

Federal Court



Cour fédérale

Date: 20091221

Docket: T-1039-09

Citation: 2009 FC 1296

Ottawa, Ontario, December 21, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**GRAND CHIEF TIMOTHY THOMPSON,
THE MOHAWK COUNCIL OF AKWESASNE AND
THE MOHAWKS OF AKWESASNE**

Applicants

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS,
THE PRESIDENT OF THE CANADA BORDER
SERVICES AGENCY AND
THE MINISTER OF TRANSPORT,
INFRASTRUCTURE AND COMMUNITIES**

Respondent

REASONS FOR ORDER AND ORDER

[1] In 2006, the decision was made that Border Services Officers working at land and marine ports of entry operated by the Canada Border Services Agency (“CBSA”) should begin carrying firearms when performing their duties. After twice postponing the implementation of the arming

initiative at the customs office on Cornwall Island, the CBSA advised the Mohawks of Akwesasne that Border Services Officers at that port of entry would begin carrying firearms on June 1, 2009.

[2] This decision resulted in a number of demonstrations taking place on Cornwall Island in the days leading up to the implementation date. On the night of May 31, 2009, a large crowd gathered near the border facility. The CBSA says that as a result of concerns for the safety of its employees, the decision was made to evacuate CBSA personnel and close the customs office on Cornwall Island. The CBSA facility on Cornwall Island remains closed to this day, although a temporary customs facility has since been opened in the City of Cornwall.

[3] Because of the peculiar geography of the area, the Mohawks of Akwesasne face particular challenges as a result of the closure and subsequent relocation of the port of entry. The applicants, who represent members of the Mohawk community in various capacities, now seek a range of interlocutory remedies to alleviate the hardship allegedly faced by the Mohawks of Akwesasne, pending the hearing of the applicants' application for judicial review of the decision to close the Cornwall Island customs office.

[4] For the reasons that follow, I have concluded that the applicants will not face irreparable harm in the period between now and the time that their application for judicial review is finally determined, and that the balance of convenience favours the respondents. As a consequence, the motion will be dismissed.

The Parties

[5] The Mohawks of Akwesasne are recognized in Canada as a “Band” and its members are recognized as “Indians” as those terms are used in the *Indian Act*, R.S.C. 1985, c. I-5. Moreover, the Mohawks of Akwesasne are also considered an “aboriginal people” within the meaning of s.35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[6] The Mohawk Council of Akwesasne (“MCA”) is a community government elected by the Mohawks in Akwesasne under customary election law. According to the applicants, it is a “council of the band” within the meaning of the *Indian Act*. The MCA administers the local affairs of the Mohawks of Akwesasne, and represents them in their dealing with Canadian governmental bodies.

[7] Grand Chief Timothy Thompson was the elected Grand Chief of the Mohawks of Akwesasne as of the date of the issuance of this application for judicial review. He has since been replaced by Grand Chief Michael Kanentakeron Mitchell.

[8] The Minister of Public Safety and Emergency Preparedness is charged with responsibility over the Canada Border Services Agency in accordance with section 6 of the *Canada Border Services Agency Act* (“CBSAA”), S.C. 2005, c.38. Section 5 of the *Customs Act*, R.S.C. 1985, c.1 (2nd Supp.) confers power on the Minister to designate customs offices inside or outside Canada, and to amend, cancel or reinstate such designation at any time.

[9] The CBSA's mandate is described in subsection 5(1) of the *CBSAA* which states that the "Agency is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation..."

[10] The CBSA is responsible for enforcing a number of statutory instruments that form part of the program legislation, including the *Customs Act* and the *Immigration and Refugee Protection Act*, S.C. 2001, c.27.

[11] The President of the CBSA is responsible for the management of the CBSA and all matters connected with it, under the direction of the Minister of Public Safety and Emergency Preparedness.

[12] The Minister of Transport, Infrastructure and Communities is responsible for the security and safety of international bridges and tunnels, in accordance with section 17 of the *International Bridges and Tunnels Act*, S.C. 2007, c.1 ("*IBTA*").

[13] Although not named as a party to this proceeding, the Seaway International Bridge Corporation Limited (SIBC) is also involved in the events giving rise to this matter. The SIBC is a subsidiary of the Federal Bridge Corporation Limited, a Transportation Crown Corporation within the portfolio of the Minister of Transport. The SIBC operates and manages the international toll bridge system linking the north shore of the St. Lawrence River, Cornwall Island and New York

State. Part of the stated mission of the SIBC is to ensure the safe, efficient and secure flow of commercial and passenger vehicles through the crossing.

The Geography of the Area

[14] In order to understand the issues on this motion, it is necessary to have some familiarity with the geography of the area. To assist in this regard, a map of the region is attached as an appendix to these reasons.

[15] Briefly stated, the City of Cornwall is on the north shore of the St. Lawrence River. Cornwall Island sits in the St. Lawrence River to the south of the City of Cornwall. Both are in Canada. The southern shore of the St. Lawrence River directly south of Cornwall Island is in the State of New York near the town of Rooseveltown. The three areas are connected by two bridges and a highway corridor across Cornwall Island.

[16] As its name suggests, the “International Bridge” crosses the Canada – U.S. border, and connects the south shore of the St. Lawrence River to Cornwall Island. At its northern end, the International Bridge feeds into the highway corridor that traverses Cornwall Island. Until May 31, 2009, the Cornwall Island port of entry was located on this corridor.

[17] The “Three Nations Bridge” then connects Cornwall Island to the northern shore of the St. Lawrence River. Since July 13, 2009, a temporary border facility has been located at the northern base of the Three Nations Bridge.

