Federal Court Cour fédérale

Date: 20240404

Docket: T-642-24

Citation: 2024 FC 525

Ottawa, Ontario, April 4, 2024

PRESENT: Madam Justice Pallotta

BETWEEN:

CECILIA (TONI) JOSEPHINE HERON

Applicant

and

SALT RIVER FIRST NATION NO. 195

Respondent

ORDER AND REASONS

[1] The applicant (Chief Heron) brings this motion for, among other relief, an interlocutory injunction to stay a March 20, 2024 Band Council Resolution (March 2024 BCR) of the Council of Salt River First Nation No. 195 (SRFN) that was passed after this Court issued its judgment and reasons in judicial review proceedings involving the same parties: *Heron v Salt River First Nation No 195*, 2024 FC 413 [*Heron v SRFN*].

[2] Chief Heron was elected as Chief of SRFN on September 19, 2022 for a three-year term. Six Councillors elected by acclamation, as no one else ran: Don Beaulieu, Kendra Bourke, Freda Emile, Bradley Laviolette, Warren Silkyea, and Levi MacDonald. On October 13, 2022, SRFN's Council suspended Chief Heron for 60 days without pay. Councillor Laviolette assumed the position of Acting Chief.

[3] *Heron v SRFN* decided (i) consolidated applications by Chief Heron to judicially review the October 13, 2022 decision suspending her as Chief, as well as subsequent decisions that continued her suspension for successive 60-day periods, and (ii) an application by SRFN to judicially review Chief Heron's October 18, 2022 decision calling for a Special Meeting to consider the removal of two SRFN councillors (Councillors Laviolette and Bourke) from office. *Heron v SRFN* was decided in Chief Heron's favour. The Court allowed Chief Heron's consolidated applications and dismissed SRFN's application.

[4] Eight days after the Court's judgment and reasons were issued, the March 2024 BCR passed by a five to one vote of Council members. It states that Council:

- determined there were sufficient grounds to remove Chief Heron as chief;
- called for a Special Meeting of Electors on Thursday, April 4, 2024 at 6:00 pm in order to consider Council's recommendation to remove her from office on the grounds set out in the March 2024 BCR;
- as Chief Heron's conduct since March 12, 2024 had caused public confusion about whether a February 1, 2024 suspension was still in force and her conduct was in breach of her oath of office, the SRFN Election Code, and her duties under the Election Code, the Council exercised its power under section 153A of the Election

> Code "for purposes of clarity and public certainty" to, among other things, suspend her for 60 days without pay, ban her from attending the SRFN conference centre and offices, and ban her from interfering with SRFN's administration, business, and dealings with membership, governments, industry, and SRFN's bank.

[5] The underlying application seeks judicial review of the March 2024 BCR. The requested relief on judicial review includes an order setting aside the March 2024 BCR, a declaration that Chief Heron remains the Chief of SRFN, an order restraining the Council from calling any further Special Meetings to consider her removal, and payment of remuneration withheld during Chief Heron's suspension. The notice of application also requests interim injunctive relief that would prevent the Special Meeting from proceeding on April 4, 2024 and reinstate Chief Heron to her position, pending disposition of the application for judicial review.

[6] On this motion, Chief Heron asks the Court to stay SRFN's decision that suspends her, bans her from SRFN offices, and bans her from interfering with administration, staff, and day-to-day business. Chief Heron also asks the Court to prohibit SRFN from issuing further suspensions and sanctions against her, prohibit SRFN from holding a Special Meeting of the membership on April 4, 2024 for the purpose of voting on her removal from the office of Chief, and prohibit SRFN from calling Special Meetings for the purpose of voting on her removal from office.

[7] The issue on this motion is whether Chief Heron meets the test for an interlocutory injunction for the relief she seeks. The tri-partite test for an interlocutory injunction, set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385,

[*RJR-MacDonald*], requires Chief Heron to establish that (i) there is a serious issue to be tried in the underlying application for judicial review; (ii) she will suffer irreparable harm if the injunctive relief is not granted; and (iii) the balance of convenience favours the issuance of the injunction. The test is conjunctive, meaning that all three elements must be met.

[8] Paragraph 12 of *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*] states the test as follows:

> 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.

