Federal Court Cour fédérale

Date: 20230921

Docket: T-1524-23

Citation: 2023 FC 1274

Vancouver, British Columbia, September 21, 2023

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

KURT BURNSTICK

Applicant

and

CHIEF GEORGE ARCAND JR. AND COUNCIL OF ALEXANDER FIRST NATION

Respondents

JUDGMENT AND REASONS

I. Overview

[1] On June 28, 2023, the Alexander Tribal Government Customary Election Regulations [*Customary Election Regulations*] that have governed the electoral process of Alexander First Nation [AFN] since 1987 were repealed and replaced by the Alexander First Nation Kipohtakaw Election Law [*Election Law*], following a ratification vote by AFN members conducted in

accordance with a recently enacted regulation, the Alexander First Nation Kipohtakaw Ratification Regulation [*Ratification Regulation*]. The *Election Law* now governs the AFN's general election scheduled to take place next week, on September 25, 2023.

[2] On July 21, 2023, the Applicant, Kurt Burnstick, a member and former chief of AFN, commenced an application for judicial review against the Respondents, AFN's current Chief and Council, seeking a declaration that the *Election Law* and *Ratification Regulation* were not validly enacted. The Applicant moved at the same time on an urgent basis for an interim order enjoining the operability of the *Election Law* in respect of the upcoming election.

[3] Following a case management conference, counsel for the parties agreed that in order to avoid duplication of proceedings and the wasting of the Court's resources, the underlying application should proceed on an expedited basis in contemplation of a decision being issued prior to the election date. The timelines under Part 5 of the *Federal Courts Rules*, SOR/98-106 to serve affidavit evidence, to conduct cross-examinations and to perfect the parties' records were accordingly abridged, and the matter was heard on September 18, 2023.

[4] In a nutshell, the Applicant argues that the purported enactment of the *Election Law*, by way of a ratification vote to "repeal and replace," was invalid because section 35 of the *Customary Election Regulations* requires a petition signed by 51% of the AFN Electors as part of the amendment process. There is no dispute between the parties that this amending procedure was not followed. The Applicant himself is not opposed to amending AFN's election law. His

stated concern is that the election code does not change to suit the agenda of any particular incumbent Chief or Council.

[5] The Respondents' position is that the election code is not set in stone, and that where there is broad consensus of the community, the method or threshold for approval of changes to their election code may be altered, even where the amendment approval method or threshold was in the past reduced to writing in a custom code.

[6] As explained below, I am not satisfied that this Court should intervene in this case. In my view, the Respondents did not commit any reviewable error by enacting the *Ratification Regulation* and ultimately adopting the *Election Law*. The uncontroverted evidence before me establishes that the amendment to AFN's election code followed a comprehensive, community-driven, transparent and inclusive consultative process carried out over several months, culminating in a referendum in which a majority of eligible AFN members voted to approve the changes.

[7] Although past Chiefs and Councils were aware of the desire for electoral reform among membership for over two decades, AFN leadership have not been able to implement these reforms. Members of the community were clearly motivated by a desire to modernize and bring AFN's election rules into compliance with section 15 of the *Charter*, specifically by giving off-reserve members the right to vote – an outcome which has been mandated by the Supreme Court of Canada, but proved elusive due to the stringent threshold of support required by the petition

process. To its great credit, AFN has succeeded in that regard, after several prior unsuccessful attempts at reform.

II. Facts

[8] The Applicant relies on his own affidavit and that of Malinda Arcand in support of the application. The Respondents filed four affidavits in response, the affidavits of Rene Paul, Sandra Relling, Jody Kootenay and Colette Arcand. None of the deponents were cross-examined. As a result, the factual underpinnings of this case are not really at issue.

[9] AFN is a nehiyâw (Cree) Nation, signatory to Treaty 6, and a "band" within the meaning of the *Indian Act*, RSC, 1985, c. I-5 [*Indian Act*]. It has a population of 2481 members located in Alberta, with 982 members living on-reserve and 1499 living off-reserve.

[10] Prior to the enactment of the *Election Law*, AFN elections were carried out in accordance with the *Customary Election Regulations*. These were enacted at a general band meeting held in 1987 where 33 of 47 members present voted in favour and endorsed their signature on a petition. The *Customary Election Regulations* were submitted to Indian Affairs and Northern Development Canada [INAC] and were granted by ministerial order in January 1988.

