 300 voters. Thus, what took place at the July 18 meeting did not affect Councillor Russell's right to remain in office.

IV. Other Grounds for Removal

[31] The applicants are also seeking to remove Councillor Russell for failing to provide information pursuant to the land code and for failing to provide drug test results. These grounds were, at least in part, the reasons why the applicants sought the removal of the respondents at the July 18 meeting. In other words, the applicants are asking the Court to do itself, with respect to Councillor Russell, what they purported to achieve at the July 18 meeting.

[32] I am dismissing this part of the application, mainly because the applicants' conduct disentitles them from seeking a remedy.

A. *Clean Hands*

[33] Judicial review is a discretionary remedy: *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paragraph 37, [2015] 2 SCR 713. In exercising their discretion, courts have sometimes declined to consider the merits of the application or refused to issue a remedy because of the applicant's conduct: *Homex Realty v Wyoming*, [1980] 1 SCR 1011 at 1033-36; *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 at paragraph 10. This situation is typically described by the maxim, "one who comes to equity must come with clean hands."

[34] In the present case, the applicants' conduct disentitles them from a remedy because they acted for an improper purpose and they used improper means.

[35] First, the applicants' conduct is improper because they allowed Shxwhá:y Village's governance processes to be hijacked for the benefit of a private entity, Della Terra. Their legal fees were paid, at least in part, by Della Terra. Their demands to the council began in earnest when the council cancelled Della Terra's permit. Two of the applicants are employed by Della Terra. While the applicants initially voiced a large array of concerns regarding financial management and reporting, the July 18 meeting and the present application are focused on removing the respondents and calling an election. All of this leads to the conclusion that the applicants were instrumentalized by Della Terra for the purposes of retaliating against the cancellation of the permit.

[36] The Court can simply not allow private interests to overtake First Nations governance processes in such a blatant manner. In *Ominayak v Returning Officer for the Lubicon Lake Indian Nation Election*, 2003 FCT 596, the Court stated that "the relief granted by the Court should further the public interest." I am mindful that Shxwhá:y Village, like most First Nations, does not have detailed campaign finance laws, even though its election code prohibits corrupt practices. The situation at hand, however, is far removed from political contributions that might or might not be allowed under any given regime. It is nothing less than a privately financed attempted coup. In the absence of evidence and submissions in this regard, I need not find that this attempt breached specific provisions of Shxwhá:y Village or Canadian law. For the purposes of exercising my discretion, it is enough to say that the Court will not countenance such a process.

[37] Second, the applicants resorted to improper means to achieve their purpose. As I mentioned above, no adequate notice was given for the July 18 meeting and there was no legal basis for the use of proxies. It is simply not credible to assert that 31 persons voting at this meeting express the consensus of a community comprising more than 300 voting members. The fact that the applicants took pains to give it the appearance of a democratic exercise does not make it more acceptable.

[38] In fact, the applicants are asking the Court to give them a result that they utterly failed to achieve by democratic means.

[39] For these reasons, I decline to consider the grounds invoked by the applicants or to issue any remedy. I will nevertheless make brief comments on the subject.

B. *Land Code*

[40] Shxwhá:y Village has adopted a land code containing detailed provisions regarding financial management, auditing, reporting and access to information. The applicants allege that the respondents failed to comply with these provisions. In particular, they say that the respondents failed to provide information they requested.

[41] The applicants may or may not have a valid complaint in this regard, and I am expressing no opinion on the issue. This, however, has no bearing on the present proceeding. The applicants have not identified any legal rule mandating the removal of council members for failing to comply with the provisions of the land code. Of course, the rule of law principle requires the respondents, like any holder of public office, to comply with the law. But it also requires citizens to use existing remedies to sanction breaches of the law. In this regard, the applicants did not resort to the recall process set forth in the election code. Neither does the present application seek to obtain the financial information that the respondents would have failed to disclose.