[9] However, where the relief sought is a mandatory interlocutory injunction, the threshold on serious issue is higher (*CBC* at paragraphs 15 to 18, footnotes omitted, emphasis in original):

> [15] In my view, on an application for a mandatory interlocutory injunction, 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. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial....
>
> [16] ... While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR-MacDonald* test, I acknowledge that distinguishing between mandatory and

> prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take…positive actions". For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the . . . injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to *refrain from doing* something.
>
> […]
>
> [18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR–MacDonald* test, which proceeds as follows:
>
> > (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing 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;
> >
> > (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
> >
> > (3) The applicant must show that the balance of convenience favours granting the injunction.

A. *The parties' positions*

[10] Chief Heron states she seeks prohibitive injunctive relief, which does not attract an elevated "strong likelihood" threshold, but in any event, she states the elevated threshold is met. Chief Heron states that the grounds for suspension repeat grounds this Court has already found to be unreasonable and the process suffers from the same procedural unfairness issues identified in

Heron v SRFN. She was not given notice or an opportunity to respond and Councillors Laviolette and Bourke participated in the decisions to suspend her despite the Court's finding that they should not have been involved in the October 13, 2022 decision to suspend her as Chief, or the subsequent decisions continuing the suspension, based on a reasonable apprehension of bias. In fact, she states Councillors Laviolette and Bourke's participation is more egregious because the SRFN membership had voted to remove them at a Special Meeting held on October 23, 2022, but the effect of that vote was stayed pending a decision in *Heron v SRFN*. Once the Court issued a decision *Heron v SRFN*, which determined that her October 18, 2022 decision calling for the Special Meeting was reasonable, the order staying Councillors Laviolette and Bourke's removal ceased to operate and their removal from office was in effect.

[11] Chief Heron submits she would suffer irreparable harm that cannot be quantified in monetary terms if injunctive relief is not granted. In September 2022, she was elected for a three-year term and has served fewer than three weeks in office. Wrongful termination from an elected political office is not compensable in monetary damages: *Gabriel v Mohawk Council of Kanesatake*, 2002 FCT 483 at para 26 [*Gabriel*]. Chief Heron states she has been prevented from fulfilling her political and fiduciary obligations to the SRFN based on suspension decisions that the Court determined to be unfair and unreasonable, and the March 2024 BCR is a repetition of the same conduct. Furthermore, Chief Heron states that since she was suspended in October 2022, SRFN Council have failed to hold an Annual General Meeting, failed to file their financial statements, and entered into contracts without fair competition.

[12] Chief Heron submits that the balance of convenience, considering the public interest, is in her favour. She has been deprived of her office for over 16 months of a three-year term and, despite success on judicial review, she has been suspended again on the same grounds. She states SRFN Council has disregarded this Court's judgment in *Heron v SRFN*, the March 2024 BCR is improper, and the harm to SRFN is minimal—particularly since the prohibitive injunctions she seeks are less intrusive than a mandatory injunction.

[13] SRFN states that the relief Chief Heron requests is mandatory injunctive relief that would require the SRFN or its governing council to take positive steps to restore the *status quo ante* prior to October 13, 2022, including by giving her access to the SRFN building and access to equipment, staff, and benefits of the Chief's office. The relief would also interfere inappropriately with the internal governance of a sovereign First Nation and the future application and enforcement of the First Nation's laws by decisions of a majority of the members of Council. Council would be required to "turn a blind eye" to future, unknown circumstances.

[14] SRFN states there is no serious issue. Based on the Court's reasoning in *Heron v SRFN*, Chief Heron's underlying application to review Council's recommendation to remove her must fail because it is premature and can only be brought after a removal meeting has been held under section 156 of SRFN's Election Code. SRFN states Chief Heron's complaints that she was not given notice must also fail because the Court in *Heron v SRFN* found that a Chief exercising discretionary power under section 155 of the Election Code does not have to give notice or details to the member of Council that she asks the membership to remove, and the same reasoning applies to Council's discretionary power under section 154 of the Election Code.

Until the Federal Court of Appeal hears and decides SRFN's appeal, SRFN states the judgment in *Heron v SRFN* is *res judicata* as between Chief Heron and the SRFN, and there is no serious issue for judicial review of Council's decision to recommend Chief Heron's removal.

