Federal Court  Cour fédérale

Date: 20200916

Docket: T-892-20

Citation: 2020 FC 899

Ottawa, Ontario, September 16, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

MICHAEL LINKLATER

Applicant

and

THUNDERCHILD FIRST NATION GOVERNMENT, CHERYL THUNDER AND JONATHON JIMMY

Respondents

ORDER AND REASONS

I. Overview

[1] I am ordering that the by-election to fill the vacant seat for Headman on the Thunderchild First Nation Council be halted while Michael Linklater's *Charter* challenge to his removal from that seat is before the Court. Since the by-election is scheduled to begin through advance voting within days, my reasons for this order will be fairly brief. I hope that they adequately explain to the parties, and to the citizens of the Thunderchild First Nation, why I am granting Mr. Linklater's request to suspend the by-election.

[2] This Court should not lightly interfere with elections directed by First Nations governments and tribunals. I apply that view in this case with consideration of the overall interests of the Thunderchild First Nation and its citizens, and the particular harm to Mr. Linklater. In doing so, I give significant consideration to the fact that Mr. Linklater's request is not opposed by either the Thunderchild First Nation Government or those who requested his removal. I also consider important the fact that there is no other Thunderchild First Nation decision-maker who can grant the relief sought.

[3] Nonetheless, even with no opposition, I must be satisfied that Mr. Linklater has shown that an injunction should be issued. I conclude that it should, because Mr. Linklater's arguments on the judicial review raise serious issues, he would suffer irreparable harm if the by-election is allowed to proceed, and the overall balance of convenience favours the granting of the injunction, considering the interests of those affected and the principle of self-government. The Thunderchild First Nation Government is therefore enjoined from continuing with the by-election for Headman until this Court has decided Mr. Linklater's application for judicial review.

[4] For clarity, this order does not grant Mr. Linklater's challenge to his removal. Nor does it reinstate him in his role as Headman, either temporarily or permanently. Those issues will be decided later. This order seeks to avoid the harm that would arise from someone else being elected Headman while the question of Mr. Linklater's removal remains outstanding.

II. Background Facts

A. *Mr. Linklater's Election and Removal*

[5] Mr. Linklater was elected Headman on the Thunderchild First Nation Council in late 2018. The *Thunderchild First Nation Election Act* requires him to reside on Thunderchild First Nation reserve lands or Treaty Land Entitlement lands, or to move there within 30 days of the election: *Thunderchild First Nation Election Act*, s. 3.02(g). Mr. Linklater considers this residency requirement to be contrary to the *Canadian Charter of Rights and Freedoms* since it represents an unjustified violation of his right to equality under section 15 of the *Charter*, as a citizen of a First Nation living off reserve. He also considers it to be a remnant of colonial structures, and of similar discriminatory provisions once in force in provisions of the *Indian Act*, RSC 1985, c I-5, that were found unconstitutional by the Supreme Court of Canada in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.

[6] In 2019, Cheryl Thunder, a citizen of Thunderchild First Nation, asked the Thunderchild First Nation Government to remove Mr. Linklater from his position for failure to meet the residency requirement. It responded that it had no authority to do so, and would not take steps to do so because it considered the residency requirement to be contrary to the *Charter*. Ms. Thunder and another citizen of Thunderchild First Nation, Jonathon Jimmy, brought applications to the Thunderchild First Nation Appeal Tribunal to have Mr. Linklater removed from his position. Among other arguments, Mr. Jimmy and Ms. Thunder noted that a 2019 referendum in Thunderchild First Nation proposing various amendments to the *Thunderchild First Nation Election Act*, including the removal of the residency restriction, had not passed.

[7] Both Mr. Linklater and the Thunderchild First Nation Government opposed the applications on the basis, among others, that the residency requirement was contrary to the *Charter*.

[8] On July 13, 2020, the Thunderchild First Nation Appeal Tribunal issued a decision removing Mr. Linklater from his position for failure to meet the residency requirement. In its decision, the Tribunal decided it did not have jurisdiction under the *Thunderchild First Nation Appeal Tribunal Act* to strike sections of the *Thunderchild First Nation Election Act* because they violate the *Charter*. It therefore did not address Mr. Linklater's *Charter* arguments. The Tribunal ordered that a by-election be held as soon as possible to fill the position vacated by its removal of Mr. Linklater. The Tribunal ended its decision with the following paragraph:

> While we cannot issue an order to amend legislation we would urge the members of the Thunderchild First Nation to revisit the residency requirement contained within the *Thunderchild First Nation Election Act*.