[11] Subsection 1(c) of the *Customary Election Regulations* provided the following definition of an "elector" who is entitled to vote in elections of the Alexander First Nation:

> (c) "Elector" means a person who:
>
> (i) is the full age of twenty-one (21) years, and

(ii) is a member of the Alexander Tribe, and

(iii) is ordinarily resident or has resided on the Alexander Reserve for a period of not less than one (1) month, and

(iv) is not the Electoral Officer or his appointed assistant.

[12] As noted earlier, section 35 of the *Customary Election Regulations* stated that the "[r]egulations may only be amended by fifty-one (51%) of all the electors of the Alexander Tribe who endorse their signatures on petition."

[13] The requirement under section 1(c)(iii) of the *Customary Election Regulations* that members be ordinarily resident or have resided on the reserve for 30 days to be eligible to vote was a point of contention from the start. Almost two decades later, Ms Relling, an off-reserve member of AFN, led efforts to challenge that requirement by applying for judicial review of the decision of an electoral officer to exclude her from the voting list and also moving for an interim injunction to stay a general election to be held in October 2017.

[14] In an unreported decision dated September 30, 2017 (Court Docket: T-1260-17), Justice Richard Southcott found that Ms Relling had raised a serious question to be considered in the underlying application in light of the decision in *Corbiere v Canada (Minister of Indian & Northern Affairs)*, [1999] 2 SCR 203. In that case, the Supreme Court of Canada declared that an on-reserve residency requirement, applicable to the right to vote in band elections pursuant to subsection 77(1) of the *Indian Act*, contravened subsection 15(1) of the *Charter*. Justice Southcott concluded, however, that the importance of the right did not necessarily mean that the party asserting the right suffers irreparable harm while waiting to have the right adjudicated. In

declining the injunction, he was of the view that the *Customary Election Regulations* should be reformed through an internal process of the AFN in accordance with its customs. The judge added at paragraph 26 that the Court should be "cautious about treading unduly into the political affairs of a First Nation." His concluding observations are apposite to the case at hand:

> [28] I also note the concern expressed by the Supporting Councillors that reliance on section 35 of the Regulations to pursue amendment of the residency requirement is somewhat circular, as it requires approval of 51% of the electors as currently defined, i.e. excluding off-reserve members. However, as the Opposing Councillors recognized in their submissions, a new Chief and Council selected in the impending election, and the Alexander First Nation itself, will be operating against the backdrop of Ms. Relling's judicial review application. I also note that the Court has already directed that this proceeding be specially managed, which may expedite the matter proceeding to a decision on the constitutional arguments. While the Court and the parties cannot know who will be elected to the Chief and Council positions, the former Chief and Councillors who participated in this motion are all expressing an interest in either reform of the residency requirement or at least employing a democratic process to consider reform. This context favours allowing the upcoming election to proceed, such that the Alexander First Nation will benefit from elected representatives who might guide its consideration of the governance and financial management issues that are raised in this motion.

[15] In July 2018, Ms Relling signed a settlement agreement with the Applicant, then AFN Chief, and Councillor Marcel Paul, whereby AFN agreed to provide Ms Relling with notice of the *Customary Election Regulations* amendment process, and to allow her to participate in the process to the same degree as other reserve members. However, as it turned out, she was never contacted by anyone in AFN.

[16] After Ms Relling filed a notice of discontinuance, the AFN Council established the "Task Force to Amend the Alexander Tribal Government Customary Election Regulations" [2019 Task

Force]. A petition was opened to electors in August 2019. While there were efforts to provide additional dates for members to vote, they were cancelled due to COVID-19 restrictions. In June 2020, the AFN administration reported that the petition was 160 votes short of the required 51% majority. It appears that election reform failed due to apathy amongst the eligible voters, wariness in signing a public document, or possibly declining to participate because of self-interest in maintaining the *status quo*.