[15] SRFN also states Chief Heron has not demonstrated a *prima facie* case that judicial review of the decision to suspend her would succeed. *Heron v SRFN* did not find or declare that Councillors Bourke and Laviolette are removed from office and Chief Heron's allegation of bias is "patently wrong" as their participation in the decisions was in keeping with their oath of office and Robert's Rules of Order. In any event, even without their votes, there was still a quorum and three of the four remaining councillors voted in favour of the new suspension and the decision to call the removal meeting on April 4, 2024. SRFN disputes that the new suspension was made on the same basis as the suspension that was found to be procedurally unfair and unreasonable in *Heron v SRFN*. SRFN states that the March 2024 BCR refers to "the suspended Chief Toni Heron's conduct since March 12, 2024 [causing] public confusion." SRFN relies on an affidavit of Acting Chief Laviolette and states Chief Heron has not demonstrated a *prima facie* case to challenge the decision to suspend her in light of her conduct that is described in the affidavit and the SRFN's need to protect its staff, members, and business and government relationships.

[16] SRFN states Chief Heron has not provided any evidence that she has or will suffer irreparable harm if the injunction is not granted. SRFN states Chief Heron is in no different position now than she was (i) on October 23, 2022 when this Court issued an interlocutory order enjoining her from acting as Chief while she was suspended according to a BCR that was said to be valid and binding unless and until a court determines otherwise; and (ii) on August 22, 2023

when the Court dismissed her motion for reinstatement and an order prohibiting Council from continuing to suspend her pending judgment in *Heron v SRFN*.

[17] SRFN states that the balance of convenience favours maintaining the *status quo*, which is to maintain SRFN's governing Council that has been in place since October 13, 2022. That Council comprises: Councillors Beaulieu, Bourke, Emile, Laviolette, Silkyea, and MacDonald, and Chief Heron who is suspended until midnight on May 18, 2024 unless she is removed as a result of the April 4, 2024 Special Meeting. SRFN states that maintaining the *status quo* is in keeping with a scheme that gives Council discretionary power to discipline any Council member (including the Chief) by suspending them or extending their suspension. An order that would prospectively prohibit a First Nation government from exercising its powers would cause irreparable harm as it represents an unwarranted interference with the right to self-govern. SRFN has made significant gains since October 13, 2022 and a change in the *status quo* will disrupt or delay SRFN's ongoing complex and time-sensitive negotiations, either because it will sow doubt about the legitimacy of decisions being made at SRFN or because Chief Heron would need time to get up to speed. There will be no way to calculate what has been lost and a loss of funding is irreparable harm: *CKLN Radio Incorporated v Canada (Attorney General)*, 2011 FCA 56 at para 13.

[18] Further, the SRFN states the Laviolette affidavit explains the irreparable harm SRFN has suffered and is suffering due to Chief Heron's conduct since the decision in *Heron v SRFN* was released on March 12, 2024. It took years to recover from political tension and upheaval in

2007-2010, and granting the requested interlocutory relief would interfere with SRFN's efforts to restore stability and calm within the community.

[19] SRFN states that when elected officials ignore and subvert the laws of their own First Nation and publicly disrespect the decisions that a majority of the members of Council make at Council Meetings, they foster and create public doubt and ambiguity as to who speaks for the First Nation and the body politic of the Nation is irreparably harmed: *Lac des Mille Lacs First Nation v Chapman*, 149 FTR 227, 1998 CanLII 8004 (FC) at para 21; *Marie v Wanderingspirit*, 2003 FCA 385 at para 15. SRFN states Chief Heron's conduct since March 12, 2024 has caused irreparable harm by fostering public doubt and ambiguity, including by trying to change the signing authority on SRFN's bank account and attending a meeting of elected leaders from the Territorial Legislature, the Metis, Smith's Landing First Nation, and the Town of Fort Smith as Chief speaking for SRFN. Acting Chief Laviolette refrained from attending the meeting to avoid public dispute that would embarrass SRFN and damage its reputation.

