

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240503

Docket: A-109-24

Citation: 2024 FCA 88

Present: LOCKE J.A.

BETWEEN:

SALT RIVER FIRST NATION #195

**Appellant
(Respondent on cross-appeal)**

and

CECILIA (TONI) JOSEPHINE HERON

**Respondent
(Appellant on cross-appeal)**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 3, 2024.

REASONS FOR ORDER BY:

LOCKE J.A.

Federal Court of Appeal



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REASONS FOR ORDER

LOCKE J.A.

[1] The appellant, Salt River First Nation #195 (SRFN), moves for an Order staying the Federal Court decision under appeal. It also seeks an interlocutory injunction prohibiting certain public statements relating to the issues in dispute.

[2] The present appeal is one of two that take issue with a single decision of the Federal Court (2024 FC 413, *per* Justice Paul Favel) that addressed two applications for judicial review.

[3] One of the applications was commenced by SRFN (Federal Court No. T-2191-22) and took issue with a decision by the respondent, Cecilia (Toni) Josephine Heron, acting as Chief of SRFN, on October 18, 2022 to call a Special Meeting to remove two SRFN Councillors from office. That Special Meeting was held on October 23, 2022, and it resulted in the removal of the two Councillors in question. The Federal Court dismissed SRFN's application, and that dismissal is the subject of the present appeal, Court File No. A-109-24.

[4] The other application addressed by the Federal Court's decision (Federal Court File No. T-2206-22) was a consolidation of a pair of applications commenced by Ms. Heron (the other one being Federal Court File No. T-97-23), which took issue with a series of decisions by SRFN (beginning on October 13, 2022, and continuing on December 12, 2022 and thereafter) that repeatedly suspended Ms. Heron from her position as Chief without pay. The Federal Court granted that application, and ordered that Ms. Heron be paid the salary she had lost because of the suspensions. This aspect of the Federal Court's decision is the subject of this Court's File No. A-107-24.

[5] The parties agree that (i) paragraph 50(1)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides the authority for this Court to grant a stay where "it is in the interest of justice that the proceedings be stayed", and (ii) Rule 398(1)(b) of the *Federal Courts Rules*, S.O.R./98-106, provides that "[o]n the motion of a person against whom an order has been made, ... (b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed."

[6] The parties also agree that the legal test applicable to SRFN's motion (with regard to both the stay and the injunction it seeks) is as contemplated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (*RJR-MacDonald*). The moving party must establish (i) a serious question to be tried, (ii) that it will suffer irreparable harm if the stay (or the injunction) is not granted, and (iii) that the balance of convenience favours granting the stay.

[7] The threshold for establishing a serious question to be tried is generally a low one. The Court must be satisfied that the appeal is not frivolous or vexatious: *RJR-MacDonald* at 348.

[8] With regard to irreparable harm, the moving party must adduce clear, compelling and non-speculative evidence to establish, on a balance of probabilities, that it will suffer "harm which either cannot be quantified in monetary terms or which cannot be cured": *RJR-MacDonald* at 341; *Sheldon M. Chumir Foundation for Ethics in Leadership v. Canada (National Revenue)*, 2023 FCA 242 at paras. 6–8.

[9] The issue of the balance of convenience involves "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *RJR-MacDonald* at 342.

[10] Having considered SRFN's submissions, as well as Ms. Heron's responding submissions and SRFN's reply submissions, I have concluded that SRFN's motion should be dismissed.

[11] It is not necessary for me to reach a conclusion as to (i) whether SRFN has established a serious question to be tried in the present appeal, or (ii) the balance of convenience, because I have concluded that it has not established that it will suffer irreparable harm if the stay (or the injunction) is not granted.

[12] SRFN makes arguments of irreparable harm in relation to the following:

- A. SRFN's reputation;
- B. Critical funding for SRFN;
- C. SRFN's membership; and
- D. Ms. Heron's impecuniosity.

[13] I will address each of these in turn.

[14] Regarding its reputation, SRFN refers to "fractious and confusing political upheavals at SRFN in 2009-2011 [during which] SRFN suffered irreparable harm to its reputation and ability to conduct its day-to-day business." SRFN argues that "staff were unable to work or left because of the political tensions and uncertainty; and, that the same thing is happening to SRFN again." SRFN also argues that it took SRFN years to recover its reputation.

[15] Firstly, bearing in mind that evidence of irreparable harm must be clear, compelling and non-speculative, I am not convinced that there is admissible (non-hearsay) and compelling

evidence to support the assertion that the harmful effects of the previous political upheaval at SRFN are happening again. Though the ingredients may be present, and such effects might occur, I find the assertion to be speculative and not compelling. I also note that the SRFN even acknowledges that its reputation recovered in time. Accordingly, it is not clear to me that any harm of the kind asserted by SRFN would be irreparable.

[16] Further, I am not convinced that either the stay or the interlocutory injunction that SRFN seeks would be effective in avoiding the alleged harm to SRFN's reputation. My sense is that the political turmoil threatening SRFN's reputation would remain even if the motion were granted.

[17] I turn now to SRFN's argument that critical funding will be jeopardized if the motion is not granted. In my view, this argument is speculative and therefore insufficient. SRFN refers to disruption and instability that could jeopardize SRFN's chances of being awarded significant funds to continue a housing project. SRFN also argues that it will suffer irreparable harm if negotiations are disrupted or delayed. Based on these contingencies, I am not convinced on a balance of probabilities that SRFN will suffer irreparable harm.

[18] SRFN's third irreparable harm argument, concerning its membership, is not a distinct argument. Rather, it alludes to the irreparable effects of the foregoing alleged harms on members of SRFN if the *status quo* prior to the Federal Court's decision is not restored. I am not convinced that any of the foregoing alleged irreparable harm will result from the dismissal of SRFN's motion. Likewise, I am not convinced that it will cause irreparable harm to its membership.

[19] With regard to Ms. Heron's impecuniosity, I note that the evidence cited by SRFN is merely a bald assertion that, if her unpaid salary is paid to her and then the appeal concerning her suspensions is successful, SRFN will never recover it. There is no evidence of Ms. Heron's financial status or her ability to return any monies paid to her. As indicated, the burden is on SRFN to adduce clear, compelling and non-speculative evidence to support its assertions. SRFN has not met that burden as regards assertions of Ms. Heron's impecuniosity.

[20] SRFN also makes submissions expressing concern for the safety of SRFN administrative staff. However, the evidence cited by SRFN in support of these concerns is entirely hearsay, and does not appear to fall within any of the exceptions to the inadmissibility of hearsay evidence. I give this evidence no weight.

[21] It follows from the foregoing reasons that I am not convinced that SRFN will suffer any irreparable harm if the requested stay and interlocutory injunction are not granted, and therefore the motion should be dismissed. The costs of this motion will be in the cause.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-109-24

STYLE OF CAUSE:

SALT RIVER FIRST NATION
#195 v. CECILIA (TONI)
JOSEPHINE HERON

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES:

REASONS FOR ORDER BY:

LOCKE J.A.

DATED:

MAY 3, 2024

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