Federal Court  Cour fédérale

Date: 20181219

Docket: T-1725-18
T-1726-18

Citation: 2018 FC 1284

Ottawa, Ontario, December 19, 2018

PRESENT: The Honourable Madam Justice Strickland

Docket: T-1725-18

BETWEEN:

KODY JOHN WILLIAM SOLOMON AND PATRICIA KELLY SOLOMON

Applicants

and

GARDEN RIVER FIRST NATION

Respondent

Docket: T-1726-18

AND BETWEEN:

JUSTIN RALPH ROMANO AND PATRICIA KELLY SOLOMON

Applicants

and

GARDEN RIVER FIRST NATION

Respondent

ORDER AND REASONS

[1] In each of these matters, the respective Applicants have brought a motion, pursuant to Rule 50 and Rule 359 of the *Federal Courts Rules*, SOR/98-106 ("Rules"), seeking to stay two Band Council Resolutions ("BCRs") of the Garden River First Nation ("GRFN") pending the resolution of the underlying applications for judicial review. The BCRs purport to banish two of the Applicants, who have been charged with drug trafficking and possession, from GRFN territory.

Background

[2] Kody William John Solomon ("Kody Solomon") is a member of GRFN. He is thirty years old and resides on the GRFN reserve in the home of his mother, Patricia Kelly Solomon ("Kelly Solomon"), who is also a member of GRFN and, like Kody Solomon, has lived on the reserve her entire life. Also living in the family home are Kelly Solomon's common-law spouse of nineteen years, Ralph Justin Romano ("Ralph Romano"), who is not a member of GRFN, and their fifteen year old daughter, Kiarra Solomon.

[3] GRFN's main reserve is home to about fifteen hundred of its three thousand members. The reserve borders the city of Sault Ste. Marie and the majority of the residences on the reserve are within 10–15 km of Sault Ste. Marie.

[4] On August 23, 2018, Kody Solomon was arrested in Batchewana First Nation. Later the same day, a search warrant was executed at Kelly Solomon's home. According to an Ontario Provincial Police News Release as published in sootoday.com, Kody Solomon was charged with twelve offences. These pertained to trafficking, possession for the purpose of trafficking, possession of drugs, possession of property obtained by crime; and, breach of firearms regulations. The drugs involved included methamphetamines (crystal meth), cocaine, heroin, and other opioids. Four charges were laid against Ralph Romano for possession of an opioid for the purpose of trafficking (other than heroin), possession of cocaine, possession of property obtained by crime, and obstruction of a police officer.

[5] On August 27, 2018, Kelly Solomon was advised that her employment as a Supervisor for the Dan Pine Healing Lodge in GRFN, where she had been employed for nineteen years, was suspended with pay pending an internal investigation. She alleges that she was not advised as to the nature of that investigation.

[6] On August 27, 2018, the GRFN Band Council passed BCR 2017-2018-46 ("Solomon BCR "), which reads as follows:

GARDEN RIVER FIRST NATION
BANNING KODY SOLOMON

> **WHEREAS**, the First Nation Council is responsible for ensuring the health and safety of its citizens; and
>
> **WHEREAS**, there exists a health and safety situation, involving Kody Solomon; and
>
> **WHEREAS**, Kody Solomon is a member of Garden River First Nation who has been charged with drug trafficking and possession.

> **THEREFORE BE IT RESOLVED**, that Garden River First Nation Chief and Council BAN Kody Solomon from Garden River First Nation territory, from this day forward.
>
> **FINALLY BE IT RESOLVED** that this resolution shall be presented to Garden River First Nation Anishinabek Police Service for enforcement.

[7] On the same date, the GRFN Band Council passed BCR 2017-2018-46 ("Romano BCR"), which reads as follows:

> **GARDEN RIVER FIRST NATION**
> **BANNING RALPH JUSTIN ROMANO**
>
> **WHEREAS**, the First Nation Council is responsible for ensuring the health and safety of its citizens; and
>
> **WHEREAS**, there exists a health and safety situation, involving Ralph Justin Romano; and
>
> **WHEREAS**, Ralph Justin Romano is a non-member of Garden River First Nation who has been charged with drug trafficking and possession.
>
> **THEREFORE BE IT RESOLVED**, that Garden River First Nation Chief and Council BAN Ralph Justin Romano from Garden River First Nation territory, from this day forward.
>
> **FURTHER MORE BE IT RESOLVED**, that the business known as D&R Plumbing of whom Ralph Justine Romano is a partner – is also banned from operations on Garden River First Nation Territory
>
> **FINALLY BE IT RESOLVED** that this resolution shall be presented to Garden River First Nation Anishinabek Police Service for enforcement.