[9] The by-election process began in late July, 2020. A public notice and meeting of electors was held on July 31, 2020 on the reserve, at which meeting electoral officers were appointed. Mr. Linklater states that he was unaware of any public notice off reserve or any online notice of the July 31, 2020 meeting and election of electoral officers. The by-election is scheduled for September 29, 2020, with one advance poll in Saskatoon on September 18, 2020 and one advance poll in Edmonton on September 21, 2020.

B. *Mr. Linklater's Federal Court Application and this Injunction Motion*

[10] Mr. Linklater has challenged the Tribunal's decision on this application for judicial review. He alleges that the Tribunal did have jurisdiction to decide his *Charter* arguments, and that it should have decided that the residency requirement was unconstitutional.

[11] This motion was filed on August 31, 2020, in accordance with the order of the same date of Prothonotary Molgat. On this motion, Mr. Linklater seeks an injunction stopping the by-election until his application for judicial review can be heard and decided.

[12] The Thunderchild First Nation Government has advised the Court that it takes no position on Mr. Linklater's motion. The other respondents, Ms. Thunder and Mr. Jimmy, have not responded to Mr. Linklater's motion.

III. Issues

[13] To get the interlocutory injunction he seeks, Mr. Linklater must show that his request meets the three parts of the test set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at p 334. The three parts of the test are (i) whether the party's application raises a serious issue for determination; (ii) whether they would suffer "irreparable harm" if the injunction is not granted; and (iii) whether the balance of convenience favours granting or refusing the injunction. The Supreme Court of Canada has recently confirmed that in assessing these questions, the "fundamental question is whether the

granting of an injunction is just and equitable in all of the circumstances of the case": *Google Inc v Equustek Solutions Inc,* 2017 SCC 34 at paras 1, 25.

[14] This Court has confirmed that this three-part test applies to injunctions seeking to halt Indigenous elections, with the proviso that the exercise of discretion should also be guided by the principle of self-government: *Awashish v Conseil des Atikamekw d'Opitciwan,* 2019 FC 1131 at paras 9–14.

[15] Mr. Linklater must show that all three parts of the test are met. The issues on this motion are therefore the following:

A. Does the application for judicial review raise one or more serious issues to be tried?

B. Would Mr. Linklater suffer irreparable harm if the injunction is not granted?

C. Does the balance of convenience favour granting the requested injunction?

IV. Analysis

A. *Has Mr. Linklater Raised Serious Issues?*

[16] The first part of the test for an interlocutory injunction asks whether there is a "serious issue" to be determined on the underlying application. Because the interlocutory injunction does not finally decide the issues raised in the application, the "serious issue" standard is a low one. While this requires the Court to make a "preliminary assessment of the case," Mr. Linklater only

needs to show that his application raises a serious issue that is not "frivolous or vexatious": *RJR-MacDonald* at pp 335, 337; *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12.

[17] Mr. Linklater claims the residency requirement in the *Thunderchild First Nation Election Act* infringes his equality rights as a citizen of Thunderchild First Nation who does not reside on reserve. He argues that this infringement is not justified under section 1 of the *Charter*. He also argues that the Thunderchild First Nation Appeal Tribunal had the authority to decide his *Charter* arguments and should have done so, instead of removing him from office on the basis that it had no jurisdiction to decide whether the *Thunderchild First Nation Election Act* violated the *Charter*.

[18] I conclude that these arguments meet the standard of a "serious issue" to be decided. This conclusion is based on the prior case law that has found residency restrictions in First Nations electoral laws to be contrary to the *Charter*, even considering the importance of recognizing self-government and the ability of a First Nation to determine qualifications for holding office.

