

Federal Court



Cour fédérale

Date: 20160512

Docket: T-489-16

Citation: 2016 FC 535

Ottawa, Ontario, May 12, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**ANITA PARENTEAU, DANNY
MOOSEHUNTER, MICAH DANIELS, AND
WESLEY BALLANTYNE, EACH IN THEIR
CAPACITY AND IN THEIR CAPACITY AS
COUNCILLORS**

Applicants

and

**LESLIE BADGER AND CLAUDIA
MCCALLUM, AND ROMONA COOK IN
THEIR CAPACITY AS THE STURGEON
LAKE FIRST NATION APPEAL TRIBUNAL**

Respondents

and

**HENRY FELIX, LAURIE PETERS-
WHITEMAN, DAVID BADGER, ORVILLE
LONGJOHN SR., FRED FELIX, ISADORE
WICHIHIN, AND WAYNE MCCALLUM**

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to sections 18, 18.1, and 44 of the *Federal Courts Act*, RSC 1985, c F-7, challenging the decision [the Decision] of the Sturgeon Lake First Nation Appeal Tribunal [the Appeal Tribunal], that upheld a decision of the CEO and DEO of Sturgeon Lake First Nation [Sturgeon Lake] dismissing each of the Applicants from their offices as members of Council and banning each from running for nomination in the 2016 Sturgeon Lake election for Chief and Council [the March 2016 Election].

I. Background

[2] The Applicants, Anita Parenteau, Danny Moosehunter, Micah Daniels, and Wesley Ballantyne, are four of the six incumbent members of the Sturgeon Lake Council [the Council]. Each was sworn in as Councillor on March 30, 2013, for a three year term that ended on March 29, 2016.

[3] The Respondents, also members of Sturgeon Lake, include:

- a. Leslie Badger and Claudia McCallum, who held the positions of Chief Electoral Officer [CEO] and Deputy Electoral Officer [DEO], respectively, during the time period in question (from January 15, 2016, onwards);
- b. Laurie Peters-Whiteman, David Badger, Orville Longjohn Sr., Fred Felix, Isadore Wichihin and Wayne McCallum, were voted as Councillors of Sturgeon Lake following a vote convened by the CEO and DEO on March 16, 17, and 18, 2016, the legitimacy of which is challenged in this application;
- c. Henry Felix Sr. is the current Chief of Sturgeon Lake as a result of his acclamation in the March 2016 Election, the legitimacy of which is also challenged in this application; and
- d. Howard Badger, Brian Wichihin and Romona Cook, formed the Appeal Tribunal and rendered the Decision under review by this Court.

[4] Sturgeon Lake is a custom election band. The customary election law of Sturgeon Lake is codified by the *Sturgeon Lake First Nation Election Act, 2009* [the *Election Act*], and the *Sturgeon Lake First Nation Executive Act, 2009* [the *Executive Act*].

[5] The *Election Act* governs the procedure for administering elections and any disputes arising therefrom. The CEO, the DEO, and a three-person Appeal Tribunal are tasked with ensuring that elections are conducted in accordance with the legislation. These individuals are selected at a special meeting held prior to the election for Chief and Council members and are appointed by the passing of a band council resolution [BCR]. They serve the same term as the Chief and Council members (sections 3.1, 3.2(a), 3.3(a), 3.4, 4 and 11.1 of the *Election Act*). The

role of the CEO and DEO is to ensure that elections conform to the *Election Act*, and the Appeal Tribunal deals with any challenges by interested parties to election results or procedure.

[6] Section 8.3 of the *Executive Act* also includes provisions for an Elders Executive Advisory Council [Elders EAC], which acts as “the conscience of the band,” and which may carry out duties assigned to it by the Chief and Council.

[7] Implementation of the *Election Act* and the *Executive Act*, despite having resulted from extensive consultations and codified custom, has to say the least, a troubled history. This Court has been involved in three previous occasions determining matters in relation to the *Election Act* and the Appeal Tribunal, each involving the Respondent, Henry Felix Sr. (see *Felix v Sturgeon Lake First Nation*, 2011 FC 1139 [*Felix 1*]; *Felix v Sturgeon lake First Nation*, 2013 FC 310; *Felix v Sturgeon lake First Nation*, 2014 FC 911 [*Felix 3*]).

[8] A BCR, in which the CEO, DEO and Appeal Tribunal are appointed, commences an election and sets dates for nomination meetings and the election (section 3.4 of the *Election Act*). To commence the March 2016 Election process, the Applicants enacted BCR 2015-2016-018 at a duly convened meeting of Council on January 15, 2016, and appointed: (i) Leslie Badger as CEO; (ii) Claudia McCallum as DEO; and (iii) Howard Badger, Brian Wichihin, and Ramona Cook to the Appeal Tribunal. It also set February 29, 2016, as the date for the candidate nomination meeting and the dates for the election (March 9, 2016 in Saskatoon, March 10, 2016 in Prince Albert, and March 11, 2016 in Sturgeon Lake).

[9] The CEO and DEO issued a report on January 28, 2016, stating that five of the current Council members were permitted to run for nomination in the Election, but that the sixth Councillor – Donna Kingfisher – could not run for nomination based on an impaired driving conviction occurring while in office. The report also purported to reinstate Henry Felix Sr. as Chief, notwithstanding that a March 18, 2015 decision of the Appeal Tribunal, following a formal hearing, had removed him as Chief and prohibited from being an eligible candidate in any Sturgeon Lake election for a period of the lesser of three terms or nine years.

