Federal Court of Appeal | Cour d'appel fédérale

Date: 20110728

Docket: A-248-11

Citation: 2011 FCA 232

Present: **STRATAS J.A.**

BETWEEN:

STONEY FIRST NATION, as represented by its Chiefs and Councillors and BEARSPAW FIRST NATION, as represented by its Chief and Councillors, Chief David Bearspaw Jr., Trevor Wesley, Patrick Twoyoungmen, Roderick Lefthand and Gordon Wildman

Appellants

and

ROBERT SHOTCLOSE, HARVEY BAPTISTE, CORRINE WESLEY, MYRNA POWDERFACE, CINDY DANIELS, WANDA RIDER and WESLEY FIRST NATION

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 28, 2011.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] In two motions, the appellants seek a stay of the judgment dated June 22, 2011 of the Federal Court (per Justice Mosley): 2011 FC 750.

[2] In the Federal Court, the individual respondents (other than the Wesley First Nation) sought the quashing of certain decisions and actions of the Bearspaw First Nation, as represented by its Chief and Councillors, and the Stoney First Nation, as represented by its Chiefs and Councillors.

[3] In those decisions and actions, the Chiefs and Councillors extended the terms of office of the Bearspaw Chief and Council. An election for those offices, originally scheduled for December 10, 2010, was not held.

[4] The Federal Court found in favour of the individual respondents. Among other things, it:

- declared that the decisions and actions of the Chief and Councillors to extend their terms were contrary to Bearspaw Band custom and, therefore, invalid;

- declared that the terms of office of the Chief and Councillors of the Bearspaw First Nation ended on December 9, 2010;

- removed the Chief and Councillors of the Bearspaw First Nation from their offices and prohibited them from exercising any of their powers pending the next election; and

- ordered that a new election for the offices of Chief and Councillors be held within 60 days.

B. Post-judgment events in the Bearspaw First Nation

[5] The Federal Court's judgment left the Bearspaw First Nation without governance. An election is scheduled for August 9, 2011. All offices are contested. In all, twenty-five candidates are running for office, including the former Chief and some of the former Councillors. After the election, the Bearspaw First Nation will again have governance.

C. The appellants bring this appeal

[6] The appellants appeal to this Court from the judgment of the Federal Court.

[7] Broadly speaking, in their appeal, the appellants say that the Federal Court erred. They submit that the decisions and actions that extended the terms of office of the Chief and Councillors were valid, and so they were entitled to remain in office. As a result, it was wrong for the Federal Court to remove the Chief and Councillors and to bar them from exercising their powers of governance.

D. The appellants' motion for a stay

[8] Soon after they filed their notice of appeal, the appellants brought a motion, without notice to the other parties, for a suspension or stay of the Federal Court's judgment until the determination of their appeal. Granting the stay would postpone the election that is scheduled for August 9, 2011,

restore the Chief and Councillors to office and allow them to exercise their powers of governance until the appeal is determined.

[9] On June 30, 2011, this Court, per Justice Trudel, directed that the appellants' stay motion be brought on notice.

[10] Of course, this direction was warranted. Given the potential impact of the stay motion and the absence of any need for the appellants to proceed by stealth, the appellants should have given notice of their motion to all affected parties.

[11] Following the direction of Justice Trudel, the appellants gave notice of their stay motion to the individual respondents. Unsurprisingly, the motion has been vigorously contested.

E. Miscellaneous matters

[12] In some of the filings, there has been some suggestion that counsel of record for the appellants no longer has authority to represent the appellant Stoney First Nation. Based on the filings made by counsel of record for the appellants, the absence of any filings or motions to relieve this counsel of his responsibilities and the legal effect of rules 120-126 of the *Federal Court Rules*, this Court is entitled to regard this counsel as having authority to represent the appellant Stoney First Nation.

F. The scheduling teleconference

[13] This Court, acting at the behest of the appellants, held a scheduling teleconference involving all parties. As a result of submissions made at the teleconference, this Court expedited the appeal and set tight deadlines for the procedural steps in the stay motion and the appeal. This Court also added the Wesley First Nation as a party respondent to the appeal. It participated in the application before the Federal Court, was regarded by all as having a genuine interest in the application, and was present for the scheduling teleconference in this Court.

[14] The appeal is scheduled to be heard in mid-September.

