

Federal Court



Cour fédérale

Date: 20190514

Docket: T-978-16

Toronto, Ontario, May 14, 2019

PRESENT: Case Management Judge Martha Milczynski

BETWEEN:

**ERIC SHIRT, SHANNON HOULE, VALERIE
STEINHAUER, AND GREG CARDINAL**

Applicants

and

**SADDLE LAKE CREE NATION, SADDLE
LAKE CREE NATION APPEAL
COMMITTEE AND RON LAMEMAN,
ELECTORAL OFFICER FOR SADDLE LAKE
CREE NATION**

Respondents

ORDER

UPON MOTION dated March 27, 2019 on behalf of the Applicant, Eric Shirt, for an Enforcement Order pursuant to Rules 466 and 467 of the *Federal Courts Rules* for the Respondents breaching the Judgment of Madam Justice McVeigh dated April 12, 2017, paragraphs 69, 71-76, with solicitor-client costs;

AND UPON reading the motion records filed on behalf of the parties;

AND UPON hearing submissions from counsel for the parties at a special sitting held at the Courthouse located at the Federal Court, Scotia Place Tower 1, Suite 530, 10060 Jasper Avenue, Edmonton, Alberta, on Wednesday, April 24, 2019;

The Applicant, Eric Shirt has brought this motion for an order pursuant to Rule 467 of the *Federal Courts Rules*:

Rule 467 ...before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order...requiring the person alleged to be in contempt

- (a) to appear before a judge at a time and place stipulated in the order;
- (b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and
- (c) to be prepared to present any defence that the person may have.

An order issued pursuant to the above is referred to as a “show cause” order. A party bringing a motion for a show cause order must establish a *prima facie* case of wilful and contumacious conduct on the part of the alleged contemnor. A show cause motion requires proof of a court order, proof of the respondent’s knowledge of the order, and proof of a deliberate flouting of the court order.

In the within case, Mr. Shirt has established that a court order exists and is binding on Saddle Lake Cree Nation (“SLCN”) and that its requirements and direction have not been fully complied with. However, while I am sympathetic to Mr. Shirt and agree that having been found eligible to stand for election, Mr. Shirt ought to have participated in a new election process in

respect of the June 2016 election, I am not satisfied that the failure to so do prior to the next scheduled election in June of 2019 establishes a *prima facie* case of contempt on the part of SLCN. SLCN made real and meaningful efforts to establish and pass a new election code as required by the same court order that would have Mr. Shirt participate in the election process as a candidate had the new election code been adopted in time. The failure to establish a new election process before June 2019 does not in and of itself constitute a *prima facie* case of contempt when taken in context of the steps taken and efforts that were made.

I. Background

A. *April 12, 2017 judgment of Justice McVeigh*

On April 12, 2017, Justice McVeigh found that the June 2016 SLCN election did not follow a custom approved by the majority of band members who knew of the new custom. She found that there was in fact, no consensus of how the elections should be governed. She also found that the Election Regulations from 1955 and 1960 were inadequate. Justice McVeigh found, with regard to Mr. Shirt (and others) that his eligibility for nomination should be reconsidered, and if found to be eligible, a new election must be held.

Any such new election, however, needed to be conducted with recognition of new customs through membership consensus or amendments of the Election Regulations, stating “if a new election must be held, it must be done in accordance with the Election Regulations and/or custom that has the support of the majority of the band members.” In other words, (1) SLCN needed to reconsider Mr. Shirt’s eligibility and (2) a new election process needed to be developed for any re-do of the June 2016 election and for the next scheduled election in June

2019. Justice McVeigh required that for the new election code, SLCN would craft and implement a transparent, procedurally fair, and unbiased nomination and election process.

Both parties agree that Justice McVeigh did not order a deadline by which SLCN was to complete the redetermination, amend or enact new election regulations and/or hold a new election. She also declined to defer the election until the next regularly scheduled election in June 2019. It is clear that should Mr. Shirt or any of the other Applicants be found eligible for nomination, a new election would be held ahead of June, 2019.

B. *First Contempt Motion and Direction of Justice Lafreniere*

Mr. Shirt and the other Applicants in the proceeding before Justice McVeigh filed a contempt motion against SLCN on June 6, 2017. The matter was resolved with the parties agreeing to dates by which the redetermination would occur. Justice Lafreniere issued a consent order and the motion was adjourned *sine die*.

C. *April 12, 2018 judgments of Justice Manson*

The redetermination of Mr. Shirt and the other Applicants proceeded but defects and lack of fairness were alleged with the process. Mr. Shirt and the other Applicants filed an application for judicial review (T-1298-17). The application was dismissed as premature by Justice Manson on April 12, 2018 - the redetermination had not yet been completed at the time the Applicants had commenced the application.

SLCN Chief and Council brought its own application for judicial review challenging the completed redetermination of panel's decision (T-1522-17). This application was granted by

Justice Manson on April 12, 2018 and he ordered the redetermination panel to reinitiate the redetermination, setting a deadline that the process be completed within two months. On June 11, 2018, Mr. Shirt was found eligible and the other three Applicants were not. At this time, however, there was no new election process in place by which to conduct a new election.

