Federal Court  Cour fédérale

Date: 20230127

Dockets: T-2536-22
T-2546-22

Citation: 2023 FC 129

Ottawa, Ontario, January 27, 2023

PRESENT: Mr. Justice Sébastien Grammond

Docket: T-2536-22

BETWEEN:

TERRINA BELLEGARDE

Applicant

and

SCOTT EASHAPPIE, SHAWN SPENCER, TAMARA THOMSON AND CARRY THE KETTLE FIRST NATION

Respondents

Docket: T-2546-22

AND BETWEEN:

JOELLEN HAYWAHE

Applicant

and

SCOTT EASHAPPIE, SHAWN SPENCER, TAMARA THOMSON AND CARRY THE KETTLE FIRST NATION

Respondents

ORDER AND REASONS

[1] The applicants are seeking judicial review of their removal from their positions as councillors of Carry the Kettle First Nation [CTK]. They brought a motion for interim relief to stay their removal and a by-election intended to replace them.

[2] I am granting the motion. There is a serious issue that the individual respondents did not have the quorum nor the qualified majority required by CTK law to remove the applicants. The respondents concede that the failure to stay the removal and the by-election would cause irreparable harm to the applicants. Given the strength of the applicants' case and the need to respect the recent expression of the wishes of CTK electors, the balance of convenience favours a stay.

I. Background

[3] CTK conducts its elections pursuant to the Cega-Kin Nakoda Oyate Custom Election Act [the Election Act]. The following features of the Election Act are relevant to the present matter. Section 12 creates the Cega-Kin Nakoda Oyate Tribunal [the Tribunal], which is mainly tasked with hearing election appeals, but also plays a role in the removal of a Chief or councillor. It is comprised of four CTK members and one non-member. Section 19 sets out the grounds and process for removing a Chief or councillor. To effect such a removal, the Council must convene a special meeting and obtain a recommendation from the Tribunal. The person concerned then has the opportunity to make submissions to the Council, after which a vote of two thirds of the remaining members of council is needed to remove the person. Section 20 provides for the

suspension of a Chief or councillor. The process for doing so is to be established by regulation, but I am informed that no such regulation has been adopted. Section 20 does not identify who has the power to suspend a councillor.

[4] An election was held on April 7, 2022. The applicants, Terrina Bellegarde (in file T-2536-22) and Joellen Haywahe (in file T-2546-22) were elected as councillors. The three individual respondents, Chief Scott Eashappie, Shawn Spencer and Tamara Thomson, were also elected, as well as Dwayne Thomson and Lucy Musqua, who are not parties to this application.

[5] Following the election, increasing distrust grew between the applicants and the respondents, with Councillors Musqua and Dwayne Thomson usually siding with the applicants. For the purposes of this motion, it is not necessary to provide a full description of the events that transpired since the election.

[6] On August 15, 2022, the Tribunal issued a notice in which it stated that it had been made aware of situations that might constitute grounds for removal. It invited any person who wished to make submissions to do so in writing before August 22, 2022.

[7] On August 24, 2022, the chairperson of the Tribunal resigned. He was the member of the Tribunal who is not a CTK member. He has never been replaced.

[8] On August 28, 2022, the Tribunal ordered, pursuant to section 20 of the Election Act, that Councillor Haywahe be suspended with pay. It also recommended that a special meeting of the Council be held to review Councillor Bellegarde's misconduct pursuant to section 19.

[9] On September 7, 2022, CTK's legal counsel sent a notice to Councillor Bellegarde of a Council meeting to be held on September 14, 2022, to consider her removal. She was also provided with the recommendation of the Tribunal to that effect. Briefly put, the grounds for removal pertained to (1) the continuance of a Council meeting after the Chief had left and Councillor Bellegarde's insistence that this be reflected in the minutes, (2) a heated discussion with Councillor Tamara Thomson that is alleged to have amounted to "forcible confinement," and (3) the issuance of a grant to a CTK member to attend a sports event.

