Federal Court  Cour fédérale

Date: 20191231

Docket: T-388-19

Citation: 2019 FC 1663

Ottawa, Ontario, December 31, 2019

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

DARLENE THOMAS

Applicant

and

ONE ARROW FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Darlene Thomas was a candidate for the position of Chief of One Arrow First Nation [One Arrow]. Because of a mistake made by One Arrow's Election Officer, her name was omitted from the ballot. She brought an appeal against the results of the election. One Arrow's election appeal process is to be presided over by a Justice of the Peace. However, a Justice of the Peace declined to act, because the provincial legislation that creates her office does not give her the power to enforce First Nation election laws. As a result, the appeal process became unworkable.

[2] Ms. Thomas then brought an application for judicial review to this Court, seeking several remedies with respect to both the Election Officer's mistake and the council's conduct after they learned that the appeal process was unworkable.

[3] I conclude that Ms. Thomas was wrongly excluded from the ballot and that this omission could have affected the result of the election. In normal circumstances, this would usually entail the calling of a new election. I decline to do so, however, as the next general election is set to take place in less than three months. I nevertheless award Ms. Thomas the costs of this application.

I. Background

[4] The elections for the Chief and council of One Arrow are governed by the *One Arrow First Nation Custom Election Regulations* [Regulations] adopted in 1981.

[5] Ms. Thomas is a member of One Arrow and was a candidate for the position of Chief in the March 2017 elections. Unbeknownst to Ms. Thomas, after entering the race on March 17, 2017, someone posing as her left a message on March 18, 2017 on the electoral officer's answering machine stating, "My name is Darlene Thomas and I'm withdrawing my name as candidate for Chief." The electoral officer unsuccessfully attempted to contact Ms. Thomas, and then removed her name from the ballot. Both parties now agree that this was contrary to section 26 of the Regulations, which requires that the withdrawal of a candidate be made in writing. The election proceeded without Ms. Thomas's name on the ballot and Ms. Tricia Sutherland was elected as Chief.

[6] The Regulations provide for an appeal process. Election appeals are decided by a general meeting of One Arrow members, presided by a Justice of the Peace. Sections 47–54 set forth the procedure. It is not necessary to describe that procedure in detail here. Suffice it to say that the role of the Justice of the Peace is to act as an impartial chair, to make certain decisions regarding which statements may be put before the general meeting and, generally, to ensure the integrity of the process. The final decision, however, is made by the members voting by secret ballot. The process may be compared, in some respects, to a jury trial.

[7] Ms. Thomas sought to appeal the results of the March 2017 election. She sent a notice of appeal to One Arrow's administration. At that time, no Justice of the Peace had been appointed to oversee the appeal process, despite the reference, in section 47 of the Regulations, to a Justice of the Peace who had been "previously appointed."

[8] Thus, the council instructed its lawyer, Mr. Pandila, to request the appointment of a Justice of the Peace. Mr. Pandila then had discussions with the Chief Judge of the Saskatchewan Provincial Court. Given the uncertainty as to the jurisdiction of Justices of the Peace to chair a First Nation's election appeal process, the Chief Judge asked Supervising Justice of the Peace Melissa Wallace to hear One Arrow's application and to make a decision.

[9] One Arrow made submissions in support of its application for the appointment of a Justice of the Peace. Ms. Thomas indicated that she agreed with those submissions. Nevertheless, Justice of the Peace Wallace held that Saskatchewan's *Justices of the Peace Act*, 1988, SS 1988-89, c J-5.1, does not allow Justices of the Peace to enforce a First Nation's election laws.

[10] When that decision was rendered, and after conferring with his client, Mr. Pandila informed counsel for Ms. Thomas that One Arrow would not be "taking any further steps."

[11] Ms. Thomas then filed an application for judicial review before the Federal Court. She is seeking an order quashing One Arrow's decision "to refuse to observe and carry out its appeal process" on several grounds as well as an order quashing the decision of the Electoral Officer to remove Ms. Thomas's name from the ballot.

II. Analysis

A. *The Decision under Review and the Nature of the Application*

[12] Given the somewhat unusual manner in which the appeal process unfolded in this case, it is necessary to clarify what decisions Ms. Thomas challenges and to explain the basis for this Court's intervention.

