SUPREME COURT OF NOVA SCOTIA
Citation: *Sipekne'katik Band Council v. Doe*, 2020 NSSC 310

Date: 20201021
Docket: Hfx No. 501202
Registry: Halifax

Between:

Sipekne'katik Band Council

Applicant

v.

John Doe, Jane Doe and Persons Unknown

Respondents

***Ex Parte* Motion**
DECISION

Judge:	The Honourable Justice James L. Chipman
Heard:	October 21, 2020, in Halifax, Nova Scotia
Oral Decision:	October 21, 2020
W**ritten Decision:**	October 30, 2020
Counsel:	Nathan M. Sutherland (appearing for Ronald A. Pink, Q.C., solicitor of record), Jason S. Edwards and James A. Michael, for the Applicant

By the Court (Orally):

[1] On October 19, 2020 the Court received a letter from Ronald A. Pink, Q.C. on behalf of his client, Sipekne'katik Band Council (the Band) enclosing the following:

1. *ex Parte* motion;
2. copy of an undertaking of the Rhonda Knockwood;
3. copy of an affidavit of Stuart Knockwood; and
4. draft Order.

[2] In Mr. Pink's letter he stated, among other things, as follows:

> … this as a request pursuant to *Civil Procedure Rule* 28 for an emergency hearing in relation to the Notice of Motion seeking interlocutory relief in [this] matter.
>
> On today's date, we are filing a Notice of Application in Chambers. The Applicant seeks an Order enjoining Unnamed Persons from engaging in unlawful activities that are part of a campaign of intimidation, threats, and property destruction against the [Band] and its members.

[3] The Band requested a half-day emergency motion today, tomorrow or Friday. Yesterday the Band filed five more items, namely:

1. two additional copies of the *ex parte* motion;
2. original and one copy of the affidavit of Mr. Knockwood;
3. original and one copy of the undertaking of Ms. Knockwood;
4. two copies of an affidavit of Jason Marr with an original to follow; and
5. three copies of a brief and book of authorities in support of the motion.

[4] As the designated Chambers Judge I reviewed all of the Band's materials. On the basis of my review, I granted the Band's request for an emergency hearing. I was, and continue to be, mindful of the gravity and urgency of the situation. Accordingly, the matter was set down for this afternoon's hearing date.

[5] Today I heard oral argument from the Band's counsel, Mr. Sutherland. During these submissions Mr. Sutherland undertook to the Court that Mr. Marr's original affidavit will subsequently be filed. In addition, Mr. Sutherland expanded upon the arguments set forth in the Band's brief. He also answered particular

questions raised by the Court and conceded certain paras. of the affidavits owing to hearsay concerns are not appropriate. Accordingly, I struck the offending paras. from being entered into evidence.

[6] The evidentiary basis for the requested interim injunction is contained in the remainder of the affidavits of Stuart Knockwood, the Band's Emergency Management Occupational Health and Safety Manager as well as Band member and fisher, Jason Marr.

[7] I wish to highlight certain of what I consider to be the key background paragraphs in support of the Band's request from Mr. Knockwood's affidavit:

> 21. In the absence of such a framework, the Band recently took steps to start its own "moderate livelihood" fishery. The Band envisioned a fishery that would permit qualified Band members to catch lobster in greater quantities than permitted by AFS licenses, but less than what is authorized under commercial fishing licenses.
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> 26. The Band opened its self-regulated moderate livelihood fishery on September 17, 2020. It held a ceremony at the Saulnierville wharf, and issued five moderate livelihood licenses to Band members who had applied and been approved at that point. The Band has restricted moderate livelihood licenses to fishers who are not fishing commercially.
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> 29. As other Band members applied to the Band for moderate livelihood licenses, and the Band determined that they met the criteria under its Management plan, the Band issued an additional six moderate livelihood licenses. By September 30 the Band had issued a total of 11 moderate livelihood licenses (each with a maximum of 50 traps).
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> 32. The moderate livelihood licenses issued by the Band require license holders to land their catch at Saulnierville wharf. Because the inshore lobster fishery is usually prosecuted within 5km of shore, in practice this means that the moderate livelihood licenses in question are being fished in [zone] LFA 34.

