Federal Court Cour fédérale

Date: 20210325

Docket: T-391-21

Citation: 2021 FC 257

Ottawa, Ontario, March 25, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

FLOYD BERTRAND

Applicant

and

ACHO DENE KOE FIRST NATION

Respondent

ORDER AND REASONS

[1] Mr. Bertrand applies for judicial review and seeks interim relief against a decision of the returning officer of the Acho Dene Koe First Nation to declare him ineligible to be a candidate in the upcoming election for the position of chief. I am denying his motion for interim relief. He has not shown that he will suffer irreparable harm if I do not issue relief now. He will be able to challenge the results of the election, including the fact that his candidacy was rejected, through the appeal process created by the First Nation or, in the alternative, by applying to this Court.

I. Background

[2] Elections for the chief and council of Acho Dene Koe First Nation are set to be held on April 26, 2021. The election was initially supposed to be held in 2020, but was postponed because of the COVID-19 pandemic. In a separate proceeding before this Court, in which I have reserved judgment, Mr. Bertrand challenged the postponement of the election.

[3] Acho Dene Koe's elections are governed by its own "custom," because it was never made subject to an order pursuant to section 74 of the *Indian Act*, RSC 1985, c I-5.

[4] Mr. Bertrand was chief of Acho Dene Koe from 2002 to 2005. He was defeated in the 2005 election. In 2007, Acho Dene Koe's council prepared a draft election code, which contained a provision declaring ineligible any person who has an outstanding debt of over $500 towards the First Nation or its subsidiaries. The parties disagree as to whether that code was validly adopted. Nonetheless, when Mr. Bertrand ran again for chief in 2008, the returning officer declared him ineligible, because he owed a debt to one of the First Nation's subsidiaries.

[5] Mr. Bertrand did not run in the 2011 and 2014 elections. He filed his candidacy for the 2017 election, but withdrew it when he was told that he was ineligible because of his debt.

[6] He now seeks to run for chief again.

[7] On January 27, 2021, through his counsel, he wrote to the returning officer to complain about several irregularities in the ongoing election process. He also asked for more clarity with respect to the requirement to repay all debts owing to the First Nation.

[8] On February 23, 2021, Mr. Bertrand delivered his nomination papers to the returning officer in person, together with proof that he had paid certain debts to Beaver Enterprises LP [Beaver], a business owned by Acho Dene Koe, and that other debts had been written off after a discussion with Beaver's accountant in 2015. After a summary verification, the returning officer told Mr. Bertrand that he still owed $27,551,94 to Beaver.

[9] On March 1, 2021, Mr. Bertrand's counsel wrote to the returning officer, denying that Mr. Bertrand owed any debt to Beaver and asking her to accept his nomination. On the same day, the returning officer wrote to Mr. Bertrand, saying that a review of Beaver's financial records did not show any write-off of Mr. Bertrand's debt.

[10] The next day, when the nomination period was about to close, Mr. Bertrand's counsel wrote to the returning officer and asserted again that Mr. Bertrand's debt to Beaver had been written off by Beaver's accountant in 2015, that Beaver was "out of time" to enforce the purported debt, that the 2007 draft election code, which contains the requirement to repay debts, was never ratified, and that if any debt existed, it should be set off against a debt of $25,000 owed by Beaver to Mr. Bertrand, according to a 2003 resolution of Beaver's board of directors. Shortly after receiving the letter, the returning officer maintained her opinion that Mr. Bertrand would be ineligible unless he paid off the debt on that day.

[11] The 2007 draft election code contains a provision referring to an appeals committee. The December 7, 2020 council resolution calling the election appointed Mr. Wallbridge, a lawyer in Yellowknife, as the "committee." On March 4, 2021, Mr. Bertrand appealed the returning officer's decision to Mr. Wallbridge.

[12] Meanwhile, Mr. Bertrand brought an application for judicial review of the returning officer's decision and a motion seeking, on an interim basis, an order that his name be added to the ballot.

[13] On March 17, 2021, Mr. Wallbridge wrote the following email to the returning officer, with a copy to Mr. Bertrand, effectively declining to exercise his jurisdiction:

> Mr. Bertrand, with the assistance of able legal counsel, makes a comprehensive and compelling argument as to why he ought to be permitted to run in the upcoming election.
>
> However I find that with Mr. Bertrand availing himself of his rights as a citizen of this country to file an application for judicial review of your same decision trumps my authority, or ability, or both, to consider this matter.
>
> Far be it from me to presume that I should insert myself in an appeal of certain matters being argued before a much higher and august judicial body than I. Any decision I might make on the merits could be quashed in the next instance by a decision of the Federal Court.
>
> My decision is that we must await that decision.

II. Analysis

[14] The interim relief sought by Mr. Bertrand is, in substance, an interlocutory injunction, that is, a temporary measure intended to preserve the rights of the parties until a decision is

rendered on the merits. It is not a final resolution of the case. The analytical framework used by the courts to decide whether it is appropriate to issue an interlocutory injunction is well known. It takes into account the fact that such motions must often be decided on an incomplete evidentiary record and that a final resolution of the merits of the case cannot be reached in a short time frame.

