

Federal Court



Cour fédérale

Date: 20140217

Docket: T-328-14

Citation: 2014 FC 153

BETWEEN:

DARLENE LONGNECK

Applicant

and

**LORETTA J. PETE LAMBERT and
MUSKEG LAKE CREE NATION**

Respondents

REASONS FOR ORDER

ANNIS J.

[1] The applicant, a member of the Muskeg Lake Cree Nation [MLCN or Band] seeks an interlocutory injunction on an emergency basis prohibiting the holding of a by-election scheduled for Monday, February 17, 2014, with an advance poll also scheduled on Saturday, February 15, 2014.

[2] She requests that the injunction remain in place until completion of her judicial review application filed January 31, 2014, in which she seeks a declaration that an election involving mail-

in ballots provided only upon request by members with a time limit is invalid and without jurisdiction.

[3] The injunction is brought against Ms Loretta J Pete Lambert, the Chief Electoral Officer [CEO] and the Band to prevent them from proceeding with the by-election. Ms Lambert is not a Band member. She has been retained to conduct and preside over the by-election by the Band Council.

[4] In 2000, the MLCN ceased to conduct its elections under the *Indian Act*, RSC, 1985, c I-5. Since then elections have been conducted under the Band's *Election Act* ("An Act Respecting the Government Elections and Related Regulations of Muskeg Lake Cree Nation").

[5] The *Election Act* contains only one provision pertaining to off-reserve elections. It is found at paragraph 7(e)(viii), which reads as follows:

e. The Chief Electoral Office shall:

viii. Preside over all electoral activities with respect to advance polls, distance balloting, and all activities on the day of the election;

[6] In addition, the *Election Act* requires that a by-election be held within 60 days following the event which resulted in the vacancy.

[7] The Band changed its voting procedure in respect to off-reserve members for the 2012 general election. It required non-resident members living within 100 km of Edmonton, Prince Albert and Saskatoon to travel to local polling stations in those centers in order to vote. In addition,

because of concerns over fraud, off-reserve members were required to have their voting declaration commissioned, adding further to the expense of voting, although these costs were reimbursed by the Band.

[8] The applicant unsuccessfully appealed the 2012 election pursuant to the appeal procedure contained in the *Elections Act* and thereafter initiated a judicial review application (T-730-13) which remains outstanding.

[9] During 2013 the Band Council, by its *Election Act* Committee, undertook a review of its election practices, which included a review of the off-reserve voting practices. This review resulted in a draft *Election Act* which was not implemented. It contained a proposed revision as follows: “An Elector must submit a request in writing to the Chief Electoral Officer to receive a mail-in ballot on or before the date of the nomination meeting.”

[10] While there is some dispute about what occurred at various meetings, it is undisputed that on January 15, 2014 the CEO sent out letters to all off-reserve members of the Band whose addresses were known (a similar letter having been sent out in December 2013). The letter advised them of the need to request a mail-in voting package by close of nomination day on February 2, 2014 by way of a telephone call made to two numbers, one of them which was toll-free.

[11] Upon being so advised, the member would be provided with a priority post ballot and a pre-paid priority post return envelope with the requirement that the ballot be returned before the close of the election on Monday, February 17, 2014.

[12] This procedure thereby eliminated concerns about voters being dissuaded from participating in the election by the fact that they would have to drive to the polling station if living within 100 km of the three named cities, or would require a commissioned declaration to accompany their ballot. The only requirement for the by-election would be that the member provide a declaration of their identification witnessed by an adult.

[13] This procedure was adopted to save on the significant mail-out costs of ballots to off-reserve members by priority post containing prepaid envelopes, many of which were not used. It also implemented an inexpensive system intended to diminish possible fraud by means of off-reserve votes.

[14] The applicant complained that problems were encountered with this procedure by the fact that the voicemail boxes of the telephone numbers were full and members therefore could not leave a message requesting a voting package. The CEO, however, indicated that she had not received any complaint of a member not being able to obtain a voting package in order to participate in the by-election.

[15] With this background in mind, I now turn to the analysis of the standard tripartite test that an applicant is required to meet to obtain an interlocutory injunction as established by the Supreme Court of Canada in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.*, [1987] 1 SCR 110, [1987] SCJ No 6.