[8] Ten members of the Band Council signed the BCRs, as did Chief Paul Syrette.

[9] On or about August 29, 2018, Kody Solomon and Ralph Romano were, respectively, served with the BCRs and left the family home and the reserve.

[10] On September 26, 2018, Kody Solomon and Kelly Solomon filed an application for judicial review, matter T-1715-18, seeking to have the Solomon BCR declared of no force or effect pursuant to s 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (*"Constitution Act, 1982"*); alternatively, seeking an order for a permanent stay of, or quashing, the Solomon BCR pursuant to s 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (*"Charter"*); in the further alternative, an order declaring the Solomon BCR invalid, *ultra vires* and/or unlawful, pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. On the same date, Ralph Romano and Kelly Solomon filed a similar application for judicial review in matter T-1726-18.

[11] These two motions seeking to stay the BCRs were heard together on December 13, 2018.

Issues

[12] The sole issue before me is whether, in each matter, the test for injunctive relief has been met. The test in that regard is well established and the parties agree that it is as set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (*"RJR MacDonald"*).

[13] Specifically:

1) whether there is a serious issue;
2) whether irreparable harm will result if the injunction is not granted; and
3) whether the balance of convenience favours granting the relief sought.

[14] The test is conjunctive and all three criteria must be satisfied to obtain interlocutory relief. The onus is of the party bringing the motion to establish that the test has been met (*RJR MacDonald* at pp 314–315). In all cases, the fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the matter (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25).

[15] The Supreme Court of Canada recently reconfirmed the test in *R v Canadian Broadcasting Corp*., 2018 SCC 5 (*"Canadian Broadcasting"*):

> [12] In *Manitoba (Attorney General) v. Metropolitan Stores Ltd*. and then again in *RJR—MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd*. 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.

Serious Issue

[16] The evidence of Chief Syrette, when cross-examined on his affidavit sworn on November 19, 2018, and filed in support of the Respondent's opposition to these motions seeking injunctive relief, confirmed that neither Kody Solomon nor Ralph Romano were given any notice of the intention of the Band Council to issue the BCRs. They were not afforded an opportunity for a hearing or to make submissions and no reasons were given to them, other that the BCRs

themselves. In fact, the Band Council meeting was held *in camera*, no notes were taken, the meeting was not videotaped and, there were no minutes to record any discussions, information or considerations that lead to the decisions to issue the BCRs.

[17] The Respondent concedes that the procedural fairness and natural justice grounds set out in the underlying applications for judicial review raise a serious issue. In my view, this was wisely conceded and I agree these circumstances give rise to a serious issue satisfying the first branch of the tripartite test.

[18] However, the Applicants also submit that, if they are also able to demonstrate that a serious issue rises to the level of a strong *prima facie* case, then this will weigh the likelihood of success on the motion strongly in their favour (*Edgar v Kitasso Band Council*, 2003 FCT 166 at para 31(*"Edgar"*)). Further, what comprises a strong *prima facie* case was recently defined by the Supreme Court of Canada in *Canadian Broadcasting*, being a case in which the court determines 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 (*Canadian Broadcasting* at para 17).

[19] The Applicants submit that here there is a strong and clear case that the Respondent breached the duty of procedural fairness. There is also a strong and clear case that the BCRs were passed without enabling authority and were *ultra vires* because there existed no by-law granting the Band Council authority to pass such a BCR. The evidence of Chief Syrette on cross-examination was that the BCRs were passed under By-law No.13, Removal of Trespassers

By-law. The Applicants point out that this by-law was initially enacted under the *Indian Act* in 1976, the current version of it being enacted in 1996. They submit that By-law No. 13 does not apply to Band Members or persons lawfully residing on the reserve. Thus, it would have no application to Kody Solomon or Ralph Romano. Further, one month after the BCRs were issued, the Band Council enacted By-law No. 20, A By-law Respecting Trespassing on Reserve, which purportedly would permit such actions by the Band Council, as of its coming into force. The Applicants submit that this clearly establishes that the impugned BCRs were *ultra vires*. And, although the Respondent now asserts that the BCRs were passed under Anishinaabe law and not the Band's By-laws, this is contradicted by the cross-examination evidence of Chief Syrette who acknowledged that the impugned BCRs were passed under By-law No. 13. It is also contradicted by a motion passed by the Band Council on October 9, 2018, which states that Kody Solomon and Ralph Romano were issued Trespass Notices under By-law No. 13, which was later replaced by By-law No. 20.

