Federal Court  Cour fédérale

**Date: 20210621**

**Docket: T-601-21**

**Citation: 2021 FC 643**



**Ottawa, Ontario, June 21, 2021**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**VERNETTA CAMPEAU**

**Applicant**

**and**

**MUSKOWEKWAN FIRST NATION BAND COUNCIL,
REG BELLEROSE, LEON WOLFE JR.,
CALVIN WOLFE, JAMIE WOLFE,
CYNTHIA DESJARLAIS, ERNEST MOISE,
HOLLY GEDDES, TERRYOLE WOLFE,
KAREN MARIE DESJARLAIS
AND THE ATTORNEY GENERAL OF CANADA**

**Respondents**

## ORDER AND REASONS

[1] Ms. Campeau is a member of the Muskowekwan First Nation and an eligible voter. She submitted her nomination and was on the ballot as a candidate for Councillor in the election that was to be held on April 4, 2021 [the April 4, 2021 Election].

[2] She seeks judicial review of the March 29, 2021 decision, as amended on April 9, 2021, cancelling the April 4, 2021 Election, and extending Chief and Council's terms in office until at least July 11, 2021.

[3] In connection with that application, Ms. Campeau seeks interim injunctive relief "preserving the *status quo*" of the election process.



**Background Facts**

[4] Section 18 of the Muskowekwan First Nation *Custom Election Act* provides that an election for Chief and Council is to be held every four years:

> A General Election shall be held on April 2, 2017, and on the first Sunday in April of each election year. The term of Office shall be of four years for the Muskowekwan First Nation Chief and eight (8) Council positions.

[5] Pursuant to this provision, and others in the Muskowekwan First Nation *Custom Election Act*, the election was to be held on Sunday, April 4, 2021, the nomination period was open on March 2, 2021, a list of 5 candidates for Chief and 21 candidates for Council was published on March 5, 2021, and mail-in ballots were sent out, with an unknown number returned to the Electoral Officer, Burke Ratt.

[6] In the period leading up to the April 4, 2021 Election, the following significant events occurred:

- On March 23, 2021, the Government of Saskatchewan issued a Public Health Order relating to the "serious health risk" posed by COVID-19. It put in place restrictions on travel and gathering in the City of Regina and the surrounding area.

- On March 25, 2021, the Regional Medical Officer of Health for Indigenous Services Canada sent an advisory to community members of the Muskowekwan First Nation, advising that there were 9 confirmed COVID-19 cases, including variants of concern, in the community of Muskowekwan First Nation. It stated that the variants of concern were 30% - 70% more transmissible, and thus it advised that "it's more important than before to follow the Public Health Order and get tested to protect yourself and those around you." It recommended that members avoid high-risk activities and places. This letter was placed on the Muskowekwan First Nation Facebook Page.

- On March 26, 2021, the Muskowekwan First Nation was put into lockdown effective 8:00 pm that day. It was publicized on the Muskowekwan First Nation Facebook Page, and reads as follows: "[I]t is strongly recommended that community members not have visitors or socialize outside their homes … [e]ntry will be restricted to residents and essential staff and services."

- On March 27, 2021 at 1:30 pm, a Chief and Council meeting was held at the Sheraton, Saskatoon, Saskatchewan. The minutes of the meeting indicate that the principal item under discussion was the April 4, 2021 Election. Council members were evenly split as

to whether to postpone the election for 30 days or 90 days. The Chief cast the tie-breaking vote, postponing the election for 90 days. The Resolution reads as follows:

> **WHEREAS** Chief and Council (the "Council") of the Muskowekwan First Nation (the "First Nation") has taken and is taking steps in response to the ongoing health risk posed by the COVID-19 Pandemic in order to protect the First Nation;
>
> **WHEREAS** the First Nation has a Council election scheduled to take place on April 4, 2021 (the "Election") pursuant to the Nation's custom Muskowekwan First Nation Custom Election Act (the "Act");
>
> **WHEREAS** Council has consulted with Lorne Fagnan of McKercher Law in order to get direction on how or whether to proceed with the election given the ongoing health and safety risk posed by the COVID-19 Pandemic;
>
> **WHEREAS** the Council has determined that the election should be postponed for 90 days, and Council's terms should be extended accordingly, in order to prevent, mitigate, or control the spread of COVID-19 on the First Nation;
>
> **WHEREAS** the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84, enable Council to extend the term of office of Council if it is necessary to prevent, mitigate, or control the spread of diseases on the Nation's reserves, even if the *Act* does not provide for such a situation; and
>
> **WHEREAS** Council believes it is in the best interests of the Nation to postpone the Election for a period of 90 days and to extend Council's term accordingly
>
> **THEREFORE BE IT RESOLVED THAT**:
>
> 1. the Election is postponed 90 days to July 3, 2021;
>
> 2. the terms of Council are extended for a period of 90 days to coincide with the 90 day postponement of the election; and
>
> 3. these Resolutions may be executed in counterparts, all executed counterparts will be deemed to be a single instrument, and a facsimile or electronic copy of a signature to this resolution shall be as effective as the originally signed copy.

