Federal Court  Cour fédérale

Date: 20180531

Docket: T-546-18

Citation: 2018 FC 568

Ottawa, Ontario, May 31, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

**GORDON GADWA,
BENJAMIN BADGER, JASON MOUNTAIN,
VERNON WATCHMAKER, RONNIE PAUL,
AND TYLER YOUNGCHIEF**

Applicants

and

**BRENDA JOLY,
WILLIAM JOHN AND TREVOR JOHN**

Respondents

ORDER AND REASONS

[1] The applicants Gordon Gadwa, Benjamin Badger, Jason Mountain and Vernon Watchmaker are moving for an interlocutory injunction to compel the respondents, who are the Chief and certain members of the Council of the Kehewin Cree Nation [the Nation], to hold an early general election. They argue that the respondents are in breach of their fiduciary duty as chief and councillors, because they have refused to call such an election, they have removed one

of the applicants from his position as councillor and, more generally, they are managing the affairs of the Nation in a “high-handed” manner.

[2] I am dismissing this motion, because the applicants have not shown that the three-part test for issuing an interlocutory injunction is met. They have not shown a strong *prima facie* case that the conduct complained of is a breach of fiduciary duty or any other legal rule. The proposed injunction would not prevent any irreparable harm and would impose significant inconvenience on the Nation.

[3] While Messrs. Paul and Youngchief are applicants in the underlying application for judicial review, only Messrs. Gadwa, Badger, Mountain and Watchmaker are moving for an interlocutory injunction. For ease of reference, I will refer to Messrs. Gadwa, Badger, Mountain and Watchmaker as the applicants.

I. Background Facts

[4] The selection of the Council of the Kehewin First Nation is governed by the *Kehewin First Nation Custom Election Act* [*Election Act*]. The *Election Act* provides for a two-step process, in which councillors are first elected by the band membership, and a chief is then elected, again by the band membership, from among the councillors who put their names forward.

[5] An election was held in March 2014. However, a member of the Nation who resided off-reserve challenged the election before this Court on the basis that the *Election Act* excludes off-

reserve members from voting and that this is contrary to the *Canadian Charter of Rights and Freedoms* [*Charter*]. The case was settled when the Council agreed to call a new election in which off-reserve members would be entitled to vote.

[6] That election was held on September 1, 2015. The applicants and respondents were elected councillors. An election for the position of chief was held four weeks later, on September 29, 2015. Mr. Gadwa, one of the applicants, was elected Chief.

[7] A member of the Nation initiated an appeal under the *Election Act*, alleging that Mr. Gadwa had engaged in corrupt election practices. The Elections Officer allowed the appeal, voided the election of Mr. Gadwa, both as Chief and Councillor, declared that Ms. Joly, the candidate who obtained the second largest number of votes, was elected Chief, and declared another person elected as councillor.

[8] Mr. Gadwa brought an application for judicial review against this decision. On May 31, 2016, in *Gadwa v Kehewin First Nation*, 2016 FC 597, Justice Strickland held that the Elections Officer's finding that Mr. Gadwa had engaged in corrupt electoral practices was reasonable. Nevertheless, she found that it was unreasonable to declare the runner-up, Ms. Joly, elected. Therefore, she stated that a by-election for the position of chief was required, according to the *Election Act*. Moreover, Justice Strickland concluded that the Elections Officer could not remove Mr. Gadwa from his position as Councillor, because the alleged corrupt practice related only to the election for the position of chief and occurred after the councillor elections. She remarked

that the *Election Act* sets forth a process for the removal of a chief or councillor, for which the Council, and not the Elections Officer, is the decision-maker.

[9] As a result of that decision, Mr. Gadwa remained a councillor. Shortly afterwards, however, a complaint was made to the Council to remove him from his position as Councillor, based on the same corrupt election practices that led to the annulment of his election as Chief. On July 7, 2016, after giving Mr. Gadwa an opportunity to respond, the remaining councillors removed Mr. Gadwa, according to section VIII.1 of the *Election Act*. The resolution was signed by the present respondents and by Messrs. Badger, Mountain and Watchmaker, who are among the present applicants.