[10] Soon thereafter, concern arose over the CEO and DEO's execution of their roles in accordance with the *Election Act*. Allegedly, they refused to provide their signed Oaths of Office to Sturgeon Lake, and to adhere to the budget approved by Council for the election.

[11] On February 26, 2016, Counsel for Sturgeon Lake wrote the CEO and DEO emphasizing that they were required to hold the election in accordance with the *Election Act*, previous Appeal Tribunal rulings, and their Oaths of Office.

[12] The CEO and DEO dismissed the remaining five Councillors of Sturgeon Lake on February 29, 2016, and disqualified them from running in the March 2016 Election on the basis that their failure to terminate Ms. Kingfisher from her position as Counsellor following her impaired driving conviction constituted a "corrupt practice" under the *Election Act*.

[13] In response, Counsel for Sturgeon Lake wrote a letter dated March 2, 2016, advising that the CEO and DEO did not have authority to dismiss Band Councillors; that their actions and

failure to abide by their Oaths of Office constituted grounds for their removal; and that the duly elected Councillors could not be unilaterally removed from office without being afforded basic procedural fairness.

A. *The Decision of the Appeal Tribunal*

[14] The Decision under review is that of the Appeal Tribunal rendered on March 3, 2016, upholding the CEO's February 29, 2016 decision to dismiss each of the Councillors and disqualify them from running in the March 2016 Election.

[15] While Rule 302 of the *Federal Courts Rules*, SOR/98-106, states that unless this Court orders otherwise, an application for judicial review shall be limited to a single order in which relief is sought, this does not apply when there is a continuous course of conduct (*Shotclose v Shorey First Nation*, 2011 FC 750 at para 64). In my view, the CEO and DEO decision and the Appeal Tribunal Decision were so closely linked that they constitute one continuing decision (*Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 at para 6). Indeed, it appears the Appeal Tribunal simply affirmed the CEO and DEO's unauthorized decision to remove and ban the Applicants as Councillors: there was no evidence presented before the Appeal Tribunal, and the decisions were made on the same facts.

[16] The Decision outlines the applicable legislation, including that under section 15.1 of the *Election Act*, the offices of Chief and Councillor shall immediately become vacant when the person holding that office:

(c) is found guilty by the Appeal Tribunal, in connection with an Election, of Corrupt Practice, giving or accepting a bribe, dishonesty or malfeasance; and

(g) fails to uphold the Oath of Office, Band By-laws or other duly enacted band legislation including this Act and the *Executive Act*.

[17] Section 2.7 of the *Election Act* defines “corrupt practice” as:

any act done by an **Elected Official**, whether Chief or Councillor, who unlawfully and/ or wrongly uses his or her name or position of authority or trust to procure some benefit or favour for him or herself or for another person contrary to his or her official or fiduciary duties and/or the rights of other persons and includes any act or omission that is recognized by law or custom to be a Corrupt Practice. *The custom gifting of tobacco and/or cloth/or proper purposes is not a corrupt practice.*

[Emphasis in original]

[18] Based on contraventions of subsections 15.1(c) and 15.1(g) of the *Election Act*, the Decision upholds the Councillor suspensions. The Appeal Tribunal further rules that the Councillors are ineligible to be candidates in the March 2016 Election, and are prevented from running for office for the lesser of three terms or nine years (section 5.1(iii) of the *Election Act*).

B. *Post-Decision Disputes and the March 2016 Election*

[19] At a meeting of Council on March 4, 2016, the Applicants enacted BCR 2015-2016-021, removing the CEO and DEO from office, effective immediately, for failing to provide a signed

Oath of Office, failing to submit deposit funds received from candidates, and for not accepting the election budget approved by Council.

[20] The next day, the Council signed an Interim Plan setting out the election process to be followed thereafter. Elaine Vandall, Sturgeon Lake's External Manager, was appointed to run all program operations from the nomination date of March 12, 2016, onwards.

[21] On March 6, 2016, by letter and BCR, the "removed" CEO wrote to the Council conveying his intention to proceed with the scheduled nomination meeting and with the election process generally.

[22] The Election process was thus splintered into two separate and concurrent election processes.

[23] On March 8, 2016, Counsel for Sturgeon Lake wrote to the "removed" CEO and DEO, informing them that the "dismissed" Councillors were eligible to run in the election, as neither the CEO, nor the Appeal Tribunal in the absence of an appeal or proper hearing, had authority to dismiss Council.

[24] On March 10, 2016, the Elders EAC distributed a Media Release conveying that the CEO and DEO had been removed from their positions, cancelling the CEO and DEO's March 11, 2016 nomination meeting, and scheduling a Special Meeting of Council for the appointment of a new CEO and DEO.

[25] Contrary to this direction, the “removed” CEO and DEO nevertheless held a nomination on March 11, 2016. At this meeting Henry Felix Sr. was named as Chief as he “won by acclamation”; ten candidates were nominated for Councillor positions; and election for Council was to take place on March 16 through 28, 2016.

[26] Evidently, there was confusion in the community surrounding the legitimacy of this nomination meeting and election process. The Applicants had been prohibited from running as nominees, despite having paid the required fee. As well, at least four candidates had paid the fee to be eligible to run for Chief, and numerous other candidates who had sought to run for Council had not been notified that the nomination meeting had been changed to March 11, 2016.

[27] Meanwhile, on March 14, 2016, the Applicants held a special meeting to explain the Election process going forward to members: 495 members of Sturgeon Lake voted and elected a new CEO [the New CEO] and a new DEO [the New DEO], as well as members of a new Appeal Tribunal. A BCR formally enacted these changes.

