

Federal Court



Cour fédérale

Date: 20220107

Docket: T-1635-21

Citation: 2022 FC 17

BETWEEN:

**CLARENCE APSASSIN, NORMAN APSASSIN
and JOSEPH APSASSIN**

Applicants

and

**BLUEBERRY RIVER FIRST NATIONS BAND
COUNCIL, CHIEF MARVIN YAHEY,
COUNCILLOR SHERRY DOMINIC,
COUNCILLOR WAYNE YAHEY,
COUNCILLOR SHELLEY GAUTHIER,
COUNCILLOR ROBIN ESKAWOV, and
COUNCILLOR TROY WOLFE**

Respondents

REASONS FOR ORDER

PHELAN J.

I. Introduction

[1] These are the Reasons for dismissing an application for judicial review seeking orders in the nature of *mandamus*, *quo warranto* with *certiorari* or declaration in aid directed at the forthcoming elections for Band Council and Chief scheduled for January 13, 2022 for Council

and January 14, 2022 for Chief. The precise nature of the remedies sought have shifted since the application was filed and the Applicants' positions varied even at the hearing.

[2] The thrust of the application is to question the currently planned election process, to permit electronic voting or call a "community vote" regarding the availability of electronic voting and to remove the Chief and Councillors from office effective on January 14, 2022, without regard to a 30-day transition period.

[3] In their Memorandum of Fact and Law, the Applicants summarize their relief sought as follows:

- (a) an Order in the nature of *mandamus*:
 - i. compelling the Council to set an Election no later than December 15, 2021 and all the necessary steps to comply with this Election date, including appointing an Electoral Officer consistent with the membership consultation;
 - ii. directing a Community Vote on the Election date and Electoral Officer consistent with sections 155 and 178 of the Custom Law;
- (b) if necessary, further and/or in the alternative, an Order in the nature of *certiorari* setting aside and quashing the purported Decision to extend Council's term in office, dated October 14, 2021;
- (c) a Declaration or a writ of *quo warranto* removing all Council Members from office at the expiry of their fixed 4 year term in office on January 14, 2021;
- (d) costs to the Applicants in the lump sum amount of \$10,000; and
- (e) such further and other relief that this Court deems just.

II. Background

[4] It is not an overstatement to describe this Band as a troubled group at least when it deals with governance issues. Council has been effectively deadlocked for a considerable period. There is one set of three Councillors (including the Chief) who support Chief Yahey [Yahey Respondents] and a set of three who generally oppose [Gauthier Respondents].

[5] For purposes of this matter, it is not necessary to delve into the ongoing conflict or the numerous proceedings taken in this Court dealing with governance issues. The facts related to this election issue follow below.

[6] The Applicants are members of the Blueberry River First Nation [Band/BRFN]. The Band has been governed since 2017 by a Custom Election Code [Code] and despite the suggestion that there is no broad support for the Code, it nevertheless governs the Band, as recognized by this Court in *Chipesia v Blueberry River First Nations*, 2019 FC 41, upheld by the Court of Appeal in 2020 FCA 9.

[7] The Band Council election must occur by January 14, 2022, when the Council's term is set to expire as provided in s 10 of the Code.

[8] The pertinent provisions of the Code are set out below:

PART 2: DEFINITIONS, INTERPRETATION AND APPLICATION

Definitions

...

“conflict of interest” means a situation where a Council member:

- (a) performs a Council duty and at the same time knows or ought reasonably to know that in the performance of the Council duty there is an opportunity to benefit their private interests, or
- (b) participates in any personal or business activities outside their role on Council that may interfere with the fulfillment or performance of their Council duties, or conflict with the interests of Blueberry River;

...

“Council resolution” means a formal motion moved by a Council member, seconded by another Council member and approved by a majority of a quorum of Council at a duly convened meeting of Council;

...

PART 3: COUNCIL

...

Term of Office

10. (1) Subject to subsections (2) – (4), the term of office for a Council member is four (4) years and commences at 11:59pm, thirty (30) days after the Declaration of Election Results for that office is posted in accordance with this By-law.

