Federal Court  Cour fédérale

Date: 20200525

Docket: T-311-19

Citation: 2020 FC 641

Ottawa, Ontario, May 25, 2020

PRESENT: Madam Justice McDonald

BETWEEN:

LAURA JAMES

Applicant

and

**MCDOWELL LAKE FIRST NATION
AS REPRESENTED BY CHIEF ELLEN VONTANE KENO
AND COUNCILLOR SHERYL DENISE
LAWSON**

Respondents

JUDGMENT AND REASONS

Introduction

[1] The Applicant, Laura James, is an elder of the McDowell Lake First Nation (MLFN) and she challenges the validity of Band Council Resolution 2019–001 (BCR) issued on January 16, 2019. This BCR extended the term in office of the elected MLFN Chief and Council for a two-month period to March 15, 2019. Another BCR issued on March 1, 2019, further extended the

term to March 29, 2019. At the end of the second extension, MLFN held an election and a new Chief and Council were elected

[2] For the reasons that follow, I conclude that BCR 2019-001 was not validly enacted and this judicial review is granted on this basis. However, I decline to grant the relief requested as it is disproportionate to any harm caused by the invalid BCR. I also decline to award costs to the Applicant.

Background

[3] MLFN is a small community located in Northern Ontario with 59 band members, 44 of whom are eligible to vote. MLFN is governed by an elected Chief and two Councillors. When BCR 2019-001 was passed on January 16, 2019, the Chief was Ellen Vontane Keno and the Councillors were Sheryl Lawson and Lois James.

[4] In addition to being an elder of MLFN, the Applicant is also the Mother of former Councillor Lois James. The Applicant's husband, Eli James, previously served as the Chief of MLFN for 12 years.

[5] The key dates and relevant events are outlined below.

[6] On November 25, 2014, a BCR was issued stating that the Chief and Council's term would run from the period of January 16, 2015 to January 16, 2019.

[7] On December 14, 2018, the Band Council determined that an election would be held on January 16, 2019, with nominations scheduled to take place on January 3-4, 2019. Councillor James was not present for this meeting.

[8] On January 16, 2019, Chief Keno and Councillor Lawson passed BCR 2019-001, which extended the term of the Chief and Council until March 15, 2019. Councillor James says she was not notified of this meeting and did not participate in the decision to issue the BCR.

[9] On February 15, 2019, the Applicant filed this Application for judicial review of the January 16, 2019 BCR.

[10] On March 1, 2019, Chief Keno and Councillor Lawson signed another BCR, which further extended the Council term to March 29, 2019. In her judicial review application, the Applicant did not request that this BCR be declared invalid.

[11] At a March 5, 2019 meeting, both Councillor James and the Applicant were nominated to run for the position of Chief. Both accepted the nomination. Councillor Lawson was also nominated to run for the position of Chief. Although Chief Keno was also nominated at this meeting, she declined the nomination.

[12] On March 29, 2019, the election was held at MLFN with 43 of the 44 eligible voters casting a vote. The Applicant participated in the election and in her judicial review application, she has not raised any issue with respect to the election itself.

[13] On March 29, 2019, Mary Lawson was elected Chief, and Dylan Cockroft and Anita Lawson were elected as Councillors.

[14] In her Notice of Application, the Applicant seeks the following:

> (b) A declaration that the Band Council Resolution 2019-001 adopted on January 16, 2019 is void, legally invalid and is of no force and effect as are the purported:
>
> > (i) establishment of a Nomination Meeting scheduled for February 20, 2019,
> >
> > (ii) establishment of a Custom Election to be held on Friday, March 15, 2019 for the purpose of electing one (1) Chief and two (2) Councillors,
> >
> > (iii) adoption and replacement of the November 25, 2014 Band Council Resolution; thereby, extending the Respondents term of officer to March 15, 2019 and permanently adopting a new term of office.
>
> (c) In the alternative, a declaration that Band Council Resolution 2019-001 adopted January 18, 2019 had the legal effect of setting aside Band Council Resolution of November 25, 2014; thereby, rescinding the election of Chief and Council for the term of January 16, 2015 to January 16, 2019.
>
> (d) A declaration that the Respondents ceased to have authority as Chief and Council effective January 16, 2019, or in the alternative, January 18, 2019.
>
> (e) A writ of *quo warranto* against the Respondents and a declaration that the Respondents do not represent the members of McDowell First Nation and have no authority to retain or hire an outside agency to draft an Interim Election Code for the McDowell Lake First Nation.
>
> (f) An interim/interlocutory Order staying any further action of former Chief Ellen Vontane Keno and Councillor Sheryl Lawson until the final disposition of this Application and any appeals from them and an order to stay the drafting of an Interim Election Code referenced above,
>
> (g) An order and declaration that the person nominated on January 4, 2019 are authorized to stand for election as nominated by the

