Federal Court of Appeal

Cour d'appel fédérale

Date: 20210527

Docket: A-102-21

Citation: 2021 FCA 103

Present: **STRATAS J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

FLOYD BERTRAND

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 27, 2021.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal Cour d'appel fédérale

Date: 20210527

Docket: A-102-21

Citation: 2021 FCA 103

Present: **STRATAS J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

FLOYD BERTRAND

Respondent

REASONS FOR ORDER

STRATAS J.A.

[1] The Attorney General moves for a stay of the judgment of the Federal Court (*per* Grammond J.): 2021 FC 287.

[2] The Federal Court declared that section 4 of the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, S.O.R./2020-84 is *ultra vires* and invalid. The section provides that the council of a First Nation whose chief and councillors are chosen

according to the custom of the First Nation "may extend [their] term of office if it is necessary to prevent, mitigate or control the spread of diseases on its reserve", even if the custom does not provide for such a situation. Simply and loosely put, section 4 allows a council to decline to hold an election because of the pandemic.

[3] The Federal Court suspended its declaration of invalidity for 60 days. In effect, during those 60 days, section 4 remains in force. The 60-day period expires four days from now, on May 31, 2021.

[4] In this Court, the Attorney General's notice of appeal identifies only one ground of appeal: the Federal Court's "overly narrow" interpretation of the section authorizing the *Regulations*, namely para. 73(1)(*f*) of the *Indian Act*, R.S.C. 1985, c. I-5.

[5] To succeed in this motion and obtain a stay, the Attorney General must show that the appeal raises a serious issue, irreparable harm will be caused if the stay is not issued, and the balance of convenience lies in its favour: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. This motion is unusual in that, except for one narrow affidavit filed by a legal assistant to Mr. Bertrand, neither party filed admissible evidence in support of their positions.

[6] I am satisfied that the legislative interpretation the Attorney General raises in its notice of appeal is a serious issue. The threshold on this branch of the *RJR-MacDonald* test is low*: RJR-*

MacDonald at 337 S.C.R.; *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112, 120 C.P.R. (4th) 385 at para. 23. The Attorney General easily satisfies it.

[7] I am not satisfied that the Attorney General has met the irreparable harm requirement.

[8] The Attorney General asks us to presume irreparable harm from the fact that if the stay is granted, the purposes of section 4 of the *Regulations* will be frustrated. In particular, the Attorney General submits in its memorandum that if the stay is not granted, First Nations will not have "the authority to postpone their elections and extend their election terms if they believe that it is necessary to do so in order to protect public health". In substance, the Attorney General says that the threat to public health posed by elections is the irreparable harm that will be suffered if this Court does not stay section 4 of the *Regulations*.

[9] Mr. Bertrand contests this. He says that to the extent there is a threat to public health posed by elections, First Nations can manage it, even during elections. He points to the fact that First Nations can make by-laws not inconsistent with the Act or any regulation "to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases": *Indian Act*, para. 81(1)(*a*).

[10] The burden lies on the moving party, here the Attorney General, to establish irreparable harm. While *RJR-MacDonald* tells us that in some circumstances irreparable harm can be presumed, and assuming the presumption applies here, the presumption is not irrebuttable. Where, as here, the respondent to the motion credibly questions the existence of irreparable

harm, the Attorney General has a provisional or tactical burden to adduce evidence in order to prevail. On provisional or tactical burdens, see *Apotex Inc. v. Bristol-Myers Squibb Co.*, 2003 FCA 263, 26 C.P.R. (4th) 129 at paras. 10-11.

[11] Here, the Attorney General has not filed any admissible evidence whatsoever in support of its position on this motion. In these circumstances, the Attorney General has not met the irreparable harm requirement.

[12] Similarly, the burden lies on the moving party, here the Attorney General, to establish that the balance of convenience lies in its favour. The Attorney General suggests that the Court can presume significant inconvenience. But in light of the position taken by Mr. Bertrand, grounded in para. 81(1)(*a*) of the *Indian Act*, the Attorney General has a provisional or tactical burden to adduce evidence in order to prevail. It has not done so.

[13] The Court is also troubled by the fact that the Crown has delayed in bringing this motion and in prosecuting the appeal. Delays can affect the Court's assessment of the balance of convenience: see, *e.g.*, *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232, 406 N.R. 304 at para. 18. This reflects the reality that a party that believes it will suffer significant inconvenience will act quickly to try to prevent it. This is especially so in this case where the Federal Court suspended its declaration for only 60 days. The short length of the Federal Court's suspension was a clear signal to the Attorney General that he had to act quickly, within a handful of days at most.

[14] The Attorney General brought this motion 41 days after the judgment of the Federal Court. He has not asked that the appeal be expedited. Nor has he asked that the appeal be exempted from the suspension of the running of time under the Court's *Notice to the Parties and the Profession* dated April 21, 2021.

[15] This appeal involves only one well-defined issue of legislative interpretation. The contents of the appeal book are not controversial and are in electronic form. Had the Attorney General proceeded quickly, the agreement on contents of the appeal book and the appeal book itself could have been filed before April 21, 2021.

[16] If this Court granted the Attorney General the stay he seeks, how long would the stay last? So far, it appears that this appeal will follow a sedate pace at best. This affects the balance of convenience to the Attorney General's detriment.

[17] On this motion, both sides filed some material from the Internet (*e.g.*, a Facebook post of First Nation election results, COVID statistics from a website, and a CBC news article) without an affidavit. This practice seems to be increasing. We remain a court of law that acts only on admissible evidence, not whatever counsel can scrounge on the Internet.

[18] Therefore, the Court will dismiss the motion with costs. Mr. Bertrand asks for elevated costs fixed at $5,000. There is no justification for elevated costs in this motion. The Court will award costs at the usual level, the midpoint of column III of Tariff B.

[19] The Court wishes to address two ancillary matters.

[20] In its responding memorandum on the motion, Mr. Bertrand requests that the appeal be expedited. Implicit in this is a request that any procedural deadlines be set and operate notwithstanding the *Notice to the Parties and the Profession* dated April 21, 2021. The Attorney General filed a reply but did not address this request. The Court directs the parties to discuss, with a view to reaching agreement, whether the procedural steps in this appeal should be allowed to proceed despite the *Notice to the Parties and the Profession* dated April 21, 2021 and whether the appeal should be expedited. Within seven days, the parties shall file an informal letter setting out their positions on this and, if expedition is sought, they shall include a draft schedule for the procedural steps for the appeal.

[21] As well, the Court notes that in this motion the parties served others who were parties in the Federal Court but who are not parties in this appeal. Having regard to Rule 338, are any of the others proper parties in the appeal? Within seven days, the parties shall file an informal letter setting out their positions on this.

[22] I shall remain seized for the purpose of dealing with the ancillary matters. I direct that the time for the filings on the ancillary matters run as usual notwithstanding the *Notice to the Parties and the Profession* dated April 21, 2021.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-102-21
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. FLOYD BERTRAND

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MAY 27, 2021

WRITTEN REPRESENTATIONS BY:

Glen Jermyn Eve Coppinger	FOR THE APPELLANT
Orlagh O'Kelly Adam Ollenberger	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPELLANT
Field LLP Edmonton, Alberta	FOR THE RESPONDENT