[10] Justice Strickland's decision also meant that the Nation was without a chief. Until then, Ms. Joly was considered to be the Chief pursuant to the decision of the Elections Officer. In her affidavit, Ms. Joly states that shortly after Justice Strickland's decision was made public, the remaining councillors (other than Mr. Gadwa) agreed that an appeal of her decision should be pursued, that a by-election for the position of chief should be held and that Ms. Joly would act as Interim Chief in the meantime. That decision appears to have been made pursuant to section VIII(2.) of the *Election Act*, which provides that when the position of chief becomes vacant, "the Council shall select a Councillor as Interim Chief until an election can be held."

[11] The matter was discussed at a council meeting on July 19, 2016. No decision was reached with respect to a by-election. However, on July 22, 2016, Justice Rennie of the Federal Court of Appeal stayed the part of Justice Strickland's judgment that required the holding of an election

pending the appeal. As a result, Ms. Joly continued to assume the position of chief until the judgment of the Federal Court of Appeal.

[12] On October 4, 2017, the Federal Court of Appeal dismissed Ms. Joly's appeal from Justice Strickland's judgment (*Joly v Gadwa*, 2017 FCA 203). Mr. Gadwa had also brought a cross-appeal of the decision, but abandoned it at the hearing.

[13] The applicants and respondents disagreed as to how to respond to that judgment. The applicants insisted on calling a general election, while the respondents wished to call a by-election for the vacant position of councillor, and then for the position of chief. While a number of council meetings were held in the fall of 2017 to reach a decision, both sides stood firm on their ground and the issue was not resolved.

[14] Both groups then started to act unilaterally. As each group is formed of three councillors, each has tried to break the deadlock through various tactics. Each group has purported to adopt council resolutions on its own.

[15] Messrs. Badger, Mountain and Watchmaker, purporting to act as a quorum of council, sought to reinstate Mr. Gadwa as Councillor, to revoke Ms. Joly's appointment as Interim Chief and to appoint Mr. Watchmaker in her stead. They also purported to call a general election in March 2018.

[16] The respondents, on their part, purported to remove Mr. Mountain from Council on the basis of his repeated absence, by a resolution dated March 13, 2018.

[17] In the fall of 2017, the present respondents initiated an application for judicial review against the actions taken by the present applicants. They obtained an interlocutory injunction from Justice Zinn on October 31, 2017 (*Joly v Gadwa*, 2017 FC 974), prohibiting Mr. Gadwa from holding himself out to the public as if he were a Councillor, Mr. Watchmaker from holding himself as out to the public as if he were Interim Chief, and Messrs. Badger, Mountain and Watchmaker from holding council meetings unless certain conditions are met. This order was extended by Justice Lafrenière on November 10, 2017, until judgment in that matter. No date has yet been set for the hearing of that matter.

[18] On March 19, 2018, Justice Martineau, being satisfied that there was *prima facie* evidence that the present applicants were in contempt of Justice Lafrenière's order, required them to appear in court on June 13, 2018, to hear proof of their contempt and to present their defence. He also issued an interlocutory injunction prohibiting the present applicants from calling a general election or participating in a nomination meeting for such an election.

[19] As the Chief and Councillors of the Kehewin Cree Nation are elected for a three-year term, the next general election will be held in September 2018.

II. Analysis

[20] An interlocutory injunction is a temporary measure intended to preserve the rights of the parties until a case can be decided on the merits. It is not meant to be a final resolution of the dispute. The courts have established a test, which I will describe below, to decide whether an interlocutory injunction should be granted. This test takes into account the reality that such motions must often be decided upon an incomplete evidentiary record.

[21] At the hearing, counsel for the applicants clarified that she is only seeking an interlocutory injunction that would force the defendants to call a general election forthwith for the positions of councillors and chief.

A. *Test for Interlocutory Injunctions*

[22] In *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*], the Supreme Court of Canada recently restated the test for granting an interlocutory injunction:

> 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.
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> (at para 12, references omitted)

[23] This three-pronged test is well-known. It was set out in earlier decisions of the Supreme Court: *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*].