> majority of the [*sic*] MacDowell Lake First Nation Band Members and, further, that the election by the [*sic*] MacDowell Lake First Nation Band Members of Chief and Band [*sic*] Counsellors shall be from those nominated on January 4, 2019.
>
> (h) An order and declaration that the election of [*sic*] MacDowell Lake First Nation Chief and Council shall be determined by the voting list determined and in place on January 18, 2019 (the election date chosen by the majority of the people of [*sic*] MacDowell Lake First Nation).
>
> (i) Any costs incurred by the Respondent in defending this application should not be paid by the [*sic*] MacDowell Lake First Nation as actions of the Respondents were made without legal authority.
>
> (j) Cost of this application.

[15] On May 15, 2019, the Applicant filed an Amended Application in which she requested that:

> (k) Costs to be ordered against McDowell Lake First Nation as the judicial review application challenges the community election process to accord with First Nations Governance Law and to further the public interest.

Relevant Band Council Resolution

[16] The full text of BCR 2019–001 issued on January 16, 2019, states:

> WHEREAS: The Band Council Resolution will supersede the Band Council Resolution dated November 25, 2014 calling for a McDowell Lake First Nation General Election January 16, 2015 and
>
> WHEREAS: The Chief and Council of McDowell Lake First Nation under Band Custom hereby call a Nomination Meeting to be held on February 20, 2019 and

> WHEREAS: A Band Custom Code General Election will be held on Friday March 15, 2019 for the purpose of electing one (1) Chief and two (2) Councillors
>
> THEREFORE BE IT RESOLVED THAT:
>
> The term of the newly elected Council will be from March 16, 2019 to March 16, 2023.

Issues

[17] While both the Applicant and the Respondents raise various issues, in my view, the issues for determination are:

1. Does the Applicant have standing to bring this Application?
2. Is BCR 2019–001 valid?
3. If BCR 2019–001 is not valid, what is the appropriate remedy?

Standard of Review

[18] The Applicant argues that the applicable standard of review is correctness as this matter involves procedural fairness issues and interpretation of governance matters (*Peguis First Nation v Bear*, 2017 FC 179, at para 29 [*Peguis*]).

[19] For the reasons outlined below, I have concluded that the BCR was not validly issued, therefore even if the reasonableness standard as articulated by the Supreme Court in *Canada (Minister of Citizenship and Immigration) Vavilov*, 2019 SCC 65, is applicable, the administrative decision to enact BCR 2019–001 is not "… based on an internally coherent and

rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[20] Additionally as noted in *Vavilov*, "[w]hile some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis" (*Vavilov* at para 86).

Analysis

1. Does the Applicant have standing to bring this application?

[21] The Respondents argue that the Applicant does not have standing under s. 18.1(1) of the *Federal Courts Act*, RSC 1985 c F-7, because she was not a member of Council and therefore she is not a person who was directly affected by the BCR.

[22] Section 18.1(1) of the *Federal Courts Act* states:

> An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[23] A party has standing where the decision affects rights or imposes legal obligations, or could prejudicially affect them (*Cowessess First Nation no. 73 v Pelletier*, 2017 FC 692 at para 19).

[24] The facts in *Shotclose v Stoney First Nation*, 2011 FC 750 [*Shotclose*] are similar where the Chief and Council passed a BCR to extend their term by two years. In *Shotclose* the Applicants were all members of the First Nation. Although the applicants' standing was not directly challenged in *Shotclose*, in allowing the judicial review the Court held that "[t]he Band is entitled to determine its own leadership selection practices but that collective right must be tempered by respect for the rights of its members to participate in that process" (*Shotclose,* at para 82). The Court also noted that "… the respondents owed the applicants a duty of fairness as members of the BFN whose established voting rights, privileges or interests would be affected by any decision to alter the Band's electoral practices" (*Shotclose* at para 92).

