

Date: 20080801

Docket: T-1267-07

Citation: 2008 FC 932

Ottawa, Ontario, August 1, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ALBERT ANGUS and WALTER JANVIER

Applicants

and

**CHIPEWYAN PRAIRIE FIRST
NATION TRIBAL COUNCIL**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants seek judicial review of a Band Council Resolution passed by the Respondent, Chipewyan Prairie First Nation Tribal Council (Band Council), dated June 11, 2007 (Resolution). In the Resolution, the Band Council dismissed Mr. Albert Angus, who was appointed by the previous band council as the Electoral Officer for the nomination meeting and elections of the Chipewyan Prairie First Nation (CPFN) Chief and Tribal Councillors held February 21, 2007 and February 28, 2007, respectively (the Election), as well as for any appeals launched in relation to that Election. The Applicants also ask the Court to quash the Resolution and to issue an order of mandamus requiring the Band Council to permit the election appeal of the Applicant, Walter Janvier, to proceed in accordance with the CPFN Election Code and, for that purpose, to provide the

necessary funds to allow Mr. Angus, who is the Electoral Officer, to complete his mandate regarding the appeals pursuant to the Election Code.

BACKGROUND

The Election and Appeals

[2] Mr. Albert Angus is a member of the Thunderchild Indian Reserve in Saskatchewan. He was appointed as the Electoral Officer by the previous band council of CPFN by a Resolution dated January 24, 2007.

[3] The other Applicant, Mr. Walter Janvier, is a member of the CPFN and was the elected Chief of CPFN from 1984 to 2007, with the exception of one term in the mid-nineties when he ran for elected Chief of CPFN but was unsuccessful.

[4] The CPFN Indian Reserve IR No. 194A is located in Fort McMurray, Alberta. The Respondent Band Council currently consists of Councillors James Janvier, Marcel Janvier, Stuart Janvier and Chief Vern Janvier, who were elected on February 28, 2007.

[5] The Chief and Councillors of the CPFN are elected by Band custom as permitted by section 2 of the *Indian Act*, R.S.C. 1985, c. I-5 and are not subject to section 74 of the *Indian Act* or the *Indian Band Elections Regulations*, C.R.C., c. 952. Rather, elections and appeals of elections of the

Band Council are governed by the CPFN Election Code (Election Code). At the time of the Election, no regulations or by-laws had been passed pursuant to the Election Code. Under section 1 of the Election Code, CPFN holds staggered elections in which one-third of the Band Council is elected each year.

[6] The Election Code allows an appeal of an election result in accordance with the following provisions:

- a. An appeal of an election result may be made by any five eligible voters if made in writing and delivered to the electoral officer within 14 days of the election.
- b. Upon an appeal being made, a Band meeting of eligible voters shall be called by the electoral officer and at that meeting, an appeal committee of three persons selected from a list of names of people, who are willing to serve on an appeal committee for the Chipewyan Prairie First Nation and are recommended as qualified by the electoral officer, will be appointed by the Band members to hear the appeal.
- c. The appeal committee will hear the reasons for the appeal and make any inquiry which it decides is necessary to determine the appeal. Upon hearing the appeal and completing any inquiry they might make, the appeals committee will decide on the appeal.
- d. Grounds for an appeal shall be:
 1. denial of eligible voters' right to vote;
 2. voting by ineligible voters;
 3. the candidacy of an ineligible candidate; or
 4. election fraud.
- e. Where the appeal committee finds that the appeal complaint is proven and its impact was sufficient to affect the election result, the appeals committee will declare the election invalid.

- f. If the appeal committee is of the opinion that the appeal compliant [*sic*], although proven, was not of significance, the committee may deny the appeal.

[7] At the conclusion of the Election, Mr. Angus prepared a report dated March 4, 2007 detailing the Election results and declaring Vern Janvier as the Chief and Stuart Janvier as a Councillor of CPFN.

[8] Subsequent to the Election, two Notices of Appeal were filed in accordance with the Election Code contesting the Election results. One appeal, dated March 5, 2007, was filed by Mr. Walter Janvier (Janvier Appeal). The Janvier Appeal was signed by the required 5 voters and was subsequently served on the Electoral Officer within 14 days of the Election, which is the time allotted under the Election Code.

[9] The Janvier Appeal sets out the following grounds of appeal:

- a. Many of the eligible voters of the CPFN were intimidated and harassed by third parties on the said election date in the Communiplex at which the voting took place.
- b. There was insufficient security for the said voting process to proceed in an orderly manner, and in one instance, the RCMP had to be called in when a candidate was threatened with assault at the said Communiplex.
- c. Many non-eligible voters were allowed to cast votes which spoiled the election result.
- d. Ballot boxes opened late and closed later than posted election times causing many voters who were at the Centre to leave due to the tardiness as well as the intimidating climate.
- e. The Electoral Officer's control over the Election was questionable, since the Electoral Officer was kept distracted by persons inquiring about their names on the list and trying to prove eligibility on the day of election while a line built up behind them.

[10] The basis of the second appeal, also dated March 5, 2007, filed by Mr. Thomas Morice, a former Councillor who was defeated in the Election, was that names were added to the voters list on the day of the Election. Mr. Morice is not a party to this application but both appeals remain outstanding and unresolved.

Correspondence between Mr. Angus and the Band Council

[11] By letter dated March 16, 2007, Mr. Angus, in his capacity as Electoral Officer, gave notice to Councillor Stuart Janvier that two Notices of Appeal were received with respect to the Election. He advised that copies of the Appeals were available upon request. Councillor Stuart Janvier, on behalf of the Band Council, sent a letter, dated March 21, 2007, to Mr. Angus stating that the Band Council would not recognize the validity of the Notices of Appeal unless the Band Council received copies of the Notices.

