Federal Court  Cour fédérale

Date: 20140613

Docket: T-1412-13

Citation: 2014 FC 569

Ottawa, Ontario, June 13, 2014

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

DODIE FERGUSON, MALCOLM DELORME, ERNEST DELORME, CAROL LAVALLEE, and KEVIN DELORME

Applicants

and

TERRENCE LAVALLEE, EDWARD AISAICAN, WALTER PELLETIER, WILLIAM TANNER, and VALERIE TANNER

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Ms. Dodie Ferguson, Mr. Malcolm Delorme, Mr. Ernest Delorme, Ms. Carol Lavallee, and Mr. Kevin Delorme (the "Applicants") seek judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of a decision of the Cowessess First Nation Band

Council (the "Band Council"), refusing to order a by-election to fill the position of Chief of the Cowessess First Nation (the "CFN"). That decision was formalized at a Band Council meeting on September 25th, 2013 in which a motion for a by-election was tied in a vote of 4 to 4.

[2] Broadly speaking, this application concerns a dispute about whether the position of Chief of CFN is currently vacant, by operation of law, that is regarding Mr. Terrence Lavallee's compliance with the residency requirements set out in the *Cowessess First Nation #73 Custom Election Act* (the "Election Act").

[3] The Applicants seek the following relief:

> 1. a declaration that the *Cowessess First Nation #73 Custom Election Act* ["*Elections Act*"] are the applicable law or required procedures governing the matters in question;
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> 2. an order in the nature of *quo warranto* that the respondent does not validly hold the office of Chief of Cowessess First Nation and that he be prohibited from continuing to usurp the office and functions of Chief of Cowessess First Nation;
>
> 3. an order that a by-election to fill the position of Chief of the Cowessess First Nation be held in accordance with the *Election Act*, and that the remaining applicant Councillors of Cowessess First Nation (or alternatively the Councillors of Cowessess First Nation) will facilitate all steps required under the *Election Act* to ensure that said by-election takes place;
>
> 4. a declaration that any official acts purported to be taken by the respondent Lavallee as Chief of Cowessess First Nation after July 27, 2013 are null and void and of no effect;
>
> 5. a declaration that any purported Band Council resolution passed by the Council after July 27, 2013, where quorum for a purported Council meeting was five and purported to be achieved by counting the respondent Lavallee as a member of the Council, are null and void and of no effect;

> 6. a declaration that, according to the custom of the band, Malcolm Delorme is the Acting Chief of Cowessess First Nation until such time as the position of Chief is filled by way of by-election; and
>
> 7. orders in the nature of *mandamus*, *prohibition*, *quo warranto*, and *certiorari*, as may be necessary in order to give effect to the relief herein requested and the relief as this Honourable Court may deem appropriate.

[4] Mr. Edward Aisaican, Mr. Walter Pelletier, Mr. William Tanner, Ms. Valerie Tanner, and Mr. Terrence Lavallee are named as the Respondents (the "Respondents").

[5] The Applicants, other than Ms. Ferguson, and the Respondents, other than Mr. Terrence Lavallee, are Councillors of the CFN Band Council. Ms. Ferguson is a member of CFN but not a Councillor. Mr. Lavallee is currently the Chief of the CFN, following an election on April 27, 2013.

[6] In that election the Applicants, apart from Ms. Ferguson, and the Respondents, apart from Mr. Lavallee, were elected as members of the CFN Band Council. Mr. Lavallee was elected as Chief of the CFN.

II. THE EVIDENCE

[7] The evidence in this matter was submitted by way of affidavits and transcripts of cross-examinations.

[8] The Applicants filed the affidavits of Mr. Kevin Delorme, Mr. Malcolm Delorme, Ms. Dodie Ferguson, Mr. Curtis Lerat, and Ms. Carol Lavallee. The Applicants provided two affidavits from Mr. Kevin Delorme, the first sworn to on August 20th, 2013 and the second sworn to on October 23rd, 2013.

[9] In his first affidavit Mr. Kevin Delorme describes the events leading up to this application. He describes the Respondent Mr. Terrence Lavallee's residency situation, including the dispute with Ms. Adrienne Sparvier about the occupancy of Unit 134 on the Reserve, and the contentious votes at Band Council meetings. Attached as exhibits to his affidavit are an extract from the minutes of the June 17th, 2013 Band Council meeting, a copy of the Election Act, and a copy of the Chief and Council Governance Policy.