[13] Ms. Thomas impugns three decisions: (1) the Electoral Officer's decision to remove her name from the ballot; (2) One Arrow's council's decision not to take any further steps after the Justice of the Peace declined to act; and (3) Chief Sutherland's refusal to resign.

[14] These three decisions were intimately related to the electoral process. There can be no serious dispute that this Court has jurisdiction to review decisions made under a First Nation's election laws, including where these laws are said to be "customary." See, for example, *Canatonquin v Gabriel*, [1980] 2 FC 792 (CA); *Ratt v Matchewan*, 2010 FC 160 at paragraphs

96–106; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paragraphs 29–63.

[15] The more difficult issue is to decide which of those decisions should be the primary focus of this application. In normal circumstances, this Court would not review a decision made by a First Nation's electoral officer. This is because customary election laws typically provide for an appeal process. When such a process exists and provides the applicant with an adequate alternative remedy, this Court will usually decline to intervene until that appeal process has been exhausted: *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 at paragraphs 16–19 [*Whalen*].

[16] In this case, however, the appeal process became ineffective, through no fault of the parties. It did not provide an adequate alternative remedy. Thus, this Court can review the Electoral Officer's decision. Indeed, that decision is the root of the dispute between the parties. The other impugned decisions were related to the process for correcting the initial decision. As this Court's review of the initial decision provides an effective remedy, I will say as little as possible about the two other decisions.

[17] It is true that Rule 302 of the *Federal Courts Rules*, SOR/98-106, provides that an application for judicial review shall be made against a single decision. Nevertheless, an exception is made where the impugned decisions form part of a "continuous course of conduct:" *Parenteau v Badger*, 2016 FC 535 at paragraph 15. This is what happened here. Moreover, Ms.

Thomas cannot be blamed for the uncertainty regarding which decision should be the primary focus of her application.

B. *The Electoral Officer's Decision*

[18] As I mentioned above, the Electoral Officer decided to remove Ms. Thomas's name from the ballot after purportedly receiving a message from Ms. Thomas on her answering machine to the effect that she was withdrawing from the election. The Electoral Officer, who does not reside in the community, testified that she tried unsuccessfully to reach Ms. Thomas by telephone. Ms. Thomas testified that she did not receive any phone call from the Electoral Officer.

[19] Both parties now agree that the Electoral Officer breached section 26 of the Regulations, which requires that the withdrawal of a candidacy be made in writing. The rationale for that rule is easy to grasp. Withdrawing a candidacy is a serious matter that affects not only the candidate who withdraws, but also, quite possibly, the result of the election. Requiring the candidate's signature on a written document helps prevent fraud and constitutes evidence if the process is later challenged. The Electoral Officer herself admitted, in cross-examination, that she acted in a manner contrary to section 26 of the Regulations and that the election for the position of chief was therefore unfair. I would simply add that the Electoral Officer's efforts to reach Ms. Thomas are immaterial. When the Electoral Officer made the decision not to include Ms. Thomas's name on the ballot, she simply did not have any written, signed withdrawal of Ms. Thomas's candidacy.

[20] But counsel for One Arrow argues that this does not end the matter. Under One Arrow's appeal process, the membership votes by secret ballot to allow or dismiss the appeal. In choosing how to vote, members may take into consideration whether, in their view, the breach of the Regulations would have affected the outcome of the election. This mechanism is akin to the provision of the election laws of other First Nations that require the election appeal committee to decide whether a breach of those laws affected the outcome of the election and, if so, to call a new election. In this connection, in *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraphs 22 and 55–56, [2018] 4 FCR 467, I noted that Indigenous decision-makers are in a good position to make findings about such issues, given their knowledge of the political views of members of their communities.

[21] That advantage, however, is now lost. One Arrow's appeal process has become ineffective. Neither party proposed an alternative manner of making it work. They are not asking me to return the matter to any form of appeal process. As a result, I myself must decide whether the omission of Ms. Thomas's name from the ballot affected the outcome, based on the record before me.

[22] The omission of Ms. Thomas's name from the ballot was a very serious breach of the Regulations. It restricted the range of choices available to One Arrow electors. If electors had been able to vote for Ms. Thomas, the outcome of the election may well have been different. For example, Ms. Thomas could have received enough votes to win. Another possibility is that the runner-up would have won if enough electors who voted for Chief Sutherland had voted for Ms. Thomas instead. As Chief Sutherland won by a margin of 25 votes, this possibility cannot be

excluded. I see no basis in the evidence before me for finding otherwise. Indeed, under cross-examination, the Electoral Officer admitted that the election was unfair and did not suggest that her breach of section 26 did not affect the result.

