Federal Court  Cour fédérale

Date: 20201120

Docket: T-986-20

Citation: 2020 FC 1069

Ottawa, Ontario, November 20, 2020

PRESENT: The Honourable Mr. Paul Favel

BETWEEN:

PAMELA HALCROW AND DEBRA CHALIFOUX-COUTURIER

Applicants

and

KAPAWE'NO FIRST NATION APPEALS COMMITTEE, KAPAWE'NO FIRST NATION LYDIA CUNNINGHAM, CHRISTOPHER HALCROW, AND PRISCILLA SUTHERLAND

Respondents

ORDER AND REASONS

I. Nature of the Matter

[1] Pamela Halcrow and Debra Chalifoux-Couturier [Applicants], bring this motion for injunctive relief pursuant to Rules 360 and 35(2) of the *Federal Courts Rules*. The Applicants

request an Order pursuant to section 18.2 of the *Federal Courts Act*, staying a July 26, 2020 decision [Decision] of the Kapawe'no First Nation Election Appeals Committee [Appeals Committee].

[2] The Appeals Committee granted the appeals of Lydia Cunningham, Christopher Halcrow, and Priscilla Sutherland [Individual Respondents] and ordered a new election.

[3] The Applicants' motion for interlocutory injunctive relief is dismissed.

II. Background

[4] The following facts are the most relevant to this motion.

[5] Kapawe'no First Nation [KFN] is an Indian band as defined in the *Indian* Act, RSC 1985, c I-5. It is governed by one chief and two councillors who represent clans or families of the KFN. Like many First Nations in Canada, KFN is governed by its own custom election law, the Custom Election Code and Regulations [Election Regulations]. What differentiates KFN from many First Nations governed by a custom election law is that KFN's chief and councillor positions are hereditary and lifetime positions.

[6] Chief Sydney Halcrow [Chief Halcrow] has held the current chief position since January 2, 2020, when the former chief died. Prior to his appointment by the former chief, Chief Halcrow was a councillor representing the Halcrow clan. The councillor position representing the Chalifoux clan has been vacant since October 2019, when that clan member resigned. Chief

Halcrow has been the only sitting member of the band council since January 2, 2020. Like many First Nations, decisions of the KFN band council are made by a quorum of the band council in normal circumstances.

[7] On March 7, 2020, Chief Halcrow scheduled an election for April 25, 2020 for the Halcrow and Chalifoux clan councillor representatives; however, on March 27, 2020 Chief Halcrow issued a notice postponing the election due to the Covid-19 pandemic. On May 15, 2020, Chief Halcrow issued a band council resolution setting an election date of July 11, 2020 and a notice of election was posted on the KFN website. A 2020 Election COVID-19 Protocol document allowed KFN members to vote online from July 9, 2020 up to 8:00 pm on the day of the election.

[8] The Individual Respondents, Lydia Cunningham and Christopher Halcrow, were candidates for the councillor representative of the Halcrow clan. The other Individual Respondent, Priscilla Sutherland, was a candidate for the councillor representative of the Chalifoux clan until the Electoral Officer rejected her nomination and excluded her name from the final list of candidates. The Applicant, Pamela Halcrow, was elected as Councillor for the Halcrow clan and the Applicant, Debra Chalifoux-Couturier, was elected as Councillor for the Chalifoux clan.

[9] The Individual Respondents each separately appealed the results of the election. On July 24, 2020, Chief Halcrow selected three elders representing each of the main clans to form an

Appeal Committee. A Notice of Appeal was posted on the KFN website on July 27, 2020. The collective grounds of appeal were as follows:

(1) The Election Code did not allow for online voting;

(2) The nomination meeting was not held at least 14 days prior to the election;

(3) The Electoral Officer removed two names from the list of candidates without providing reasons; and

(4) The membership list was not made available by the Electoral Officer prior to the nominations.

[10] The Individual Respondents and the Electoral Officer attended the appeal meeting and were able to provide submissions. The Applicants were not scheduled to attend. On July 29, 2020, the Appeal Committee unanimously granted the appeals and ordered a new election in a brief written decision. Although the Decision does not explicitly state that the Applicants have been removed from their respective councillor positions, the parties have treated the Decision as though it has.