[28] The following day, the New CEO and DEO set out an election schedule and published Notices of Election. The nomination meeting would take place on March 29, 2016, and the general election would take place on April 5, 6, and 7, 2016 [the April 2016 Election].

[29] Notwithstanding this direction, on March 18, 2016, the “removed” CEO and DEO held a poll for the March 2016 Election at a local church. Several of the Applicants attempted to

interfere with the process, first at the advance poll on March 17, and again at the main poll on March 18, which had to be moved to another location. At this election:

- a. the names of the Applicants who sought re-election as Councillors were not on the ballot;
- b. some band members were denied the right to vote;
- c. 289 of 1728 (17%) eligible voters cast ballots (by contrast, in the 2013 Election 927 of 1605 eligible voters cast votes);
- d. the position of Chief was purportedly uncontested, although in modern times, it has always been a contested election.

[30] The following day, the “removed” CEO and DEO “swore in” Henry Felix Sr. as Chief, and six other individuals as Councillors: Laurie Peters-Whitman, David Badger, Orville Longjohn Sr., Fred Felix, Isadore Wichihin, and Wayne McCallum - Respondents in this proceeding.

[31] The April 2016 Election, presided over by the New CEO and DEO, was held on April 5, 6, and 7, 2016, as scheduled: 614 members of Sturgeon Lake cast ballots. At this election Greg Ermine was elected Chief (309 votes), and Anita Parenteau, Danny Moosehunter, Christina Longjohn, Dalton Kingfisher, Elaine Naytowhow, and Craig Bighead were elected to the positions of Councillor.

[32] Accordingly, there are currently two purported sets of Councillors, each claiming to be the “true” Council for Sturgeon Lake and the governance of Sturgeon Lake is paralyzed.

II. Issues

[33] The issues are:

- A. Is Judicial Review the proper process for recourse and do the Applicants have standing?
- B. Did the Appeal Tribunal exceed the jurisdiction conferred on it by the *Election Act* and *Executive Act* in rendering its Decision?
- C. Did the Appeal Tribunal breach its duty of procedural fairness?
- D. What is the appropriate remedy?

III. Standard of Review

[34] The Federal Court has jurisdiction to determine this application as the Appeal Tribunal constitutes a “federal board, commission or other tribunal” for the purpose of section 2 of the *Federal Courts Act* (*Felix 3*, above, at para 34).

[35] An administrative body’s interpretation of its enabling statute generally gives rise to the deferential standard of review. However, in *Felix 1*, above, Justice Marie-Josée Bédard concluded that the Appeal Tribunal’s decision must be reviewed under the correctness standard, as the issue was a question of law involving interpretation of the *Election Act*. Since the Appeal Tribunal members are appointed for a time-limited mandate, Justice Bédard found they do not have expertise in interpreting the *Election Act* or in legal interpretation generally.

[36] There is no indication in this case that the Appeal Tribunal even considered the *Election Act* in rendering its Decision. Given that the issues are either questions of law or jurisdiction or matters of procedural fairness, correctness is the appropriate standard.

IV. Analysis

[37] The relevant provisions of the *Election Act* and *Executive Act* are attached as Annex A.

A. *Is Judicial Review the proper process for recourse and do the Applicants have standing?*

[38] As a preliminary issue, the Respondents argue the Applicants have no standing because their positions as Councillors have terminated. Further, the Respondents claim the Applicants have not exhausted the available internal appeal mechanism, and thus the Court should not intervene.

[39] The Applicants argue their only recourse is to seek judicial review: appealing the present matter to the Appeal Tribunal following the March 2016 Election is not an adequate alternative remedy for two reasons:

- i. Section 12.1 of the *Election Act* only permits a “Candidate at the Election or any Elector who gave or tendered his or her vote at the Election” to bring an appeal. The Applicants were not “candidates”, as they were deemed ineligible to run, and they did not vote in what they considered to be an illegal election;
- ii. Even had the Applicants brought an appeal of the March 2016 Election to the Appeal Tribunal, the basis of that appeal - the termination of six Councillors and the barring of

them from running in the March 2016 Election - would have been the very issues upon which the Appeal Tribunal opined in its Decision.

[40] I agree with the Applicants that the Court's intervention is warranted, and that judicial review is the proper forum in this case for challenging the Appeal Tribunal's Decision.

B. *Did the Appeal Tribunal exceed the jurisdiction conferred on it by the Election Act and Executive Act in rendering its Decision?*

[41] At the hearing, counsel for the Respondents agreed that the Appeal Tribunal acted outside its jurisdiction under the *Election Act* in rendering its Decision removing the Applicants as Counsellors, banning them from running in the March 2016 Election and for a term of the lesser of three terms or nine years, and determining the Applicants committed a "corrupt practice". The Respondents also conceded the Decision was procedurally unfair. To provide context for my decision on the available relief, I have set out my analysis and reasons for each issue below.

[42] Under the *Election Act*, the Appeal Tribunal has no jurisdiction to hear a matter relating to an election before the election takes place. Section 12 governs the procedure for appealing an election to the Appeal Tribunal. Section 12.1 states:

12.1 Any Candidate at the Election or any Elector who gave or tendered his or her vote at the Election may, within fourteen (14) calendar days of the Poll, appeal the Election if he or she has reasonable and probable grounds for believing that:

(a) error or violation of the *Election Act* was made in the interpretation or application of the Act which might have affected the outcome of the Election;

(b) a Candidate who ran in the Election was ineligible to do so pursuant to this Act; and/or

(c) there was a Corrupt Practice in contravention of the *Election Act*.