(2) Despite subsection (1) and subject to subsection (3), a person elected under this By-law holds office until 11:59pm thirty (30) days after the Declaration of Election Results is posted following election for that office.

(3) Despite subsection (1), a person who is elected in a by-election or in an election that is directed under section 137(b) must commence their position in office immediately after the Declaration of Election Results for their office is posted, and hold their position in office for the remainder of the term of office of that Council member to whom the newly elected person replaces.

(4) For greater certainty, in the event of any appeal of an election result, a Council member must be entitled to remain in office until such time as the appeal has been determined and, thereafter, subject to the appeal decision.

...

PART 4: ELECTION AND BY-ELECTION DATES

...

Setting of Election and By-Election Dates

22. At least sixty-five (65) days before the expiry of the term of Family Councillors, and no later than fifteen (15) days after the date that a by-election is required to fill a vacant position on Council, the Council must pass a Council resolution in the form set out in Schedule “A” Forms, setting a date for the election and Chief election meeting or by-election to take place.

PART 5: APPOINTMENT OF ELECTORAL OFFICER/DEPUTY ELECTORAL OFFICER, AND DESIGNATION OF POLLING SITES

Appointment of Electoral Officer, Deputy Electoral Officer and Designation of Polling Sites

23. (1) At least sixty-five (65) days before an election day, and no later than fifteen (15) days after the date that a by-election is required, the Council must pass a Council resolution in the form set out in Schedule “A” Forms to:

- (a) designate the locations of polling sites;
- (b) designate the location of the Chief election meeting;
- (c) appoint an electoral officer; and

(d) where desirable to the Council, appoint a deputy electoral officer.

(2) The Council must post a copy of the completed Council resolution:

(a) in a conspicuous location at the principal administration office of Blueberry River;

(b) at all other locations designated by Council, and

(c) on the website of Blueberry River.

(3) If the Council does not appoint an electoral officer within the time set out in subsection (1), the chief operating officer must immediately appoint an electoral officer and comply with subsection (2).

(4) Where a deputy electoral officer is appointed, that person has the authority to fulfill any obligations of the electoral officer set out in this By-law that are delegated to him or her by the electoral officer.

...

PART 6: PRE-NOMINATION PROCEDURES

...

Nomination Meeting and Entitlement to Vote by Mail-In Ballot

39. At least fifty-five (55) days before a scheduled election day, the electoral officer must prepare a Notice of Nomination Meeting, setting out:

(a) a statement that Council has set an election day;

(b) a statement that Council has set a Chief election meeting;

(c) the date of the scheduled election day;

(d) the date of the Chief election meeting;

(e) the location of each polling site;

(f) the location of the Chief election meeting;

- (g) the date, time, location and duration of the Nomination Meeting;
- (h) the definition of an elector;
- (i) a statement setting out that a person may confirm the inclusion of their name on the electors' list by contacting the electoral officer;
- (j) a statement that each elector may nominate or second candidates for Chief;
- (k) a statement that each elector within a Family Group may nominate or second candidates for Family Councillor to represent that Family Group, but not for a Family Group to which they do not belong;
- (l) instructions for how an elector may nominate a candidate or second the nomination of a candidate for Chief;
- (m) instructions for how an elector may nominate a candidate or second the nomination of a candidate for Family Councillor;
- (n) the eligibility requirements for a person to be a candidate as set out in section 41;
- (o) a statement that electors may obtain a copy of this By-law and nomination forms from the electoral officer;
- (p) a statement that electors ordinarily resident on Reserve who are unable to vote in person on the date of the election may at least twenty (20) days prior to the date on which the election is to be held, apply to the electoral officer to vote by mail-in ballot;
- (q) a statement that any elector who is not ordinarily resident on Reserve is entitled to vote by mail-in ballot and that a mail-in ballot will be sent to them unless they advise the electoral officer in writing that they do not want to receive a mail-in ballot at least forty (40) days prior to the date on which the election is to be held; and

- (r) the name and contact information for the electoral officer.

...

PART 11: VOTING IN PERSON

...

Right to Vote

75. The electoral officer and each polling clerk must permit every person to vote who attends a polling site for the purpose of voting, provided that the person:

- (a) is an elector;
- (b) has not already voted; and
- (c) if he or she has been provided a mail-in ballot but has not voted by mail-in ballot, complies with paragraph 76(b).

