Federal Court of Appeal  Cour d'appel fédérale

Date: 20130429

Dockets: A-102-13
A-101-13

Citation: 2013 FCA 114

Present: **MAINVILLE J.A.**

BETWEEN:

Docket: A-102-13

GEORGE ASSINIBOINE, MARVIN DANIELS and RUTH ROULETTE

Appellants

and

DENNIS MEECHES

Respondent

BETWEEN:

Docket: A-101-13

DAVID MEECHES

Appellant

and

DENNIS MEECHES

Respondent

Heard at Winnipeg, Manitoba, on April 22, 2013.
Order delivered at Ottawa, Ontario, on April 29, 2013.

REASONS FOR ORDER BY: MAINVILLE J.A.

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REASONS FOR ORDER

MAINVILLE J.A.

[1] The appellants are seeking to stay the judgment of Russell J. of the Federal Court dated February 26, 2013 (citation number 2013 FC 196) which declared that the Long Plain First Nation Election Appeal Committee ("Election Appeal Committee") had made a final and binding decision requiring new elections for the offices of Chief and Council, and that all relevant parties were bound by and must comply with that decision.

BACKGROUND

[2] The Long Plain First Nation ("First Nation") is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. It is governed by a Chief and four councillors elected for three year terms pursuant to the *Long Plain First Nation Election Act* ("Election Act"), an election code adopted by the First Nation. The last elections were held on April 12, 2012, and resulted in the election of the appellant David Meeches as Chief, and of the appellants George Assiniboine, Marvin Daniels and Ruth Roulette as councillors. Mrs. Daniels Barbara Esau, who is not a party to these appeals, was also elected councillor at that time.

[3] Certain complaints challenging these elections were submitted to the Election Appeal Committee constituted under the Election Act, including a complaint by the respondent, Dennis Meeches. After reviewing the matter, the Election Appeal Committee concluded as follows:

> While there were some deviations from the Long Plain Election Act as discussed above, the election process overall appears to have been fairly conducted. However, since the Election Act is a key part of the governance of the First Nation and since it

> was enacted to govern elections, we recommend that the election be set aside and an election process be undertaken following the Act as it is written.

[4] An application was subsequently filed in the Federal Court on behalf of the First Nation seeking to set aside that decision. Concurrently, a motion was brought seeking to stay the decision pending the final determination of the application. The stay motion was dismissed by Harrington J. on May 11, 2012 (citation 2012 FC 570) on the ground that the Election Appeal Committee had simply recommended that a new election be held, and that this recommendation was not a "decision" or an "order" that had to be accepted or acted upon by the First Nation. Harrington J. however noted that if an order was issued by the Election Appeal Committee calling for a new election, then a new stay motion could be submitted, if need be. The First Nation discontinued its application shortly after receiving the decision of Harrington J.

[5] In light of that decision, the respondent Dennis Meeches asked the Election Appeal Committee to clarify its prior decision, which it declined to do. The respondent Dennis Meeches then initiated his own application before the Federal Court. That application was dealt with by Russell J. in the judgment which is the subject of the pending appeals before our Court. Russell J. found that he was not bound by the prior decision of Harrington J., and he rather concluded, at par. 87 of his reasons, "that a decision by the Election Appeal Committee under paragraph 17.7 [of the Election Act] that a new election should be called is binding upon the Tribal Government, and they must act upon it forthwith and call an election."

[6] The respondent subsequently filed a motion in the Federal Court seeking an order pursuant to Rule 431 of the *Federal Courts Rules*, SOR/98-106 compelling compliance with the decision of

Russell J. That motion was dismissed by Strickland J. on April 11, 2013 on the ground that the judgment of Russell J. was purely declaratory and could therefore not be enforced under Rule 431.

[7] The appellants are now seeking to stay the effects of the judgment of Russell J. pending the outcome of their appeals to our Court.

