

Federal Court



Cour fédérale

Date: 20230216

Docket: T-1109-22

Citation: 2023 FC 229

Ottawa, Ontario, February 16, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

KAREN BIRD

Applicant

and

**PETER BALLANTYNE CREE NATION,
PETER BALLANTYNE CREE NATION BAND COUNCIL, and
PETER BALLANTYNE CREE NATION COUNCIL OF ELDERS**

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Karen Bird, the elected Chief of Peter Ballantyne Cree Nation [PBCN], seeks judicial review of the May 10, 2022 decision [Decision] of the PBCN Council of Elders, removing her as the Chief. On July 5, 2022, an Interim Order was granted, staying the removal of the Applicant as Chief pending the outcome of this Application.

[2] For the reasons that follow, this judicial review is granted as the process followed leading to the Decision to remove the Applicant as Chief was not procedurally fair. I further conclude the PBCN Council of Elders breached the PBCN Election Code, as a petition from 15% of PBCN electors did not accompany the formal complaint received about the Applicant.

I. The Parties

[3] PBCN is composed of eight communities located in northeastern Saskatchewan. PBCN is governed through a Band Council comprised of a Chief and 14 Councillors. The Band Council is made up of representatives elected from each of the eight PBCN communities. PBCN also elects a Council of Elders who provide support and guidance to Chief and Council.

[4] PBCN has enacted a customary electoral code, *An Act Respecting the Government Elections of the Peter Ballantyne Cree Nation* [Election Code], which was updated in 2014. The relevant provisions of the Election Code as set out below.

[5] The Applicant was elected Chief of PBCN in April 2021.

[6] The Applicant named as Respondents PBCN, the PBCN Band Council, the individual Band Councillors, the PBCN Council of Elders, and the individual Council of Elders members.

[7] PBCN is represented by legal counsel and takes no position on the merits of this Application. Its only submissions were on the issue of costs.

[8] Separate legal counsel represents the remaining Respondents. They ask that the judicial review be dismissed and they seek costs against the Applicant.

II. Relevant Background

[9] A PBCN Band Council meeting was held on December 2, 2021. According to the Applicant, she has no recollection of receiving notice of this meeting. Nevertheless, the Applicant was not able to attend as she had family commitments following the sudden death of her brother. When the Applicant reviewed the minutes arising from the December 2 meeting, she noted a number of Band Council Resolutions [BCRs] were passed that purported to overturn BCRs approved at an earlier meeting she chaired in September 2021.

[10] At a Band Council meeting on December 14, 2021, the Applicant confronted Councillor Kevin Morin about the BCRs passed at the December 2 meeting. The Applicant admits that her interaction with Councillor Morin escalated into an argument, and resulted in her telling Councillor Morin to leave the meeting and that she would have him suspended. There is a history of acrimony between the Applicant and Councillor Morin.

[11] On January 20, 2022, the Chair of the PBCN Council of Elders contacted the Applicant and informed her the Council had received a letter. The Chair indicated the Council of Elders wished to discuss the letter with the Applicant. As the Applicant was ill, the meeting was set for February 8, 2022.

[12] At the February 8, 2022 meeting, the PBCN Council of Elders showed the Applicant a letter of complaint signed by a number of PBCN Band Councillors, including Councillor Morin. The PBCN Council of Elders refused to give the Applicant a copy of the complaint letter.

[13] During the meeting, the Applicant explained the December 14, 2021 incident with Councillor Morin. The PBCN Council of Elders also asked the Applicant about unrelated allegations that police had escorted her out of a casino and that she crashed a golf cart while drunk. The Council of Elders did not identify the source of these allegations and the Applicant denied the allegations.

[14] On April 11, 2022, the PBCN Council of Elders held meetings in two PBCN communities, Denare Beach and Sandy Bay. The Applicant was not invited to the meetings. A community member informed her of the Sandy Bay meeting the day it occurred.