[10] Councillor Bellegarde did not attend the September 14 meeting. Only the three respondent members of Council attended the meeting, in addition to the Tribunal members and two CTK Elders. Councillors Musqua and Dwayne Thomson declined to attend. The three respondents voted unanimously to remove Councillor Bellegarde. Detailed reasons for this decision were only provided on November 1, 2022, after this Court's decision in *Saulteaux v Carry the Kettle First Nation,* 2022 FC 1435 [*Saulteaux*] made it clear that reasons were needed in a similar situation.

[11] The applicants did not accept that they were validly removed or suspended. Together with Dwayne Thomson and sometimes Councillor Musqua, who are apparently of the same opinion, they have purported to hold Council meetings. In particular, on September 22, 2022, the

applicants and Councillor Dwayne Thomson adopted a resolution suspending the Chief. Councillor Bellegarde informed Indigenous Services Canada [ISC] of the dispute among the Council. As a result, ISC advised that they would not take certain actions or disburse certain funds until they receive a resolution signed by all seven elected members of Council or an order of the Court.

[12] On October 21, 2022, Councillor Haywahe received notice of a Council meeting to be held on October 27, 2022, to consider her removal pursuant to section 19 of the Election Act. Councillor Haywahe did not attend the meeting. Nor did Councillors Musqua and Dwayne Thomson. The record contains a document dated November 3, 2022, which sets out the Tribunal's recommendation to remove Councillor Haywahe. On November 5, 2022, the three respondent members of Council voted to remove Councillor Haywahe, and detailed reasons were provided. The grounds for removal pertain to harassment of CTK employees, the purported removal of the Chief, the holding of unlawful Council meetings and the refusal to accept her suspension. The reasons state that Councillors Musqua and Dwayne Thomson refused to attend the October 27 meeting, but it is unclear whether there was a separate meeting on November 5. In any event, they did not sign the resolution removing Councillor Haywahe.

[13] The applicants also state that they filed complaints against the Chief and Councillor Spencer with the Tribunal, but that no action appears to have been taken.

[14] The applicants have brought applications for judicial review of their removal. After these applications were filed, CTK announced that by-elections would take place on February 3, 2023,

to fill the seats of the applicants. The applicants have thus brought motions for a stay of their removal and of the February 3, 2023 by-election, as well as an interlocutory injunction prohibiting the council from making certain decisions without a quorum and requiring the respondents to call a council meeting and a membership meeting.

[15] Before the motion for interim relief was heard, the respondents indicated their intention to challenge this Court's jurisdiction to hear the present applications and, by way of consequence, any motion for interim relief. At a case management conference held before my colleague Associate Justice Catherine Coughlan, they insisted that the motion for interim relief be postponed until the final determination of their objection to jurisdiction. Associate Justice Coughlan declined to do so and set a timetable for steps leading to the hearing of the motion for interim relief. The respondents appealed her case management order. I dismissed their appeal because there is no legal requirement that the jurisdictional issue be determined prior to the issuance of interim relief: *Bellegarde v Carry the Kettle First Nation*, 2023 FC 86.

II. Analysis

[16] I am granting the applicants' motion and staying their removal and the by-election. To explain why, I first lay out the three-part test for the issuance of stays and interlocutory injunctions. I then describe the serious issue that arises with respect to the validity of the applicants' removal. As the respondents concede the second prong of the test, I move directly to the third part, the balance of convenience. I show that the strength of the case and respect for the democratic choice of CTK electors tip the balance of convenience in favour of a stay.

A. *The Test for Stays and Interlocutory Injunctions*

[17] In deciding whether to issue a stay (or an interlocutory injunction), Canadian courts employ a three-part test derived from the decision of the British House of Lords in *American Cyanamid Co v Ethicon Ltd*, [1975] AC 396. The best known statement of this test is found in the Supreme Court of Canada's decision in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334 [*RJR*]:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[18] The first two steps of this method aim at assessing the risk of harm to the plaintiff if the stay is not granted. At the third step, this risk is compared to the risk of harm to the defendant if a stay is granted but the defendant later prevails on the application for judicial review. Harm to third parties and the public interest may also be considered at that stage: *RJR*, at 343–347.

