

Federal Court



Cour fédérale

Date: 20111205

Docket: T-1180-11

Citation: 2011 FC 1305

Ottawa, Ontario, December 5, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

MIKE ORR

Applicant

and

**FORT MCKAY FIRST NATION
CHIEF AND COUNCIL**

Respondents

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Fort McKay First Nation Council to suspend Mike Orr from his position as a Councillor by Band Council Resolution on July 13, 2011.

[2] For the following reasons, this application is allowed.

I. Background

[3] On April 5, 2011, Mike Orr (the Applicant) was re-elected as a Councillor for Fort McKay First Nation.

[4] On July 1, 2011, the Applicant was charged with the sexual assault of a woman at her home contrary to section 271 of the *Criminal Code*, RSC 1985, c C-46. The alleged victim is not a member of the Fort McKay First Nation. The Applicant has yet to be convicted of this offence but is required to abstain from communicating with the woman or from going near her residence.

[5] In addition to the sexual assault charge, the Applicant is alleged to have sent a series of explicit text messages and photographs to the alleged victim and another woman. The other woman also claims to have been threatened by members of the Applicant's family regarding her testimony.

[6] On July 13, 2011, Fort McKay First Nation Council (the Respondent) passed a Resolution suspending the Applicant from his position as a Councillor and removing him as a Director of all corporate entities within the Fort McKay Group of Companies and joint ventures. The Resolution cited the Applicant's serious criminal charges and that the Royal Canadian Mounted Police were seeking his arrest.

[7] The Council insists that the Applicant is only temporarily suspended pending the outcome of his criminal charges. There were concerns raised regarding the safety of the community and the

potential for negative media coverage from an open hearing. However, the Applicant was given the opportunity to speak to the Council and chose not to do so.

II. Relevant Provisions

[8] Part 10 of Fort McKay First Nation's *Election Code* covers the suspension, removal and vacancy of office of chiefs or councillors. Section 100.1 provides that the office of a Councillor becomes automatically vacant when that Councillor dies or is convicted of a criminal offence.

[9] The process for removal of a chief or councillor may be commenced by a resolution of the council or petition of the electors. Section 101.3 enumerates several causes for removal or suspension, the particulars of which must be specified in the resolution or petition. These causes include that the Councillor has:

- 101.3.1 missed three consecutive council meetings without notice or reasons;
- 101.3.2 ceased to meet the eligibility requirements for nomination;
- 101.3.3 engages in drunk, drug related, disorderly or inappropriate conduct at council meetings, general meetings, special meetings or other public functions in which the chief or councillor are present as representatives of the first nation and which would tend to bring the reputation of the first nation into disrepute;
- 101.3.4 uses or misappropriates first nation funds or converts first nation property to his own use, including the funds or property of related business corporations or entities which are owned or controlled, in whole or in part, by the first nation;

- 101.3.5 engaged in gross financial mismanagement such that the first nation is burdened with substantial unnecessary debt;
- 101.3.6 breached Part 8 of this Code and the breach has resulted in adverse effect to the first nation; or
- 101.3.7 such further or other conduct which is sufficiently serious to warrant cause in all the circumstances.

[10] Part 8 of the *Elections Code* identifies the duties of the Council. Section 91.1 entrusts council “with matters which are fundamental to good governance and economic well being of the first nation and its members.”

III. Issues

[11] The following issues are before the Court:

- (a) Did the Council have jurisdiction to suspend the Applicant from his position as a Councillor under the *Election Code*?
- (b) Was the Applicant afforded procedural fairness in the process leading to his suspension?
- (c) Was it reasonable for the Council to suspend the Applicant from his position in the circumstances?

IV. Standard of Review

[12] The standard to be applied in determining whether the Council has jurisdiction is correctness (see *Martselos v Salt River Nation #195*, 2008 FCA 221, [2008] FCJ no 1053 at paras 28-32).

[13] Questions of procedural fairness are also addressed based on correctness (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

[14] The decision to suspend the Applicant from his position in the circumstances is a matter of mixed fact and law that must be assessed on a standard of reasonableness (see *Prince v Sucker Creek First Nation #150A*, 2008 FC 1268, 303 DLR (4th) 438 at para 22; *Martselos*, above).

[15] Reasonableness is “concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” as well as “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

Issue A: *Does the Council have Jurisdiction to Suspend the Applicant From his Position as a Councillor Under the Election Code?*

[16] The Applicant submits that the Council lacks the authority to suspend him from his position as a Councillor because he has not been convicted of a criminal charge as required by the *Election Code*. The laying of a charge is not sufficient or specifically covered by the conditions specified in section 101.3.

[17] I acknowledge that the Respondent has jurisdiction to suspend Councillors in a range of circumstances. This is expressly provided for in section 101.3. As there are a number of specified causes, the Council's discretion in suspending a Councillor is also relatively broad. Section 101.3.6 establishes as a cause the breach of council duties resulting in an adverse effect to the first nation. In addition, section 101.3.7 allows suspension for "such further or other conduct which is sufficiently serious to warrant cause in all the circumstances."