[19] In *Corbiere*, the Supreme Court of Canada held that the restriction in subsection 77(1) of the *Indian Act* limiting voter eligibility for band chief and councillors to band members "ordinarily resident on the reserve" was unconstitutional as it was contrary to the *Charter*. It concluded that off-reserve band member status, which it termed "Aboriginality-residence," was an analogous ground of discrimination protected by the equality rights in section 15 of the *Charter*. It found that the residency requirement in subsection 77(1) was discriminatory, and that

this discrimination was not justified as a "reasonable limit" on the equality right under section 1 of the *Charter*: *Corbiere* at paras 6, 14–18, 21–24.

[20] Subsequent to *Corbiere*, this Court has found residency obligations in certain First Nations election laws to infringe section 15 of the *Charter*, and not to be justified under section 1: see, *e.g.*, *Clifton v Hartley Bay (Electoral Officer)*, 2005 FC 1030 at paras 45–58; *Cardinal v Bigstone Cree Nation*, 2018 FC 822 at paras 48–78. In *Cardinal*, Justice Roussel considered the right to self-government as part of the section 1 analysis at paragraphs 76 and 77 of her decision:

> The Respondents also argued that the changes that resulted from the adoption of the 2009 BCN Election Code marked a profound change in the manner in which elections were held. By providing that two (2) candidates must reside in each of the smaller communities, the BCN Election Code introduced the concept of direct representation. The Respondents contend that this change reflects the voice of its membership and submit that this Court should show deference to the BCN's inherent right to self-government.
>
> While I recognize the importance of the Respondents' inherent right to self-government, this Court has repeatedly stated that it must be exercised in compliance with the *Charter*. The right to decide who better represents the interests of the band's membership ultimately lies in the hands of each band member at the time of election.
>
> [Emphasis added; citations omitted.]

[21] At the same time, this Court has found that not all residency-based limitations are unconstitutional. Notably, in *Clark v Abegweit First Nation Band Council*, 2019 FC 721, Justice Favel found that residency restrictions on voting and on holding office as Chief or Councillor in the Abegweit First Nation's election regulations infringed the equality rights in

section 15. However, while he found the restrictions on voting and holding office as Councillor were not justified under section 1, he found that the residency restriction in respect of the position of Chief was justified and therefore not contrary to the *Charter*: *Clark* at paras 55–58, 66–74. Justice Favel reached the following conclusion at paragraphs 69 to 70 and 73 to 74:

> Turning now to the Chief position, the Court finds that the exclusion of off-reserve members for the position of Chief is justified. The Court agrees with the Respondent that if the Court finds that the residency requirement for the purposes of voting is unconstitutional, and if the Court also finds that the residency requirement for the position of Councillor is unconstitutional, which the Court has found, then the exclusion of off-reserve members from becoming candidates for Chief minimally impairs the rights of off-reserve First Nation members.
>
> The Court agrees with the Respondent that members of the First Nation have the inherent authority and power to decide whether an off-reserve Band member can run for Chief and it is ultimately part of a First Nation's internal governance to which the Court must show deference. […]
>
> […]
>
> In the present case, the First Nation's Band Council is relatively small, consisting of one Chief and two Councillors. There is now a more meaningful opportunity for off-reserve First Nation members to participate in the governance of the First Nation, should they choose to do so, with an opportunity to not only vote but to run as candidates for two Councillor positions.
>
> Striking the portion of section 3 to permit off-reserve First Nation members to be eligible to be candidates for the Councillor positions, while excepting the Chief position, strikes an appropriate balance and respects the deference the Court has for the self-governing nature of the First Nation.
>
> [Emphasis added.]

[22] Both the right to self-government and the equality rights reflected in the *Charter* raise important issues relevant to the constitutionality of residency requirements for office holders of

First Nations governments. Additional issues raised by Mr. Linklater on this application, and in the responses of Ms. Thunder and Mr. Jimmy before the Tribunal, including the application of the *Charter* and the role of the referendum, are also important and will have to be assessed at the hearing of this application. For the present, I am satisfied that the application raises serious issues for determination.

[23] I include in this the question of whether the Thunderchild First Nation Appeal Tribunal had authority to determine the constitutional issue. As the Tribunal pointed out, the *Thunderchild First Nation Appeal Tribunal Act* does not expressly give it the power to decide issues under the *Charter*. However, whether it nonetheless had this jurisdiction implicitly—either under the *Charter*, the *Thunderchild First Nation Constitution* or the *Thunderchild First Nation Appeal Tribunal Act*—or whether this Court has the power to grant the remedies sought by Mr. Linklater if the Tribunal does not, raise serious issues for determination.

