



Date: 20161019

Docket: T-74-16

Citation: 2016 FC 1165

Montréal, Quebec, October 19, 2016

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

WARREN SCOTT McCALLUM

Applicant

and

**PETER BALLANTYNE CREE NATION
PETER BALLANTYNE CREE NATION
COUNCIL OF THE ELDERS,
DARLENE WATSON, FLORENCE CLARKE,
FLORENCE McKAY, ELIAS SEWAP,
GEORGE P. CLARKE, PHILIP RAY SR.,
ELIZABETH MERASTY,
SAMSON BALLANTYNE**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] The Peter Ballantyne Cree Nation (PBCN) is a First Nation band in northern Saskatchewan comprised of 8 communities. In April 2015, it held an election, and Mr. Warren

Scott McCallum, the applicant, was then re-elected as Councillor for the PBCN Urban area, pursuant to the terms of the *Peter Ballantyne Cree Nation Election Code* of 2014 [the Election Code].

[2] However, on November 16, 2015, PBCN Urban Members sent Chief Peter A. Beatty and Council a letter requesting Mr. McCallum's immediate suspension without pay from his elected position, and attached to their letter a Petition to Remove Councillor Warren McCallum from Office [the Petition] bearing 207 signatures. More signatures were added afterwards, bringing the total numbers of signatories to 260.

[3] On December 10, 2015, after executing removal procedures under the Election Code, the Council of Elders decided to remove Mr. McCallum from his elected position as Councillor, effective the same day, decision challenged in these proceedings.

[4] Mr. McCallum thus seeks his reinstatement as Councillor for the PBCN Urban area and compensation for the earnings lost from December 13, 2015 to the date of the filing of his application, representing an amount of \$7,400.00, and interests.

[5] As exposed hereinafter, the Court will allow the application, being convinced there is no evidence the Petition that prompted the Council of Elders to consider Mr. McCallum's removal from office was signed by 25% of the Electors of the affected community, as required under paragraph 12(h) of the Election Code. This flaw is, in the Court's view, fatal to the removal process.

II. Relevant context

[6] First the parties agree that it is within this Court's jurisdiction to hear this matter (*Sparvier v Cowessess Indian Band #73*, [1993] 3 FC 142).

[7] As per its section 1, the Election Code is authorized by the Electors of the PBCN, and it represents an agreement and covenant between the people of the PBCN. This Election Code contains the proclamation of Inherent Rights, and provisions pertaining, *inter alia*, to the eligibility to vote, the eligibility to run for the position of Chief or Councillor, the term of office, the election and nomination procedures, the Appeal Tribunal, the standard of conduct for the Chief and the Councillors, and at play in these proceedings, provisions on the role and authority of the Council of Elders and on the process leading to the Chief or a Councillor's removal from office.

[8] The parties also agree that the Council of Elders, as per section 6 of the Election Code, reproduced in annex, have a mentoring and guidance role as they must "ensure that Peter Ballantyne Cree Nation Chief and Council are abiding by the Standards of Conduct and Oath of Office as contained in this Election Code and the provisions in any PBCN legislation involving the executive."

[9] Section 12 of the Election Code relates to the Removal from office and its paragraph (h) states that a Member may file a complaint against a councillor provided he has a duly signed petition. It is worthy to reproduce paragraphs 12(h) and (k):

REMOVAL FROM OFFICE

12. Once duly elected by Members of the Peter Ballantyne Cree Nation, the Chief and Councillors are accountable to all Members and as such they may be removed from office if they: [...]

h. To file a complaint against a PBCN Councillor, a Member must have a petition signed by twenty five per cent (25%) of the Electors from the affected reserve/community. This petition must be presented to the Chairperson of the PBCN Council of Elders. [...]

k. The decision of the PBCN Council of Elders is final and binding.

[10] The extent of the Council of Elders' authority is disputed in these proceedings, however, it is not in dispute that it must determine if the Petition referred to in paragraph 12(h) meets the required threshold of being signed by 25% of the Electors of the affected community.

[11] Therefore, as stated earlier, on November 16, 2015, PBCN Urban Members sent Chief Peter A. Beatty and Council a letter of complaint requesting Mr. McCallum's immediate suspension without pay and attached to their letter the Petition bearing 207 signatures. More signatures were added afterwards, bringing the total number of signatories to 260.