PROCEDURAL MATTER

[8] Prior to the hearing of these stay motions, the appellant David Meeches sought to add to his motion record an additional affidavit referring to additional documents. At the outset of the hearing, after having received representations from the parties, I refused to accept for filing this additional affidavit for the following reasons: (a) first, many of the documents referred to in the affidavit were already part of the record, the respondent Dennis Meeches having included some in his own motion record; (b) second, the remaining documents contemplated by the additional affidavit did not concern new matters and were available to the appellant David Meeches at the time he first filed his motion record; (c) third, in light of the timelines, the respondent was not provided with an adequate opportunity to respond to the additional affidavit and the additional material it referred to.

PRELIMINARY MATTER: CAN THE DECLARATORY JUDGMENT BE STAYED?

[9] Since Strickland J. found that the declaratory judgment of Russell J. was not enforceable under Rule 431 of the *Federal Courts Rules*, the respondent Dennis Meeches questions whether a stay of that judgment is appropriate. He relies for this purpose on *Janssen-Ortho Inc. v. Apotex Inc.*, 2009 FCA 250, 392 N.R. 308.

[10] *Janssen-Ortho Inc. v. Apotex Inc.* concerned a motion to stay an order of a prothonotary who had summarily dismissed a prohibition application under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133. Since the prothonotary's order simply put an end to an attempt to stop the Minister of Health from doing something she was required to do under her statutory mandate, Sharlow J.A. found that no stay was available in those circumstances. With respect, that decision has no bearing on the issue at hand in these proceedings.

[11] In this case, the judgment of Russell J. "declares that the Election Appeal Committee made a final and binding decision which requires new elections for the offices of Chief and Council of the Long Plain First Nation to take place" and "further declares that all relevant parties are bound by and must comply with the decision to hold new elections, including the present Tribal Government."

[12] Such a declaratory judgment is binding and has legal effect. A declaration differs from other judicial orders in that it declares what the law is without ordering any specific action or sanction against a party. Ordinarily, such declarations are not enforceable through traditional means. However, since the issues which are determined by a declaration set out in a judgment become *res judicata* between the parties, compliance with the declaration is nevertheless expected, and it is required in appropriate circumstances.

[13] Declaratory relief is particularly useful when the subject of the relief is a public body or public official entrusted with public responsibilities, because it can be assumed that such bodies and officials will, without coercion, comply with the law as declared by the judiciary. Hence the

inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory orders against public bodies and public officials.

[14] As aptly noted by MacGuigan J.A. in *LeBar v. Canada* (F.C.A.), [1989] 1 F.C. 603, 90 N.R. 5, the proposition that public bodies and their officials must obey the law is a fundamental aspect of the principle of the rule of law, which is enshrined in the Constitution of Canada by the preamble to the *Canadian Charter of Rights and Freedoms*. Thus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it. If the public body or official has doubts concerning a judicial declaration, the rule of law requires that body or official to pursue the matter through the legal system. The rule of law can mean no less.

[15] As further noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, ("*Doucet-Boudreau*") at par. 62, the assumption underlying the choice of a declaratory order as a remedy is that governments and public bodies subject to that order will comply with the declaration promptly and fully. However, should this not be the case, the Supreme Court of Canada has laid to rest any doubt about the availability of contempt proceedings in appropriate cases in the event that public bodies or officials do not comply with such an order. As noted by Iacobucci and Arbour JJ. at par. 67 of *Doucet-Boudreau*: "[o]ur colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases" (emphasis added).

[16] Moreover, in the seminal case of *RJR-MacDonald v. Canada (A.G.)*, [1994] 1 S.C.R. 311, the Supreme Court of Canada stayed a judgment of the Quebec Court of Appeal declaring valid certain provisions of legislation controlling the marketing and sale of tobacco products. After that judgment, regulations were enacted under the legislation that, if enforced, would have imposed costly obligations on the parties asserting a constitutional challenge to the legislation. In those circumstances, the Supreme Court of Canada found that it had jurisdiction to stay the effect of the judgment of the Quebec Court of Appeal. Justice Rothstein reiterated this principle in *Baier v. Alberta*, 2006 SCC 38, [2006] 2 S.C.R. 311 ("*Baier*") at paras. 12 to 14.