[15] On April 14, 2022, the Applicant requested a meeting with the PBCN Council of Elders for guidance and support in dealing with some personal issues. She was advised to attend the Council of Elders meeting already scheduled for that day. During this meeting, the Applicant was given a letter dated April 1, 2022, from the PBCN Council of Elders, requesting her resignation as Chief. The letter states she ignored a quorum of Band Council and engaged in unprofessional conduct and lateral violence. The letter also alleges she violated the PBCN Election Code. The letter makes reference to meetings between the PBCN Band Councillors and the PBCN Council of Elders in February 2022. Finally, the letter requests that she resign by

April 4, 2022, and provide a response in writing by April 8, 2022. The deadlines in this letter had already passed by the time the Applicant was presented with the letter.

[16] During the April 14, 2022 meeting, the allegations of the Applicant's drinking were raised again and she again denied the allegations.

[17] Following the April 14th meeting, the Council of Elders held community meetings on April 19 and April 26, 2022 to discuss the Applicant's alleged behaviour. The Applicant was not advised of these meetings, was not invited to these meetings, and did not attend these meetings. She only learned of one of the meetings from a community member who informed her of the meeting the day it occurred.

A. *Decision Under Review*

[18] On May 10, 2022, the Applicant received a letter from the PBCN Council of Elders, informing her that she was being removed from the Office of Chief. The letter included a direction that a by-election be called to fill the vacancy. The Decision states as follows:

The Council of Elders take their elected positions of support and guidance to Chief and Council very seriously, we received formal complaints from the Office of Peter Ballantyne Cree Nation Council dated January 12, 2022 regarding the following:

- Unprofessional conduct and behaviors of lateral violence displayed by Chief Karen Bird at a meeting of the PBCN Chief and Council and Band staff on December 14, 2021 at the River Cree Resort in Edmonton, AB.
- Quorum of Council decision making and due process according to Band Custom requirements being ignored by Chief Karen Bird.

After completion of PBCN Elders Council review of the concerns contained herein, and with consideration of discussion with Chief Karen Bird on February 8, 2022 and April 14, 2022 and PBCN Councillors February, 8, 9, & 10, 2022 it is the opinion of the PBCN Council of Elders that Chief Bird is in violation of the following codes of conduct.

- a) Agree to uphold the Oath of Office and Declaration as cited in this Election Code.
- b) Provide credible and strong leadership that the Cree Nation members can respect and support.
- c) Communicate and consult with and hear concerns of the membership in matters which affect PBCN Cree Nation Members.
- d) Demonstrates and practice fairness, honour, courage, respectful of justice and have acceptable conduct at all times.
- e) Uphold honesty, consistently working toward the elimination of rumour, deceit, distortion and conflict, while holding office.
- f) Promote and safeguard Treaty and First Nation laws, values and policies.
- g) Communicate with Cree Nation Members on all matters and inform the people of any initiatives.

Standards of Conduct for the Chief and Councillors (PBCN Election Code, 2014, p. 17)

The Council of Elders has met to decide on the removal of Chief (Election Code, 2014, p.17-18) after:

- i) after receiving a complaint of the Councillors of the Peter Ballantyne Cree Nation and meeting with them February 8, 9, & 10, 2022;
- ii) meeting with the Chief on two occasions February 8, 2022 & April 14, 2022;
- iii) no written response received from Chief Karen Bird to Elders Council recommendation letter delivered via email and in person that was dated April 1, 2022;
- iv) PBCN Elders holding community meetings in each of the PBCN communities, the last of which was held April 26, 2022.

As a result of the complaint received from the Councillors of the Peter Ballantyne Cree Nation, and a result of meetings with the Chief, Councillors and PBCN communities, the Council of Elders

has determined that Chief Karen Bird breached the following provisions of the PBCN Election Code, 2014.

- i) has breached her oath of office; 12(a)
- ii) failed to abide by the Standards of Conduct as cited in this Election Code; 12(f)i
- iii) has brought disrespect and dishonor upon her office. 12(f)ii

And as a result, the Council of Elders at a duly convened meeting on Tuesday, May 10, 2022 at the Coronet Hotel in Prince Albert, Saskatchewan in accordance with the powers granted to them under section 12 of PBCN Election Code (2014).