[42] Rather, the applicants use the alleged lack of disclosure as a pretext for unseating the respondents. The rule of law principle, however, does not mean that citizens can rush to the Court and seek removal of an elected official every time the law is not fully complied with. The rule of law is meant to promote stability and work in tandem with democracy: *Reference re*

Secession of Quebec, [1998] 2 SCR 217 at paragraphs 66, 70 and 78. There is nothing in the rule of law that empowers the Court to substitute itself to the voters.

C. *Drug Tests*

[43] The applicants also invoke the respondents' failure to provide yearly drug test results, contrary to section 7 of the election code. Pursuant to section 8, this would result in the respondents' automatic removal from office.

[44] The respondents, however, assert that the common practice is to provide drug test results only prior to being nominated for an election and that no one in recent years provided annual drug test results. Murray Sam, one of the applicants, stated in his first affidavit that while he was band manager or CEO from 2008 to 2016, he "always received complete tests from each Chief and Councillor each year." In their affidavits, the five respondents registered their disagreement and stated that they were not aware of councillors submitting annual drug tests. Mr. Sam then submitted another affidavit in which he stated that "It was typical for [him] to receive drug test results from at least half of the current Council members."

[45] Given that Mr. Sam contradicted himself, I prefer the evidence of the respondents and find that the annual drug test requirement was not enforced. This is especially relevant because one of the applicants, Ms. Tina Sam, was a member of council until 2018. Yet, she did not file an affidavit in the present proceedings and we have no statement from her regarding her compliance with section 7.

[46] Thus, it would be unjust for the applicants to seek the removal of Councillor Russell for failing to comply with a requirement that was not enforced for many years. This is an additional reason for the Court exercising its discretion not to issue any remedy.

[47] Given the manner in which I am disposing of the case, it is not necessary for me to decide whether the lack of enforcement of the annual drug test requirement resulted in the emergence of a custom displacing the explicit requirements of the election code. For the same reason, it is not necessary to rule on the respondents' challenge to the constitutional validity of the requirement. This being said, councillors would be well advised to comply with the annual drug test requirement in the future.

D. *Disclosure of Legal Opinion*

[48] The applicants also seek disclosure of communications between the respondents and their legal counsel regarding a note sent to Shxwhá:y Village members on July 17, 2020. In this note, the respondents state that they obtained a legal opinion to the effect that the proposed July 18 meeting was unlawful. The applicants argue that the respondents waived solicitor-client privilege by alluding to this legal opinion in their communication to members.

[49] The difficulty with this argument is that the applicants do not point to any legal rule, enforceable through an application for judicial review, that would require disclosure of the legal opinion in the first place. Thus, whether the respondents waived solicitor-client privilege is irrelevant. This request is entirely devoid of merit.

V. Disposition and Costs

[50] In summary, the application for judicial review is dismissed as moot with respect to respondents Robert Gladstone, Michelle Roberts, Ronald Jr. Miguel and Tanya James. With respect to respondent Bonnie Russell, it is dismissed because the resolutions adopted at the July 18 meeting were devoid of legal effect and the applicants' conduct disentitles them from any remedy.

[51] The respondents are seeking costs not only against the applicants, but also against Della Terra. They argue that Della Terra is the true applicant and stands to benefit from a judgment in the applicants' favour. I decline to order costs against Della Terra. Della Terra is not a party to this proceeding. It has not been given notice of the respondents' claim nor had any opportunity to make submissions regarding the proposed costs order. I have not been persuaded to depart from the usual rule whereby the losing party, and only the losing party, is liable to pay the costs of the prevailing party, according to the Tariff.

JUDGMENT in T-1108-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. The applicants are condemned to pay costs to the respondents.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1108-20
STYLE OF CAUSE:	PHILLIP NARTE, DANTE NARTE, TINA SAM, MURRAY SAM, ROSALIA GLADSTONE, TERRY ST. GERMAIN JR. AND RAEANNA RABANG v ROBERT GLADSTONE, MICHELLE ROBERTS, RONALD JR. MIGUEL, BONNIE RUSSELL, TANYA JAMES AND SHXWHA:Y VILLAGE FIRST NATION
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JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	MAY 12, 2021

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