Date: 20070704

Docket: T-829-07

Citation: 2007 FC 705

Winnipeg, Manitoba, July 04, 2007

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

THUNDERCHILD FIRST NATION APPEAL TRIBUNAL, and JOSEPH JIMMY and ALLAN SNAKESKIN

Applicants

and

DALE AWASIS, GARRY FRENCHMAN, WILTON ANGUS, MELVIN THUNDERCHILD, ALBERT MEETOOS, LEONARD PADDY, JOHN B. NOON, RICHARD STAR, CHARLIE PADDY, SR., VIOLET WEEKUSK, MARY THUNDERCHILD, ANDREW WAPASS, LESLIE ANGUS, EUGENE OKANEE, and JAMES STANDING WATER

Respondents

REASONS FOR ORDER

[1] This is a motion by the Applicants for

> *An injunction ordering the Respondents to refrain from purporting to exercise any jurisdiction or authority concerning appeals made in relation to or disputes concerning the election that took place on*

> *March 26, 2007, or the recount that took place on April 2, 2007 at Thunderchild First Nation, until such time as the Appeal Tribunal has had the opportunity to hear and decide on those appeals and disputes;*

together with costs and an order for substituted service. Substituted service is no longer an issue that needs to be determined. For the reasons that follow, I am dismissing this motion and the request to set aside the appointment of an Expanded Appeal Tribunal without costs to any party.

[2] The Applicants Jimmy and Snakeskin purport to constitute the Thunderchild First Nation Appeal Tribunal, being the remaining members of that Tribunal as constituted at a meeting of the Chief and Council of the Thunderchild First Nation held August 9, 2006. The Respondents Awasis et al. are persons purportedly elected as Chief and Counsellors (Headmen) of the Thunderchild First Nation by an election held March 26, 2007 together with members of what is called an Expanded Appeal Tribunal appointed by the Chief and Councillor Respondents.

[3] The Thunderchild First Nation is a Cree First Nation located in north western Saskatchewan. In August 2004, it adopted a written Constitution which provides for among other things, an Appeal Tribunal and incorporates by way of a schedule, the *Thunderchild First Nation Election Act.* That *Act* contains detailed provisions as to the election of a Chief and Council, the manner in which voting is to be conducted, it provides for Electoral Officers to preside and it provides for an appeal to an Appeal Tribunal which, according to section fourteen of that *Act*, hears all appeals in respect of an election and makes a final and binding decision from which there is no further appeal.

[4] To recount briefly some of the events leading up to the current dispute, the Constitution, including the *Election Act* of the Thunderchild First Nation was put in place August 12, 2004. In the spring of 2006, the elected Chief of the Thunderchild First Nation was Walter Jimmy. He, together with the Council, appointed members of the Appeal Tribunal as contemplated by the *Elections Act*. At that time, August 9, 2006, the Applicants Joseph Jimmy and Alan Snakeskin were appointed to that Tribunal, along with Maria Linklater. On October 16, 2006, an election was held and Winston Weekusk was apparently elected as Chief. That election was challenged and the Appeal Tribunal was asked to determine the matter. On November 16, 2006, Maria Linklater resigned from the Tribunal leaving just the Applicants Jimmy and Snakeskin. On January 22, 2007, the Appeal Tribunal determined that a new election should be held. That election occurred on March 26, 2007. The Chief and Council applied to the Federal Court before the election was held for a stay of that determination. The stay was refused by a decision of this Court dated February 22, 2007 cited as *Weekusk v. Thunderchild First Nation (Appeal Tribunal)*, 2007 FC 207.

[5] In the election conducted on March 26, 2007, one relative of the Applicant Jimmy ran unsuccessfully, for Chief and another, unsuccessfully for Council. A relative of the Applicant Snakeskin ran unsuccessfully for Council. These circumstances, the Respondents allege, create a situation where the Applicants Jimmy and Snakeskin can no longer occupy positions with the Appeal Tribunal. However, if they were to recuse themselves, there would be no persons remaining to constitute that Tribunal. This allegation was made by the Respondents but not vigorously perused on the basis of bias.