[43] This provision clearly indicates that an election having taken place is a precondition to the Appeal Tribunal having jurisdiction to hear a matter. The Appeal Tribunal's role is to adjudicate upon grievances of an election that has *already occurred*. No election had taken place when the Appeal Tribunal rendered its Decision, and thus it acted without authority.

[44] As well, under section 12.1, the Appeal Tribunal has no authority to engage its own appeal powers: that can only be done by a "Candidate at the Election or any Elector who gave or tendered his or her vote at the Election".

[45] The *Election Act* also does not confer on the Appeal Tribunal authority to make disciplinary decisions unless expressly reconvened by the Elders EAC pursuant to section 11.3 of the *Election Act*, and section 11 of the *Executive Act*. The Elders EAC did not call upon the Appeal Tribunal at all, and thus the Appeal Tribunal had no authority to determine disciplinary matters.

[46] Subsection 3.3(a) of the *Election Act* provides that the Appeal Tribunal "shall serve for a period equal to the term of office of the Chief and Council". Thus, until March 29, 2016, the Appeal Tribunal appointed for the prior election was the only body authorized to make decisions relating to discipline "during an Elected Official's term of office" (*Election Act*, section 11.3) and only upon being called upon by the Elders EAC (*Executive Act*, section 11.1).

[47] The Appeal Tribunal derives its powers from the *Election Act* and had no authority whatsoever in this instance to act upon the CEO and DEO's request prior to the election or to decide upon the issues it did. In failing to abide by the provisions that both grant and restrict its power to act, the Appeal Tribunal acted beyond its jurisdiction.

[48] As a result of this invalid Decision, the Applicants were prematurely removed from their positions as Councillors and were unlawfully prevented from running in the March 2016 Election. Pursuant to the procedures set out in the governing Acts, the Applicants were eligible to be nominated to run in the March 2016 Election, and the results of that election cannot be valid.

C. *Did the Appeal Tribunal Breach its duty of procedural fairness?*

[49] It is well established that the Applicants were entitled to due process and procedural fairness in being dismissed from their positions as Councillors (*Sparvier v Cowessess Indian Band No 73*, [1993] FCJ No 446 at para 57; *Felix 3*, above, at para 76; *Orr v Fort McKay First Nation*, 2011 FC 37 at para 14). In this context, the Applicants were entitled to know the case against them, and be given an opportunity to be heard (*Duncan v Behdzi Ahda First Nation*, 2003 FC 1385 at para 20; *Desnomie v Peepeekisis First Nation*, 2007 FC 426 at paras 33, 34).

[50] Even if the Appeal Tribunal *did* have jurisdiction to render a disciplinary decision, its Decision would have been set aside on the basis of failing to adhere to principles of procedural fairness and non-observance of the procedures set out in section 11 of the *Executive Act*. The Applicants were given no notice at all, nor were they provided any opportunity to address the

allegations against them prior to the Decision being made purporting to remove them from office.

[51] Essentially, the manner in which the Appeal Tribunal rendered their Decision in this case reveals not only an indifference to their authorized role under their governing statutes and the procedures to which they are bound to adhere, but more importantly it shows a disregard for the power entrusted in them by their Band.

D. *What is the appropriate remedy?*

[52] The real crux of this judicial review involves fashioning an appropriate remedy.

[53] Notwithstanding efforts by Justice Bédard in 2011 (*Felix 1*) and Justice Kane in 2014 (*Felix 3*) to guide the Sturgeon Lake election process, it is apparent the offered advice has been ignored and that the election process, as it stands, has been ineffective.

[54] In *Felix 3*, Justice Kane found she could not order relief that was not specifically conferred upon the Appeal Tribunal under the *Election Act*. At paragraph 121 she writes:

As noted by Justice Bédard in *Felix #1*, Rules 3 and 4 [of the *Federal Courts Rules*, SOR/98-106] do not permit the Court to order the substantive relief the applicants seek. At para 56:

[56] The Court does not have jurisdiction to set aside the election results and order a new election. Rules 3 and 4 of the Rules do not allow the Court to go as far as creating a substantive relief that is not provided for in the *Election Act*. Rule 3 is an interpretation rule and Rule 4, often called the "Gap Rule", is procedural in nature and does not allow the Court to invent relief not contemplated in the

applicable legislation. The responsibility of deciding whether the election results should be set aside and if a new election is warranted rests with the Appeal Tribunal and the Court must not usurp that role.

[55] Justice Kane remitted the matter back to the same Appeal Tribunal, with a caution:

128 Given that the same Appeal Tribunal must determine the appeal of the decision which they have taken part in, it will be essential that the Appeal Tribunal meets its duty of procedural fairness, seeks submissions from counsel for the parties on the proper interpretation of the *Election Act*, particularly regarding the qualifications of candidates, the role of the CEO and the role of the Appeal Tribunal, and should make every effort to approach the appeal with an open mind to avoid the inherent apprehension of bias.

[56] Although the above comments were made in the context of the same *Election Act*, they arose in the context of a dispute emanating from an appeal of an election. I agree with the Applicants that the Court is not bound by those findings in this particular instance, as the present case is distinguishable from *Felix 1* and *Felix 3*. Rather than being an appeal of election results, the Decision at hand is one that was made without jurisdiction, and which ultimately had further-reaching ramifications on the validity and fairness of the March and April 2016 Elections.

[57] Both parties argue these are exceptional circumstances. I agree.

