Federal Court Cour fédérale

Date: 20231206~~06~~07

Docket: T-2442-23

Citation: 2023 FC 1646

Ottawa, Ontario, December ~~6~~ 7, 2023

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

KYRA WILSON
A. DENNIS MYRAN
KEELY ASSINIBOINE

Applicants

and

DAVID MEECHES
GARNET MEECHES
MARVIN DANIELS

Respondents

AMENDED ORDER AND REASONS

[1] This is a motion for an injunction (dated November 30, 2023) to stay the Long Plain First Nation election on December 7, 2023. The Urgent hearing was heard on December 5, 2023. The Applicants seek the stay until the Application for judicial review of the Long Plain Election Appeal Committee ("EAC") decision made on November 8, 2023 is determined.

[2] The Long Plain First Nation Custom Election Code is dated August 3, 2017 and governs the First Nation's elections.

[3] The Applicant Kyra Wilson was elected Chief and Dennis Myran and Keely Assiniboine were two of the counsellors elected in the April 15, 2022 election, David Meeches placed second by 12 votes for the election of Chief.

[4] Justice Strickland on September 25, 2023, granted a judicial review by David Meeches of the April 15, 2022 election and sent the decision back to be re-determined by a different Election Appeal Board. Justice Strickland's decision set out timelines for the relief. This decision is being appealed to the Federal Court of Appeal.

[5] The (new) Election Appeal Committee decided on October 27, 2023, that the appeal by David Meeches was successful. As a result the Election Appeal Committee set down a new election. The advance polls have already occurred:

i) Winnipeg: November 30, 2023;

ii) December 2, 2023: Brandon;

iii) December 5th: Portage la Prairie.

iv) Mail in ballots.

The on- reserve vote takes place on December 7th, 2023.

[6] A timeline is set out below:

a. September 25, 2023 – Decision rendered by Justice Strickland granting the judicial review of the April 2022 election;

b. October 16, 2023 — Notice of Appeal filed by the Applicants, of the decision of Justice Strickland in the Federal Court of Appeal (A-278-23);

c. October 16, 2023 — Notice of Motion filed by the Applicants, in the Federal Court of Appeal requesting a Stay Order;

d. October 17, 2023 — New Election Appeal Committee is formed;

e. October 24, 2023 – Order from the Federal Court of Appeal (Justice Locke) is issued, dismissing the Stay Motion;

f. After a new Election Appeal Committee was appointed on October 27, 2023, the EAC began to draft reasons to allow the appeal;

g. A member of the new Election Appeal Committee recused himself on October 30, 2023;

h. The new member participated in internal discussions of the EAC on October 30, 2023;

i. Kyra Wilson, Jacqueline Meeches and David Meeches were given notice of a November 6, 2023 in-camera hearing with a schedule for oral submissions only;

j. November 5, 2023 – The Applicants' lawyer sent a letter to the EAC with a number of requests and concerns of which no response was received. Nor were other requests to attend the in camera meeting granted;

k. November 6, 2023 – In camera hearings are held by the New Election Appeal Committee involving J. Meeches, Wilson and D. Meeches;

l. November 8, 2023 – New Election Appeal orders the Election invalid and declares that a new election be held;

m. November 13, 2023 – Second Notice of Motion is filed by the Applicants, in the Federal Court of Appeal, requesting a Stay Order;

n. November 19, 2023- Electoral Officer posted notice that a list of candidates for by-election and that the list would be finalized by November 21/23;

o. November 20, 2023 – Notice of Application is filed by the Applicants in the Federal Court of Canada seeking Judicial Review;

p. November 23, 2023 – Notice posted and all Applicants were candidates on the list;

q. November 27, 2023 – Electoral Officer told Chief and Counsel to resign by November 28, 2023 to remain on the ballot; Emails were sent by two of the Applicants saying they could not resign or their judicial review would be moot. Applicant Denis Myran resigned as requested;

r. November 28, 2023 – Federal Court of Appeal dismissing the Second Stay Motion (Justice Stratus);

s. November 28, 2023 – The Electoral Officer removed Kyra Wilson and Keely Assiniboine as candidates on the ballot as they did not resign so could not participate in the election;

t. November 29, 2023 – Amended Notice of Application is filed by the Applicants;

u. November 30, 2023 – Motion for an Injunction is brought.