[6] On the evening of March 26, 2007 and into the morning of the next day, the ballots for the election were counted in a process observed by about 200 members of the Thunderchild First Nation. As a result of this count it was announced that the Respondent Dale Awasis had been elected Chief and some of the Respondents, Richard Star, Garry Frenchman, Melvin Thunderchild, Walton Angus, Albert Meetoos, Leonard Paddy and John B. Noon had been elected as Councillors (Headmen). This election was recognized by the Department of Indian and Northern Affairs by letter dated April 18, 2007, however, that letter recognized that the Appeal Tribunal might consider the matter.

[7] The Chief Electoral Officer conducting the election received oral and subsequently two written requests for a recount. A meeting was held with that Officer and the Appeal Tribunal, comprising the Applicants Jimmy and Snakeskin, as a result of which it was determined by the Chief Electoral Officer that a recount should take place. It was determined that the recount to take place on April 2, 2007 and the Department of Indian and Northern Affairs was so notified. It is important to observe that the *Elections Act* does not provide for a recount. It does provide for an appeal to the Appeal Tribunal however, no appeal of the March 26, 2007 election was ever invoked under the provisions of the *Elections Act*.

[8] In the meantime, the apparently newly elected Chief, Dale Awasis and newly elected Councillors appointed a new Appeal Tribunal of 8 persons not including the Applicants Jimmy or Snakeskin. The new Chief, by letter dated March 29, 2007, purported to terminate the Applicants Jimmy and Snakeskin as members of the Tribunal. Two of the new Appeal Tribunal, Paddy and

Weekusk, by a letter dated March 29, 2007, instructed the Electoral Officer not to conduct a recount. This Electoral Officer says that she did not read the letter until April 3, 2007, the day after the recount was conducted.

[9] On April 2, 2007, the Electoral Officer conducted a recount in the presence of about 150 members of the Thunderchild First Nation. The Respondents allege that this recount was irregular in that certain ballots that they say were properly marked were rejected. As a result of the recount, the Electoral Officer declared that Delbert Wapass (and not Dale Awasis) had been elected as Chief and that all of the Councillors said to have been elected as of March 26, 2007 were again said to be elected except for Ira Horse who was said to be elected instead of Leonard Paddy. The Applicants Jimmy and Snakeskin, in a letter dated April 7, 2007, said that they accepted the results arising from the recount and if the matter was appealed, they would review the matter.

[10] Dale Awasis wrote a letter dated April 19, 2007 to each of the Applicants Jimmy and Snakeskin saying that the letter of March 29, 2007 purporting to terminate their membership in the Appeal Tribunal should be disregarded and that they were reinstated as members of the Appeal Tribunal along with the additional eight members. This group of ten constituted the so-called Expanded Appeal Tribunal.

[11] The Expanded Appeal Tribunal wrote a letter to the Electoral Officer dated April 30, 2007, questioning the validity of the recount. The Applicants, through their solicitor wrote to the Thunderchild First Nation on May 2, 2007, expressing concern as to the actions of Dale Awasis and

the purported removal of the applicants from the Appeal Tribunal and appointment of others to that Tribunal. On that same day, May 2, 2007, the purported newly constituted Appeal Tribunal met and determined that the recount of April 2, 2007 was not in accordance with the *Elections Act*. The Applicant Jimmy initially met with the Expanded Appeal Tribunal but quickly left. The Applicant Snakeskin never met with the Expand Appeal Tribunal.

[12] This motion was filed May 18, 2007.

THE ISSUES

[13] The essential issue in these application proceedings as a whole is who is to evaluate appeals in respect of the election for Chief and Councillors of the Thunderchild First Nation held on March 26, 2007 and the purported recount of April 2, 2007. Is it to be the "old" Appeal Tribunal consisting of the Applicants Jimmy and Snakeskin or the "Expanded" Appeal Tribunal in which those persons are included along with eight others chosen by the Chief and Councillors purportedly elected on March 26 2007?