The Mohawks of Akwesasne

[18] The Mohawks of Akwesasne are part of the greater Mohawk community of Akwesasne, whose members include the St. Regis Mohawk Tribe in the United States. The Mohawks of Akwesasne have reserves set aside for them in the Provinces of Ontario and Québec. The reserve lands in Ontario are referred to as Akwesasne Reserve No. 59, and include Cornwall Island (or “Kawehnoke”). The reserve lands in Québec are known as Akwesasne Reserve No. 15, and are composed of two districts – “Tsi-Snaihne”, which is also known as “the Chenail”, and St. Regis Village (or “Kanatakon”). There are approximately 10,800 persons living on the two Akwesasne Reserves in Canada.

[19] The Akwesasne Reservation is in New York State, on the south shore of the St. Lawrence River. It is directly below Cornwall Island, and adjoins the mainland portion of Akwesasne Reserve No. 15 to the east and north. Grand Chief Mitchell states in his affidavit that his information is that there are some 4,000 persons living on the Akwesasne Reservation, although he acknowledges that some of these people may also be included in the population figures for the Mohawks of Akwesasne.

Background

[20] The Cornwall Island border facility is the 11th busiest land border port in Canada in terms of the number of people processed annually. The CBSA has also identified this land border port as one with a high risk for illegal activities such as smuggling.

[21] Whether they reside in Ontario, Québec or New York, the Mohawks of Akwesasne consider themselves to be members of a single community. There is a great deal of movement between the various districts that make up the community of Akwesasne. Individuals may live in one part of the community, work in another part, and have family members residing in the third.

[22] One cannot travel by car from the Akwesasne Reserve No. 15 in Québec to Cornwall Island without passing through the United States. Movement between the Akwesasne Reservation in New York State and Cornwall Island requires the crossing of an international boundary. As a consequence, there is a great deal of regular cross-border traffic by members of the Akwesasne community, with the result that the Mohawks of Akwesasne are heavy users of the bridges. Indeed, it has been estimated that members of the Akwesasne community account for as much as 70% of the bridge traffic.

[23] The creation of an international boundary dividing the Akwesasne community, and the regulation of the movement of people and goods across that border has generated significant conflict and litigation over the years.

[24] Amongst other things, the right of members of the Mohawks of Akwesasne to bring goods into Canada from the U.S. for trading purposes without paying customs duties was the subject of proceedings in the Supreme Court of Canada: see *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, 2001 SCC 33, [2001] 1 S.C.R. 911. The legality of the expropriation of land on

Cornwall Island to create the highway corridor and CBSA border facility has been in issue for years, and is the subject of ongoing proceedings in this Court (Court file number T-2210-76).

[25] Most recently, there have been allegations of racial profiling and other forms of discrimination by CBSA officers working out of the Cornwall Island customs facility, which have resulted in numerous complaints being filed with the Canadian Human Rights Commission. There has also been opposition within the Akwesasne community to the proposed expansion of the CBSA facility on Cornwall Island.

The CBSA Arming Initiative

[26] According to the respondents, Border Services Officers face a growing challenge, particularly at land borders, in intercepting potential threats including high risk individuals, firearms, explosives, drugs and illegal contraband. Prior to being provided with firearms, Border Services Officers were unable to deal with individuals endeavouring to cross the border who were identified as “armed and dangerous”. Officers were instructed to let such individuals into Canada and immediately notify the appropriate police force.

[27] The lack of immediate police assistance and the number of armed and dangerous travelers or “look-outs” passing through the border led to numerous instances of Border Services Officers abandoning their posts due to perceived unsafe work conditions. This contributed to the decision in August of 2006 to provide Border Services Officers working at land ports of entry such as that located on Cornwall Island with firearms.

[28] There were a number of discussions between representatives of the Mohawks of Akwesasne and the CBSA in the period between August of 2006 and May of 2009 with respect to the implementation of the arming initiative at the border crossing on Cornwall Island. The Mohawks of Akwesasne strenuously opposed the arming of Border Services Officers, which they viewed as encroaching on the issue of Mohawk self-government. They also wanted a number of other issues resolved prior to Borders Services Officers carrying arms on Cornwall Island.

[29] Moreover, many Mohawks perceived the deployment of an armed force that was not accountable to the Mohawk community as a form of “intersocietal aggression”. Indeed, the MCA advised the Minister of Public Safety and Emergency Preparedness that the deployment of arms would be viewed within the Mohawk community as “an act of war”.

[30] The implementation of the arming initiative was postponed twice. Despite further discussions between the CBSA and members of the Mohawks of Akwesasne, no resolution of the issue was arrived at, and the CBSA came to the conclusion that no resolution was likely. Indeed, Grand Chief Thompson confirmed in his cross-examination that as far as the MCA was concerned, the issue was, and still is, “non-negotiable”.

[31] Consequently, on March 6, 2009, the Executive Vice-President of the CBSA advised Grand Chief Thompson and two district Mohawk Chiefs from St. Regis Village that the CBSA intended to begin deploying armed Border Services Officers at the Cornwall Island port of entry on June 1, 2009.

The Protests at the Cornwall Island Port of Entry

[32] After being advised that the arming initiative would be implemented at the Cornwall Island border facility on June 1, 2009, Grand Chief Thompson advised the CBSA that the MCA would be engaging in peaceful protests commencing on May 1, 2009. There were discussions between the parties as to when and where these protests would take place, so as to minimize the disruption to border services operations.

[33] There is a disagreement between the parties with respect to the nature of the protests that ensued. It is, however, uncontroverted that on May 25, 2009, an individual later identified as “R.N.” entered the CBSA building on Cornwall Island. R.N. had previously been identified as someone who was potentially inadmissible to Canada. R.N. was accompanied by 14 other individuals, some of whom self-identified as “warriors”. One individual in the group advised the CBSA staff that the group was there to ensure the safe passage of R.N. into Canada, as they did not recognize the Canada – U.S. border, or the authority of the CBSA or the Government of Canada to deny R.N.’s entry into this country.