[12] It is not altogether clear when the Respondent received copies of the Notices of Appeal. Attached as an exhibit to the affidavit of Albert Angus sworn on July 13, 2007 is a facsimile transmittal cover sheet dated April 3, 2007 to former Councillor Shaun Janvier in which Mr. Angus purportedly sent copies of the Notices of Appeal. The facsimile, however, contains no indication that it was actually transmitted. On April 10, 2007, Ms. Vivienne Beisel, previous counsel for the Band Council, sent a letter to Mr. Angus stating that she had yet to receive copies of the Appeals and again requested that Mr. Angus provide copies of the Notices of Appeal. It is clear, however, that the Band Council received copies of the Notices of Appeal by at least April 18, 2007.

[13] By letter to the Band Council, also dated April 10, 2007, Mr. Angus advised that he had not yet received funds from the Band Council for the purpose of initiating and completing the appeals. He warned that “If no funds are received this week, I will have no choice but to hold all events at the Thunderchild Reserve where I live and accept funds from the appellants who may offer to contribute to the appeal costs.” Mr. Angus also provided the Band Council with a budget which totalled \$24,711.50, detailing the estimated fees and costs for carrying out the appeals.

[14] By letter dated April 12, 2007, the Band Council informed Mr. Angus that, until it received copies of the Notices of Appeal, the Band Council could not acknowledge or participate in the appeals process. Further, the Band Council stated that it was opposed to having CPFN business handled on a different Reserve, especially one in another province.

[15] By letter dated April 18, 2007, Mr. Angus faxed and mailed copies of the Notices of Appeal to the Band Council. He also requested a response from the Band Council concerning the approval of a budget to conduct the appeals.

[16] Ms. Beisel informed Mr. Angus by letter dated May 3, 2007, that the Band Council was discussing the appeals procedure and budget and that Chief Vern Janvier would respond to Mr. Angus within two weeks. By letter dated May 29, 2007, Mr. Angus, not having received a response, gave formal notice to the Band Council that he would be taking action to effect the appeal hearings by the following week if he did not receive written notification from the Band Council as to whether or not the Council was “going to cooperate and provide funds to finance” the appeals.

[17] On June 11, 2007, the Band Council passed a Resolution severing its ties with Mr. Angus as Electoral Officer of the Election and stated that “for the genuine purpose of the wellbeing and harmony of the membership of the [CPFN]” the Band Council would not “approve or tolerate any suggestion that [the] community should be burdened with another election other than what the norm has been for years.” This BCR of June 11, 2007 constitutes the Resolution and decision under review in this application.

The Settlement

[18] On October 22, 2007, Chief Vern Janvier, Ms. Beisel, Mr. Angus, Mr. Walter Janvier, and the Applicants’ previous counsel (Mr. David Holt) met to conduct cross-examinations on the affidavits filed in this matter. However, cross-examinations were not conducted and, according to the Applicants, a settlement was reached to resolve the dispute underlying these proceedings. The Respondents deny that any properly authorized settlement was ever concluded and they say that further litigation may be necessary to resolve the differences between the parties on this matter. However, for purposes of the present application, the Applicants ask the Court to note that on October 25, 2007, the terms of the Settlement, as drafted by Ms. Beisel, were confirmed by counsel for both parties. Among other things the Settlement included the following provisions:

- a. Chief and Council undertake to revoke the BCR of June 11, 2007 to allow the election appeal to proceed in accordance with the terms of the agreement set out below.
- b. Albert Angus will qualify at least five candidates who are un-biased, objective, and removed from the politics and business dealings of the CPDFN. Mr. Angus will make best efforts to complete the initial selection and qualification of candidates

within 30 days of today. He will release the resumes of these individuals to the community in advance of the Band meeting.

- c. Alberta [*sic*] Angus will attend a Band meeting for the purpose of selecting three Appeal Committee members from the five qualified candidates. Selection of Appeal committee members will be some form of secret ballot.
- d. Upon selection of the Appeal Committee, and writing a memo to the community and Appeal Committee members, Albert Angus' role as Electoral Officer will be complete (subject to being called as a witness by the Appeals Committee).
- e. CPDFN will pay to Albert Angus \$13,000.00, by direct deposit into his bank account, to carry out his duties as described above.
- f. Upon payment to Albert Angus and the revocation of the BCR of June 11, 2007, Walter Janvier will withdraw the petition circulating for the removal of the chief from his office and the Plaintiffs Albert Angus and Walter Janvier undertake to discontinue the above-named action [T-1267-07, the application herein] without costs.

[...]

- g. The Appeal Committee will hear the Appeal in the community.

[...]

[19] On November 7, 2007, pursuant to the terms of the Settlement, Mr. Angus forwarded a fax to the Band Council, which contained the names and resumes of five individuals he had qualified to be considered to sit on the Appeal Committee. In the facsimile letter, Mr. Angus also acknowledged receipt of the "deposit of fees of \$13,000.00" from the Band Council.

[20] However, notwithstanding the above communications, the Band Council, by Resolution dated January 28, 2008, reaffirmed its earlier Decision contained in the June 11, 2007 BCR to remove Mr. Angus as Electoral Officer and appointed Ms. Shirley Janvier as Substitute Electoral Officer "to complete any unfinished duties in relation to the election held on February 28, 2007."

[21] The Applicants argue that the Band Council has taken no further steps to allow the appeals to proceed since making the payment of \$13,000 to Mr. Angus, and has given no notice to the Applicants of its decision not to allow the appeal to proceed. The Applicant's further note that by April 3, 2008, in compliance with an Order made by Case Management Prothonotary Lafrenière, all cross-examinations were conducted but only a partial reply to the undertakings given by the Band Council's affiants, namely Councilor Stuart Janvier and Chief Vern Janvier, was provided by the time the Applicants filed their Memorandum of Law for this application, despite several demands by the Applicants. The Applicants say that the refused undertakings are relevant to the issues in this application and are further evidence of the Band Council's bad faith in resisting the appeals process and refusing to acknowledge responsibility for the ensuing problems.

[22] The Band Council states that the \$13,000 payment to Mr. Angus was not properly authorized and argues that the Settlement is not legally enforceable.