[24] In *RJR*, the Supreme Court stated that the "serious question to be tried" criterion is a relatively low threshold (*RJR* at 337). However, in *CBC*, the Court modified that threshold when a mandatory interlocutory injunction is sought. In contrast to a prohibitive injunction, which orders the defendant not to do something, a mandatory injunction requires the defendant to perform a positive act. In those cases, a "strong *prima facie* case" is required, which means that

> […] upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.
>
> (*CBC* at para 17, emphasis in original)

[25] In this case, it is clear that the interlocutory injunction sought by the applicants is a mandatory injunction. As such, the applicants have to show a strong *prima facie* case.

[26] Even under the *RJR* framework, this would not be a case where the low threshold of a "serious question to be tried" applies. In *RJR*, the Court recognized that in some cases, "the result of the interlocutory motion will in effect amount to a final determination of the action" (*RJR* at 338). Then, "a more extensive review of the merits of the case must be undertaken" (*RJR* at 339). In other words, where the judge hearing the merits of the case cannot undo what was done at the interlocutory stage, a strong prima *facie case* must be shown.

B. *Strong prima facie case*

[27] To obtain an interlocutory injunction, the applicants must first show, as I explained above, a strong *prima facie* case. They have failed to do so. They have relied mainly on the legal concept of fiduciary duty. Thus, before analyzing their allegations, I need to define this concept further.

(1) Fiduciary Duty

[28] Even though the *Election Act* is a form of Indigenous law (John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 42-44), the applicants have mainly relied on a concept of Canadian private law, the fiduciary duty. That concept cannot be used in the context of elections to give this Court a mandate to perform a general review of the conduct of the respondents.

[29] The concept of fiduciary duty is sometimes used in the context of public law or even political theory. Nevertheless, as a legal concept, it remains subject to criteria defined by the jurisprudence. These criteria do not support its use as a general purpose tool to review the conduct of elected officials. That would stretch the concept of fiduciary duty far beyond its recognized scope. To understand why this is so, it is useful to step back and to consider the proper role of law and courts in the selection of political leaders.

[30] The rule of law is a basic principle of Canadian public law. Among other things, it means that "all government action must comply with the law" (*Reference re Secession of Quebec,*

[1998] 2 SCR 217 at para 72). This does not mean, however, that the law regulates everything that politicians do. Many decisions made by public officials bear a political character. While they are not entirely immune from judicial review, judges usually show a large measure of deference to those decisions.

[31] This may be illustrated by an analogy with the game of hockey. Hockey is subject to a number of rules. The role of the referee is to make sure the players comply with the rules. But the strategies developed by the players in order to score goals are not the subject of those rules. The referee does not judge these strategies.

[32] Likewise, legal rules govern the conduct of elections. They set out the process for voting and criteria to decide who wins. But they do not tell voters for whom to vote. There are also rules regarding the conduct of assemblies. But again, they do not tell members of assemblies what decisions they should make. Legal rules govern the process, not the outcome.

[33] Like a referee, courts can apply legal rules governing the electoral process. They can settle disputes as to whether that process has been followed, such as disputes as to the eligibility of a candidate. Once people have been validly elected, however, courts cannot intervene to tell elected officials how to exercise their powers or what policy to adopt. Those are purely political questions.

[34] It may be that in Indigenous traditions there is no clear distinction between law and politics. However, the parties have rested their case on the *Election Act*. Very much like

Canadian election law, it regulates the process for choosing leaders, but it does not say how leaders, once elected, should exercise their powers. As a result, there is nothing that empowers me to look beyond the legal rules that regulate process and judge the way in which the applicants and the respondents have discharged their duties. In the end, this Court has no more power than the membership of the Nation to call elections in a manner not provided for in the *Election Act*. As Justice Marshall Rothstein, then a member of this Court, stated in a case concerning the Kehewin Cree Nation more than twenty years ago:

> The law that the Band has adopted is that Council members, including the Chief, are elected for three years and being elected for three years, they are immune from recall over that period except for specified reasons and pursuant to specified procedures for removal under the Kehewin Indian Law Number One.
>
> (*Long Lake Cree Nation v Canada (Minister of Indian and Northern Affairs)*, [1995] FCJ No 1020, 1995 CarswellNat 3203 at para 9 [*Long Lake*])

[35] This brings me to the concept of fiduciary duty. While this concept and the neighbouring concept of trust find their origins in private law, they have often been used in a public law context.