[34] During this exchange, the group saw a second individual known as “T.H.” being questioned by CBSA personnel. T.H. evidently had a history of involvement in serious criminal activity, and there was a question as to his admissibility to Canada. Surrounded by the group, R.N. and T.H. were able to leave the CBSA facility and enter Canada.

[35] While there appears to be some question as to whether R.N. was attempting to enter Canada or was already in Canada, I do not understand there to be any dispute about the fact that T.H. was indeed trying to enter Canada from the U.S.

[36] Lance Markell was the District Director at the Cornwall Island port of entry at the time in question. He states in his affidavit that he elected not to take any action with respect to the entry of R.N. and T.H. into Canada so as not to escalate an already tense situation.

[37] On May 29, 2009, a group of approximately 100 protesters gathered at the CBSA facility. Grand Chief Thompson led a group of about 40 protesters into the CBSA building. He read aloud an MCA resolution opposing the arming of Border Services Officers, and someone in the crowd then advised Mr. Markell and others that this was the “first notice” to CBSA.

[38] One of the individuals accompanying Grand Chief Thompson noticed four men being examined by CBSA officials. When the men were asked who they were, they announced that they were Native Americans from Oklahoma. The four men then walked out of the CBSA facility surrounded by protesters and entered Canada.

[39] The four individuals were being questioned by CBSA because of concerns with respect to their potential inadmissibility to Canada for reasons of serious criminality. Once again, Mr. Markell states that he elected not to take any immediate action with respect to the entry of these individuals into Canada so as not to further inflame the situation. He did, however, request the assistance of

CBSA Intelligence and Inland Enforcement officials to locate these four individuals in Canada for fear that their presence in this country could negatively impact the health and safety of the local community.

[40] On May 30, 2009, a crowd of approximately 200 protesters gathered at the CBSA facility. Grand Chief Thompson once again read the MCA resolution opposing the arming of Border Services Officers, and advised Mr. Markell and others that this was the “second notice” to the CBSA.

The Protests on May 31, 2009 and the Closure of the CBSA Facility

[41] There is also a disagreement between the parties as to the nature of events which took place on May 31, 2009. The applicants submit that there was a peaceful political demonstration against the arming of CBSA Border Services Officers scheduled to take effect the following day. The applicants point to the fact that no one was ever arrested for actions occurring on that evening as support for their position that the protest remained peaceful. On the other hand, the CBSA witnesses state that the protests on the evening of May 31, 2009 presented a threat to the safety of the CBSA officers on duty.

[42] While the two sides place a very different spin on what happened at the CBSA facility on Cornwall Island on the evening of May 31, 2009, I do not, however, understand there to be any dispute about the fact that several hundred protesters gathered at the facility. Some of the protesters

were wearing combat fatigues, and some wore balaclavas or bandanas obscuring their faces. A large backhoe was also brought to the site.

[43] At approximately 8:00 in the evening, Grand Chief Thompson and others presented Mr. Markell with the “third and final notice” of the MCA resolution. Mr. Markell had a discussion with Chief Cheryl Jacobs, who asked if the implementation of the arming of the Border Services Officers could be postponed. Chief Jacobs also advised Mr. Markell that she was doing her best to control the protesters, but that “there was a group of angry men prepared to take matters into their own hands”.

[44] Over the course of the evening, individuals wearing “Warrior” insignias on their clothing shone lights at surveillance cameras on the site, making it difficult to monitor the area around the CBSA facility. Bonfires were also set at several locations surrounding the CBSA facility.

[45] At around 11:00 p.m., Mr. Markell spoke to Jerry Swamp, the Chief of the Akwesasne Mohawk Police Service. It is uncontroverted that Police Chief Swamp told Mr. Markell that he was worried that his officers might not be able to control the crowds, and that it may be in the CBSA’s best interests if CBSA staff left Cornwall Island.

[46] Approximately 40 minutes later, Mr. Markell was advised that SIBC employees working at the toll booths at the north end of Cornwall Island were being evacuated out of fear for their safety.

[47] Richard Comerford, the Regional Director General for the CBSA's Northern Ontario Region, was monitoring the situation by video feed. Just before midnight, Mr. Comerford spoke by phone to Police Chief Swamp, who advised him that there was a large crowd gathering at the CBSA facility on Cornwall Island, and that he could not guarantee the safety of the Border Services Officers. The applicants do not dispute the fact that Police Chief Swamp suggested to Mr. Comerford that CBSA employees should leave the facility.

[48] Mr. Comerford then instructed Mr. Markell to evacuate CBSA personnel from the Cornwall Island facility and the port of entry was closed.

[49] The next morning, Mr. Comerford spoke to Grand Chief Thompson and Police Chief Swamp, both of whom expressed concerns for the safety of CBSA officers if they were to return to Cornwall Island carrying firearms. Over the ensuing days, the Akwesasne Mohawk Police Service continued to advise Mr. Comerford that it was not safe for CBSA employees to return to Cornwall Island, even if the purpose of the visit was simply to pick up equipment left behind.

The Period Between June 1, 2009 and the Opening of the Temporary Facility

[50] The closure of the Cornwall Island customs facility led to the immediate closure of both the International and Three Nations Bridges. The blockading of the Three Nations Bridge by officers of the Cornwall Community Police Service meant that Mohawks could leave Cornwall Island, but could not return.

