

Date: 20051124

Docket: T-2035-05

Citation: 2005 FC 1594

Vancouver, British Columbia, Thursday, November 24, 2005

PRESENT: THE HONOURABLE MADAM JUSTICE TREMBLAY-LAMER

BETWEEN:

HEBER CLIFTON, JOHN PAHL

CLYDERIDLEY, FRED RIDLEY

HARVEY RIDLEY and ALLAN ROBINSON

Applicants

- and -

THE HARTLEY BAY VILLAGE COUNCIL

THE HARTLEYBAY INDIAN BAND

and DAVID BENTON in his capacity as the

HARTLEYBAYELECTORAL OFFICER

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion for a mandatory injunction or order in the nature of *mandamus* directing the Electoral Officer and Hartley Bay Village Council (the "Council") to put in place voting procedures that permit members of the Hartley Bay Indian Band who do not reside on the Reserve but who are otherwise qualified to vote in Council elections ("Off-Reserve Members") to have a fair opportunity to participate in the Council elections scheduled to take place on November 29, 2005 by:

- (i) providing off-reserve polling stations in Prince Rupert and in Vancouver (the "Off-Reserve Polls") on the day set for voting in the 2005 Election;
- (ii) staffing the Off-Reserve Polls;
- (iii) keeping the Off-Reserve Polls open for the same hours as the poll at Hartley Bay;

- (iv) otherwise making the Off-Reserve Polls subject to the same regulations that apply to the Hartley Bay Poll; and
- (v) notifying Off-Reserve Members of the Off-Reserve Polls forthwith and prior to voting day in the 2005 Election;

[collectively, the "requested voting procedures"]

[2] The applicants also seek a mandatory injunction or order in the nature of *mandamus* directing that if the Electoral Officer and Council cannot comply with the requested voting procedures, then the Electoral Officer and Council postpone the 2005 Elections by two weeks to allow sufficient time to comply with the requested voting procedures.

[3] *Mandamus* is an extraordinary remedy for which the Federal Court has exclusive original jurisdiction pursuant to subsection 18(1). Subsection 18(3) of the Act provides the writ of *mandamus*, amongst others "~~may be obtained only on an application for judicial review~~ made under section 18.1". It cannot be obtained on an interlocutory motion. A writ of *mandamus* by definition cannot be characterized as an interim relief. (*Brissett v. Canada (Minister of Citizenship and Immigration)*, (2002), 228 F.T.R. 314 at para. 12).

[4] As I stated in *Delisle v. Canada (Attorney General)* (2004), 258 F.T.R. 268 at paragraph 13:

[...] this is a motion for an interlocutory order of *mandamus*. Here again, the case law is determinative in this regard. The issuance of a writ of *mandamus* is not possible in such circumstances, for it would constitute in fact an interim declaration of right (*Paquette v. Canada (Attorney General)* (2001), 211 F.T.R. 179 (F.C.T.D.); *Brissett v. Canada (Minister of Citizenship and Immigration)* (2002), 228 F.T.R. 314 (F.C.T.D.)).

[5] Thus, the Court has no jurisdiction to grant this remedy on a motion.

[6] Moreover, it is a requirement of the writ of *mandamus* that there be proof that performance of the duty is actually due and incumbent upon the decision-maker because *mandamus* will not be issued to enforce a future obligation: *Mensinger v. Canada (Minister of Employment and Immigration)*, [1987] 1 F.C. 59 (T.D.). Courts will not simply grant this relief in anticipation of a potential or supposed future omission or refusal of a public officer to discharge his duty. There must be a prior demand that the duty be performed and a refusal to do so: *Karavos v. Toronto and Gillies*, [1948] 3 D.L.R. 294 (Ont. C.A.). While I appreciate that time is of the essence (the election is to take place on November 29, 2005), in the present matter, this requirement is not met.

[7] For these reasons, the motion is dismissed. No costs.

ORDER

THIS COURT ORDERS that

The motion be dismissed. No costs.

(Sgd.) "Danielle Tremblay-Lamer"



~~FEDERAL COURT~~

~~NAME OF COUNSEL AND SOLICITORS OF RECORD~~

DOCKET: T-2035-05

STYLE OF CAUSE: HEBER CLIFTON et al.

- and -

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THE HARTLEY BAY VILLAGE COUNCIL et al.

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: November 24, 2005

REASONS FOR ORDER: TREMBLAY-LAMER J.

DATED: November 24, 2005

~~APPEARANCES:~~

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