...

PART 18: COUNCIL MEETING PROCEDURES

...

Community Vote Required

155. Where all Council members are in a conflict of interest with regard to a decision that must be made, they must refer that decision to a community vote which must be conducted in accordance with Part 21.

...

PART 21: COMMUNITY VOTE PROCEDURE

Community Vote Meeting Required

178. A community vote must be conducted in accordance with this Part if:

- (a) community approval of a Council decision is required pursuant to section 155; or

- (b) community approval is required for amendments to this By-law.

[9] Band Council had been at an impasse regarding election dates. The Gauthier Respondents favoured an election on December 13 and 14, 2021, in part because they took the position that the Code set the term for Councillors at no more than four years with a 30-day transition period which could not extend the term beyond four years (Code s 10). The interpretation of s 10 became a significant issue between the Yahey and Gauthier Respondent groups.

[10] The Yahey Respondents favoured an election on January 13 and 14, 2022, because the Band office is closed in December and because there is a December 29 deadline for negotiating a settlement arising from the BRFN's recent landmark treaty rights infringement decision from the Supreme Court of British Columbia - see *Yahey v British Columbia*, 2021 BCSC 1287.

[11] The BRFN's legal counsel advised that in the absence of anything in the Code addressing a deadlock over an election date, the election should be held on January 14, 2022, and Band staff and the electoral office should act accordingly.

[12] There was also an impasse regarding the appointment of electoral officers. The Gauthier Respondents apparently favoured a company, One Feather, possibly because they would conduct the election electronically. The Band's legal counsel advised that the Code did not provide for electronic voting.

The impasse was not resolved at the October 28, 2021 Council meeting and was put over to the next scheduled meeting of November 9, 2021.

[13] The November 9 council meeting was cancelled due to the death of Councillor Wolfe's mother. It is Band custom to suspend Band activities when an Elder dies.

[14] Under objection and through e-mail negotiation, the Gauthier Respondents agreed to a Council election on January 13, 2022, the Chief's election on January 14, 2022, and the appointment of Rosie Holmes as electoral officer.

[15] With the 65-day time limit in s 22 of the Code running and in the absence of a Council resolution under s 23(1) appointing an electoral officer, the chief operating officer [COO] acted pursuant to s 23 (3) to appoint an electoral officer.

[16] On November 10, 2021, the COO selected January 13 and 14, 2022 as the election dates and appointed Ms. Holmes as electoral officer.

[17] However, in the face of death threats, Ms. Holmes refused to attend on reserve to fulfill her electoral officer duties. While the Gauthier Respondents (minus Councillor Wolfe who was on bereavement leave) wanted to replace Ms. Holmes with One Feather, the continuing impasse was broken in Councillor Wolfe's absence such that on November 30, 2021, Council passed a resolution affirming the proposed election dates and appointing a deputy electoral officer to fulfill Ms. Holmes' on reserve duties.

[18] The November 30, 2021 decision has not been the subject of a specific judicial review application.

[19] In the current judicial review, the Band has taken no position although legal counsel attended the Court's Zoom hearing and provided some assistance to the Court. The Gauthier Respondents supported the judicial review whereas the Yahey Respondents opposed it.

III. Issues

[20] Despite the lack of clarity as to what the Applicants seek by way of remedy, the Court concludes that the issues are:

- Should *mandamus* issue with respect to the election scheduled for January 13 and 14, 2022, including whether *certiorari* should be included and whether a form of directed decision is appropriate?
- Should a writ of *quo warranto* be issued removing Council members at the end of the four-year term on January 14, 2022?

[21] In respect of *mandamus*, the Applicants say that Council failed to exercise their duties under the Code – to set an election date by resolution, appoint an electoral officer by resolution, and to listen to/consult with members.