[24] In *Perry v Cold Lake First Nations*, 2018 FCA 73, the Federal Court of Appeal noted that there is a presumption that a First Nation appeal committee has jurisdiction over constitutional questions, but that it was rebutted in that case based on the particular language of the Cold Lake First Nations election law: *Perry* at paras 45–48. In *Awashish*, Justice Grammond concluded, in declining a request for an injunction, that Mr. Awashish could raise his *Charter* arguments before the appeal committee, suggesting they had jurisdiction to consider such arguments: *Awashish* at paras 38–45. There is thus in my view a serious issue as to whether the Tribunal had the jurisdiction to decide the *Charter* arguments presented by Mr. Linklater and the Thunderchild First Nation Government.

[25] The first part of the test for an interlocutory injunction is met.

B. *Would Mr. Linklater Suffer Irreparable Harm?*

[26] As described by the Supreme Court of Canada, the need to show "irreparable" harm relates to the nature of the harm suffered, and not its magnitude. It is harm that cannot be quantified or cured by a claim for money damages: *RJR-MacDonald* at p 341. Mr. Linklater claims that the election of a new Headman to fill his seat would result in irreparable harm.

[27] In the context of First Nations elections, this Court has recognized that suspension or removal of a councillor or chief may constitute irreparable harm, as it may result in the loss of political power or the loss of prestige: see *Awashish* at para 35 and the decisions cited therein. In the present case, Mr. Linklater has already lost his seat. He does not on this motion seek reinstatement; he seeks that remedy among others on the underlying application for judicial review. However, if another Headman is elected to that seat, Mr. Linklater may be excluded from acting as Headman until the next election in late 2022, regardless of the outcome of this application. I agree with Mr. Linklater that this would amount to irreparable harm resulting from the by-election itself, over and above any harm already incurred as a result of the order removing him from his seat as Headman.

[28] In *Awashish*, Justice Grammond found that irreparable harm may not be established where a claimant has an effective recourse to another tribunal established under the laws of the First Nation: *Awashish* at paras 36–45. As he stated, respect for self-government necessitates ensuring that governance disputes are first dealt with by Indigenous decision-making processes:

Awashish at para 38, citing *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at para 19.

[29] This is not the case in the current situation. The Thunderchild First Nation Appeal Tribunal has already rendered its decision, and has decided that it does not have jurisdiction to grant a remedy under the *Charter*. Indeed, the remedy that Mr. Linklater now seeks is an injunction to counteract one of the effects of the Tribunal's decision that it does not have jurisdiction. Based on the material before me, there is no body established under the *Thunderchild First Nation Constitution* or the other laws of the Thunderchild First Nation that could make the requested decision and give a remedy. To the contrary, the Tribunal appears to have concluded that it had no choice but to remove Mr. Linklater from his position, and to order a new by-election in consequence. Whether it is ultimately decided that the Tribunal had that authority or not, I cannot conclude on this motion that Mr. Linklater had an alternative recourse that would provide an adequate remedy.

[30] I therefore conclude that Mr. Linklater has established that he would suffer irreparable harm if the requested injunction is not granted.

C. *Does the Balance of Convenience Favour Granting the Injunction?*

[31] The final part of the test for an injunction looks at the harm that Mr. Linklater would suffer if the injunction is not granted, and the harm that would be suffered by others if it is granted. This includes consideration of the public interest and other "special factors" that may be relevant in the particular circumstances of a case: *RJR-MacDonald* at pp 342–343.

[32] Although no party has responded opposing Mr. Linklater's request, he was candid in recognizing that the injunction he seeks has impacts on governance in Thunderchild First Nation. In particular, halting the by-election would mean that the Thunderchild First Nation Council is not at its full complement, and that its citizens are therefore not fully served by their representative government. It would also mean that other citizens who are qualified under the *Thunderchild First Nation Election Act* as it currently reads would not be able to stand for office to represent their community.

