

Federal Court



Cour fédérale

Date: 20140221

Docket: T-770-13

Citation: 2014 FC 171

Ottawa, Ontario, February 21, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DELAPHINE BIGHETTY

Applicant

and

**BARREN LANDS FIRST NATION,
COUNCILLOR ROY BIGHETTY,
COUNCILLOR BILLY LINKLATER,
COUNCILLOR ROBERT MERASTY and
MICHAEL SEWAP**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. NATURE OF THE PROCEEDING

[1] This judicial review concerns the removal of a Chief from that position following receipt of a community petition. The story behind the removal decision is convoluted at times, the applicable election regulation confusing and the interplay between the principal actors unhelpful to the community. The community appears to have been in crisis for a number of years.

[2] The Election Appeal Committee [EAC] of the Barren Lands First Nation [the Band] decided to remove the incumbent Chief Delaphine Bighetty [Applicant] from her position pursuant to the Barren Lands First Nation Election Regulations [Election Regulations].

[3] Despite the Applicant's refusal to recognize the EAC's authority to remove her from the position of Chief and her efforts to occupy the Band Office, a new Chief was acclaimed following a nomination process in which the Applicant was not nominated as a candidate for the position.

[4] The relevant provisions of the Election Regulations are set out below:

f. "Election Appeal Committee" means those band members appointed by band members to monitor and process Band Election Appeal, petitions, complaints or other issues relative to the Election Process."

ELECTION APPEAL COMMITTEE

May be appointed from elders and/or respected band members. It would be better if Chief and Council do not reside on the committee. Committee should include up to Seven (7) members including 2 elders from the senate of elders

DUTIES OF ELECTION APPEAL COMMITTEE

I Will discuss and decide all appeals by Band members, protests by council members dismissed, resignations, all Band members petitions, and any other important matters with respect to the conduct of Good Governance of the Barren Lands First Nation Community.

II The Election Appeal Committee shall appoint an Electoral Officer and a Deputy. The Electoral Officer shall be responsible to oversee and co-ordinate elections, by-elections, appeals, dismissals and regulations contained

hereto and the said Electoral Officer shall ensure that the minute books of the Election Appeal Committees are maintained and up to date.

VACANCY

The officer of Chief and Councillor becomes vacant when:

- a. a person who holds that office
 - i. is convicted of an indictable offence
 - ii. dies or resigns his/her office
 - iii. Is or becomes ineligible to hold office by virtue of these regulations

- b. The election appeal committee of the Band declare by decision that the person who holds office
 - i. is unfit to continue office by reason of having been convicted of an indictable offence and/or incarcerated for the offence;
 - ii. Has been absent from scheduled meetings of the council for three (3) consecutive meetings without just cause.
 - iii. Was guilty of corrupt practice in connection with an election, bringing or accepting a bribe, dishonesty, or malfeasance (wrongdoing/misconduct) during his/her term of office as determined by the election appeal committee.

- c. The members of the Barren Lands First Nation hereby declares a person who ceases to hold office by virtue of paragraph (b)(i)(ii)(iii) to be eligible to be a candidate for the Chief or Councillor for a period not exceeding three (3) years.

ELECTION APPEALS

Any Elector or group of Electors may lodge an appeal individually or by petition as stipulated, of an election if he/she/they have reasonable grounds that there were discrepancies in the method of the election and he/she or they shall forward by registered mail or hand deliver a petition signed by no less than ten (10) Electors who voted in the election to the Electoral Officer indicating and specifying the discrepancies, who shall forward same to the Appeal Committee.

Any complaints regarding a Council member must be made in writing to Election Appeal Committee or the Electoral Officer, depending on the nature of the complaint, each and every complaint shall be acted upon and recorded with the results and action taken to be forwarded in writing to the complainant.

The Election Appeal Committee shall proceed to investigate the discrepancies and they shall act accordingly.

In the event that a Chief and Councillor does not comply to these regulations, does not function in accordance to the Band Council Policy or the Band Constitution (Band Council Policy/Band Constitution are to be provided to Council and adhered to by Council as the official mandate of the people of Barren Lands First Nation), if ineffective or inefficient and lacks interest as a Chief or Councillor he/she may be removed from office by:

- a. A petition signed by (50% +1 person) Electors who had voted in his/her election who shall forward the petition to the Electoral Officer indicating their reason for requesting the removal of the said Chief or Councillor from office.
- b. The Electoral Officer shall forward the petition to the Election Appeal Committee, if in the opinion of the same Committee that the reasons in the petition are valid they shall direct the Electoral Officer to request for a resignation of the said Chief or Councillor. The Appeal Committee will discuss and decide if the petition is valid. All decisions rendered by the Appeal Committee will be final.

