Federal Court  Cour fédérale

Date: 20190830

Docket: T-1326-18

Citation: 2019 FC 1121

Ottawa, Ontario, August 30, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

PEARL BERNICE POTTS

Applicant

and

ALEXIS NAKOTA SIOUX NATION

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 the Applicant, Pearl Potts, seeks review of the decision of the Electoral Officer [the Officer] of June 20, 2018 regarding her challenge to the Alexis Nakota Sioux Nation's [ANSN or the First Nation] June 15, 2018 election process and results. Ms. Potts made a number of allegations of improper election practices, however, the Officer rejected her appeal as she failed to state her grounds of appeal during the appeal period.

[2] On this judicial review, Ms. Potts seeks to quash the decision of the Officer and asks this Court to declare the 2018 election results invalid and remove the Chief and Councillors from office.

[3] For the reasons that follow, the judicial review is dismissed, as Ms. Potts has not established that the Officer's decision was unreasonable. Furthermore, Ms. Potts has failed to exhaust alternative review procedures available to her pursuant to the custom electoral code.

Relevant Background Facts

[4] The Alberta Alexis Nakota Sioux Nation is a signatory Treaty Six First Nation. The ANSN adopted a custom electoral system in 1997 and the ANSN Custom Electoral Regulations [the ANSN Regulations] outline the procedural and substantive elements of the custom electoral system.

[5] Ms. Potts is a member of ANSN and served as an elected member of the Council from June 2014 to June 2018.

[6] Ms. Potts alleges that a number of improprieties occurred during the 2018 election campaign. She says that the ANSN Chief and Councillors signed cheques during the two-week period before the election, despite an agreement that they would not. She also claims that Chief Alexis held a youth rally on June 5, 2018 and improperly used the ANSN logo at this event. She alleges that Chief Alexis provided money, employment, and gasoline to ANSN members in

exchange for their votes. Finally, she alleges that a candidate bribed voters with the promise of housing in exchange for their votes.

[7] Ms. Potts also claims that a number of corrupt and improper practices occurred on the day of the election. She alleges that a candidate bribed voters by giving out food and refreshments outside of a polling station. She says that the Electoral Officer added names to the voter list who were not members of the ANSN and that a voter was caught with two ballots.

[8] The ANSN retained Bernie Makokis to act as the Electoral Officer for the 2018 Election. Mr. Makokis is not a member of the ANSN.

[9] In his Affidavit, Bernie Makokis (para 10) explains his duties as the Electoral Officer for ANSN were to (1) prepare a list of electors, (2) establish an election file that contains all information relevant to the conduct of the election, (3) conduct the nomination in the manner prescribed by the Customary Election Regulations, (4) supervise the election and ensure it is conducted in accordance with the Customary Election Regulations, (5) appoint polling clerks and interpreters, (6) arrange for the construction of appropriate polling booths that ensure secrecy and privacy, and (7) to organize and Chair the meetings of the Election Appeal Committee.

[10] The ANSN election was held on June 15, 2018. Ms. Potts was unsuccessful in her re-election bid.

[11] On June 18, 2018, Ms. Potts submitted a letter to the Electoral Officer, Mr. Makokis, stating as follows:

> Please accept this letter as our notice of appeal in accordance to section 13 of the Customary Election Regulations of the Alexis First Nation.
>
> We strongly believe we have true evidence and adequate information to proceed with an appeal, in addition we have our $300.00 in accordance to 13.2.1 of the regulation.
>
> Lastely (*sic*) and more importantly we called and texted you to inform you of the appeal, however we have no received a response until late this afternoon to deliver an original copy and funds of the appeal.

Decision of the Electoral Officer

[12] By letter dated June 20, 2018, the Electoral Officer, Mr. Makokis, rejected the Applicant's appeal as she had not provided grounds for appeal as required by section 13 of the ANSN Regulations. His letter states:

> The procedure for election appeals is governed by The Customary Election Regulations of the Alexis First Nation (the "Regulations"). Section 13.1 of the Regulations sets out the requirements for appealing the results of the elections. Section 13.2 of the Regulations sets out the mandatory requirements for the Notice of Appeal that must be forwarded to the Electoral Officer. Section 13.2 reads…
>
> …
>
> In the present case, your letter of intention to appeal does not identify the grounds for appeal within the allotted time, and as such it does not comply with the requirements of Sections 13.2 of the Regulations. Accordingly, your letter of intention to appeal is defective, and does not constitute a Notice of Appeal as required by the Regulations, and must be dismissed.
>
> Therefore, the Notice of Appeal cannot be accepted, and I am unable to proceed with the appeal as required by the Regulations.

