

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2020 SKQB 273**

Date: **2020 10 26**
Docket: QBG 1181 of 2020
Judicial Centre: Regina

BETWEEN:

BIG RIVER FIRST NATION

APPLICANT

- and -

AGENCY CHIEFS TRIBAL COUNCIL INC.

RESPONDENT

Counsel:

Joshua T. Morrison and Sonia L. Eggerman
Donald E. Worme, Q.C., and Mark Ebert

for the applicant
for the respondent

JUDGMENT
OCTOBER 26, 2020

McCREARY J.

I. OVERVIEW

[1] The applicant, Big River First Nation [BRFN], applies for relief from what it alleges is the oppressive conduct of the respondent, Agency Chiefs Tribal Council Inc. [ACTC]. The application is brought pursuant to the oppression remedy provided under *The Non-profit Corporations Act, 1995*, SS 1995, c N-4.2 [NPCA].

[2] ACTC was incorporated on or about October 24, 1990 as a non-profit membership corporation under the *NPCA*. ACTC was created to conduct business and deliver programs to members of the corporation, who at that time consisted of BRFN, Pelican Lake First Nation, Witchekan Lake First Nation, and Ahtahkakoop Cree Nation (as it is now known). However, shortly thereafter, Ahtahkakoop Cree Nation resigned its membership in ACTC.

[3] In response, the remaining First Nations – BRFN, Pelican Lake First Nation and Witchekan Lake First Nation [Member Nations] formed a new tribal council in 1991 called the Agency Chiefs Tribal Council [Tribal Council]. The Tribal Council was constituted to promote cooperation among the Member Nations and to develop capacity for self-determination. ACTC continued as a non-profit membership corporation with BRFN, Pelican Lake First Nation and Witchekan Lake First Nation as members of the corporation. The Tribal Council also incorporated a number of other entities, whose purpose, along with ACTC, was to conduct business and deliver community services to Member Nations and their constituents.

[4] On July 13, 1991, representatives from the Member Nations signed the *Agency Chiefs' Tribal Council Convention Act* [*Convention Act*]. The *Convention Act* contains a number of provisions purporting to govern the relationship between the Member Nations. It is grounded in traditional Cree values and customs and represents the setting down of some of the signatory First Nations' customs in written form.

[5] Section 21 of the *Convention Act* requires that the *Convention Act* comes into force when it is ratified by formal resolution by the members of the General Assembly. The evidence is controverted respecting whether the

Convention Act was ever ratified or voted upon by the membership of the Member Nations.

[6] ACTC is one of the primary entities through which the Tribal Council conducts business and delivers community services. By convention, each Member Nation nominates two representatives to be appointed to ACTC’s board of directors. The board of directors is responsible for directing ACTC’s activities for the benefit of each Member Nation.

[7] In 2019, BRFN decided it would take steps to resign from the Tribal Council in order to have exclusive control over its funding, businesses and community services. The application before me is concerned with BRFN’s stated intention to resign its membership in ACTC, which is one facet of its resignation from the Tribal Council.

[8] On September 9, 2019, Chief and Council for BRFN passed Band Council Resolution 2019/20-15 [First Resignation BCR], which is concerned with the resignation of its membership in ACTC. The First Resignation BCR provided, *inter alia*:

...

d. Council deems it to be in the First Nation’s best interests to assume exclusive control of the management, administration and delivery of the Programs and Services, with effect as of the date on which the First Nation, or an agency nominated by the First Nation, secures and receives funding from ISC, in such amounts and on such terms and conditions as the First Nation deems appropriate, in its sole discretion (the “**Funding Date**”).

e. Council also deems it to be in the First Nation’s best interests to submit its resignation as a member of ACTC and to terminate its membership in accordance with section 116 of *The Non-*

Profit Corporations Act (Saskatchewan), 1995, with effect as of the date on which all of the following have occurred:

- i. the directors of ACTC approve its annual audited financial statements for the fiscal year ending on March 31, 2020; and
- ii. the Funding Date

(collectively, the “**Effective Date**”)

[9] On September 10, 2019, Derek Klein, Chief Executive Officer of BRFN, provided a copy of the First Resignation BCR to Ken Thomas, Chief Executive Officer for ACTC, by email, without comment.

[10] On October 9, 2019, BRFN held an election which resulted in changes to the membership of BRFN’s Chief and Council. Thereafter, there was some question as to whether BRFN’s new leadership intended to proceed with its resignation from ACTC. However, on November 22, 2019, BRFN passed Band Council Resolution 2019/28 [Second Resignation BCR]. The wording of the Second Resignation BCR is identical to the wording of the First Resignation BCR. The Second Resignation BCR authorized BRFN to resign its membership in ACTC, subject to the same conditions as the First Resignation BCR.

[11] ACTC takes the position that BRFN’s resignation from ACTC was effective the date of the First Resignation BCR – September 9, 2019. It is ACTC’s view that BRFN is not entitled to make its resignation from membership in ACTC subject to conditions, and that the effect of the First Resignation BCR was an immediate resignation of BRFN’s membership in ACTC.

[12] Consequently, ACTC has filed a Notice of Change of Directors with Information Services Corporation, removing BRFN’s two representatives,

Chief Bruce Morin and Council Member Leonard Lachance, from ACTC's board of directors effective September 9, 2019.

[13] The issues arising from BRFN's application are:

- (i) Did BRFN resign its membership in ACTC?
- (ii) Did ACTC engage in oppressive conduct when it removed BRFN's representatives from its board of directors?
- (iii) Is BRFN entitled to relief pursuant to the *NPCA*'s oppression remedy?