[14] In this particular motion the Court is asked to restrain the Respondents, who include the Chief and Councillors of March 26, 2007 and members of the Expanded Appeal Tribunal appointed by them, from acting until the members of the "old" Appeal Tribunal, Jimmy and Snakeskin have heard and determined the propriety of these matters.

THE STATUS QUO

[15] This is an application for an interlocutory injunction the function of which is to preserve the status quo, that is, to keep matters in the state as they existed at the time of that the motion for an interlocutory injunction was brought. This motion was filed May 18, 2007; therefore, the state of matters as of that date must be examined.

As of May 18, 2007:

1. An election had been held March 26, 2007 the result of which was that Dale Awasis and seven Councillors (Headmen) (including Leonard Paddy) were declared to have been elected by the Chief Electoral Officer.

2. No challenge by way of an appeal under the *Election Act* has ever been taken in respect of the election of March 26, 2007.

3. A recount of the March 26 ballots was undertaken by the Chief Electoral Officer, after conversation with the Applicants Jimmy and Snakeskin, on April 2, 2007. Having conducted the recount Dale Wapass was declared to have been elected as Chief and Isabelle (Ira) Horse was declared to have been elected as a Headman in place of Leonard Paddy. All other Headmen remained the same.

> 4. Dale Awasis and the March 26 Headmen had appointed an Expanded Appeal Tribunal consisting of ten persons including the Applicants Jimmy and Snakeskin.
>
> 5. The Expanded Appeal Tribunal, absent the Applicants Jimmy and Snakeskin, on an Appeal, ruled that the April 2 recount was not done in accordance with the *Election Act*.

[16] Counsel for the Applicants conceded in argument that the evidence does not show that any further activity by the Expanded Appeal Tribunal or Chief and Council, that is, the Respondents, is anticipated in respect of the March 26, 2007 election or the April 2, 2007 recount. To that extent therefore, the subject matter of the injunction sought does not exist. Applicants' Counsel however sought the indulgence of this Court under Rule 3 of the *Federal Court Rules* 1998 and sections 18 and 18.1 of the *Federal Courts Act* to consider the propriety of the purported appointment of the Expanded Appeal Tribunal and the purported decision by that Tribunal that the April 2, 2007 recount was not in accordance with the *Election Act* and to set them aside. Respondents' Counsel opposed this request. In order to bring some finality to this matter I will grant the request of the Applicants and consider that they have requested a determination as to whether the Chief and Council as elected on March 26, 2007 could appoint new members to the Appeal Tribunal and whether such Tribunal could consider an appeal as to the recount of April 2, 2007.

TEST FOR INTERLOCUTORY INJUNCTION

[17] Counsel for both sets of parties were agreed that the appropriate test to be applied in considering whether an interlocutory injunction should be granted is that as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 namely:

1. Is there a serious issue to be trial?
2. Will the moving party suffer irreparable harm if the injunction is not granted?
3. Does the balance of convenience favour the granting of an injunction?

Each of these criteria will be considered.

SERIOUS ISSUE

[18] Counsel for the parties agree that the standard for establishing a serious issue on a motion such as this is low. There must, however, be such a standard. Here, where there is no evidence that there is anything left to be enjoined, there cannot be said to be a serious issue. The Respondents' before the motion papers were filed on May 18, 2007 had done what they were going to do with respect to the March 26, 2007 election, which was nothing. The April 2, 2007 recount was appealed to the Expanded Appeal Tribunal which Tribunal had declared the recount not to be in accordance with the *Election Act* before May 18, 2007.

[19] There is no evidence that anything further is threatened or anticipated.