[58] The selection of Band governance is an inherent right and the electors of Sturgeon Lake should determine their leadership. In crafting an appropriate remedy, I have considered Justice

Barnes' caution in *Sweetgrass First Nation v Gollan*, 2006 FC 778 at para 53 (also cited in *Felix* 3, above, at para 135):

53 There is much to be said for the Court adopting the least intrusive path into the affairs and decisions of Sweetgrass in fashioning a remedy for the electoral impasse which has arisen. Like most other democratic institutions, the electors and elected representatives of Sweetgrass are fully capable of conducting their business without outside involvement and, except in a limited way, this case is no exception.

[59] I also find instructive Justice Noël's *obiter* comment in *Pelican Lake Band Council v Thomas*, 2007 FC 1152 at paras 31-34, in which he quashed the decision of the Appeal Tribunal relating to an election under a similar *Election Act*, following the below guiding comments:

31 In the normal course of a judicial review, the reviewing Court would have the option to return the matter to a differently and properly constituted Appeal Board to re-determine the matter. However, the *Election Act* makes no provision for such a possibility, as my colleague Mr. Justice John O'Keefe concluded in *Bill v. Pelican Lake Band Appeal Board*, [2006] F.C.J. No. 877, 2006 FC 679 (F.C.), and which was affirmed by Mr. Justice Létourneau on appeal, as cited above. Mr. Justice O'Keefe stated at paragraph 59:

59 The matter cannot be referred to a differently constituted Appeal Board as there is no provision to constitute another Appeal Board. Subsection 11(1) of the Act requires the Appeal Board to be appointed as follows:

11(1) An Appeal Board shall be appointed by the membership at the Nomination Meeting immediately after the close of nominations has been announced by the Chief Electoral Officer or his/her designate.

32 I also add that the Court's finding of apparent bias makes it impossible to return the matter to the Appeal Board as it was constituted after the March 2007 election. What can a Court do in such a situation?

33 This exceptional situation calls for exceptional measures. To put an end to this vicious cycle and allow the democratic will of Band members to run its course, this Court therefore allows the appeal. In *obiter* therefore, the Court is of the studied opinion that the applicants should take all means possible to correct the present situation. The Pelican Lake Band Council, under the direction of the applicants, Chief Peter Bill and Councillors Romeo Thomas, Frederick Whitehead, David Thomas, Gilbert Chamakese, Sidney Bill and Jimmy Bill, elected for a three year term on March 9, 2007, are encouraged to take the decision of the electoral process back to the people according to Band custom, and decide how best the Band will be governed pursuant to the amendments deemed to be in the best interests of the Band and its people.

34 In so doing, the Court would encourage the Band Council to turn its mind to the people within six (6) months of these reasons, and using the amending formula provided under section 16 of the *Election Act* put in place clear, fair and just procedures to assure that the democratic will of the Band members is respected and allowed to run its course and effectively stop the revolving door of judicial proceedings.

[Emphasis added]

[60] This too is an exceptional and complex situation, which calls for exceptional remedies. The remedy of remitting the matter back to the Appeal Tribunal has had limited long term success, as evinced by the personal and financial resources spent within the last five years on litigation in relation to election matters.

[61] Moreover, the present case is unique in that there are two Appeal Tribunals; one which has acted beyond their jurisdiction, acted without procedural fairness, and which would no doubt generate a reasonable apprehension of bias if the matter were remitted to them, and the other, constituted while the initial and duly appointed Appeal Tribunal still held office.

[62] The Court is entitled to fashion a remedy appropriate to the circumstances (*Ballantyne v Nasikapow*, [2000] FCJ No 1896 at para 79).

[63] The Decision to remove the Applicants from their position as Councillors, and banning them from participation in the March 2016 Election and for the lesser of three terms or nine years is quashed. The inevitable consequence is that the processes ancillary to that Decision are also invalidated.

[64] The Councillors who were unlawfully banned from running in the March 2016 Election and in future elections should have been eligible as nominees and their wrongful preclusion from participating invalidates the results of the March 2016 Election.

[65] Likewise, for the electoral process to be democratic and fair, the results of the April 2016 Election must also be quashed. The members supposedly elected in the March 2016 Election did not participate in the April 2016 Election, and the voters were split.

[66] Given that the Band is left without a duly elected Chief and Council, a new election is necessary and should be instituted in accordance with section 3 of the *Election Act*. A new election should be overseen by a fresh and differently constituted election committee and should be undertaken by the Band as soon as is reasonably possible. The March 2016 Election, from initiation to completion, had it not been illegally interfered with, spanned approximately three months, and I fail to see why a new election cannot be carried out within three months of the date of this judgment.

[67] In an attempt to ensure, as far as possible, that the effect of this order does not unnecessarily disrupt administration of the Band, governance of Sturgeon Lake until the new electoral process is complete necessitates preserving the “status quo” of the four Applicants, Anita Parenteau, Danny Moosehunter, Micah Daniels, and Wesley Ballantyne, and Jonas Sanderson (not party to this application) as Councillors for interim oversight. They are the only Councillors duly elected and valid at law at the time of the Appeal Tribunal Decision, which has been quashed.

[68] The termination of Elaine Vandall, Sturgeon Lake’s External Manager, by the Chief and Councillors elected in the March 2016 Election is also invalid, as the Chief and Councillors had no authority to act. Elaine Vandall is under contract to Sturgeon Lake until January 2019, pursuant to an Independent Service Contract, requested by Aboriginal Affairs and Northern Development Canada [AANDC], which sets out her authority and responsibilities, principally involving the oversight of financial affairs relating to the Band.

[69] The Court’s repeated recommendations for the Band to promptly enact amendments to the *Election Act* that would help prevent yet another return to the Court each election have been disregarded and have been evidently ineffective.