[10] In his second affidavit, Mr. Kevin Delorme describes his communications with Mr. Curtis Lerat, an employee of CFN. The communications were related to Mr. Terrence Lavallee's residence on the Reserve and whether he had been allocated a home or had a legal claim to occupy Unit 134. A number of emails between Mr. Kevin Delorme and Mr. Curtis Lerat are attached as exhibits to that affidavit.

[11] The Affidavit of Ms. Dodie Ferguson was sworn to on August 20th, 2013. Ms. Ferguson is a member of CFN. Her affidavit describes a conversation with the Respondent Ms. Valerie Tanner about the eviction of Ms. Adrienne Sparvier from Unit 134. In that conversation Ms. Dodie Ferguson indicated concerns about the legality of the eviction of Ms. Sparvier, and also concerns about some of the governance decisions made by the Band Council. Ms. Dodie

Ferguson also communicated to Ms. Valerie Tanner the concerns of Ms. Adrienne Sparvier regarding her eviction.

[12] Ms. Ferguson notes that CFN is currently subject to a Recipient Managed Management Action Plan with the Department of Aboriginal Affairs and Northern Development Canada. She expresses concern that a failure to follow this plan will lead to either an Expert Resource Support Management Action Plan or Third Party Management, either of which would reduce the autonomy of CFN.

[13] Mr.Curtis Lerat executed his affidavit on August 20th, 2013. He was employed as Tenant Relations Officer with the Cowessess Housing Department prior to Mr. Lavallee's election as Chief. In his affidavit he describes his duties in that position, the number of unoccupied houses on the Reserve, and his knowledge that Mr. Terrence Lavallee has not been assigned a house on the Reserve. He also describes his actions in researching the leasing history of Unit 134 and some of Mr. Terrence Lavallee's efforts to evict Ms. Adrienne Sparvier from that unit.

[14] Mr. Lerat also discusses dismissal from his employment on August 16th, 2013 and his belief that this dismissal was politically motivated in relation to the dispute over Mr. Lavallee's residency. Attached as an exhibit to his affidavit is a letter to Mr. Malcolm Delorme that Mr. Lerat claims he wrote, but did not sign, confirming that as of July 29th, 2013 Mr. Lavallee did not have a house in his name on the CFN Reserve.

[15] The affidavit of Ms. Carol Lavallee was sworn to on October 16th, 2013. In that affidavit she briefly describes her attendance at the Band Council meeting of September 25th, 2013. She describes Mr. Kevin Delorme's motion for a by-election and the defeat of that motion.

[16] The affidavit of Mr. Malcolm Delorme was sworn to on August 20th, 2013. He describes the events leading up to the current application, including a description of the contested election of April 27th, 2013, the dispute about Mr. Lavallee's residency and the contentious Band Council and community meetings on that subject.

[17] Mr. Malcolm Delorme also describes how he came to fill the position of Acting Chief. He provides evidence about the Recipient Managed Management Action Plan and the financial situation of CFN. He describes a mortgage loan agreement arranged by Mr. Terrence Lavallee, between CFN and a company called USand group. It is Mr. Malcolm Delorme's opinion that Mr. Lavallee has placed himself in a conflict of interest situation as a result of this arrangement, and the mortgage loan agreement will place the financial interests of the First Nation and its members in danger.

[18] The Respondents filed the affidavits of Mr. Terrence Lavallee, Mr. Walter Pelletier, Ms. Valerie Tanner, Mr. William Tanner, Mr. Edward Aisaican, and Ms. Shelley Fairbairn. They also filed the cross-examinations of Mr. Terrence Lavallee, Ms. Carol Lavallee, Mr. Malcolm Delorme, Mr. Kevin Delorme, and Mr. Curtis Lerat.

[19] The affidavit of Mr. Terrence Lavallee was sworn to on September 13th, 2013. In it he disputes much of the evidence provided in the affidavits filed by the Applicants and provides his perspective on the events leading up to this application. He describes his election as Chief and provides evidence about the traditional aboriginal definition of "take up permanent residence".