- A second meeting of Chief and Council was held on March 29, 2021. It had a single agenda item – whether to cancel or postpone the April 4, 2021 Election. By a vote of 5 to 4, it was decided to cancel the April 4, 2021 Election. The Resolution reads as follows:

> **WHEREAS** Chief and Council (the "Council") of the Muskowekwan First Nation (the "First Nation") has taken and is taking steps in response to the ongoing health risk posed by the COVID-19 Pandemic in order to protect the First Nation;
>
> **AND WHEREAS** the First Nation has a Council election scheduled to take place on April 4, 2021 (the "Election") pursuant to the Nation's custom Muskowekwan First Nation Custom Election Act (the "Act");
>
> **AND WHEREAS** at a meeting of Council, Council has discussed the merits of proceeding with the Election given the ongoing health risks posed by the COVID-19 pandemic;
>
> **AND WHEREAS** Council has decided that the Election should be cancelled and rescheduled, and Council's terms should be extended accordingly, in order to prevent, mitigate, or control the spread of COVID-19 on the First Nation;
>
> **AND WHEREAS** the First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases), SOR/2020-84, enable Council to extend the term of office of Council if it is necessary to prevent, mitigate, or control the spread of diseases on the First Nation, even if the Act does not provide for such a situation;
>
> **WHEREAS** Council believes it is in the best interests of the First Nation to cancel the Election for a minimum of 90 days.
>
> **THEREFORE BE IT RESOLVED THAT**:
>
> 1. the Election is cancelled for a minimum of 90 days from April 4, 2021, with a new election date to be scheduled within 7 days of the expiry of the 90-day period.
>
> 2. the terms of Council are extended for a period of 90 days from April 4, 2021; and
>
> 3. these Resolutions may be executed in counterparts, all executed counterparts will be deemed to be a single instrument, and a facsimile or electronic copy of a signature to this resolution shall be as effective as the originally signed copy.

- On April 1, 2021, Council was made aware of this Court's decision in *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 [*Bertrand*], wherein this Court declared that section 4 of the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84 is *ultra vires* and invalid, and suspended that declaration for 60 days.

- On April 8, 2021, Council passed a motion dealing with the timing and other particulars of the replacement election. The motion reads as follows:

> Muskowekwan Chief & Council will appoint Marilyn Louison for the Electoral Officer for the Muskowekwan First Nation Election 2021. Election is to be held on July 11, 2021 and nomination is held June 8, 2021.

**Relief Sought**

[7] Ms. Campeau clarified that she is seeking an Order in the following terms:

1. The decision dated March 29, 2021 to cancel the April 4, 2021 election is suspended pending the outcome of this application for judicial review;

2. The election process commenced on or about March 2, 2021 is resumed effective immediately;

3. A new election date shall be scheduled as soon as possible and no later than the week of July 5, 2021;

4. For greater certainty, the Electoral Officer, Burke Ratte, is directed to take all necessary steps to implement this Order in accordance with the *Muskowekwan First Nation Custom Election Act*;

5. The Court shall remain seized of this matter for 30 days in order to address any issues that arise relating to the implementation of this Order.



[8] Because Ms. Campeau in this motion is not seeking any remedy directed to the decision of Chief and Council to extend their terms, I shall not address that aspect of the underlying application.

**The Law**

[9] An interlocutory injunction is an "extraordinary and equitable remedy" and "the decision to grant or refuse such a remedy is a discretionary one:" *Halcrow v Kapawe'no First Nation*, 2020 FC 1069, at paragraph 20.

[10] The Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 established the three-part test to be used by courts when an injunction is sought. First, the court is to undertake a preliminary analysis of the merits of the underlying application to determine whether it raises a serious question to be tried, in the sense that the application is neither frivolous nor vexatious. Second, the court must be satisfied that the applicant will suffer irreparable harm if the injunction is not granted. Third, the court must be satisfied that the balance of convenience favours the applicant in that she will suffer the greater

harm if the injunction is not granted than will the respondent if it is granted. Because it is a tri-partite test all three elements must be satisfied for the injunction to issue.