In the event that the said Chief and Councillor is removed from office, the Electoral Officer shall immediately proceed to call a by-election as provided in these regulations.

It is apparent that the drafting of the Regulations leaves a lot to be desired.

[5] The Applicant sought, in summary, to have the EAC declared as illegally constituted; to have its removal decision held to be illegal/unlawful and therefore quashed; to have the election of the new Chief quashed and to have herself reinstated.

II. BACKGROUND

[6] The Band is a First Nation and Band under the *Indian Act*. At the relevant time the Band was under co-management. Its Band Council consisted of a chief and three (3) councillors, each of whom was elected for two (2) year terms. There were approximately 1,100 registered Band members of whom 400 lived on the reserve – a fly-in community about 350 kilometres north-east of Thompson, Manitoba.

[7] The Band enacted the present version of the Election Regulations in May 2003. The Election Regulations appear to be some attempt to codify the Band's custom election process as the Regulations appear to have been interpreted and applied by reference to past practices and customs.

[8] The Band had a practice of using petitions to either force a resignation from Council or in fact to have the EAC remove a chief or councillor. Between 2007 and 2009, one councillor resigned, one councillor was removed and one chief was removed as a result of petitions.

[9] The Applicant was elected Chief on April 12, 2012, having received 109 of the 216 votes cast.

[10] The community's crisis of confidence in the Applicant appears to have stemmed from her attempt to control the assignment of temporary jobs. In May 2012 she assigned herself the Logistics portfolio which gave her responsibility for fundraising and the creation of temporary jobs. The assignment of portfolios to Councillors was itself controversial as the Respondents alleged that by

custom the Local Government Portfolio went to the Councillor with the most votes and the other portfolios were assigned by consensus.

[11] The evidence confirms that by March 2013 there was a widespread concern that the Applicant was awarding jobs to supporters and family members rather than awarding them on a competitive basis. The issue was discussed at at least one staff meeting and at a regular Band meeting in that month.

[12] By May 2012 the Applicant announced her intention to appoint a new EAC – one presumably more friendly towards her. The Applicant was informed by two Councillors that such an appointment was contrary to the Regulations. By custom the appointments are done at a Band meeting.

[13] On March 27, 2013, members of the Band circulated a Petition asking the EAC to remove the Applicant as Chief. The Petition contained allegations that the Chief was awarding band employment without competitive process and on the basis of favouritism as well as allegations of misuse of funds and false statements concerning the Band's financial position. The Petition claimed that the Chief no longer had the confidence of the Band.

[14] In accordance with the Election Regulations, the Petition required the signature of 50% plus one person who had voted at the last election. As 218 people voted in the 2012 election, the Petition required 109 signatures.

[15] The Electoral Officer confirmed that the required number of signatures was present and gave the Petition to the Applicant. Although there were 116 signatures, the Electoral Officer declared only 112 to be valid.

[16] Following the presentation of the Petition to the Applicant, the Chief and her supporters took a series of steps to frustrate and challenge the Petition. The Applicant refused to accept the Petition; a physical fight erupted at the Band's office between the Applicant's family, her supporters and those who had signed the Petition.

[17] The Applicant demanded proof of the establishment of the existing EAC. In the same period a counter petition was circulated expressing support for the Applicant and demanding an investigation and proof of the various allegations.

[18] On April 4, 2013, the Electoral Officer informed the Applicant that an EAC meeting was to be convened to address the Petition. The Applicant countered that she would use her own EAC. The alleged existence of another EAC and the removal of the incumbent Electoral Officer was news to the incumbent Electoral Officer.

[19] The incumbent EAC held its meeting on April 4, 2013, determined that the Petition was valid and that there was a basis for removing the Applicant as Chief. A decision to that effect was signed by the five members of the EAC and attempts were made to serve the Applicant with the decision which she refused to accept.

This is the decision under review.

[20] On that same day the Applicant posted a notice that there would be a Band meeting to address the selection of Elders for the Senate of Elders, the selection of another EAC and the selection of a new electoral officer.

[21] The Band meeting was held and attended by 35 Band members. From then on the Applicant attempted to establish a parallel structure, and continued to occupy the Band office. There also followed a series of allegations and counter allegations about the use of pay cheques, the access to computer records and general mayhem in the administration of Band affairs as the Applicant refused to recognize the legitimacy of the EAC's decision.