[36] From a very general perspective, it may be said that all political power is held in trust. This means that persons who hold political office must use their powers for the benefit of the people who are subject to their authority and not for their personal advantage. This idea has been firmly rooted in Western political philosophy at least since Locke and Rousseau. A similar idea may be found in Indigenous philosophies. Professor John Borrows asserts that the concept of stewardship properly describes the relationship between Indigenous leaders and the members of their communities (John Borrows, “Stewardship and the First Nations Governance Act” (2003)

29 Queen's LJ 103). This concept may be likened to that of trust, although they are not implemented in the same manner.

[37] But it does not follow that every exercise of political power gives rise to what Canadian law recognizes as a fiduciary duty. For example, the Supreme Court of Canada has recognized that the relationship between the Crown and Indigenous peoples is fiduciary in nature, but not every aspect of that relationship results in a legally cognizable fiduciary duty (*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 48, [2013] 1 SCR 623). In particular, the Court made it clear that a fiduciary duty exists typically in situations where a property interest, or something akin to it, is involved (*Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 51, [2011] 2 SCR 261; *Caron v Alberta*, 2015 SCC 56 at para 106, [2015] 3 SCR 511).

[38] Certain decisions have imposed a fiduciary duty on the chief and council of First Nations. One case frequently cited is *Gilbert v Abbey*, [1992] 4 CNLR 21 (BCSC) at 23 [*Gilbert*]:

> There can be no question that a duly-elected Chief as well as the members of a Band Council are fiduciaries as far as all other members of the Band are concerned. The Chief upon being elected, undertakes to act in the interest of the members of the band. The members of the band are vulnerable to abuse by the fiduciary of his or her position, and a fiduciary undertakes not to allow his or her interest to conflict with the duty that he or she has undertaken.

[39] This idea was summarized a few years later in *Assu v Chickite*, [1999] 1 CNLR 14, 1998 CanLII 3974 (BC SC) at para 34:

> […] courts have occasionally held a Chief or Council member liable for breach of fiduciary duty where the Chief or Council

> member participated in their elected capacity in decisions advancing their personal interests.

[40] However, it should be borne in mind that a finding of breach of fiduciary duty or breach of trust was made only where elected officials misappropriated public funds for their personal purposes, as in *Gilbert*, or where there was an impropriety in the distribution of funds to members of a First Nation (see *Barry v Garden River Band of Ojibways*, 147 DLR (4th) 615, 1997 CanLII 493 (ON CA)).

[41] Political disagreement does not constitute a breach of fiduciary duty. Political disagreement must be resolved through public deliberation processes, including elections. A claim of breach of fiduciary duty cannot become a substitute for making political arguments in a political forum. The way in which the affairs of a First Nation are managed is usually a political question. In some circumstances, as in *Gilbert*, it may also give rise to legal questions, but this is not always so.

(2) Review of Applicants' Allegations

[42] With those principles in mind, I will review the facts that, according to the applicants, constitute a breach of fiduciary duty or a breach of any other relevant legal rule.

(a) *Refusal to call a general election*

[43] It seems that the main issue between the parties in this case and in file T-1608-17 is whether to call a general election forthwith.

[44] As mentioned above, a council meeting took place on November 28, 2017. At that meeting, one of the applicants moved that a general election be called. Messrs. Badger, Mountain and Watchmaker voted in favour. Messrs. William John and Trevor John voted against. Ms. Joly, who was chairing the meeting, exercised her right to vote and voted against. As a result, there was a tie and the motion was not carried.

[45] The applicants argue that Ms. Joly was entitled to vote only if there was a tie and that she could not vote to create a tie. Hence, they say that the motion to call for an election was actually carried and that the respondents breached a fiduciary duty by not complying with that motion.

