Federal Court  Cour fédérale

Date: 20240702

Docket: T-1572-24

Citation: 2024 FC 1038

Ottawa, Ontario, July 2, 2024

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

VERNON WATCHMAKER, SIMON WATCHMAKER, DARLENE WATCHMAKER, RAMONA COLLINS AND GLENDA PAUL

Applicants

and

KEHEWIN CREE NATION #466, AS REPRESENTED BY ITS CHIEF AND COUNCILLORS AND AS REPRESENTED BY ITS ELDERS ADVISOR COMMITTEE

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicants are members of the Kehewin Cree Nation [“KCN”]. One of the Applicants, Vernon Watchmaker, served as the Chief of KCN from 2018 until 2021. Before this Court, the Applicants have filed an application challenging the validity of the process leading up to a referendum vote. They argue the referendum process is contrary to the *Kehewin Cree Nation Election Act* [“the Election Act”] in two ways: i) approval to conduct a referendum vote was not

sought from the general membership, and ii) notice of the referendum was not mailed to the last known mailing address of all KCN Members.

[2] The referendum to vote on proposed changes to the Election Act is scheduled to take place tomorrow, July 3, 2024. The Applicants have brought this motion asking for an injunction to stop the KCN from proceeding with the planned referendum vote until the judicial review challenging validity of the process has been determined. I heard the motion today by videoconference.

[3] I am dismissing the Applicants' motion primarily because I do not find that they have established that they will suffer irreparable harm if the referendum vote is to proceed tomorrow. The Applicants have not shown that the harm they are complaining of – a referendum vote based on an invalid process – could not be remedied at a later date. There is an effective remedy available and therefore at this stage there is no basis for the Court to intervene to halt an electoral process that is already underway.

II. Background

[4] KCN conducts its elections according to its Election Act. The parties agree that the Elders Advisory Committee has been exploring amending the Election Act for some time. One of the proposed changes is to remove the current restriction in Section 10 (I) that states "a Member cannot serve three consecutive terms as a Kehewin Chief or Councillor." The Applicants allege that these changes would allow the current Chief and Councillors who have served two consecutive terms to run for re-election.

[5] Section 16 sets out the process required to make amendments to the Election Act. I will not detail the full steps of the process here. What is clear is that in order to make changes to the Election Act, a referendum vote among the KCN Membership must happen. The Applicants raise issues with two aspects of the referendum process that have taken place: i) the steps required before a referendum vote can be called; and ii) once a decision is taken to hold the referendum, the notice provided to the Members of the referendum voting day.

[6] Section 16 (D) states that "if a majority vote of fifty percent plus one of the Kehewin Cree Nation Membership at the General Meeting support the requested change [to the Election Act], then a Kehewin Cree Nation Membership referendum will have to be held." Section 16 (F) states that "the referendum voting date(s), place(s) and time(s) will be set and announced to all Members." In the definition section "Referendum Vote" is defined as: "Kehewin Members are contacted (via letter sent to their last known mailing address) and informed where he/she can cast their vote on a specific motion or election. The matter will also be announced through Internet."

[7] Section 16 of the Election Act also provides that the Elder Advisor Committee oversees the referendum vote and that "the approved change(s) would come into effect at the next KCN election". The KCN election is scheduled to take place in September 2024.

III. Test for Interlocutory Injunction

[8] The well-established test for an interlocutory injunction, set out in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 [*RJR-MacDonald*], requires those seeking injunctive relief to demonstrate that i) there is a serious issue to be tried;

ii) a refusal to grant relief could irreparably harm the applicant's interests and iii) the balance of convenience favours granting the injunction. To succeed on a motion for an interlocutory injunction, an applicant needs to demonstrate all three elements of the test (*Janssen Inc v Abbvie Corp*, 2014 FCA 112 [*Janssen*] at para 14). The three factors are not "watertight compartments" operating independently of each other; instead, motions judges are to take a flexible approach in considering the three factors, recognizing that in some cases the strength of one factor may compensate for a weakness on another (*Monsanto v Canada (Health)*, 2020 FC 1053 [*Monsanto*] at para 50). The overall question is whether "granting the injunction would be just and equitable in all the circumstances of the case" (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at [*Google*] at para 1).

[9] In the context of First Nations governance issues that come before this Court, the need for deference and respect for Indigenous self-government has been repeatedly recognized as an animating principle required to be considered at each stage of the process. As recently explained by Justice Grammond: "courts should show deference to Indigenous decision-makers and strive to minimize the impact of their decisions on Indigenous self-government" (*Bellegarde v Carry the Kettle First Nation*, 2023 FC 129 at para 20).