[12] In a nutshell, the Petition contends that "Councillor Warren McCallum has failed to abide by the Standards of Conduct as cited in the PBCN Election Code of 2014, by violating the Oath of Office and failing to provide a Criminal Record Check at the time of the April 2015 Elections, thereby acting in an dishonorable manner" and provides for certain factual concerns.

[13] On the same day, Chief Peter A. Beatty handed over the PBCN Urban Members' Petition to the Council of Elders, and instructed them to deal with it.

[14] The Council of Elders' first duty is to determine if a petition respects the requirement set at paragraph 12(h), hence that it is signed by 25% of the Electors of the affected community. In this case, the Council of Elders calculated the percentage of signatures using as denominator the number of Electors of the Urban area who had actually voted in the 2015 election instead of the total number of Electors of the Urban area. The Council of Elders justified their action to use the number of voters in the 2015 election as denominator by the fact that the total number of Electors in the Urban area was then not available or unknown.

[15] On November 23, 2015, Mr. McCallum attended a first meeting with the Council of Elders where he was read the Petition for the first time, and asked to answer the concerns. Meetings were again held on November 24 and 25, 2015.

[16] On November 25, 2015, the Council of Elders held an internal meeting and decided to suspend Mr. McCallum without pay. As per provisions of paragraph 12(g) of the Election Code, on December 2, 2015, the Council of Elders met with Chief Beatty and Vice-Chief Harold Linklater; on December 3, 2015, the Council of Elders held a community meeting and finally, on December 10, 2015, it rendered the final decision removing Mr. McCallum from office.

[17] Mr. McCallum's position then being vacant, a PBCN Urban By-Election was called for February 4, 2016. However, on February 3, 2015, our Court granted Mr. McCallum an interim injunction, prohibiting the PBCN from holding a by-election to replace Mr. McCallum as Councillor for the Prince Albert Urban area until further Order of this Court.

III. Issues

[18] The parties ask the Court to determine if Mr. McCallum's removal from office breached procedural fairness and natural justice, if the Council of Elders held the power and authority to remove Mr. McCallum, and finally to determine if the decision to remove Mr. McCallum is reasonable or not.

IV. Standard of Review

[19] The Court agrees with the respondent that the issues of procedural fairness and natural justice attract the correctness standard (*Metansinine v Animbiigoo Zaagi'igan Anishinaabek First Nation*, 2011 FC 17 [*Metansinine*] at para 16; *Henry v Roseau River Anishinabe First Nation*, 2014 FC 1215 at para 29). The issue as to whether the Council of Elders has the authority to remove Chief and Council, absent addiction concerns, attracts the reasonableness standard as the Court must interpret a First Nation election regulation (*Orr v Fort McKay First Nation*, 2012 FCA 269 at paras 10-11; *D'Or v St. Germain*, 2014 FCA 28).

[20] The issue pertaining to the lack of evidence confirming the number of Electors who are required to sign the Petition so as to form at least 25% of the Electors of the affected community is a question of mixed law and fact, and thus attracts the reasonableness standard (*Democracy Watch v Campbell*, 2009 FCA 79).

V. Submissions of the Parties

A. *Submissions of the Applicant*

[21] Mr. McCallum submits essentially that the respondent breached procedural fairness and natural justice, that the Council of Elders did not have the power and authority to remove him from his position of Councillor and that the issues raised in the Petition itself were groundless. Mr. McCallum submitted at the hearing that all the issues attracted the reasonableness standard.

[22] On the first issue, Mr. McCallum submits essentially that (1) a fair notice should have been given (*Metansinine*); (2) there is no evidence that the Petition was signed by 25 % of the Electors of his community; (3) the Council of Elders could not remove him before examining the financial reports and statements and should thus have waited for all the necessary information before deciding; and (4) the affidavit material of the respondent was filed by deponents who do not speak the English language and did not understand what they were signing.

[23] Mr. McCallum submits in particular that the Petition that prompted the PBCN Council of the Elders to consider his removal was in breach of paragraph 12(h) of the Election Code as it did not contain the signatories of at least 25% of the Electors from his Urban area, that many of the signatories were not members or residents of his Urban area and relies on the paragraph 12(g) of the Election Code which states that “a Member must be a Resident in the reserve, community or surrounding areas, to be eligible to vote for the Council position in that community.” He further submits that no evidence was presented by the respondent confirming the total number of eligible Electors which would be required to form the 25% of signatories to the Petition and that no evidence was presented of an announcement or a practice to advise the voters that the Petition was circulating.