[46] In the absence of a specific provision in the laws of the Kehewin First Nation regarding the procedure to be followed at council meetings, both parties suggest that guidance may be found in *Robert's Rules of Order*. The applicants also argue that a custom has developed within the Kehewin First Nation that the person who chairs council meetings does not vote unless there is a tie.

[47] It appears, however, that Ms. Joly's course of action was in compliance with *Robert's Rules of Order*:

> If the presiding officer is a member of the assembly, he can vote as any other member when that vote is by ballot […]. In all other cases the presiding officer, if a member of the assembly, can (but is not obliged to) vote whenever his vote will affect the result – that is, he can vote either to break or to cause a tie […]. In particular:
>
> > On a tie vote, a motion requiring a majority vote for adoption is lost, since a tie is not a majority. Thus, if there is a tie without the chair's vote, the presiding officer can, if he is a member, vote in the affirmative, thereby causing the motion to be

> adopted; or, if there is one more in the affirmative than in the negative without the chair's vote (for example, if there are 72 votes in favour and 71 opposed), he can vote in the negative to create a tie, thus causing the motion to be rejected.
>
> *(Sarah Corbin Robert et al, ed,* Robert's Rules of Order*, 11th ed (Cambridge, Mass: Da Capo Press, 2011) at 405)*

[48] This also seems to be compatible with section 22(2) of the *Interpretation Act*, RSC 1985, c I-21, which could arguably be applicable insofar as the Council is exercising powers recognized by the *Indian Act*, RSC, 1985, c I-5. In its relevant part, section 22(2) reads:

Quorum of board, court, commission, etc.	**Quorum**
22(2) Where an enactment establishes a board, court, commission or other body consisting of three or more members, in this section called an "association",	22(2) Les dispositions suivantes s'appliquent à tout organisme — tribunal, office, conseil, commission, bureau ou autre — d'au moins trois membres constitué par un texte :
[…]	[…]
(b) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, is deemed to have been done by the association; […]	b) tout acte accompli par la majorité des membres de l'organisme présents à une réunion, pourvu que le quorum soit atteint, vaut acte de l'organisme; […]

[49] As the Chief is a member of the Council – the "association" – he or she must be counted among the "members of the association present" in order to determine if there is a majority.

[50] The applicants also suggest that by custom, the Chief does not vote at Council meetings. "Custom," in that sense, means a particular form of Indigenous law that finds its source in the practice of a specific First Nation. It was described as comprising "practices […] which are generally acceptable to members of the band, upon which there is a broad consensus" (*Bigstone v Big Eagle*, [1993] 1 CNLR 25 (FCTD) at 34; approved by *Oakes v Pahtayken*, 2010 FCA 169). As custom, in this sense, refers to the practice adopted in a specific First Nation, it must be proven as a fact. In this case, there is evidence that the alleged practice was not uniformly followed. It would be unwise for me to declare a custom on such a thin basis.

[51] As a result, the applicants have not made out a strong *prima facie* case that Ms. Joly acted unlawfully by voting to defeat the resolution calling for an immediate election. I would only add that if such an illegality was found, I fail to see how it would result in a breach of fiduciary duty. Once again, fiduciary duty is a precise legal concept that does not encompass every form of unlawful conduct.

[52] The applicants also submit that by custom, elections in the Kehewin Cree Nation are always held in March. It is only as a result of the settlement of litigation that elections were held in September 2015. However, the *Election Act* refers to a three-year term and gives Council the discretion to set the date of the election. There is no indication whatsoever that elections should normally be held in March. At the hearing, when asked about the rationale for holding elections in March, counsel for the applicants could only point to the fact that this coincides with the end of the Nation's fiscal year. The applicants have not discharged the burden of proving a custom that would displace the explicit terms of the *Election Act*.

(b) *Removal of Councillor Jason Mountain*

[53] The applicants also complain about the removal of Mr. Mountain from Council as a result of his repeated absence. At the hearing, counsel for the applicants clarified that the applicants are not seeking any specific remedy with respect to that removal in the context of this application. They reserve the right to bring a separate application for judicial review to challenge Mr. Mountain's removal at a later stage. Given the possibility of further proceedings, I will say as little as possible on this subject.