- i) Does hereby remove Chief Karen Bird from the office of Chief effective immediately.
- ii) Band administration is directed to call a by-election to fill the vacancy created.
- iii) The decision of the PBCN Council of Elders is final and binding. 12(k)

[19] On May 31, 2022, the Applicant filed this judicial review Application. She also sought interim injunctive relief to stay her removal as Chief.

B. *July 5, 2022 Order*

[20] On July 5, 2022, Justice Ahmed issued an Interim Order granting a stay of the Applicant's removal from the Office of Chief and prohibiting the holding of a by-election pending the resolution of this Application (*Bird v Peter Ballantyne Cree Nation*, 2022 FC 994 [*Bird*]).

III. Preliminary Issues

[21] At the hearing of this Application, the following two preliminary issues were raised.

- A. Proper style of cause; and
- B. Objections to evidence.

A. *Proper Style of Cause*

[22] The Respondents request the style of cause be amended to remove the PBCN Council of Elders and all of the individually named Respondents. They submit that pursuant to Rule 104(1)(a) of the *Federal Courts Rules*, SOR/98-106 [*Rules*], the individuals named should be removed as they are not proper parties to the proceeding because they are not affected by the outcome of the Application. The Respondents further submit that per Rule 303(1)(a), the PBCN Council of Elders, as the tribunal who made the Decision under review, is not a proper party.

[23] The Applicant explains that individual members of the PBCN Band Council and the PBCN Council of Elders were named as the Applicant was unaware of who initiated the complaint against her. As she alleges bad faith with respect to the complaint, she named the potentially responsible parties personally. She seeks costs against those who acted in bad faith and argues that PBCN should not be responsible for the costs of this Application.

[24] While I understand the Applicant's reasoning in naming individuals, it is not necessary to do so as the Court has the discretion to award costs against individuals when appropriate (*Rules*,

Rule 400(1)). In any event, I have concluded there is insufficient evidence to support a finding of bad faith against any one or more individuals.

[25] Further, as noted in the *Rules*, it is unnecessary to name the decision-making body—the PBCN Council of Elders—in these circumstances it was not inappropriate for the Applicant to name them as a Respondent given the nature of the allegations raised. In particular, the Applicant alleges the PBCN Council of Elders acted beyond their mandate as outlined in the Election Code and she alleges bad faith.

[26] Likewise, as the complaint originated with the Band Council, and considering the Band Council did not have a petition to support the complaint, it was also appropriate for the Applicant to name the PBCN Band Council as a Respondent.

[27] Accordingly, I hereby amend the style of cause to name only the entities of PBCN, the PBCN Band Council, and the PBCN Council of Elders.

B. *Objections to Evidence*

[28] The Respondents argue the Court should not consider the Affidavit of Randy Clarke, as it contains information that was not before the decision-maker. The Applicant's position is that the Clarke Affidavit provides context for the Election Code and background information on the removal process adopted at PBCN when they introduced the Election Code.

[29] I agree with the Respondents on the general rule that the record before the decision-maker is all that the Court can consider on judicial review. However, there are exceptions to this rule. One exception is where the information provides context and background information to the dispute (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20). I will consider the Clarke Affidavit evidence on that basis.

[30] The Respondents also argue the legal opinion of Pandila & Co. dated July 6, 2019, attached to the Affidavit of Karen Bird, should not be considered as it is protected by solicitor-client privilege. The legal opinion is addressed to the then Chief of PBCN, Peter A. Beatty. As Justice Ahmed held in his Interim Order, any privilege that attached to the opinion either was held by the Office of the Chief, or was waived by Mr. Beatty when the opinion was shared with the Applicant (*Bird* at para 20). Further, the legal opinion contains information that had been prepared for PBCN on the role and powers of the PBCN Council of Elders and that information is relevant to how the Council of Elders conducted itself in this case. Accordingly, I will allow the evidence.