[24] On the second issue, Mr. McCallum submits that (1) the role of the Council of Elders is essentially to mentor and guide the Chief and Council and not to remove Chief and Council from office, unless addiction issues are raised; and (2) the Council of Elders should recognize or want the authority which is in dispute, and that they do not all so recognize or want this authority (cross-examination of Philip Morin, from page 49 to page 60, as well as on the cross-examinations of John Dorion and Elias Sewap who purportedly acknowledged that the removal of a Councillor from office should be left to Chief and Council).

[25] On the third issue, Mr. McCallum contests the issues raised in the Petition itself as he conducted his duties as Councillor diligently and opposes the accusation of his misappropriation of funds.

B. *Submissions of the Respondent, the Council of Elders*

[26] The respondent's Memorandum of Fact and Law is the one prepared on behalf of the Council of Elders, the other respondents not having participated.

[27] The Council of Elders submits that (1) there was procedural fairness in the decision to remove Mr. McCallum as Urban Councillor; (2) it has the power and authority to remove Chief and Council under the Election Code; and (3) its decision was reasonable.

[28] On the first issue, the Council of Elders does not dispute that Mr. McCallum has the right to natural justice and procedural fairness, but submits that the requirements in that regards have been met here. It relies on the criteria set out by the Supreme Court in *Baker v Canada (Minister*

of Citizenship and Immigration), [1999] 2 SCR 817 [*Baker*] and *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165 and points out that it was not part of the Petition process nor aware of it, that it received the Petition, determined there were sufficient signatures to proceed with the complaint, provided Mr. McCallum with notice, consulted with Council members, met with Mr. McCallum on three occasions to provide him with fair opportunity to respond to the concerns and issues, proceeded to have an internal meeting, proceeded to have a further meeting with Chief Beatty and proceeded to hold a community meeting and that the decision was made in accordance with the provisions of the Election Code.

[29] In regards to the determination that there were sufficient signatures to proceed with the complaint, and central to these proceedings, the Council of Elders acknowledged that the Petition should represent at least 25% of the Electors of the affected community and that they calculated the percentage against the number 1008, being the number of votes registered for the Urban area in the 2015 election as per the 2015 Elections Final Report. They used this reference based on the fact that, at the time of the decision, there was no conclusive information as to the number of eligible voters residing in the Urban area because the list of eligible Electors had been destroyed after the election. Mr. McCallum speculated there may be 3,500 to 4,000 members living off reserve, but the respondent asserts there is no evidence to support this number or to support the claim that some of the signatories to the Petition are not Urban Members of the PBCN.

[30] With this chain of events, the respondent submits that the Council of Elders carefully complied with section 12 of the Election Code as it is clear the applicant received notice and was aware of the concerns and issues as outlined in the Petition. It is the applicant who refused to

cooperate with the Council of Elders during this process and who rather decided to focus his efforts on challenging the authority of the Council of Elders.

[31] Regarding Mr. McCallum's argument that there is no evidence of an announcement or a practice to advise the Electors that the Petition was circulating, the respondent submits that there is no requirement in the Election Code that the Council of Elders announces the Petition or engages in a practice to advise the Electors that a petition is circulating and refers to paragraph 12(h) of the Election Code. Furthermore, the respondent submits that a reasonable apprehension of bias could be raised if there was such a requirement for the Elders to be involved in the process.

[32] The respondent also rejects Mr. McCallum's argument that a fair notice to the potential Electors would be required in a fair and just process and distinguishes *Metansinine* from the present case. Indeed, according to the respondent, the Council of Elders, unlike a council of a First Nation, is not mandated to play any role in the process of voting in Chief and Council. The role of the Council of Elders is rather limited to providing guidance and support to Chief and Council, ensuring that Chief and Council are abiding by the Standards of Conduct and Oath of Office, hearing complaints and requesting that an elected official seek professional assistance for substance abuse, provided that certain requirements are met. Moreover, the respondent recalls that the Council of Elders invited the Urban Members of PBCN to attend a community meeting where all members could speak and voice their concerns and stresses that the Election Code does not expressly require a referendum or vote in order to remove a Councillor.

