

Federal Court



Cour fédérale

Date: 20230510

Docket: T-562-23

Citation: 2023 FC 668

Montréal, Québec, May 10, 2023

PRESENT: Madam Justice Walker

BETWEEN:

SERGE SIMON

Applicant

and

MOHAWK COUNCIL OF KANESATAKE

and

SHIRLEY BONSPILLE

and

MYRLYN BONSPILLE

Respondents

ORDER AND REASONS

I. Overview

[1] The applicant, Mr. Simon, has sought the Court's review of a February 15, 2023 decision (Decision) by the Appeal Board established under the *Mohawks of Kanésatake Custom Electoral*

Code (the Code) invalidating his election as a Chief of the Mohawk Council of Kanesatake (MCK). Mr. Simon now brings a motion for interim relief (the Motion) staying the Decision and ordering the MCK, one of the respondents, to recognize his status as a Chief pending the Court's determination of his application for judicial review.

[2] In its response to the Motion, the MCK takes no position regarding the interim stay sought by Mr. Simon.

[3] Ms. Shirley Bonspille and Ms. Myrlyn Bonspille are the two remaining respondents in the application for judicial review. Ms. Shirley Bonspille filed a letter with the Court on April 28, 2023 indicating that she does not have a lawyer and requesting that she be kept informed of matters pertaining to this Court file. The Court is not aware of any response or other document filed by Ms. Myrlyn Bonspille with respect to the application for judicial review or the Motion.

II. Events leading to the Decision

[4] Very briefly, the MCK is the governing body of the Mohawks of Kanesatake and consists of seven elected members (one Grand Chief and six Chiefs) who typically serve a four-year term. The Code was approved by community referendum and by the MCK in 2015.

[5] When a seat on the MCK becomes vacant more than one year before the next election, as in the present case, the MCK may (a) hold a special public meeting to obtain authorization to continue its mandate with the remaining Chiefs or (b) call a by-election. In the event of an

election or by-election, the Code provides for the appointment of a Chief Electoral Officer and the establishment of an Appeal Board, consisting of three members selected by the Chief Electoral Officer at a special public meeting.

[6] Part 14 of the Code sets out the procedure for contesting the election process. An elector who contests an election “shall submit the contestation to the Chief Electoral Officer”. The Chief Electoral Officer then issues a decision with reasons determining whether there has been a violation of the Code that affected the result of the election. Either the plaintiff or the elected candidate may appeal the Chief Electoral Officer’s decision to the Appeal Board.

[7] In February 2022, one Chief on the MCK resigned leaving a vacant seat. A by-election was originally scheduled for September 24, 2022 but was subsequently rescheduled to January 21, 2023. Advance polling began on January 14, 2023. The MCK engaged PlanIt Consulting and Communications (PlanIt), a consulting and services business, to organize the by-election. PlanIt employee Ms. Jacobs was appointed as Chief Electoral Officer.

[8] The results of the by-election were:

- Mr. Simon: 105 of 205 votes (approx. 51%).
- Ms. Shirley Bonspille: 55 of 205 votes (approx. 27%).
- The one other candidate: 42 of 205 votes (approx. 20%).
- 3 ballots (less than 2%) were spoiled.

[9] On January 25, 2023, a community member submitted a letter to the Appeal Board contesting the by-election. The letter was forwarded to Ms. Jacobs, as Chief Electoral Officer,

who issued a decision concluding that the contestation failed to demonstrate a violation of the Code.

[10] In late January and early February 2023, Ms. Shirley Bonspille and Ms. Myrlyn Bonspille each wrote to the Appeal Board contesting the by-election results (the Bonspille contestation letters).

[11] Mr. Simon states in his affidavit of March 30, 2023 that he was not informed of the Bonspille contestation letters. In turn, Ms. Jacobs affirms in her affidavit of April 13, 2023 that the contestations were not forwarded to her, contrary to the Code.

[12] On February 15, 2023, the Appeal Board issued its Decision invalidating the by-election in response to the Bonspille contestations. Ms. Jacobs received the Decision on February 17, 2023 and Mr. Simon received the Decision on February 21, 2023.

[13] In its Decision, the Appeal Board addressed a number of procedural and substantive complaints regarding the election. Ultimately, the Appeal Board unanimously deemed the by-election process invalid due to irregularities in process and violations of the democratic process of the Mohawks of Kanasatake and its membership. The Board concluded that PlanIt did not follow due process by failing to send required information to voters thereby obstructing eligible electors from casting their votes.

III. **Application for Judicial Review**

[14] Mr. Simon filed his Notice of Application for judicial review of the Decision on March 22, 2023. In the Notice, he requests that the Court quash the Decision, confirm the validity of the January 21, 2023 by-election and order him reinstated as a Chief of the MCK. In summary, Mr. Simon submitted that (a) the Appeal Board was without jurisdiction to address the Bonspille contestations; (b) the Decision was rendered in violation of the principle of *audi alteram partem*; and (c) the Appeal Board did not act as an impartial adjudicative or appellate body.

IV. **The Motion**

[15] Mr. Simon filed his Amended Notice of Motion on April 25, 2023, requesting:

- (1) A stay of the Decision until his application for judicial review is determined;
- (2) An order that the MCK recognize his status as a Chief of MCK, with all the rights and privileges that entails, until the application for judicial review is determined; and
- (3) Costs calculated using the maximum number of units under Column V of the table to Tariff B.

