

**Date: 20090506**

**Docket: T-536-09**

**Citation: 2009 FC 470**

**Vancouver, British Columbia, this 6<sup>th</sup> day of May 2009**

**Present: The Honourable Mr. Justice Pinard**

**BETWEEN:**

**FRIEDA MARTSELOS, GLORIA VILLEBRUN,  
BRADLEY LAVIOLETTE and FREDERICK BEAULIEU**

**Applicants**

**and**

**DAVID POITRAS, TONI HERON  
and RAYMOND BEAVER**

**Respondents**

**REASONS FOR ORDER AND ORDER**

[1] This is a motion on behalf of the respondents for the appointment of a receiver/manager to act on behalf of the Salt River First Nation (“SRFN”) pending the election which is the subject matter of the applicants’ Notice of Application herein or the disposition of the said Notice of Application.

[2] The applicants were elected as Chief and Councillors respectively in an election of the SRFN on August 25, 2008. That election was challenged by the respondents who were unsuccessful in the election. An appeal arbitrator appointed under the Customary Election Regulations (“CER”) of the SRFN found that “infractions were committed which materially affected the outcome of the 2008 Election in respect of the position of Chief and in respect of the three positions of Councillor”, who are all the applicants. The appeal arbitrator, therefore, ordered a new election. The applicants are entitled to run in that new election. They applied for an order to prevent the election from taking place, but have now abandoned that application.

[3] Since 2002 the SRFN has suffered from an ongoing dispute. In November 2002, a “rump group” of the SRFN held an impromptu election, ousted the duly elected Council and took over the governance powers of the Band, including bank signing authority. Court orders were made to protect the funds of the Band but those Orders were breached and several hundreds of thousands of dollars of Band money was unlawfully taken. Members of that group were found guilty of contempt of court and fined. Other members connected with that group were convicted of theft over \$5000.00 for stealing monies from one of the Band companies.

[4] Within one month of taking office on August 25, 2008 the applicants passed Band Council Resolutions (BCRs) to pay \$1.188 million of Band funds to members of, or persons associated with the November 2002 Council, and over \$600,000 was paid to the applicant, Chief Martselos.

[5] Two Band councillors opposed the BCRs and publicized to the SRFN membership the fact that large amounts of funds were being taken personally by the Chief and ten members or associates of the November 2002 Council; those two councillors (Chris Bird and Mike Beaver) were removed from office by the applicants for doing so. A by-election was held to fill the vacancies created by this removal, but Chris Bird and Mike Beaver were not eligible to run in the by-election. However, they can run in the election which is the subject matter of these proceedings.

[6] The by-election was held on April 20, 2009 with the result that two other members of the SRFN were elected to fill the places vacated by the removal of Chris Bird and Mike Beaver.

[7] The respondents' interpretation of the CER is that as of the date of the appeal arbitrator's decision (March 30, 2009) the applicants ceased to be duly elected officials of the SRFN such that only one councillor (Delphine Beaulieu) remained at that time and as of the by-election on April 20, 2009 only three councillors remained. The CER requires a quorum of four members of Council. Thus, on this interpretation of the CER the present Council of three lacks the power to govern.

[8] The respondents were the opposing parties before the appeal arbitrator. They are the ones who challenged the applicants' claim to office based on the results of the election of August 25, 2008. As persons interested in the orderly and lawful administration of the SRFN, the respondents request that, upon a determination by the Court that the applicants have ceased to hold elected office, the Court appoint Browning Crocker Inc. as receiver/manager to exercise the powers of the Council of the SRFN on the terms set out in Appendix "C" of the Motion until a result is declared in

the election to be held on June 29, 2009, with liberty to either the applicants or the respondents to apply for an extension of the Order until the hearing of the judicial review application herein.

\* \* \* \* \*

[9] Section 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, gives the Court authority to appoint a receiver, “where it appears to be just or convenient to do so”:

**44.** In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.

**44.** Indépendamment de toute autre forme de réparation qu’elle peut accorder, la Cour d’appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d’exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu’elle juge équitables.

[10] The following section of the *Federal Courts Rules*, SOR/98-06, also addresses the appointment of a receiver by the Court:

**375.** (1) On motion, a judge may appoint a receiver in any proceeding.

**375.** (1) Un juge peut, sur requête, nommer un séquestre judiciaire dans toute instance.

(2) An order under subsection (1) shall set out the remuneration to be paid to, and the amount of security to be given by, the receiver.