[11] In certain circumstances, the serious issue element of the test may be elevated above the not frivolous and vexatious requirement. One such circumstance is where the applicant is seeking a mandatory injunction: *R v Canadian Broadcasting Corporation*, 2018 SCC 5 [*CBC*]. In *CBC* at paragraph 15, the Supreme Court of Canada described a mandatory injunction in the following way: "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…' "

[12] The Supreme Court of Canada notes that the taking of such positive steps is often costly or burdensome, and that equity has long been reluctant to make such orders. Accordingly, they will only be granted where on the first prong of the test, the applicant is able to show a strong *prima facie* case.

[13] The Supreme Court of Canada also observed that it is frequently difficult to determine whether what is sought is a mandatory injunction or a prohibitory injunction. At paragraph 16 of *CBC*, it observes:

> 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.

**Applying the Law to the Facts**

[14] The applicant submits that all she is seeking is to prohibit the application of the resolution cancelling the April 4, 2021 Election, and to restore the *status quo*. She submits that she is seeking a prohibitory injunction.

[15] The respondents submit that since a new election date has been set, the *status quo* is to hold an election on July 11, 2021. Accordingly, they submit that the practical consequences of the motion, is to "restore the pre-March 29, 2021 *status quo*, not preserve the current *status quo*."

[16] In my view, whether what is being sought is a mandatory injunction or not, the applicant must convince the Court that she has raised a serious issue on an elevated standard because granting the injunction, in the form requested – suspending the decision to cancel the April 4, 2021 Election and ordering that it proceed and be scheduled promptly – effectively grants the relief sought in the underlying application. As stated by this Court in *Wang v Canada (Minister of Citizenship & Immigration)*, 2001 FCT 148, and as approved by the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, in those circumstances, the serious issue test becomes the likelihood of success on the underlying application.

**Serious Issue**

[17] Ms. Campeau has raised three issues which she submits are serious issues: (1) that the decision to cancel the April 4, 2021 Election was made without lawful authority, (2) that Council breached procedural fairness because there was a lack of consultation and notice to members of the community, and (3) that the decision is unreasonable.

[18] In my assessment, these three grounds meld together in the manner shown below, and do constitute a serious issue on the elevated standard.

[19] The respondents concede that there is nothing in the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)* which empowers this Chief and Council to cancel the April 4, 2021 Election. There is also nothing in the Muskowekwan First Nation *Custom Election Act* that gives that power. It does have provisions in sections 116 to 120 to amend it which could be used for that purpose, but that is a long and involved process, and the limited time available did not permit that approach to be used.

[20] The respondents submit, and the applicant appears to accept, that Chief and Council's authority to undertake the actions it did – to suspend and then cancel the April 4, 2021 Election – would have to be found in the Muskowekwan First Nation's customary laws. Both parties accept that the application here of customary law, as discussed in *Bertrand* at paragraphs 36 to 37, is manifested through broad consensus of the community:

> In *Bone v Sioux Valley Indian Band No 290*, [1996] 3 CNLR 54 (FCTD), at paragraph 31 [*Bone*], Justice Heald mentioned that the *Indian Act*

> …does not confer a power upon a Band to develop a custom for selecting its council. Rather, it recognizes that an Indian Band has customs, developed over decades if not centuries, which may include a custom for selecting the Band's Chief and Councillors.

> The test developed by this Court for the recognition of custom is tied to the concept of consent of the governed: *McLeod Lake Indian Band v Chingee* (1998), 165 DLR (4th) 358 (FCTD) at paragraph 8 [*Chingee*]. In *Bigstone v Big Eagle*, [1993] 1 CNLR 25 (FCTD) at 34, Justice Strayer stated that custom includes "practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus." This test has been followed ever since: see, for example, *Oakes v Pahtayken*, 2010 FCA 169 at paragraph 5. One of its consequences must be underlined: custom is made by the community, not the council: *Bone*, at paragraph 29; *Bacon St-Onge v Conseil des Innus de Pessamit*, 2017 FC 1179 at paragraph 72, aff'd 2019 FCA 13 [*Bacon St-Onge*]; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 at paragraph 48, [2019] 4 FCR 217 [*Whalen*].

[21] I am prepared to accept that evidence of a broad consensus of the community will depend on the specific facts leading up to the decision-making. It is arguable that the decision to postpone the April 4, 2021 Election, in the circumstances being faced regarding the spread of COVID-19 and its variants, and the short time prior to that date, permitted only scant contact with the community. Nonetheless, it is noted that Chief and Council did nothing to alert the community as a whole through its Facebook Page, or otherwise of the possibility that it might postpone the election date.

[22] However, that decision is not at issue here. At issue is the decision made March 29, 2021, to cancel the April 4, 2021 Election that Council had just postponed.

[23] I agree with the submission of the applicant that the respondents have failed to establish a broad consensus of support to cancel the April 4, 2021 Election or to replace the Electoral Officer. The only evidence in the record is that some Councillors had some discussions with some unnamed members of the community prior to deciding to postpone the April 4, 2021 Election, and even fewer discussions thereafter. Moreover, the record supports the applicant's submission that the real reason for the cancellation decision may have been to remove the Electoral Officer. Again, this was not a decision made on the basis of broad community support or advance notice.