[20] The Applicants also submit that these applications raise important issues of constitutional law relating to the interaction between the rights of individual First Nations members and the broader interests of First Nations communities. Specifically, whether a First Nation may permanently banish a member, or a spouse of a member, from the reserve and whether this would violate s 7 of the *Charter*. It also raises novel issues under s 6 and s 35 of the *Constitution Act, 1982,* being whether s 6 protects an Aboriginal person's right to move on or off reserve within a province, or, where that person is in a spousal relationship with an Aboriginal person. And, with respect to s 35, whether a band member, such as Kody Solomon, has treaty rights which guarantee him the right to hunt and fish on his traditional lands, which rights would be

impaired by permanent banishment. Similarly, whether an Aboriginal person, whose spouse is not an Aboriginal person, can be forced to choose between his or her right to reside on reserve and his or her right to reside with his or her spouse.

[21] The Respondent submits that in effect, the Applicants are attempting to rewrite the *RJR MacDonald* test. Further, where an applicant has challenged the constitutionality of a law, the Court will only grant a stay against enforcement of a law in clear cases (*Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9 (*"Harper"*). The public interest is a special factor in assessing the balance of convenience where the constitutionality of law is challenged (*RJR MacDonald* at p 337) and in such cases the public interest is expressed as the need for stability and preservation of laws pending determination of their legality (*RJR MacDonald* at p 348-349). In cases where an applicant makes allegations of unconstitutionality of the law under review, the Court may give a hard look to the merits of the underlying application at the serious issue branch of the test (RJR MacDonald at p 334 and 338-339). Here, the Applicants' allegations of unconstitutionality may not survive such a hard look. They admit that the issue of the constitutionality of the BCRs is novel, but a case cannot both be novel and also be strong on the merits. A mere allegation of constitutionality will not satisfy the strong case requirement (*International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2009 FCA 3 at para 26).

Analysis

[22] In the context of a mandatory injunction, which is not sought in this case, the Supreme Court in *Canadian Broadcasting* held that the appropriate criterion for assessing the strength of

the applicant's case at the first stage of the *RJR MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. This means that upon a preliminary review of the case, the motions judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, or in this case on judicial review, that the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[23] However, the Supreme Court of Canada did not go further and suggest that the *RJR MacDonald* test is modified beyond the circumstance of a mandatory injunction. In fact, it did the opposite, and confirmed that the traditional tripartite *RJR MacDonald* test is still applicable in other circumstances.

[24] Regardless, the Applicants submit that the Supreme Court's definition of a *prima facie* case can be applied in this matter and that a finding of a *prima facia* case impacts the weighing of the other two branches of the test. This submission is founded in part in this Court's decision in *Edgar*, which the Applicants submit is factually similar to this matter. In *Edgar*, as here, a serious issue was conceded. Justice Shore stated that in his view the applicant in that matter had a very strong case that a breach of procedural fairness invalidated the subject band council resolution which banished her. Justice Shore then stated:

> 31. Justice Sharpe in his book Injunctions and Specific Performance, 3rd Edition (Canada law Book, 2000), at page 2-10 indicates "[i]f the plaintiff does demonstrate a strong *prima facia* case, the likelihood of the ultimate success will weigh heavily in favour of an injunction".

[25] Justice Shore did not further address this point and proceeded to assess both irreparable harm and the balance of convenience and, having done so, granted the interlocutory injunction.