[17] The effect of the declaratory judgment of Russell J. is quite clear: new elections are to be called without any further delay. Further, as public officials and parties to the proceedings, the Chief and councillors of the First Nation are bound by this judgment and are compelled to implement its effects. Moreover, in this case, the respondent has indicated that he will be forcefully pursuing legal proceedings to enforce the judgment of Russell J. in the event the stay motion is not allowed: see transcript of cross examination of Dennis Meeches held Friday April 19, 2013 at pp. 45 to 47. Already the respondent has unsuccessfully sought an order under Rule 431. In these circumstances, it is both open to and appropriate for this Court to determine if a stay of the effects of the declaratory judgment of Russell J. should be granted.

ANALYSIS

[18] The test which applies when considering whether to grant a stay order pending an appeal is the well known test set out in *RJR-MacDonald v. Canada (A.G.)*, above. I summarized that test as

follows in *Tervita Corp. v. Canada (Commissioner of Competition*, 2012 FCA 223, 434 N.R. 159 at par. 9:

> a. First, a preliminary assessment must be made of the merits of the appeal to ensure that there is a serious issue to be determined. The threshold here is a low one. It suffices that the appeal is not frivolous or vexatious. A prolonged examination of the merits of the appeal is neither necessary nor desirable, save in exceptional circumstances, such as where the stay would, in effect, amount to the final determination of the appeal, or would impose such hardship on a party as to remove any benefit from proceeding with the appeal.
>
> b. Second, it must be determined whether the party seeking the stay will suffer irreparable harm if it were refused. The only issue to be decided at this stage is whether the refusal to grant the stay could so adversely affect the appellants' interests that the harm could not be remedied in the event the appeal is successful. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.
>
> c. Third, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the stay pending the decision on the merits of the appeal. The factors which may be considered in the assessment of this "balance of convenience" test are numerous and vary which each case. Public interest considerations may be considered within this balancing exercise.

Serious Issue

[19] Though the appellants raise numerous issues in their respective notices of appeal, for the purposes of this stay motion, I need only be satisfied that a least one of these issues meets the low threshold of the first part of the test.

[20] In this case, Harrington J. found that the Election Appeal Committee had made a non-binding recommendation to hold a new election, while Russell J. found that the committee had made a binding decision which required all interested parties to proceed forthwith with a new election. These apparently contradictory findings raise numerous issues which merit appellate

review, not the least of which is the binding or non-binding effect of the Election Appeal Committee's decision. This is a serious issue.

[21] However, I express no opinion whatsoever on that issue or on any other issue raised by the appeals. I only find that the appellants have raised in their appeals at least one issue that meets the serious issue test for the purposes of their stay motions.

Irreparable Harm

[22] Should the stay not be granted, as a result of the judgment of Russell J. and of the rule of law, the appellants will be required to follow the recommendation of the Election Appeal Committee to call a new election for the positions of Chief and councillors of the First Nation. The outcome of such an election cannot be predicted. Consequently, should the stay be denied, the appellants will risk losing their political offices prior to the normal expiration of the term for which they were elected. In the event they are not re-elected, they would no longer benefit from the pecuniary advantages attached to their offices, as well as from the prestige and authority which such offices confer.

[23] The loss of elected office prior to the expiration of the normal term of office has generally been found to constitute irreparable harm in light of the non-compensable nature of the loss suffered: *Baier*, above, at para. 16; *Gabriel v. Mohawk Council of Kanesatake*, 2002 FCT 483 ("*Gabriel*") at paras. 26 to 30; *Martselos v. Salt River First Nation #195*, 2007 FC 613 at para. 15; *Prince v. Sucker Creek First Nation*, 2008 FC 479 at paras. 30 to 32; *Lower Nicola Indian Band v. Joe*, 2011 FC 147 at paras. 18 to 20; *York v. The Council*, 2012 FC 103 at para. 35.