[51] Similarly, the blockading of the International Bridge by New York State Police and U.S. Customs and Border Protection Officers meant that Mohawks could leave Cornwall Island for the United States, but could not return. According to the applicants, these measures compelled the Mohawk Council of Akwesasne to arrange emergency transport by boat with the assistance of individual members of the Akwesasne community.

[52] On June 26, 2009, the applicants filed their application for judicial review of the decision to close the international port of entry located on Cornwall Island on May 31, 2009.

[53] A temporary CBSA facility and port of entry opened at the northern base of the Three Nations Bridge in the City of Cornwall on July 13, 2009. When the temporary facility was opened, two-way traffic on the International and Three Nations Bridges was also restored.

[54] Since July 13, 2009, all travelers from the United States to Cornwall Island are required to report their entry into Canada at the temporary customs facility in the City of Cornwall. This means that members of the Akwesasne community travelling from New York State to Cornwall Island have to drive just over three kilometres further to the City of Cornwall to report, before doubling-back to Cornwall Island. In addition to the extra distance that they have to travel, members of the community have also experienced significant delays at the temporary customs facility.

[55] On July 30, 2009, the CBSA/Cornwall Taskforce was established. Members of the Taskforce include representatives of the CBSA, the MCA, the St. Regis Tribal Mohawk Council,

and the Mohawk Nations Council of Chiefs. The Taskforce has met regularly since July 30, 2009 in order to try to address CBSA operational issues affecting members of the Akwesasne community, amongst other things.

[56] In the period between July 13, 2009 and September 16, 2009, the CBSA did not actively enforce the statutory requirement that individuals arriving in Canada present themselves at a customs office. However, an evaluation process implemented by the CBSA to measure the rate of traveler compliance with the reporting obligations revealed that an average of 42% of vehicles heading north on the International Bridge from New York State failed to report to the temporary border facility in the City of Cornwall during the period between July 13 and August 31, 2009.

[57] The CBSA advised representatives of the MCA and other groups representing the Mohawks of Akwesasne that it would resume enforcing the reporting requirements under the *Customs Act* and the *Immigration and Refugee Protection Act* in mid-September, 2009. In the view of the CBSA, this was necessary to ensure public safety and national security.

[58] On September 18, 2009, the CBSA began seizing vehicles that had been used to transport persons into Canada in contravention of the reporting requirements of the *Customs Act*. Since then, the compliance rate has increased dramatically.

The Applicants' Motion for Interim Relief

[59] The applicants' motion seeks "Interim Orders, an Interlocutory Injunction and other Interim Relief" pending the final determination of their Application for Judicial Review. Specifically, the applicants seek:

- a) to suspend and prohibit the seizure by Respondents or the Canada Border Services Agency of vehicles of any of Applicants the Mohawks of Akwesasne at the purported new customs facility ... and purported new international port of entry in the city of Cornwall ... and to suspend and prohibit the imposition of fines or other liability on the Mohawks of Akwesasne for failure to report to the Canada Border Services Agency ("CBSA") at the new port of entry when traveling only to Cornwall Island from the United States across the international bridge linking Rooseveltown to Cornwall Island for purposes of carrying on their daily lives, occupations or activities or the way of life of the Mohawks of Akwesasne or community activities, including to reach their residences, to transport Mohawk children to schools and Mohawk patients to health facilities, to provide, administer or receive educational, health, social or public services and programs, or for the purposes of Mohawk governance.
- b) to suspend the application by Respondents to Applicants of the *Customs Act*, and other relevant federal legislation in respect to the travel by Applicants within or between the Akwesasne Reserves situated in Canada and the United States and particularly to Cornwall Island, part of Indian Reserve No. 59;
- c) in the alternative, permitting the Applicants the Mohawks of Akwesasne to report to the CBSA, at a location on Cornwall Island, for the purposes of the *Customs Act* and other relevant federal legislation, when Applicants the Mohawks of Akwesasne and the Mohawk Council of Akwesasne travel from the United States to destinations on Cornwall Island;
- d) in the further alternative, directing Respondents to make alternative arrangements respecting reporting by Applicants pursuant to the *Customs Act* and other relevant federal legislation in relation to the travel of Applicants from the United States to destinations on Cornwall Island;

- e) in the alternative, to direct the Respondent Minister of Public Safety and Emergency Preparedness to issue an authorization to the Applicants, including all Mohawks of Akwesasne, allowing them to present themselves in an appropriate and practical alternative manner when traveling from the United States to destinations on Cornwall Island;
- f) in the further alternative, to direct the President of the CBSA to reopen the CBSA facility on Cornwall Island in order to permit the Applicants traveling from the United States to Cornwall Island to report their entry into Canada at that facility as it operated prior to May 31, 2009, the whole under reserve of the proceedings under court number T-2210-76 concerning title to those lands;
- g) to make such other order or provide such other interim relief as to this Honourable Court may seem just.

[60] The primary focus of the applicants' arguments in their initial oral submissions was on having the CBSA provide alternative reporting arrangements for the Mohawks of Akwesasne. In contrast, in their reply submissions, the focus of the applicants' argument was their contention that the CBSA should be compelled to reopen the Cornwall Island border facility with unarmed Border Services Officers pending the determination of the applicants' application for judicial review.

The Test for Injunctive Relief

[61] The parties agree that in determining whether the applicants are entitled to the relief sought, including an interlocutory injunction, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*].

[62] That is, the applicants must establish:

- 1) That there is a serious issue to be tried in the underlying application for judicial review;
- 2) That irreparable harm will result if the injunction is not granted; and
- 3) That the balance of convenience favours the granting of the relief sought.

[63] Given that the test is conjunctive, the applicants have to satisfy all three elements before they will be entitled to relief.