[24] The lack of notice and community involvement prior to the decision being taken to cancel the April 4, 2021 Election is all the more troubling because there was no urgency to make that decision when it was made or so quickly. As the election had been postponed for 90 days, Chief and Council had a significant period of time to inform community members and consult with them before taking the step of cancelling that election and doing it over.

[25] In the circumstances, I am satisfied that the applicant is likely to succeed on her application for judicial review in establishing that the decision to cancel the April 4, 2021 Election ought to be set aside as unreasonable, and beyond the jurisdiction of Chief and Council as it was not made based upon broad community support at the time.

**Irreparable Harm**

[26] I find that the disfranchisement of electors in an election mandated under the Muskowekwan First Nation *Custom Election Act* to take place on April 4, 2021, constitutes clear and convincing evidence of irreparable harm.

[27] I do not accept the respondents' submission that any harm to the applicant or the members is "repaired" because of the members' ability to vote in the election set for July 11, 2021. If it is ultimately found that the July 11, 2021 election decision is invalid, then that election result is invalid and there is no cure. I have already found that the applicant is likely to succeed in establishing its invalidity.

**Balance of Convenience**

[28] The respondents submit that if the injunctive relief is granted it will suffer "significant inconvenience" because a "new Electoral Officer has been appointed, and a new nomination meeting has taken place" and mail-in ballots that have or will be sent out will have to be located and destroyed. With respect, these matters do not constitute harm to the respondents, and most certainly not irreparable harm, but merely, as they state, an "inconvenience."

[29] If the respondents are ultimately successful in upholding the validity of the resolution passed on March 29, 2021, then a new election date may be set. In that regard, the Court notes that while their current term appears to expire on June 1, 2021, as a consequence of the *Bertrand* decision, the Government of Canada is proposing to ameliorate its impact by passing section 4 of

Bill C-30, *Budget Implementation Act, 2021*, No 1, 2nd Sess, 43rd Parl, 2020-2021, Div 31, s 268, by deeming everything done under and all consequences flowing from the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84 since April 8, 2020, to be deemed to be effective.



[30] On the other hand, if the injunction is not granted, the mandated April 4, 2021 Election will not take place, and presumably the mail-in ballots cast will be destroyed. If the applicant is ultimately successful, then that does constitute a harm, and an irreparable one, both to her and to other members of this First Nation.

**Conclusion**

[31] For these reasons, the injunction will issue largely in the terms requested. The applicant is entitled to her costs. The Attorney General of Canada took no position on this motion but counsel was available, had the Court needed any clarification from the Attorney General. Accordingly, the Attorney General is not liable for the applicant's costs. In the motion materials Ms. Campeau asked for an opportunity to speak to costs, which will be granted if the parties are unable to reach agreement thereon within 10 days.

**ORDER IN T-601-21**

**THIS COURT HEREBY ORDERS** that:

1. The decision dated March 29, 2021, to cancel the April 4, 2021 Election is suspended pending the outcome of this application for judicial review;

2. The election process commenced on or about March 2, 2021, towards the April 4, 2021 Election, is resumed effective immediately;

3. The election date of July 3, 2021, set by Chief and Council in its Resolution of March 27, 2021, is to be observed if possible; however, if that is not possible, then a new date for the April 4, 2021 Election shall be scheduled as soon as possible and it must be held no later than the week of July 5, 2021;

4. For greater certainty, the Electoral Officer, Burke Ratte, is directed to take all necessary steps to implement this Order in accordance with the Muskowekwan First Nation *Custom Election Act*;

5. Muskowekwan First Nation is to inform the community by way of its Facebook Page, and any other method usually used for such purposes, of this decision, the suspension of the July 11, 2021 Election, the continuation of the April 4, 2021 Election and the date it is to be held, and any other information the Electoral Officer, Burke Ratte requires;

6. The Court shall remain seized of this matter for 60 days in order to address any issues that arise relating to the implementation of this Order; and

7. The applicant is entitled to her costs of this motion, and the Court will retain jurisdiction to fix those costs if agreement cannot be reached between the parties as to the amount.

"Russel W. Zinn"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-601-21 |
| **STYLE OF CAUSE:** | VERNETTA CAMPEAU v MUSKOWEKWAN FIRST NATION BAND COUNCIL ET AL |
| **PLACE OF HEARING:** | HELD VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | JUNE 17, 2021 |
| **ORDER AND REASONS:** | ZINN J. |
| **DATED:** | JUNE 21, 2021 |



**APPEARANCES:**

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