[70] Nevertheless, in addition to Justice Kane’s suggestions of potential *Election Act* amendments in *Felix 3* (at paras 130-136), not yet heeded, the present scenario has also illuminated the need for an independent or disciplinary review mechanism for the CEO and DEO if they act outside their authority. By way of guidance, for instance, their powers could be

defined by the BCR that commences an election and upon which they are appointed (*Election Act*, section 3). A further check on that power could ensue through an amendment to the *Executive Act*, such that the CEO and DEO are included under disciplinary provisions (sections 11 and 12 of the *Executive Act*). Any amendment will of course require that the amendment procedures under section 16 of the *Election Act* be followed.

[71] As I have indicated to the parties, this scenario cries out for mediated settlement in order to effect meaningful changes to the *Election Act* and *Executive Act*, and avoid futile and repeated returns to this Court. The Court has not proven to be an effective forum for achieving a fair and undisputed election process for Sturgeon Lake, as unfortunately it has been unable to provide lasting resolutions to internal disputes caused by sharp divisions among the membership.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The Decision to remove the Applicants from their position as Councillors, and banning them from participation in the March 2016 Election and for the lesser of three terms or nine years is quashed;
3. The results of the March 2016 Election are quashed and set aside;
4. The results of the April 2016 Election are quashed and set aside;
5. Sturgeon Lake shall institute an election in accordance with section 3 of the *Election Act* to select a Chief and Councillors as soon as reasonably possible, and within three months from the date of this decision;
6. In the interim, the status quo from before the invalid elections took place will be maintained: the four Applicants in this proceeding, Anita Parenteau, Danny Moosehunter, Micah Daniels, and Wesley Ballantyne, and Jonas Sanderson (not party to this application) shall continue to hold office in the normal course. These Councillors shall be paid for their positions from the date of their wrongful dismissal (March 3, 2016) until the end of their previous term (March 29, 2015) and from the date of this judgment until the new election has been conducted and a new Chief and Council have been elected. In the event of any interim resignations, payment for the position resigned will cease as of the effective date of resignation, which shall not exceed a period of thirty days from the date of resignation;

7. The termination of Elaine Vandall, Sturgeon Lake's External Manager, by the Chief and Councillors elected in the March 2016 Election is declared invalid.

"Michael D. Manson"

Judge

ANNEX A

Sturgeon Lake First Nation Election Act, 2009

Definitions

2.7 "**Corrupt Practice**" means any act done by an Elected Official, whether Chief or Councillor, who unlawfully and/or wrongly uses his or her name or position of authority or trust to procure some benefit or favour for him or herself or for another person contrary to his or her official or fiduciary duties and/or the rights of other persons and includes any act or omission that is recognized by law or custom to be a Corrupt Practice. The custom gifting of tobacco and/or cloth for proper purposes is not a corrupt practice.

Commencement of Election

3.1 Prior to an Election being called, a special Band meeting shall be convened on Sturgeon Lake IR to select a Chief Electoral Officer, Deputy Electoral Officer and the Appeal Tribunal.

3.2 (a) The Chief Electoral Officer and the Deputy Electoral Officer shall serve for a period equal to the term of office of the Chief and Council and shall be responsible for all Band By-elections that may be called during the same term. The Chief Electoral Officer and/or Deputy Electoral Officer may be re-appointed.

3.3 (a) The Appeal Tribunal shall serve for a period equal to the term of office of the Chief and Council and shall be responsible for all By-elections that may be called during the same term.

3.4 Every General Election and By-election shall be commenced by the passing of a Band Council Resolution [BCR] which shall:

(a) name the Chief Electoral Officer, Deputy Electoral Officer and Appeal Tribunal and alternates, if any, who were selected at a special meeting of the Band convened for that purpose.

(b) fix the last day for any business transaction to occur on behalf of the Sturgeon Lake First Nation which day shall be Nomination Day. Thereafter, no person running for office whether in an Election or By-election shall use Band facilities or resources, human or fiscal, to promote themselves nor conduct any business nor approve any contracts or purchase orders on behalf of the Band. In the case of a By-election, persons whose term is not over will continue to do business on behalf of the Band but must diligently avoid conflicts of interest or Corrupt Practice in relation to any of the Candidates or engage in any acts designed to influence the outcome of that By-election.

(c) fix the day by which Declarations of Intention to Run for Office must be filed

which day:

(i) must not be a public holiday, a Saturday or Sunday:

and

(ii) must be not more than fourteen (14) days nor less than seven (7) days after the date on which the Notice of Election has been issued:

(d) fix the Nomination Day, which day must be no less than seven [7] days nor more than fourteen [14] days following the deadline for receipt of Declarations of Intention to Run for Office: but, if that day is a public holiday, a Saturday or Sunday, then on the first day following that is not a public holiday, Saturday or Sunday;

(e) fix the Polling Day, if an Election or By-election is required,

which day shall be seven [7] days following the Nomination Day:

(f) describe the type of Election, whether General Election or By-election, which is to be conducted:

(g) describe the powers given or bestowed upon the Chief Electoral Officer, Deputy Electoral Officer, Appeal Tribunal and Security Personnel as those set out in this Election Act.

4.1 Subject to section 3 of this Act, the Chief Electoral Officer, Deputy Electoral Officer and Appeal Tribunal shall be officially appointed by Chief and Council through a Band Council Resolution [BCR] which will

(a) contain their full names:

(b) set out the date, time and place for the Declarations of Intention to Run for Office to be filed, the Nomination Meeting, the Polling Day and the Advance Polls;

(c) describe the type of Election (i.e., General Election or By-election) which is to be conducted;

(d) describe the powers given or bestowed upon the Chief Electoral Officer, Deputy Electoral Officer and Appeal Tribunal as those set out in this Election Act; and

(e) establish the rate of remuneration for the Chief Electoral Officer, Deputy Electoral Officer, and Appeal Tribunal [flat fee for the latter or per diems for the Electoral Officers and proper travel-related expenses (mileage, meals. etc.)]