ANSN Regulations

[13] The relevant provisions of the ANSN Regulations are as follows:

> 13. ELECTION APPEALS
>
> 13.1 Appeal Period and Grounds of Appeal
>
> Within five (5) consecutive days of and including the Election Day, any Elector may appeal the results of an Election, By-election, or run-off Election on the following grounds:
>
> …
>
> 13.1.3 Any Candidate was guilty of promoting or aiding corrupt practices including, but not limited to bribery, threats, and intimidation of Candidates, Electors, the Electoral Officer, or Polling Clerks;
>
> 13.2 Notice of Appeal
>
> 13.2.1 A Notice of Appeal I [*sic*] writing and signed by the Appellant shall be forwarded to the Electoral Officer outlining the grounds for the Appeal and with a cash deposit of Three Hundred ($300.00) Dollars.
>
> 13.2.2 The Notice of Appeal must be received by the Electoral Officer within three (3) days of the Election Day.
>
> 17. REMOVAL FROM OFFICE
>
> 17.1 Grounds for Removal
>
> The removal of a Chief or Councillor from office may be sought by the Electors on the following grounds:
>
> …
>
> 17.1.5 He had engaged in corrupt Election practices.

Issues

[14] Based upon the written submissions, and the positions taken by the parties during oral submissions, the following are the issues for determination:

a. Did the Applicant appeal within the appeal period?

b. Is the Applicant's hearsay evidence admissible?

c. Has the Applicant established corrupt election practices?

d. What is the appropriate remedy?

Standard of Review

[15] The Applicant submits that the standard of review of the Electoral Officer's decision is correctness.

[16] This is in contrast to the presumption of reasonableness that applies to the interpretation by an administrative body of its home statute (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54).

[17] In keeping with *Dunsmuir*, a decision by a First Nation election appeal body tasked with interpreting an election code will generally be reviewed on a standard of reasonableness (*Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 20 [*Pastion*]).

[18] In *Commanda v Algonquins of Pikwakanagan First Nation*, 2018 FC 616, Justice Phelan notes (at para 19) that a "decision of a community's electoral laws, as part of the respect owed to

aboriginal peoples in the governance of their internal affairs…should be accorded a high degree of deference within the reasonableness range of outcomes."

[19] The applicable standard of review in this case is reasonableness. As a result, a significant degree of deference will be shown to the Officer.

Analysis

a. *Did the Applicant Appeal Within The Appeal Period?*

[20] The Applicant argues that sections 13.1 and 13.2.2 of the ANSN Regulations are inconsistent with each other and, as a result, cannot stand. Further, she argues that as a member of ANSN, she can seek the removal of a Chief or Councillor at any time pursuant to sections 17.1 and 17.1.5 of the ANSN Regulations; therefore, she argues it was an error for the Officer to determine that she had missed the deadline to appeal the election results.

[21] I agree that the wording of the Election Code contains a discrepancy between section 13.1 and 13.2.2 as to whether the appeal period is three or five days. This Court has previously interpreted the period to be five days (*Kootenhayoo v Alger*, 2003 FC 1128 at para 7 [*Kootenhayoo*]) where the Court recognized the inconsistency between these two sections of the ANSN Regulations and concluded that the correct interpretation is that the appeal period is five days.

[22] In this case, whether the appeal period is three or five days is inconsequential. The appeal period includes June 15, 2018, being the day of the election (section 13.1); therefore, the five day appeal period ran until June 19, 2018. Here, Ms. Potts failed to submit the grounds of her appeal by June 19, 2018, as required by section 13.2.1 of the ANSN Regulations.

[23] Accordingly, even with the benefit of an interpretation which allows for a five day appeal period, Ms. Potts did not submit a proper appeal within the applicable time frame. Therefore, the decision of the Electoral Officer is reasonable and is entitled to deference by this Court.

b. *Is The Applicant's Hearsay Evidence Admissible?*

[24] In support of this judicial review, Ms. Potts filed her own affidavit as well as affidavits sworn by Florence Letendre and Cameron Peter Alexis. These affidavits contain numerous allegations of electoral impropriety including bribery and intimidation.