IV. Serious issue

[10] The serious issue part of the test for interlocutory injunctive relief considers the merits of the underlying application for judicial review. In a case such as this, where the type of injunction being sought is prohibitive and where granting it would not be effectively granting the same relief being sought in the underlying application, only a preliminary assessment of the merits is

required. It is a low standard in which the motions judge assesses the merits, not for the purpose of making a definitive determination on the likelihood of success of the underlying application, but rather to determine whether the application is frivolous or vexatious. The serious issue factor can be satisfied even where the motions judge does not believe, on a preliminary assessment, that the applicant would be likely to succeed in the underlying application (*RJR-MacDonald* at 337-338). In *RJR-MacDonald* at 338, the Supreme Court of Canada cautioned that "a prolonged examination of the merits is generally neither necessary nor desirable."

[11] The Respondent argued that there is no serious issue on two grounds. First, that the application is premature. They argue that scheduling a referendum vote is an interim decision and therefore not able to be judicially reviewed. Second, they argue that application is an abuse of process because the Applicants have brought and declined to pursue two other applications that sought, in the Respondent's view, the same relief: to stop KCN's governance reform efforts.

[12] The Respondent did not in their written or oral submissions substantively address the Applicants' complaint that the notice given of the referendum vote was not in accordance with the Election Act.

[13] I am satisfied on the low threshold that the Applicants' challenge to the validity of the process to hold the referendum meets the serious issue test. I will not delve further into these arguments here because the merits are best considered based on a full record and arguments, and I have primarily decided this motion on the failure to establish irreparable harm.

V. Irreparable Harm

[14] Irreparable harm has been defined as harm which "either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (RJR-MacDonald at 341; see also Canada (Attorney General) v Oshkosh Defense Canada Inc, 2018 FCA 102 [Oshkosh] at para 24; Janssen at para 24). Irreparable harm is about the nature of the harm and not its scope or reach; as explained by Justice Gascon at paragraph 49 in Letnes v Canada (Attorney General), 2020 FC 636: "The irreparability of the harm is not measured by the pound."

[15] The moving party must demonstrate, on a balance of probabilities, that they will suffer irreparable harm between the date of the injunction application and the determination of their underlying judicial review application on the merits (Evolution Technologies Inc v Human Care Canada Inc, 2019 FCA 11 at paras 26, 29).

[16] The central problem is that at this stage the Applicants cannot show that they will suffer a harm that could not be remedied at a later date. At this stage we do not know whether the referendum will lead to any changes. If it does lead to amendments to the Elections Act, the Applicants have not explained why they could not challenge those results by way of a judicial review of the referendum vote in this Court, as the Respondent suggests or some alternative route. I note, though not argued extensively, that the Applicants' counsel noted in oral submissions that the KCN's election appeal process does not apply to referendum vote results. If approved in the referendum vote, the amendments themselves will not come into effect,

according to the Election Act, until the next KCN election which is currently scheduled for September 2024.

[17] If the referendum is invalid, the Court will be able to issue an effective remedy when it hears the application on the merits, and there may be other avenues of remedy as well (see *Shawna Jean v Swan River First Nation*, 2019 FC 804 at para 20). Ultimately, the Applicants can still challenge the validity of the referendum process even if the referendum proceeds, and therefore, irreparable harm has not been established.

VI. Balance of Convenience

[18] The balance of convenience factor requires the Court to "identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction pending a decision on the merits" (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12). It is the moving party's onus to demonstrate that the balance of convenience lies in their favour (*Canada (Attorney General) v Bertrand*, 2021 FCA 103 at para 12).

[19] The Applicants have not advanced other concrete considerations to be assessed at this stage of the analysis, other than claiming that harm will result from the referendum proceeding on an invalid basis. As I have explained above, there are ways the Applicants can continue their challenge to the validity of the process even if the injunction is not granted. Moreover, the Respondent has provided evidence on this motion of the expenses they have incurred in preparing to conduct the vote that is scheduled to take place tomorrow. In these circumstances, I find the balance of convenience favours the Respondent.

VII. Conclusion on Whether Relief is Warranted

[20] Taking together the factors described above (serious issue to be tried, irreparable harm and balance of convenience) and considering the overall question of whether it is just and equitable in all of the circumstances to grant injunctive relief (*Google* at para 1), I am dismissing the Applicants' motion for an interlocutory injunction. Overall, I do not find that the evidence provided on this motion demonstrates that there is sufficient compelling and non-speculative evidence that the Applicants will face irreparable harm if an injunction is not granted and the scheduled referendum goes ahead.

VIII. Costs

[21] Both parties sought the costs of this motion. I do not see a reason to alter the usual practice of ordering the unsuccessful party to pay the costs of the motion.

ORDER in T-1572-24

THIS COURT ORDERS that:

1. The motion for interlocutory injunction is dismissed; and

2. Costs are awarded to the Respondent assessed according to the Tariff.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1572-24
STYLE OF CAUSE:	VERNON WATCHMAKER, SIMON WATCHMAKER, DARLENE WATCHMAKER, RAMONA COLLINS AND GLENDA PAUL v KEHEWIN CREE NATION #466, AS REPRESENTED BY ITS CHIEF AND COUNCILLORS AND AS REPRESENTED BY ITS ELDERS ADVISOR COMMITTEE
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