(2) L’ordonnance rendue en vertu du paragraphe (1) prévoit la rémunération du séquestre judiciaire et le montant du cautionnement qu’il doit fournir.

[11] Sections 3.4 and 15.9 of the CER are also highly relevant:

- 3.4 (a) A person Elected under these Regulations, holds office from immediately following the declaration of Election result to immediately before the declaration of the result of the next General Election for that office.
- (b) In the event of an appeal, any person whose election is subject of an appeal shall hold office until the outcome of an appeal determines their election was invalid.
- 15.9 Within five (5) days of the conclusion of the Hearing, the Election Appeal Arbitrator shall communicate, in writing, a decision:
- 15.9.1 To deny the Appeal on the basis that evidence presented did not establish the necessary grounds for an Appeal; or
- 15.9.2 To uphold the grounds for an Appeal but allow the results of the Election to stand, if the infraction did not materially affect the result of the Election; or
- 15.9.3 To uphold the Appeal and call for a new Election or Run-off Election.

\* \* \* \* \*

[12] The principles to be applied in determining whether to grant a motion to appoint a receiver-manager were set out by Associate Chief Justice James Jerome (as he then was) in *Buffalo v.*

*Canada*, [1993] 1 C.N.L.R. 39:

A comprehensive review of these principles was given in *Turbo Resources Ltd. v. Petro Canada Inc.* (1989), 91 N.R. 341 (F.C.A.). The court must be satisfied: (1) there is a serious issue to be tried; (2) the relief the applicant seeks on the motion must not be such as would effectively give it the relief to be sought at trial; (3) the applicant would otherwise suffer irreparable harm; and (4) the balance of convenience favours the applicant. Therefore, resolution of the balance of convenience determination is appropriate only in situations where the potential relief of damages would not provide an adequate remedy for the party in whose favour the action may be finally determined. Further, the context in which the court should

make this resolution is that the prudent route generally favours preservation of the *status quo*.

Significantly, Jerome A.C.J. continued:

A special factor was discussed by the Federal Court of Appeal in *Gould v. Attorney General of Canada and Solicitor General of Canada* (1984), 54 N.R. 232 and by the Supreme Court of Canada in *Attorney General of Canada v. Metropolitan Stores (MTS) Ltd. and Manitoba Food and Commercial Workers, Local 832 and The Manitoba Labour Board*, [1987] 1 S.C.R. 110. Where the dispute affects some third person or the general public, or where the grant or refusal of the order can have serious public interest ramifications, the court in its analysis must go beyond the ordinary balance of convenience test. If such broader consequences are likely, the motion cannot be treated as concerning only the immediate parties; the disadvantage to these third persons or to the public interest also must be weighed.

[My emphasis.]

[13] I believe that such a “special factor” exists in the present case, given that it concerns issues related to the integrity of the democratic process in Band elections and the duties of those who hold public office. Indeed, it is open to either party to rely on considerations of public interest (see *RJR - MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, at paragraph 66).

[14] The respondents’ motion presupposes a “gap in the governance” of the Band Council, following the appeal arbitrator’s decision. The applicants disagree. Accordingly, before turning to whether a receiver-manager should be appointed under the circumstances, it should first be determined whether indeed the alleged circumstances exist.

[15] The disagreement between the parties as to whether there is a “gap of governance” stems from their disagreement about the consequences of the appeal arbitrator’s call for a new election,

based on her finding that “infractions were committed which materially affected the outcome of the 2008 Election both in respect of the position of Chief and in respect of the three positions of Councillor”. Fundamentally, the dispute centres on the meaning of section 3.4 of the CER.

[16] The applicants’ argument appears to rest principally on the following proposition set out in their Written Representations: “The custom of the Salt River First Nation, as a self-governing aboriginal First Nation, is that there is always a Council in place to provide leadership for the people”. The CER should therefore be interpreted in this light, as it is an expression of SRFN custom. Thus, it would be contrary to the spirit of the CER to interpret it in such a way as to countenance a gap in leadership. As to the letter of the law, the applicants argue that it is of significance to the present motion that the CER contains no provision granting any individual, including the appeal arbitrator, the power to determine that “an election is invalid”.