IV. PBCN Election Code of 2014

[31] The relevant provisions of the PBCN Election Code are as follows:

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.

...

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:
- a. Consistently ignore or abuse the “**OATH OF OFFICE**” or any legislative enactments of the Peter Ballantyne Cree Nation;
 - b. An elected Councillor shall maintain his/her Residence in the Peter Ballantyne Cree Nation reserve, community or surrounding area where he/she was elected. Failure to maintain a Residence in the reserve, community or surrounding area in which one was elected for a consecutive period of 30 days or longer will be sufficient grounds for the Council of Elders to remove the Councillor and seek a By-Election for that vacant Councillor position.
 - c. Are absent from three (3) consecutive Peter Ballantyne Cree Nation assemblies or duly convened Council meetings without justified cause;
 - d. Are convicted under the *Criminal Code* of an indictable offence or a dual offence on which the Crown has elected to proceed by way of an indictment;
 - e. Are convicted of an offence under the *Controlled Drugs and Substances Act* involving the importing, exporting, trafficking or possession for the purpose of trafficking of a substance covered by the aforementioned Act.
 - f. Being duly elected by the Members, the Chief and Councillors represent and are therefore accountable

to the membership, whereupon the said Chief and Councillors will be removed from office if they:

- i) Fail to abide by the Standards of Conduct as cited in this Election Code;
 - ii) Bring disrespect and dishonour upon themselves or their office or other Cree Nation Members through action(s) which is/are attributable to the said Chief and Councillors;
 - iii) Are found unfit to continue in office by reason of having been convicted of an offence (summary) and is/are imprisoned for that conviction, unless such conviction flowed from the practice of Treaty or aboriginal rights.
- g. PBCN Council of Elders, in a separate meeting, will decide on removal of Chief or Councillors after, consultation with the Council members and community members. This meeting will be held seven (7) days after the community consultation meeting.
- 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.
- i. To file a complaint against a PBCN Chief, a Member must have a petition signed by fifteen percent (15%) of the Electors of the PBCN membership. This petition must be presented to the Chairperson of the PBCN Council of Elders.
- j. The Council of Elders shall have the authority to require an elected official to seek professional assistance if the said official is abusing alcohol and that abuse reflects poorly on the membership and/or affects the ability of the official to conduct their affairs in a manner expected of such official. Failure or refusal of the official to seek professional assistance shall result in the removal of said official

from the Chief or Council position. All By-Election measures shall then apply.

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

V. Issues

[32] The Applicant raises a number of issues with the Decision, which I will address as follows:

- A. Was there a breach of procedural fairness?
- B. Was the PBCN Election Code followed?
- C. Is the Decision reasonable?

VI. Standard of Review

[33] The parties agree the standard of review on procedural fairness issues is correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[34] The standard of review of the Decision itself is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]).

VII. Analysis

- A. *Was there a Breach of Procedural Fairness?*

[35] The Applicant states that she never received a copy of the complaint against her. She also states that she was never provided with an opportunity to respond directly to the complaint

or to defend herself against the complaint. Although she was aware of complaint, she was never advised of the specific conduct the PBCN Council of Elders viewed as violating the PBCN Election Code. She submits that, as the duly elected Chief, she was entitled to a high level of procedural fairness.

[36] In assessing the fairness of the process followed in this case, the Court considers the factors outlined in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], which were affirmed in *Vavilov* as follows at paragraph 77:

Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself [citations omitted].

[37] In applying *Baker*, the Court must consider a number of factors including the factual context, the applicable legislative scheme (here, the Election Code), and the importance of the decision to the affected individual.

[38] The *Baker* factors have been applied in the context of removals of First Nation Chiefs or Councillors in a number of cases, including: *Okemow v Lucky Man Cree Nation*, 2017 FC 46 at paras 11 and 30; *McCallum v Peter Ballantyne Cree Nation*, 2016 FC 1165 at para 28

[*McCallum*]; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 32; and *Cardinal v Bigstone Cree Nation*, 2018 FC 822 at para 29.