[26] As to the Applicants' reliance on *Dreaver v Pankiw*, 2006 FC 601 (*"Dreaver"*), there Justice Shore quoted from *Turbo Resources Ltd* [1989] 2 FC 451(CA), which also referred to the Sharp text, which text suggested that the three branches of the tripartite test should not be seen "as separate water-tight compartments" and that they "relate to each other and strength on one part of the test ought to be permitted to compensate for weakness in another". I note that *Dreaver* pre-dates *RJR-MacDonald* and that Justice Shore merely states that the three branches of the test often overlap when the legal issues considered require the courts to consider and balance competing public interests. This Court has also held that while the criteria may not be three separate watertight compartments, the party seeking the relief must still make a substantial showing in each of the three factors (*Voltige Inc v Cirque X Inc.*, 2006 FC 700 at para 20).

[27] The Applicant also relies on *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761 (*"City of Toronto"*). There the issue was whether to grant the Attorney General's motion for a stay pending an appeal to the Ontario Court of Appeal from the Superior Court of Justice's order that provisions of Bill 5, the *Better Local Government Act, 2018*, SO 2018, c 11 infringed 2(b) of the *Charter* and were therefore of no force and effect. In that case the election period for the City of Toronto 2018 municipal elections, based on the City's by-laws providing for a 47-ward structure, began on May 1, 2018. Bill 5, introduced on July 30, 2018 and given Royal Assent on August 14, 2018, changed the course of the elections by imposing a 25-ward structure. Proceedings were quickly brought to challenge the constitutionality of Bill 5.

[28] In addressing the serious issue branch of the test, the Ontario Court of Appeal noted that in *RJR MacDonald* the Supreme Court recognized that in cases where, as a practical matter, the rights of the parties will be determined by the outcome of the stay motions, the court may give significantly more weight to the strength of the appeal.

[29] This statement is made in reference to the first of two exceptions to the general rule precluding a motions judge from engaging in an extensive review of the merits when considering if a serious issue has been established, as identified by the Supreme Court in *RJR MacDonald*. There the Supreme Court stated that the first exception will arise when the result of the interlocutory motion will, in effect, amount to a final determination of the action. This will be the case when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial (p 338). The Supreme Court went on to state that the circumstances in which the first exception would apply will be rare and "[w]hen it does, a more extensive review on the merits of the cases must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be born in mind" (p 339).

[30] Ontario Court of Appeal held that *City of Toronto* was such a case because an immediate decision was required to permit the elections to proceed on October 22, 2018, and the decision would determine whether the election proceeded on the basis of 25 or 47 wards. The Court stated "[i]n these circumstances, greater attention must be paid to the merits of the constitutional

claim and, as contemplated by RJR-MacDonald, we must ask whether there is a strong likelihood that the appeal will succeed." (p 339).

[31] It was in that context that the Ontario Court of Appeal stated:

> [20] Our finding of a strong *prima facie* case on appeal bears upon the analysis under the second and third prongs of the *RJR-MacDonald* framework: see *RJR-MacDonald*, at p. 339. We recognize that in this case, Ontario does not have a monopoly on the public interest and that the City also speaks for the public interest. However, having acceded to the argument of the respondents that the more exacting "strong likelihood of success" standard should be applied and having reached the decision that the judgment under appeal was probably wrongly decided, we have no doubt that the moving party would suffer irreparable harm if a stay were not granted. It is not in the public interest to permit the impending election to proceed on the basis of a dubious ruling that invalidates legislation duly passed by the Legislature. We do not accept the respondents' submission that, because Ontario exercised its legislative authority to enact Bill 5, it does not have "clean hands" and should not be entitled to the equitable relief of a stay from this court.
>
> [21] Similarly, the balance of convenience favours granting a stay. As the Supreme Court held in *Harper v. Canada (Attorney General)*, 2000 SCC 57 (CanLII), [2000] 2 S.C.R. 764, at para. 9, "[c]ourts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter." The court then stated that "only in clear cases" will stays preventing the "enforcement of a law on the grounds of alleged unconstitutionality succeed." Given our tentative conclusion that Bill 5 does not suffer from constitutional infirmity, we have no hesitation in finding that the balance of convenience favours granting a stay.

[32] In my view, *City of Toronto* is distinguishable as the two applications for judicial review before me are not matters that fall within either of the two *RJR MacDonald* exceptions. Accordingly, the Court need not undertake more than a preliminary an assessment of the merits,

and in fact the serious issue has been conceded on the basis of the allegation of a failure to provide procedural fairness. As an extensive review on the merits is not being conducted, the anticipated result on the merits is not a factor to be considered in the second and third branches of the test.