[23] At the hearing of this matter in Vancouver on June 19, 2008, the Respondents conceded that the appeals should be heard and that the Court should order that this occur in accordance with consent wording to be agreed upon by both sides. The Respondents agree that the only remaining issue, other than costs, is whether Mr. Angus, as Electoral Officer, should play a role in the Appeals. For various reasons the Respondents would like Ms. Shirley Janvier, the Deputy Electoral Officer, to organize the appeals process.

[24] Subsequent to the hearing in Vancouver, the parties have provided to the Court their consent wording for the holding on the appeals and have asked that it be included in any Order I made for this application.

ISSUES

[25] The issues on this application for judicial review are:

- a. Is the June 11, 2007 Resolution a decision reviewable by this Court pursuant to the *Federal Courts Act*?
- b. Did the Band Council act without jurisdiction or act beyond its jurisdiction in passing the June 11, 2007 Resolution and reaffirming that Resolution on January 28, 2008?
- c. If the second issue is answered in the affirmative, are the Applicants entitled to the remedy of mandamus which they seek?

[26] Because the Respondents have now conceded that the appeals must be heard and have agreed with the Applicants on consent wording to be included in an order of the Court, I do not think that the third issue remains a point of contention between the parties. Consequently, there is no longer a need to consider the request for mandamus.

ANALYSIS

1. *Is the June 11, 2007 Resolution a decision reviewable by this Court pursuant to the Federal Courts Act?*

[27] The June 11, 2007 Resolution is a final decision of the Band Council reviewable pursuant to the Federal Court's jurisdiction under section 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act). Section 18.1(4) of the Act provides:

<p>18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal</p>	<p>18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :</p>
<p>(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;</p>	<p>a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;</p>
<p>(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;</p>	<p>b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;</p>
<p>(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;</p>	<p>c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;</p>
<p>(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;</p>	<p>d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;</p>
<p>(e) acted, or failed to act, by reason of fraud or perjured evidence; or</p>	<p>e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;</p>
<p>(f) acted in any other way that was contrary to law.</p>	<p>f) a agi de toute autre façon contraire à la loi.</p>

[28] Section 2(1) of the Act gives a broad definition to “federal board, commission or other tribunal”:

<p>“federal board, commission or other tribunal” means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the <i>Constitution Act, 1867</i>; [...]</p>	<p>« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la <i>Loi constitutionnelle de 1867</i>. [...]</p>
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[29] In *Gabriel v. Canatonquin*, [1978] 1 F.C. 124, aff'd [1980] 2 F.C. 792 (FCA), this Court held that a band council falls within the jurisdiction of the Federal Court where the election of the band council took place pursuant to band custom and not in accordance with the *Indian Act*. More recently in *Vollant v. Sioui* (2006) F.T.R. 48, 2006 FC 487, Justice de Montigny succinctly summarized the state of the law on this issue as follows:

25. It is now settled law that decisions taken by a band council, when it exercises, or is deemed to exercise, its power to govern the band may be judicially reviewed by the Federal Court. The case law is replete with decisions holding that a band council is, for purposes of section 18 of the Federal Courts Act, “a federal board, commission or other tribunal:” see, *inter alia*, *Rider v. Ear* (1979), 103 D.L.R.(3d) 168 (Alta. S.C.); *Canatonquin v. Gabriel*, [1980] 2 F.C. 792 (F.C.A.) (QL); *Coalition To Save Northern Flood v. Canada* (1995), 102 Man R. (2d) 223 (Man. C.A.). This is true not only when

a council exercises the power it was explicitly granted by a federal statute, but also when the contested decision is based on a custom; this is so simply because it is the *Indian Act* itself, more specifically subsection 2(1) of the Act, that recognizes the legal character of the custom: see *Francis v. Mohawk Council of Kanesatake*, [2003] 4 F.C. 1133 (QL), at paragraphs 13-17 (F.C.); *Conatonquin v. Gabriel*, supra; *Frank v. Bottle*, [1993] F.C.J. No. 670 (QL); *Scrimbitt v. Sakimay Indian Band Council* (T.D.), [2000] 1 F.C. 513. Therefore, resolutions of a band council are considered decisions under the Federal Courts Act and may be subject to judicial review.

[30] Following this line of jurisprudence, it is clear that the Band Council is a “federal board, commission or other tribunal” within the meaning of the *Federal Courts Act* and the June 11, 2007 Resolution at issue in this application is a decision reviewable by this Court.

2. *Did the Band Council act without jurisdiction or act beyond its jurisdiction in passing the June 11, 2007 Resolution?*

Standard of Review

[31] The Applicants submit that the issue is one of jurisdiction and thus the applicable standard of review, following the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, is correctness. The Applicants rely on this Court's decision in *Gamblin v. Norway* (2000), 198 F.T.R. 242 at para. 39, citing *C.P. Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, for the principle that, in matters of jurisdiction, any decision by a band council must be correct and little deference is due by a reviewing court. Further, as stated by Justice Beaudry in *Martselos v. Salt*

River First Nation, 2008 FC 8 at para. 16, “no deference is owed to the council in determining whether their powers were exercised in accordance with the Customary Election Regulations.”

[32] The Respondent agrees that, in matters of jurisdiction, the standard of review is correctness, but argues that once it is determined that the Band Council had jurisdiction to remove Mr. Angus as Electoral Officer, the Court should afford the Band Council considerable deference as regards its decision to remove Mr. Angus as Electoral Officer. The Band Council cites and relies upon *Pete v. Canada (Attorney General)*, 2005 FC 993 at para. 75 [*Pete*], wherein I held as follows:

75. It is true, of course, that there might have been other ways for INAC and the Band Council to handle the situation. But that does not mean they were wrong to do what they did. They have obligations and feelings too. They needed to assess the situation and act in accordance with their respective duties to the First Nation and the Applicant. I can find no convincing evidence of any reason or motivation for removing the Applicant as Chief Electoral Officer on this occasion other than the clearly stated one of ensuring that the community retain its confidence in the election process, and the Election itself be managed in a fair and efficient manner. It is not for the Court to try and second guess, or substitute its discretion, for the Band Council or INAC. There was nothing unreasonable, or certainly patently unreasonable, about what they did.