C. *One Arrow's Failure to Follow the Appeal Process*

[23] Ms. Thomas's notice of application seeks an order quashing One Arrow's decision "to refuse to observe and carry out its appeal process." Although the argument presented in her memorandum is sometimes difficult to follow, she seems to be impugning the council's decision not to take any further steps once the Justice of the Peace decided that she had no jurisdiction to participate in a First Nation's appeal process.

[24] The difficulty with this argument is that Ms. Thomas herself did not then, and does not now, propose any practical manner of breaking the deadlock resulting from the Justice of the Peace's decision.

[25] Indeed, both parties appeared to take the position that strict compliance with the Regulations was required and that the unavailability of a Justice of the Peace rendered the appeal process ineffective. For that reason, I will refrain from expressing an opinion as to what could have been done to make the process work without formally amending the Regulations and whether there is a valid analogy with cases such as *Mercredi v Fond du Lac Denesuline First Nation*, 2018 FC 1272. I simply note that election laws can only be amended by the broad consensus of a First Nation's members; the First Nation's council has no inherent power to do

so: *St-Onge v Conseil des Innus de Pessamit*, 2017 FC 1179 at paragraphs 72–82; *Whalen*, at paragraphs 47–48.

D. *Failure to Call a New Election*

[26] In light of the failure of the appeal process, Ms. Thomas forcefully argues that One Arrow's council should have called a new election for the position of Chief or that Chief Sutherland should have resigned, which would have produced the same result. Her argument, if I understand it correctly, is that it was not enough for the council to follow the rules; Chief Sutherland and the council had to "do the right thing."

[27] The simple answer to that argument is that the council had no power to call an election outside the framework of the Regulations. At the hearing of this matter, counsel for Ms. Thomas asserted that a First Nation's council has an inherent and unlimited power to deal with the affairs of the First Nation, including the calling of an election. But that is not so. To understand why, it is useful to step back and to consider certain general principles regarding the governance of First Nations communities.

[28] First Nations communities had their own governance structures before the advent of the *Indian Act*, RSC 1985, c I-5. While the *Indian Act* required First Nations (or "Indian bands") to have a council and empowered the government to order that this council be elected according to the Act, traditional governance systems may have continued to exist in parallel to the *Indian Act* council: John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 43. Under the *Indian Act*, councils were never meant to hold unlimited powers.

[29] We now recognize that First Nations are self-governing entities. The most recent pronouncement on the subject is Parliament's statement that "the inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982,* includes jurisdiction" in relation to certain matters: *Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, SC 2019, c 24, s 18.

[30] This does not mean, however, that First Nations councils, whether chosen according to "custom" or elected pursuant to the *Indian Act*, now have unlimited powers. This Court recognizes that First Nations may create or maintain their own governance systems, provided that there is a "broad consensus" among their members: *Bigstone v Big Eagle*, [1993] 1 CNLR 25 (FCTD) at 34; *McLeod Lake Indian Band v Chingee* (1998), 165 DLR (4th) 358 (FCTD). There are several ways of proving such a broad consensus, thus allowing for the continuity of traditional systems while preserving the possibility of transformation: *Whalen*, at paragraphs 33–40. Absent such evidence, however, we should not presume that a First Nation's membership intended to confer unlimited powers to its council. Indeed, the concept of unlimited power can hardly be uncoupled from the Western concept of sovereignty and is unlikely to be appropriate to understand the governance systems of Indigenous peoples: see, in this regard, Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

[31] In this case, I have not seen any evidence of a broad consensus to the effect that the council has an untrammelled power to call an election. Quite the contrary, section 14 of the Regulations sets out a process whereby a general meeting of One Arrow members may call an

election outside the regular three-year cycle. Provisions such as these evince a hierarchy of power between the council and the membership: *Whalen*, at paragraphs 47–48, 72–73 and 78. The council cannot usurp the powers that the membership reserved to itself in the Regulations.

[32] Neither does this Court, in the absence of a specific legal duty or rule, have a general power to call elections in First Nations simply to resolve what appears to be intractable political disagreement: *Felix Sr. v Sturgeon Lake First Nation*, 2011 FC 1139 at paragraph 56; Gadwa v Joly, 2018 FC 568 at paragraphs 29–34, 70–72 [Gadwa].