[17] On September 3, 2020, the AFN electoral officer posted an announcement outlining the details for the general elections upcoming later that month. Ms Relling was once again denied the right to vote because she did not live on the Alexander Reserve. In October 2020, she applied for judicial review to challenge the decision of the chief electoral officer finding her ineligible to vote in the election. The current AFN administration proposed a settlement inviting Ms Relling to a new election task force that would address the exclusion of off-reserve members from voting in AFN elections.

[18] The Respondents established a second election task force in 2021 [2021 Task Force] with the objective of recommending potential election policy options. Its members were appointed by the Respondents to represent as many perspectives as possible, including representation from members residing both on and off reserve.

[19] On the evidence before me, it is clear that the 2021 Task Force operated at arm's length from Chief and Council, and that its members were committed to ensuring that the process and results reflected the will of the membership. While the 2021 Task Force provided updates to

Chief and Council to inform them of its activities and progress, Chief and Council did not direct its work.

[20] At the very first meeting the 2021 Task Force held with AFN Elders, the latter indicated that they were tired of fighting in the community and wanted change. The Elders discussed the previous petition process that had stalled and been ineffective, and recommended that the 2021 Task Force build something new and design a corresponding process from scratch. It was important to the Elders that the election law reflected the AFN as nehiyaw people instead of being tied to the *Indian Act*. This feedback led to what the Applicant describes as the "repeal and replace" approach.

[21] As explained in great detail by the Respondents' deponents, the 2021 Task Force held 18 community meetings, four family meetings, monthly joint meetings with AFN's housing and membership task forces, and six surveys from early 2022 to mid 2023 to gather community feedback and guide the drafting process. It also offered to visit AFN members' homes to discuss election issues or address any questions. In the course of its work, the 2021 Task Force engaged with approximately 1200 members. Members of AFN had multiple opportunities to participate in and to provide input into the process, and a large number did so, including the Applicant.

[22] The 2021 Task Force established engagement plans that were flexible during the process, such as changing the time and venue of meetings depending on community feedback. It also offered incentives for attendance at community meetings. These incentives were usually door prizes, draws, or meals that were offered to encourage attendance of AFN members.

[23] Ms Kootenay states in her affidavit that AFN members generally supported the creation of an election law and were broadly supportive of proceeding by way of ratification instead of by petition. According to Ms Kootenay, they understood what was generally being proposed and were familiar with the process because it very closely resembled the process to conduct Land Surrender Claim votes, which AFN had used each year for over 20 years.

[24] The drafting process for the election law was iterative, particularly with the aspects that were contentious in the community, such as sections pertaining to age restrictions and fees for nominating candidates and running for office. At each meeting, the 2021 Task Force would distribute an updated information package containing the latest changes to the draft. The language in the draft was decided collectively by the members of the 2021 Task Force, based on the collective input of the members.

[25] When the election law was in final form, the 2021 Task Force left it in the hands of Chief and Council to provide direction on the ratification process and voting procedure.

[26] On May 25, 2023, the Respondents approved and enacted the *Ratification Regulation* without making any changes to the draft election law. After appointing the Ratification Officer, they stepped back to allow the ratification process to be conducted at arm's length.

[27] On May 26, 2023, the Tribal Administrator sent copies of the final draft of the election law intended to repeal and replace the *Customary Election Regulations*. The most notable changes pertain to voting age and residency requirements. The new law would lower the voting

age from 21 to 18. It would also allow members living off-reserve to vote; however, nominees for chief and councillor position would be required to have lived on reserve for at least 90 consecutive days immediately prior to the election, as opposed to 30 days as prescribed in the *Customary Election Regulations*.

[28] On June 28, 2023, the vote for the proposed *Election Law* took place at the community hall in AFN. In her affidavit, Malinda Arcand states that she and her daughter were not asked for identification. She noted that several other people who attended the voting location were also not asked to show any sort of identification. She also did not recognize any of individuals in her line waiting to vote in spite of living on Alexander Reserve her whole life. There existed an internal recourse under the *Ratification Regulation* to address any such allegations; however, such recourse was not triggered by Ms Arcand or any other member of the community.

[29] On June 29, 2023, the Tribal Administrator announced that the *Election Law* was ratified and would be in force for the September general election. Out of a total of 682 votes, 397 members voted in favour, 266 voted against, and 17 votes were spoiled. Of note, the Applicant and 50 other people he spoke to chose not to participate in the vote.