[20] Mr. Lavallee also describes the housing dispute with Ms. Adrienne Sparvier, and describes the arrangement between CFN and the USand Group. He provides evidence about the non-renewal of certain teachers' contracts, and alleges that Counsel for the Applicants is in a conflict of interest as he also represents teachers whose contracts were not renewed by CFN. He proceeds to describe actions taken by the Applicants, such as locking the doors to the Band Council office, which he describes as intimidation or harassment.

[21] Mr. Lavallee also provides evidence as to CFN's relationship with the Department of Aboriginal Affairs and Northern Development Canada, and states that they are not currently in danger of going into Third Party Management. A number of exhibits are attached to his affidavit in support of his evidence.

[22] The affidavit of Mr. Walter Pelletier was sworn to on September 13th, 2013. Mr. Pelletier provides evidence as to the events that took place at the meeting of the Band Council of July 30th, 2013, organized by Mr. Malcolm Delorme as Acting Chief. Mr. Pelletier deposes that he only attended this meeting for approximately four minutes, and once he realized attempts were being made to bring motions he left, on the basis that in his opinion the meeting was illegal.

[23] Mr. Pelletier provides evidence that it is customary for the Chief to call meetings. He did not stay long enough to hear a full motion nor did he vote on any motion put forward at that meeting. Mr. Pelletier also describes visiting Unit 134 with the RCMP and Mr. Terrence Lavallee on August 29th, 2013 in an attempt to evict Ms. Adrienne Sparvier. He confirms that Ms. Sparvier continues to occupy Unit 134.

[24] In her affidavit, sworn to on September 13th, 2013, Ms. Valerie Tanner provides evidence of her talks with Ms. Dodie Ferguson. She speaks of discussing the non-renewal of teaching contracts and the elimination of community committees, as well as the housing situation of Ms. Adrienne Sparvier. She denies stating that it was Ms. Sparvier's responsibility to go to court if she was unhappy with the eviction. It is her evidence that based on Band tradition and custom, as well as provisions of CFN's Housing Policy, occupation of Unit 134 should revert to Mr. Terrence Lavallee.

[25] The affidavit of Mr. William Tanner was sworn to on September 13th, 2013. In this affidavit Mr. Tanner describes a conversation with Ms. Carol Lavallee on September 3rd, 2013 when he asked Ms. Lavallee why incorrect evidence was placed in the Applicants' affidavits about a motion regarding a by-election on October 22nd, 2013. It is the evidence of Mr. Tanner that Ms. Lavallee responded that there had been no such motion.

[26] In his affidavit, sworn to on September 13th, 2013, Mr. Edward Aisaican confirms that he attended the Band Council meeting of June 27th, 2013 and seconded the motion to allocate Unit 134 to Mr. Terrence Lavallee. He deposes that Ms. Adrienne Sparvier moved into the house on

the day of the election, and based on Band custom, the circumstances of Mr. Lavallee's earlier eviction from the unit and his payment of any arrears, the unit should be allocated to him. It is the evidence of Mr. Aisaican that Mr. Terrence Lavallee intended to make Unit 134 his permanent residence.

[27] The affidavit of Ms. Shelley Fairbairn was sworn to on October 25th, 2013. Ms. Fairbairn is a court reporter from Regina who attended the Band Council meeting of September 25th, 2013 and transcribed the proceedings. Attached to her affidavit as exhibits are a transcript of that meeting, the agenda of the meeting, the Housing Portfolio Report discussed at the meeting, and a letter regarding CFN and its SaskTel Services Account.

[28] The Applicants filed a transcript of the cross-examination of Mr. Terrence Lavallee. The cross-examination focuses largely on Mr. Lavallee's residence and his understanding of the difference between a non-aboriginal interpretation of permanent residence and a traditional aboriginal interpretation of permanent residence.

[29] The Respondents filed the cross-examinations of Ms. Carol Lavallee, Mr. Malcolm Delorme, Mr. Kevin Delorme and Mr. Curtis Lerat. Those cross-examinations took place on October 25th, 2013 and relate to the material contained in the affidavits filed by those individuals.

III. BACKGROUND

[30] The facts below are taken from the affidavits, including the exhibits, filed by the parties.