B. *Analysis*

[20] Turning first to the threshold for determining whether there is a serious issue, I am not convinced that the relief sought is in the nature of a mandatory injunction. SRFN states the relief should be characterized as mandatory injunctive relief as it would require the SRFN or its governing council to take positive steps to restore the *status quo ante* prior to October 13, 2022. However, *Heron v SRFN* affected the *status quo*. The *status quo* cannot be defined as if that decision does not exist. In any event, I agree with Chief Heron that the outcome of this motion

does not turn on the proper threshold. I find that Chief Heron has demonstrated a serious issue based on the elevated threshold for serious issue described in *CBC*.

[21] Based on the motion records that are before me, I find that Chief Heron has demonstrated a strong likelihood on the law and the evidence presented that she would be successful in the underlying judicial review. I am satisfied that there is a serious issue on Council's decisions to suspend and sanction her and to call for a meeting to consider her removal, as set out in the March 2024 BCR.

[22] Chief Heron has demonstrated that Council has suspended her by repeating conduct the Court found to be unreasonable and procedurally unfair in *Heron v SRFN*. The Court in *Heron v SRFN* stated that a suspension of an elected leader and extension of such a suspension are serious matters that require a high degree of procedural fairness.

[23] One of the bases for the Court's finding that the SRFN had acted in a procedurally unfair manner was that Council proceeded with the Council meeting to decide on her suspension in her absence. In the present circumstances, Chief Heron was not at the Council meeting held March 20, 2024 and was not provided with prior notice of the March 2024 BCR decision. In addition, one of the sanctions imposed by the March 2024 BCR is that Chief Heron is banned from attending the SRFN Conference Centre and offices. The Special Meeting of members scheduled for April 4, 2024, to decide whether Chief Heron will be removed, is to be held at the SRFN Conference Centre that she has been banned from attending.

[24] SRFN argues that Chief Heron's suspension is a continuation of the February 1, 2024 suspension, for which she had notice. However, the February 1, 2024 suspension extension was made on substantially the same basis as earlier suspension extensions that the Court found to be unreasonable in *Heron v SRFN*. Furthermore, the suspension extension decisions, including the February 1, 2024 extension, were made in order to have the benefit of the Court's decision in *Heron v SRFN*. However, the March 2024 BCR, which suspended Chief Heron anew "for purposes of clarity and public certainty" was made without notice and in Chief Heron's absence, and the grounds for suspension in the March 2024 BCR do not seem to account for the Court's findings in *Heron v SRFN*.

[25] Also, the Court in *Heron v SRFN* found that Councillors Laviolette and Bourke should not have participated in suspension decisions due to their conflicts of interest. However, Councillors Laviolette and Bourke participated in the decision to suspend Chief Heron on March 20, 2024. Furthermore, this Court's order that stayed their removal from office ceased to operate on March 12, 2024, when the decision was released in *Heron v SRFN*.

[26] I do not accept that Councillors Laviolette and Bourke were required to participate in the decisions because of their oath of office or Robert's Rules of Order. Additionally, I am not persuaded by the argument that there was still a quorum without their votes. The issue of bias and whether they had been removed from office affects whether they should have participated in the meeting at all, not simply whether their votes should have counted. It is speculative to guess at what would have happened at the meeting had they not participated.

[27] Finally, I find Chief Heron has established that a number of the grounds for her suspension are grounds that supported suspensions this Court found to be unreasonable in *Heron v SRFN*. The March 2024 BCR fails to account for the Court's findings in *Heron v SRFN*. A number of the grounds supporting the March 20, 2024 suspension are grounds related to events that took place in 2022, and include grounds (for example, concerning Schedule A of the Election Code) that the Court found to be unreasonable. SRFN states that the suspension is also based on Chief Heron's conduct after March 12, 2024. In reviewing the allegedly wrongful conduct, it appears that much of the evidence in Councillor Laviolette's affidavit is hearsay and the conduct largely relates to Chief Heron's attempts to re-assume her role as Chief following the decision in *Heron v SRFN*.

[28] I disagree with SRFN that the underlying judicial review has no chance of success because it is premature or because SRFN was not required to give notice to Chief Heron. The Court's findings that SRFN's application for judicial review was premature is not analogous. The circumstances are different because Council did not simply call a meeting to consider whether Chief Heron should be removed. Rather, council determined that she had engaged in conduct that warranted her suspension, suspended her and imposed other sanctions, and then called a meeting to consider her removal that will be held at a location they have banned her from attending. In my view, the circumstances of this case present exceptional circumstances that warrant the Court's intervention: *CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at para 31.