[39] Directly on point to this case is the following from Justice Strickland in *Morin v Enoch Cree First Nation*, 2020 FC 696 at paragraph 34:

Significantly, notice and an opportunity to make representations have been characterized as the most basic requirements of the duty of fairness (*Orr v Fort McKay First Nation*, 2011 FC 37 at para 12 (“*Orr*”); *Gadwa* at paras 48-53). Further, the Federal Court of Appeal has stated that, “No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond” (*Canadian Pacific* at para 56).

[40] The discussion in *Lecoq v Peter Ballantyne Cree Nation*, 2020 FC 1144 is also relevant. There, the issue was a decision of the PBCN Appeal Tribunal allowing an appeal of an election of a PBCN Councillor. Justice Favel held:

[44] The greater the importance and impact of a decision, the more procedural protections are owed. For example, a high standard is required where the right to continue ones’ profession or employment is at stake. This is because negative decisions can have severe and permanent impacts on ones’ career (*Baker* at para 25).

...

[46] There is no right of appeal of the Appeal Tribunal’s Decision provided for in the Code, which establishes the need for a higher level of procedural fairness. There are also significant ramifications of an appeal outcome to both the governance of PBCN and to Ms. Lecoq and Mr. McCallum. In light of these factors, I find that the appeal process has a judicial component to it and, based on the requirements of the Code, there is some level of formality and testing of the evidence required in the hearing process.

[41] These cases confirm that a high degree of procedural fairness was owed to the Applicant as the elected Chief. Fairness required that she know the full nature of the specific allegations or complaint made against her, and that she be provided with an opportunity to make a full response.

[42] The Respondents argue there was no breach of procedural fairness as the Applicant had two meetings with the PBCN Council of Elders to discuss the complaint. They argue she had sufficient notice and an adequate opportunity to respond.

[43] The two meetings the Applicant had with the Council of Elders were on February 8, 2022, and April 14, 2022. A consideration of the context and circumstances surrounding these two meetings is necessary to understand if procedural fairness safeguards were afforded to the Applicant.

(1) February 8th Meeting

[44] Prior to the February 8, 2022 meeting with the PBCN Council of Elders, the Applicant states that she was not advised of the complaint made against her. In her cross-examination she testified being told that the PBCN Council of Elders “had a letter that they needed to discuss” at the February 8, 2022 meeting. They did not say the letter was a complaint from the PBCN Band Council.

[45] During the February 8, 2022 meeting, the Council of Elders, at first, refused the Applicant’s request to see the complaint letter, but later allowed her to review the letter. The

Council of Elders however refused to allow her to have a copy of the letter to take with her after the meeting.

[46] The Applicant also states that some of the allegations raised by the PBCN Council of Elders during this meeting were not referenced in the letter of complaint. These allegations included that she had “attended the Dakota Dunes Casino and gotten so drunk that [she] had to be escorted away from the premises, and that [she] had fought a police officer who was escorting [her] away ... [and that she] had attended Kachur’s Golf Club in Prince Albert and was drunk-driving and crashed a golf cart.”

[47] In response, the Respondents argue the Applicant was presented with a copy of the complaint letter at the February 8, 2022 meeting and read it, thus, they argue, she had notice. They also argue the Council of Elders wanted to hear the Applicant’s explanations, but that the Applicant chose to leave the meeting early before addressing all of the concerns raised.

[48] From a procedural fairness perspective, the February 8th meeting did not meet the Applicant’s right to advance notice. Prior to the February 8th meeting, she was not aware of the nature of the complaint or the specific allegations made against her. Although the PBCN Council of Elders informed the Applicant of a letter, they did not advise her of the contents of the letter, nor did they advise her that the letter was a “complaint” from the PBCN Band Council. The Applicant was therefore not able to prepare in advance of the meeting to address the contents of the complaint; rather, she had to address the complaint immediately and on the spot. This defeats the purpose of advance notice which is to permit a party to prepare and respond in

full. The failure to inform the Applicant that the Council of Elders had received a complaint denied her most basic procedural fairness right.