III. Analysis

[30] I start my analysis by noting that the Applicant has withdrawn his constitutional challenge to various provisions of the *Election Law*. This is a proper concession as a declaration of constitutionality must be supported by evidence and a process that allows a fulsome and proper assessment and such an assessment is not possible on the record before me.

[31] The Applicant submits that the main point in issue in this application is whether the purported enactment of the *Election Law*, by way of the ratification vote to "repeal and replace," was valid. A corollary point in issue is whether, in light of the language of section 35 of the *Customary Election Regulations*, the Respondents had jurisdiction to enact the *Ratification Regulation* and effectively change the definition of "Elector" prior to the ratification vote.

[32] The Respondents disagree. They say that the first issue to be determined is whether a judicial review is the proper procedure to challenge the *Election Law*. If so, the next two issues to be determined are whether the *Election Law* was validly enacted and reflects the broad consensus of the members of AFN, and whether the approval vote was tainted by any improper emoluments. They submit that only if the Applicant is successful on these issues would the issue of the appropriate remedy have to be addressed.

[33] Due to the expedited nature of this application, these reasons are brief. I see no useful purpose to expound on all of the issues identified by the parties given that on the evidentiary record before me, I am satisfied that no reviewable error was made by the Respondents. The *Customary Election Regulations* were plagued by clear constitutional deficiencies, including the denial of the right of off-reserve members to vote in elections, which were the subject of legal challenges and failed efforts to reform them over the years. AFN was effectively at an impasse and the membership had no choice but to go back to the drawing board.

[34] The Applicant relies heavily on the decision of my colleague, Justice Sébastien Grammond, in *Pittman v Ashcroft First Nation*, 2022 FC 1380 [*Pittman*] for the proposition that

Chief and Council have no authority to independently "fix" perceived constitutional deficiencies by essentially changing the criteria for amending the election law. However, in the case at bar, the *Ratification Regulation* was passed by Chief and Council to avoid the very circumstances at issue in *Pittman*: the unilateral amendment of an election code by Chief and Council. In *Pittman*, the band Council adopted a series of resolutions in 2012 that effectively amended the membership rules enacted by the Band in 1987 and admitted new members into the Band in accordance with the resolutions. There was little evidence that members of the community knew about the resolutions passed in 2012 or in the following years. In 2021, the Council held a referendum to repeal the 1987 membership rules and replace them with rules similar to those found in the resolutions. In contrast, in the case at bar, the enactment of the *Ratification Regulation* was part of an independent process that the Respondents set in motion to ensure that any amendments to the *Customary Election Regulations* originated from and met the approval of the AFN membership.

[35] *Pittman* can easily be distinguished as it concerned membership, which is not the case here. The Respondents agreed to allow members who were wrongly and unconstitutionally excluded from the vote in the past (primarily due to their off-reserve status) to participate as electors in the ratification of the new election code. I am satisfied that it was reasonable for the Respondents to define electors for the purpose of the ratification vote as they did as the definition reflected the view of the membership obtained through extensive consultations by the 2021 Task Force. In fact, the inclusion of off-reserve members as electors was mandated by the *Charter*.

[36] The 2021 Task Force also heard a great deal of debate amongst Elders about what minimum voting age should be set out in the *Election Law*, and in particular whether it should be 18 or 21. Some of the Elders were in favour of allowing those 18 and older to vote, and others maintained that it should be 21. Ultimately, the Elders recognized that compromises had to be made in order to pass the *Election Law* and achieve the much-needed electoral reform. The Respondents were simply following the will of the membership at large.

[37] The Applicant argues that the repeal of the *Customary Election Regulations* and adoption of the *Election Law* did not follow the existing amendment process. The argument is simplistic and ignores the reality of the catch-22 situation the Nation was facing. It simply cannot be that on-reserve members, who may have a vested interest in maintaining the status quo, can deprive off-reserve members of their clear right to have a say in the governance of their own Nation.