[33] In my view, the jurisdictional issue in this case, specifically whether the Band Council acted beyond its jurisdiction when it passed the June 11, 2007 BCR is reviewable on a standard of correctness. If it is found that the Band Council acted within its jurisdiction, then the applicable standard of review of the Band Council’s decision to remove Mr. Angus as Electoral Officer and to halt further proceedings regarding the Election raise issues of fairness and natural justice and should also be reviewed under a standard of correctness.

Arguments

[34] In support of their argument that the Band Council acted without jurisdiction or beyond its jurisdiction, the Applicants characterize the Band Council's June 11, 2007 Resolution as a decision refusing an election appeal and removing the Electoral Officer.

[35] With respect to the Band Council's decision to terminate Mr. Angus as Electoral Officer, the Applicants submit that, since the Election Code regulates all matters pertaining to the election of the Band Council, any authority to terminate Mr. Angus must flow from the Election Code. Relying on section 4 of the Election Code, the Applicants argue that the Election Code expressly provides that the Electoral Officer is appointed by the band council and his or her appointment is to continue in order to "uphold the provisions of the Election Code," including any appeal of an election. The Applicants also argue that the present Band Council has no authority under the Election Code to interfere with a decision to appoint the Electoral Officer made by the previous band council. They submit that the Electoral Officer occupies a public office and has the powers and authority given to him by the Election Code. Thus, it is outside the present Band Council's jurisdiction to remove him.

[36] The Applicants also submit that the Band Council's Decision constitutes a denial of an election appeal. They argue that the Band Council has ignored the process set out in the Election Code and that there is no authority conferred on the Band Council to make a decision affecting the election procedure without first complying with the rules for CPFN elections as codified in the Election Code. The Applicants submit that the Election Code sets out a clear procedure to deal with

election appeals. As provided by section 1 of the Election Code, the Applicants submit that the process begins with a notice of appeal made in writing by five eligible voters and delivered to the electoral officer within 14 days of the election. The Applicants argue that, in the present case, the Electoral Officer did receive two Notices of Appeal within 14 days of the Election which were in writing and duly signed by five eligible voters. The Applicants note that, upon receiving the two Notices of Appeal, the Electoral Officer prepared a budget for the election appeal and provided the budget and the Notices of Appeal to the Band Council. By mid-April 2007, the Band Council required no further documentation from the Electoral Officer to proceed with an appeal of the Election. Once the Band Council was in possession of all necessary documentation, the Applicants say it was required to allow the Electoral Officer to call a Band Meeting of eligible voters to select an appeal committee pursuant to the Election Code. The Applicants argue that the Band Council has ignored the established practice of CPFN as set out in the Election Code and has acted without jurisdiction, or has acted beyond its jurisdiction, by making a Decision affecting the election procedure without first complying with the Election Code.

[37] In response, the Band Council argues that section 4 of the Electoral Code, contrary to the Applicants' submission, does not expressly address the term of the Electoral Officer's appointment, whether there is a power to remove the Electoral Officer, or anything at all regarding election appeals. The Band Council also submits that the Applicants submission that "the Band Council has no authority under the Election Code to interfere with a decision to appoint the Electoral Officer made by the previous Band Council" is incorrect. Beyond a general reference to the Election Code, submits the Respondent, the Applicants offer no authority for this legal premise.

The Band Council argues that it was within its jurisdiction to remove Mr. Angus as Electoral Officer, noting that most statutes governing elections provide for the removal of election officials. They refer to examples such as the *Canadian Elections Act*, S.C. 2009, c. 9, the *Election Act*, R.S.A. 2000, c. E-1, and the *Local Authorities Election Act*, R.S.A. 2000, c. L-21.

[38] The Band Council relies on *Pete, supra*, wherein this Court considered whether Indian and Northern Affairs Canada, along with the Chief and Council of a first nation, could remove an electoral officer. Although *Pete* involved an *Indian Act* band election, the Respondents argue that the reasoning in that case is instructive in the present case as the issue in *Pete* was also whether the band council had the power to remove a sitting returning officer. In *Pete*, the relevant provisions of the *Indian Act*, the *Interpretation Act* and the *Indian Band Election Regulations* were considered and, although there was no express provision providing for the removal of an electoral officer, it was held that the band council in that case possessed such authority based on the following reasoning at paragraphs 67-68:

67. Any person fixed with the role of ensuring, on behalf of the First Nation and the Minister, that band council elections are carried out in accordance with the governing legislation must have the confidence and approval of both the First Nation and the Minister throughout the process. For instance, if they acted in a way that does not meet with the Minister's approval and could not be removed, then the Minister would have no means of ensuring that his or her general fiduciary duties are discharged. Once the Minister perceives that the electoral process is threatened, it behooves the Minister to act in any way necessary to discharge statutory and fiduciary obligations. If this necessitates recommending the removal of an electoral officer, then the Minister must be free to do this. If there was no way to remove an electoral office once appointed, it would restrict the Minister's ability to fulfill the statutory and fiduciary obligations imposed on the Minister in this context as a matter of law, including the obligation to ensure that band council elections are carried out in a

fair and efficient manner that is commensurate with the scheme of the Indian Act and the Regulations.

68. Consequently, I believe that INAC must have the power to seek the removal of an electoral officer appointed under the Regulations where such removal is required to ensure that the Minister's obligations under the Indian Act and the Regulations are fulfilled. In a situation where the electoral officer has been appointed by a band council with the approval of the Minister, the appropriate procedure is to raise any concerns with the band council in question and seek the council's concurrence and approval. That is precisely what happened in this case. Of course, the power cannot be exercised for any other purpose that is not commensurate with the scheme, the specific provisions, and the general purpose of the Indian Act and the Regulations. But there is no suggestion in this application that it was.