[49] Furthermore, the refusal of the PBCN Council of Elders to initially allow the Applicant to see the letter, and then to refuse to allow the Applicant to have a copy of the letter, further breached her right to know the case being made against her.

[50] Additionally, the Applicant was not informed the PBCN Council of Elders would conduct an investigation into the complaint following the February 8, 2022 meeting. The meeting summaries included in the Timeline document in the Certified Record indicate the discussion about an investigation into the complaint took place after the Applicant left the meeting. At the end of the entry for the February 8, 2022 meeting, the Timeline document states: “To understand the complaints that were brought forward to the PBCN Elders Council it was important in addition to the meeting with Chief Karen Bird that the PBCN Elders Council meet with the PBCN Council members as well.”

[51] There is no evidence the Applicant was formally advised an investigation would be undertaken, nor was she advised, formally or otherwise, that PBCN Council of Elders were considering her removal from Office. Consequently, there was no process afforded to the Applicant that gave her proper advance notice of the written complaint and other allegations against her or the jeopardy she faced. An adequate process should also have provided her with sufficient opportunity to obtain guidance or legal advice and an opportunity to fully respond to

the complaint and other allegations. Given the nature of the rights at stake—loss of livelihood—the Applicant was entitled to a process that included these most basic procedural fairness rights.

[52] The February 8, 2022 meeting was not procedurally fair to the Applicant.

(2) April 14th Meeting

[53] The Applicant next met with the PBCN Council of Elders two months later, on April 14, 2022. Again, the Applicant says she was not advised in advance of this meeting that the complaint would be discussed. In fact, she had requested a meeting with the Council of Elders to discuss some personal family issues and to seek spiritual guidance from the Council.

[54] During the April 14th meeting, the Applicant was given a letter dated April 1, 2022, signed by the Council of Elders. The letter demanded her resignation as Chief by April 4, 2022. The letter demanded her written response by April 8, 2022. Obviously, both of these dates had already passed by the time the Applicant was given the letter on April 14, 2022.

[55] The events at the April 14, 2022 meeting are even more troubling from a procedural fairness perspective. The Applicant states she “[did] not recall being given this letter prior to the meeting of April 14, 2022.” Although the May 10, 2022 Decision letter states the April 1st letter was delivered via email and in person, there is no evidence on the record that establishes the Applicant was provided with the letter at any time before the April 14th meeting. Accordingly, the Applicant attended the April 14th meeting without any advance notice of the intention of the

PBCN Council of Elders, and without any notice of what evidence the Council of Elders relied upon to insist upon her resignation.

[56] The Respondents do not explain why the Applicant was given a backdated letter at the April 14th meeting. However, they argue, as the Applicant spent approximately three hours with the PBCN Council of Elders on April 14th, she had ample opportunity to respond to the complaint made against her. In my view, this submission completely disregards the purpose of the procedural fairness requirement of advance notice, particularly considering the interests at stake for the Applicant.

[57] Further, as the April 1st letter directs that the Applicant resign or be removed, it cannot be said that the April 14th meeting afforded the Applicant any fair opportunity to defend herself. Clearly the PBCN Council of Elders had already reached a decision; the Applicant was either going to resign as Chief or they would remove her from the position.

[58] I conclude the April 14, 2022 meeting was not conducted in a manner that afforded the Applicant a procedurally fair process.

[59] Overall, and considering that the removal of a Chief attracts a heightened level of procedural fairness, the Applicant's right to know the case against her was not respected. The Applicant was not given prior or proper notice of the written complaint made against her, nor was she given notice that the complaint would be addressed at either the February 8, 2022 meeting or the April 14, 2022 meeting with the PBCN Council of Elders.