[31] Mr. Lavallee had resided in a house, that is Unit 134, on the Reserve prior to 1992. However, in 1992 he was evicted for failing to pay the rent on the home. He claims that the primary motivation for his eviction was political, but does not deny that he did not pay the rent on the house. He no longer has a home on the reserve and lives in Regina. Mr. Lavallee maintains farmland that he works on the Reserve, and keeps his farming equipment on that land.

[32] The house that Mr. Lavallee lived in prior to 1992 was re-allocated to another member of CFN after his eviction. Despite having what he submits is a traditional claim to the house and land, Mr. Lavallee was told by former Chiefs and Band Councils that he no longer had a claim to that house. The current occupant of that house, Ms. Adrienne Sparvier, had been allocated Unit 134 by the former Chief and Band Council. As of the Band Council meeting on June 17, 2013, she was in arrears for non-payment of rent in relation to the house.

[33] On June 17th, 2013, a motion was passed by the Band Council evicting Ms. Adrienne Sparvier from Unit 134. The original vote was tied, with four Band Councillors in favour and four against. Mr. Terrence Lavallee, as Chief, cast the deciding vote in favour of the motion evicting Ms. Sparvier from Unit 134. On July 11, 2013, Ms. Sparvier appealed the decision to evict her. That appeal was dismissed on August 19th, 2013.

[34] On July 19th, 2013, at a Band Council meeting, the Applicant Kevin Delorme brought a motion to transfer Unit 134 to Mr. Lavallee. Mr. Delorme claims that the motion was brought on the condition that Mr. Lavallee bring documents to the Band Council demonstrating his legal claim to the property before July 27th, 2013. There is some dispute about whether these

conditions were a requirement for the transfer of the property. In any event, the motion was passed with 7 votes for, none against. Two other motions were passed at that meeting, one to allow Mr. Lavallee to install power in his name at Unit 134 and one to allocate that property to him through a Band Council resolution. These motions were passed with 4 votes in favour, 2 against.

[35] For reasons that are not known, Ms. Sparvier refused to vacate Unit 134. Mr. Lavallee was unable to take up occupancy of that property. On July 27th, 2013, three months after Mr. Lavallee's election as Chief, the Applicant Malcolm Delorme approached him and encouraged him to call a meeting to discuss issues with respect to his residency and the Election Act. Mr. Lavallee refused to call a meeting.

[36] Mr. Malcolm Delorme shortly afterward confirmed that Mr. Lavallee had not been allocated a house on the Reserve and called a Band Council meeting. That meeting was held on July 30, 2013 and was attended by Mr. Malcolm Delorme and the other Applicant Councillors. One of the Respondents, Mr. Walter Pelletier, at some point during that meeting came and took his seat at the Council table.

[37] At that point, the Applicant Councillors realized that they had reached a quorum, that is five persons, for an official Band Council meeting. A motion was brought to uphold and enforce the Elections Act. According to the Applicants, Mr. Walter Pelletier was the sole vote against the motion. Mr. Pelletier denies that the meeting was a valid Band Council meeting and denies voting on the motion.

[38] On August 3rd, 2013 a special community meeting was held with members of CFN in attendance. The Applicants attended that meeting. The CFN members discussed the Election Act and its residency requirements. They voted to uphold the Election Act and demanded that Mr. Malcolm Delorme take up the position of Acting Chief. His eligibility for the position of Acting Chief, according to the Applicants, was based on a local custom that the Councillor who received the highest number of votes in the last election becomes Acting Chief when the position of Chief is vacated.

[39] A Band Council meeting was held on August 9th, 2013, at which all of the Applicants and Respondents were present. As Chief, Mr. Lavallee assumed the position of chair of the meeting. The Applicants stated that they did not recognize Mr. Lavallee as Chief as his office was vacant by operation of the Election Act. Mr. Kevin Delorme requested that Mr. Lavallee step down and appoint a new chair in his place. Mr. Lavallee refused that request.

[40] Mr. Kevin Delorme then brought a motion calling for a resolution that a by-election be held to fill the vacant position of Chief of CFN. That motion was seconded by Mr. Malcolm Delorme. The motion was ruled out of order by Mr. Lavallee and the Respondents refused to vote on it. The Applicants then left the meeting in protest, and the Respondents carried on with Band Council business.