Serious Issue

[64] In *RJR-MacDonald*, the Supreme Court of Canada observed that the threshold for establishing the existence of a serious issue is a low one. In this regard, the Supreme Court noted that:

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. (at para. 50)

[65] The respondents contend that the nature of the relief sought by the applicants (namely an exemption from, or modification of the application of the *Customs Act* and the *Immigration and Refugee Protection Act*) would give the applicants more than they would be entitled to in a final decision on the merits of their application for judicial review. The respondents further submit that the applicants are seeking a temporary declaration of invalidity with respect to provisions of the *Customs Act* and the *Immigration and Refugee Protection Act* as they apply to the applicants.

[66] In such circumstances, the respondents say that the Court should take a hard look at the merits of the underlying application before finding that it raises a serious issue. As will be explained further on in these reasons, I find it unnecessary to resolve this question in this case.

[67] Although they acknowledged that they were not challenging the decision to arm Border Services Officers, the applicants made arguments with respect to the alleged failure of the CBSA to properly consult with respect to the implementation of the CBSA arming initiative at the port of entry on Cornwall Island.

[68] During their oral submissions, the applicants also made arguments with respect to the alleged illegality of the establishment of the temporary border facility on lands which the applicants say are the subject of land claims, and the failure of the respondents to consult with the applicants with respect to the use of these lands. In addition, the applicants made submissions regarding the alleged illegality of the seizure of motor vehicles by the CBSA commencing in mid-September of 2009.

[69] The applicants also take issue with the legality of CBSA Border Services Officers at the temporary border facility questioning members of the Akwesasne community who are travelling from Cornwall Island to the mainland in Canada. In this regard, the applicants say that the CBSA has no authority to question persons travelling from one location in Canada to another location in Canada.

[70] It is not, in my view, necessary to consider whether any of these issues meet the relevant threshold for the establishment of a serious issue for the purposes of the tripartite injunctive test. Whether there are serious questions with respect to any of these matters, they are not “serious issues” for the purposes of the underlying application for judicial review.

[71] It bears repeating that the applicants’ application for judicial review was filed on June 26, 2009, with respect to the decision to close the Cornwall Island port of entry on the evening of May 31, 2009. The applicants have not brought an application for judicial review with respect to either the CBSA’s 2006 decision to begin arming border guards, or the decision communicated to Grand Chief Thompson on March 6, 2009 to implement the arming initiative at the Cornwall Island port of entry on June 1, 2009.

[72] Therefore, to the extent that the implementation of the arming initiative at the Cornwall Island Port of Entry is relevant to this proceeding, it is relevant as background information providing a factual context for the decision under review.

[73] Similarly, the opening of a temporary border facility in the City of Cornwall took place a month and a half after May 31, 2009, and more than two weeks after the applicants commenced their application for judicial review. While the consequences of the relocation of the port of entry for members of the Akwesasne community are relevant to the issue of irreparable harm and balance of convenience on this motion, they are not relevant to the legality of the May 31, 2009 decision in issue in the underlying application.

[74] Insofar as the seizure of motor vehicles by the CBSA commencing in September of 2009 is concerned, these seizures began three and a half months after the decision under review was made, and nearly three months after the application for judicial review was filed. Thus the seizure of motor vehicles is not relevant to the legality of the decision to close the port of entry on Cornwall Island on May 31, 2009.

[75] I would also note that there is an administrative remedy available to the affected individuals under the provisions of the *Customs Act* in the event that they want to challenge the seizure of their vehicles.

[76] Finally, while there may be some debate as to the authority of Border Services Officers to question individuals travelling from Cornwall Island to the mainland in Canada, it is not a serious issue in this case, having regard to the nature of the underlying application for judicial review. Indeed, I am advised that this question is currently before the Ontario courts.

[77] As was noted earlier, there is a disagreement between the parties as to whether the applicants simply have to meet the low “neither vexatious nor frivolous” threshold identified in the *RJR-MacDonald* decision, or whether the nature of the relief being sought on an interlocutory basis mandates that the Court take a hard look at the merits of the underlying application.

[78] Because the applicants have failed to satisfy either of the remaining two branches of the injunctive test, I do not need to resolve this question for the purposes of this motion. I also do not

need to determine whether the arguments advanced by the applicants with respect to their rights under international law or their aboriginal or treaty rights to unimpeded travel throughout their traditional lands or their asserted right to live as a single community raise serious issues in light of the decision of the Supreme Court of Canada in *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*.

[79] Nor do I need to consider whether the applicants' arguments with respect to the alleged failure of the respondents to consult with the applicants regarding the decision to close the Cornwall Island port of entry meet the appropriate threshold for the establishment of a serious issue for the purposes of the injunctive test. The same is true with respect to the arguments advanced by the applicants under sections 6, 8, 15 and 26 of the *Canadian Charter of Rights and Freedoms*.

Irreparable Harm

[80] Injunctive relief should only be granted in cases where it can be demonstrated that irreparable harm will occur between the date of the hearing of the motion for interim relief and the date upon which the underlying application for judicial review is heard, if the injunction is not granted: *Lake Petitecodiac Preservation Assn. Inc. v. Canada (Minister of the Environment)* (1998), 149 F.T.R. 218, 81 A.C.W.S. (3d) 88 at para. 23.

[81] Irreparable harm is harm that cannot be quantified in monetary terms, or which cannot be cured by an award of damages: *RJR-MacDonald* at para. 59.

[82] The burden is on the party seeking the relief to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied: see, for example, *Aventis Pharma S.A. v. Novopharm Ltd.*, 2005 FC 815, 140 A.C.W.S. (3d) 163 at para.59, aff'd 2005 FCA 390, 44 C.P.R. (4th) 326.