[33] On the second issue, the Council of Elders submits that section 12 of the Election Code confers the power to hear and decide upon a complaint, and such power was upheld when Chief Beatty requested the Council of Elders to deal with the Petition.

[34] The respondent disagrees with Mr. McCallum's submission that it does not have the power and authority to remove Chief and Council unless addiction issues are raised and first addressed with support. According to the respondent, even if abuse of alcohol is specifically addressed in paragraph 12(j) of the Election Code, it is not the only ground to remove Chief and Council, such grounds for removal being contained in paragraphs 12(a) to (f).

[35] Furthermore, while Mr. McCallum relies on the cross-examinations of Mr. Philip Morin, Mr. John Dorion and Mr. Elias Sewap to submit that "a majority of the Elders do not purport to have the authority to remove Chief and Council from office, but rather, are required to play a very important mentoring and guiding role", the respondent rather argues that Mr. Morin was referring to personal experience he had in the past with unrelated matters for mischief and alcohol abuse, and made it clear that he was expressing a personal opinion and not necessarily the opinion of the Council of Elders.

[36] On the third issue, the respondent submits that if this Court determines that the decision of the Council of Elders was made in accordance with the principles of procedural fairness and natural justice, and that the Elders do have the power and authority to remove Chief and Council under the Election Code, it must then determine whether the decision to remove Mr. McCallum from office was reasonable.

[37] The respondent submits that the decision of the Council of Elders to remove Mr. McCallum from office was reasonable. To support its position, the respondent draws similarities between the present case and the decision *Pellissey v Pehdzeh Ki First Nation*, 2014 FC 1214 at paragraph 3 where the applicant “was aware of the allegations against her, informed of the proceedings, and given a chance to defend herself. Further, the First Nation’s decision was based on evidence relating to [the applicant’s] conduct leading up to the meeting and, therefore, was not unreasonable”.

[38] The respondent furthermore submits that there is evidence before the Court to indicate misconduct by Mr. McCallum, including the Petition which outlined specific concerns and issues, speeches by Urban Members during the community meeting held on December 3, 2015, as well as written letters submitted by Urban Members of the PBCN which are attached to the affidavit of Darlene Watson.

[39] The respondent does not agree with Mr. McCallum’s submission that its affidavit material was filed by deponents who do not speak the English language, did not understand what they were signing, and did not understand the process or understand that they were adopting the affidavit evidence of Darlene Watson. The respondent argues that because John Dorion does not read, the Notary Public who witnessed the affidavit of John Dorion, read him the affidavit. The respondent also submits that many statements made by Mr. Dorion during his cross-examination illustrate that he did understand and accept the affidavit of Darlene Watson, and that he provided several replies in the English language (respondent’s Memorandum of Fact and Law at paras 74-76). Similarly, the respondent submits that Elias Sewap confirmed that the affidavit of

Darlene Watson had been read to him and that he has shown some ability to speak the English language. Furthermore, there is no issue raised by the applicant regarding the affidavits of Darlene Watson, Philip Ray, Florence McKay, Elizabeth Merasty, and Florence Clarke.

(1) Costs

[40] While the applicant is requesting costs on a solicitor-client basis, the respondent submits that “[t]he Supreme Court has held that solicitor-and-client costs are generally awarded only in circumstances where there are been reprehensible, scandalous, or outrageous conduct on the part of one of the parties” and refers in particular to *Baker* (respondent’s Memorandum of Fact and Law at para 79). The respondent contends that such circumstances are not present in this case.

VI. Decision

[41] The Court will limit its decision to one issue that allows for granting of the present application.

[42] The parties agree that the Election Code is the agreement and the covenant between the people of the PBCN.

[43] In turn, section 12 of the Election Code sets the process for removal of office, and its paragraph h) outlines the requirement to set in motion the removal of a councillor from his duly elected position. Hence, a Member’s complaint must be accompanied by a petition signed by

25% of the Electors of the affected community, and the respondent admits that this number refers to all the Electors of the affected community.

[44] However, to assess the 25% threshold, the Council of Elder was not provided with the number of Electors in the Urban area, but rather with the number of votes registered in the 2015 Elections (1008), as the number of Electors was unavailable, the lists having been destroyed after the 2015 election. The Council of Elders had clearly no real and precise indication as to the total number of Electors of the Urban area on which to base its calculation.

