Federal Court  Cour fédérale

Date: 20240725

Docket: T-2206-22

Citation: 2024 FC 1177

Ottawa, Ontario, July 25, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

CECILIA (TONI) JOSEPHINE HERON

Applicant

and

SALT RIVER FIRST NATION NO. 195

Respondent

ORDER AND REASONS

I. Overview

[1] On March 21, 2024, Cecilia (Toni) Josephine Heron [Chief Heron or Applicant] filed a motion pursuant to Rule 397(1)(b) of the *Federal Court Rules*, SOR/98-106 [*Rules*] for reconsideration in relation to the Order granted in *Heron v Salt River First Nation No 195*, 2024 FC 413 [Judgment].

II. Background

[2] The procedural background to this matter is set forth in the Judgment.

[3] On March 12, 2024 the Court rendered the Judgment, ordering as follows:

1. The application for judicial review in T-2191-22 is dismissed.
2. The application for judicial review in T-2206-22 is allowed.
3. Chief Heron is awarded remuneration for the salary she would have received had she not been suspended.
4. Chief Heron is awarded lump sum costs in the amount of $12,000 payable by SRFN forthwith.

[4] Chief Heron requests that the Court reconsider the Judgment concerning T-2206-22 in accordance with Rule 397(1)(b). In the Notice of Motion, Chief Heron seeks the following relief:

1. A Declaration pursuant to Rule 397[1](b) that the relief sought in the Applicant's judicial review for [applications] T-2206-22 and T-97-22 is hereby granted, including that this Court's Decision rendered on March 12, 2024, held that:
    a) The initial October 13, 2022, suspension of Chief Heron by the Respondent, Salt River First Nation ("SRFN") is no longer in effect.
    b) The subsequent suspensions by SRFN as against Chief Heron, including the suspension issued February 1, 2024 by SRFN, suspending Chief Toni Heron, for a further 60 days are no longer in effect.
    c) That as of the Court's Decision on March 12, 2024, Chief Toni Heron is the acting Chief of SRFN.
2. Costs on a solicitor-client basis;
3. Such further and other relief as counsel may advise and this Honourable Court deems just.

III. Preliminary Issue

[5] In support of this motion, Chief Heron filed an affidavit dated March 20, 2024 in which she provides evidence about events since the Court heard the underlying judicial review and since the Court rendered its Judgment on March 12, 2024. Chief Heron details how SRFN maintains the view that the Applicant remained suspended until April 4, 2023 and other concerns about whether SRFN is complying with its Election Code.

[6] SRFN submits that the Court should disregard this evidence, as it is irrelevant and inadmissible in a Rule 397 motion. In a reconsideration under Rule 397(1), the Court being *functus officio* is only asking itself whether the Judgment does or does not accord with its reasons (*Sharma v Canada (Revenue Agency)*, 2020 FCA 203 at para 3). Further, paragraphs 2 to 20 of the affidavit of Chief Heron is not relevant to the underlying judicial reviews. Evidence that is not relevant and admissible, as defined by the Applicant's Notices of Application, has no place in a motion to reconsider the Court's Judgment.

[7] I agree that the affidavit of Chief Heron is largely irrelevant to this motion. Rule 397 is technical rule designed to address situations where a matter that should have been addressed was overlooked or accidentally omitted (*Lee v Canada (Minister of Citizenship and Immigration)*, 2003 FC 867 at para 3). Paragraphs 1 and 2 of the affidavit are introductory and summarize the Judgment. Paragraphs 3 to 14 detail events since the hearing and Judgment and have some bearing on understanding why the Applicant has filed this motion but ultimately do not assist the Court in assessing whether it overlooked or omitted a matter. In contrast, paragraphs 15 to 20 of the affidavit focusing on Chief Heron's concerns about SRFN's alleged contraventions of its Election Code do not relate to whether this Court overlooked or omitted a matter in its Judgment.

IV. Issue

[8] The sole issue for determination is whether the Court should reconsider its relief ordered in its Judgment under paragraph 397(1)(b) of the *Rules*.

V. Relevant Provision

[9] Rule 397 enables the Court to reconsider its Order:

> **Motion to reconsider**
>
> 397 (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that
>
> (a) the order does not accord with any reasons given for it; or
>
> (b) a matter that should have been dealt with has been overlooked or accidentally omitted.
>
> **Mistakes**
>
> (2) Clerical mistakes, errors or omissions in an order may at any time be corrected by the Court.