[33] And while I agree that the constitutional issues that the Applicants raise in the context of banishment by a First Nation of a Band Member, or spouse of a Band Member, raise serious issues, and important ones, these are currently live, unresolved and largely novel issues. Further, in *RJR MacDonald,* the Supreme Court held that the second of the two exceptions to the general rule that a motions judge should not engage in an extensive review of the merits when considering if a serious issue has been established arises when the question of constitutionality presents itself as simple question of law alone. The Supreme Court found that there may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by the motions judge, in which event the second and third branches of the test need not be considered. This is because they are irrelevant in as much as the constitutional issue is finally determined rendering a stay unnecessary.

[34] This is not such a circumstance. And, in any event, no substantive arguments on the merits of the constitutional issues were made and, therefore, any assessment of the strength of those issues cannot be conducted and the issues resolved on this interlocutory motion for injunctive relief.

Irreparable harm

[35] "Irreparable" refers to the nature of the harm suffered rather than its magnitude; it is harm that either cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other (*RJR-MacDonald* at p 341). The applicant must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for interlocutory relief is denied (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7 (*"US Steel"*)). It is not sufficient to demonstrate that irreparable harm is likely to be suffered, nor should the alleged harm be based on mere assertions (*US Steel* at para 7).

[36] The Federal Court of Appeal has stated that "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals, and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31 (*"Glooscap"*)).

[37] The Applicants submit that in *RJR MacDonald* the Supreme Court held that, in cases involving *Charter* rights, any financial damage suffered as a result of an allegedly unconstitutional law will generally be deemed to be irreparable harm. However, what the Court actually stated in that case was that:

> This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of

> the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

[38] Further, the same argument made by the Applicants was recently made, and rejected, in *Right to Life Association of Toronto and Area v Canada (Minister of Employment, Workforce and Labour)*, 2018 FC 102. There Justice St-Louis found:

> [60] The Federal Court of Appeal has since developed case law that runs contrary to the applicants' argument that the irreparable harm threshold is lower in *Charter* cases, or that irreparable harm flows from the allegations of a *Charter* breach. In *Canada (Attorney General) v United States Steel Corp,* 2010 FCA 200 [*US Steel*], where the appellant raised allegations that the legislation at issue contravened section 11 of the *Charter*, the Court stated that "The jurisprudence of this Court holds that the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied. It is not sufficient to demonstrate that irreparable harm is "likely" to be suffered. The alleged irreparable harm may not be simply based on assertions" (at para 7, emphasis added).
>
> [61] Madam Justice Kane reviewed the case law in a case involving section 8 of the *Charter* in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2015 FC 1101 [*Professional Institute of the Public Service of Canada*]. Given the urgency of the present matter, and for economy of time, I refer to her conclusion that the Federal Court of Appeal "has found that irreparable harm must be established independently of arguments regarding the constitutionality of the measures at issue and cannot be inferred based on a potential Charter breach that has yet to be determined" (*Professional Institute of the Public Service of Canada*, at para 154; *Groupe Archambault Inc. v. Cmrra/Sodrac*

> *Inc.*, 2005 FCA 330 at para 16; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3).

[39] In this matter, neither Kody Solomon nor Ralph Romano have filed affidavits. Thus, there is no evidence from either of these Applicants as to irreparable harm. When this was raised by the Court at the hearings, counsel for the Applicants stated that this was because those parties have been charged with criminal offences and were concerned about being cross-examined about the drug charges. Counsel for the Respondent pointed out that the Applicants could only be cross-examined on the content of their affidavits, which need not have addressed the criminal charges. I agree with the Respondent that Kody Solomon and Ralph Romano could have restricted their affidavit evidence to the issue of irreparable harm and need not have addressed any aspect of the outstanding charges. I am also of the view that the absence of any evidence from these Applicants significantly weakens their claim of irreparable harm.

[40] The only evidence in this regard is that of Kelly Solomon. In both applications Ms. Solomon swore an affidavit dated October 2, 2018, in which she described the harm that she claims she and her family are facing. As to the impact on her family, Ms. Solomon states that since her son and spouse left she has been raising Kiarra alone. She states that Kody Solomon and Ralph Ramono were very involved in Kiarra's life, driving her to school, taking her hunting and fishing, celebrating special occasions and participating in weekly dinners. They are parental figures to Kiarra and she relied on them for guidance and support. Kiarra has expressed frustration and distress with her brother and father not being able to return home and has been bullied by peers who are "aware of the allegations". Ms. Solomon says she does not feel safe living alone, she cannot winterize her home alone, and her extended family live on GRFN and

her son and spouse played an integral part in assisting her father, who lives alone, in the maintenance of his property and the performing of chores.