[22] Ultimately a Nomination Meeting was held (notice having been given). The Applicant was away and unable to return for the meeting. The result of the meeting was that Michael Sewap was acclaimed as Chief for the remainder of the term ending in April 2014. The Applicant was not even nominated for the position of Chief.

[23] The Council acknowledged the election of the new Chief and Aboriginal Affairs and Northern Development Canada was advised of the band council resolution [BCR] confirming the new Chief.

[24] Following the April 4 meeting where the EAC decided to remove the Applicant based on the Petition, the EAC had a further meeting on April 12. That meeting went on to discuss the Applicant's attempt to establish a new EAC.

[25] The Applicant received a letter outlining the discussions at the April 12 meeting. The letter concludes that the Applicant violated the Election Regulations, and that she had become ineligible to hold office because of violation of the Election Regulations. It went on to make allegations of malfeasance, favouritism, paying people with prizes to attend public meetings, improper use of the Band office and improper personal conduct.

[26] The end result of this Band turmoil is that the Applicant was removed as Chief by reason of a petition for her removal and that a new Chief was appointed by acclamation.

[27] Against this background, the Applicant seeks judicial review to overturn the actions of the EAC.

III. ANALYSIS

[28] While the parties have framed the issues slightly differently, the issues are:

- (a) Was the EAC's interpretation of the Election Regulations and decision within its powers?
- (b) Was there any breach of procedural fairness?
- (c) What remedy, if any, is appropriate?

A. *Standard of Review*

[29] In *Martselos v Salt River Nation #195*, 2008 FCA 221, 168 ACWS (3d) 224 [*Martselos*], at paragraph 32, the Federal Court of Appeal held that an EAC's interpretation of the Election Regulations is reviewable on a standard of correctness.

[30] The Respondents suggest that the standard is reasonableness based on the Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers'*]. The *Martselos* decision was rendered before the *Alberta Teachers'* decision. The nature of the decision, decision making process and decision maker in the present case is very different than that in the *Alberta Teachers'* case such that the standard of review analysis is not completely applicable to a political/legal process of Band governance.

[31] In my view, this Court is bound in principle by the *Martselos* decision. While the EAC may lack expertise in matters of statutory interpretation, it does have expertise in the area of custom and has knowledge of the practices and conduct flowing from its Election Regulations. In this area, the Courts recognize a degree of flexibility and commonly accepted interpretation and implementation of election regulations and other provisions of band governance (see *Francis v Mohawk Council of Kanesetake*, 2003 FCT 115, [2003] 4 FC 1133; *Whitehead v Pelican Lake First Nation*, 2009 FC 1270, 360 FTR 274, at paragraphs 1, 2 and 55).

[32] While the interpretation of the Election Regulations must be correct, the interpretative aids and the application of the law must exhibit recognition and acceptance of custom law and application where it does not directly conflict with the wording of the Election Regulations.

[33] The structure and wording of the Band's Election Regulations is less than ideal and is in need of review. However, the practice of petitions of removal had been an accepted part of the Election Regulations as evidenced by the affidavits filed in this matter.

[34] On any issue of procedural fairness, the usual standard of correctness is applicable (*Metansinine v Animbiigoo Zaagi'igan Anishinaabek First Nation*, 2011 FC 17, 382 FTR 127).

B. *Interpretation and Application of the Election Regulations*

[35] The Applicant argues that the EAC's authority under the Election Regulations is limited to directing the Elections Officer to request a Chief or Councillor's resignation. That power of request is conditional upon receipt of a petition signed by 50% + 1 person of the number of people who voted in the last election.

[36] The Applicant also claims that as part of the removal process, the EAC is required to investigate the complaints made in the petition – failure to comply with the Election Regulations; failure to function in accordance with Band Council Policy or Band Constitution; inefficiency or ineffectiveness and lack of interest [the “enumerated grounds”].

[37] The Applicant reads the removal process as incorporating all the steps contained under the Election Regulations' heading – ELECTION APPEALS. These steps including lodging an appeal or petition; an investigation of any discrepancies; EAC confirmation of the grounds for removal; if the appeal or petition is found valid; removal by petition of 50% + 1 and a direction to the Electoral Officer to request resignation of a Chief or Councillor.

[38] It is evident from past practice and in this case specifically that the EAC did not read the Election Regulations in this matter and concluded that there was a right or duty to remove if a petition was filed by the requisite number of electors; such petition being based on the “enumerated grounds” for removal.