VI. Analysis

A. *Applicant's Position*

[10] In the Notice of Application for T-97-23, Chief Heron sought judicial review of the following decision:

> … the decision of the Council of the Salt River First Nation No. 195 ("SRFN") wherein they decided to suspend (or extend the prior suspension of) the Applicant from her position of Chief of the SRFN for a period of 60 days, and the ongoing course of conduct

> of continuing to maintain and/or extend the suspension going forward (the "Decision"). The Decision was communicated to the Applicant on December 12, 2022.
>
> [emphasis added.]

[11] Similarly, the Notice of Application for T-97-23 identified that "[t]his conduct of repeatedly extending the suspension for a further 60 days, including the Second Suspension, is the "course of conduct" that the Applicant seeks to challenge in this application".

[12] As such, Chief Heron is not seeking to amend the Notice of Application as it already addresses ongoing suspensions and a continuing course of conduct. This understanding of the decision that was under review is consistent with the Respondent's own understanding in its memorandum of fact and law for the underlying judicial review, which stated:

> SRFN also opposes the request of the suspended Chief in Application No. T-97-23 (since consolidated with Application No. T-2206-22) for an Order in the nature of *certiorari*, quashing and setting aside SRFN Council's December 4, 2022 and all later decisions extending the October 13 Suspension for a further 60 days without pay ("**the Suspension Extensions**").

[13] In her applications, Chief Heron sought relief that included an Order in the nature of prohibition restraining Council from their conduct of repeatedly suspending Chief Heron for the same allegations, as well as an Order or Declaration that Chief Heron remains the Chief.

[14] Chief Heron was entirely successful in her application. The suspensions after the September 13, 2023 hearing are on the same grounds as the grounds that were before the Court in Chief Heron's application for T-2206-22 and T-97-23. However, SRFN continues to take the

position that Chief Heron remains suspended pursuant to SRFN's decision on February 1, 2024 to suspend her for another 60 days.

[15] In order to give effect to the Judgment, the Court must reconsider its Judgment to include an Order that SRFN is prohibited from continuing to suspend Chief Heron for the same grounds and that Chief Heron remains the Chief of SRFN. Otherwise, SRFN will continue to suspend Chief Heron on the same grounds and Chief Heron's only recourse would be to file another judicial review. Chief Heron's motion must be granted to provide certainty and finality to the Court's Judgment.

[16] The Judgment requires wording identifying that the Court granted the relief sought. In particular, the request for an Order in the nature of *certiorari* quashing and setting aside the decision must include the first suspension and all subsequent suspensions. It would serve everyone if the Judgment clearly stated that Chief Heron is Chief. The Judgment also requires wording that Chief Heron cannot continue to be suspended on the same grounds. Finally, the Judgment only refers to salary and not remuneration but it is possible that there is other remuneration owed to her.

B. *Respondent's Position*

[17] The exceptions to the doctrine of *functus officio* created by Rule 397 are "much narrower than it sounds" (*Singh v Canada (Citizenship and Immigration)*, 2022 FC 8 at para 4 [*Singh*], citing *Canada v MacDonald*, 2021 FCA 6). *Singh* at paragraph 5 similarly identifies the following limitation, citing *Yeager v Day*, 2013 FCA 258:

> The reconsideration power under Rule 397 is not the same as this Court's powers on appeal under section 52 of the Federal Courts Act, R.S.C. 1985, c. F-7. Instead, the reconsideration power is more limited – to correct small oversights, such as an inconsistency between the order and the reasons (Rule 397(1)(a)), the failure of the Court to deal with something that was put to it (Rule 397(1)(b)), and clerical mistakes, errors or omissions in the order (Rule 397(2)).

[18] There is no clerical error at issue. The Court's Judgment and Reasons are also consistent, as the Judgment allowed Chief Heron's application and is entirely in accordance with the Reasons.

[19] At the time of the hearing, the suspensions before the Court were the October 2022, December 2022, February 2023, March 2023, June 2023, and August 2023 suspensions.

[20] This motion is an attempt to amend the Notices of Application and add further relief that was not pleaded, and was not before the Court on September 13, 2023. A motion to amend does not fall within motion the very narrow exceptions to the doctrine of *functus officio* created by Rule 397. A Notice of Application cannot be amended retroactively. As Justice Pelletier said in *Halford v Seed Hawk Inc*, 2004 FC 455 [*Halford*]:

> [16] In my view, a trial judge has a broad discretion to allow amendments to the pleadings at any time prior to judgment, but that right is extinguished after judgment has been signed. At that point, there has been a final adjudication of the parties' rights which can only be attacked upon appeal. I would therefore dismiss the application for reconsideration.