[83] That is, it will not be enough for a party seeking injunctive relief to show that irreparable harm may arguably result if the relief is not granted. Moreover, allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm will result: see *International Longshore and Warehouse Union, Canada v. Canada (Attorney General)*, 2008 FCA 3, 168 A.C.W.S. (3d) 315 at paras. 22-25.

[84] Before turning to consider the specific allegations of irreparable harm advanced by the applicants in this case, it should be observed that some of the affidavits provided by the applicants in support of their allegations of irreparable harm were sworn in July of 2009, and deal with the situation as it stood prior to the opening of the temporary border facility in the City of Cornwall. As such, they are of limited assistance in evaluating the harm faced by the applicants in light of the current situation.

[85] A number of other affidavits provided by the applicants were sworn in late September, 2009, and provide an updated view of the situation as it stood to that point. It is, however, evident from the affidavits filed by the respondents and from the cross-examination of various witnesses for both sides that the situation faced by the Mohawks of Akwesasne remains somewhat fluid. That is,

the situation has continued to evolve since late September, as specific difficulties created by the relocation of the port of entry are identified by the applicants and arrangements are made to address those concerns.

[86] This evolution in the facts is particularly important as it relates to the concerns identified in affidavits relied upon by the applicants with respect to the ability of emergency vehicles such as ambulances, police cars and fire trucks to respond to urgent calls on Cornwall Island in a timely manner.

[87] Indeed, Grand Chief Mitchell confirmed on his cross-examination that although the applicants had genuine concerns in the summer of 2009 with respect to the ability of emergency vehicles to respond to urgent calls in a timely fashion, the concerns that he had expressed in his September 30, 2009 affidavit have now been addressed. He further acknowledged that emergency vehicles are no longer required to report at the City of Cornwall port of entry prior to responding to emergency calls.

[88] The evidence of Sakakohe Pembleton was to a similar effect. Ms. Pembleton is the Director of the Department of Health for the Mohawk Council of Akwesasne. Ms. Pembleton testified that arrangements have been made with the SIBC to clear bridge traffic so as to enable ambulances to get on and off Cornwall Island quickly.

[89] Barry Montour is the Director of the Akwesasne Mohawk Board of Education. The AMBE operates a school on Cornwall Island, one in Tsi-Snaihne and another in St. Regis Village. Students are transported by bus from various regions within the Mohawk community to attend these schools. Mr. Montour's affidavit discusses his concerns with respect to the harmful effects that requiring school buses to report at the port of entry in the City of Cornwall will have for Mohawk students. In particular, Mr. Montour asserts that the inordinate delays at the border crossing will unduly lengthen the children's school day and will negatively affect their academic and emotional well-being.

[90] However, in cross-examination, Mr. Montour acknowledged that since the beginning of the school year in September, school buses have not in fact been reporting to the temporary border facility. Grand Chief Mitchell also acknowledged on cross-examination that the concerns with respect to school bus traffic have now been largely addressed.

[91] It is also evident from the cross-examination of Grand Chief Mitchell that as a result of concerns expressed by members of the Akwesasne community, similar accommodations have been made by the CBSA with respect to funeral processions.

[92] Grand Chief Mitchell attributes the fact that the CBSA was willing to negotiate a resolution to the concerns regarding emergency vehicles, school buses and funeral processions to the fact that the applicants had initiated these proceedings. Whatever the impetus may have been for the accommodations made by the CBSA in this regard, the fact is that at this point, the concerns of the Akwesasne community in this regard have now been largely addressed.

[93] The applicants are concerned that the accommodations provided by the CBSA are not “enshrined” anywhere, and could thus be changed or withdrawn at any time. However, there is nothing in the evidence before me to suggest that the CBSA has any intention of changing the arrangements that have already been put into effect in relation to emergency vehicles, school buses and funeral processions, and the applicants’ arguments in this regard are thus entirely speculative. Furthermore, if the situation should change, it will be open to the applicants to initiate such further legal proceedings as they deem appropriate.

[94] Mr. Montour and several other affiants also discuss their concerns with respect to the negative impact that the requirement to report at the City of Cornwall port of entry is having on employees of various organizations delivering educational, medical and social services to the members of the Akwesasne community.

[95] The employees of these various organizations may reside in Québec, Ontario or New York, and deliver services in all three parts of Akwesasne. Briefly stated, the concern is that the lengthy wait times at the temporary border facility are taking up valuable staff time that could otherwise be devoted to the delivery of services to the most vulnerable members of the Mohawk community. It is therefore necessary to examine the evidence with respect to border wait times at the temporary border facility.

[96] A number of the applicants’ witnesses have provided anecdotal evidence in their affidavits of having encountered delays of up to two hours at the temporary facility in the City of Cornwall.

[97] However, Grand Chief Mitchell acknowledged in cross-examination that the wait times at the temporary border facility have improved since September of 2009 when the last of the applicants' affidavits were sworn. Moreover, the statistical evidence adduced by the respondents with respect to border wait times suggests that such lengthy delays are very much the exception.

[98] That is, the statistics kept by CBSA for the period between August 14, 2009 and October 4, 2009 indicate that 86% of the time there are no delays whatsoever at the port of entry, that 10% of the time, the wait was between 20 and 55 minutes, and that roughly 3% of the time, the wait exceeded 60 minutes. While there may well be some frailties with the CBSA's record-keeping, I am nevertheless satisfied that the concerns with respect to border wait-times identified by a number of the applicants' witnesses relate to exceptional situations.

[99] I am also satisfied that many of the difficulties with respect to the additional administrative burden imposed on employees by the duty to report at the temporary border facility can be addressed in the short term through administrative measures, such as altering hours of work so as to avoid peak traffic periods.

[100] Avoiding peak traffic hours would also serve to address the concerns expressed as to the reluctance of certain individuals to attend medical appointments or visit family members in different parts of the community so as to avoid long wait times.