[25] In advance of the hearing, the Respondent filed a Motion seeking to strike portions of the Applicant's Affidavit evidence on the grounds that they contain hearsay. This Motion was considered at the hearing of the judicial review application. In particular the Respondent objects to:

(i) paragraphs 4, 5 and 8 of the Affidavit of Pearl Potts;

(ii) paragraphs 4 and 5 of the Affidavit of Florence Letendre; and

(iii) paragraphs 5, 6 and 7 of the Affidavit of Cameron Peter Alexis.

[26] In response, Ms. Potts says that her evidence falls within a hearsay exception. In support of this, she relies on the Supreme Court of Canada's decision in *Sideleau v Davidson* ([1942] SCR 306 [*Sideleau*]) and the Federal Court decision in *Wilson v Ross* (2008 FC 1173 [*Wilson*]). However, these cases speak to the Court being able to draw an interference of corrupt election practices when certain conduct has been established. These cases do not say that hearsay evidence can be used to prove that this conduct occurred. Further, in *Wilson*, Justice Dawson states at para 30 that requiring "an elector to come forward to testify that their vote was bought imposes too high a burden on a party who alleges corrupt practices." However, she does not discuss hearsay and does not state that untested hearsay may be used to prove conduct occurred.

[27] The general rule is that hearsay evidence should not be considered. It can "…exceptionally be admitted into evidence if it is necessary and reliable" (*R v Bradshaw*, 2017 SCC 35 at para 18 [*Bradshaw*]).

[28] The facts contained in these paragraphs relied upon by Ms. Potts, are not facts confined to the direct personal knowledge of the affiants. In the case of Ms. Potts' Affidavit she attaches statements from others and repeats what she was told by others. The Affidavits of Florence Letendre and Cameron Peter Alexis repeat alleged statements made by others prefaced in the Affidavits with: "I was told by…". This is classic hearsay evidence. The Applicant has not provided direct evidence from those making these various allegations, nor has the Applicant explained why their direct evidence could not be provided. Therefore, this evidence which goes to the central issues in dispute cannot be considered necessary or reliable.

[29] The Court therefore will not consider paragraphs 4, 5 and 8, of the Affidavit of Pearl Potts, paragraphs 4, and 5 of the Affidavit of Florence Letendre, and paragraphs 5, 6, and 7 of the Affidavit of Cameron Peter Alexis.

c. *Has The Applicant Established Corrupt Election Practices?*

[30] Ms. Potts argues that when allegations of corrupt election practices are made the onus is on the Respondent to prove that the corruption did not occur. In support of this, Ms. Potts relies upon the Federal Court decision in *Papequash v Brass*, 2018 FC 325 [*Papequash*], where at para 33 Justice Barnes states:

> [t]he Applicants carry the burden of proof of establishing, on a balance of probabilities, that a contravention of the Act has occurred that is likely to have affected the election results: see *McNabb v. Cyr*, 2017 SKCA 27 (Sask. C.A.) at para 36, [2017] S.J. No. 132 (Sask. C.A.). Where sufficient evidence of corruption is adduced, the evidentiary burden may shift to the Respondents.

[31] However, the evidentiary shift in burden is only applicable once a Court is satisfied that there is reliable evidence of corruption (*Papequash*, at para 33). In this case, when the balance of the Applicant's evidence is considered, that is, the evidence which is not excluded because it is hearsay evidence, the Applicant has not established with reliable evidence on a balance of probabilities that corruption occurred during the June 2018 election.

[32] In fact, the only action which at first glance might appear to be questionable, is the act of the ANSN Chief purchasing gas for Florence Letendre shortly before the election. The Chief, at paragraph 56 of his Affidavit of September 21, 2018, acknowledges having done so. However he

also explains that when he bought the gas there was no discussion of Ms. Lentendre's vote. Likewise Ms. Letendre does not make this allegation and further stated during her cross examination that she was not trying to do anything unlawful when she asked the Chief to buy her gas. (Cross examination of Florence Lentendre – Record of Pearl Bernice Potts, volumbe 1, Teb E, page 119)

[33] In *Henry v Roseau River Anishinable First Nation*, 2017 FC 1038 at paras 57 – 58 the Court reviews the law of "vote buying". Important, is Justice Mandamin's conclusion at paragraph 59 that "…there is no bribery, or vote buying, when money is given without any condition to vote in a certain way."