[18] However, a review of the causes available for suspension reveals that they are related to the Councillor's conduct in office, such as disorderly conduct in meetings or breaching the duty of good governance. The broader clause relating to "such further or other conduct which is sufficiently serious to warrant cause in all of the circumstances" would similarly relate to a Councillor's conduct in office where it is not covered by the specified causes. Moreover, there is no mention of criminal charges serving as a sole cause for suspension.

[19] Based on previous determinations by this Court, the Respondent has asserted that the Council may retain the inherent power to suspend as rooted in custom to ensure harmony in the community so long as the Band's legislation has not "covered the field" (see *Whitehead v Pelican Lake First Nation*, 2009 FC 1270, 2009 CarswellNat 4625 at para 41; *Lafond v Muskeg Lake Cree Nation*, 2008 FC 726, 2008 CarswellNat 1882 at para 10).

[20] While this may have been relevant in other instances, I fail to see its application to the present case. Given the relatively broad and specified causes for suspension in the *Election Code*

related to conduct in office, I must find that the legislation has “covered the field” in this area and does not give rise to additional inherent or customary powers to suspend.

[21] As a consequence, the Council only has jurisdiction to suspend a Councillor, such as the Applicant, in a manner consistent with the causes specified in the *Election Code*. Unless criminal charges are directly linked to one of these specified causes, the Council is not authorized to suspend solely on that basis.

Issue B: *Was the Applicant Afforded Procedural Fairness in the Process Leading to his Suspension?*

[22] The Applicant has provided the Court with a series of similar cases stressing the importance of procedural fairness, including the right to have full knowledge of the allegation and the proper opportunity to present evidence and argument before removal (see *Martselos*, above at paras 32-37; *Lafond*, above at paras 25-30; *Prince*, above at para 39).

[23] The Respondent contends, however, that the Applicant was ensured procedural fairness. Given community concerns there was no open hearing, but the Applicant was provided an opportunity to speak to Council and chose not to do so.

[24] While I recognize that the Respondent was given the opportunity to speak, I continue to have concerns regarding procedural fairness.

[25] Under section 101.3, the resolution related to suspension “must include the particulars of cause for the removal or suspension of the chief or councillor.” The Resolution does not appear to follow the procedures prescribed by the *Election Code* as it merely refers to the conviction, which is not in itself one of the specified causes. Given this requirement, the Council did not elaborate sufficiently on the reasons for the suspension.

[26] I therefore find that the failure of the Council to comply with its own procedures and set out the specified causes for the Applicant’s suspension amounted to a breach of procedural fairness.

Issue C: Was it Reasonable for the Council to Suspend the Applicant from his Position in the Circumstances?

[27] The Applicant implies that it was unreasonable to suspend him from his position because he has not been formally convicted of any criminal offence. He also suggests that the requirements of section 101.3 have not been met and none of the particular causes have been specified. He denies that he represents a public safety threat and notes that while some individuals have threatened the woman (referred to at paragraph 5 of these reasons), he has not done so and does not pose any particular security concern.

[28] By contrast, the Respondent argues that given the nature of the Applicant’s conduct there were reasons to be concerned about the safety and security of the Band. The Council best understands the needs of the community. The relative peace enjoyed following the Applicant’s suspension should not be disturbed.

[29] I acknowledge that the Council would have found the Applicant's behaviour disconcerting. As highlighted in my analysis of Issues A and B, however, the *Election Code* does not provide for the suspension of the Applicant based solely on the laying of criminal charges. He can only be removed from his position if ultimately convicted.

[30] The Respondent has implied that the Applicant's suspension could be covered under the cause relating to "such further or other conduct which is sufficiently serious to warrant cause in all of the circumstances" based on their public safety allegation. This was not specified in the Band Council Resolution that referred only to criminal charges.

[31] It was unreasonable for the Council to suspend the Applicant solely on the basis of the criminal charges as this is different from the types of categories referred to in the *Election Code* related to a Councillor's conduct in office. However questionable the Applicant's recent conduct, it is related to events in his personal life and not his position in public office. The public safety concerns raised do not alter this conclusion. It was not open to the Council to suspend the Applicant in these circumstances.

VI. Conclusion

[32] The Council only has jurisdiction to suspend the Councillor based on the causes enumerated in the *Election Code*. Since the Resolution failed to specify the cause on which the Applicant's suspension was based, there is a breach of procedural fairness. For similar reasons, the Council's decision cannot be reasonable.

[33] Accordingly, this application for judicial review is allowed. The decision of the Council to suspend the Applicant is quashed and he is restored to his position pending the outcome of his criminal trial.

JUDGMENT

[34] **THIS COURT’S JUDGMENT is that** this application for judicial review is allowed. The decision of the Council to suspend the Applicant is quashed and he is restored to his position pending the outcome of his criminal trial.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1180-11

STYLE OF CAUSE: MIKE ORR v. FORT MCKAY FIRST NATION
CHIEF AND COUNCIL

PLACE OF HEARING: CALGARY

DATE OF HEARING: OCTOBER 18, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: **DECEMBER 5, 2011**

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