[33] These are significant matters, and weigh against granting the injunction. I recognize in particular that the by-election as currently called is proceeding in accordance with a law that has been duly enacted by the First Nation, and was not amended during the course of the 2019 referendum. At the same time, these issues are tempered by the significance and seriousness of the argument that the residency requirement is discriminatory and unconstitutional. A by-election under the current regime would similarly exclude non-resident candidates, and therefore raise similar concerns regarding representation and discrimination to those raised by Mr. Linklater. In addition, I consider the fact that replacement of Mr. Linklater by another Headman would mean that the membership of the Thunderchild First Nation Council may not reflect the will of the Thunderchild First Nation electorate as expressed in the original election, until at least the next election. Another potential outcome is that, if a by-election is held, and Mr. Linklater's application is then allowed, there may be uncertainty, or there may be reversal of the by-election results. Each of these would cause difficulty and negatively affect the governance of Thunderchild First Nation.

[34] As Justice Grammond has rightly stated, the principle of Indigenous self-government includes decisions on Indigenous matters being made by Indigenous decision-makers. For this principle to be given meaningful recognition, judicial intervention in Indigenous decision-making processes must be avoided whenever possible: *Whalen* at para 19. In the present case, this concern is tempered by the recognition that the Thunderchild First Nation Government does not oppose the requested injunction, and has not raised any prejudicial effect it believes would weigh against issuing the injunction. Indeed, the Thunderchild First Nation Government opposed Ms. Thunder and Mr. Jimmy's applications to the Tribunal, including on *Charter* grounds. Similarly, the Tribunal itself, in the closing passage reproduced at paragraph [8] above, appears to have indicated that it was only its assessment of its jurisdictional limits that prevented it from making a decision on Mr. Linklater's *Charter* arguments. In other words, while this Court should be wary in making orders that might displace Indigenous decision-making, the Indigenous Tribunal in this case concluded that it did not have decision-making authority.

[35] Nor have the other respondents, who sought Mr. Linklater's removal and a new by-election, raised any prejudice to either them or other citizens that would weigh against the injunction.

[36] Other factors for consideration in the balance of convenience include the fact that this request, and thus this decision, are being made somewhat in advance of the by-election date in late September, but only days before the first advance polling date. An injunction risks disruption of an election process already underway, but less so than if the by-election itself were to be scheduled for this week. Mr. Linklater also raises concerns about holding an in-person by-

election during the COVID-19 pandemic, with reference to the recommendation of the Minister of Indigenous Services Canada to delay Indigenous elections during the pandemic. However, both the Tribunal in making its order and the Thunderchild First Nation Government in making arrangements for the by-election would have been aware of the pandemic and the Minister's recommendation, and proceeded nonetheless. I therefore do not give weight to these issues in the balancing.

[37] Overall, I conclude that the balance of convenience favours granting the requested injunction. The particular harm to Mr. Linklater if the injunction is not granted is significant, as described above. The harm associated with granting the injunction is related to broader interests of self-governance and democratic principles. These latter interests are of fundamental importance, but the concern that they will be materially harmed by postponing the by-election are attenuated in the particular circumstances of this case.

V. Conclusion

[38] I therefore conclude that the three parts of the test for an interlocutory injunction are met and that in all of the circumstances, issuing the requested injunction is in the interests of justice. The Thunderchild First Nation Government is therefore enjoined from continuing with the by-election for Headman to replace Mr. Linklater until this Court has decided Mr. Linklater's application for judicial review.

[39] Mr. Linklater asked that no costs be awarded, or alternatively that costs be in the cause. As no party has opposed this motion, I order that no costs are to be payable on the motion.

ORDER IN T-892-20

THIS COURT ORDERS that

1. The Thunderchild First Nation Government is hereby enjoined from continuing with and holding a by-election for Headman to fill the vacant position left by the removal of Michael Linklater, until the determination of this application for judicial review or further Order of the Court.
2. There is no order as to costs.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-892-20
STYLE OF CAUSE:	MICHAEL LINKLATER v THUNDERCHILD FIRST NATION GOVERNMENT ET AL

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	MCHAFFIE J.
DATED:	SEPTEMBER 16, 2020

WRITTEN REPRESENTATIONS BY:

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