[15] Based on the materials that the appellants had filed with the Court by the time of the scheduling teleconference, the Court was concerned about the lack of governance, the welfare of the community, and the possibility that emergencies might arise before the stay motion could be determined. The appellants had already signalled the likelihood that an interim motion seeking immediate relief might have to be brought. Therefore, in the event that an interim stay motion became necessary, this Court directed a particular procedure for the parties to follow. The procedure was designed to deal with a real emergency, defined by this Court as a serious matter that could not wait until it determined the stay motion.

G. The appellants' motion for an emergency interim stay

[16] Soon afterward, following the procedure devised by the Court, the appellants brought a motion for an emergency interim stay. They filed material in support of it. This Court found that the appellants' material did not disclose an emergency requiring this Court's intervention before it determined the stay motion. It ruled that it would consider the interim stay motion together with the stay motion.

H. The motions before this Court

[17] Therefore, before this Court are two motions for a stay of the Federal Court's judgment and all of the supporting material offered by the parties in both motions.

[18] In the interests of speed, the parties were content that the Court determine these motions on the basis of written representations under rule 369 rather than by way of oral submissions. This Court did not require any oral submissions from the parties. It determined the two motions on the basis of the ample material filed by the parties and the parties' helpful written representations. These are the Court's reasons concerning both motions.

I. Preliminary issues in the motions

(1) Admissibility of the affidavit of Robert Shotclose, sworn July 19, 2011

[19] The individual respondents presented this affidavit to the Registry after the time set by this Court in its scheduling order for the filing of affidavits and cross-examinations. The Registry accepted this affidavit for filing. Quite aside from the scheduling order, the filing of such an affidavit is not contemplated by rule 369.

[20] If, on a motion made to this Court, the individual respondents demonstrated due cause and the absence of prejudice to the appellants, this affidavit might have been admissible. However, the individual respondents did not bring such a motion.

[21] Accordingly, this affidavit should not have been accepted for filing and it is inadmissible. In reaching its decision on these motions, this Court has not taken it into account. The Registry shall remove this affidavit from the Court file and return it to counsel for the individual respondents.

(2) The motion for an order imposing confidentiality over Exhibit "B" to the affidavit of Robert Shotclose, sworn July 19, 2011

[22] The appellants brought a motion for a confidentiality order over Exhibit "B" to this affidavit. The respondents consented to the motion.

[23] As mentioned above, this affidavit should not have been accepted for filing. It will be removed from the Court file and will be returned to the individual respondents. Therefore, a confidentiality order is not necessary and none shall be made.

[24] A comment on this motion is necessary for the guidance of parties in future cases. In their material in support of their motion, the appellants offered virtually no justification for the imposition of confidentiality over Exhibit "B". They referred to a public interest in confidentiality over the financial information, but did not specify exactly what that public interest was, nor did they attempt to justify with particularity why confidentiality was warranted.

[25] The public interest is overwhelmingly in favour of open court proceedings. Indeed, it is a constitutional principle under subsection 2(b) of the Charter that court proceedings, including the material filed with the Court, are to be open, not secret. Those seeking secrecy over some aspect of proceedings such as this must establish that an exception to this constitutional principle is warranted, following the exacting procedures and standards repeatedly set out by the Supreme Court of Canada: see, e.g., *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65.

[26] Seen in light of these cases and our Constitution, the word "confidentiality" is a euphemism of sorts. What is being really sought in this motion – by a select few over the interests of everyone else – is secrecy.

[27] The fact that the parties to this proceeding consented to confidentiality over Exhibit "B" is really beside the point, because the interests here, constitutionally-based, go beyond the private interests of the parties and extend to the public at large. This is especially so in the present case which concerns important issues of governance of a First Nations community.

[28] In this case, if, on a reading of the motion, I found that a possible case for secrecy over Exhibit "B" existed, I would have required the parties to give notice to the media in accordance with the Supreme Court's cases. But, based on the material filed, there was no possible case for secrecy.

[29] In any event, as the affidavit in which Exhibit "B" appears should not have been filed, the relief sought in the motion for secrecy is not necessary. The motion shall be dismissed on that basis.

J. Determination of the merits of the motions

(1) Opening observations

[30] The parties have filed much evidence on the motions. The evidence takes the form of volumes of affidavits and transcripts from cross-examinations of deponents. The Court has read all of this material and has given it the most careful consideration.