[19] The three prongs of the *RJR* test should not be applied in a mechanistic fashion. While each of the three prongs must be met, strength on one prong may compensate weakness on another: *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc*, 2011 SKCA 120 at paragraph 26; *Monsanto v Canada (Health)*, 2020 FC 1053 at paragraph 50; *Spencer v Canada (Attorney General)*, 2021 FC 361 at paragraph 51; *Singh v Canada (Citizenship and Immigration)*, 2021 FC 846 at paragraph 17. In the end, "The fundamental question is whether the granting of [a stay] is just and equitable in all of the circumstances of the

case. This will necessarily be context-specific": *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paragraph 25, [2017] 1 SCR 824. In other words, deciding whether a stay is warranted is a fact-dependent and pragmatic exercise.

[20] I have stated on a number of occasions that courts should show deference to Indigenous decision-makers and strive to minimize the impact of their decisions on Indigenous self-government: see, for instance, *Gadwa v Joly*, 2018 FC 568 at paragraph 71; *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraphs 21–27, [2018] 4 FCR 467; *Waquan v Mikisew Cree First Nation*, 2021 FC 1063 at paragraphs 13–14; *Whitstone v Onion Lake Cree Nation*, 2021 FC 1228 at paragraph 13 [*Whitstone*]. Nevertheless, members of First Nations are entitled to procedural fairness and remedies for the breach of their rights: *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142 (TD) at 161; *Saulteaux*, at paragraphs 55–58. Moreover, First Nation governments must comply with the rule of law: *Simon c Bacon St-Onge*, 2023 CAF 1 at paragraphs 19–22. Thus, while deference and self-government must be kept in mind at every step of the analysis, they do not foreclose this Court's intervention in appropriate cases.

B. *Serious Issue*

[21] In *RJR*, at 337–338, the Supreme Court stated that the first step of the inquiry is usually a low threshold. It is enough that "the application is neither vexatious nor frivolous." In a later case, however, the Court carved an exception to this principle and stated that an applicant who seeks a mandatory injunction must show "a strong *prima facie* case" or a strong likelihood of prevailing at trial: *R v Canadian Broadcasting Corp*, 2018 SCC 5 at paragraphs 15 and 17, [2018] 1 SCR 196. A mandatory injunction is an injunction that requires the defendant to do

something, as opposed to an injunction that merely prevents the defendant from doing something.

[22] At this stage of the test, especially if the lower threshold of a "serious issue" is applicable, the courts' usual practice is to refrain from extensively discussing the merits of the underlying case. This recognizes that the evidence available on a motion for a stay or interlocutory injunction is often incomplete, and that the trial judge will be in a better position to reach a decision. Nevertheless, it may be necessary to assess the relative strength of the parties' cases, as this may be a relevant factor at later stages of the analysis: *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at paragraph 97, [2020] 2 FCR 124, rev'd on other grounds 2021 FCA 84; *SKGO v Canada (Citizenship and Immigration)*, 2023 FC 83 at paragraph 23.

[23] In this case, the respondents argue that the stay sought by the applicants is in reality a mandatory injunction, which would require them to show a strong likelihood of success. I disagree. In substance, the applicants seek to preserve the status quo and to prevent the respondents from doing something, namely, to conduct a by-election, which would alter the status quo. When looking at the substance, they are seeking a form of prohibitive, not mandatory injunction. I also note that the lower threshold of a "serious issue" has been uniformly applied in motions for a stay of a councillor's removal and by-election: *Sound v Swan River First Nation*, 2002 FCT 602; *Gopher v Mocassin*, 2004 FC 1750; *Buffalo v Bruno*, 2006 FC 1220 [*Buffalo*]; *Lower Nicola First Nation v The Council*, 2012 FC 103 [*Lower Nicola*]; *Perry v Cold Lake First Nations*, 2016 FC 1081 [*Perry*]; *Yahey v Ewaskow*, 2020 FC 732 [*Yahey*]; *Linklater v*

Thunderchild First Nation, 2020 FC 899; *Whitstone* ; *Bird v Peter Ballantyne Cree Nation*, 2022 FC 994 [*Bird*]. Likewise, an injunction to stop a general election was said to require only a serious issue in *Jean v Swan River First Nation*, 2019 FC 804 at paragraph 13.