[41] The Applicants brought a motion for an injunction against the Respondents that would restrain Mr. Lavallee from performing the duties of or holding himself out as Chief of CFN. That motion was adjourned *sine die* by Justice Harrington on September 18, 2013, on the condition

that Mr. Lavallee provide an undertaking to the Court that he would allow a vote to take place on the issue of whether a by-election should be called.

[42] A meeting of the Band Council took place on September 25th, 2013. Mr. Kevin Delorme brought a motion to call a by-election for the position of Chief. That motion was seconded by Mr. Malcolm Delorme. Voting took place and was tied with four Councillors in favour, four against. All of the Applicants voted in favour, and all of the Respondents, apart from Mr. Lavallee, voted against. Mr. Lavallee abstained from the vote. Due to the tied vote, the motion died and was, in effect, defeated.

[43] The decision that is challenged by the Applicants, that is a vote by the Band Council, does not contain reasons. The motion that was voted on, as moved by Mr. Kevin Delorme, reads as follows:

> Kevin Delorme: I'll make that motion in regards to Article 14 of the Custom Election Act and for the fact that Terrence Lavallee didn't obtain residency by the 27th of July, and for the fact that their dispute resolution was recognized only on August 2nd, I would like to put the motion that we call a by-election.
>
> Carol Lavallee: And the chief's position being empty.
>
> Kevin Delorme: For the chief's position, which should have been deemed vacant July 27th.

[44] The Band Council did not discuss the motion or the meaning of the Election Act provisions in any detail. The vote was held and the motion was defeated.

IV. ISSUES

[45] Two issues arise in this proceeding:

i) What is the appropriate standard of review?

ii) Does the decision of the Band Council meet the applicable standard?

V. SUBMISSIONS

(a) *Applicants' Submissions*

[46] The Applicants argue that the appropriate standard of review is correctness since the question raised involves the interpretation of the Election Act. The Applicants submit that the tribunal, that is the Band Council, failed to interpret the relevant provisions of the Election Act and accordingly, the standard of correctness applies, as discussed by the Federal Court of Appeal in *York v. Lower Nicola Indian Band*, [2013] 2 C.N.L.R. 388 at paragraph 6.

[47] The Applicants argue that the Election Act is clear. A Chief who does not reside on the Reserve must take up permanent residence on the Reserve within three months of their election. Failure to do so renders the position of Chief vacant. There is no provision in the Election Act that allows the Band Council to relieve the Chief of this requirement.

[48] The Applicants submit that if the three month deadline is not met, the position of Chief is vacant by operation of law and the Band Council must call a by-election within 90 days of the vacancy. Their only discretion is with respect to the exact date of the by-election within the 90 day period. As the position of Chief was vacant, the Band Council could not refuse to call a by-election.

[49] Furthermore, the Applicants submit that the interpretation urged by the Respondents with respect to an alternative, traditional aboriginal meaning of the concept of taking up permanent residence does not withstand scrutiny. The Applicants argue that Mr. Lavallee's explanations of this alternative meaning were inconsistent, contradictory, and changed continually over the course of his cross-examination. It is the position of the Applicants that taking up permanent residence requires that the individual move to the Reserve and set up and maintain his principal place of residence there.

[50] The Applicants further argue that the dispute with Adrienne Sparvier over Unit 134 did not extend the period of time in which Mr. Lavallee had to take up permanent residence. If it did, it would have extended the period to September 7th, 2013, at the latest.

[51] They submit that the evidence is clear that even as of that late date Mr. Lavallee had not taken up permanent residence on the Reserve. Mr. Lavallee has failed to meet the deadline to take up permanent residency provided for in the Act. The Applicants submit that this failure has rendered the position of Chief vacant, and the Band Council is required to call a by-election.

(b) *Respondents' Submissions*

[52] The Respondents, on the other hand, submit that the questions in issue involve a question of mixed fact and law. Accordingly, on the basis of the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 53, reasonableness is the applicable standard of review.

[53] As well the Respondents argue that in interpreting its home statute, that is the Election Act, the Band Council is entitled to a high degree of deference, which attracts the reasonableness standard; see the decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654.