[22] The framework for a *mandamus* is well set out in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA):

1. There must be a public legal duty to act;
2. The duty must be owed to the applicant;
3. There is a clear right to the performance of that duty, in particular:
 - a. The applicant has satisfied all conditions precedent giving rise to the duty; and
 - b. There was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;

4. Where the duty sought to be enforced is discretionary, certain rules apply;
5. No other adequate remedy is available to the applicant;
6. The order sought will be of some practical value or effect;
7. The Court in the exercise of its discretion finds no equitable bar to the relief sought; and
8. On a “balance of convenience” an order in the nature of mandamus should (or should not) issue.

[23] With respect to the duty to set an election date as provided in s 22 of the Code, the COO, acting pursuant to s 23(2), selected January 13 and 14, 2022 as the election dates given the necessity to meet the time limits in the Code. As explained by the Band’s legal counsel, a resolution was passed on November 30, 2021, affirming the dates.

[24] With respect to the appointment of an electoral officer, Council failed to meet the requirements in s 23 to appoint an electoral officer at least 65 days prior to the election date.

[25] However, s 23(3) empowers the COO, where Council fails to do so, to appoint an electoral officer and post the resolution per s 23(2).

[26] In view of the setting of the election date and the appointment of the electoral officer (and now the deputy), there is nothing an order of *mandamus* could achieve in respect of these two matters.

IV. Analysis

A. *Mandamus*

[27] With respect to *mandamus* for a community vote or some form of community consultation, the Applicants, in seeking *mandamus*, seek to have the Council or the Electoral Officer authorize electronic voting or failing that, to call for a community vote. The issue of electronic voting had been a topic of discussion for Council in the past.

[28] The Code makes no provision either in favour or by prohibition for electronic voting. However, the Code is not silent on the method of voting. It makes extensive provisions for in person voting and voting by mail.

[29] In my view, by specifying clearly the two methods of voting, it would be contrary to the Code to impose a third method of voting – electronic voting.

[30] I do not understand, as the Applicants argue, that *Fond du Lac First Nations v Mercredi*, 2020 FCA 59 at para 5 [*Fond du Lac*], stands for the proposition that courts, in these kinds of matters, should “think outside the box” - the box in this case being the Code.

That is not to say that we would have necessarily granted the remedial order the Federal Court did. If a similar case were to arise in the future, the reviewing court should consider all of the remedial tools at its disposal and, during argument, put a number of these to counsel. While the reviewing court must tailor its remedy to fit with the relevant elections legislation adopted by the First Nation (see, e.g., *Gitxaala Nation v. Canada*, 2016 FCA 187 at paras. 333-341) much scope for creativity exists. For example, strict timing requirements for implementation can be imposed to

ensure that the remedial purposes are carried out quickly. It is also possible for the reviewing court to supervise the implementation of its remedy to ensure it is followed: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. Other terms, consistent with public law values, can also be imposed: see discussion in *Paradis Honey Ltd. v. Canada*, 2015 FCA 89 at para. 138. However, in the end, regardless of what is decided, remedial orders should be clear and specific so they can be enforced. Those to whom they are directed need to know what constitutes compliance and what constitutes non-compliance: *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 at para. 24.

[31] The *Fond du Lac* decision puts emphasis on courts' remedial powers within the relevant elections legislation. The creativity referred to does not include reading or writing in provisions or granting powers that run contrary to the election legislation. The decision reinforces the need to stay true to the relevant election law.

[32] To the extent that BRFN members are unhappy with the Code's absence of electronic voting or other features, the Code provides a means for amendment. That is for the Band at some other time but not now. It is not for the Court to rewrite the Code through this decision.

[33] The survey and community comment evidence presented by the Applicants is not sufficient to amend the Code. That Code does not speak in terms of general broad consultation in establishing an election process. The proper amendment procedure would have to be followed.

[34] With respect to the Applicants' argument that the Court should direct a community vote, such a vote is not authorized in these circumstances. Section 178 sets the framework for a community vote in the context of s 155 where all Council members are in a "conflict of interest".

[35] A conflict of interest is further defined as benefiting Council members' private interest or personal or business activities.

There is no evidence to substantiate that such private/personal/business interests arise here.

[36] I have concluded that there is no basis for this Court to intervene by way of *mandamus*. The election has been called by Band resolution, the electoral officer and deputy electoral officer are in place and the method of voting in person or by mail is established under the Code.