[41] In relation to cultural impact, Ms. Solomon states that the banishment has denied Kody Solomon the ability to pursue his hunting, gathering, and fishing rights and he has been unable to access his fishing boat, equipment or space to clean and prepare fish, which he sells. Ms. Solomon states she has felt and increasing sense of alienation on the reserve preventing her and Kiarra from participating in traditional and community matters due to the shame associated with the banishment.

[42] As to financial impact, Ms. Solomon does not provide any supporting documentation or indicate direct financial impact on Kody Solomon. She states that her spouse has lost approximately half of his business due to the banishment of his company and the associated negative publicity. She and her spouse contribute equally to the household finances but, because he has been forced to live elsewhere and incurred costs to do so, he is no longer able to contribute to the household maintenance, which Ms. Solomon states she must now bear alone. She also states that she has incurred debt for legal costs arising from the events leading up to and following the banishment of her son and spouse.

[43] Further, the banishment of her son and spouse has caused her significant stress and anxiety. Since the banishment she has been raising her daughter alone; she is suspended from work and subject to an internal investigation and the loss of her reputation in her small

community has been deviating; she has not been able to see Kody's daughter; and, she is unable to spend much time with her son and spouse.

[44] In a reply affidavit sworn on November 19, 2018, Ms. Solomon adds that she has been unable to share the family home with her spouse or son since August 27, 2018, as they had done for the past nineteen years. In this affidavit she states that she has been suspended without pay since August 27, 2018, although I note that in her prior affidavit she states she was suspended with pay. Ms. Solomon also states that Kody Solomon routinely exercised his treaty rights by hunting and fishing, cleaning his catch in the garage at home. He did catch one moose this fall, which he gave to his grandfather, but could not dress it at the family home and that GRFN had refused his request to continue his traditional harvest methods at their home. His fishing boat remains parked there. Kody is now living in Sault Ste. Marie. Her spouse sometimes lives with a family member and sometimes with a friend in Sault Ste. Marie, and, to see him, Ms. Solomon must travel there. At Christmas she and Kiarra will be forced to decide between spending the holiday with her son and spouse, or with her extended family on GRFN.

[45] In my view, this evidence does not establish irreparable harm.

[46] Nor do I accept the Applicant's submission that, because this is an application for judicial review in which an award of damages is not available, the Court can assume that the harm suffered by Kody Solomon and Ralph Romano is irreparable. Moreover, there is no evidence that the Applicants, if successful on judicial review, could not otherwise pursue any quantifiable financial losses. More significantly, no supporting documentary evidence was submitted to

establish that any financial damage incurred by Kody Solomon or Ralph Ramono as a result of having to live off the reserve, or as to any lost income.

[47] The Applicants also rely on *Toth v Canada (Minister of Employment and Immigration*) (1988), 6 IMM LR (2d) 123, for the proposition that *any* evidence demonstrating potential harm to the family unit as a result of the impugned order is considered to be irreparable harm. I do not understand this to be the finding of the Federal Court of Appeal in *Toth*. There the Court of Appeal stated that based on the evidence before it, which was at that stage uncontradicted, the applicant met the test of irreparable harm as if he were deported, there was a reasonable likelihood that the family business would fail and his family, who were dependant on the family business for their livelihood, would suffer and that a portion of that potential harm was not compensable in damages. When addressing the balance of convenience, the Court added that the precedential value of a stay being granted in that case was minimal as it was granted only after careful consideration of all of the circumstances of that particular case.

[48] Here there is no evidence that Kody Solomon contributed to the finances of the family. Nor is there any evidence as to the financial impact of the banishment on Ralph Romano's business, although there is evidence that he and his partner also do work off the reserve. And, although Ms. Solomon refers to the negative publicity about the banishment, there is no evidence of this publicity and on cross examination she acknowledged that any business loss could also be attributable to the serious allegations of criminality against Mr. Romano, which were published. Similarly, there is no evidence as to the additional costs Mr. Romano is incurring in staying off

the reserve and if this completely offsets what he would otherwise have contributed to the running of the family home. In any event, any such losses are quantifiable.