[16] Mr. Simon submits that the Appeal Board had no jurisdiction to entertain and determine the Bonspille contestation letters because section 14.3 of the Code requires any elector who contests an election process to do so “within thirty (30) days from the date on which the election was held and shall submit the contestation to the Chief Electoral Officer”. Mr. Simon argues that only the Chief Electoral Officer had jurisdiction to consider the contestations and that the Bonspille contestation letters were submitted directly to the Appeal Board contrary to the Code. In addition, Mr. Simon states that he was not informed of the Bonspille contestation letters and

was afforded no opportunity to respond to the letters prior to the Appeal Board rendering its Decision, thereby violating both the Code and the principle of *audi alteram partem*.

[17] The MCK takes no position regarding Mr. Simon's request for an interim stay of the Decision. The MCK stated at the hearing that it neither supports nor opposes the Motion.

[18] The MCK's submissions focus on respect for the Code as the law of the community. Its interest in the proceeding is in maintaining the community's trust in the electoral process. The MCK emphasizes that the appeal process established in the Code "must be scrupulously respected" and expresses concern that the appeal process and Decision were not consistent with the Code.

[19] The MCK submits that a second order recognizing Mr. Simon's status as a Chief is unnecessary because it is redundant. The MCK's concern is that any order granted by the Court not extend a Chief's rights and powers beyond those normally flowing from their status as an elected Chief in accordance with the Code.

[20] Ms. Shirley Bonspille and Ms. Myrlyn Bonspille have not filed notices of appearance in this proceeding and, other than Ms. Shirley Bonspille's request to be informed of matters pertaining to the file, have not responded to the Motion.

[21] I have considered the written and oral submissions of counsel for Mr. Simon and the MCK; the evidence set out in Mr. Simon's Motion Record, notably the Code and Ms. Jacob's

affidavit regarding the by-election and contestation process at issue; and the Decision, against the well established three-part test for an interim stay (*Bellegarde v Carry the Kettle First Nation*, 2023 FC 129 at para 17 (*Bellegarde*), citing the Supreme Court of Canada's decision in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334). I have also taken into consideration Justice Grammond's statement in *Bellegarde* (at para 20) regarding the importance of balancing Indigenous self-government and deference to Indigenous decision makers with the right of members of First Nations to procedural fairness and remedies for breach of those rights.

[22] I find that Mr. Simon has raised a serious issue in the Appeal Board's process and Decision based on the evidence before me that is neither frivolous nor vexatious, the threshold applied in motions for a stay of a by-election (*Bellegarde* at para 23). The Appeal Board's exclusion of Mr. Simon and the Chief Electoral Officer from the adjudication of the Bonspille contestation letters contravened the Code and was procedurally unfair. I also find that Mr. Simon will be irreparably harmed should an interim stay of the Decision not be granted. He will be prevented from fulfilling his role and duties as a Chief and Mohawk Council member for the bulk of his remaining elected term given the likely hearing and ultimate disposition dates of the underlying application.

[23] I have also considered the final element of the three-part *RJR* test: the balance of convenience. In so doing, I must balance the harm to Mr. Simon if a stay of the Decision is not granted and the harm to the Respondents if a stay is granted. I have also taken into account the interests of the larger community of the Mohawks of Kanasatake and the importance of safeguarding the community's interest in ensuring compliance with the Code. In my opinion, the

interests of Mr. Simon and of the MCK representing the larger community align in this regard. The balance of convenience weighs in favour of the granting of an interim stay of the Decision. As a result, I conclude that Mr. Simon has satisfied the third element of the test.

[24] For the foregoing reasons, I will order an interim stay of the Decision until such time as the underlying application for judicial review of the Decision is disposed of by the Court.

[25] Upon issuance, my stay order suspends the application of the Decision in its entirety. Accordingly, the results of the by-election remain valid and Mr. Simon resumes his position as a Chief and member of the MCK with the same rights and privileges that attached thereto immediately prior to the Decision, no more and no less.

[26] I decline to grant the additional order sought by Mr. Simon because it would be redundant to the normal operation and consequences of the stay of Decision order. In drafting the order set out below, I have sought to address the specific wrong engendered by the Decision to avoid any such redundancy and confusion (*Bellegarde* at para 45).

[27] Counsel for Mr. Simon and the MCK indicated during hearing that they had agreed that costs in this Motion are best addressed once the outcome of the overall application is known. Costs shall therefore be in the cause.

ORDER IN T-562-23

THIS COURT ORDERS that:

1. The decision dated February 15, 2023 of the Appeal Board for the Kanesatake By-Election of January 21, 2023 is stayed in its entirety such that the results of the By-Election, namely the election of Mr. Simon as a Chief with the rights and privileges of a Mohawk Council member, remain in effect until the present application for judicial review is finally determined.

2. Costs for this motion shall be in the cause.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-562-23

STYLE OF CAUSE: SERGE SIMON v MOHAWK COUNCIL OF
KANESATAKE, SHIRLEY BONSPILLE, MYRLYN
BONSPILLE

PLACE OF HEARING: MONTRÉAL, QUÉBEC

DATE OF HEARING: MAY 9, 2023

ORDER AND REASONS: WALKER J.

DATED: MAY 10, 2023

APPEARANCES:

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