[24] It is only necessary to discuss one serious issue: whether the Council had quorum and the qualified majority required for removing Councillors Bellegarde and Haywahe. It is common ground that Councillors Musqua and Dwayne Thomson did not attend the meetings convened for that purpose and that the decision was made by the three individual respondents.

[25] As in *Yahey*, this manner of proceeding appears to breach the quorum requirements laid out by the Election Act. Unfortunately, the provisions of the Election Act in this regard are contradictory. Subsection 5(2) states that the quorum is four members of the Council, while subsection 24(5) states that the quorum is five and includes the Chief. It is far from clear that this contradiction can be resolved by contextual or purposive interpretation. Nevertheless, it need not be resolved in this case, as neither requirement was met.

[26] In addition, subsection 19(6) states that a councillor's position becomes vacant only if two thirds of the remaining councillors vote in favour. Assuming that Councillor Haywahe was validly suspended when a vote was taken with respect to Councillor Bellegarde's removal, in both cases there were five remaining councillors. Three positive votes out of five remaining councillors do not amount to two thirds, but only to 60%. This would also hold true if the Chief votes only in case of a tie: there would have been two votes for the removal among the four remaining councillors (excluding the Chief).

[27] Thus, whether one looks at the issue from the perspective of quorum or qualified majority, the respondents simply did not have the votes to remove Councillors Bellegarde and Haywahe. This raises a serious issue. In fact, the applicants' case appears particularly strong in this regard.

[28] The respondents seek to justify their actions by a creative reading of certain provisions of the Election Act. Their reasoning is encapsulated in the following excerpt from the reasons for the decision to remove Councillors Bellegarde and Haywahe:

> Councillor Dwayne Thomson and Councillor Lucy Musqua refused to attend the special meeting duly called by the Chief. The Tribunal and Council determined that the knowing refusal to attend a special meeting duly called for a single purpose constitutes a Councillor refusing to vote, therefore under Section 24(16) of the Custom Election Act, they are deemed to vote yes.

[29] To place this in context, it is useful to reproduce not only subsection 16, but also subsection 15 of section 24:

> 15. Every member present when a question is put shall vote thereon, unless the council excuses him or unless he is personally interested in the question, in which case he shall not be obliged to vote.
>
> 16. A member who refuses to vote shall be deemed to vote yes.

[30] It appears obvious that subsection 16 is the sanction for a councillor who fails to abide with the duty to vote flowing from subsection 15. It is very difficult to imagine how paragraph 16 could apply to members not present or operate so as to displace the requirement for a quorum. This is simply not what it says. In fact, the respondents' interpretation has the potential to render any quorum requirement meaningless.

[31] At the hearing of this motion, the respondents admitted that the process they followed was less than perfect, but sought to justify it by the concept of necessity. Given the refusal of Councillors Musqua and Dwayne Thomson to attend, the respondents decided that deeming them to vote yes was the best they could do to achieve a result they thought necessary for the good of the Nation. Yet, unless we accept that the ends justify the means, this kind of results-oriented reasoning cannot displace the explicit requirements of the Election Act for a quorum and a qualified majority.

[32] Thus, the justification advanced by the respondents for proceeding as they did does not seriously lessen the strength of the applicants' case with respect to the issue of quorum and qualified majority. Neither is the strength of the applicants' case affected by the deference due to Indigenous decision makers. Deference does not render the respondents' interpretation any more plausible. Likewise, the respondents argued that their challenge to this Court's jurisdiction gives rise to a presumption that the removal decisions are valid. I fail to understand the logic of this proposition, but more importantly, any such presumption would likely be rebutted in the circumstances of this case.