[39] After concluding that the band council in *Pete* had the ability to remove an electoral officer, the Court found that there were sufficient grounds for the electoral officer's removal. In that case, the electoral officer had made an error in mailing out ballots and had then attempted to correct her error by sending out further corrected ballots. This caused confusion which was sufficient grounds for the removal. It was also held that the electoral officer must have the confidence of the First Nation. Because the electoral officer in *Pete* was found to have lost the confidence of the First Nation, the electoral officer's application for judicial review was refused.

[40] The Band Council submits that the CPFN Band Council has a similar power to remove an electoral officer appointed under its Election Code, provided that the Electoral Officer has lost the confidence of the CPFN Band Council. The Respondent puts forward three arguments in support of its position.

[41] First, it is argued that the Election Code, which was created by CPFN, gives a general power to the Band Council to make regulations, providing that “the Chief and Council may approve such regulations and forms as is necessary to give effect to this Indian Band custom election code.” This provision, argues the Band Council, gives the Chief and Council a general power that includes the ability to remove the Electoral Officer, provided that it is consistent with the general purposes of the Election Code.

[42] Second, the Band Council submits that the general power given to the Chief and Council by the Electoral Code includes a power to undo things that the previous Chief and Council have done. According to the Election Code, the Chief and Council appoint the Electoral Officer. Absent anything express to the contrary, the Band Council submits that the Chief and Council have the authority to remove the Electoral Officer provided that reasons for doing so are consistent with the general purpose of the Election Code.

[43] Third, the Band Council submits that it has the authority to remove an electoral officer appointed under its Election Code since it passed a Regulation on February 22, 2008 allowing for the removal and substitution of an electoral officer and, on February 28, 2008, the Band Council passed a Resolution affirming the June 11, 2007 Resolution removing Mr. Angus as Electoral Officer and substituting Ms. Shirley Janvier in his place.

[44] The Band Council has not addressed the Applicants' challenge to its decision to refuse an election appeal and, at the hearing of this matter, conceded that the election appeals must take place in accordance with the consent wording contained in the Order of the Court.

CONCLUSIONS

The *Pete* Decision

[45] To begin with, I think it has to be made clear that, apart from the fact that both cases involve the removal of an electoral officer, the present case bears no resemblance in fact or principle to the *Pete* case.

[46] In the *Pete* case, the Court was dealing with a pre-election removal of an electoral officer under the *Indian Act* and governing regulations which had been initiated by INAC in its fiduciary capacity, and which had the cooperation of the pre-election band council.

[47] In the present case, the Court has been asked to deal with the purported removal of an electoral officer by a post-election Band Council whose legitimacy has been challenged by way of appeal under the CPFN's own Election Code. After resisting and thwarting the appeals for months, the Band Council has now conceded that the appeals must be allowed to take place. All that remains in dispute is whether Mr. Angus, the Electoral Officer appointed under the Election Code by the

previous band council, should be the one to identify and present a list of possible Appeal Committee candidates to CPFN for consideration by CPFN Band members.

[48] The Band Council has cited *Pete* to support a general power for a band council to remove an electoral officer. But the facts and the reasoning in *Pete* support no such general power.

General Principles in the Present Case

[49] In the present case, any power of the Band Council to remove Mr. Angus as Electoral Officer must be found in the CPFN Election Code or under some general principle of elections law that has been incorporated into that Code.

[50] The Respondents in the present application occupy an extremely dubious position. They are, in fact, now seeking to rationalize their previous thwarting of legitimate appeals under the CPFN Election Code by saying they do not trust Mr. Angus to do his duty. What they do not seem to appreciate is that, by delaying and attempting to thwart the appeals process, they have undermined their own legitimacy and have cast doubt upon their own motives and right to speak for the CPFN people on this issue.

[51] Mr. Angus was properly appointed as Electoral Officer under the CPFN Election Code. There is also no argument that the appeals in the present case have been made in accordance with the Election Code. It is equally clear that, under the Election Code, it is the Electoral Officer who

must call a Band meeting of eligible voters and place before them a list of names recommended by the Electoral Officer. And, most important, it is the Band meeting of eligible voters who will choose the Appeal Committee members.

[52] As the Election Code makes clear, no power is given to the newly-elected Band Council to interfere in this process. And, of course, there is good reason for this, as the present dispute makes abundantly clear. A band council whose legitimacy to represent the CPFN people has been challenged following a disputed election cannot have the power to interfere in, or thwart, the appeals process laid down in the Election Code and the direct connection which the Election Code prescribes between the Electoral Officer and eligible voters. Mr. Angus' duty is owed to the eligible voters of CPFN. It is not owed to a newly elected Band Council with whom he may well find himself at loggerheads because of election appeals. To allow the newly-elected Band Council to come between the Electoral Officer and eligible voters would undermine the Election Code and would thus thwart the will of the CPFN people as manifested in the Election Code. The Electoral Officer must remain independent and free to operate within the confines of the Election Code without interference from individuals or groups who may well have a personal interest in ensuring that the obvious intent of the appeals process under the Election Code is undermined.

[53] In the present case, the newly-elected Band Council has, a year and a half after the disputed election, conceded that the appeals should be allowed to proceed. In fact, the Band Council has had no good reason to resist those appeals and the fact that it has taken significant effort and legal action to achieve this concession reflects poorly upon the way they have handled this matter. If the

problem was Mr. Angus, that did not give the Band Council a right to resist the whole appeals process. Their duty was to promptly address any concerns they had regarding Mr. Angus in accordance with principles of fairness and natural justice so that the legitimate appeals could be conducted efficiently and in a timely manner under the Election Code. The fact that they chose not to proceed in this way not only undermines the Election Code, it also casts considerable doubt on the reasons they now put forward to attack Mr. Angus in an attempt to rationalize the time and resources they have used to resist the appeals process.

[54] The Band Council argues that the Election Code itself allows that “the Chief and Council may approve such regulations and forms as is necessary to give effect to this Indian Band Custom election code.”