[31] The Court is mindful of the controversy in the community and the pending election. It does not wish to influence the election or the appeal to this Court. Therefore, it will refrain from making unnecessary rulings, observations or comments on the issues raised by the parties.

(2) The test for a stay

[32] In the stay motion and in the interim stay motion, the three-fold test set out in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 applies. In order to stay the Federal Court's judgment, the appellants must demonstrate that there is a serious issue to be tried, irreparable harm will be suffered if the Federal Court's judgment is not stayed, and the balance of convenience lies in favour of staying the Federal Court's judgment.

[33] The appellants must establish all three of these requirements. Failure to establish any one of these will result in the dismissal of the motions.

(3) The request for postponement of the election ordered by the Federal Court

[34] As mentioned above, the appellants' motion seeks, among other things, the suspension, pending this Court's determination of the appeal, of the Federal Court's order that an election should be held for the offices of Chief and Councillors of the Bearspaw First Nation.

[35] In my view, the appellants have not established on the evidence that the balance of convenience lies in their favour on this aspect of the Federal Court's judgment. As far as allowing the election to proceed is concerned, the benefits outweigh the detriments.

[36] On August 9, 2011 the election will be held. The material shows ample involvement in the election by the candidates and significant community interest and participation in the election. Some on the former Council of Bearspaw First Nation are running for office. They may or may not be re-elected. A new government for the Bearspaw First Nation will soon assume office and will be able to manage all of the community's affairs. This situation is not dissimilar from that prevailing in *Weekusk v. Thunderchild First Nation Appeal Tribunal*, 2007 FC 202 where the Federal Court found that the balance of convenience was against staying a Tribunal's decision pending review by the Court.

[37] It is true that in the appeal this Court might rule in favour of the appellants, rule that the August 9, 2011 election should not have been held, and restore the former Chief and former Councillors to their positions on the Bearspaw First Nation Council. That could result in possible detriments. The former Chief and former Councillors, if not elected on August 9, 2011, will have been deprived of their ability to earn salary and exercise their powers between the date of determination of this motion and the determination of the appeal. Also the community will have been deprived of governance by the former Chief and former Councillors during that time.

[38] But balanced against those possible detriments is the fact that between now and this Court's determination of the appeal, the community will obtain the benefit of democratically-chosen governance and overall management of the community's affairs. The chaos and potential hazards said by the appellants to be caused by the current absence of governance would be eliminated. The appellants do not suggest otherwise in their material.

[39] In my view, for the foregoing reasons, based on an evaluation of the evidence in its entirety, the balance of convenience lies against staying the requirement of the Federal Court in its judgment that that an election be held. This Court will not stop the election, scheduled for August 9, 2011, from going ahead.

(4) Staying the remainder of the Federal Court's judgment

[40] As for the remainder of the Federal Court's judgment, in my view the appellants have not established the existence of irreparable harm.

[41] Given that the election will go ahead as scheduled on August 9, 2011, a new Chief and Councillors will be elected at that time. Any harms caused by the Federal Court's decision to remove the Chief and Councillors will disappear after the results of the election on August 9, 2011 becomes known. Governance will then be restored. The appellants' evidence does not suggest otherwise.

[42] Therefore, in considering the remainder of the Federal Court's decision, the question is whether irreparable harm will be suffered during the period between now and when governance is restored.

[43] In their material offered in support of the two motions, the appellants raise much at a level of unhelpful generality. They point to the fact that at the present time the Bearspaw First Nation is not represented on the Stoney Tribal Council. Further, in their written submissions they speak of an "extraordinary position of vulnerability and paralysis," with "devastating consequences" that impact "every member." This is said to arise from "the failure to execute co-management and indemnity agreements" which "could result in the entire Stoney Nation going into third party management," which will in turn "mean that only essential services will be provided." "[E]conomic losses would likely accrue" alongside a dramatic increase in "risk of mass layoffs and program cuts." "Cash flow problems" will be worsened, overdraft facilities will be depleted, payroll cheques will bounce and invoices will go unpaid. The "day to day conduct of business and governance matters" between now and August 9, 2011 will not happen, they say, with effects on "existing and potential business relationships," "future relationships," "contracts," and "goodwill."

[44] The respondents contest much of this. Among other things, they point to evidence that the co-management agreement has been signed and suggest that this will allow important decisions to be made and funds to flow.

[45] It is not necessary to resolve this conflict in the evidence. On the appellants' evidence alone, they have not established that irreparable harm will be suffered during the relevant period.