[101] In light of the foregoing, the applicants have failed to satisfy me with clear and non-speculative evidence that irreparable harm will occur between now and the date upon which the underlying application for judicial review is determined, in the event that the injunction is not granted.

[102] The injunctive test is conjunctive. As a consequence, the finding that the applicants have not demonstrated that they will suffer irreparable harm is sufficient to dispose of the motion. That said, in the interests of completeness, I will also address the issue of balance of convenience.

Balance of Convenience

[103] In *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, the Supreme Court stated that this third branch of the injunctive test requires the determination of which of the two sides will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits: see para. 35.

[104] As was noted earlier, the applicants argue that the CBSA should be compelled to reopen the Cornwall Island border facility, and that the facility should be staffed by unarmed Border Services Officers pending the determination of the applicants' application for judicial review.

[105] Alternatively, the applicants contend there should be a temporary suspension of the reporting requirement, or that the CBSA should be ordered to provide alternative reporting

arrangements for members of the Akwesasne community that do not involve personal presentation at the temporary border facility in the City of Cornwall.

[106] In my view, the balance of convenience clearly favours the respondents in this case.

[107] I accept that the relocation of the port of entry from Cornwall Island to the City of Cornwall has significantly disrupted the lives of many members of the Akwesasne community. However, as was explained earlier in these reasons, I am not persuaded that the inconvenience resulting from the relocation of the port of entry will result in irreparable harm to members of that community between now and the time that the underlying application for judicial review is decided. I am also satisfied that the harm that would result from granting the forms of interlocutory relief sought by the applicants greatly outweighs the inconvenience that these individuals will experience in the relevant period.

[108] I will deal first with the request that the Court order the reopening of the Cornwall Island border facility with unarmed Border Services Officers. I do not need to resolve the differences in the evidence as it relates to the nature of the protests that took place on Cornwall Island in late May of 2009 for the purposes of this motion. It is uncontroverted that on May 31, 2009, the Chief of the Akwesasne Mohawk Police Service told representatives of the CBSA that he was concerned that his officers would not be able to control the crowds that had gathered at the CBSA facility, and that it would be in the CBSA's best interests if the CBSA staff left Cornwall Island.

[109] It is also not disputed that in the period following the closure of the port of entry, the Chief of the Akwesasne Mohawk Police Service advised CBSA representatives on at least three separate occasions that it was not safe for CBSA employees to return to Cornwall Island, even for the limited purpose of picking up equipment left behind.

[110] Moreover, as Grand Chief Mitchell has stated in his affidavit and again in cross-examination, the situation in Akwesasne “remains volatile and unpredictable”.

[111] As a consequence, I am of the view that it would be inappropriate to order the reopening of the port of entry on Cornwall Island in circumstances where the physical safety of Border Services Officers remains in doubt.

[112] One of the applicants’ alternative requests is that the respondents be ordered to “suspend the application by Respondents to Applicants of the *Customs Act*, and other relevant federal legislation in respect to the travel by Applicants within or between the Akwesasne Reserves situated in Canada and the United States and particularly to Cornwall Island, part of Indian Reserve No. 59”.

[113] In assessing the balance of convenience in a case where a party is seeking to restrain a public authority carrying out its statutory mandate, the Court must proceed on the assumption that the law – in this case the obligation on individuals to report at a CBSA facility when entering Canada imposed by subsection 11(1) of the *Customs Act* - “is directed to the public good and serves a valid public purpose”. Moreover, this “assumption of the public good in enforcing the law weighs

heavily in the balance”: see *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764 at para. 9.

[114] The balance of convenience does not favour suspending the application of the reporting requirement as it relates to the applicants. The applicants are seeking to restrict the CBSA’s ability to carry out its statutory responsibility to provide “integrated border services that support national security and public safety priorities” while facilitating the free flow of persons and goods. Such a result would be contrary to the public interest in light of the potential harm that could result to the security of Canada should such an interlocutory remedy be granted. As a consequence, the balance of convenience clearly favours the respondents in this regard.

[115] Finally, the applicants seek an order that the respondents provide alternative reporting arrangements for members of the Akwesasne community visiting Cornwall Island for the purposes of carrying on their way of life.

[116] Subsection 11.1(1) of the *Customs Act* authorizes the Minister of Public Safety and Emergency Preparedness to issue to any person an authorization to present him or herself in an alternative manner. Paul Porrior, the CBSA’s Director of the Intelligence and Enforcement Division, Northern Ontario Region, states in his affidavit that telephone reporting is authorized in locations where there is no permanent customs office.

[117] While acknowledging that such discretion exists, the respondents say that it would be inappropriate to order such alternative measures for the applicants in this case. In this regard, the respondents point out that there are somewhere between 12,000 and 15,000 people in the Akwesasne community to whom the alternative reporting measures would apply. There would be no way for the CBSA to verify if cars travelling from New York State to Cornwall Island do, in fact, contain members of the Akwesasne community, or others. Nor would the CBSA be able to ascertain the purpose of these individuals' travel to Cornwall Island.

[118] Such a practice would also raise concerns with respect to the ability of the CBSA to monitor compliance with the alternative reporting requirement by members of the Akwesasne community. In this regard, it should be recalled that there was a very high level of non-compliance with the statutory reporting requirement by members of the Akwesasne community until such time as the CBSA began seizing vehicles in mid-September of this year.

[119] Moreover, while counsel for the applicants acknowledged in their submissions that the Mohawks of Akwesasne are obliged by law to report to the CBSA when entering Canada from the United States, they also observed that "the vast majority" of members of the Akwesasne community believe that they have no duty to report to the CBSA when they are travelling within Mohawk territory. This was confirmed by Chief James Ransom in his cross-examination.