[49] As to Ms. Solomon's claim of reputational harm, on cross-examination she confirmed that her shame and reluctance to participate in community matters is not only because of the banishment, but because of the drug trafficking charges against her son and spouse that gave rise to it. Further, that this was easing a little with time. Her evidence as to stress and anxiety is understandable in the circumstances but does not amount to irreparable harm. On cross-examination she acknowledged that the bullying Kiarra was subjected to was likely also contributed to by the criminal charges. Nor is there any evidence that the internal workplace investigation is related to the BCRs, resulting in reputational harm to Ms. Solomon. And while Ms. Solomon states that she has not been able to see her grand-daughter since the banishment, no reason is given for this.

[50] The Applicants also claim that Kody Solomon is unable to exercise his treaty rights in his preferred places, or at all, and that the courts have held negative effects on Aboriginal and treaty rights and restrictions on the ability to exercise such rights in their preferred places constitutes harm. Support for this is stated to be found in *Wahgoshig First Nation v Her Majesty the Queen in Right of Ontario* 2011 ONSC 7708 (*"Wahgoshig"*). However, that case involved a duty to consult. Wahgoshig sought an interlocutory injunction prohibiting a mining company from engaging in mineral exploration activities within that First Nation's traditional territory. The Court held that the evidence established that there was a significant possibility of harm to the First Nation's aboriginal and treaty rights in the absence of meaningful consultation and

accommodation and that damages would not suffice as compensation. In my view, the applications before me are not circumstances where there is a risk that any individual treaty or Aboriginal rights that may be held by Kody Solomon will be irreparably harmed while the application for judicial review is being addressed. That is, it is not a circumstance where the land or the resource may be irreparably harmed. Further, while the written submissions made on behalf of the Applicants state that Kody Solomon is a commercial fisherman, that he has no place to store his boat and equipment in Sault Ste. Marie, and that he provides for his entire extended family, Ms. Solomon's evidence does not support this. It is also unclear why he can only process any fish or game in the family garage, other than incurring a potential cost to utilize another space, and why arrangements have not been made to bring his boat, which is on a trailer, to him so that he could use it to fish off the reserve.

[51] Considered in whole, Ms. Solomon's affidavit and cross-examination evidence does not convince me that either of the Applicants will suffer irreparable harm if the injunctions are not granted. And while *Edgar* is factually similar, it is the evidence in each case that is determinative. There the applicant was a thirty-five year old woman accused of trafficking marijuana and whose family, including her children, lived in her remote village of approximately 400 people, which was accessible only by air. I note that the evidence in that case included an affidavit from the applicant as well as one from her father, her grandmother and her spouse as to irreparable harm. Here, as noted above, neither Kody Solomon nor Ralph Romano have filed evidence in support of these motions. They have also been charged with trafficking opioids, and the GRFN is a 20 minute drive from Sault Ste. Marie.

Balance of convenience

[52] In determining balance of convenience, the Court must consider which of the two parties will suffer greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits (*RJR MacDonald* at p 334). The factors to consider in determining the balance of convenience will vary depending on the circumstances of the individual case, but in all constitutional cases, the public interest is a special factor which must be considered in assessing where the balance of convenience lies and which must be given the weight it should carry (*RJR-MacDonald* at pp 342–343). Where a private applicant alleges that the public interest is at risk, that harm must be demonstrated (*RJR MacDonald* at pp 344) and:

> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

[53] Here again the Applicants rely on *City of Toronto* to suggest that the balance of convenience will weigh in favour of an applicant where the merits of the constitutional claim are strong. For the reasons above, I do not find *City of Toronto* to assist the Applicants in these circumstances.

[54] The Applicants also submit that this case is analogous to stays of deportation orders in immigration matters and asserts that in immigration cases this Court regularly finds that the balance of convenience favours the moving party once the first two branches of the *RJR MacDonald* test have been met. In my view, such an outcome is driven by the facts and evidence in each case. And, in any event, here the Applicants have failed to establish irreparable harm.