[21] The relief requested by Chief Heron was what was before the Court in September 2023. However, Chief Heron is asking for express relief to cover the February 1, 2024 suspension so it

is a motion to amend pleadings and add further relief that was not before the Court at the hearing. The Court can only clarify that it quashed the October 2022, December 2022, February 2023, March 2023, June 2023, and August 2023 suspensions, which were the suspensions before the Court at the hearing.

[22] Further, the “matter” that Rule 397(1)(a) permits the Court to reconsider "is related to the remedies sought by the moving party. It is not related to an argument that was raised before the Court" (*Singh* at para 9, citing *Naboulsi v Canada (Citizenship and Immigration)*, 2020 FC 357). The Applicant’s request falls well outside the narrow exception to the doctrine of *functus officio* created by Rule 397(2) (*Halford* at paras 9, 10, 13, 14; *Singh* at para 9).

C. *Conclusion*

[23] The relief sought by Chief Heron does not fall within the exceptions of Rule 397.

[24] While I am sympathetic to Chief Heron, the Court cannot review decisions that are not properly before it. There is an exception to Rule 302 in which a Court can review a continuing course of conduct rather than limit the judicial review to a review of a single decision (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 164). The wording of the T-97-23 Notice of Application identified the continuing course of conduct at issue, which is why the subsequent suspensions after the December 2022 suspension up until the August 2023 suspension were reviewable before the Court.

[25] While the Court identified the fact in its Reasons that SRFN continued to suspend Chief Heron every 60 days after the hearing, the Judgment did not take into consideration these suspensions as they occurred after the hearing. The suspensions after the hearing may be a part of the same conduct by SRFN, but the Court cannot review a decision that is not before it. The Court did not have the benefit of pleadings or even copies of any suspensions after the hearing and so cannot rule that the February 1, 2024 suspension is no longer in effect. Its reasonableness may be called into question, but it is not for the Court on a Rule 397 motion to determine. As such, Chief Heron has not shown that a matter that should have been dealt with has been overlooked or accidentally omitted.

VII. Costs

A. *Applicant's Position*

[26] SRFN's conduct is a classic abuse of process (*Toronto (City) v CUPE Local 79*, 2003 SCC 63 at paras 37, 42, 51, 52 [*CUPE*]). SRFN's position that Chief Heron remains suspended is contrary to the Court's Judgment and an abuse of process. This matter has been litigated and despite Chief Heron being entirely successful, she remains suspended. SRFN's conduct warrants costs of this motion on a solicitor-client basis.

[27] As noted in the Court's Reasons for the Judgment, there is also a large financial imbalance between the parties. Forcing Chief Heron to file this motion so that she can simply return to her rightful role as Chief is an extreme abuse of process and thus, she is entitled to her full solicitor-client costs.

B. *Respondent's Position*

[28] If costs are awarded, the Court should award costs to SRFN and against Chief Heron.

[29] Contrary to Chief Heron's submissions, SRFN has not misused the Court's procedures in any way that would bring the administration of justice into disrepute. SRFN is also not trying to re-litigate anything that was before the Court at the September 13, 2023 hearing and SRFN's only resort to the Court's procedures since March 12, 2024 was to file a Notice of Appeal. As such, SRFN has brought a "proper review by way of appeal" (*CUPE* at para 52).

[30] SRFN also denies that Chief Heron was "forced" to file this motion. The Court's Judgment provides Chief Heron with the entirety of the relief she required in her Notices of Application. SRFN also acknowledged through its lawyers on March 12, 2024 that the Court granted the prohibition order. Further, Chief Heron brought this motion notwithstanding the Court's direction on March 15, 2024 that it is *functus officio* and directing her to Rule 397. This motion is a waste of the Court's time.

VIII. Conclusion

[31] For the above reasons, the Applicant's motion is dismissed.

[32] I am exercising my discretion to not award costs of this motion to any party. Each party shall bear their own costs.

ORDER in T-2206-22

THIS COURT ORDERS that:

1. The Applicant's motion under Rule 397(1)(b) is dismissed.

2. There is no order for costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2206-22
STYLE OF CAUSE:	CECILIA (TONI) JOSEPHINE HERON v SALT RIVER FIRST NATION NO. 195
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