

Federal Court



Cour fédérale

Date: 20220705

Docket: T-1109-22

Citation: 2022 FC 994

Ottawa, Ontario, July 5, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KAREN BIRD

Applicant

and

**PETER BALLANTYNE CREE NATION, PETER BALLANTYNE CREE
NATION BAND COUNCIL, WALTER BALLANTYNE, PETER R.
BEATTY, HARVEY NATAWEYES, NELSON MORIN, KEVIN MORIN,
MARVIN MORIN, CLARRISSE LECOQ, NORA BEAR, SARAH SWAN,
ELIZABETH MICHEL, THOMAS LINKLATER JR., RONALD MICHEL
JR., MYRTLE BALLANTYNE, ALLEN MICHEL, PETER BALLANTYNE
CREE NATION COUNCIL OF ELDERS, MARGARET MICHEL,
ARTHUR BEATTY, BEATRICE GAMACHE, DARLENE WATSON,
DENNIS COOK, FLORENCE CLARKE, MAURICE BEAR, MYRTLE
MORIN, ROBERT MCCALLUM AND ROBERT RAY**

Respondents

ORDER AND REASONS

I. **Overview**

[1] On May 31, 2022, the Applicant, Karen Bird, filed a Notice of Application for Judicial Review of the following decisions made by the Respondents:

- A. The removal of the Applicant from the Office of Peter Ballantyne Cree Nation (“PBCN”) Chief on or around May 10, 2022;
- B. The withholding of the Applicant’s salary and termination of her access to PBCN property, including the email account designated for the PBCN Chief; and
- C. The direction that PBCN Band Council take steps to hold a by-election to fill the vacancy created by the removal of the Applicant from the Office of Chief.

[2] The Respondents are named as: Peter Ballantyne Cree Nation (“PBCN”), Peter Ballantyne Cree Nation Band Council (“PBCN Band Council”), and Peter Ballantyne Cree Nation Council of Elders (“PBCN Council of Elders”). Individual members of the PBCN Band Council are listed as: Walter Ballantyne, Peter R. Beatty, Harvey Nataweyes, Nelson Morin, Kevin Morin, Marvin Morin, Clarrisse Lecoq, Nora Bear, Sarah Swan, Elizabeth Michel, Thomas Linklater Jr., Ronald Michel Jr., Myrtle Ballantyne and Allen Michel. Individual members of the PBCN Council of Elders are listed as: Margaret Michel, Arthur Beatty, Beatrice Gamache, Darlene Watson, Dennis Cook, Florence Clarke, Maurice Bear, Myrtle Morin, Robert McCallum and Robert Ray.

[3] The Applicant now brings a motion for interim relief requesting an order from this Court for an interlocutory injunction staying the decision of the PBCN Council of Elders to remove the

Applicant from the Office of Chief and to hold a by-election, pending the hearing of the underlying judicial review application. The Applicant also seeks an order to compel the PBCN to take the necessary steps to restore the Applicant to the Office of Chief of PBCN, including restoring her salary and access to the Chief's email account, and for PBCN to reverse any progress made on conducting a by-election.

II. Facts

[4] PBCN is a First Nation band government, composed of eight communities disparately located several hundred kilometers from each other in the region north-east of Prince Albert, Saskatchewan. PBCN's central head office is located in Prince Albert.

[5] PBCN holds elections for Chief and Band Council. In total, 14 Councillors are elected from the eight different communities that constitute PBCN. Both Chief and Band Council are elected pursuant to the *Peter Ballantyne Cree Nation Election Code of 2014* (the "Election Code"), which was enacted pursuant to the *Indian Act*, RSC 1985, c I-5.

[6] The Applicant is a full member of PBCN. On April 28, 2021, the Applicant was elected Chief of PBCN, having run unsuccessfully for Office of Chief on two previous occasions – in 2015 and 2018. The April 28, 2021 election was held pursuant to the Election Code. The parties do not dispute that the Applicant was duly elected for the Office of Chief, nor were any appeals filed challenging the April 28, 2021 election outcome.

