

Federal Court



Cour fédérale

Date: 20110330

Docket: T-419-11

Citation: 2011 FC 395

Vancouver, British Columbia, March 30, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**COUNCILLOR MIKE ORR, AND
COUNCILLOR CECILIA FITZPATRICK**

Applicants

and

**FORT MCKAY FIRST NATION,
CHIEF JIM BOUCHER,
COUNCILLOR RAYMOND POWDER,
AND COUNCILLOR DAVID BOUCHIER**

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion by the applicants for an interim injunction pursuant to Rule 373 of the *Federal Courts Rules*, SOR/98-106 and sections 18.1 and 44 of the *Federal Courts Act*, RSC, 1985, c F-7, compelling the Fort McKay First Nation to adjourn the election set for Tuesday, April 5, 2011 and prohibiting Pauline Gauthier from acting as election officer for the election.

[2] The applicants are two councillors of Fort McKay First Nation who had previously judicially reviewed three Band council resolutions removing them from office (Court file T-2089-10). The result of the judicial review was that Madam Justice Johanne Gauthier issued an interim injunction on January 13, 2011 returning them to office. The judicial review was scheduled to be heard on May 17, 2011. A further Band council meeting purported to remove them from office again. Mediation then occurred and resulted in a special meeting being called for March 3, 2011 at which meeting a vote would take place to determine whether the general election, which all parties agreed should be held, would take place on April 5, 2011 or June 1, 2011. All issues except costs were settled by the mediation.

[3] At the general meeting on March 3, 2011, the voters voted 77 to 66 in favour of the April 5, 2011 date.

[4] The applicants submitted that there were a number of issues with the vote at the general meeting on March 3, 2011. These included:

1. No votes were taken at the hospital.
2. In the revised vote count, there was no affidavit from the returning officer at Fort McKay and no affidavit from the person who helped in the revised vote count.
3. Five people were told that there was no vote.
4. The applicant, Councillor Orr, was not permitted to speak at the meeting.
5. The Band list was altered.
6. People were allowed to vote after 9:00 p.m., the closing time for the vote.

[5] The respondents made submissions on each of these issues.

Issue

[6] Should the Court grant an injunction preventing Fort McKay First Nation from having a general election on April 5, 2011?

[7] The test for granting an interim injunction is:

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

As well, the applicants must meet all three branches of the tri-partite test in order to obtain an injunction (see *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311).

[8] I wish to first deal with irreparable harm. I have reviewed the filed material and considered the representations of counsel and I cannot find any evidence that goes to the issue of whether the applicants would suffer irreparable harm if the election was held on April 5, 2011 instead of June 1, 2011. The applicants can participate as candidates if the election is held on April 5, 2011. This is not a case where electors will not be able to vote in an election as the vote at the March 3, 2011 meeting was a vote to determine when the actual election would be held. It was not the election vote itself. I am of the opinion that the applicants have not shown that they would suffer irreparable harm if the general election was held on April 5, 2011 instead of June 1, 2011.

[9] As the applicants must meet all three branches of the test in order to obtain the injunction, I need not deal with the other two branches of the test.

[10] As a result of irreparable harm not being found, the motion must fail.

[11] The motion of the applicants is dismissed. Neither party addressed the issue of costs at the hearing of the motion, although costs were requested in the written material. Absent some argument on costs, I decline to make an order for costs.

ORDER

IT IS ORDERED that the motion for an interim injunction is dismissed and there is no order as to costs.

“John A. O’Keefe”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-419-11

STYLE OF CAUSE: COUNCILLOR MIKE ORR, and
COUNCILLOR CECILIA FITZPATRICK

- and -

FORT MCKAY FIRST NATION,
CHIEF JIM BOUCHER,
COUNCILLOR RAYMOND POWDER,
and COUNCILLOR DAVID BOUCHIER

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 28, 2011

REASONS FOR ORDER: O'KEEFE J.

DATED: March 30, 2011

APPEARANCES:

Priscilla Kennedy FOR THE APPLICANTS

Trina Kondro FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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