[25] In my view, like in *Shotclose*, the Applicant here as-a member of MLFN with the right to vote, has the necessary standing to allow her to bring this Application pursuant to s. 18.1(1) of the *Federal Courts Act*.

2. Is BCR 2019–001 valid?

[26] The Applicant argues that the BCR is invalid as it was adopted in contravention of s. 2(3)(b) of the *Indian Act* (the *Act*) and s. 12 of the *Indian Band Council Procedure Regulations* (the *Regulations*).

[27] Section 2(3)(b) of the *Act* provides that:

Unless the context otherwise requires or this Act otherwise provides, …	Sauf indication contraire du contexte ou disposition expresse de la présente loi :

(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.	**b)** un pouvoir conféré au conseil d'une bande est censé ne pas être exercé à moins de l'être en vertu du consentement donné par une majorité des conseillers de la bande présents à une réunion du conseil dûment convoquée.

[28] Section 12 of the *Regulations* states:

Each resolution shall be presented or read by the mover, and when duly moved and seconded and placed before the meeting by the presiding officer, shall be open for consideration.	Toute motion doit être présentée ou lue par son auteur; une fois qu'elle a été proposée et appuyée en bonne et due forme et soumise à l'assemblée par le président, elle devient sujette à débat.

[29] Compliance with the *Act* and the *Regulations* requires more than just formal compliance. For a meeting to be "duly convened" within the meaning of s. 2(3)(b) of the *Act*, the Council's actions must comply with the "spirit and intention of the provisions in their entirety" (*Peguis* at para 58). This means that it is not enough for Councillors to be present at a meeting, they must also be able to consider the resolution that is the subject of the meeting (*Peguis* at para 58).

[30] The evidence is that Councillor James was not informed of the meeting, nor was she provided with the opportunity to discuss the BCR with the rest of the Council or to provide any input. Neither Chief Keno nor Councillor Lawson discussed the content of BCR 2019-001 with her. In these circumstances, BCR 2019-001 falls short of the requirements of s. 2(3)(b) of the *Act* and s. 12 of the *Regulations.* BCR 2019-001 was not "debated and passed in accordance

with the rules and guidelines of the Band and in accordance to the principles of democracy" (*Balfour v Norway House Cree Nation*, 2006 FC 213, at para 55 [*Balfour*]).

[31] In fact, Chief Keno and Councillor Lawson's decision-making process on this BCR appears to have taken place entirely to the exclusion of Councillor James. In *Balfour,* Justice Blais held at, para 55, that "[r]esolutions cannot be adopted in secret meetings, and then subsequently ratified at a duly convened meeting without being discussed and debated. The resolution itself must be passed at a duly convened meeting." If it is insufficient for a resolution to be adopted in secret and then subsequently ratified, it follows that a resolution adopted in secret without a subsequent ratification at a duly convened meeting must also be insufficient to satisfy the requirements of s. 2(3)(b) of the *Act* and s. 12 of the *Regulations.*

[32] The Respondents argue that the *Act* permits the ratification of BCRs in the unique circumstances faced by MLFN – the territory is only seasonally inhabited and community members are spread out over a significant distance. Assuming that is the case, there is still a lack of evidence that there was any attempt to convene a meeting to address the matters outlined in BCR 2019-001. In fact, both Chief Keno and Councillor Lawson acknowledged on cross-examination that a meeting was not duly convened. Furthermore, there was no evidence that there was any attempt at a discussion about the content of the BCR with Councillor James prior to its adoption. Therefore, in my view, the particular circumstances of MLFN does not justify the adoption of a BCR that does not comply with the *Act* and *Regulations*.

[33] The Respondents also argue that it is the Council's "custom" to pass BCRs without duly convened meetings due to the seasonal and geographical considerations noted above. Chief Keno stated in her cross-examination that Councillor James had previously signed BCRs after meetings that she did not attend, and that this was a common practice among Council members even before this particular Council was elected. Chief Keno states that this also occurred when she served as a Council member prior to her 2014 election as Chief. This is the only evidence of this alleged custom in the record.