[54] The Respondents also submit that the authorities relied on by the Applicants in urging a correctness standard are easily distinguishable. The authorities cited by the Applicants do not address the relevant Supreme Court of Canada jurisprudence and do not stand for the proposition that correctness review is applicable. The Respondents argue that the proper guiding authority is *Fort McKay First Nation Chief and Council v. Orr* (2012), 438 N.R. 379. The standard of reasonableness in this case is sufficient to protect the Court's position as a guarantor of administrative fairness.

[55] The Respondents argue that the Election Act is not a complete code governing CFN elections. Band custom has a role to play. The Election Act must be interpreted as a whole, and the Applicants improperly rely on the requirements of ordinary residence to inform an interpretation of permanent residence. According to the Respondents these are two different concepts relating to different Band Council members.

[56] The Respondents note that permanent residency is not defined in the Election Act. They argue that this omission is intentional, and the meaning of permanent residency is to be inferred from band custom and tradition.

[57] The Respondents argue that Band traditions with respect to consensual governance and the right to occupy hereditary, traditional lands are important to an understanding of the concept of permanent residence. There is a critical difference between the traditional aboriginal understanding of permanent residency and a non-aboriginal understanding. The Respondents submit that, according to Band custom and tradition, permanent residency is dependent primarily upon long-term intention.

[58] Further, the Respondents submit that the concept of permanent residency under the Election Act should be assessed in a manner consistent with the common law concept of domicile. At common law, it is not necessary to reside physically in a place in order to show domicile there; see the decision in *Foote Estate, Re*, [2011] 6 W.W.R. 453 at paragraph 19. Similarly, the Respondents argue that under the traditional understanding of CFN, permanent residence does not require physical occupancy.

[59] In any event, the Respondents submit that the evidence demonstrates that Mr. Terrence Lavallee has taken up permanent residence on the Reserve. He intends to reside on the Reserve at Unit 134 on his traditional land. He was born on that land, which is connected with four generations of his ancestors. These objective actions by Mr. Terrence Lavallee form an unassailable foundation upon which the Band Council based its September 25th, 2013 decision

that he had taken up permanent residency. That decision was reasonable and this application for judicial review should be dismissed.

VI. DISCUSSION AND DISPOSITION

[60] The first matter to be addressed is the applicable standard of review. As outlined above, the parties take different views on that issue, the Applicants arguing in favour of correctness and the Respondents in favour of the standard of reasonableness.

[61] The Applicants rely on the Federal Court of Appeal's decision in *York, supra*, for the proposition that the Band Council's decision should be reviewed on the standard of correctness. In my opinion, their argument is flawed. That case involved issues of procedural fairness, which are reviewable on the standard of correctness. In the present application, there are no concerns raised about procedural fairness and the correctness standard does not apply.

[62] The substantive issue in this application is whether the Respondent Mr. Lavallee meets the residency requirements of the Election Act in order to remain in position as Chief of CFN. The answer depends upon interpretation of the relevant provisions of the Election Act and the application of that interpretation to the facts. This is a question of mixed fact and law. According to the decision in *Dunsmuir, supra* at paragraph 53, such a question is reviewable on the standard of reasonableness.

[63] The Federal Court of Appeal has confirmed that where a Band Council interprets and applies a custom election code, such as the Election Act, reasonableness is the applicable standard of review; see the decision in *Orr, supra*, at paragraphs 10 and 11.

[64] Justice Stratas' comments at paragraph 12 of *Orr, supra* are instructive:

> In the circumstances, however, the distinction between the two standards of review is most narrow. If the Council's decision to suspend Mr. Orr as a councillor by way of resolution alone cannot be supported by the words of the *Election Code* or any other source of power, the decision cannot be said to be acceptable or defensible on the law. I now turn to this issue.

[65] In this case, the range of acceptable outcomes available to the Band Council is narrow: either Mr. Terrence Lavallee took up permanent residence on the Reserve within the required timeframe and within the meaning of the Election Act and he is Chief of CFN, or he did not take up permanent residence and the position of Chief is vacant, requiring a by-election.