[55] The Affidavit of Chief Paul Syrette states that upon election the Chief and Councillors of GRFN are entrusted by the community to act in the interests of the First Nation, they are to promote and protect the public interest, and they take this fiduciary duty seriously. Further, that sometimes protecting and promoting the public interest of the First Nation as a whole means that the needs of the many outweigh the needs of the few, or one. In GRFN's Anishinaabe law, rights have always been associated with responsibilities and not fulling ones responsibilities leads to an associated loss of rights. Chief Syrette states that GRFN, and many other communities in northern Ontario, have been ravaged by a drug crisis. In particular, an epidemic of illegal drug use, opiates, crystal meth, cocaine and heroin, are being sold in First Nations communities despite the best efforts of the police to stem the flow. The illegal drugs that have come into GRFN poison the GRFN people, create a strain on the community and families, pose a

serious risk to the health and safety of the community, and tax the GRFN police and healthcare workers.

[56] In paragraph 21 of his affidavit, Chief Syrette states that the harms caused by the drug epidemic in GRFN are so severe that harm to the people of GRFN which would be caused by Ralph Romano and Kody Solomon remaining in the community greatly outweighs the harm which may be caused to the Applicants by their removal from the community, even if they are not convicted of the charges.

[57] The Applicants submit that paragraph 21 is inadmissible as improper opinion evidence, it should be ignored by the Court and that otherwise Chief Syrette has not identified any harm to GRFN if the Applicants were permitted to return to the reserve. In my view, impacts of the opioid crisis, in cities and communities across Canada – Aboriginal and non-Aboriginal – is well known. And while there were some errors in Chief Syrette's affidavit evidence, I do not view his evidence in whole to be unreliable, as the Applicants urge. The affidavit evidence of Ms. Solomon contains similar frailties.

[58] It is true that Kody Solomon and Ralph Romano are subject to conditions of release from custody and that if they are caught trafficking they will be subject to re-arrest. Chief Syrette also agreed on cross examination that GRFN is a small community and that it would be fair to say that all eyes would be on them if they returned. However, in my view, the fact of a re-arrest does not erase the potential harm to the public interest if Kody Solomon and Ralph Romano were to again traffic drugs on the GRFN reserve.

[59] That said, I acknowledge that in *Edgar* the Court found that the harm of the banishment outweighed the harm of return to the community and that the risk of trafficking upon return was speculative. Further, if that occurred, the applicant would be arrested and removed from the community. Here, however, and unlike *Edgar* the Applicants have not established irreparable harm. Further, it would only be if the Applicants were caught trafficking that they would be re-arrested and the drugs at issue here are far more serious than marijuana.

[60] In *Harper* the Supreme Court held that the motions judge must proceed on the basis that the law is directed to the public good and serves a valid public purpose. The assumption of the public interest in enforcing the law weighs heavily in the balance:

> 5 Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf ed.), at para. 3.1220.
>
> .....
>
> 9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR--MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 348-49:
>
> > When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an

> effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
>
> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law -- in this case the spending limits imposed by s. 350 of the Act -- is directed to the public good and serves a valid public purpose. This applies to violations of the s. 2 (*b*) right of freedom of expression; indeed, the violation at issue in *RJR--MacDonald* was of s. 2 (*b*). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[61] Here the BCRs may ultimately fail on procedural fairness grounds, they may be saved on the basis of the application of Anishinaabe law, or the matter may be resolved one way or the other on Constitutional or other grounds. Before me, however, there is sufficient evidence to conclude that the BCRs were made in good faith and for the public good. While I am very concerned as to the legality of the banishment, viewed in whole, I find that the balance of convenience lies with the public interest and the Respondent in these circumstances.

[62] In conclusion, the Applicants have not established that they meet the second two branches of the tripartite test and, accordingly, injunctive relief will not be granted. The Applicants may, however, request that the underlying applications for judicial review be heard on an expedited basis.

ORDER IN T-1725-18 AND T-1726-18

THIS COURT'S JUDGMENT is that

1. The motions are denied;

2. The Applicants may request that the underlying applications for judicial review be heard on an expedited basis; and,

3. Costs will be in the cause.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1725-18 T-1726-18
STYLE OF CAUSE:	KODY JOHN WILLIAM SOLOMON AND PATRICIA KELLY SOLOMON v GARDEN RIVER FIRST NATION JUSTIN RALPH ROMANO AND PATRICIA KELLY SOLOMON v GARDEN RIVER FIRST NATION
PLACE OF HEARING:	TORONTO, ONTARIO
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