[7] The PBCN Council of Elders is also elected pursuant to the Election Code. Pursuant to section 6(a) of the Election Code, “[T]he purpose of the PBCN Council of Elders shall be to ensure that Peter Ballantyne Cree Nation Chief and Council are abiding by the Standards of Conduct and Oath of Office as contained in the Election Code [...]”. Under section 12 of the Election Code, the PBCN Council of Elders may remove someone from the Office of Chief, or Band Council, in certain circumstances. Section 12(g) of the Election Code states:

PBCN Council of Elders, in a separate meeting, will decide on removal of Chief or Councillors after consultation with the Council members and community members. This meeting will be held seven (7) days after the community consultation meeting.

[8] In order for the PBCN Council of Elders to remove an individual from the Office of Chief, a complaint must be signed by 15% percent of PBCN electors and provided to the Chairperson of the PBCN Council of Elders. Section 12(i) of the Election Code stipulates:

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

[9] The Applicant states that at a PBCN Band Council meeting held on or around December 14, 2021, the Applicant got into a disagreement with Councillor Kevin Morin, who occupied the Office of Vice Chief at the time. Allegedly, the disagreement was over motions passed by the PBCN Band Council during a meeting held on December 1, 2021, which the Applicant states she did not attend because she did not receive notice of the meeting.

[10] The Respondents state that on January 12, 2022, the PBCN Band Councillors made a complaint in writing about the Applicant to the PBCN Council of Elders. Based on this complaint, the PBCN Council of Elders commenced an investigation into the Applicant's conduct.

[11] On February 8, 2022, the Applicant states that she attended a meeting with the PBCN Council of Elders. The Applicant was allegedly shown a copy of a letter dated January 12, 2022, outlining the complaint that had been made against her. The letter was signed by several PBCN Band Councillors, including Councillor Kevin Morin. The Applicant states that she was not provided with a copy of the letter. To the best of her recollection, the complaints against her were in relation to the disagreement that had occurred during the December 14, 2021 meeting.

[12] During the February 8, 2022 meeting, the Applicant alleges that the PBCN Council of Elders asked her about several other allegations circulating in the community. This included whether she had fought with a police officer at the Dakota Dunes Casino, and if she had been driving a golf cart while intoxicated, resulting in a crash, at a golf club in Prince Albert. The Applicant denied the allegations and was not provided with further particulars about the allegations.

[13] On April 14, 2022, the Applicant again met with the PBCN Council of Elders. The Applicant alleges that during this meeting, the PBCN Council of Elders presented her with a letter dated April 1, 2022 and addressed to her. The April 1, 2022 letter referenced meetings that were held on February 8, 9, and 10, 2022 between the PBCN Band Council and the PBCN

Council of Elders. The Applicant states that she did not receive notice of the meetings held between February 8-10, 2022, and does not know who attended or what was discussed. The April 1, 2022 letter also included a recommendation from the PBCN Council of Elders that the Applicant resign from the Office of Chief. During the April 14, 2022 meeting, the Applicant states that the PBCN Council of Elders confronted her about a number of rumours, including that she has a drinking problem, has damaged property in public, and has received criminal charges. The Applicant denied the allegations and left the meeting.

[14] By letter dated May 10, 2022, the PBCN Council of Elders informed the Applicant of their decision to remove her from the Office of Chief and direct a by-election to fill the vacancy. The Applicant states that she is unaware of, nor was she presented with, a petition or complaint signed by 15% of the PBCN electorate in support of her removal from Office of Chief. There is also no evidence that such a petition was provided to the Chairperson of the PBCN Council of Elders.

[15] Since the May 10, 2022 decision, Councillor Kevin Morin has been acting in the role of PBCN Chief. The Applicant states that she has also had her salary withheld, and has been prevented from accessing PBCN property, including the email address used by the Office of Chief.

[16] On May 22, 2022, PBCN published a press release on the PBCN website, notifying PBCN members that the Applicant had been removed from the Office of Chief. Attached to the press release was the May 10, 2022 decision from the PBCN Council of Elders.