[17] The respondents’ argument seems to me to be more defensible. It is set out at some length in their Memorandum of Fact and Law dated April 20, 2009.

[18] At paragraphs 35 to 39 and 41-42 of this Memorandum, the respondents write:

35. This interpretation provides internal harmony to the scheme of fixed date elections and is consistent also with ss. 15.9.2 and 15.9.3 – which provide that an appeal arbitrator who upholds grounds of appeal must determine whether or not to allow “the results of the Election to stand”. If the results are allowed to stand an order is made under s. 15.9.2. If the results are not allowed to stand a new election is called under s. 15.9.3. The choice is determined by a finding whether or not the infractions materially affected the result of the election. If they did, the logical consequence would be that the results of the election would not be allowed to stand. This is

consistent with the analysis and sequence of decisions made by the appeal arbitrator in her Final Award.

36. The legal recognition of an illegally elected official is an oxymoron. It would require express words to effect this result in s. 15.9.3, such as “To uphold the Appeal and call for a new Election *but allow the results of the affected Election to stand until immediately before the declaration of the result of the new Election*”. If the drafters intended this result they could easily have added these words.

37. The Applicants’ interpretation assumes that someone who is illegally elected to office remains in office even though the foundation of that right (a valid election) is gone. In making the choice between 15.9.2 and 15.9.3 the appeal arbitrator is necessarily determining whether to validate or to invalidate the election which has given rise to the appeal. A decision in favour of s. 15.9.3 necessarily rejects the option of validating the election pursuant to 15.9.2 and necessarily results, instead, in an invalidation of the election. That is the essential premise for the power to call a new election. It is the determination that the election results cannot stand that result, by operation of law, in a voiding or invalidating of the election. This interpretation is consistent with the choice of the word “invalid” in s. 3.4(b).

38. On the other hand, the narrow interpretation of s. 3.4(b) advanced by the Applicants would allow no meaning to the section. It thus conflicts with the presumption that each legislative provision has a function to fulfill.

39. The Applicants’ interpretation would create a situation that is highly unusual, perhaps unknown, in election law, namely the continuance in office of a person whose only claim to office is based on an election the results of which were materially affected by illegal election practices. It would result in the continuance in office, for example, of a person found to be ineligible to hold office under s. 15.1.2, a person elected by the votes of persons not eligible to vote under s. 15.1.5, and a person whose claim to office is based on a falsified electoral report under s. 15.1.6. This cannot be the intended consequence of a determination pursuant to s. 15.9.3.

41. The purpose of the CER is to make it clear to candidates in SRFN elections that they will become ineligible to hold office if the results on their election were materially affected by certain prohibited election practices. This is a vitally important purpose



since the integrity of the electoral process goes to the root of responsible government. It is the right to govern which is in issue here. That is of vital concern to members of the SRFN.

42. The purpose of the legislation strongly favours the interpretation that upon a determination that a member has been improperly elected his or her right to hold office is at an end. By thus deterring illegal election practices this interpretation serves to preserve the integrity of the election process.

[19] As to the issue raised by the applicants that the CER abhors a power vacuum, the respondents note that the present circumstances are quite exceptional, and may not have been anticipated by the drafters, in so far as the elections of the Chief and three councillors were invalidated because of irregularities. Under most circumstances, it is unlikely that the calling of a new vote by an appeal arbitrator would result in the absence of a quorum.

[20] In my opinion, the respondents' interpretation of the CER and of the relevant legislation is more consistent with their apparent purpose and context. I adopt their interpretation, as I find it is soundly based on the principles of statutory interpretation stated by Elmer Driedger in *Construction of Statutes* (2<sup>nd</sup> ed., 1983) at page 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[21] I now turn to consider each of the factors set out in *Buffalo, supra*.

[22] With respect to the first stage of the tri-partite test, the application for interim relief herein does not engage the same issue that was raised in the underlying application for judicial review.

First, in the latter application, both parties agree that it raises a serious issue. Second, the “gap of governance” which is raised by the respondents in this motion and which is the result of the above interpretation of the CER constitutes, in itself, a serious issue.