[54] In a nutshell, the respondents argue that section VIII.1 of the *Election Act* provides that a councillor's position is automatically vacated when a councillor is absent without reason from three consecutive council meetings without reasonable grounds. They say that Mr. Mountain was absent from three consecutive meetings without giving any reason and that it is only afterwards that he gave notice that he had been diagnosed with cancer. That notice, according to the respondents, did not operate so as to retroactively reinstate him on Council.

[55] On the other hand, it might be argued that a councillor's position is not automatically vacated, as the Council must assess whether there are reasonable grounds for the absence, and that procedural fairness requires that the councillor be given notice that the Council intends to remove him. As Justice Rothstein stated in *Long Lake*, "this requires a process in which the council member is permitted to explain the reasons for his or her absence" (at para 19).

[56] I do not wish to express an opinion as to the validity of Mr. Mountain's removal from council. Nevertheless, even if Mr. Mountain's removal was unlawful, this does not constitute a breach of fiduciary duty. There may be administrative law reasons to challenge that decision, but so far, Mr. Mountain has not done so. Fiduciary duties should not be conflated with administrative law doctrines. In any event, this situation does not constitute a legal reason for calling a general election.

(c) *Financial Mismanagement*

[57] The heart of the applicants' complaint seems to be that Messrs. Badger and Watchmaker, and potentially Mr. Mountain, as Councillors, are disempowered and kept in the dark as to the conduct of the business of the Nation, especially with respect to financial matters. For example, they allege that the respondents have caused cheques to be issued without the approval of Council; that the respondents have signed a long-term agreement with the Department of Indigenous Services without the participation of the applicants; and that the respondents have failed to account for the use of a large settlement payment received by the Nation. They add that the respondents, in particular Ms. Joly, have acted in a "high-handed manner."

[58] The respondents dispute these allegations and assert that their conduct was in compliance with the laws of the Kehewin First Nation and with established practice; that whatever decisions were made were adopted by a majority vote of the Council; and that the use of the settlement money was discussed at a public meeting.

[59] In essence, the applicants' allegations relate to disagreements about the conduct of the Nation's business.

[60] As I mentioned above, the applicants must show a strong *prima facie* case, which means a strong likelihood of winning. Most of their allegations are disputed and I cannot reach a decision in the context of a motion for an interlocutory injunction. Most importantly, the applicants' complaints are directed at the manner in which the respondents discharge their political duties. This does not give rise to a legal fiduciary duty.

[61] The applicants also challenge certain specific financial decisions made by Ms. Joly, namely that she ordered cheques to be made for amounts in excess of $5000 without Council approval, that she employed her son and ex-husband and that she had her personal legal expenses reimbursed by the Nation. These allegations, if proven, might come closer to a breach of fiduciary duty as this concept is usually understood. However, the respondents reply that cheques may be made for an amount exceeding $5000 where the expenditure have already been approved by Council and that all Councillors agreed that the Nation would pay for the legal fees associated with the case before the Federal Court of Appeal. Again, the applicants have the burden of showing a strong *prima facie* case. The applicants, in my view, have not done so.

C. *Irreparable Harm*

[62] Even if I am wrong in finding that the applicants have not shown a strong *prima facie* case, they fail to prove that the interlocutory injunction they are seeking would prevent the

materialization of irreparable harm. Irreparable harm, in this context, means “harm which either cannot be quantified in monetary terms or which cannot be cured” (*RJR* at 341).

[63] The applicants argue that their reputations are tarnished by the situation, that they are prevented from advancing the policies they were elected to implement, and that money is being spent without their approval. They say that these harms are not compensable by an award of damages.

[64] These harms, however, are a necessary consequence of the fact that the applicants do not command a majority of council. A councillor who loses a vote at council does not suffer irreparable harm that entitles him or her to an injunction. A politician’s failure to have his or her policies implemented does not constitute irreparable harm. More generally, a person involved in a public decision-making process may be faced with an unfavourable outcome, but that does not, without more, constitute irreparable harm: *Newbould v Canada (Attorney General)*, 2017 FCA 106 at paras 31-33.