[66] Three provisions of the Election Act are relevant to the issue of "residency", that is Articles 5.01(b), 12.03 and 13.01(a)(v), which provide as follows:

> ARTICLE 5- ELIGIBILITY
>
> or the purpose of this Act:
>
> […]
>
> (b) any Elector may seek nomination as a Candidate in any Election or By-Election for the position of Chief regardless of their place of residence, however, in accordance with the provisions of section 11.03 hereof, any individual who may be successful in obtaining office to the position of Chief and who is ordinarily resident off the Home Reserve at the time of conducting of the Election or By-Election shall be required to take up permanent

> residence on the Home Reserve within three (3) months following their assumption of office.
>
> […]
>
> ARTICLE 12 - ASSUMPTION OF OFFICE
>
> […]
>
> 12.03 Any Candidate who is successful in obtaining election to the position of Chief shall be required to take up permanent residency on the Home Reserve within three (3) months following their assumption of office, and maintain their residency on the Home Reserve for the duration of their term of office.
>
> […]
>
> ARTICLE 13 - VACANCIES AND REMOVAL FROM OFFICE
>
> […]
>
> 13.01 Following assuming of office by the Council pursuant to section 12.02 above, the office of Chief, Resident Councillor or Non-Resident Councillor shall only be deemed to be vacant when:
>
> (a) the person occupying such office:
>
> […]
>
> (v) in the context of the Chief's position, fails to take up or maintain their residency on the Home Reserve as required pursuant to the provisions of this Act following their assumption of office;

[67] Article 5.01(b) is clear, on its face. It requires that a person who is elected Chief, if not resident on the Reserve at the time of the election, must take up permanent residence on the Reserve within three months of assuming the office of Chief.

[68] Article 12.03 is also unambiguous, requiring the successful candidate for Chief to assume permanent residence on the Reserve within three months of taking office. This provision also

requires the Chief to maintain, that is continue, residency on the Reserve during the term of holding the office of Chief.

[69] Article 13.01(a)(v) is equally clear in its terms. It provides that the office of Chief is deemed to be vacant if the successful candidate fails to take up permanent residence within three months of assuming office.

[70] On the basis of the evidence submitted, Mr. Lavallee resides in Regina. He has access to farmland on the Reserve but he does not live on the Reserve.

[71] The evidence about the availability of Unit 134 is, in my opinion, irrelevant. The fact that Unit 134 was unavailable to Mr. Lavallee, for whatever reason, is not responsive to the obligation created by the Election Act that a person occupying the position of Chief is required to reside on the Reserve.

[72] Even if such evidence were relevant, in my opinion the Respondents err in arguing that the delay within which Mr. Lavallee had to establish permanent residency was suspended by the election appeal and the housing dispute with Ms. Sparvier.

[73] The Election Act provides for no exceptions. The three month time period runs from the time the Chief assumes office. By his own admission, in his affidavit filed in this proceeding, Mr. Terrence Lavallee assumed office on April 27th, 2013. He had 3 months from that date to take up permanent residence on the Reserve, pursuant to Article 12.03.

[74] The Respondents have argued that a broad interpretation should be given to the residency requirements of the Election Act, that is an interpretation based on a traditional aboriginal definition of permanent residence.

[75] The problem with this argument is that the only evidence of a traditional customary definition of permanent residence is found in the affidavit of Mr. Lavallee. This affidavit is obviously self-serving and of little probative value. In effect, there is no reliable evidence to support this argument.

[76] I am mindful of the importance of tradition and custom when interpreting First Nation election codes, such as the Election Act. I am also mindful of the direction of the Supreme Court of Canada that within the context of aboriginal law, the traditional rules of evidence should be modified or relaxed; see the decision in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paragraph 98. That does not mean, however, that the rules of evidence can be completely ignored. I am not satisfied that the Respondents have adduced sufficient evidence to demonstrate a traditional understanding of permanent residence.

[77] The Respondents' reliance on the traditional common law concept of domicile is misplaced. There is nothing to suggest that this concept is relevant to a determination of permanent residence, and is contradictory to their arguments in favour of a traditional aboriginal understanding of permanent residence.