[33] In sum, even considering the arguments the respondents put forward to justify their conduct, I find that the applicants have raised a serious issue and, indeed, a likelihood of succeeding, with respect to quorum and qualified majority.

[34] For this reason, I do not need to assess the applicants' other submissions, and I express no opinion in their regard. Likewise, I do not need to ascertain the extent to which Councillors

Bellegarde's and Haywahe's refusal to attend the meetings of the Council at which their removal was discussed constitutes a waiver. It is enough to say that any waiver would not empower the Council to act without quorum or without the requisite qualified majority.

C. *Irreparable Harm*

[35] The respondents concede that if the applicants succeed in showing a serious issue, they will suffer irreparable harm if a stay is not granted. This concession, with which I agree, is in line with this Court's decisions in the cases cited above at paragraph [23].

D. *Balance of Convenience*

[36] A finding of irreparable harm, however, does not end the matter. The harm suffered by the applicants if the stay is denied must be compared with the harm suffered by the respondents if the stay is granted. The public interest, or in this case the interest of the Nation, may also be taken into account at this stage. This is the balance of convenience.

[37] In this case, both parties agree that the interest of the Nation is paramount, but they disagree as to what that interest is. The respondents insist on the conflict, disagreement and havoc that the presence of the applicants on Council has caused, and is likely to cause again if their removal is stayed. They also emphasize that the process laid out in the Election Act must be followed. The applicants, in contrast, argue that the Nation's interest is best evidenced by the result of the recent elections and that their removal would foster distrust in the democratic process. I will address these factors in turn.

[38] Respect for the process laid out in the Election Act is of course an important consideration. The respondents, however, can hardly accuse the applicants of disregarding the Election Act. As we have seen above, they have themselves taken significant liberties with the quorum and qualified majority requirements.

[39] To be sure, there has been an unfortunate spiral of conflict among the Council since the last election. The parties have been unable or unwilling to de-escalate. At the hearing of this motion, the resort to hyperbole to describe the situation was not helpful. Given my role in deciding this motion and the limited evidence in the record at this stage, I will simply say that I am unable to ascribe the responsibility of this conflict to one side only. Thus, the balance of convenience is not tipped by one party's attempts to blame the other for the situation.

[40] The conflict between the parties must also be considered in light of the structure of CTK's political system. First Nations like CTK do not have a Parliamentary system in which an anticipated election may be called if the government loses the confidence of the elected assembly. Rather, councillors are elected for a fixed term. When they have opposing views, they must find a way, often through compromise, to manage the affairs of the Nation. In this respect, I can do no better than quote the wise words of Professor John Borrows in *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 38–39:

> Fortunately, the fact that many Indigenous laws are based on deliberative processes means that non-aligned or dissenting viewpoints can be taken into account in the law's formulation. When any society identifies, proclaims, and enforces its laws, there is bound to be disagreement. Most legal systems that respect individual freedoms and dignity must find peaceful ways to deal with opposition in their midst. This requires that conflicting

> viewpoints be processed in a manner that is conducive to orderly and respectful listening, discussion, and resolution.

[41] It is tempting to say that there would be less conflict if all power was given to one side. Indeed, in the present case, both sides have tried to act unilaterally at times. However, CTK electors did not want to hand all power over to one side. They elected councillors with different perspectives or political agendas. They want them to work together.

[42] Thus, the decisive factor in this case is the respect due to the democratic choice of CTK electors. Given my assessment of the strength of the applicants' case, the failure to stay their removal from Council would give CTK members the impression that the removal procedure is instrumentalized to silence opposition. As this Court has noted on several occasions, this is likely to foster distrust in the democratic process: *Buffalo*, at paragraphs 15 and 19; *Lower Nicola*, at paragraph 35; *Perry*, at paragraphs 10–11; *Bird*, at paragraphs 37, 39 and 43. Moreover, if the by-election is not stayed and the applicants are successful on the merits, two councillors would be elected, only to be forced to step down a few months later.