[65] More fundamentally, I fail to see how the remedy sought, an immediate general election, would prevent irreparable harm. We do not know the results of such an election. It may or may not reproduce the current division among councillors. Hence, we do not know whether that remedy will actually prevent the harms alleged.

[66] I would add that there is no evidence that the Nation is paralyzed, that its day-to-day operations have come to a stop or that it has failed to honour its commitments as a result of the situation complained of by the applicants.

[67] Therefore, this case is distinguishable from other cases involving the governance of a First Nation in which an interlocutory injunction was issued, for example to prevent the unlawful removal of an elected official (*Gabriel v Mohawk Council of Kanesatake*, 2002 FCT 483; *Prince v Sucker Creek First Nation*, 2008 FC 479).

D. *Balance of Convenience*

[68] The third prong of the *RJR/CBC* test is the balance of convenience. At this stage, the Court compares the inconvenience for the applicant if the injunction is not granted and the inconvenience for the defendant if the injunction is granted. In the administrative law context, the effect of granting or not granting the injunction on the public interest may also be considered (*RJR* at 343-347). In particular, courts normally consider that the public interest favours compliance with duly enacted laws.

[69] In this case, there is a public interest in compliance with the term of office set by the *Election Act* for the Chief and Council. It is generally accepted that stability requires governments to be elected for fixed terms. By way of comparison, at the federal and provincial levels, there is now legislation establishing, within constitutional bounds, fixed dates for elections (see, e.g., section 56.1 of the *Canada Elections Act*, SC 2000 c 9).

[70] The applicants are, in effect, asserting that this Court has a general power to call elections for the council of a First Nation whenever the members of the council are unable to reach consensus on certain subjects. While the achievement of consensus is a desirable goal, neither the *Election Act* nor any legal rule grants this Court such a broad power.

[71] Indeed, in interpreting the *Election Act*, this Court should be guided by the principle of self-government (*Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3). I need not, for the present purposes, give a comprehensive definition of that concept. Suffice it to say that self-government entails, at least, that decisions concerning the political fate of the Nation should, as far as practicable, be made by the Nation, and not by an external body such as this Court.

[72] Hence, I conclude that this Court's intervention in the electoral cycle of the Nation, where no breach of a specific legal rule has been shown, would create a significant inconvenience to the Nation's public interest. This militates against the granting of an interlocutory injunction.

[73] From a more practical standpoint, I also observe that a general election is scheduled for September 2018 in any event. I fail to see how holding an election immediately rather than in September would serve the interests of the members of the Nation. Any alleged benefits of an immediate election would equally result if an election is held in September.

[74] Moreover, a process for the amendment of the *Election Act* is currently underway, in order to make it compliant with the *Charter*. If an election is called now, it would be under the

current *Election Act* and adaptations would need to be made, as happened in the September 2015 election. This is an additional inconvenience resulting from the proposed injunction. In contrast, allowing the next election to take place in September would leave a window of opportunity for the amending process set out in section XV of the *Election Act* to be followed.

III. Conclusion

[75] To summarize, the applicants have not shown that the three-part test for the issuance of an interlocutory injunction is met. Accordingly, their motion will be dismissed.

ORDER

THIS COURT'S ORDER is that:

1. The motion for an interlocutory injunction is dismissed;

2. The applicants, Gordon Gadwa, Benjamin Badger, Jason Mountain and Vernon Watchmaker shall pay the costs of this motion forthwith to the respondents, irrespective of the eventual outcome of the underlying application.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-546-18
STYLE OF CAUSE:	GORDON GADWA, BENJAMIN BADGER, JASON MOUNTAIN, VERNON WATCHMAKER, RONNIE PAUL, AND TYLER YOUNGCHIEF v BRENDA JOLY, WILLIAM JOHN AND TREVOR JOHN
MOTION HELD VIA TELECONFERENCE ON MAY 25, 2018 FROM OTTAWA, ONTARIO	
ORDER AND REASONS:	GRAMMOND J.
DATED:	MAY 31, 2018

APPEARANCES:

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SOLICITORS OF RECORD:

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