[23] As for the questions of irreparable harm and balance of convenience, the evidence indicates that only three members of Council are in place, and the SRFN requires a quorum of four to act. The above interpretation of the CER makes it clear, therefore, that there is indeed a gap in the governance of the SRFN. I agree with the submissions contained in paragraph 21 of the respondents’ Memorandum of Fact and Law, which reads:

The evidence indicates that only three members of Council are in place, and the SRFN requires a quorum of four to act. Thus, there is a plain need for a caretaker to administer the Band until a new council is elected. The general membership of the SRFN is affected in that there is a gap in their governance. If, for example, there is no lawful body to appoint the election appeal arbitrator pursuant to s. 6.1 of the CER, any appeal arbitration could be null and void. There is evidence that the Applicants participated in a purported Band Council Resolution setting the election date for June 25, 2009. Such an election would have been null and void for two reasons: (1) no valid council in place to pass it, and (2) contrary to s. 15.15 of the CER. Fortunately, the appeal arbitrator remedied this by setting the date for June 29, 2009, but it remains as an example of the possible harm caused to the SRFN by the continued purported exercise of authority by the Applicants herein. The balance of convenience strongly favours the appointment of a receiver/manager to carry out all the administrative arrangements for the new election, and to supervise staff.

[24] In my view, it is only just and convenient, in the circumstances, to appoint a receiver/manager, in order to avoid irreparable harm. The general membership of the SRFN is

affected by the gap in their governance, which tips the balance of convenience in favour of the respondents.

[25] For all the above reasons, it is ordered as follows:

### **ORDER**

UPON THE APPLICATION of the respondents;

UPON reviewing the Motion Records, affidavits and memoranda of fact and law filed by the parties;

UPON hearing the submissions from legal counsel for the applicants and respondents;

UPON being advised by legal counsel for the respondents that the Minister for Indian Affairs and Northern Development is aware of this application but takes no position on the granting of this Order;

AND UPON it appearing that it is just and equitable to grant this Order.

### **DEFINITIONS**

1. In this Order, the following terms shall have the following meanings:

- (a) “CER”, shall mean the Customary Election Regulations of the Salt River First Nation #195;
- (b) “Council”, shall mean the Council of the Salt River First Nation #195;
- (c) “Funds” shall mean all monies and accounts hitherto administered by the Council of the Salt River First Nation #195;
- (d) “INAC”, shall mean Department of Indian Affairs and Northern Development;
- (e) “SRFN” shall mean the Salt River First Nation #195.

## **SERVICE**

2. Service of notice of this Order to the interested parties is deemed good and sufficient.

## **APPOINTMENT AND SECURITY**

3. Pursuant to section 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and amendments thereto, Browning Crocker Inc. (the "Receiver") is hereby appointed as Receiver-Manager to exercise the powers of the Council of the SRFN in accordance with the provisions of this Order. The Receiver shall provide security in the amount of one hundred thousand dollars (\$100,000.00).

## **RECEIVER'S POWERS**

4. The Receiver is hereby empowered and authorized to exercise the powers of the Council of the SRFN until a result is declared in the election to be held on June 29, 2009, or until the hearing of the application for judicial review herein if so further ordered by the Court at the request of either party, and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following:
  - (a) to take all administrative action necessary to ensure the orderly, fair and impartial conduct of the election to be held on June 29, 2009 by the election officer and election officer's assistant previously appointed by the SRFN election appeal arbitrator, in accordance with the CER;
  - (b) to appoint a fair and impartial election appeal arbitrator for the election to be held on June 29, 2009 and, if necessary, counsel for such arbitrator, in accordance with the CER;
  - (c) to take possession and control of the Funds and any and all proceeds, receipts and disbursements arising out of or from the Funds;
  - (d) to receive, preserve, protect and maintain control of the Funds, or any part or parts thereof, including, but not limited to, taking possession and control of any bank accounts hitherto administered by the Council;
  - (e) be entitled to immediate, unfettered and unconditional access to the Records (as defined in paragraph 6 hereof) hitherto administered by the Council;
  - (f) be entitled to immediate, unfettered and unconditional access to the SRFN Administration Office;
  - (g) to determine, as accurately as possible, appropriate recipients of current programs hitherto administered by the Council, and the proper amount

payable to these recipients, and the Receiver shall issue or cause to be issued cheques to those recipients for these current amounts, but only to the extent the Receiver, in its discretion, determines there are sufficient funds available to make these payments;