[15] This framework has been the subject of several decisions of the Supreme Court of Canada, including *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, *RJR–MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*], and *Harper v Canada (Attorney General)*, 2000 SCC 57, [2000] 2 SCR 764. In *R v Canadian Broadcasting Corp*, 2018 SCC 5 at paragraph 12, [2018] 1 SCR 196 [*CBC*], the Court summarized the approach to be taken:

> 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.

A. *Serious Issue*

[16] In usual cases, the first prong of the test is a low threshold and the applicant need only demonstrate that its case is not frivolous. However, where a mandatory injunction is sought, or where the decision on an interlocutory injunction will amount to a final determination of the matter, the bar is higher and the applicant must prove a strong likelihood of prevailing at trial:

RJR, at 339; *CBC*, at paragraph 7. In *Awashish v Conseil des Atikamekw d'Opitciwan*, 2019 FC 1131 at paragraphs 17-19, I held that this heightened test applies where a person whose candidacy was rejected seeks to have his name added to the ballot.

[17] Mr. Bertrand raises a number of grounds in support of his challenge to the returning officer's decision to reject his candidacy. First, he denies that there is any valid customary requirement for the candidates to repay debts over $500. He asserts that the 2007 draft election code was never validly ratified and that Acho Dene Koe has not brought sufficient evidence of a practice attracting a broad consensus within the community. Second, he asserts that he was never in debt towards Beaver, that he settled his accounts in 2015 with Beaver's accountant and that in any event, the debt is statute-barred. Lastly, he argues that the process followed by the returning officer was unfair.

[18] The issues raised by Mr. Bertrand are serious. This is not to say that he will surely prevail or that Acho Dene Koe has no defence. These issues deserve careful consideration. However, I am unable to find that Mr. Bertrand has a strong likelihood of prevailing. The issues I outlined above have a strong factual component. The evidence in the motion record was assembled over a two-week period and consists only of affidavits with attached documents. There was no opportunity for cross-examination. I would be doing a disservice to all parties and the community if I were to order Mr. Bertrand's name to be placed on the ballot on the basis of such an incomplete evidentiary record.

B. *Irreparable Harm*

[19] The second prong of the *RJR* test is irreparable harm. In a nutshell, the court must consider whether the applicant's rights will become ineffective if the court does not intervene at an early stage.

[20] In the context of First Nations elections, the existence of other procedures to challenge the results of the election is often a decisive factor in the assessment of irreparable harm: *Gopher v Saulteaux First Nation*, 2005 FC 481 at paragraphs 23-26; *Cachagee v Doyle*, 2016 FC 658 at paragraph 9; *Awashish*, at paragraph 38.

[21] Here, Mr. Bertrand will be able to appeal the results of the election to the appeal officer appointed by Acho Dene Koe. Even if the challenge is brought after the election, I have no doubt that the appeal officer will assess whether Mr. Bertrand's candidacy was rightly or wrongly rejected. Moreover, the appeal officer will be able to consider all the relevant evidence and to receive oral testimony.

[22] Mr. Bertrand, however, argues that the appeal officer is not validly empowered, as the 2007 draft election code that sets up the appeal committee was never ratified by the community and there is no evidence of any past practice of appointing appeal committees or officers. I appreciate the difficulty, but I do not think that this deprives Mr. Bertrand of a useful remedy. Acho Dene Koe does not challenge the validity of the process it created. Thus, if Mr. Bertrand wishes to use it, I trust that Acho Dene Koe will recognize its outcome.

[23] If, on the other hand, this process is declared invalid or becomes ineffective, nothing would prevent Mr. Bertrand from challenging the election, including the omission of his name from the ballot, directly in this Court, as was the case in *Thomas v One Arrow First Nation*, 2019 FC 1663 at paragraph 16.

[24] Thus, I find that this Court's early intervention is not required to ensure that Mr. Bertrand has an adequate remedy.

[25] Mr. Bertrand also argues that an injunction is necessary to prevent instability in Acho Dene Koe's governance. He relies on cases such as *Buffalo v Bruno*, 2006 FC 1220, and *Landry v Abénaki Council of Wôlinak*, 2018 FC 601. Of course, there is always some form of instability until all challenges to an election are finally decided. More is needed, however, to justify the issuance of interim relief. In *Buffalo v Bruno*, the injunction prevented a by-election to fill a seat that was declared vacant as a result of a challenge to the results of a general election; see also *Linklater v Thunderchild First Nation*, 2020 FC 889, for a similar situation. In *Landry*, an injunction was issued to delay an election where hundreds of members were excluded from the voters' list. Both situations are distinguishable from that of Mr. Bertrand.

[26] Lastly, I am not persuaded by Mr. Bertrand's assertion that an injunction is necessary to prevent irreparable harm to his reputation.

C. *Balance of Convenience*

[27] As Mr. Bertrand has not made out the first two prongs of the *RJR* test, it is unnecessary to consider the third prong, balance of convenience.

III. Disposition

[28] Mr. Bertrand has not shown that the test for interim relief is met. Accordingly, his motion for interim relief will be dismissed.

ORDER in T-391-21

THIS COURT ORDERS that:

1. The applicant’s motion for interim relief is dismissed.

2. Costs in the cause.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-391-21
STYLE OF CAUSE:	FLOYD BERTRAND v ACHO DENE KOE FIRST NATION
PLACE OF HEARING:	BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO, EDMONTON, ALBERTA AND VANCOUVER, BRITISH COLUMBIA
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