[60] The Respondents' argument that the Applicant did not raise procedural fairness issues with the PBCN Council of Elders and therefore cannot now make the argument is without merit. For this argument to be valid, the Respondents would have to establish that the Applicant had advance notice of the jeopardy she faced, and that she had a full and fair opportunity to respond. Neither the February 8, 2022 meeting, nor the April 14, 2022 meeting satisfied these procedural fairness requirements. In fact, the April 1, 2022 letter demonstrates the Council of Elders had already made its Decision.

B. *Was the PBCN Election Code Followed?*

[61] In the Decision, the PBCN Council of Elders states the Applicant was in breach of the following provisions of the Election Code: sections 12.a, 12.f.i, and 12.f.ii.

[62] The Applicant argues the PBCN Council of Elders failed to follow the PBCN Election Code, as there was no petition from PBCN electors as required by section 12.i, which states:

To file a complaint against a PBCN Chief, a Member must have a petition signed by fifteen percent (15%) of the Electors of the PBCN membership. This petition must be presented to the Chairperson of the PBCN Council of Elders.

[63] There is no petition here.

[64] The requirement for a petition was the central issue in *McCallum*, which dealt with the removal of a PBCN Councillor. Justice St-Louis held there was “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,” which was fatal to the removal process (*McCallum* at para 5).

[65] Although the issue in *McCallum* was the removal of a Councillor, the relevant provision of the Election Code (section 12.h) reads identically to the provision at issue here concerning the removal of a Chief (section 12.i). The only difference is that removal of a Councillor requires a petition supported by 25% of the specific community electorate, whereas removal of a Chief requires a petition supported by 15% of all PBCN voters.

[66] Notwithstanding *McCallum*, the Respondents take the position that a petition was not required here. Specifically, the Respondents argue that based upon section 12.f of the Election Code the Council of Elders must remove a Chief who fails to abide by the Standards of Conduct, who brings disrespect on the Office of Chief or PBCN, or who is found unfit to continue. Further, they argue sections 12.g (community consultation) and 12.j (failure to seek professional assistance when required) of the Election Code also support an interpretation that the Council of Elders has the power to remove a Chief in those circumstances without a petition. According to the Respondents, no petition was required.

[67] The problem with the interpretation of the Election Code advanced by the Respondents is twofold. First, in this case, the Council of Elders was not acting of their own accord. The Decision specifically notes they were acting in response to a complaint. If, and in what circumstances, the PBCN Council of Elders may have the power to remove a Chief of their own

accord without a complaint is beyond the scope of this Application, as here the Council of Elders was acting in response to a complaint.

[68] Secondly, and more importantly, the Respondents' position is premised upon there having been a fair process through which it was determined that the Applicant breached her Oath of Office, failed to abide by the Standards of Conduct, and brought disrespect and dishonor upon her Office as alleged in the Decision. For the reasons outline above, I have concluded there was no such process afforded to the Applicant in this case.

[69] In considering the Election Code, I accept the Court must give effect to the language chosen by PBCN in its Election Code. I also accept the Court must accord deference to decisions made under the Election Code (*Porter v Boucher-Chicago*, 2021 FCA 102 at para 27 [*Porter*]). However, on a correctness standard of review, deference does not supersede procedural fairness.

[70] Based upon a plain and contextual reading of the Election Code, the complaint made against the Applicant should have been supported by a petition as required by section 12.i. The Decision explicitly states the PBCN Council of Elders "received formal complaints" about the Applicant's conduct. The formal complaint was from the Councillors of PBCN who are members of PBCN. Section 12.i of the PBCN Election Code provides that a complaint from a member against the Chief requires a petition signed by 15% of PBCN electors. The complaint was sent to the Chair of the PBCN Council of Elders, which indicates the PBCN Band Council was acting under section 12.i.

[71] I further note the Election Code does not provide for any other process for a complaint to be initiated by a PBCN Band Councillor, individually or as a collective. Accordingly, I conclude a petition was required.