[17] A Notice to the Membership of PBCN, signed by the PBCN Head Electoral Officer on June 10, 2022 indicates that a by-election for the Office of Chief is scheduled to be held on July 25, 2022. Advanced polls are set to open on July 18, 2022.

III. Preliminary Issue

A. *Legal Opinion on Record*

[18] As part of the motion record, the Applicant has submitted a legal opinion from Anil Pandila (Pandila & Co), dated July 6, 2019 (“2019 Legal Opinion”). The 2019 Legal Opinion appears to have been obtained in the context of inquiries about the removal of a Band Councillor and discusses the 2014 Election Code and the role of the PBCN Council of Elders. It is addressed to the Peter Ballantyne Cree Nation, attention to Chief Peter Beatty, the then-Chief of PBCN.

[19] During the hearing of this matter, the Respondents’ counsel objected to the inclusion of the 2019 Legal Opinion on the record. The Respondents’ counsel submits that the 2019 Legal Opinion is inappropriately before this Court because it is a privileged document and deals with a completely different legal matter.

[20] I disagree with the Respondents’ position. As noted by counsel for the Applicant, if the 2019 Legal Opinion is indeed a privileged document, the privilege belonged to the Office of the Chief, which the Applicant was able to waive in occupying the Office of Chief. Moreover, if the privilege belonged to the individual, such privilege was waived when the document was given to

the Applicant, a third party. Further, the 2019 Legal Opinion discusses the role of the PBCN Council of Elders and the provisions under section 12 of the Election Code – matters that are also at issue in these proceedings. I therefore find that the 2019 Legal Opinion is to remain on the record.

B. *Affidavit of Randy Clarke*

[21] During the hearing, counsel for the Respondents also objected to the affidavit of Randy Clarke, included in the Applicant's motion record. The Respondents' counsel argued that the affidavit of Mr. Clarke was filled with opinion and hearsay, and should therefore not be accepted by this Court.

[22] The Applicant's counsel argued that the Affidavit of Randy Clarke ought to be admitted, as Mr. Clarke helped oversee the process of amending the 2014 Election Code. He observed the deliberations and is therefore well-suited to provide evidence about what took place during the drafting of the Election Code. The Applicant notes that the Respondents' affidavit of Kevin Morin also includes opinion and yet should still be admitted.

[23] I see no reason to strike the Affidavit of Randy Clarke from the record. The weight given to the information contained is at the Court's discretion.

IV. **Issue**

[24] The sole issue on this Motion is whether the Applicant meets the test for an interlocutory injunction, as set out by the Supreme Court in *RJR-MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117 (SCC), and most recently in *R v Canadian Broadcasting Corp.*, 2018 SCC 5 (“*Canadian Broadcasting*”).

[25] In order to be successful, the Applicant must demonstrate that the motion raises a serious issue to be tried, that she will suffer irreparable harm if an injunction is not granted, and that the balance of convenience favours granting the injunction (*Yahey v Ewaskow*, 2020 FC 732 (“*Yahey*”) at para 3). This evaluation is context-specific and asks the fundamental question of whether the granting of an injunction is just and equitable in all of the circumstances of the case (*Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 at para 25).

V. **Analysis**

A. *Serious Issue*

[26] In determining whether there is a serious issue to be tried, the Court must undertake a preliminary investigation of the merits of case, “in the sense that the application is neither frivolous nor vexatious” (*Canadian Broadcasting* at para 12). While the first prong of the test is usually a low threshold, the bar is higher where a mandatory injunction is sought, or where the decision on an interlocutory injunction will amount to a final determination. In such cases, the

Applicant is required to demonstrate a stronger likelihood of success (*Bertrand v Acho Dene Koe First Nation*, 2021 FC 257 at para 16).