[20] I will consider subsequently, because Applicants' Counsel requested that I do so, the propriety of the appointment of the Expanded Appeal Tribunal, but that is not the subject of the motion for an interlocutory injunction.

IRREPARABLE HARM

[21] The Applicants claim that their appointment to the Appeal Tribunal in August 2006 was largely influenced by the respect that they had achieved as elders within the Thunderchild Nation. They say that not only does the Constitution of 2004 govern the affairs of that Nation but also the traditional laws and customs which are entrenched in the preamble to the Constitution.

[22] The Applicants argue that any attempt to supplant them as the only Appeal Tribunal is not only offensive to traditional laws and the Constitution but also will create chaos and confusion in the community and with those dealing with the community. This position is articulated principally in the affidavit of Dale Noon, a member of the Thunderchild Nation and operator of that Nation's radio station.

[23] The Respondents argue that they have acted responsibly and within the laws and Constitution of the Thunderchild Nation. Any chaos, they argue, is that caused by the Applicants. They argue that continued funding from the federal government may be prejudiced and that yet another election at this time will prove very costly.

[24] I find that no harm of an irreparable nature has been made out by the Applicants, who bear the burden in this regard. The evidence of Annette Jimmy and J. Albert Angus filed late in these proceedings but on consent of the parties shows that serious efforts are being made to clarify the whole issue as to constitution of the Appeal Tribunal by way of referendum as to the implementation of a new *Act* in that regard.

[25] There is no irreparable harm made out in respect of the Applicants Jimmy and Snakeskin personally. Any harm to the community at large is in the course of being rectified and cannot be seen to be irreparable.

BALANCE OF CONVENIENCE

[26] An interlocutory injunction is intended to preserve the status quo until the proceedings can be finally resolved. Here the status quo is that no further activity by the Respondents in respect of the March 26 election or April 2 recount is anticipated. The Thunderchild Nation is going about its usual business in other matters.

[27] The balance of convenience does not favour the granting of an interlocutory injunction.

AS TO AN INTERLOCUTORY INJUNCTION

[28] Therefore, in applying the three part test, I find that the Applicants have not met any of the three criteria. The motion for an interlocutory injunction will be dismissed.

AS TO SETTING ASIDE THE EXPANDED APPEAL TRIBUNAL

[29] As previously indicated in these Reasons, Applicants' Counsel asked for leave to include in the request made for an order, an order as to setting aside the purported appointment of an Expanded Appeal Tribunal and their decision as to the April 2 recount. I fully appreciate that it is not usual that such a request be considered on a motion of this kind, particularly when opposed by the Respondents. However, given that the Applicants' according to their Counsel, are persons of limited means, and that there is an interest in seeking finality in these matters. I agree to Applicants request to make such a determination. I find that the appointment of the Expanded Appeal Tribunal by the Chief and Council as elected March 26, 2007 was in accordance with the Constitution and *Election Act* of the Thunderchild Nation and that their decision as to the April 2 recount was proper. To the extent that the laws and customs of that Nation are also to be considered as they were put before me in the Applicants' evidence, I find nothing in that evidence that is inconsistent with my findings.

[30] The Constitution provides in Article Seven for an Appeal Tribunal. The Constitution does not stipulate the number of persons to constitute such Tribunal. Article 7.05 contemplates that legislation will be passed which will set out more precisely various matters in respect of that Tribunal and, in the meantime, the Chief and Council may appoint members for a term not exceeding two years. It says:

> *7.05 Until such time as legislation of Thunderchild First Nation is passed governing the Appeal Tribunal, the appointment of the Appeal Tribunal members shall be made by the Chief and Council on an interim basis for a term not exceeding two (2) years and on reasonable terms and conditions*

> *consistent with the Thunderchild First Nation Constitution.*

[31] The appointment of the Applicants Jimmy and Snakeskin to the Appeal Tribunal (together with Maria Linklater) is reflected in minutes of the meeting of the Chief and Council at the time on August 9, 2006. Motion #3 reads:

> *Chief and Council hereby move to appoint the following individuals as members of the New Thunderchild Appeal Tribunal (and thereby replacing the previous members): Joe Jimmy Sr., Allan Snakeskin, and Maria Linklater.*
>
> *Motion by: Charlie Paddy*
> *Second by: Arnold J. Wapass*
> *Motion Carried.*

[32] There is nothing else in evidence as to their appointment. No term is mentioned, however whatever the term was, it cannot exceed two years as stipulated by Article 7.05 of the Constitution.