[11] On August 26, 2020, the Applicants filed an application for judicial review of the Decision. On October 8, 2020, the Applicants filed the motion seeking interlocutory relief in the form of an injunction staying the Appeal Committee Decision. KFN submits that it takes no position on this motion and provided submissions to assist the Court.

III. Issue

[12] The only issue for determination is whether the Court should grant the Applicants' motion for interlocutory relief, which would have the effect of staying the Decision of the Appeal Committee pending the determination of the application for judicial review on the merits.

[13] The tri-partite test for injunctive relief was set out by the Supreme Court of Canada in *RJR MacDonald v Canada (Attorney General*), [1994] 1 SCR 311 [*RJR*]:

(1) Is there is a serious question to be tried?

(2) Will the Applicant suffer irreparable harm if the injunction is denied?

(3) Will the Applicant suffer greater harm from a refusal to grant the injunction?

[14] In *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12 [*CBC*] the Supreme Court of Canada recently summarized the test as follows:

> [12]…At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.

[15] The test is conjunctive meaning that an applicant must satisfy every part of the test (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at paras 19-21). Failure to satisfy any part of the test is fatal to an applicant's motion.

IV. Preliminary Issues

[16] KFN submits that the Affidavits of Lydia Cunningham and Pamela Halcrow go beyond the procedural fairness issues and seeks to defend and substantively explain the Decision. It submits that the Court should not consider these portions of the Affidavit evidence.

[17] KFN also submits that the Affidavit of Lydia Cunningham includes a September 29, 2020 letter from one of the decision makers, which the Individual Respondents appear to rely upon as additional reasons for the Decision despite its issuance two months after the Decision. It submits that the Court does not permit a decision maker to issue reasons for decision well after a decision is challenged. Lastly, KFN submits that the Individual Respondents have tendered a solicitor-client privileged letter over which KFN has not waived privilege.

[18] At the hearing, the Individual Respondents argued that the Court should disregard KFN's submissions in their entirety since it is not accurate that they are taking no position on this motion.

[19] After hearing the argument and reviewing the evidence in question, I find that the evidence that KFN questions is not relevant to the issues in this motion.

V. Analysis

[20] An interlocutory injunction is an extraordinary and equitable remedy. The decision to grant or refuse such a remedy is a discretionary one (*CBC* at para 27). The Applicants have not satisfied the well-established test for the granting of interlocutory relief. My analysis is below.

A. *Serious Issue*

[21] At this first stage of the test, the Court is to conduct a preliminary investigation of the merits of the case and decide whether the Applicants demonstrate that there is a serious question to be tried and that the application is neither frivolous nor vexatious (*CBC* at para 12).

[22] The Applicant states that the Appeal Committee did not provide facts or reasons, contrary to the principles of reasonableness. Further, the Applicants did not receive notice of the Election Appeal, other than a public notice, were not invited to the election appeal hearing, and they were not provided an opportunity to make submissions, which contravenes principles of procedural fairness (*Baker v Canada* [1999] 2 SCR 81). They state that the Decision is unreasonable and has the serious effect of removing them from office, immediately effecting their rights, interests, and privileges. Therefore, the Applicants submit that there is a serious issue.

[23] The Individual Respondents submit that the Appeal Committee is an internal administrative tribunal and its decisions are not subject to further appeal. Therefore, the Decision has the force of law and has a presumption of validity. Further, the Appeal Committee was ruling

on the application of the Election Regulations and has exclusive responsibility for its interpretation and their Decision requires deference.

[24] The Individual Respondents submit that a heightened and more stringent threshold is appropriate, specifically that there is a "strong *prima facie*" case. This heightened threshold applies where the result of the interlocutory motion will effectively amount to a final determination of the action or where the Court assessing the merits of the case could not reverse what was done at the interlocutory stage (*Gadwa v Joly*, 2018 FC 568 at para 26).