4.5 The Chief Electoral Officer or his or her designate shall, in accordance with the Band Council Resolution, post a Notice of Election along with a list of all eligible Electors ["the Voters' List"]. The Notice of Election, Voters' List and a copy of this Act shall be posted in all Band Offices and in such other public places as the Chief

Electoral Officer or his or her designate deems necessary.

4.8 The Notice of Election shall contain and set out:

(a) the time, date and place for receipt of the Declarations of Intention to Run for Office:

(b) the time, date and place for the Nomination Meeting;

(c) the time, date and place for the Advance Polls in Prince Albert and Saskatoon;

(d) the time, date and place for the Poll: and

(e) the position or positions open for Election or By-election.

5.1 The Chief Electoral Officer shall ensure that the following conditions are met:

(a) Any Elector may nominate or second the nomination of a Candidate.

(b) Only Members of the Sturgeon Lake First Nation who:

(i) are of the full age of eighteen (18) years on Nomination Day: and

(ii) have been nominated in accordance with this Act; and

(iii) have not disqualified themselves by a Corrupt Practice for a period of either three (3) terms or nine (9) years, whichever is less, and

(iv) have a satisfactory security clearance as indicated by a current CPIC and declaration and (A) are not otherwise disqualified from running in an Election or By-election by virtue of having been convicted of an indictable offence under the Criminal Code of Canada for a period of at least five (5) years or of a hybrid or dual offence with respect to which the Crown has elected to proceed by way of indictment or of an offence under the Narcotic Control Act or the Food and Drug Act involving trafficking of a prohibited or controlled substance: and (8) are not otherwise disqualified from running in an Election or By-election by virtue of having been convicted of an summary conviction under the Criminal Code of Canada for a period of at least three (3) years or of a hybrid or dual offence with respect to which the Crown has elected to proceed summarily; and

(v) where applicable, have applied for or are eligible to apply for a pardon: and

(vi) who have filed a Declaration of Intention to Run for Office, provided a sworn declaration with respect to their criminal history and a satisfactory criminal record check to the Chief Electoral Officer prior to the Nomination meeting: and

(vii) who do not owe any money to the Band: and

(viii) who do not have any Band property in their possession without due authority to

have custody or control of the same; and

(ix) who live a positive life style; and

(x) who have paid the requisite fee may be nominated as a Candidate pursuant to subsection 2.5 of this Act.

11. An Appeal Tribunal shall be appointed at the time the Election is called

11.1 Except under the extraordinary circumstances set out in section 3.3(e), the Appeal Tribunal shall be made up of three (3) persons all of whom who meet the same eligibility requirements as do Candidates.

11.3 The Appeal Tribunal shall supervise and administer all Election and By-election Appeals in accordance with this Election Act. The Appeal Tribunal may be reconvened to deal with any disciplinary matters that arise during an Elected Official's term of office pursuant to the terms of the *Sturgeon Lake First Nation Executive Act*, 2009.

12. The Appeal Procedure shall be as follows:

12.1 Any Candidate at the Election or any Elector who gave or tendered his or her vote at the Election may, within fourteen (14) calendar days of the Poll, appeal the Election if he or she has reasonable and probable grounds for believing that:

(a) error or violation of the Election Act was made in the interpretation or application of the Act which might have affected the outcome of the Election:

(b) a Candidate who ran in the Election was ineligible to do so pursuant to this Act; and/or

(c) there was a Corrupt Practice in contravention of the Election Act.

12.5 If the Appeal Tribunal decides to proceed with an Appeal Hearing, the Hearing shall be held within fourteen (14) days of receiving the complaint. All proper parties [the Appellant(s) and Respondent(s)] shall be given notice of the date, time and place of the Appeal Hearing and the grounds for appeal by registered mail.

12.6 At the Appeal Hearing, the Appellant(s) shall present his, her or their case. All proper Respondents are entitled to make full answer and defence. The Appellant(s) shall then have an opportunity for rebuttal. Any of the parties [Appellants, Respondents] may be represented by legal or other counsel each at their own expense. The Appeal Tribunal may have legal counsel whose professional fees shall be paid by the Band.

15. Vacancies shall occur in the event of the following:

15.1 The offices of Chief and Councillor shall immediately become vacant when the

person holding that office

(a) is convicted of an offence that may affect their ability to give effective leadership or bring disrepute to their person or the office including, but not limited to, fraud, violent crimes including murder, manslaughter and assaults of any kind, any sexual offences, any offences intending to corrupt morals, disorderly conduct, and offences involving drugs or alcohol;

(b) dies or resigns office;

(c) is found guilty by the Appeal Tribunal, in connection with an Election, of Corrupt Practice, giving or accepting a bribe, dishonesty or malfeasance:

(d) has been absent from meetings of the Council for three (3) consecutive meetings without being authorised to do so;

(e) declares personal bankruptcy:

(f) is determined to be incompetent by a duly licensed medical practitioner for the Province of Saskatchewan;

(g) fails to uphold the Oath of Office, Band By-laws or other duly enacted Band legislation including this Act and the Executive Act:

(h) is removed from office following a vote of no confidence pursuant to *The Sturgeon Lake First Nation Executive Act, 2009*: or

(i) is determined to be ineligible to hold office by virtue of this Act or any amendments thereto.