[34] In this case, the act of the Chief buying Ms. Letendre gas can only be considered "vote buying" if it was done on the condition that she vote for the Chief in the upcoming election. However, this is rebutted by the direct evidence of the Chief and Ms. Letendre. Accordingly, on these facts, the act of the Chief of buying a tank of gas does not substantiate Ms. Pott's allegation of corrupt election practices.

[35] Overall, having failed to present reliable and direct evidence to support the allegations made, in the circumstances, Ms. Potts cannot rely upon the shift of the burden of proof to the Respondent to establish indirectly what she has not established directly.

d. *What Is The Appropriate Remedy?*

[36] The Applicant relies upon her right to seek removal of a Chief or Councillor for corrupt practices through sections 17.1 and 17.1.5 of the ANSN Regulations. However, the record does not disclose that Ms. Potts made any complaint or application pursuant to sections 17.1 and 17.1.5 of the ANSN Regulations. The availability of a mechanism within the ANSN Regulations to challenge corrupt practices that was not used by Ms. Potts shows that she has failed to exhaust all possible avenues before coming to this Court.

[37] In *Peters First Nation Band Council v Peters*, 2019 FCA 197 [*Peters*], the Federal Court of Appeal stated (at paras 37) that:

> 37 As a general rule, absent exceptional circumstances, a Court should refuse to hear a judicial review application unless all the administrative appeal processes have been exhausted (*C.B. Powell Ltd. c. Canada (Agence des services frontaliers)*, 2010 FCA 61, [2011] 2 F.C.R. 332 (F.C.A.) at paras. 30-33). In *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.) at para. 101, this Court held, "[judicial review] is a tool of last resort, available only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed, ineffective or inadequate, and the Federal Court has the power to grant the relief sought".

[38] It is well established that an adequate alternative is a discretionary ground for refusing an application for judicial review (*Strickland v Canada (Attorney General)*, 2015 SCC 37, at para 38 [*Strickland*]). For the Federal Court to intervene at the current stage of this dispute would ignore the judiciary's limited supervisory role in adjudicating Indigenous election disputes.

[39] In *Strickland* (at paras 42-45), the majority of the Supreme Court noted that since refusing to hear an application for judicial review on the basis that the parties have not exhausted

an alternative remedy is discretionary, before deciding whether to refuse to hear the application for judicial review, the Court must consider all the circumstances of the case.

[40] In these circumstances, the comments in *Pastion,* are applicable where the Court states as follows at para 23:

> The idea that the legislature intends for administrative decision-makers to be afforded deference has a particular resonance in the Indigenous context. For at least three decades, it has been a policy of the federal government to recognize Indigenous self-government (see, for example, Government of Canada, *Federal Policy Guide: Aboriginal Self-Government* (1995)). The enactment of Indigenous election legislation, such as the Election Regulations at issue in this case, is an exercise of self-government. The application of laws is a component of self-government. It is desirable that laws be applied by the same people who made them. Therefore, where Indigenous laws ascribe jurisdiction to an Indigenous decision-maker, deference towards that decision-maker is a consequence of the principle of self-government.

[41] The same logic applies to this Court's decision to exercise its supervisory authority over Indigenous election disputes. If an alternative process rooted in Indigenous self-governance is available to adequately resolve the dispute, it would be inappropriate for this Court to intervene.

[42] Here, the Applicant has recourse to address the alleged corrupt election practices under the ANSN Regulations. In the circumstances, it would not be appropriate for the Court to step into the shoes of those chosen by ANSN to address those issues. This is an appropriate circumstance in which the Federal Court will decline to exercise its jurisdiction.

Conclusion

[43] This application for judicial review is dismissed with costs payable by the Applicant to the Respondent in the fixed amount of $1,000.00.

JUDGMENT IN T-1326-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. The Applicant shall pay the Respondent costs in the fixed amount of $1,000.00.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1326-18
STYLE OF CAUSE:	PEARL BERNICE POTTS v ALEXIS NAKOTA SIOUX NATION
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	JUNE 11, 2019
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	AUGUST 30, 2019

APPEARANCES:

Priscilla Kennedy	FOR THE APPLICANT
Aiyaz A. Alibhai Vita Dos Santos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DLA Piper (Canada) LLP Barristers and Solicitors Edmonton, Alberta	FOR THE APPLICANT
Miller Thomson LLP Lawyers / Avocats Vancouver, British Columbia	FOR THE RESPONDENT