[27] The Applicant submits that the test for serious issue is met because the decision at issue was made without any legal authority, consists of a violation of her rights to procedural fairness and is unreasonable when reviewed on its merits. In this case, the Applicant seeks preservation of the *status quo* election of April 28, 2021, which was held in accordance with the PBCN's Election Code. Specifically, the Applicant argues that the PBCN Council of Elders erred in their interpretation of their jurisdiction and authority under section 12 of the Election Code. There is no evidence to indicate that a complaint was signed by 15% of PBCN electors and provided to the Chairperson of the PBCN Council of Elders, as required under subsection 12(i) of the Election Code. Further, it appears that the decision to remove the Applicant from the Office of Chief was based on rumours.

[28] The Respondents admit that the removal of the Applicant from the Office of Chief and her appeal of such removal is a serious issue. The Respondents also agree with the Applicant that the removal from Office is neither frivolous nor vexatious.

[29] I find that the case does indeed raise a serious issue. There is nothing in the record to indicate that a complaint signed by 15% of electors was presented to the Chairperson of the PBCN Council of Elders, pursuant to subsection 12(i) of the Election Code. The 2019 Legal Opinion indicates that the purpose of the PBCN Council of Elders is to "provide support and guidance to the Chief and Council of [PBCN]" in an oversight role. The 2019 Legal Opinion

discusses how the PBCN Council of Elders “does not have any authority to discipline the Chief and Council of the PBCN”, and can only remove individuals from Office – either the Chief or Councillors – where the preconditions of the Election Code are satisfied, which includes the filing of a complaint pursuant to the requirements under subsection 12(h) and 12(i) of the Election Code.

[30] As noted by the Applicant, a similar issue involving the removal of a Band Councillor of PBCN was addressed by this Court in *McCallum v Peter Ballantyne Cree Nation*, 2016 FC 1165 (“*McCallum*”). At paragraphs 45 and 46, the Court notes:

[45] The removal from office of a duly elected official and the departing from the agreement and covenant between the people of the PBCN are not trivial issues.

[46] The Council of Elders holds the important duty of safeguarding the process that trumps the removal from office of a councillor. The Election Code is unequivocally clear in requesting the Petition be signed by 25% of the Electors of the affected community, and failing a precise calculation, the process should, in my view, fail. The reason raised to justify the departure from the clear wording of the relevant section is unacceptable given the gravity of the consequences for the Councillor (*Prince v Sucker Creek First Nation #150A*, 2008 FC 1268 at paras 48-49, *aff’d* 2009 FCA 40).

[31] I note that while the *McCallum* decision addresses the removal of a Band Councillor, which requires a petition to be signed by 25% of electors, the case at hand only requires a petition signed by 15% of electors, pursuant to section 12(i) of the Election Code, since it relates to the Office of the Chief. I also agree with the Applicant that the impugned decision, and the

events leading up to it, raise concerns of procedural fairness that constitute a serious issue, as do the merits of the decision.

B. *Irreparable harm*

[32] At this second stage of the test, the Court must be convinced that the Applicant “will suffer irreparable harm if an injunction is refused” (*Canadian Broadcasting* at para 12). The Court is required to evaluate whether the Applicant has demonstrated that irreparable harm is likely to occur, or that it can be inferred from the circumstances as a whole. In *Newbold v Canada (Attorney General)*, 2017 FCA 106, the Federal Court of Appeal noted at paragraph 29:

[...] Where the harm apprehended is financial, clear and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence such as that set out at paragraph 17 of *Gateway City Church*. In the case of harm to social interests such as reputation or dignity, as in *Douglas*, the occurrence of irreparable harm can be satisfied by inference from the whole of the surrounding circumstances.

[33] The Applicant submits that without the interim relief request, she and PBCN band members would suffer substantial and irreparable harm, including irremediable damage to the Applicant’s democratic interests, and those of the PBCN membership. The Applicant notes that, in the context of First Nations’ elections and elected officials who have been sitting on Council, this Court has found irreparable harm where it is necessary to preserve the *status quo* (see discussion in *Halcrow v Kapawe’no First Nation*, 2020 FC 1069 at paras 34-37).

