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The Application of the *Charter* to a Protest on the Siksika Nation

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Case Commented On: *Siksika Nation v Crowchief*, 2016 ABQB 596 (CanLII)

Recently there have been several cases involving the issue of whether the *Charter of Rights and Freedoms* (*Charter*) applies in a context where there is some government or public nexus but the action may be characterized as one involving private parties. See for example, my previous post on the application of the Charter to Universities.

This case presents yet another situation where the court is asked to address whether the *Charter* applies. Most of the decision involves whether the Court should grant an interlocutory injunction to the Siksika Nation. The Siksika Nation, represented by its Chief and Council (Applicant), filed a Statement of Claim seeking an injunction and damages against Ben Crowchief and "Unknown Defendants" (Respondents). A number of band members, including Crowchief, blockaded the reconstruction of Siksika Nation homes being built to address damages from flooding of the Bow River in 2013. The blockade was intended to protest the lack of accountability and transparency by the council and chief (at para 18).

The parties agreed that the three-part test for granting an interlocutory injunction, as set out in *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (CanLII), was applicable. In order to obtain an interlocutory injunction:

> [26] The onus is on the Applicant to demonstrate that:
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> (a) it has a serious issue to be tired or, in some cases, a strong *prima facie* case;
> (b) it will suffer irreparable harm before trial if the injunction is refused; and
> (c) the balance of convenience favours granting the injunction.
> (*RJR* at 334, 348)

Justice S.L. Hunt McDonald found that the Applicant had demonstrated that it has a strong *prima facie* case; that it will suffer irreparable harm before trial if the injunction is refused; and that the balance of convenience favours granting an injunction (at para 60). The application for an interlocutory injunction was granted (at para 61).

The Respondent argued that the proposed order (e.g., the injunction) would violate its freedom of expression (right to protest) under *Charter* s 2(b). Justice Hunt McDonald analyzed first whether the *Charter* applied in the circumstances. She noted that the case of *RWSDU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 (CanLII) (*Dolphin Delivery*) held that the *Charter* does not apply to private litigation. She also noted, however, that the Supreme Court of Canada (SCC) had held that *Charter* applies to many forms of delegated legislation (such as by-laws). The SCC held that "where the exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another," the *Charter* will apply (at para 64, citing *Dolphin Delivery* at 602-603). Justice Hunt McDonald then

examined the case of *Horse Lake First Nation v Horseman*, 2003 ABQB 152 (CanLII) (*Horse Lake*), where Justice Lee held:

> [29] The Charter should apply to any decision or by-law or action the Band Council or the Band makes under the authority of the *Indian Act* because the Band is using its statutory authority to regulate the life of its members. Therefore, the women whom the Band seeks to restrain from protesting should be able to raise freedom of expression against the Band Council.
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> [30] There are circumstances where the decisions of the Band should not be subject to the Charter. For example, if the Band or Band Council is contracting with a private party for goods or services, the relationship is one that would likely be governed by private contract law.
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> Justice Hunt McDonald noted that this excerpt had been cited with approval in *Pridgen v University of Calgary* (2012 ABCA 139 (CanLII) at para 90). This is another decision that deals with the issue of application of the *Charter* (on university campuses). See Jennifer Koshan's blog post on *Pridgen* here.

In *Horse Lake*, the defendants were protesting over perceived improper management and administration of funds by the Chief and Band Council. They occupied parts of the Band Council offices and demanded that forensic audits and drug testing be performed (at para 65). Because the facts resembled the first situation set out by Justice Lee (*Horse Lake*, at para 29), the *Charter* applied. In the *Siksika Nation* case, the Applicant was seeking an injunction to prevent the Respondents from interfering with a private contract (at para 67). Justice Hunt McDonald found that the *Siksika Nation* case fell within the second category discussed by Justice Lee (*Horse Lake*, at para 30). It occurred in a situation where there were contracts with private parties for services (construction of homes). Thus, although the current case had some similarities with the *Horse Lake* case, it was distinguishable (at par 67).

While acknowledging that the issue of *Charter a*pplication under these circumstances is unsettled, Justice Hunt McDonald concluded that it does not apply. However, she was prepared to address the issue of freedom of expression (*Charter* 2(b) and *Charter* s 1) in case she was wrong and the *Charter* does apply (at para 68).

The Applicant conceded that the blockade fell within the ambit and manner of expression that is protected under *Charter* s 2(b), and that granting the injunction would be a *prima facie* infringement on the Respondent's freedom of expression (at para 69). The Court then analyzed whether any limit that would be imposed on the Respondents by the injunction could be justified under section 1 of the *Charter* (by using the test in *R v Oakes*, [1986] 1 SCR 103 (CanLII) (*Oakes*)).

Justice Hunt McDonald noted that the SCC in *Retail, Wholesale and Department Store Union Local 558 v Pepsi Cola Canada Beverages (West) Ltd*, 2002 SCC 8 (CanLII) (*Pepsi Cola*), addressed the *Oakes* test in the context of picketing. The SCC had held that "secondary picketing is generally lawful unless it involves tortious or criminal conduct" and that "picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation, or misrepresentation, will be impermissible, regardless of where occurs" (at para 72; citing *Pepsi Cola* at paras 3, 77). This holding applies to all forms of protest analogous to picketing (at para 72; citing *Pepsi Cola* at paras 80-82).

In applying the *Oakes* and *Pepsi Cola* factors to the facts of the case, Justice Hunt McDonald concluded that the proposed order for an injunction was for a pressing and substantial objective—the risk of significant financial and societal harm. Second, the proposed order was directly linked to that objective. Third, the proposed order was minimally impairing because it only infringed on impermissible expression, such as tortious conduct arising from the blockade together with threats and intimidation. Thus, the injunction order was a justifiable infringement of s 2(b) of the *Charter* (at para 74).

Justice Hunt McDonald's hesitancy about the issue of the *Charter's* application in this situation demonstrates yet another situation where it is unsettled whether the *Charter* applies. This case involved the relationship between private parties, but the existence of the Band's authority derived from legislation could bring the *Charter* into play. Other cases in which the issue of the application of the *Charter* can be contentious often involve privately owned spaces to which members of the public are invited. Some of these "public" locations include university campuses, shopping malls, airports, bars, sports stadiums and nursing homes. Because members of the public are invited to these spaces, attendees assume that they are protected by the *Charter*, when it may not apply. The issue of the application of the *Charter* in some circumstances is arising with more frequency. It is hoped that such a case will come before the SCC so that even more guidance can be provided.

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