[43] In saying this, I do not wish to be taken as setting out a hard-and-fast rule that a councillor who seeks judicial review of their removal will always be entitled to a stay. All the circumstances must be taken into account, including the assessment of the strength of the applicant's case.

E. *Terms of Relief*

[44] In addition of a stay of their removal and the by-election, the applicants are seeking injunctions prohibiting the respondents from conducting business without a quorum of five councillors and requiring the respondents to comply with the Election Act, in particular the requirement to call Council and membership meetings.

[45] I decline to grant these additional orders. First, in several respects they are merely orders to comply with the law. Injunctions, however, should be carefully tailored to remedy the specific wrong that has been proved or that is reasonably anticipated: *Cambie Surgeries Corp v British Columbia (Medical Services Commission)*, 2010 BCCA 396 at paragraph 39; *NunatuKavut Community Council Inc v Nalcor Energy*, 2014 NLCA 46 at paragraph 71. Injunctions worded in broad terms or the scope of which is uncertain may be difficult to enforce. I have alluded to a number of challenges in interpreting the Election Law; it would be unfortunate if these issues had to be decided in the context of contempt proceedings. Relatedly, the applicants are seeking an order that the respondents not conduct business without a quorum of five councillors, but the issue of how the quorum provisions of the Election Act should be reconciled was not fully argued before me.

[46] Second, unless the orders sought are merely ancillary to the main relief, namely the stay of the applicants' removal and the by-election, the applicants had to show that the three-part *RJR* test is met with respect to each of these orders. They have not done so. The justification for the orders sought does not immediately appear from the evidence.

[47] Third, there is no doubt that I may issue ancillary orders to ensure the effectiveness of the main relief, but I have not been persuaded that it is necessary to do so in the present circumstances.

[48] Lastly, the applicants asked me to retain jurisdiction to intervene as needed with respect to the implementation of my order. Again, I have not been persuaded that this is necessary or useful. The matter is under case management. It is not desirable to add a second layer of supervision to the case. Moreover, retaining jurisdiction in the present circumstances would amount to the kind of intervention in the affairs of the Nation that should be avoided to the extent possible.

[49] Having said this, I emphasize that I expect both parties to comply in good faith with this order and the Election Law.

[50] On the eve of the hearing of this motion, the respondents submitted an informal request for interim relief, prohibiting the applicants from discussing this case with third parties. Their request is based on the fact that Councillor Bellegarde sent information regarding the case, including instructions for requesting a link to attend the virtual hearing, to representatives of corporations with which CTK has business relationships.

[51] This request is without merit. This matter is heard in open court and the record is accessible to the public. Several observers attended the hearing of this motion. The respondents have not shown that the test for a confidentiality order, laid out in *Sherman Estate v Donovan*,

2021 SCC 25, is met, nor have they provided any authority for the proposition that a party may be restrained from discussing with third parties a case heard in open court.

III. Disposition

[52] For these reasons, I am granting the motion and issuing a stay of the applicants' removal from CTK Council and of the by-election scheduled for February 3, 2023. Other requests for relief are denied.

[53] The parties have not made submissions regarding costs. I will thus apply the usual rule that costs follow the event and will be assessed according to the Tariff.

ORDER in T-2536-22 and T-2546-22

THIS COURT ORDERS that:

1. The removal of Councillors Terrina Bellegarde and Joellen Haywahe from the Council of the Carry the Kettle First Nation is stayed until the present applications for judicial review are finally determined.

2. The by-election scheduled for February 3, 2023 to replace Councillors Terrina Bellegarde and Joellen Haywahe on the Council of the Carry the Kettle First Nation is stayed.

3. The costs of this motion are awarded to the applicants.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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