[34] The Applicant argues that the decision consists of an interference with fundamental democratic interests, and that in these circumstances, there is no practical alternative remedy available to her. Specifically, the Applicant advances three grounds for the irreparable harm. First, the unnatural shortening of the Applicant's tenure as Chief of PBCN – an Office that comes with important duties, honours and social standing – has been taken away from the Applicant on the basis of mere allegations that she violated the Election Code. Second, the decision raises concerns regarding the Office of Chief, as it suggests that the PBCN Council of Elders can “despotically and abruptly” remove an individual from the Office of Chief. And third, the damage to the electoral process and democratic interests of PBCN First Nation more broadly, as there is the risk of PBCN band members losing faith in their leaders and institutions if a leader can be removed from Office in such fashion. The Applicant argues that letting the decision of the PBCN Council of Elders stand would further reinforce the allegations against her. Most importantly, if an elected official can be removed on the basis of bare allegations and rumours, without any real explanation or opportunity for consultation with PBCN membership, there is a risk that PBCN members will lose faith in their Electoral Code and the governance of PBCN.

[35] The Respondents submit that the Applicant has failed to demonstrate that she will suffer any irreparable harm arising from the decision of the PBCN Council of Elders to remove her from the Office of Chief. The Respondents stress that this decision arises out of the complaint of the PBCN Band Councillors to the PBCN Council of Elders that the Applicant had breached her Oath of Office and the Code of Conduct. Her removal from the Office of Chief was a result of her misconduct in office and is distinguishable from the jurisprudence dealing with the

reinstatement of a Chief or a Councillor pending an election appeal. In the absence of the Chief, the affairs of the PBCN are assumed by the Vice-Chief and the Band Councillors, and will carry on as normal – the administration of band affairs will not be affected by the loss of the one vote held by the Chief.

[36] The Respondents maintain that the Applicant's submissions on irreparable harm largely relate to the personal inconvenience for the Applicant resulting from her removal from Office, including a loss of ongoing duties, honours, social standing and income. Yet if the decision in underlying application for judicial review is quashed, the Applicant's duties, honours and social standing will continue. Furthermore, the Respondents submit that no damage to the Office of Chief or the electoral process could arise from the PBCN Council of Elders actually exercising the authority given to it under section 12 of the Election Code, which gives the PBCN Council of Elders the power to remove a Chief or Councillor from Office. In fact, should the decision of the PBCN Council of Elders be summarily reversed by this Court, the Respondents argue that the electorate's trust and belief in the Election Code will be shaken. If the decision to remove the Applicant from Office is not proper or appropriate, it ought to be determined by this Court at a full hearing.

[37] I agree with the Applicant that if the PBCN Council of Elder's decision to remove the Applicant from the Officer of Chief, and the direction that PBCN Band Council take steps to hold a by-election to fill the vacancy in the Office of Chief is left to stand, then irreparable harm will occur. First, I find that holding a by-election before the underlying application for judicial review is heard on its merits is pre-mature. To do so could lead to irreparable harm for the

Applicant, who was elected on April 28, 2021 pursuant to the Election Code, as well as to the PBCN's democratic process.

[38] Second, while the Respondents submit that the removal of the Applicant from the Office of Chief was done in accordance with the Election Code, I am not convinced that the Respondents have presented sufficient evidence to support this assertion. They have also not demonstrated that a complaint signed by 15% of electors was presented to the Chairperson of the PBCN Council of Elders, as required under section 12(i) of the Election Code, before the issuance of the letter of May 10, 2022 notifying the Applicant that she was to be removed from the Office of Chief. As noted by this Court in *Yahey* at paragraph 5:

[...] the removal of a Chief or Council members from office prior to the expiration of their normal term of office generally constitutes irreparable harm (*Assiniboine v Meeches*, 2013 FCA 114, at para 23), especially when the rules the First Nation has adopted for itself and chosen to abide by have not been followed;

[39] I also agree with the Applicant's submission that a band member's ability to choose their leaders is a fundamental interest, and irreparable harm results from the removal of an elected representative if such a removal is not done in accordance with the procedures outlined in the Election Code. Based on the record before this Court, there is a lack of evidence to support the Respondents' assertion that the PBCN Council of Elders followed the process outlined in the Election Code when arriving at its decision to remove the Applicant from the Office of Chief and direct the PBCN to take steps to hold a by-election for the position of Chief. I therefore find that the Applicant has sufficiently demonstrated that irreparable harm would likely occur if the injunction requested were refused.