B. *Certiorari*

[37] The Applicants have not directly addressed this issue in their submissions. To the extent that the Applicants challenge the Council's refusal or inability to set an election date of December 15 and 16, 2021, and appoint One Feather as the electoral officer, such a challenge should be a separate judicial review proceeding. To the extent the Applicants suggest that the result is the extension of the term of office by 30 days, that issue as discussed below in respect of *quo warranto* is without merit.

C. *Quo Warranto*

[38] The Applicants seek this relatively rare relief to remove Council immediately on January 14, 2022. They say that Council will unlawfully extend the fixed four year term if the present Council continues for the 30 days after the declaration of the election results (see Code s 10(1)).

[39] The Gauthier Respondents argue for a declaration that a) the new Council be immediately installed; b) the prior Chief and Council have no authority to bind the Band as such authority resides with the new Council and Chief; and c) any future election be held 30 days prior to the expiry of the four year term.

[40] At its core, the issue is whether the Code provides for a fixed four year term or whether it is read as four years plus 30 days. The Applicants and Gauthier Respondents see an internal inconsistency between a fixed four year term and the 30 days which follow the declaration of the results of the election.

[41] The so-called inconsistency is resolved by a plain reading of the words of s 10 and reading subsection 1 thereof in its context.

[42] Section 10(1) establishing the basic four year fixed term is subject to s 10(2) which states that “despite” the four year term, the person elected holds office until 11:59 p.m. 30 days after the posting of the election results.

10. (1) Subject to subsections (2) – (4), the term of office for a Council member is four (4) years and commences at 11:59pm, thirty (30) days after the Declaration of Election Results for that office is posted in accordance with this By-law.

(2) Despite subsection (1) and subject to subsection (3), a person elected under this By-law holds office until 11:59pm thirty (30) days after the Declaration of Election Results is posted following election for that office.

(3) Despite subsection (1), a person who is elected in a by-election or in an election that is directed under section 137(b) must commence their position in office immediately after the Declaration of Election Results for their office is posted, and hold

their position in office for the remainder of the term of office of that Council member to whom the newly elected person replaces.

[43] In my view, the four year term is subject to extension of at least 30 days after the election. There is sufficient flexibility to allow for time to post the election results after the vote counting is complete.

[44] Therefore, there is no basis for the declaration requested. Nor is there a basis for *quo warranto* which the parties seem to acknowledge is premature in any event as the election has not occurred.

V. Costs

[45] In this matter, the Applicants seek costs of \$10,000. In argument, they say that costs should not be awarded against them because this case was important for clarity of Code provisions not previously interpreted.

[46] However, the Yahey Respondents were successful and they carried the burden of upholding the Council's decisions and processes. The Band took no position in this matter but did assist the Court's understanding.

[47] The Applicants, having asked for their costs, implicitly accept that the successful party should receive its costs. Commencing litigation has cost consequences. To the extent that this case clarified the Code as suggested by the Applicants, it was the Yahey Respondents who did so.

[48] The Applicants have filed evidence of their account for this litigation. The Yahey Respondents have proposed costs of \$5,000, a modest amount well below the Applicants' charges. The Yahey Respondents suggest that the costs be awarded half to them and half to the Band.

[49] In the context of this case and related litigation, this is a reasonable suggestion which the Court accepts. An order to that effect will issue. The Gauthier Respondents are neither awarded costs nor have costs assessed against them. The Applicants are entirely liable for the cost award, jointly and severally.

"Michael L. Phelan"

Judge

Ottawa, Ontario
January 7, 2022

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1635-21

STYLE OF CAUSE: CLARENCE APSASSIN, NORMAN APSASSIN and JOSEPH APSASSIN v BLUEBERRY RIVER FIRST NATIONS BAND COUNCIL, CHIEF MARVIN YAHEY, COUNCILLOR SHERRY DOMINIC, COUNCILLOR WAYNE YAHEY, COUNCILLOR SHELLEY GAUTHIER, COUNCILLOR ROBIN ESKAWOV, and COUNCILLOR TROY WOLFE

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: DECEMBER 17, 2021

REASONS FOR ORDER: PHELAN J.

DATED: JANUARY 7, 2022

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