[38] The principles recently summarized by Justice Cecily Strickland in *Da'naxda'xw First Nation v Peters*, 2021 FC 360 [*Peters*] at para 72 apply in this case:

- band election custom "is not frozen in time";
- any change to such custom "requires a broad consensus of the membership";
- such a broad consensus "may be demonstrated by a one-time event like a referendum or majority vote", as occurred here, and
- "The codification of a written law, passed by a majority of members, is itself an expression of the customs of the community," as occurred here;

[39] The burden is on the party trying to prove that there is a broad consensus for change in governance custom. The Applicant points to the *Customary Election Regulations* as an expression of the customs of the community; however, the circumstances surrounding their adoption are not particularly compelling. As noted earlier, the *Customary Election Regulations* were passed at a general band meeting by a vote of only 33 electors at a single, poorly-attended meeting, amidst much political turmoil and confusion.

[40] From Elder Rene Paul's perspective, the *Customary Election Regulations* and the process to adopt them were, as a whole, flawed. According to Elder Paul, not only was the information relied upon to adopt them flawed, INAC did not follow their own policy to allow AFN to follow custom as they define it from a nehiyaw worldview. While AFN may have grown accustomed to conducting elections under the Indian Act and the *Customary Election Regulations*, he is of the view that the election code adopted in 1987 did not reflect AFN's pre-treaty custom of governance and leadership that has been handed down in oral teachings. This evidence carries great weight.

[41] The Court must consider the totality of the circumstances surrounding a purported expression of the will of the people to determine whether the outcome truly reflects a broad consensus of the community. In *Taypotat v Taypotat*, 2012 FC 1036, at paras 31-35, aff'd 2015 SCC 30, Justice Yves de Montigny provided examples taken from the case law that would suffice to illustrate that proposition, including *Lac des Mille Lacs First Nation v Chapman*, 1998 CanLII 8004 (FC), [1998] FCJ no 752, 149 FTR 227 [*Chapman*]. In *Chapman*, the Court held that an election code adopted as a result of a vote in which 86 of 300 eligible voters voted, and

only 73 voted in favour, constituted a broad consensus. In the unique circumstances of that First Nation, the location of only about 130 voters was known and typically only 45 voters participated in the electoral process. Against this history of general non-participation, the fact that 86 voters voted was actually significant.

[42] The level of support for change in this case is very similar to that in *Chapman*. Applying the principles in Peters to the case at bar, it is clear that AFN has, democratically and duly decided to adopt and follow the *Election Law*.

[43] I further find that the ratification vote itself was conducted efficiently and professionally, and the Applicant has raised no issues with the vote itself or disputed that the *Election Law* was approved by a wide margin of AFN members who voted, other than vague allegations by Ms Arcand. There existed an internal recourse under the *Ratification Regulation* to address any such allegations, which recourse was not triggered by Ms. Arcand. Moreover, the Applicant's bald allegation that the 2021 Task Force offered financial incentives to those who would attend the meetings in order to entice them to vote for the ratification of the new *Election Law* is rejected. On the evidence before me, it is clear that a member's entitlement to the incentives was never conditional on the member taking a particular position or voting one way or another.

IV. Conclusion

[44] In conclusion, the Respondents have clearly shown that the *Election Law* reflects the broad consensus of the AFN membership. It would be contrary to this broad consensus to force AFN to revert to the *Customary Election Regulations*, which I find were not reflective of a broad

consensus of the membership at the time, and certainly not at the present. In my view, this Court should refrain from intervening and frustrating the will of the community. The application is accordingly dismissed. As agreed by the parties, costs should follow the event in the amount of $4,000.00.

[45] One last word. By this application, the Applicant is asking this Court to ignore and to set aside the clear and democratic expression of the desire of AFN to reform its election law – something expressly urged by this Court in a prior decision – and to annul the enormous and conscientious efforts of the community-led task force process that led to its development and ultimate approval. Members of the community who drove this amendment process, and more particularly Ms Relling, who fought so hard over the years advocating for the right of disenfranchised off-reserve members, should instead be applauded for their courage, determination and tenacity in seeing the process through.

JUDGMENT IN T-1524-23

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. The Applicant shall pay to the Respondents their costs of the motion and application, hereby fixed in the amount of $4,000.00, inclusive of disbursements and taxes.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	KURT BURNSTICK v CHIEF GEORGE ARCAND JR. AND COUNCIL OF ALEXANDER FIRST NATION
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