IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Edzerza* v. *Kwanlin Dun First Nation* 2007 YKSC 27

Date: 20070511
S.C. No. 05-A0059
Registry: Whitehorse

Between:

JENNIFER EDZERZA, HELEN CHARLIE and JACINE FOX

Petitioners

And

KWANLIN DUN FIRST NATION, MIKE SMITH, SHIRLEY DAWSON, JESSIE DAWSON, ALLAN TAYLOR, BILL WEBBER, ANN SMITH, EDITH BAKER and JENNIFER MAURO

Respondents

Before: Mr. Justice W.M. Darichuk

Appearances:

André W.L. Roothman — Counsel for Petitioners
Gary W. Whittle — Counsel for Respondent Kwanlin Dun First Nation

REASONS FOR JUDGMENT

Darichuk J. (Oral):

[1] This proceeding concerns the constitutional validity of the election of Chief and Council for the Kwanlin Dun First Nation held on June 3 and 4, 2005.

[2] By their petition, the petitioners seek declaratory relief. The declarations particularized are:

a) a declaration that the rules and procedures under which this election were held are inconsistent and in conflict with Schedule 3 of its constitution;

b) that these rules and procedures have the status of legislation;

c) that the election of Chief and Council was not conducted substantially in accordance therewith; and

d) a declaration that the election was not conducted substantially in accordance with mandatory rules and procedures.

[3] Aside from determining whether the "*Rules and Procedures for conduct of a vote for Chief and Council, Kwanlin Dun, 2005*" and the election which was conducted were in conflict with the requirements of the constitution of Kwanlin Dun First Nation, two additional legal questions were identified. Firstly, "what is the legal effect of the repeal of the Rules and Procedures by Chief and Council on September 7, 2005, and secondly, whether the re-enactment of the Rules and Procedures on October 4, 2005, by Chief and Council could make the 2005 Election valid and with retroactive effect".

[4] According to s. 4 of the *Yukon First Nation Self-Government Act*, 1994, c. 35, the purpose of the *Act* was to bring into effect self–government agreements concluded with first nations. On April 1, 2005, the Kwanlin Dun First Nation became a self-governing Yukon First Nation. On the same date, its Council enacted the *Kwanlin Dun First Nation Constitution* ("the Constitution"), and as well the *Rules and Procedures for Conduct of a Vote for Chief and Council, Kwanlin Dun First Nation, April 2005* ("the *Election Rules, 2005*").

[5] The petitioners assert that the election conducted on June 3 and 4, 2005, was invalid. They submit it was in conflict with the Constitution in that it was not conducted in

accordance with the *Election and Referendum Code* contained in Schedule 3 thereof, but in accordance with the *Election Rules, 2005*. Subsequent to the written request of July 18, 2005, to the Chief and Council to review its decision pursuant to s. 47 of the Constitution, on September 1, 2005, the *Election Rules, 2005* were repealed *in toto*.

[6] The preliminary issue for determination is whether these proceedings should be stayed so that the Judicial Council can exercise its powers and responsibilities under c.8 of the Constitution, or whether this Court should exercise its concurrent jurisdiction under s. 25(1) of the *Yukon First Nation Government Act*, *supra*.

[7] A resolution of this issue attracts a review, not only of the purpose and scheme of the *Yukon First Nations Self-Government Act*, *supra*, but various other sections of this *Act* and various sections of the Constitution as well as the spirit, purport and object of the Constitution. The scheme of the Constitution is not only to provide for the enactment of laws pertaining to a citizenship code, its governing bodies, the recognition and protection of the rights and freedom of its citizens, but, as well, under s. 8(1)(e) for "challenging the validity of the laws of the first nation and quashing invalid laws". Subject to s. 25(1) of the *Act, supra,* such challenge must be made first by appeal to the council, then the Judicial Council and then to this court.

[8] The Constitution (which by s. 52(1) thereof is declared to be the supreme law of the Kwanlin Dun First Nation) reads in part as follows:

> 52 *Challenges to Legislation and other Legislative Procedures*
> (1) Subject to subsection (2), the validity of a Kwanlin Dun First Nation law may be challenged in the Yukon Supreme Court.
>
> (2) Before a person may challenge the validity of a Kwanlin Dun First Nation law in the Yukon Supreme

> Court, that person must first exhaust any other procedures established by Kwanlin Dun legislation for challenging the validity of that law.
>
> …

[9] Pursuant to s. 47 of the Constitution and the written request of the petitioners, the Council of the Kwanlin Dun First Nation reconsidered its decision. In passing, it is to be noted that one of the listed grounds to review its decision was s. 47(1)(c), namely, that its decision appears to be "inconsistent with this Constitution". By virtue of s. 47(3) of this Constitution, a decision that is the subject of a request under this section remains in force "unless the Council changes, or repeals it, subject to a decision of the Judicial Council under s. 56(1)(d)".