[45] The removal from office of a duly elected official and the departing from the agreement and covenant between the people of the PBCN are not trivial issues.

[46] The Council of Elders holds the important duty of safeguarding the process that trumps the removal from office of a councillor. The Election Code is unequivocally clear in requesting the Petition be signed by 25% of the Electors of the affected community, and failing a precise calculation, the process should, in my view, fail. The reason raised to justify the departure from the clear wording of the relevant section is unacceptable given the gravity of the consequences for the Councillor (*Prince v Sucker Creek First Nation #150A*, 2008 FC 1268 at paras 48-49, *aff'd* 2009 FCA 40).

[47] Regardless of the standard of review applicable in this situation, this flaw in the process is, in the Court's view, unreasonable, incorrect and unfair. It is fatal and allows for granting of the application and setting aside of the Council of Elders's decision of December 10, 2015.

[48] Mr. McCallum has asked for costs on a solicitor-client basis and, at the hearing, for costs to compensate damages resulting from his removal from office.

[49] The Court will grant neither, as first, the evidence does not show the respondent's conduct during the litigation as being reprehensible, scandalous, or outrageous so to attract costs on a solicitor-client basis (*Baker* at para 77) and second, as the Court has no jurisdiction to grant damages in an application for judicial review context failing conversion of the application into an action (*Hinton v Canada (Minister of Citizenship & Immigration)*, 2008 CAF 215 at para 45; *Sivak v Canada (Minister of Citizenship and Immigration)*, 2011 FC 402 at para 43) as per section 18.2 of the *Federal Courts Act*, RSC, 1985, c F-7, which has not been raised here.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted.
2. The December 10, 2015 decision of the Council of Elders is set aside.
3. Mr. McCallum is reinstated as Councillor.
4. With costs to the applicant.

“Martine St-Louis”

Judge

ANNEX

COUNCIL OF ELDERS

6. The following provisions shall apply to the Council of Elders:

- a) The main purpose shall be to provide guidance and support to Chief and Council. The purpose of the PBCN Council of Elders shall be to ensure that Peter Ballantyne Cree Nation Chief and Council are abiding by the Standards of Conduct and Oath of Office as contained in this Election Code and the provisions in any PBCN legislation involving the executive. To be clear, the Elders shall not vote in Chief and Council business.
- b) Elders shall be nominated in each respective community and elected by the Members. The Elder(s) with the most votes from each community will then be declared as the representative on the PBCN Council of Elders. In the event that only one Elder is nominated from a reserve/community, that Elder shall be declared the representative on the PBCN Council of Elders for that reserve/community.
- c) The PBCN Council of Elders will select a Chairperson to oversee matters within the PBCN Council of Elders and will be the primary person responsible to call meetings and/or for PBCN members to direct their appeals/complaints.
- d) Elders Council shall not be involved in the PBCN Chief and Council election appeal process.
- e) The Council of Elders will consist of the following members: Two (2) for Pelican Narrows Reserve; Two (2) Sandy Bay Reserve; Two (2) for both Southend and Kinoosao Reserve; one (1) for Amisk Lake Reserve; one (1) for Sturgeon Landing Reserve; two (2) for Urban Members, two (2) for Deschambault Lake.
- f) The PBCN Council of Elders shall be in place for the duration of the term of office of Chief and Council which is deemed to be from the date of the Election until the dissolving of Peter Ballantyne Cree Nation Chief and Council activities and authorities prior to the next duly called General Election.

- g) All costs incurred by the PBCN Council of Elders will be covered by Peter Ballantyne Cree Nation.
- h) PBCN Council of Elders will be required to follow the Standards of Conduct as set out in section 11 in this Election Code.
- i) PBCN Council of Elders will have their own Guidelines and Procedures Handbook to follow for the duration of the term of office of Chief and Council.
- j) PBCN Council of Elders will be required to follow the Standards of Conduct as set out in Section 11 of the Election Code.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-74-16

STYLE OF CAUSE: WARREN SCOTT McCALLUM AND PETER
BALLANTYNE CREE NATION ET AL.

PLACE OF HEARING: PRINCE ALBERT, SASKATCHEWAN

DATE OF HEARING: OCTOBER 12, 2016

JUDGMENT AND REASONS: ST-LOUIS J.

DATED: OCTOBER 19, 2016

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