[55] Clearly, however, this is a facilitating provision. It fixes the Band Council with the duty of ensuring that the Election Code works in the way it says it works. It does not provide a power to a newly-elected Band Council to modify or change the primary functions and purpose of the Election Code by regulation or form. Any such “regulation” or “form” must “give effect” to the Code. This provision cannot be used by the Band Council to pass resolutions and enact Regulations that allow it to thwart the appeals process or to come between the eligible voters and their duly appointed Electoral Officer.

[56] If a newly-elected Band Council perceives problems regarding the Electoral Officer, it is not without remedies to address such problems. Fixed with the obligation to facilitate appeals under the

Code, it clearly has a duty to ensure that the financing required is appropriate and provided in a timely manner. It can also bring its concerns to the attention of the Band at a duly convened band meeting or, if they are relevant, at the meeting of eligible voters called to consider the Appeals Committee proposals of the Electoral Officer. There are also legal remedies available, including relief in this Court. In the present case, however, the newly-elected Band Council has simply expended time and resources in resisting legitimate election appeals and in attempting to rationalize its conduct by leveling accusations at Mr. Angus that it has failed to substantiate or address in a way that accords with the Election Code, other legal means available to handle any concerns, or the principles of natural justice and procedural fairness.

[57] The Band Council now says, after being brought into Court, that it will no longer resist the election appeals but that it wants its own nominee, Ms. Shirley Janvier, to replace Mr. Angus under the appeals process.

[58] Ms. Shirley Janvier may be an entirely qualified and disinterested officer who would do a fine job. But that is not the point. To allow such a substitution without a legal or substantive justification would be to accept the principle that the Band Council is free to appoint its own nominee to conduct the appeals process. Clearly, this is not contemplated by the Election Code and, in my view, the Band Council has offered this Court no legal or factual basis that would justify their acting outside of the Code or that can be reconciled with the facts of this case and principles of natural justice and procedural fairness.

[59] The Respondent Band Council has failed to establish any jurisdiction for its attempt to remove Mr. Angus as Electoral Officer under the Election Code or under any general law or procedure that might be applicable in the present case.

The Complaints Against Mr. Angus

[60] The Band Council submits that it acted reasonably when it passed the June 11, 2007 Resolution to remove Mr. Angus because he had lost the confidence of the Band Council and the membership of the CPFN. In support of its argument on this point, the Band Council lists the following factors:

- a. Mr. Angus only left Saskatchewan the evening before the election and did not make adequate provision for preparation time;
- b. Polling opened late on Election Day because Mr. Angus felt it necessary to go to the RCMP station to make security arrangements (something that could have been done in advance, with adequate preparation time);
- c. Mr. Angus needed to summon the incumbent candidate for Chief to the polling station to try to keep order;
- d. It took Mr. Angus over a month to forward copies of the Notices of Appeal to the Band Council, despite requests made by a councilor, legal counsel and the Chief and Council;
- e. Before forwarding copies of the Notices of Appeal to Chief and Council, Mr. Angus drafted a budget which, in the view of the Chief and Council, was excessive;

- f. Before forwarding copies of the Notices of Appeal, Mr. Angus threatened to hold the appeal process on a First Nation reserve in Saskatchewan – an idea that is offensive to the CPFN people;
- g. Also before forwarding copies of the Notice of Appeal, Mr. Angus threatened to fund the appeal proceeding by asking appellants to pay what they were willing, which raises fear that the appeal proceeding could be for sale and creates a reasonable apprehension of bias;
- h. When Mr. Angus assembled résumés of candidates for the appeal committee, he allegedly found people from areas away from CPFN so as to avoid potential conflicts. CPFN members assumed that members would be found from their surrounding community and were not satisfied with an appeal committee comprised of people from so far away or the costs associated with such process;
- i. Even though Mr. Angus was seeking to avoid any candidates that would have a potential conflict, he put forward someone contracted as a lead negotiator for a very important transaction by the Athabasca Tribal Council – CPFN’s regional council. This negotiator would have met with, taken instructions from, and would personally be familiar with Walter Janvier, one of the appellants in the Election Appeal.

[61] In addition to this list, the Respondents point to the allegations made against Mr. Angus by the appellants in their Notices of Appeal. These allegations, the Band Council argues, directly impugn Mr. Angus’s conduct as Electoral Officer. Any further involvement by Mr. Angus in the

appeal process would, according to the Band Council, undermine the CPFN's confidence in the appeal process.

[62] The Band Council also argues that it is somehow "odd" that Mr. Walter Janvier has made common cause with Mr. Angus while, at the same time, Mr. Walter Janvier is demanding that Mr. Angus continue in his role as Electoral Officer, notwithstanding the allegations of incompetence and malfeasance leveled against Mr. Angus by Mr. Walter Janvier in his appeal of the Election. Further, the Band Council notes that although one of the grounds of the Janvier Appeal was that "in one instance, the RCMP had to be called when a candidate was threatened with assault," Mr. Walter Janvier was the candidate who became involved with the RCMP and was asked by the RCMP to leave the polling station.

[63] The Band Council further argues that there is an additional oddity regarding the incident with the RCMP on Election Day, namely an apparent dispute regarding the number of scrutineers candidates were allowed to have at the polling site, and Mr. Angus refused to control the situation himself and requested that Mr. Walter Janvier come to the polling station to take control.

[64] Finally, the Band Council notes that, on March 2, 2007, Mr. Angus was suspended by the Law Society of Saskatchewan and did not inform the Band Council. The Band Council contends that Mr. Angus made a conscious choice not to inform them of his suspension and that the Band Council learned of the suspension from their legal counsel who had read about it in the *Star Phoenix* newspaper.