[34] To rely upon a "custom," the burden is on the party claiming there is a custom to prove its existence (*Vollant v Sioui*, 2006 FC 487 at para 38). In *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115, at para 36 [*Francis*], Justice Martineau provided the following definition of custom:

> [f]or a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a "broad consensus" as to its applicability. This would exclude sporadic behaviours which may tentatively arise to remedy certain exceptional difficulties of implementation at a particular moment in time as well as other practices which are clearly understood within the community as being followed on a trial basis.

[35] Apart from Chief Keno's statement, there is no other evidence that this practice is "firmly established, generalized and followed consistently and conscientiously by a majority of the community" (*Francis* at para 36). Nor is there any evidence that this behaviour was known to have occurred outside of the Council or that the rest of the community would have accepted it. Accordingly, I am not satisfied that there is sufficient evidence to establish a custom that would override s. 2(3)(b) of the *Act* or s. 12 of the *Regulations*.

[36] I therefore conclude that BCR 2019-001 was not passed in accordance with s. 2(3)(b) of the *Act* or s. 12 of the *Regulations*.

3. If BCR 2019–001 is not valid, what is the appropriate remedy?

[37] The Applicant seeks various forms of relief. As noted, she does not directly challenge the March 29, 2019 election in her Notice of Application or in her Amended Notice of Application. However, in her argument, she submits that if the 2019 BCR is not valid then the election results should be invalidated and that a new election be ordered.

[38] In my view, on these facts, it is a step too far to assume that an invalid BCR necessarily invalidates all subsequent actions. MLFN needed to hold an election, as the term of the Chief and Council were ending. Although the Applicant raises issues about which nomination list should have been used, and the date on which the election should have been held, she does not dispute that an election was necessary. Further, there is nothing in the evidence that demonstrates there were issues with the election itself. The narrow issue is the validity of the BCR by which the Chief and Council extended their term by two months prior to the election.

[39] A new Chief and Council for MLFN were elected on March 29, 2019. The previous Chief and Council members who extended their term are no longer serving. Accordingly, it is not clear what, if anything, would be gained from invalidating the election results. Invalidating the election results due to the invalidity of BCR 2019-001 would leave MLFN without a Chief and Council. While part of the process that led the 2019 election was flawed, given the amount

of time that has passed, in my view, “the community is entitled to finality” (*Ledoux v Gambler First Nation*, 2019 FC 1465, at para 34).

[40] In *Medzalabanleth v Conseil des Abénakis de Wôlinak Council*, 2014 FC 508, at para 53, Justice de Montigny held that to set aside an election result, an applicant must first show that there was a violation of the election code and then establish that the violation might have affected the result. Here, the Applicant did not argue that there was a violation of MLFN’s election code, and even if the issue with the BCR is an implied violation, she has not demonstrated that the alleged violation affected the outcome of the election. In the absence of a principled reason to invalidate the election, and leave MLFN without a Chief and Council, I decline to grant the relief requested.

[41] The discretion to deny a portion of the relief sought involves the balance of conveniences, including the consideration of any disproportionate impact on the parties (*Gamblin v Norway House Cree National Band Council*, 2012 FC 1536, at para 87, citing *MiningWatch Canada v Canada (Fisheries & Oceans)*, 2010 SCC 2, at para 52). In my view, to grant the relief requested by the Applicant would have a disproportionate impact on the MLFN.

[42] I therefore decline to grant any of the remedies the Applicant has requested.

Costs

[43] A successful party is normally entitled to an award of costs. However, in the circumstances, I decline to award costs to the Applicant. The Applicant filed affidavits

containing impermissible hearsay evidence. More egregiously, the Applicant made baseless allegations of improprieties and criminal conduct, including fraud and theft, against various individuals. The Applicant acknowledged during her cross-examination that she did not have any evidence to support these allegations. This is an inappropriate and unnecessary course of conduct. I therefore conclude that it is a proper basis for me to exercise my discretion to not award costs to the Applicant in this case.

JUDGMENT IN T-311-19

THIS COURT'S JUDGMENT is that the judicial review is granted as BCR 2019–001 was not validly enacted. I decline to grant any remedy and I also decline to award costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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