[72] In *Porter*, the Federal Court of Appeal found, at paragraph 37, the adjudicator's interpretation of the election code:

conforms with the general principles of statutory interpretation and the modern approach set out in *Rizzo*, which apply to the interpretation of election codes (*Boucher v. Fitzpatrick*, 2012 FCA 212, 434 N.R. 199 at para. 25). The fact that the Adjudicator did not engage in a formalistic statutory exercise is not an impediment to a finding of reasonableness under the *Vavilov* framework (*Vavilov* at para. 119)."

[73] The Respondents rely upon the decision in *Porter* to argue the Court must accept their interpretation of the Election Code that a petition was not required in the circumstances. The facts in *Porter* are very different from here. In *Porter*, the issue was the eligibility of a candidate to run for election given his prior criminal convictions and the applicable interpretation of two provisions of the relevant election code. Directly at issue in *Porter* was the decision of the election appeal body. There is no such appeal body decision at issue here.

[74] More to the point, the 2019 legal opinion attached to the Bird Affidavit specifically notes, "that the Council of Elders does not have any authority to discipline the Chief and Council of the PBCN," aside from the authority to remove under section 12. The legal opinion goes on to consider the power to remove a sitting Chief or Councillor, noting:

It is however incumbent upon the Council of Elders to first of all comply with the provisions of the Election Code. A complaint supported by a petition would have been required to have been

filed with the Council of Elders. Here there is no evidence that a complaint supported by a petition signed by 25% of the Electors from the affected reserve community was received by the Council of Elders. Accordingly in the present circumstances, the Council of Elders lack the authority under the terms of the Election Code to order Councillor ... to be removed from office...

[75] Here, there is no doubt that the PBCN Council of Elders was acting under section 12 of the Election Code, as that is what is relied upon in their Decision. They do not rely upon any other sections of the Election Code. The Chair of the PBCN Council of Elders received a formal complaint, as specifically referenced in the Decision. However, the complaint from PBCN members lacked a petition from 15% of the PBCN electorate as required by the PBCN Election Code. In my view, by taking steps without the required petition, the Council of Elders was not acting within their mandate under the Election Code.

[76] The PBCN Council of Elders embarked on a course of conduct that, even if well intentioned, permitted a series of allegations against the Applicant to be used as the foundation for their Decision to remove her from the elected Office of Chief. The process and protections for complaints against the Chief outlined in the Election Code, therefore, needed to be followed.

[77] Fundamentally, the Applicant had the right to the protections afforded by the Election Code, and was entitled to know the full case against her and the opportunity for a full and fair chance to respond. Neither of these most basic procedural fairness safeguards were afforded to the Applicant in this case.

C. *Is the Decision Reasonable?*

[78] Having determined the Decision to remove the Applicant was procedurally unfair and not in compliance with the Election Code, the Decision is also unreasonable.

[79] Therefore, this judicial review is granted.

VIII. Costs

[80] As the successful party, the Applicant is entitled to costs. She seeks costs personally against some of the named Respondents on the grounds they acted in bad faith. While I agree the PBCN Council of Elders acted in a manner that was procedurally unfair to the Applicant, and perhaps acted in a misguided manner, there is insufficient evidence to make a finding of bad faith. Accordingly, there are no grounds to award an enhanced scale of costs against the Council of Elder members personally.

[81] The Applicant is entitled to her costs. I have agreed to allow the parties to make written submissions on costs following receipt of this Judgment.

JUDGMENT IN T-1109-22

THIS COURT'S JUDGMENT is that:

1. This judicial review is granted and the Decision of the PBCN Council of Elders, dated May 10, 2022, is set aside.
2. The style of cause is amended with immediate effect to name only the entities of PBCN, the PBCN Band Council, and the PBCN Council of Elders.
3. The Applicant is entitled to costs. The parties may make written submissions on costs not exceeding 10 pages to be received within 15 days of the date of this Judgment, failing which the Court will make an award of costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1109-22

STYLE OF CAUSE: BIRD v PETER BALLANTYNE CREE NATION ET AL

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 13, 2022

JUDGMENT AND REASONS: MCDONALD J.

DATED: FEBRUARY 16, 2023

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