[33] An election was held on March 26, 2007. The votes were counted and the Chief Electoral Officer, in accordance with Section 8.02 of the *Election Act* declared that Dale Awasis had been elected as Chief together with seven Councillors (Headmen). As stated by Cheryl Wapass, Chief Electoral Officer, at paragraph 24 of her affidavit these new Chief and Councillors were sworn in on March 27, 2007 and, in accordance with section 9 of the *Election Act* the results of the election were delivered to them. At that point, the functions of the Chief Electoral Officer are complete. Section 10.01 of the Act provides only that she is to retain the ballots for a period of thirty (30) days in the event of an appeal. No provision for a recount is made, only a provision for an appeal. No appeal was taken.

[34] If an appeal were to be taken, it is to the Appeal Tribunal in accordance with section fourteen of the *Election Act*. The process is begun by a candidate or voter who must submit an affidavit setting out one or more of the various stipulated grounds for appeal. No such appeal was launched in respect of the March 26, 2007 election. Thirty days have gone by. That election is final.

[35] The newly elected Chief and Council as of March 27, 2007 were in a position, in accordance with Article 7.05 to appoint members to the Appeal Tribunal. There is no stipulated number of members. The appointment of eight new members selected from various groups within the community is not unreasonable. There is no provision to dismiss a member of the Appeal Tribunal save and except perhaps article 7.02 which requires among other things good character, impartiality and no criminal record. However, no such circumstance has been alleged here. Respondents' equivocation as to bias is noted but it has not been vigorously urged in oral argument. The purported dismissal of the Applicants Jimmy and Snakeskin was, in any event, revoked. Thus the final Expanded Appeal Tribunal is not inconsistent with the Constitution and the Chief and Council appointing the Expanded Appeal Tribunal were duly elected in accordance with the *Election Act*.

[36] The purported recount of April 2 was found by the Expanded Appeal Tribunal to be not in accordance with the *Election Act*. They had the power so to find. In any event, I agree with the finding. The *Act* makes no provisions for a recount, the remedy is an appeal. No appeal was sought.

[37] Therefore, I find that the appointment of the Expanded Appeal Tribunal, including the Applicants, does not offend the Thunderchild Nation Constitution or *Election Act*.

COSTS

[38] The Respondents have been successful on the motion, including in respect of the relief sought orally on the motion. Applicants' Counsel points out that the Applicants have limited means and brought the motion in a genuine endeavour to seek clarity and regularization in respect of a chaotic matter. To that extent, I agree that clarity is desirable and the matter has been chaotic.

[39] I award no costs to any party.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-829-07**
STYLE OF CAUSE:	**THUNDERCHILD FIRST NATION APPEAL TRIBUNAL et al. v. DALE AWASIS et al.**
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APPEARANCES:

Donald E. Worme, Q.C. Tel.: (306) 664-7175 Fax: (306) 664-7176	FOR THE APPLICANTS
Katherine Hensel Tel.: (416) 593-2486 Fax: (416) 593-9345	
Ranji G. Jeerakathil Tel.: (306) 975-7107 Fax: (306) 290-9013	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

SEMAGANIS WORME Asimakaniseekan Askiy Indian Reserve Saskatoon, SK	FOR THE APPLICANTS
STOCKWOODS LLP Toronto, ON,	
MacPHERSON LESLIE & TYERMAN LLP Saskatoon, SK	FOR THE RESPONDENTS