1. *Is there a serious issue to be tried?*

[16] I am in agreement with the applicant that the *Election Act* does not cover the matter of off-reserve voting. The reference to the CEO presiding over the election contained in the *Act* does not authorize changes to the manner in which off-reserve members are entitled to vote.

[17] Voting by non-resident members has been acknowledged as an important issue in band elections that may influence their outcome (*Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 (CanLII), [2003] 4 FC 1133). Implementation of changes to non-reserve members therefore is subject to court scrutiny where they may impact on the fairness of an election.

[18] Nevertheless, I am not concerned that the changes to the voting process implemented for non-reserve members in this by-election will entail an adverse impact on the fair by-election of a new Band councillor. All non-reserve members have received a notice describing in clear terms the requirement to phone in a request to obtain a ballot. There were no obstacles disclosed to obtaining a ballot or to casting a vote. Indeed, the process was simplified with my only concern perhaps being the limited time frame in which to react to the request for a ballot.

[19] I do, however, share the applicant's concern about the failure to complete the amendment to the *Election Act*. Nevertheless, I am not convinced that a Band custom exists with respect to non-reserve voting, or at least I do not have sufficient evidence to form that conclusion.

[20] In the circumstances, therefore, I am satisfied that the applicant has not made out a serious issue to be considered that the off-reserve procedure would result in an unfair by-election.

2. *Will the applicant suffer irreparable harm?*

[21] I also conclude that the applicant would not sustain irreparable harm either for herself personally or as someone who represents the interests of off-reserve members. For example, there is no evidence that any Band member will lose the right to vote or to stand for election.

[22] The applicant alleges that she would suffer emotional trauma and that the integrity of the democratically elected bandleaders would be undermined by ignoring Band custom. I am not satisfied that either would occur, nor would this constitute irreparable harm in the circumstances of this by-election.

3. *Does the balance of convenience favour the applicant?*

[23] I conclude that the balance of convenience favours the respondents. The vacancy on the Band Council would remain unfilled until the matter was resolved by the judicial review application. This would leave the Council in a potential stalemate position if the six members divided evenly on important matters. In addition, the *Election Act* requires a by-election to be held within 60 days of the vacancy occurring. Failure to proceed with the by-election would therefore place the Band in violation of its own Act.

[24] In addition, there exists an appeal process under the *Election Act* which allows the applicant to challenge the election by a process internal to the Band. This avoids the need to involve courts interfering in the affairs of the Band where it is unnecessary to do so. In this regard I cite the

remarks of Justice Barnes in *Basil v Lower Nicola Indian Band*, 2009 FC 1039 at para 5, [2009]

FCJ No 1280, as follows:

[...] In *Sweetgrass First Nation v. Gollan*, 2006 FC 778, I made the point that the Court should be cautious about treading unduly into the political affairs of a First Nations band. These applicants have not exhausted their internal rights to challenge this decision through the Council of Elders. While there may be some inconvenience associated with the process of appeal that takes place after the election, it is, nevertheless, a process that should not be usurped collaterally by seeking an interim injunction through the Court. If an appeal is successful the by-election can be re-held.

[25] Finally, I note that significant costs would be thrown away by not holding the election in circumstances where I do not see any serious impediment to a fair election occurring by the process used for off-reserve voting by Band members.

[26] Accordingly, for all the foregoing reasons the application is dismissed.

[27] Ms Lambert did not seek costs. While the Band had originally requested costs, its council left the matter in the hands of the Court. The applicant was entitled to raise the issue of concerns about the off-reserve voting procedure, which, as mentioned, can represent a serious threat to fair elections if abused by First Nation Band councils. Therefore, no award of costs is made against the applicant in order to ensure that vigilance is encouraged and not deterred.

"Peter Annis"

Judge

Ottawa, Ontario
February 17, 2014

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-328-14

STYLE OF CAUSE: DARLENE LONGNECK v
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MUSKEG LAKE CREE NATION

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 14, 2014

REASONS FOR ORDER:
ANNIS J.

DATED: FEBRUARY 17, 2014

APPEARANCES:

Ms Darlene Longneck FOR THE APPLICANT
(ON HER OWN BEHALF)

Ms Loretta J. Pete Lambert FOR THE RESPONDENT
(ON HER OWN BEHALF)

Ms Ashley Smith FOR THE RESPONDENT
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