[120] As Mr. Porrior observed in his affidavit, where alternatives to physical presentation are used, there must be an ability on the part of the CBSA to verify compliance. He further noted that the inability of CBSA officers to conduct random compliance examinations on Cornwall Island in a safe and secure environment means that alternative reporting is simply not a viable option. I agree.

[121] I am therefore satisfied that imposing the alternative reporting measures requested by the applicants would not be appropriate in this case, as such an order would significantly impair the CBSA's ability to carry out its statutory mandate insofar as it relates to its national security and public safety priorities.

[122] I would also note that the applicants are essentially asking this Court to direct the CBSA as to how it should manage and police Canada's border services operations in the Cornwall area. This is not the function of this Court on a motion such as this: see *North of Smokey Fishermen's Assn. v. Canada (Attorney General)* 2003 FCT 33, 229 F.T.R. 1 at para. 27.

[123] Having regard to all of the circumstances, I find that the balance of convenience clearly favours the respondents in this case.

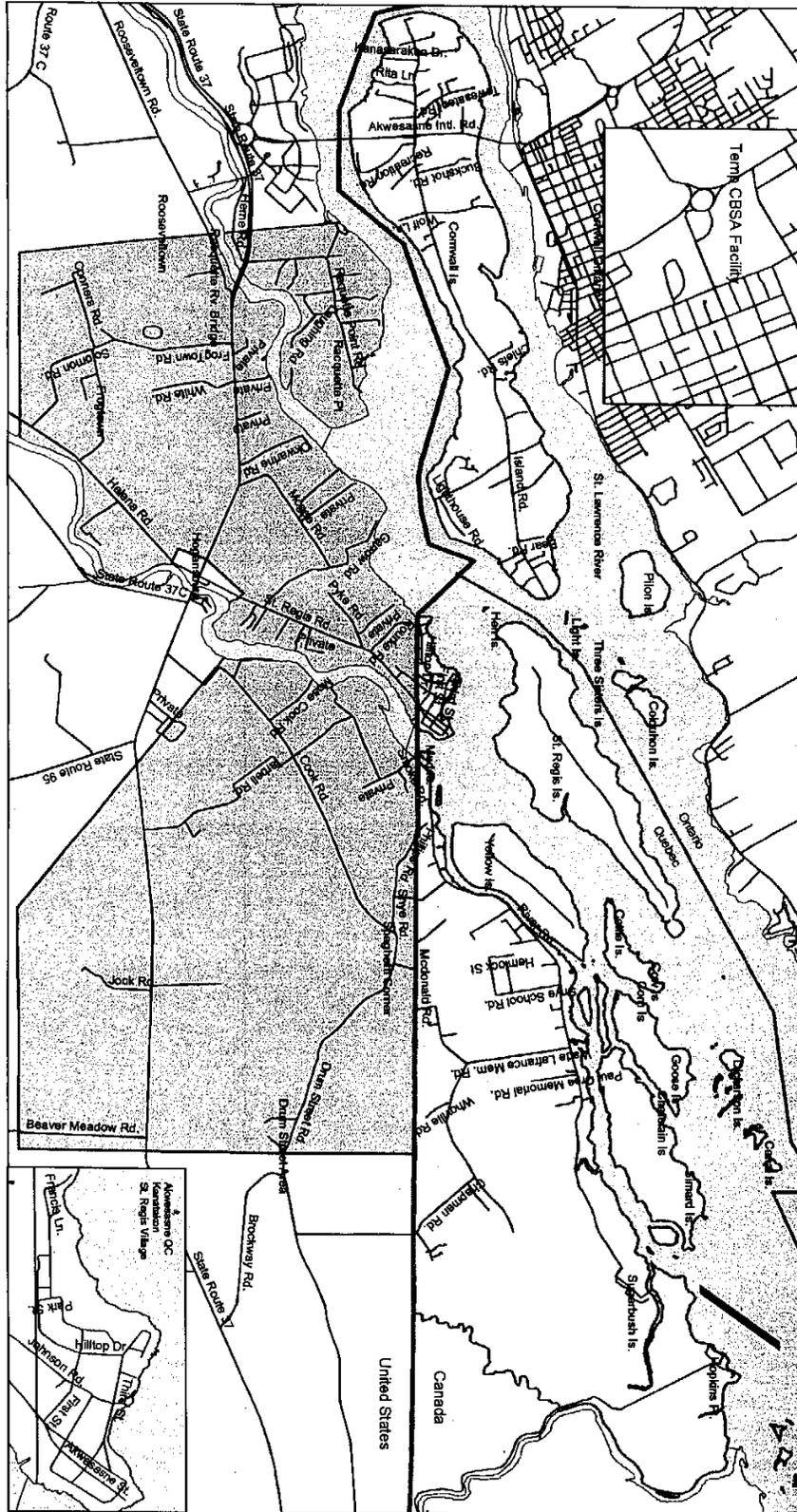
ORDER

THIS COURT ORDERS that the applicants' motion is dismissed, with costs in the cause.

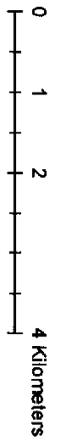
"Anne Mactavish"

Judge

APPENDIX



This map was created to illustrate Akwesasne Territory and its Watershed. This map does not show all roads and does not show numerous political jurisdictions dealt with on a daily basis.



H. Cole
MCA GIS/ST
September 2000
UTM 18 NAD 83



FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1039-09

STYLE OF CAUSE: GRAND CHIEF TIMOTHY THOMPSON, ET AL v.
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS, ET AL

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: December 8, 9 & 10, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Mactavish J.

DATED: December 21, 2009

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