[46] There is no question that the removal of the Chief and Councillors has created a governance vacuum that has caused at least the potential of harm. Some of this harm indeed might be significant. With adequate proof in this motion, this Court might have ruled some of the harm to be irreparable. But the appellants' proof has not been adequate.

[47] By and large, the evidence offered by the appellants does not establish that the harm will happen between now and when the officials elected on August 9, 2011 assume office. For example, the appellants raise the possibility – and only a possibility – that the Stoney Nation will be placed in third party management. But there is no evidence at all about when that is likely to happen. There is no evidence as to when the overdraft will be depleted, causing failure to honour financial obligations. There is no evidence regarding whether any particular financial obligations must be met before new governance is in place. There is no evidence of any decisions that have to be made or any authorizations that have to be given before new governance is in place. Quite simply, there is no evidence that irreparable harm will be suffered in the next two weeks or so.

[48] On the issue of the irreparable nature of the harm, the evidence offered by the appellants also falls short. The evidence offered in support of a stay must demonstrate with particularity – not just assert with generality – the actual existence or real probability of harm that cannot be repaired later. It is all too easy for those seeking a stay in a case like this to enumerate problems, call them

serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[49] A stay of a judgment must be regarded for what it is. It is the temporary prevention of a judgment – made on the basis of evidence, submissions and due consideration – from having force according to its terms. To get that sort of remedy, the moving party must do more than identify harm or inconvenience. The moving party must demonstrate (along with the other branches of the *RJR-Macdonald* test) that harm will actually be suffered and that it will not be able to be repaired later. It must do this by providing evidence concrete or particular enough to allow the Court to be persuaded on the matter.

[50] That has not happened here. How will the absence of Bearspaw First Nation representation on the Stoney Tribal Council over the next two weeks or so give rise to harm that is irreparable? What invoices fall due over the next two weeks? Which ones cannot be delayed and why? What exactly is the cash flow situation? What exactly is the status of the overdraft and why? What are the consequences to members of the community? Who is suffering, how much, and why? What exactly is the "vulnerability and paralysis" that the appellant speaks of? What is the basis for saying that the August 9, 2011 election may result in Stoney Nation members losing confidence and trust in their government?

[51] The appellants have also offered case law that they say suggests that a disruption in band governance or a loss of prestige on the part of those removed automatically results in irreparable

harm: *Montana First Nation v. Rabbit*, 2011 FC 420; *Orr v. Fort McKay First Nation*, 2011 FC 37; *Duncan v. Behdzi Ahda First Nation*, 2002 FCT 581. I do not accept that irreparable harm in those circumstances is automatic and there are cases to that effect: see, for example, *Weatherill v. Canada (Attorney General)* (1998), 143 F.T.R. 302, 6 Admin. L.R. (3d) 137 at paragraph 30 (T.D.). It must again be recalled that the moving party is seeking the extraordinary remedy of preventing a judgment from being in force according to its terms. Judgments should not be stifled in part on the basis of some sort of presumption of irreparable harm. Instead, the evidence filed regarding the actual circumstances must be examined without any pre-conceived notions or presumptions. On these motions, after examining the evidence, I conclude for the foregoing reasons that the appellant has fallen short of the mark.

K. Costs

[52] The respondent, Wesley First Nation, does not seek its costs. The respondents other than Wesley First Nation seek their costs on a full indemnity basis.

[53] While the appellants' initial decision to bring their stay motion without notice is regrettable, by itself that does not warrant the making of an award for enhanced costs. Nor is there any other conduct on the part of the appellants or any other circumstances that need to be addressed by such an award.

L. Disposition

[54] For the foregoing reasons, the appellants' motions shall be dismissed. The respondent, Wesley First Nation does not seek its costs. The remaining respondents shall have their costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-248-11
STYLE OF CAUSE:	**Stoney First Nation, as represented by its Chiefs and Councillors and Bearspaw First Nation, as represented by its Chief and Councillors, Chief David Bearspaw Jr., Trevor Wesley, Patrick Twoyoungmen, Roderick Lefthand and Gordon Wildman v. Robert Shotclose, Harvey Baptiste, Corrine Wesley, Myrna Powerface, Cindy Daniels, Wanda Rider and Wesley First Nation**

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	July 28, 2011

WRITTEN REPRESENTATIONS BY:

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