- (h) shall keep written records of all payments made in accordance with this Order, including the name of the recipient, the amount paid, how the amount was calculated and the particular program or use the payment was for;
- (i) shall not be obligated to but may make inquiries about whether a person is or is not entitled to receive funds hitherto administered by the Council, and shall be entitled to rely on the Records as they currently exist, and shall not be liable to any person nor responsible for any incorrect or inaccurate payment made in good faith by relying on the Records or any information provided by any employee or member of SRFN. In making the payments, the Receiver shall exercise its best judgment in an impartial manner and make such payments as it deems advisable;
- (j) to engage agents, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties conferred by this Order;
- (k) to receive and collect all monies and accounts now owed or hereafter owing to SRFN and to exercise all remedies and powers hitherto administered by the Council;
- (l) to settle, extend or compromise any indebtedness hitherto administered by the Council;
- (m) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Funds, whether in the Receiver's name or in the name and on behalf of the Council, for any purpose pursuant to this Order;
- (n) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted as have been hitherto administered by the Council, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

- (o) to implement such cost saving measures as the Receiver deems advisable with a view to improving or enhancing the financial condition of the SRFN hitherto administered by the Council;
- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Council;
- (q) to take any steps reasonably incidental to the exercise of these powers;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below) and without interference from any other Person; provided however that the Receiver is empowered and encouraged to consult councillors Delphine Beaulieu, Ron Schaeffer and Kendra Burke, being the duly elected councillors of the SRFN.

#### **DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER**

- 5. All of the current employees and officers who hitherto reported to the Council are hereby directed to co-operate with the Receiver.
- 6. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs hitherto conducted by the Council, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

#### **NO PROCEEDINGS AGAINST THE RECEIVER**

- 7. No proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

8. Nothing contained in this Order shall:
- (a) make the Receiver an employer or successor employer as those terms are defined in the Employment Standards Code (Alberta) or any other applicable employment legislation; and
  - (b) except as expressly provided in this Order, make the Receiver liable to or responsible to pay or satisfy any debt or obligation of the Council or the SRFN to any creditor or third party.
9. Notwithstanding any provisions to the contrary and any Federal or Provincial legislation relating to the protection of personal information, but subject to paragraph 5(b) hereof the Receiver is hereby authorized to collect, gather and report on such personal information as may be reasonably necessary to allow him to carry out his duties and obligations under this Order.

#### **RECEIVER'S REMUNERATION AND ACCOUNTS**

- 10.
- (a) the Receiver, legal counsel to the Receiver and anyone retained to assist the Receiver, shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges as part of the costs of these proceedings;
  - (b) the Receiver and its legal counsel shall pass their accounts from time to time at the direction of the Court;
  - (c) the Receiver shall be reimbursed for its fees and disbursements from the funds hitherto administered by the Council within 30 days of the passing of their accounts;
  - (d) the Receiver, to the extent that there are available funds (as determined by the Receiver) in the accounts hitherto administered by the Council, is hereby authorized and directed to use available funds to pay any amounts owing to the Receiver in relation to the performance of its duties and obligations under this Order subject to the obligation to pass accounts as provided in this Order;
  - (e) the Receiver is hereby authorized and empowered at any time to make further application to this Court to seek direction in relation to the payment and or securing of its fees and disbursements and that of its legal counsel;
  - (f) prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and

disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

**GENERAL**

11. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
12. The Receiver is at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.
13. The Royal Canadian Mounted Police or any other policing authority with jurisdiction is hereby authorized to give such assistance to the Receiver as the Receiver may reasonably request, to ensure the Receiver can perform its duties without any breach of the peace.
14. This Order and all of its provisions are effective at 12:01 a.m., Mountain Standard Time, on the date of this Order.
15. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

“Yvon Pinard”

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Judge



**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-536-09

**STYLE OF CAUSE:** FRIEDA MARTSELOS, GLORIA VILLEBRUN,  
BRADLEY LAVIOLETTE and FREDERICK BEAULIEU  
v. DAVID POITRAS, TONI HERON and RAYMOND  
BEAVER

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** May 4, 2009

**REASONS FOR ORDER  
AND ORDER:** Pinard J.

**DATED:** May 6, 2009

**APPEARANCES:**

Mr. David C. Rolf FOR THE APPLICANTS  
Ms. Colleen Verville

Mr. Christopher Harvey, Q.C. FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

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