[24] Though in some cases irreparable harm has been found not to attach to the loss of elected office, these cases may be easily distinguished. Thus, in *Weekusk Sr. v. Thunderchild First Nation (Appeal Tribunal)*, 2007 FC 202, 309 F.T.R. 314, Tremblay-Lamer J. distinguished (at paras. 12 to 20) her findings on irreparable harm set out in *Gabriel*, above, on the basis that the elected band councillors had only recently been elected; however, a close reading of this decision shows that it was in fact decided on the basis of the balance of convenience rather than irreparable harm. Likewise, in *Stoney First Nation v. Shotclose*, 2011 FCA 232, 422 N.R. 191, Stratas J.A. found (at para. 40) that no irreparable harm resulted from the removal of band councillors from office; however, in that case, the terms of office of the councillors had already expired, and the concerned councillors were attempting to unilaterally extend their terms without calling an election.

[25] In this case, the appellants have held their elected positions for the last year as a result of the decision of Harrington J. finding that the Election Appeal Committee had simply made a non-binding recommendation. Moreover, the appellants' terms of office have not yet expired. In these circumstances, I find that the appellants will suffer irreparable harm should a new election be called as a result of the judgment of Russell J.

Balance of convenience

[26] The appellants have the right to appeal to this Court, and that right would largely become moot should an election be held as a result of denying a stay of the judgment of Russell J.

[27] Nevertheless, the respondent suggests that this Court should deny the stay and rather proceed with scheduling the appeals in such a manner that they may be finally disposed of after the election is called, but prior to the actual voting day. This is not a practical option. Once an election is called, it is simply unrealistic to believe that it could be cancelled without causing disruption and confusion among the electors of the First Nation. Moreover, should an election be held, this will involve costs for the First Nation and for each candidate running in the election.

[28] The respondent further submits that should the stay be granted, these appeals may well not be finally dealt with before the end of 2013 or the beginning of 2014. Should the decision of Russell J. be then upheld by our Court, and taking into account the minimum time required to organize and hold an election, by the day that election is held the appellants will have illegitimately occupied their elected offices for most of their three year term. This is certainly a valid preoccupation which I must take into account in assessing the balance of convenience and determining an appropriate solution.

[29] In this case, another important factor in the balance of convenience analysis is the public interest of the First Nation. Though here the appeals do not concern constitutional issues as was the case in *RJR-MacDonald v. Canada (A.G.)*, above, they nevertheless raise public interest considerations that must be taken into account in the balance of convenience component of the test to grant a stay: *Gopher v. Saultaux First Nation*, 2005 FC 481 at para. 28.

[30] Until recently, the appellants and the electors of the First Nation could reasonably conclude from the decision of Harrington J. that the elected Chief and council were legitimately occupying

their offices. However, the decision of Russell J. now places into question that legitimacy. As a result, there is now uncertainty in the management of the affairs of the First Nation. That uncertainty is not in the best interest of the First Nation, and it will continue until the matter is finally resolved, either through a decision of this Court or through a new election.

[31] In my view, calling an election now would result in even more uncertainty and confusion in the affairs of the First Nation, particularly in the event this Court eventually overturns the decision of Russell J., either during the time that election is taking place or after the results of the election have been made public. On the other hand, for the reasons set out above, the current situation should not be unduly prolonged.

CONCLUSIONS

[32] Consequently, I will stay the judgment of Russell J., but without costs on the stay motions. I will also significantly abridge the delays set out under the *Federal Courts Rules* for the purpose of expediting these appeals, as all parties requested me to do at the hearing of these stay motions. Moreover, pursuant to paragraph 53(1) and section 55 of the *Federal Courts Rules*, I will further order a modified appeal process to ensure that the abridged calendar for these consolidated appeals is respected. I will also set the date and place of the hearing of both consolidated appeals for Tuesday June 25, 2013 at 9:30 am in Winnipeg for a maximum duration of 3 hours. The stay order will remain subject to paragraph 398(3) of the *Federal Courts Rules*.

"Robert M. Mainville"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSELS AND SOLICITORS OF RECORD

DOCKETS:	A-102-13 A-101-13
MOTIONS TO STAY A JUDGMENT OF THE HONOURABLE RUSSELL J. OF THE FEDERAL COURT DATED FEBRUARY 26, 2013	
STYLE OF CAUSE:	*Meeches et al v. Meeches*
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	April 22, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
DATED:	April 29, 2013

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