[39] In my view, the EAC's interpretation and application of the Election Regulations must be upheld. The first part of the ELECTION APPEALS provisions deals with discrepancies in the method of elections. The duty to investigate is conditional on an allegation of discrepancies in the vote for Chief and/or Councillor. The EAC is then empowered to act accordingly in the face of an improper election – such further action is not stated but must include the power of removal.

[40] The power to remove by reason of petition is a separate process involving a petition based on the enumerated grounds, a determination of the validity of the ground, and if valid, the EAC can (but is not required to) remove the Chief or Councillor and a by-election process is initiated.

[41] The EAC's determination of the validity of the grounds for removal does not specify an investigation or hearing or any other specific process. The process for determining validity is a

matter of discretion. In a small remote community some extensive discovery process would not appear necessary; the EAC must be presumed to be in touch with its community.

[42] The fact that this removal process, which is somewhat akin to a ‘recall’ process, is contained under the heading ELECTION APPEALS may be confusing but it clearly engages a process which is quite distinct from a challenge to an election process. The heading does not govern the substance of the distinct processes covered within the heading.

[43] I would note that the letter of April 12 from the EAC seems to broaden the basis for removal so as to engage misconduct as specified under VACANCY – b.iii. The purported effect would be to render the Applicant ineligible to hold office for a three (3) year period. That would make the Applicant ineligible to run in the next Band election. The EAC, from notes of its April 4 meeting, may have believed that the Applicant was subject to a three-year bar but a proper interpretation of the Election Regulations does not support that belief.

[44] The April 12 letter and any effort to expand the basis for removal are of no force and effect. The decision of April 4 removed the Chief on the basis of a petition. The EAC cannot engage in ‘piling on’ by adding new grounds for a removal which had already occurred.

[45] Therefore, subject to the issue of procedural fairness discussed below, the EAC’s decision to remove the Chief from office was valid.

C. *Procedural Fairness*

[46] The Applicant alleges breach of procedural fairness on the grounds of failure to investigate and failure to provide the Applicant an opportunity to rebut the allegations against her. The Court has already addressed the matter of a duty to investigate. The manner of the EAC's determination of the validity of the enumerated grounds is a matter of discretion subject to the appropriate procedural safeguards.

[47] The enumerated grounds is a mix of wrongful conduct (failure to comply with regulations and constitution) and political or quasi political assessment (ineffectiveness, inefficiency, lack of interest).

[48] Depending on the grounds relied upon, the nature of procedural fairness will vary. Where misconduct is alleged, the fairness element will be more substantive. Where the allegation is political, such as exhibiting lack of interest in the position, the degree of procedural fairness is less.

[49] In the normal course, a person may be entitled to rebut or address the allegations; however, these procedural protections must be viewed in the context of these facts.

[50] The Applicant, while not being accorded a formal opportunity to be heard, never asked for that opportunity. In fact, the Applicant's reaction was to reject the EAC's authority to deal with the Petition, to challenge the EAC's authority and to set up a parallel structure to address the actions and legitimacy of the incumbent EAC.

[51] The Applicant refused to even accept service of the Petition, yet she knew of its existence and knew or ought to have known of its substance. The Electoral Officer met twice with the Applicant before the April 4 decision. Each time the Applicant refused to address the Petition. She can hardly complain about lack of knowledge or opportunity to rebut the enumerated grounds.

[52] The Applicant, having chosen to challenge the legitimacy and authority of the EAC, cannot complain that she was not given a formal opportunity to a hearing – an invitation to attend could be said to be a matter of form over substance. The Applicant had her opportunity and she chose a course of conduct which deprived herself of such an opportunity to be heard.

[53] Therefore, I conclude that to the extent that procedural fairness was in issue, the Applicant availed herself (or failed to avail herself) of such procedural rights as she desired. There was no breach of procedural fairness.

IV. CONCLUSION

[54] For these reasons, this judicial review will be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-770-13

STYLE OF CAUSE: DELAPHINE BIGHETTY v BARREN LANDS FIRST NATION, COUNCILLOR ROY BIGHETTY, COUNCILLOR BILLY LINKLATER, COUNCILLOR ROBERT MERASTY and MICHAEL SEWAP

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: DECEMBER 5, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** PHELAN J.

DATED: FEBRUARY 21, 2014

APPEARANCES:

J.R. Norman Boudreau
Earl C. Stevenson

FOR THE APPLICANT

Robert A. Watchman
Karen R. Poetker

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Boudreau Law
Barristers and Solicitors
Winnipeg, Manitoba

FOR THE APPLICANT

Pitblado LLP
Barristers and Solicitors
Winnipeg, Manitoba

FOR THE RESPONDENTS