[33] Moreover, there is no legal rule requiring Chief's Sutherland to step aside or to resign, be it when Ms. Thomas launched an appeal, or when it became apparent that the appeal process was ineffective. In the absence of such a rule, Chief Sutherland's decision to remain in office appears to be a personal decision that is not reviewable in this Court.

E. *Procedural Fairness*

[34] Lastly, Ms. Thomas argues that One Arrow acted in a procedurally unfair way. Again, her argument is not always easy to follow, but it seems that the main basis for her argument is the fact that the council, and Chief Sutherland in particular, acted out of self-interest and showed bias against her when they decided not to take any further steps to make the appeal process work, not to call an election or not to resign.

[35] I reject this argument. There is no doubt that Indigenous decision-makers, including election appeal tribunals, have a duty of procedural fairness where the context so requires, as

Justice Marshall Rothstein, then a member of this Court, recognized in his seminal decision in *Sparvier v Cowesses Indian Band*, [1993] 3 FC 142 (TD).

[36] However, there is no duty of procedural fairness where the decision-maker does not have the power to render a decision in the first place. The council could not itself call an election. Ms. Thomas did not say what the council could have done to make the appeal process work after the Justice of the Peace declined to participate. Thus, it cannot be said that the council acted in breach of procedural fairness by failing to take such unknown steps.

[37] In the absence of a legal duty to resign, Chief Sutherland's decision to remain in office was a purely personal decision, which did not attract a duty of procedural fairness towards other persons, such as Ms. Thomas.

F. *Remedies*

[38] As the Electoral Officer breached the Regulations in a manner that affected the result of the election for the position of Chief, the adequate remedy would normally be to annul the election and to order a new election.

[39] However, the next general election is set to be held in March 2020.

[40] In similar circumstances, this Court exercised its discretionary power not to issue a remedy: *Sparvier v Cowesses Indian Band*, [1993] 3 FC 175 (TD); *Parisier v Ocean Man First*

Nation (1996), 106 FTR 297; *Standinghorn c Atcheynum*, 2007 FC 1137 at paragraph 55; *Gadwa*, at paragraphs 72–73.

[41] By way of analogy, section 16 of the Regulations provides that a by-election need not be held if the chief or a councillor resigns within three months of the next general election.

[42] As I understand the Regulations, if I were to order that a new election for the position of Chief take place forthwith, it would constitute a by-election and would not displace the general election for the positions of Chief and councillors that will take place in March 2020. It would be a significant waste of One Arrow's resources to hold two elections for the same position within a period of less than three months. Although section 16 is not applicable to election appeals, it testifies to a broad consensus that two elections for the same position should not be held within a period of less than three months.

[43] Given the circumstances, I decline to order that a new election for the position of Chief take place.

III. Disposition and Costs

[44] Because Ms. Thomas's name was omitted from the ballot in breach of the Regulations, the 2017 election for the position of Chief of One Arrow First Nation was irregular. It is only for practical reasons that I decline to order a remedy to correct this irregularity – the next general election will be held in less than three months.

[45] Thus, while Ms. Thomas is successful in principle, I am nevertheless dismissing her application for judicial review. Even though she technically loses, however, I am prepared to award her the costs of this application.

[46] The amount of costs is usually assessed according to the tariff found in the *Federal Court Rules*. Typically, the application of this tariff results in an amount that is far less than the actual costs that a party incurred to defend herself. In this regard, Ms. Thomas seeks solicitor-client costs or, in other words, a full indemnity.

[47] In *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119, I discussed the factors that are relevant to the assessment of costs in First Nations governance disputes. I noted that solicitor-client costs are sometimes awarded in such disputes, where the losing party's conduct was reprehensible or where an application helps clarifying the interpretation of a First Nation's election laws. Nevertheless, solicitor-client costs remain the exception.

[48] I am not persuaded that it is appropriate to award solicitor-client costs in this case. One Arrow did not act in a reprehensible manner. Ms. Thomas's assertion that she should never have been forced to begin this application appears to be based on her argument that Chief Sutherland should have resigned or that the council should have called a new election. As I have rejected this argument, it cannot be a ground for awarding solicitor-client costs. Costs will thus be assessed according to the tariff.

JUDGMENT in T-388-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs are awarded to the applicant.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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