[10] Under the Kwanlin Dun self-government structure, the Judicial Council is one of its five (5) integral branches of self-government.

[11] Pursuant to s. 49 of the Constitution, the Kwanlin Dun First Nation Council enacted the *Kwanlin Dun First Nation Judicial Council Act* on October 4, 2005.

[12] In clear and unequivocal language, this branch of the self-government framework is specifically empowered to consider an application challenging a decision of the Council on any ground set out in s. 47(1). As previously noted, specifically included under this section is a citizen's request to Council to reconsider its decision on the ground that its decision is inconsistent with the Constitution. This section does not favourably endorse the submission of learned counsel for the petitioners that the subject matter of these proceedings is clearly outside the jurisdiction of the Judicial Council.

[13] Section 10(4) of the *Yukon First Nations Self-Government Act,* supra, reads in part:

> "A law enacted by a first nation named in Schedule II comes into force at the beginning of the day following its enactment, or at such later time as is specified in the law."

[14] The pith and substance of this legislation concern the implementation of an effective date when the legislation comes into force, not an express prohibition regarding the presumption in law respecting substantive and procedural provisions. Laws of general application continue to apply to a first nation, to its citizens and in respect of its settlement land: See s. 16 of the *Act.*

[15] While there exists in law a general presumption that statutes do not operate with retrospective effect, procedural provisions (unlike substantive provisions) are not subject to the presumption. To the contrary, they are presumed to operate retrospectively: See *Howard Smith Paper Mills Limited* v. *Her Majesty The Queen*, [1957] S.C.R. 403, and E.A. Driedger, *Construction of Statutes*, (2nd ed. 1983) at pp. 202 – 3.

[16] Neither the inherent right to self-government nor the effective exercise of powers and responsibilities pertaining thereto favourably endorse the submission that s. 10(4) *of the Yukon First Nations Self-Government Act,* supra, preclude all laws enacted by a first nation from having a retrospective application.

[17] The applicable rule of interpretation is set forth in s. 68 of the Constitution. It reads:

> 68 Interpretation
>
> (1) When interpreting this Constitution, or any of the Schedules, the Judicial Council, a court, tribunal or forum must:
>
> (a) promote the values that are set out in it, or underlie it; and

(b) promote the spirit, purport and objects of the Constitution.

…

[18] The enactment of the Constitution on April 1, 2005, did not preclude the retrospective application of the aforesaid Rules and Procedures.

[19] In support of his submission that this Court should exercise its concurrent jurisdiction with the Judicial Council of the Kwanlin Dun first Nation, learned counsel for the petitioner cited the case of *Ermineskin Cree Nation* v. *Canada*, 2001 ABQB 760. The subject proceedings are readily distinguishable.

[20] In the *Ermineskin* case, Moen J. noted at para. 52 that "… The issues that will be determined in this case, the law that will be argued, and the evidence given on the jurisdictional question go far beyond the nature of inquiries usually before the Tribunal or those contemplated by the CHRA. …" (*Canadian Human Rights Act*). Further, she notes at para. 71 that "Counsel for Ermineskin estimated that a six month hearing would be necessary to determine the constitutional issue raised in this case. …"

[21] By exercising the concurrent jurisdiction of the Court, she notes at para. 66 "… Therefore, proceeding before the Tribunal would likely result in four hearings. By contrast, if the question proceeds through this Court, and is eventually appealed to the Supreme Court of Canada, the result would be three hearings."

[22] Unlike the factual situation in *Ermineskin Cree Nation* v. *Canada, supra*, there are no evidentiary problems in these proceedings. A comparable lengthy hearing is not required and the subject matter does not fall outside the mandate of the tribunal. As previously noted, the Judicial Council is explicitly empowered under s. 56(a) of the

Constitution to affirm or set aside the decision of Council under s. 47(1) on the basis that it is inconsistent with the Constitution.

[23] It is of particular significance that the Judicial Council is, as set out in s. 2 of the Constitution, one of five (5) integral branches of the Kwanlin Dun government structure. As such, it is an essential component to responsible self-government. In recognition of the right to self-government, and control over their own affairs and communities, judicial interference is limited. As noted, s. 52 limits judicial challenge of a Kwanlin Dun First Nation law. The person must first exhaust other procedures established by Kwanlin Dun legislation for challenging the validity of that law.

[24] Given the jurisdiction of the Judicial Council under the Constitution, in light of the totality of the circumstances, these proceedings are stayed.

DARICHUK J.