[29] For these reasons, I find that Chief Heron has met the first element of the tri-partite test.

[30] Turning to irreparable harm, I find that Chief Heron has established that she would suffer irreparable harm that cannot be quantified in monetary terms if injunctive relief is not granted. I am not persuaded that I should grant all of the injunctive relief Chief Heron seeks; however, I will return to this point when discussing the appropriate relief, below.

[31] I am satisfied that preventing Chief Heron from serving in office and fulfilling her political and fiduciary obligations, particularly in the circumstances of this case where the Court has found that her previous suspensions were unreasonable, is sufficient to constitute irreparable harm: *Gabriel* at para 26. Chief Heron was elected for a three-year term in September 2022. To date, she has served for less than one month. Chief Heron is in a different position now than she was in October 2022 or August 2023 when this Court made prior orders pending the disposition in *Heron v SRFN*. *Heron v SRFN* has since been decided, and the case was decided in Chief Heron's favour.

[32] Chief Heron therefore meets the second element of the tri-partite test.

[33] Turning to balance of convenience, I am persuaded by Chief Heron's submissions that the balance lies in her favour. As noted above, Chief Heron has been deprived of her office for over 16 months of a three-year term, despite success on judicial review. Eight days after this Court's decision, she finds herself suspended on similar grounds before she has spent any time in office.

[34] I disagree with SRFN's submissions on the balance of convenience and the *status quo*. SRFN sees the *status quo* as maintaining SRFN's governing Council that has been in place since October 13, 2022. As noted above, in my view SRFN's argument does not adequately account for the changes to the *status quo* that flow from the Court's decision in *Heron v SRFN*. Furthermore, while I make no comment on whether SRFN Council has disregarded this Court's judgment in *Heron v SRFN*, as noted above it appears that the March 2024 BCR fails to account for a number of the Court's findings. In my view, this factor should be considered in weighing the relative harm to each party.

[35] SRFN notes that Chief Heron has failed to give an undertaking as to damages that would be suffered by the First Nation in the event that the outcome on judicial review does not accord with the outcome on this motion. They argue that such an undertaking is required. SRFN has not explained what damages they would be entitled to if Chief Heron is unsuccessful on the underlying application for judicial review. It is unclear to me whether SRFN gave such an undertaking when it obtained interlocutory injunctive relief in the *Heron v SRFN* proceeding, however, it seems that no damages were awarded to Chief Heron. The Court found that Chief Heron was entitled to remuneration that she should would have received had she not been suspended, but specifically stated that this was not an award of damages. I am not satisfied that the relief Chief Heron seeks should be denied for failure to provide an undertaking as to damages.

[36] With respect to the injunctive relief that Chief Heron requests, I am satisfied that an order should issue staying the operation of the March 2024 BCR pending a determination on the

underlying application for judicial review. As a consequence, the decisions suspending Chief Heron and the related sanctions of banning her from SRFN offices and from interfering with administration, staff, and day-to-day business are stayed. I will also issue an order prohibiting SRFN from holding a Special Meeting of the membership on April 4, 2024 for the purpose of voting on her removal from the office of Chief.

[37] I am not persuaded that I should prohibit SRFN's future actions, for example to prohibit Council from issuing further suspensions and sanctions against Chief Heron. There is insufficient basis on this motion to support such broad relief. At the hearing of the motion, Chief Heron argued that, given SRFN Council's past conduct, it would be appropriate to require SRFN to seek Court approval before it is permitted to issue further suspensions or sanctions against Chief Heron. However, in my view that relief is quite distinct from the relief sought on the motion and I decline to entertain Chief Heron's request.

[38] Chief Heron requested costs of this motion on a solicitor and client basis. She has not established that a solicitor and client costs award is justified. Costs are awarded to Chief Heron in the cause.

ORDER in T-642-24

THIS COURT ORDERS that:

1. Unless the Court orders otherwise, the operation of the March 2024 BCR is stayed pending a determination on the underlying application for judicial review.
2. SRFN is prohibited from holding a Special Meeting of the membership on April 4, 2024 for the purpose of voting on Chief Heron's removal from the office of Chief.
3. Costs of this motion are awarded to Chief Heron in the cause.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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