Test for Injunctive Relief

[7] The three-part test from *RJR – Macdonald Inc v Canada (Attorney General),* [1994] 1 SCR 311 [RJR] and *R v Canadian Broadcasting Corp,* 2018 SCC 5, requires the Applicants to establish (i) there is a serious issue to be tried; (ii) it will suffer irreparable harm if the order is not granted; and (iii) the balance of convenience favours making the Order, considering all the circumstances.

[8] The elements of the injunction test are conjunctive, meaning the Applicants must satisfy all three parts of the test. An injunction is an extraordinary remedy that the Court grants only at its discretion.

Is there a serious issue?

[9] The threshold is low as it is whether it is frivolous or vexatious. (RJR para 50). There is some argument that there is a higher threshold of prima facie when a mandatory injunction is sought. This injunction motion is in the nature of a prohibitive injunction and not a mandatory injunction. (*Jean v Swan River First Nation* 2019 FC 804 (para 13). The assessment of the merits at the serious issue step should not be a prolonged examination. (*Assiniboine v Meeches* 2013 FCA 114 at para 18). Justice Stratus in the stay application referenced above called it the arguability requirement.

> [3] Thus, the motion fails at the first branch of the test for a stay, the requirement of arguability: RJR-MacDonald Inc. v. Canada (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385; and for a situation analogous to this case, see Guillaume v. Chief Animal Welfare Inspector, 2023 ONSC 5782 at paras. 10-11.In this case the Applicants have raised a number of serious issues. Those issues relate to what they say are procedural unfairness and to breaches of the Custom Election code as well as other reviewable errors.

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[10] The Applicants raise many issues including procedural fairness issues and errors that they say meet the first branch of this test. In fact they argued that the serious issues are so strong that they tip the balance towards giving an injunction.

[11] The Respondents do not agree and provided arguments regarding the issues raised by the Applicants.

[12] I will not opine on any of the issues raised as that is best left to the Judicial Review Judge who will have a full record and evidence before them. But I do find that the Applicants raise at least one serious issue. Given the low bar the Applicants had to meet, they have met the serious issue branch of the test.

Is irreparable harm established?

[13] The irreparable harm alleged must not be speculative but must be clear. Given this is an extraordinary remedy, the burden is on the Applicant and it is not an easy bar to get over. (*Gopher v. Saulteaux First Nation* 2005 FC 481). Irreparable harm is the nature of the harm and not the magnitude, meaning that the harm could not be remedied.

[14] The Applicants argue the irreparable harm is that they are not on the ballot so cannot be elected. They say because of procedural unfairness and the Election Committee not following the Custom Election Code it is irreparable harm if the election were not stopped. This harm they say is irreparable given how strong their position is in relation to the judicial review. The Election Appeal Committee hurried this election and thus many of the procedural fairness steps they were entitled to did not happen. They indicate that they did not resign as they had to protect their Judicial Review application. The loss of their positions as Chief and counsellors before their terms expire they say is irreparable as they were in a term and this is harm that is irreparable. The entire flawed election process the Applicants argued cannot be allowed to continue as it would only cause more damage. This harm extends to their loss of income from these positions as well as their reputations.

[15] I find that the Applicants have not met the irreparable harm branch of the test for a number of reasons that follow.