[8] Following para. 32, Mr. Knockwood's affidavit is organized under five headings. Given the detailed evidence he has supplied – inclusive of the five exhibits – I have no hesitation in concluding that the five headings are legitimate. Accordingly, given the evidence proffered on this motion I conclude that Band members over the past month and a few days have experienced intimidation, harassment and property damage both on the water and on land in southwest Nova Scotia. This has resulted in a broader economic impact such that the Band's fishery has effectively been shut down.

[9] Mr. Knockwood has provided the Court with detail with respect to two incidents occurring on October 13, 2020: one involved vandalism and an assault at the New Edinburgh lobster pound and the other concerned vandalism at the Middle West Pubnico lobster pound. Additionally, Mr. Knockwood, through his affidavit outlines other acts of violence in southwest Nova Scotia on October 4 or 5, 14 and 17, 2020.

[10] Mr. Marr's affidavit provides his first-hand account of what happened to the Middle West Pubnico lobster pound on the evening of October 13, 2020. For example, he deposes as follows in his affidavit:

> 23. As the mob grew, I heard people walking and speaking to one-another around the entire circumference of the building and on part of the roof. Members of the mob kicked or banged on the loading bay door and yelled at us to open the door. Members of the mob threw rocks at the building and smashed every one of the building windows.
>
> 24. Members of the mob directed various racist slurs at us. A member yelled "I'm gonna burn your wagon." They also threatened to burn the building down with us inside it if we did not give them our lobster catch.
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> 27. I witnesses members of the mob vandalising the van. They opened the van doors and rummaged through the cab. I saw them pour chemicals in the gasoline tank and in the air vents. Later, when I was able to access the van, I discovered the chemical was anti-freeze.
>
> 33. At 10:57 pm I started a Facebook Live video stream to document what was happening. In the video I explained "They've destroyed my van. There's a couple hundred of them out there and I refuse to leave, I'm not leaving… they said they won't let me leave unless they have my lobsters. The cops are saying that I have to leave…" A copy of the video I recorded is attached on a USB key at Exhibit "A".
>
> 47. The lobster pound where the October 13, 2020, incident took place was destroyed in a suspicious fire on or about October 17, 2020. This fire was reported in the media by various sources, including by CBC. A copy of the story CBC posted to the internet on October 17, 2020 titled "Fire destroys lobster facility in southwest Nova Scotia amid escalating fisher tensions" is attached as Exhibit "C".

[11] As I indicated during my questioning of Mr. Sutherland, I reviewed the USB Facebook live video stream and I find it gives credibility to para. 33. Additionally, the Court has reviewed the attached CBC report and I find it is in keeping with what Mr. Marr has deposed to.

[12] Since the incidents, Mr. Marr's life has changed. For example, he states as follows in his affidavit:

> 45. Since the incident, I have not fished for lobster pursuant to my moderate livelihood license or my FSC license. I am afraid for my safety and do not want to incur more damage to, or theft of, my fishing gear.
>
> 48. I am afraid for my safety and the safety of my family. I have participated in some interviews with media and believe based on that that I have gained some notoriety as an indigenous fisher. I have been threatened on social media. Because of the threats, and my experience on October 13, 2020, I do not leave my home as often as I would otherwise.

[13] I note Mr. Marr also has sworn in his affidavit that when he went to retrieve his lobster traps back on September 19, 2020 that most had been cut or taken.

[14] Once again, the Band seeks an interim order enjoining persons unknown from interfering with the fishing activities of Band members in southwest Nova Scotia and engaging in related threatening or hostile actions against Band members.