C. *Balance of Convenience*

[40] The third and final stage of the test for an interlocutory injunction involves an assessment of the balance of convenience, “in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merit” (*Canadian Broadcasting* at para 12).

[41] The Applicant submits the balance of convenience favours maintaining the *status quo* pending the outcome of the underlying application for judicial review by upholding the outcome of the April 28, 2021 election, instead of allowing a by-election to proceed without legal basis. The Applicant argues that an election, however conducted, takes time, effort, and financial resources for all those involved. Holding a by-election that is likely to be overturned following judicial review of the underlying application would be a waste of these resources. The Applicant notes that this Court has held that a need to preserve that *status quo* weighs heavily in the balance of convenience analysis (*Danone Inc. v Canada (Attorney General)*, 2009 FC 44, at paras 61-62; *Gopher v Saulteaux First Nation*, 2005 FC 481 (“*Gopher*”) at para. 30).

[42] The Respondents submit that no irreparable harm would arise from the injunction being refused, other than the shortening of the Applicant’s tenure as Chief and the “personal prestige and perks” that come with the Office of Chief. The Respondents note that the “dark side” of reinstating the Applicant to her position as Chief would give her the opportunity to take action against those whom she believes were involved in her suspension and removal from Office. This would cause disharmony and animosity within the PBCN Band Council and lead to the

disruption of band affairs. The Respondents note that the Election Code intended that decisions of the PBCN Council of Elders be final, binding, and not interfered with. Furthermore, the Respondents argue that the delay in bringing the Application weighs heavily against stopping the by-election, for which the process has already commenced: nomination day is on July 4, 2022, advanced polls are open on July 18, 2022 and Election Day is to be held in July 25, 2022.

[43] In my view, the balance of convenience weighs in favour of the Applicant. I find that it would be in the interest of PBCN membership to grant the interim stay and to preserve the *status quo* until the underlying application for judicial review is decided on its merits. As noted by this Court in *Gopher*, “[T]he purpose of an interlocutory injunction is to preserve or restore the status quo until trial, not to give the plaintiff his remedy” (at para 30). A refusal of the requested injunction would allow the by-election to proceed – an election that has the potential of being declared moot should the underlying application for judicial review succeed. Conversely, if the interim order is granted, the option to conduct a by-election following the hearing of this application on its merits would still be open to the Respondents and the interests of those involved in a by-election would not be harmed. In fact, I find that the risk that a by-election could later be declared void would only add to the current state of uncertainty within PBCN (*Gopher* at para 30).

[44] Finally, I do not find that concerns of disharmony within the PBCN Band Council tip the balance of convenience in favour of the Respondents. While the Respondents’ counsel asserted during the hearing that granting the requested order and restoring the *status quo* would “create havoc”, I find this risk to be speculative.

VI. **Costs**

[45] Costs of this motion shall follow the cause and are to be addressed by the Application Judge in the underlying application for judicial review.

VII. **Conclusion**

[46] For the reasons outlined above, and in the interest of preserving the *status quo* pending the outcome of the underlying application for judicial review, the Applicant's motion for an interlocutory injunction is granted.

ORDER in T-1109-22

THIS COURT ORDERS that:

1. The decision of the PBCN Council of Elders to remove the Applicant from the Office of Chief and to direct the PBCN to hold a by-election, is stayed until the final resolution of the underlying judicial review application on its merits.
2. Until a final determination of the judicial review application on its merits, the PBCN is ordered to take necessary steps to restore the Applicant to the Office of Chief of PBCN.
3. Any steps taken to hold a by-election to fill the vacancy created by the removal of the Applicant from the Office of Chief are to be halted.
4. Costs of this motion shall follow the cause.

"Shirzad A."

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1109-22

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PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: JULY 4, 2022

ORDER AND REASONS: AHMED J.

DATED: JULY 5, 2022

APPEARANCES:

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