[25] The Individual Respondents submit that the Decision reasonably concluded that the Election Regulations did not allow for electronic voting and the Election Regulations entitled Priscilla Sutherland to a hearing on whether her nomination was valid. They state that the Appeal Committee's interpretation of the Election Regulations warrants deference and that the Applicants have failed to establish a serious issue.

[26] KFN cites *Morin v Enoch Cree First Nation*, 2020 FC 696 at paras 30-35, where the Court concluded that while an election code did not specifically require that an applicant have an opportunity to address allegations, it is a basic premise of procedural fairness.

[27] In reviewing the parties' submissions, I am not convinced that the higher threshold applies to this case. If the relief sought in this case is granted, it would only be until the hearing of the application on its merits.

[28] Turning now to the submissions on this first stage of the test, I find that the Applicants have satisfied the low threshold that the issues they raise are not frivolous or vexatious. I will not comment any further on the facts, as I will leave that for the applications Judge hearing the merits of this matter.

B. *Irreparable Harm*

[29] At this stage of the test, an applicant must establish with clear and convincing evidence that it will suffer irreparable harm; speculation and assertions are not sufficient (*Glooscap Heritage Society v Minister of National Revenue*, 2012 FCA 255 at para 31). Irreparable harm refers to the nature of the harm, not the magnitude. Monetary compensation cannot cure irreparable harm (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 6; *RJR* at 341).

[30] The Applicants state the Decision undermines their authority, standing, and reputation in the community and that if the Court does not grant a stay, they will suffer irreparable harm, as the Decision will have the effect of denying them a significant part of their term of office. Additionally, they submit that since their removal means that the quorum of the band council is not met, current governance issues and a lack of stability will also cause irreparable harm (*Councillors Georgina Brandy, Brandy Jules and Ronald Jules, Adams Lake Indian Band*, March 3, 2017, Docket A-42-17 FCA).

[31] The Applicants submit that each day out of office prevents an applicant from performing their elected duties which is not compensable in damages (*Bonspille v Mohawk Council of*

Kanesatake, 2002 FCT 677 at para 40). The Applicants also submit that the Decision undermines their reputation and standing in the community and prevents them from speaking out on behalf of policies for which they were elected (*Gabriel v Mohawk Council of Kanesatake*, 2002 FCT 483; *Prince v Sucker Creek First Nation*, 2008 FC 479).

[32] KFN points out that Council cannot form quorum and that Council does not represent all the KFN clans, which presents restrictions in respect of governance. However, it acknowledges that none of the decisions made by Chief Halcrow have been challenged since he was appointed as Chief in January 2, 2020.

[33] The Individual Respondents state that the Applicants have not established, but simply assert that they will suffer irreparable harm. Therefore, the circumstances of this case do not warrant the granting of the interlocutory injunction. The Individual Respondents also submit that since the Applicants waited approximately nine weeks to ask for interlocutory relief, it weighs against their allegation of irreparable harm (*Alberta Permit Pro v Booth*, 2005 ABQB 317 at para 4).

[34] The Individual Respondents also distinguish the case law cited by the Applicants from the circumstances of this matter. In the cases considered by the Applicants, the injunction maintained a status quo and re-established elected officials into a role that they had already started unlike in the instant case where the Applicants have never actually held office. The Individual Respondents cite *Awashish v Conseil des Atikamkw d'Opitciwan*, 2019 FC 1131 at

para 35, where the Court found there to be no irreparable harm where the party had not been sitting on Council before the impugned decision was made.

[35] Further, the Individual Respondents state that the Applicants' reputations and suitability for office were never at issue. Rather, the Decision focused on irregularities in the election process and therefore their reputations are not irreparably harmed (*Weekusk Sr. v Thunderchild First Nation (Appeal Tribunal)*, 2007 FC 202 at para 16 [*Weekusk*]; *McIvor v Canada (Attorney General)*, 2006 FC 1187 at para 9).

[36] The Individual Respondents also submit that, since KFN's daily operations have not halted based on lack of quorum, irreparable harm has not occurred. They submit that if the Court granted the injunction, the result would be increased uncertainty since the band council's quorum would consist of two new improperly elected councillors. This would offend the proper purpose of an interlocutory injunction, which is to preserve or restore the status quo (*Canada (Attorney General) v Gould*, [1984] 1 FC 1133 at para 18 (affirmed) [1984] 2 SCR 124).