[15] Given the evidence I have reviewed, it is fair to state that in the weeks since the Band started a self-regulated moderate livelihood fishery on September 17, 2020, its members have been subjected to an on-going and notorious campaign of violence, intimidation and property damage. The acts in question have been committed by persons largely unknown who are apparently hostile to the indigenous rights-based fishery.

[16] Section 43(9) of the *Judicature Act*, R.S.N.S., c. 240 provides this Court with the authority to order an interlocutory injunction "in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made".

[17] The sole issue on this motion is whether the Band is entitled to an *ex parte* interim injunction. In addition to the *Judicature Act*, Civil Procedure Rules 41.04 and 41.05 provide further guidance with respect to interim injunctions:

> 41.04 (1) A party who files an undertaking as required by Rule 41.06 may make a motion for an interim injunction or interim receivership.
>
> (2) A judge who is satisfied on all of the following may grant the motion:
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> (a) the party claims an injunction or receivership as a final remedy in the proceeding, or it is in the interests of justice that an injunction or
>
> receivership be in place before determination of the claims in the

> proceeding;
>
> (b) the party has moved, or will move, for an interlocutory injunction or interlocutory receivership and is proceeding without delay;
>
> (c) an urgency exists and it cannot await the determination of the motion for an interlocutory injunction or interlocutory receivership;
>
> (d) considering all of the circumstances, it is just to issue an order for an interim injunction or interim receivership.
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> 41.05 (1) A judge who is satisfied there are circumstances of sufficient gravity to justify making a motion for an interim injunction or interim receivership without notice may grant an *ex parte* order.
>
> (2) Rules 22.04 to 22.09 of Rule 22 - General Provisions for Motions apply to an *ex parte* motion for an interim injunction or interim receivership.

[18] The tripartite test for an interim or interlocutory injunction is well known. The moving party must establish a distilled three-part test according to the Supreme Court of Canada's seminal decision in *RJR-MacDonald Inc. v. Canada*, [1994] 1 SCR 311 at p. 332 as follows:

> (a) the merits of the case demonstrate that there is a serious question or issue to be tried.
>
> (b) the moving party would suffer irreparable harm if an inunction was not granted; and
>
> (c) on a balance of convenience, an injunction should be granted.

[19] On the question of a serious issue to be tried, Associate Chief Justice Smith (as she then was) said in a relatively recent decision of this Court, *Saint Mary's University v. Atlantic University Sport Association*, 2017 NSSC 294 at p. 44:

> The first part of the test is generally not considered to be particularly onerous. In *RJR-MacDonald Inc.* … the Court described the "serious question to be tried" test as having a low threshold requiring only a preliminary assessment of the merits of the case. At para. 50 the Court said:
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> > Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[20] In my view, the affidavit evidence clearly establishes a serious risk to be tried. The evidence shows that members of the Band have been subjected to a campaign

of intimidation, threats, and destruction of property. There is a very real, sustained threat to Band members' safety as well as their livelihoods.

[21] There is a strong *prima facie* case that the individual acts that make up the campaign of intimidation, threats, and destruction of property are tortious and/or contrary to the *Criminal Code of Canada*, R.S.C. , 1985, c. C-46. The acts in question include destruction of equipment (including damage to fishing boats, vehicles, lobster traps and gear); physical and verbal threats; physical assault; unlawful confinement and theft.

[22] The affidavit evidence demonstrates that the Band and its members have experienced threats and intimidation, and instances of property destruction, from mid-September to the present. There is a real risk of continuing violence and destruction of property against Band members. They are unable to effectively engage in fishing activities, which were recognized by the Supreme Court of Canada in the *Marshall* case over 20 years ago.