16. Any changes or additions to this Act shall require written notice of the proposed changes to be mailed or hand-delivered to the Membership three (3) months prior to their adoption.

16.1 Anyone having reason to challenge those changes must do so in writing to the Sturgeon Lake First Nation. Attention: Chief and Council within the three (3) month period. Upon expiry of the three (3) month period, duly called meetings of the First Nation Electors must be held in Sturgeon Lake, Prince Albert and Saskatoon and a vote must be taken to determine whether a majority of those present agree to the change(s) or addition(s).

16.2 If the amendments are adopted by a simple majority of those present, Chief and Council shall sign a Band Council Resolution [BCR] to this effect and file the same with Indian Affairs.

Sturgeon Lake First Nation Executive Act, 2009

8.3 The Elders Executive Advisory Council shall carry out those duties assigned to them including:

- (a) providing guidance to the Chief and Council when their advice is sought;
- (b) acting as the conscience of the Band and, where necessary or warranted, instituting disciplinary or impeachment proceedings against the Chief and Council;
- (c) providing a sober second thought on issues and concerns of the day;
- (d) acting as a sounding board to new proposals;
- (e) serving as a resource to Band members;
- (f) acting as statesmen and women within the legislative arm.

11. Discipline

11.1 If, the Elders Executive Advisory Council, acting reasonably, have reason to believe that the Chief or one of the Councillors have breached the Code of Ethics, Oath of Office or Conflict of Interest Guidelines or that the Chief or Councillor are guilty of improper, unethical, immoral or illegal conduct the Elders Executive Advisory Council shall call upon the Appeal Tribunal to convene a disciplinary hearing.

11.2 The Chief or Councillor who is being subject to the disciplinary hearing shall be given notice of such a hearing by the Appeal Tribunal as soon as practicable after it has been asked to convene a disciplinary hearing. The notice shall provide at least seven (7) clear days before the hearing and shall set out:

- (a) the nature of complaint;
- (b) the details of the complaint: describe the incident(s), what is alleged to have been said or done, the date and location of the incident(s), the circumstances surrounding the incident(s), the names of any witnesses and any other relevant information;
- (c) notice that the Respondent may have a friend or solicitor attend the hearing but that any expenses so incurred are the responsibility of the Respondent.

11.3 The Appeal Tribunal shall have full powers to investigate, including access to Band records or files, documents and data. They may interview witnesses, take testimony under oath and make such inquiries as will serve the interests of justice.

11.4 The Appeal Tribunal may

- (a) suspend the Respondent without pay during the investigation, which pay

will be reinstated if the Appeal Tribunal finds no evidence of wrongdoing on the part of the Respondent;

- (b) suspend the Respondent without pay following a finding of guilt;
- (c) refer the Respondent for assessment and treatment; and/or
- (d) recommend a community meeting to remove the Respondent from office.

12. Motion of no Confidence

12.1 Grounds for a motion of No Confidence include a serious breach of the duties and responsibilities contained in this Act.

12.2 The process for a motion of No Confidence shall be as follows:

(a) a Petition requesting a motion of No Confidence of the Chief or Councillor must be submitted by a Petitioner in writing to the Elders Executive Advisory Council;

(b) at the time of the submission of the Petition for a Motion of No Confidence, there shall be presented therewith an affidavit by the Petitioner(s) that he, she or they has (have) good reason to believe, and verily does (do) believe, that the person against whom the Petition is filed, has breached the provisions of this Act;

(c) at the time of the submission of the Petition, security for the payment of all costs, charges and expenses, that may become payable by the Petitioner(s), shall be given on behalf of the Petitioner(s);

- (i) to any person summoned as a witness on his behalf; or
- (ii) to the Respondent.

(d) The security shall be in the amount of \$100.00 per Petitioner and shall be given by a deposit of money to the Elders Executive Advisory Council made payable to the Band;

(e) The Elders Executive Advisory Council will immediately notify the Chief, and the Respondent; and, if the Chief is the Respondent, the Elders Executive Advisory Council will immediately notify the Councillors; and the Elders Executive Advisory Council will thereafter call a meeting of the Appeal Tribunal, the Respondent and the Petitioner(s) for the purpose of making a determination of the issue. The determination shall be made in a closed session by means of resolution confirmed by a quorum of the Elders Executive Advisory Council and the Appeal Tribunal; and

- (i) if the grounds for the Motion of No Confidence are substantiated, bring the matter forward to a Band meeting; or
- (ii) if the grounds for the Motion of No Confidence are not

12.3 The Office of Chief or a Councillor becomes vacant when fifty percent plus one (50% + 1) of the persons present at the Band meeting vote in favour of a motion of No Confidence.

12.4 If the grounds for the Motion of No Confidence are not substantiated, the security shall be forfeited and deposited in the Band account.

12.5 If the grounds for the Motion of No Confidence are substantiated, the security shall be refunded to the person who filed the Petition.

12.6 If the complaint is found to be frivolous or vexatious, the Elders Executive Advisory Council and the Appeal Tribunal shall assess a penalty of \$100.00 against each of the Petitioner(s) which shall show as an Accounts Receivable by the Band until paid. The monies shall go to the Band account.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-489-16

STYLE OF CAUSE: ANITA PARENTEAU ET AL v LESLIE BADGER ET AL

PLACE OF HEARING: SASKATOON, SASKATCHEWAN

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JUDGMENT AND REASONS: MANSON J.

DATED: MAY 12, 2016

APPEARANCES:

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