[37] The Applicants have not persuaded me with clear, convincing and non-speculative evidence that they will suffer irreparable harm if the motion is denied. I am in agreement with the submissions of the Individual Respondents that the circumstances here are unlike the circumstances in the cases cited by the Applicants. Rather they are more factually similar to *Weekusk* in that the Applicants in this case have not held office. Accordingly, any reputational harm is speculative. Additionally, since a hearing of the merits is scheduled for January 13, 2021, there is only a short wait for the issue to be dispensed with. Chief Halcrow, with the

assistance of administrative staff, has been making decisions on behalf of KFN that have gone unchallenged, so there is no harm to KFN beyond an assertion that a quorum is required. Lastly, the fact that the two councillor positions are for lifetime terms also weighs against the finding that irreparable harm exists, as the ultimate resolution of this matter may very well result in a significant term of office.

C. *Balance of Convenience*

[38] The Court has defined the third part of the tripartite test as an assessment of "which party will suffer the greatest harm from the granting or refusal of the stay?" (*RJR*, at 342; *Canada (Prime Minister v Khadr)*, 2010 FCA 199 at para 23; *Fox v Canada (Citizenship and Immigration)*, 2009 FCA 346 at para 19).

[39] In light of my finding that the Applicants have not satisfied the Court with clear, convincing and non-speculative evidence of irreparable harm, which is fatal to their motion, there is no need to analyze this part of the test.

VI. Conclusion

[40] I conclude that the Applicants have not satisfied the conjunctive tri-partite test for the granting of an injunction. Specifically, the Applicants have not established, with clear, convincing and non-speculative evidence, that they will suffer irreparable harm.

VII. Costs

[41] The Applicants seek costs without elaborating on specifics of that request.

[42] KFN state that they do not seek costs and asks that none be awarded against it.

[43] The Individual Respondents request an order for costs based on the time and expense of this motion, which they submit, were avoidable if the Applicants had accepted the Respondents' offer to accept a discontinuance without costs before the Respondents' affidavits were due. They also submit that the public interest in having the proceeding litigated, rather than allowing it to be argued unopposed, is clear, though they are individuals of limited means who stand alone to support the Decision of a committee of elders from their community.

[44] The Individual respondents submit that the Court has awarded costs ranging from $5,000 to $9,000 when dismissing applications for an interlocutory injunction for a First Nations election issue (*Lake St. Martin First Nation v Woodford*, 2000 CarswellNat 1671; *Buck v Canada (Attorney General),* 2020 FC 76). Therefore, they seek costs of $5,799.07, which includes stenographer fees of $799.07 for Priscilla Halcrow's cross-examination on her affidavit.

[45] After considering the factors in Rule 400, I am exercising my discretion to award costs to the Individual Respondents in the sum of $2,799.07, of which $799.07 relates to the cost of the stenographer fees. The unique circumstances of this case, being that this application involves the first consideration of the Election Regulations by this Court, and my determination that a serious

issue exists, necessitates a lower cost award than that sought by the Individual Respondents notwithstanding the result. The total sum of $2,799.07 is to be borne equally by KFN and the Applicants.

JUDGMENT in T-986-20

THIS COURT'S JUDGMENT is that:

1. The Applicants' motion for a stay is dismissed.
2. The Individual Respondents are entitled to costs in the amount of $2,799.07 to be borne equally by KFN and the Applicants, payable within ninety (90) days of this order.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-986-20
STYLE OF CAUSE:	PAMELA HALCROW AND DEBRA CHALIFOUX-COUTURIER v KAPAWE'NO FIRST NATION APPEALS COMMITTEE, KAPAWE'NO FIRST, NATION, LYDIA CUNNINGHAM, CHRISTOPHER HALCROW, AND PRISCILLA, SUTHERLAND
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 12, 2020
ORDER AND REASONS:	J FAVEL
DATED:	NOVEMBER 20, 2020

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