[23] Having established the first part of the *RJR-MacDonald* test, I go to the second question – has the Band established proof of irreparable harm? The second test requires the moving party to satisfy the Court it is likely to suffer irreparable harm if an injunction is not granted. Damages are not an adequate remedy where the conduct the moving party seeks to enjoin is deliberately tortious or unlawful. As the Ontario Superior Court stated in *Ideal Railings Ltd. v. Laborers' International Union of North America*, 2013 ONSC 701 at paras. 57-58:

> 57 Damages are not an adequate remedy where the conduct is deliberately tortious or unlawful. As set out by Justice Hill in *Aramark*, … at para. 41: "On the facts here, where tortious and criminal actions are extant, irreparable harm is readily established and compensation by damages in not realistically an available option."
>
> 58 The continuation of *prima facie* tortuous and unlawful conduct amounts to irreparable harm. See *Unilux Boiler Corp. et al. v. Fraser et al*, [2005] O.J. No. 2410 at paras. 25-28.

[24] The fact that criminal conduct is alleged does not disentitle the Band from injunctive relief. This point was made in the Supreme Court of Canada decision of *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 SCR 1048 at paras. 20-21:

> 20 ,... The mere fact that conduct may be characterized as criminal does not deprive a person whose private rights are affected from seeking relief in the civil courts. […] where criminal conduct affects property rights, the person so affected

> may invoke the equitable jurisdiction of the court to obtain an injunction prohibiting the conduct: […]
>
> Section 11 of the *Criminal Code*, R.S.C., 1985, c. C-46, codifies this principle in unqualified terms: "No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence".
>
> 21 I conclude that the fact that the conduct of blocking the roads can be characterized as criminal does not deprive the British Columbia Supreme Court of the right to grant an injunction against potential offenders in a civil action.

[25] The Nova Scotia Court of Appeal granted an injunction restraining criminal conduct in *S.R. McKay & Sons Ltd. v. Unnamed Persons*, 1994 NSCA 140. Justice Hallett stated at p. 3:

> In our opinion the learned judge erred in refusing to grant the injunction; the error is apparent in the third reason he stated for refusing. It was clearly **necessary** for the appellant to resort to the court to seek an injunction as the RCMP was not prepared to "disrupt the protest." The appellant was entitled to look to the courts for relief which should have been granted given the learned judge's finding of fact. It is of no comfort to the appellant that the learned judge was of the opinion that the RCMP ought to have acted. [Hallett, JA's emphasis added]

I venture to say a similar sentiment may be echoed in this case. RCMP intervention thus far has failed to prevent the unlawful activity the Band seeks to enjoin.

[26] In my opinion, the risk of physical injury or serious property damage provides further evidence to support a finding of irreparable harm. Where there is a risk that incidents of unlawful conduct will escalate in both danger and number the issuance of an injunction is warranted. In this regard, I refer to *Photo Engravers Electrotypers Ltd. v. Fell*, 1989 CarswellOnt 2344 (at para. 12) (aff'd in *Photo Engravers & Electrotypers Ltd. v. Fell*, 1989 CarswellOnt 2122 (ON CA)):

> 12 … The harm will be compensable in damages to some extent, however, damages cannot be considered adequate compensation for conduct which is not only deliberately tortious, but also criminal. Damages provide an inadequate remedy to a person who is the victim of such deliberate and injurious conduct. It does not rest well with me that the court should tell members of the community who are acting in a law abiding manner that they should run the risk of being assaulted or of having their property deliberately damaged because at some future point a court may order the person who assaulted them or caused the damage to pay them some money. In cases like this damages provide an inadequate and indeed an inappropriate remedy. Substantial injury which cannot be adequately or appropriately compensated in damages constitutes irreparable harm *Trailmobile*

> *Canada Ltd. v. Merrill et al., supra,* at p. 10-12. In that sense there is irreparable harm in this case.

[27] The campaign of intimidation, threats, and property destruction constitutes a real risk of harm to the health and safety of Band members. Band members are justifiably afraid for their own safety. In this regard, I again refer to the accepted affidavit evidence proffered by Messrs. Marr and Knockwood.