[78] The word "reside" is capable of more than one meaning, according to the context in which it is used. In this regard I refer to the decision in *Sifton v. Sifton*, [1938] 3 D.L.R. 577 at paragraph 27 where the Judicial Committee of the Privy Council said the following:

> Their Lordships' attention was called during the arguments to numerous authorities in which the Court has been called upon to consider the meaning of the words reside and residence and the like. But these authorities give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used.

[79] In my opinion, the relevant provisions of the Election Act, properly interpreted, require the physical presence of the Chief on the Reserve. The fact that the Election Act allows a period of time, that is three months, for a person to "take up" permanent residence supports the interpretation of a physical presence. The three months constitutes a grace period to allow a person to move on to the Reserve.

[80] Despite the Respondents' submissions to the contrary, the record demonstrates that Mr. Lavallee has not taken up permanent residence on the reserve. The Election Act does not mention intent or steps taken to obtain permanent residency, nor does it mention traditional lands. The permanent residency requirement has not been met, and Mr. Lavallee did not take up permanent residence on the Reserve within the three month time period required by the Election Act.

[81] In my opinion, this finding is determinative of the application.

[82] The failure to establish residence on the Reserve within three months of assuming office triggers Article 13.01(a)(v) of the Election Act, as cited above. That Article mandates that when a person who is elected Chief does not take up permanent residence as required by the Election Act, the position of Chief is deemed to be vacant.

[83] Mr. Lavallee failed to take up permanent residence on the Reserve within three months of taking office as Chief. Pursuant to the application of the relevant provisions of the Election Act, the position is deemed to be vacant. Mr. Lavallee filled the position of Chief for three months after taking office on April 27, 2013. He was not legally the Chief as of July 27, 2013.

[84] Article 14.01 of the Election Act sets out the requirements for a by-election when a position on the Band Council becomes vacant. That Article provides as follows:

> ARTICLE 14- BY-ELECTIONS
>
> […]
>
> 14.0.1 When for any reason a position on the Council becomes vacant pursuant to the provisions of Articles 12 and 13 hereof, the remaining members of the Council shall, as soon as possible, designate a date for a By-Election which shall be held within ninety (90) days following the event which resulted in the vacancy. Unless otherwise stipulated herein, all provisions respecting eligibility and procedures with respect to the conducting of Elections shall apply equally to any By-Elections undertaken pursuant to this Act.

[85] The Election Act provides that when a position on the Band Council becomes vacant for any reason, the vacancy is to be filled following a by-election. The Band Council lacks the discretion to waive calling a by-election in the case of such a vacancy. Article 14.01 requires the Band Council to call a by-election within 90 days of a position becoming vacant. The position of

Chief became vacant, by operation of law, on July 27, 2013. The Band Council's decision not to call a by-election to fill the vacant position of Chief was unreasonable.

[86] In conclusion, there is simply insufficient evidence to support the interpretation of the Election Act urged by the Respondents. Mr. Lavallee has not taken up permanent residency on the Reserve and, pursuant to the Election Act, the position of Chief is vacant.

[87] The decision of the Band Council is quashed and the Band Council is directed to set a date for a by-election in accordance with the Election Act.

[88] The Applicants have succeeded and are entitled to costs. Both parties have requested costs on a solicitor and client basis if successful in this proceeding. According to the decision in *Canadian Assn. of Broadcasters v. Canada*, [2009] 1 F.C.R. 3, such an award should not be made in the absence of submissions from the parties.

[89] Accordingly, the parties can make submissions, the submissions on behalf of the Applicants to be served within seven (7) days of receipt of the Judgment in this matter, responding submissions to be filed within five (5) days of receipt of the Applicants' costs submissions.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, with costs to the Applicants. Submissions can be made as to an award of solicitor and client costs, the submissions on behalf of the Applicants to be served within seven (7) days of receipt of the Judgment in this matter, responding submissions to be filed within five (5) days of receipt of the Applicants' costs submissions.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1412-13
STYLE OF CAUSE:	DODIE FERGUSON, MALCOLM DELORME, ERNEST DELORME, CAROL LAVALLEE, and KEVIN DELORME v TERRENCE LAVALLEE, EDWARD AISAICAN, WALTER PELLETIER, WILLIAM TANNER, and VALERIE TANNER
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 8, 2013
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	JUNE 13, 2014

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