

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120118

Docket: A-450-11

Citation: 2012 FCA 17

Present: STRATAS J.A.

BETWEEN:

FORT MCKAY FIRST NATION CHIEF AND COUNCIL

Appellants

and

MIKE ORR

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 18, 2012.

REASONS FOR ORDER BY:

STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] The appellants, the Fort McKay Chief and Council, seek an order staying the judgment dated December 5, 2011 of the Federal Court (*per* Justice Near) in file T-1180-11 until this Court hears and determines their appeal. The Federal Court's reasons for judgment can be found at 2011 FC 1305.

[2] In order to stay the Federal Court's judgment, the Chief and Council must demonstrate that there is a serious issue to be tried, irreparable harm will be suffered if the judgment is not stayed,

and the balance of convenience lies in favour of granting the stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[3] Since these requirements are met, the stay shall be granted.

A. The facts

[4] The respondent, Mr. Orr, is a councillor for the Fort McKay First Nation. On July 1, 2011, he was charged with the sexual assault of a woman contrary to section 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. His criminal trial has not taken place. In the meantime, he is required to abstain from communicating with this woman or going near her residence.

[5] Twelve days after charges were laid, the Council passed a resolution suspending Mr. Orr from his position as councillor and removing him as a director of all corporate entities associated with the First Nation.

[6] Mr. Orr brought an application for judicial review of the Council's decision to suspend him.

[7] The Federal Court granted the application for judicial review. In its view, the Council lacked jurisdiction to suspend Mr. Orr under Part 10 of Fort McKay First Nation's *Election Code*. It also found that the Council did not follow the procedures set out in Part 10 of the *Election Code*.

B. Applying the test for a stay

(1) Serious issue

[8] On the first branch of the three-fold test for a stay, the appellant must establish that the appeal involves a serious issue. However, the threshold for seriousness is “a low one” and “liberal”: *RJR-MacDonald, supra* at page 337; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at page 358, La Forest J. (dissenting, with apparent concurrence on this point from the majority). It need only be shown that the appeal is not doomed to fail or that it is “neither vexatious nor frivolous”: *RJR-MacDonald, supra* at page 337.

[9] From the material filed, it appears that this appeal will turn on the proper interpretation of Part 10 of the *Election Code* and its application to the facts of this case. Without in any way prejudging this appeal, it seems to me that the Chief and Council do have arguments to make in this Court: their arguments are not doomed to fail and are not frivolous or vexatious.

(2) Irreparable harm

[10] The Chief and Council have established irreparable harm. Their affidavit evidence is somewhat unparticularized, but it is enough to establish the existence of harm that would materialize if the stay is not granted. This includes harm to the reputation and standing of the

Council, community concerns, and concerns associated with Mr. Orr continuing in office and serving as a director of the First Nation's corporate entities while the charges are hanging over him.

(3) Balance of convenience

[11] As the moving parties, the Chief and Council bear the burden of showing that the balance of convenience lies in favour of the granting of the stay. The affidavits tendered on their behalf disclose various harms and inconveniences, as described above. This evidence lacks some particularity on the issues of harm and inconvenience. This diminishes the weight that can be given to it. Does it outweigh the evidence tendered on behalf of Mr. Orr?

[12] The evidence tendered on behalf of Mr. Orr consists of identically-worded affidavits from thirteen members of the Fort McKay First Nation. This evidence suffers from some deficiencies.

[13] The affidavits contain only general, unparticularized assertions without supporting reasoning or information. They go no further than to show that thirteen people feel that Mr. Orr should continue in office. Whether their feelings mirror those of the community is unclear. Further, the affidavits do not show any tangible harm or inconvenience that has happened or might happen in the future.

[14] However, I do accept there is harm associated with the removal of a duly-elected councillor: the will of the electorate is thwarted. This harm has been suffered during the last six months.

[15] As I explain below, this appeal will be heard in approximately three months' time.

Therefore, if a stay is granted, for at least another three months this community will be deprived of one of its chosen representatives. What weight should be given to this consideration?

[16] Unfortunately, the affidavits tendered on behalf of Mr. Orr do not assist. A number of questions are left unanswered. What roles and responsibilities does Mr. Orr have as a councillor and as a director? Was he overseeing any particular issues or projects such that his removal might affect the community's interests or the over the next three months? If so, what community interests are affected and to what extent? Will his removal cause him any personal difficulties over the next three months? Will his removal deprive the community of a meaningful voice on certain issues over the next three months? Are there any issues over the next three months that would benefit from Mr. Orr's presence?

[17] Indeed, the affidavits tendered on behalf of Mr. Orr tend to minimize the existence of any problems associated with his removal. In particular, they say that "everything has been peaceful" while he has been out of office and out of his directorships. As for the future, the affidavits say nothing.

[18] Based on the totality of the evidence tendered on behalf of Mr. Orr, it would appear that Mr. Orr's absence from his elected office or his directorships does not cause any particular problem over

and above the fact that the community will be deprived of one elected councillor. In saying this, I do not discount the importance of that deprivation – it deserves weight.

[19] Left unaddressed by the parties is whether Mr. Orr will have any satisfactory recourse if it turns out that he should not have been removed from his elected office or directorships. As the parties have not addressed this, it forms no part of my assessment.

[20] Overall, assessing the evidence tendered on behalf of the parties on this motion and mindful that the burden of proof lies on the Chief and the Council, I find that that burden has been discharged. The balance of convenience lies in favour of the Chief and Council.

[21] Therefore, I shall order that the judgment dated December 5, 2011 of the Federal Court is stayed until this Court determines the appeal. The Chief and Council do not seek their costs of the motion and so I shall not order costs.

C. Miscellaneous matters concerning the appeal

[22] The parties are well-advanced in their preparations for the appeal: they need only file their memoranda and the requisition for hearing. The parties are represented by counsel in Edmonton, Alberta. Under the usual timelines under the *Federal Courts Rules*, SOR/98-106, as amended, the parties will have no trouble obtaining a hearing during the next sittings of the Court in Edmonton. These sittings will take place as early as the week of April 16 or as late as the week of April 30.

[23] In the circumstances of this case, it is in the interests of this community that the issues in this appeal be heard as soon as reasonably possible, *i.e.*, during the next sittings of the Court in Edmonton. I shall so order.

[24] The parties need not file a requisition for hearing. Soon the Judicial Administrator will contact counsel and find out their preferences for the date of hearing during this Court's next sittings in Edmonton.

[25] For clarity and by way of comfort to the parties, the order of this Court granting the stay and these reasons have nothing whatsoever to do with the issues on appeal and no significance should be drawn from them. The appeal is entirely separate. It will be determined on the basis of the evidentiary record in the appeal book and the governing law.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-450-11

STYLE OF CAUSE: Fort McKay First Nation Chief and
Council v. Mike Orr

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: Stratas J.A.

DATED: January 18, 2012

WRITTEN REPRESENTATIONS BY:

J. Trina Kondro

FOR THE APPELLANTS

Priscilla Kennedy

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ackroyd LLP
Edmonton, Alberta

FOR THE APPELLANTS

Davis, LLP
Edmonton, Alberta

FOR THE RESPONDENT