[16] The Applicants can continue their Judicial Review even if the election goes ahead so this is not irreparable harm. A loss of income as alleged would be compensable if the Applicants were successful at their Judicial Review. As well, I note that one of the Applicants is on the ballot as he resigned as requested so he could be re-elected and not suffer any financial loss. Loss of reputations is speculative given how much litigation is on going with the possibility of success for parties or failure of the parties their reputations have been in the public for some time with a number of allegations. Though I will not comment directly on the self determined strategy of two of the Applicants when they decided not to resign in order to stay on the ballot; it does make the irreparable harm more speculative given the other Applicant did resign and is included on the ballot with his application proceeding. Nor do I see that this happening midterm is irreparable harm. I see these alleged irreparable harm allegations as unfortunate but are the consequences that can occur in First Nation Band election judicial reviews but do not meet the elevation of an irreparable harm.

[17] I find that the determining factor is that the election has already taken place in three locations as well as mail in ballots with only the on reserve voting left to do. The democratic process is well in motion already and to grant an injunction before the determination of whether the decision to hold the election was reasonable or not is not in the public interest. An injunction could not be seen as in the public interest given the election is already in progress, the money is spent, and the vote of many members have already taken place. If the Applicants' are successful

in their application, then yes, two of them would not be on the ballot but that determination would be sent back to be re-determined. It is difficult to put the genie back in the bottle at this stage and still be seen to be in the public interest. It is only in the two Applicant's interests and this does not meet the test for irreparable harm.

[18] I can say it no better than Justice McDonald did in the similar case of *Jean v. Swan River First Nation* at paras 21, 22 and 23:

> "21 – In this case the election process is already underway. Votes have been cast, expenses have been incurred. In the circumstances more harm would result by interfering with the democratic process already underway, even if it is ultimately determined to be a flawed process.
>
> 22 – Acceding to the request that an injunction be granted and that the current Chief and council be held in office pending the resolution of the judicial review (and any appeals that may result) has the potential to do more harm to the democratic process as compared to allowing the current election to procced. As in *Cachagee,* the Applicant's right to challenge the residency requirement for election will continue.
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> 23 – Accordingly, on these facts, I am not satisfied that irreparable harm to the Applicant has been established."

[19] The Applicants fail on the irreparable harm branch of the test.

Balance of Convenience

[20] Given that the Applicants did not meet the irreparable harm branch of the test, there is no need for me to deal with this branch. But given that the election has taken place already in three locations, it too is like *Cachagee v. Doyle* 2016 FC 658 (para 10) "the horse is out of the barn" so the balance of convenience would not weigh in the Applicants favor either.

Case Management

[21] As Justice Stratus alludes to in his stay decision with the same parties dated November 28, 2028 (2023 FCA 233), the Courts can provide assistance to have the matter expedited. ~~I will direct that a CMJ be assigned to this Judicial Review.~~

Costs

[22] Costs will be awarded to the Respondents. Given the Applicants have brought two unsuccessful stay applications before the FCA as well as this injunction application all since the end of October, there is a cost to the Respondents that should be acknowledged. The costs I award are only for this injunction motion. The records were huge and all was filed very last minute with an urgent scheduling of a hearing. There were arguments blaming each side for why there was no alternative but to be so last minute. But without determining the blame I can tell you how this stretches the courts resources to deal with large complex important injunction applications on such short notice with so much riding on the outcome. For that reason I will award lump sum costs in the amount of $5,000.00 fees plus disbursements and taxes payable forthwith by the Applicant to the Respondents. The lump sum costs awarded to the Respondents are to be divided 50% to the Respondent David Meeches and 50% to the Respondents Garnet Meeches and Marvin Daniels.

ORDER IN T-2442-23

THIS COURT ORDERS that:

1. The Motion for an injunction is dismissed.

2. Costs of $5,000.00 plus disbursements and taxes to be payable forthwith by the Applicants to the Respondents.

~~3. The underlying Judicial Review Application will have a case manager appointed.~~

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2442-23
STYLE OF CAUSE:	KYRA WILSON, A. DENNIS MYRAN, KEELY ASSINIBOINE v DAVID MEECHES, GARNET MEECHES, MARVIN DANIELS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 5, 2023
ORDER AND REASONS:	MCVEIGH J.
DATED:	DECEMBER 6, 2023
AMENDED:	DECEMBER 7, 2023

APPEARANCES:

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