[28] The conduct the Band is seeking to enjoin constitutes a serious risk to Band members. It may well also constitute a threat to any other member of the public who appear to align themselves with the Band. A lobster pound building was destroyed in a fire and an individual is in hospital as a result of the injuries sustained in the fire. The fire could have spread to other buildings and lives could have been lost.

[29] With respect to the third part of the test, there is a presumption that the balance of convenience favours a party seeking to enjoin illegal acts. As the Ontario Superior Court stated in *Fleming Door Products Ltd. v. Hazell*, 200 CanLII 38961 (ON SC) at para. 21:

> Where a moving party seeks to enjoin illegal acts, the "balance of convenience" favours the moving party…

[30] The Ontario Court of Appeal considered First Nation constitutional rights and their relationship to property rights in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] OJ No. 4790. The Ontario Court of Appeal stated at para. 117:

> 117 In the present case, for example, many considerations are at play beyond the obligation to enforce the law. These considerations include Aboriginal and treaty rights, constitutional rights, the right to lawful enjoyment of property, the right to lawful protest, concerns about public safety, and importantly, the government's obligation to bring about the reconciliation of Aboriginal and non-Aboriginal peoples through negotiation.

[31] Having considered the filed materials I conclude that the balance of convenience favours the Band. The Band is trying to realize its constitutionally-protected right to harvest lobster. The Respondents are attempting to prevent the Band from doing so with an unlawful campaign of tortious and criminal intimidation, threats, and property destruction.

[32] By way of conclusion, no matter where an individual may stand on the myriad of issues in play right now in southwest Nova Scotia, I would hope everyone could

agree that violence is not way to sort things out. We are in a civilized nation with the rule of law. What has been going on over the past month or so has shocked all Canadians. The violence and destruction has become national and international news.

[33] Canadians are better than this. The Acadian and Indigenous communities have a broader history of harmony, allegiances and alliances. Apart from all that has been said today in Court and in the filed materials, I am hopeful that what has been rightly characterized as an extraordinary remedy, the Supreme Court order I am issuing will help to effect pause in the tensions and restore much needed peace.

[34] In my view an order needs to be issued and the order should include clear language that the RCMP or other law enforcement agencies will enforce the prohibitions.

[35] It is appropriate to include notice that law enforcement officers will arrest and charge anyone in breach of the prohibitions. The leading authority on injunctions against persons unknown is *MacMillan Bloedel Ltd.* The Supreme Court of Canada's reasons include an explanation why reference to law enforcement action is appropriate in an injunction against unnamed persons. Justice McLaughlin (as she then was) states at paras. 41-42:

> 41 …I observe only that the inclusion of police authorization appears to follow the Canadian practice of ensuring that orders which may affect members of the public clearly spell out the consequences of non-compliance. Members of the public need not take the word of the police that the arrest and detention of violators is authorized because this is clearly set out in the order signed by the judge. Viewed thus, the inclusion does no harm and may make the order fairer.
>
> 42 I conclude that the British Columbia Supreme Court has jurisdiction to make orders enjoining unknown persons from violating court orders. Such orders are enforceable on the long-standing principle that persons who are not parties to the action, but who violate an order of the court, may be found guilty of contempt for interfering with justice. Provided that contempt is the only remedy sought, it is not necessary to join all unknown persons in the action under the designation, "John Doe, Jane Doe and Persons Unknown". Nor, strictly speaking, is it essential that the order refer to unknown persons at all. However, the long-standing Canadian practice of doing so is commendable because it brings to the attention of such persons the fact that the order may constrain their conduct. Similarly to be commended is the practice followed by the courts in this case of ensuring that the wording of the orders is clear and that their effect is properly circumscribed.

[36] In my view the proposed order with some minor changes (which I have noted) is sound. The Order shall be in effect until the next scheduled appearance on December 15, 2020. We now have an issued Supreme Court order and violators will be held in contempt. The Court expects its orders (if not obeyed) to be enforced.

Chipman, J.