D. *Second Contempt Motion – August 15, 2018 order of Justice Fothergill*

Mr. Shirt filed a motion for a show cause order on June 29, 2018, alleging that a new election should have been conducted in accordance with the process used in the June 2016 elections, despite their having been found to be inadequate by Justice McVeigh and her order that they be amended. This motion was dismissed by Justice Fothergill on August 15, 2018. He found that a *prima facie* case had not been established that SLCN's conduct amounted to "wilful and contumacious conduct".

In reviewing Justice McVeigh's judgment, Justice Fothergill noted:

The judgment is silent regarding the timeframe within which the new process to determine the candidates' eligibility must be completed, or within which any election must be held. An outer time limit may be inferred from her refusal to defer the matter until the next scheduled election in 2019, but that is all.

E. *Third Contempt Motion – within motion*

Justice Fothergill noted in his reasons that, since Justice McVeigh's decision in April, 2017, SLCN was engaged in a process of consultation with their membership regarding a new election code. SLCN advised Justice Fothergill that they were working toward a deadline of December 2018 to complete the new electoral and membership codes.

At the time they were before Justice Fothergill, SLCN conceded that Justice McVeigh required any new election in respect of the June 2016 election to be held prior to the next regularly scheduled election, namely before June 2019. However, it was not until April 10, 2019 that the new election code was approved and adopted. An election date has been set for June, 2019 but this is the next regularly scheduled election, not a new election in respect of the 2016 election.

The issue on the within motion is thus whether this failure to hold a new election establishes a *prima facie* case of contempt – does the delay in adopting a new election process constitute a deliberate flouting of Justice McVeigh’s order?

At paragraphs 35 to 56 of SLCN’s written representations, SLCN sets out the steps taken, when and how the steps were taken and the efforts of Chief and Council to develop a new election process, consult with the membership and adopt the new regulations. They have also filed a chart with the chronology. SLCN submits that their actions were taken in good faith, addressed long-standing deficiencies and were undertaken in a manner that was in keeping with the appropriate guiding principles:

- The process was in accordance with *iyiniwak* (Cree) practice that recognizes the traditional teach of the *onihcikiskwapowin* (SLCN’s Elders and Knowledge holders).
- The process undertaken was reviewing and changing what had been in place since 1960 – the application before Justice McVeigh in respect of the 2016 election was the first time the Election Regulations were brought before the Court. The development of a new election code was a great undertaking.

- The process was an essential and important part of the undertaking, not just the result, going to the heart of the community's right to govern itself according to its own custom.
- The proposed amendments concerned sensitive matters that required extensive consultation and discussion: marital status, residency, membership and general leadership qualities.
- In June of 2017 SLCN received funding from Indigenous and Northern Affairs Canada to assist in a joint project to amend the election code and re-establish a membership code. Meetings were held with INAC in September 2017.
- A deadline of December 2018 was set for the completion of a new election and membership code.
- Community information meetings were conducted (April, 2018)
- Surveys were distributed and information sessions were scheduled
- MEC working group was established and a Coordinator engaged to conduct meetings and consultations, including at the Seniors lodge, with urban members in Edmonton (September-October, 2018).
- An Elders Advisory Committee conducts a review of the SLCN constitution, and the matter of membership and elections. They established next steps and timelines and conduct weekly meetings.

- Throughout late 2018 and in 2019, the Elders Advisory Committee met regularly to develop the new election code. The plan was to conduct a band meeting on December 21, 2018 – the meeting was conducted where the survey results were presented and information provided. The amendment process, however, continued into 2019 and new drafts were presented for discussion, including an appeal procedure, voting age of 18 and residency.
- Elders Advisory Committee and Band information meetings conducted January, 2019. Motions passed to support ongoing work, amendments are drafted for marriage, residency and appeals process – finalized for delivery at meetings scheduled for February and March, 2019.
- February-April, 2019 – further meetings and presentation of final amendments for marriage residency, appeals procedures, establishment of eligibility panel and voting age – new election code received final approval and adopted on April 10, 2019.
- Nominations are scheduled for May 29, 2019, with elections scheduled for June 15 and 19, 2019.

Having regard to the above, I cannot conclude that a *prima facie* case has been established that SLCN deliberately flouted or ignored Justice McVeigh's order to establish a new election code and conduct a new election in respect of the 2016 result that had been quashed. The new election code required planning, development and consultation, all of which that needed to be conducted in a manner that respected the community's custom and process of decision

making. Justice McVeigh did not set a hard date or deadline for its completion. Justices Manson and Fothergill also did not fix a date for the final adoption of a new election code.

I agree with Mr. Shirt that the Court might possibly have been of assistance, but such assistance was not sought. This omission does not, however, rise to the level of contemptuous conduct. Neither the Court nor SLCN could impose a new election code. The evidence of SLCN establishes good faith efforts in albeit slow but steady and constant steps to comply with Justice McVeigh's judgment. SLCN initiated and maintained a process of education, amendment and consensus building that resulted in a new election code being approved by the community. There was no denial of the obligation or deliberate delay to defeat or frustrate Justice McVeigh's judgment. Accordingly, the motion for a show cause order will be dismissed.

THIS COURT ORDERS that:

1. The motion be and is hereby dismissed.
2. In the event the parties cannot agree on costs, each may file written submissions no longer than 3 pages in length within 15 days of the date of this Order.

"Martha Milczynski"
Case Management Judge