[65] The Applicants argue that Mr. Angus properly discharged his duties, and they submit that there is no evidence of improper conduct or bias by the Electoral Officer. With respect to the Band Council's allegation that the budget drafted by Mr. Angus was excessive, the Applicants submit that the funds enumerated in the budget were required by the Electoral Officer in order to conduct the appeals. The Applicants note that, although Councillor Stuart Janvier deposed in his affidavit that the councilors collectively believed that the budget was exaggerated, under cross-examination, Councillor Stuart Janvier conceded that he had no experience in preparing such budgets and he had never seen such a budget prior to reviewing the budget prepared by Mr. Angus. Further, Councillor Stuart Janvier admitted that he did not speak for the other Councillors in alleging the proposed budget was exaggerated. The Applicants also note that Chief Vern Janvier admitted under cross-examination that he had no issue with the Electoral Officer's budget and that his real concern was with the three days that Mr. Angus predicted would be required to complete the appeals process. Chief Vern Janvier believed that the entire process could be completed in one day.

[66] In response to the Band Council's complaint regarding the candidates for the Appeals Committee put forward for consideration by the eligible voters, the Applicants note that under cross-examination Mr. Stuart Janvier asserted that he had "no issue" with the candidates presented by Mr. Angus, save for Mr. Blaine Favel whom Mr. Stuart Janvier identified as a person with a "potential conflict of interest" and who was "not a good candidate." The Applicants stress that both Mr. Stuart Janvier and Chief Vern Janvier conceded under cross-examination that the selection of the members of the appeal committee is conducted at a Band meeting called for such a purpose.

Thus, Mr. Favel's alleged bias would be an issue that the members of CPFN could consider at such time.

Conclusions

[67] In my view, the allegations made against Mr. Angus cannot reasonably support a decision to remove Mr. Angus as Electoral Officer even if the Band Council had the power and jurisdiction to remove him as they have attempted to do in this case.

[68] The problem is that all of the allegations remain unsubstantiated and none of them have been subjected to the safeguards afforded by principles of natural justice and procedural fairness. Some of the important ones have been contradicted in the cross-examinations of Chief Vern Janvier and Councilor Stuart Janvier. The Band Council is attempting to tarnish Mr. Angus by implication and innuendo as a basis for saying that the people of CPFN have lost confidence in him.

[69] But there is no evidence before me that the people of CPFN have lost confidence in Mr. Angus. The only evidence I have is that the newly-elected Band Council now objects to Mr. Angus; but the Band Council has been at loggerheads with Mr. Angus because it has tried to prevent him from doing his duty under the Election Code. The Band Council has tried to prevent legitimate appeals from taking place. If there were any concerns regarding Mr. Angus, such concerns could and should have been subjected to due process and rules of natural justice and dealt with long ago.

[70] For example, the Court is asked to assume that because Mr. Angus and Mr. Walter Janvier are joint applicants in this application there is some apprehension of bias because they are acting together. I see nothing “odd” in an Electoral Officer and an election appellant putting their names on an application for judicial review of a decision that was intended to prevent a legitimate appeals process from taking place and, for that reason, thwarts both Mr. Angus as Electoral Officer and Mr. Walter Javier as an appellant.

[71] I am equally puzzled as to why I should assume that Mr. Angus’ relationship with the Law Society of Saskatchewan should give rise to a lack of confidence in Mr. Angus as an Electoral Officer when the Band Council has failed to establish, or even ask, why Mr. Angus has been suspended or what possible relevance that suspension might have to the present situation or Mr. Angus’ duties or performance as Electoral Officer.

[72] Equally problematic are the allegations in the appeals themselves and whether they can be attributed in some way to Mr. Angus. The Band Council has blocked those appeals and has prevented the grounds from being placed before the eligible voters of CPFN. Now the Band Council wants the Court to accept those allegations as grounds for its own decision to dismiss Mr. Angus. But these are matters for the people of CPFN to assess and judge. The Band Council has simply prevented that process from taking place.

[73] A review of the cross-examinations reveals that there has been no due process, natural justice or procedural fairness behind the Band Council's attempts to rid themselves of Mr. Angus, who is attempting to do his duty under the Election Code.

[74] The grounds in the appeals are mere allegations that will be considered by the Appeals Committee. If these allegations in and of themselves were sufficient to establish a loss of confidence in the Electoral Officer, then the effect would be that the Band Council could circumvent the entire Election Appeals process by removing the Electoral Officer based on the grounds of appeal alleged in a Notice of Appeal. I do not find that this is the purpose of the Notice of Appeals or the Election Code and, as such, I decline to consider these grounds in my analysis of whether the Band Council and the members of CPFN have reasonable grounds for their purported loss of confidence in Mr. Angus's ability to act as Electoral Officer.

[75] The Applicants have also argued that the Band Council acted without or beyond its jurisdiction by issuing the June 11, 2007 Resolution in which it effectively refused to allow an appeal of the Election. The pertinent sections of the June 11, 2007 Resolution are as follows:

[...] WHEREAS The Chief and Council have reviewed the following for the purpose of bringing closure to this past election:

- the tenure of the past Chief and his failure to fully ratify the membership list and
- the obvious oversight on his part once again to consult with the membership for the purpose of endorsing a voters list, despite concerns that were raised and
- the fact that the elections were conducted regardless of these irregularities and
- the margin in the final tally of votes under your supervision and sanctioning were significant and
- the financial disarray that was left in the hands of the newly elected Tribal Chief and Council, which has been conveyed to you by this leadership, resulting in our

- inability to pay those added dollars you were requesting to coordinate an appeal and
- the matter of your total comprehension of all the above, leaves this leadership with no recourse but to call for a halt in any future action surrounding the elections of the leadership of the Chipewyan Prairie First Nation

THEREFORE BE IT RESOLVED That for the genuine purpose of the wellbeing and harmony of the membership of the Chipewyan Prairie First Nation that this Chief and Council will not approve or tolerate any suggestion that this community should be burdened with another election other than what the norm has been for years [...]

[76] When cross-examined by the Applicants' counsel on April 3, 2008, Councillor Stuart Janvier provided the following explanation regarding the words that "for the genuine purpose of the wellbeing and harmony of the membership of the Chipewyan Prairie First Nation that this Chief and Council will not approve or tolerate any suggestion that this community should be burdened with another election other than what the norm has been for years":

Q What does that mean?

A That means that the Chief and Council made a decision when consulting with the elders that the facts of the -- the appeal process has been forward in the way things were transpiring, that the community would not tolerate things to move forward.

Q So that there would be no appeal; is that correct?

A Basically, yes.

Q So that the election results from February 28th, 2007, stand, correct?

A Yes.

Q So a Council resolution says, We're not going to have any appeals at Chipewyan; is that correct?

A Yes.

Q Has a Band Council Resolution ever been withdrawn?

A No.

Q So this is still the decision of the Council, correct?

A Yes.

Q Has there been any subsequent Band Council Resolutions passed that might change this decision?

A No.

Q So this is the only Band Council Resolution that's been passed as it relates to the elections that were held February 28th?

A Yes.

Q So would it be fair to say, Mr. Janvier, that the purpose of your Affidavit is to ensure that there is no election appeal of the election results of February 28th, 2007?

A Yes, with – unless the circumstances are changed that Albert Angus and his biases is not involved with the process.

(Cross-Examination of Councilor Stuart Janvier, pages 37-38.)

[77] The Applicants are correct that there exists an established appeal procedure set out in the Elections Code and that the Band Council was required to follow this procedure. In this regard, I find that by issuing the June 11, 2007 Resolution, the Band Council attempted to circumvent the procedure set out in the Elections Code and denied the right of an appeal to the persons who filed Notices of Appeal under the Election Code. In making such a Decision the Band Council, in my view, acted beyond its jurisdiction. The Band Council cannot, simply by its own resolution, decide that the Election Code can be disregarded and that an appeal will not take place. Also, the Band Council cannot, by its own resolution, and without due process and procedural fairness simply remove an Electoral Officer who, under the Election Code, is fixed with the duty of overseeing the

appeals process and who, in effect, answers to the eligible voters of CPFN. In the present case, the Band Council has not conducted itself with due process or in accordance with established rules of natural justice and procedural fairness. The Band Council has provided the Court with no authority or principle that would authorize or justify its conduct so far in this matter. The cross-examinations of Chief Vern Janvier and councilor Stuart Janvier do not suggest a Band Council that is cognizant of its obligations under the Election Code or under rules of procedural fairness. The Band Council has, in effect, prevented the people of CPFN from making decisions that the Election Code says are their's to make.

[78] The conduct of the Band Council to date places them in a conflicted and dubious position regarding the complaints they have now decided to raise regarding Mr. Angus' suitability to conduct the appeals as Electoral Officer under the Code. In addition, the grounds raised remain unsubstantiated and/or contradicted by the Band Council itself. They have not been dealt with fairly or in accordance with the usual rules of natural justice and the Band Council's position on this issue is, in my view, unreasonable and unsustainable. Mr. Angus remains the duly appointed Electoral Officer to conduct the appeals under the Election Code.

The Remedy

[79] A significant amount has changed since the Applicants were compelled to bring this application. The Respondents have now acknowledged that they cannot block the appeals and agree

that the Court should order that the appeals take place in accordance with an agreed procedure that should be incorporated into a Court order.

[80] Hence, the only other matter for the Court to decide is whether Mr. Angus has been removed as Electoral Officer and is no longer in a position to facilitate the appeals in accordance with the Election Code.

[81] For reasons given, I have concluded that Mr. Angus has not been legally removed as Electoral Officer. He remains in place to conduct the appeals in accordance with the Election Code. Any concerns that the Band Council may wish to raise regarding Mr. Angus' fitness to facilitate the appeals and do his duty under the Election Code can be raised and dealt with as part of the appeals process and the selection of the Appeals Committee, if those concerns have any relevance to that process and the issues and criteria that the Election Code specifically asks the people of CPFN and the Appeals Committee to address. If and when they are, those concerns must be dealt with in accordance with due process and rules of natural justice and fairness.

[82] At this stage, the Court does not wish to pre-empt the people of CPFN from considering these matters in their own way and in accordance with their own Code. No order of mandamus is required because the Decision dismissing Mr. Angus is quashed for reasons given, and the Band Council has agreed that the appeals process must be conducted in accordance with the Court's order.

[83] If the parties cannot agree on costs, then either side is at liberty to address this Court on the matter of costs for this application which may be done by way of written submission and/or before the Court at a time and in a manner to be discussed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Application is allowed in part and the June 11, 2007 Resolution of the Band Council – and any subsequent confirmation – is quashed for the reasons given so that Mr. Angus remains the Electoral Officer for purposes of the appeals that both sides agree should proceed in accordance with the Election Code;

2. The Appeals will proceed in the following manner as agreed by the parties and mandated by the Court:

Within 14 days of the date of this Order, the Respondent, Chipewyan Prairie First Nation Tribal Council shall take all necessary steps to hold a Band Meeting of eligible voters for the purposes of selecting an Appeal Committee (the “Band Meeting”), pursuant to the Chipewyan Prairie First Nation Election Code enforced at the time of the election of February 28, 2007 (the “Election”), and as attached at Exhibit “B” to the Affidavit of Albert Angus in this matter. Within 14 days of the Band Meeting the newly elected Appeal Committee shall meet for the first time and thereafter establish the process which it will follow in hearing the appeal of the election. The Appeal Committee shall be comprised of 3 members as selected at the above referred Band Meeting by eligible votes pursuant to the order of this Honourable Court.

3. The Respondents may raise any concern regarding Mr. Angus' conduct as Electoral Officer as part of the appeal process and/or in accordance with due process, procedural fairness and the rules of natural justice;

4. The parties may address the Court on the issue of costs in the manner outlined in the reasons.

“James Russell”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1267-07

STYLE OF CAUSE: Albert Angus and Walter Janvier and Chipewyan Prairie First
Nation Tribal Council

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: June 19, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** RUSSELL J.

DATED: August 1, 2008

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