[14] For the reasons that follow, I find that BRFN did not resign its membership in ACTC. ACTC engaged in oppressive conduct when it treated BRFN's notice that it would resign its membership in the future as an immediate resignation. It also engaged in oppressive conduct when it unilaterally removed BRFN's directors from its board. Among other things, ACTC shall amend its corporate records to restore BRFN's membership in the corporation and shall replace two of its current directors with named BRFN directors. This will put BRFN in a fair position to negotiate the consequences of its future resignation from ACTC.

II. ANALYSIS

1. BRFN Did Not Resign its Membership in ACTC

[15] I find that BRFN did not resign its membership in ACTC when it issued the First Resignation BCR or the Second Resignation BCR. BRFN's

resignation from ACTC is properly subject to conditions and, thus, its resignation is not effective until those conditions are met.

[16] ACTC argues, and I agree, that the *Convention Act* must inform any interpretation of the effectiveness of BRFN’s resignation. It argues that the Cree custom or law upon which the *Convention Act* is derived must inform my interpretation of the *NPCA*, as well as the parties’ reasonable expectations, relevant to this application.

[17] Courts have recognized the existence of a rule of Indigenous law when it is shown that it reflects the broad consensus of the membership of a First Nation: *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 at para 32, [2019] 4 FCR 217 [*Whalen*].

[18] There are two ways to identify whether “broad consensus” exists. The first is through a majority vote of the membership of a First Nation: *Whalen* at paras 33-35. The second is through a course of conduct: *Whalen* at paras 36-38.

[19] It is uncontroverted that the *Convention Act* is based in traditional Cree custom and that members of the Member Nations collectively developed and drafted the document. The evidence overwhelmingly demonstrates that the Member Nations, including BRFN, originally agreed that their dealings would be informed by organizing principles grounded in, and permeated with, Cree custom and tradition and that the *Convention Act* was a written expression of some of this.

[20] Harry Bill, a former Councillor of Pelican Lake First Nation and a former board member of ACTC, swears in his August 12, 2020 affidavit that he

was one of the individuals who drafted the *Convention Act* and was a signatory to the *Convention Act* (at para. 2). He deposes:

10. To draft the *Convention Act*, each member First Nation nominated one individual from their respective Band Councils. These individuals also became a director of ACTC Inc. This is how I came to be a drafter of the *Convention Act* and an original Director of ACTC Inc. ...

11. We drafted the *Convention Act* as a collective. We would also have open discussions which each member First Nation's Chief and Council, incorporating parts of what we heard during those discussions.

12. There are lot of unwritten rules in the *Convention Act*. Everything was based on the traditional values of respect and nothing was done for personal gain – everything was done for the members of the member First Nations.

[21] In his affidavit sworn August 12, 2020, Chief Peter Bill, of Pelican Lake First Nation, swears that the *Convention Act* came into force when each of the Member Nations “ratified it by formal resolution and signed the *Convention Act* by each Chief and a Councillor” (at para. 3). In contrast, Mr. Klein, CEO of BRFN, deposes that the *Convention Act* was never ratified.

[22] While there is conflicting evidence respecting whether the *Convention Act* was ever ratified, I need not make a finding of fact on that issue to determine this application. Regardless of whether the *Convention Act* was ratified, it is clear to me on the bulk of the evidence that founding Member Nations of the Tribal Council intended that the business of their organization and affiliate corporations would be informed by Cree custom and tradition. Whether ratified or not, the *Convention Act* is a written expression of the intentions of the founding Member Nations. I am satisfied that the *Convention Act* should be given deference when interpreting the *NPCA*.

[23] Section 5 of the *Convention Act* provides that before a Member Nations can withdraw from the Tribal Council, the Member Nations must hold a referendum on withdrawal and receive approval from the membership of the Member Nations, after which the Member Nations may pass a band council resolution. The withdrawal of membership from the Tribal Council is therefore conditional upon the majority support of the Member Nations' community.

[24] However, while the *Convention Act* speaks to how Member Nations may withdraw from the Tribal Council, it does not speak to how a Member Nations may withdraw from ACTC. I note that the Member Nations chose to register ACTC as a Saskatchewan non-profit membership corporation pursuant to the *NPCA*, which suggests that the parties expected to adhere to the *NPCA*, within the framework of Cree custom and tradition.

[25] In my view, there is no direct conflict between the *Convention Act*, the *NPCA*, nor the common law, with respect to how a member may withdraw its membership in ACTC. An enactment is only rendered void by a paramount piece of legislation if it deals with the same subject matter as that legislation and is in direct conflict with it: *Baker v Sherwood No. 159 (Rural Municipality)*, 2015 SKQB 301 at para 48, 483 Sask R 48. Here, no direct conflict exists so as to require a finding that one source of law is paramount.

[26] ACTC is incorporated in Saskatchewan under the *NPCA*. Section 116 of the *NPCA* deals with the termination of membership in a non-profit corporation where, as here, the articles or bylaws of the corporation are silent respecting how membership may be terminated:

116 Unless the articles or bylaws of a corporation provide otherwise, a membership interest of a member in the corporation is not transferable and is terminated when:

- (a) the member dies or resigns;
- (b) the member is expelled or his or her membership is otherwise terminated in accordance with the articles or bylaws of the corporation;
- (c) the member's term of membership expires; or
- (d) the corporation is liquidated and dissolved pursuant to Division XVI.

[27] Section 116, and the *NPCA* as a whole, is silent regarding how a member's resignation must be tendered, accepted and made effective. This is not the case for all resignations addressed by the *NPCA*, such as the resignation of auditors (s. 152) or directors (s. 95). The *NPCA* requires that a resignation of an auditor or director is effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

[28] Because the *NPCA* addresses the method of resignation and effective date of resignations for some individuals, but not for members, it follows that the legislature must have intended that the issue of a member's resignation should be governed by the articles and/or bylaws of the corporation. Where no articles or bylaws exist, then resignation of a member must be governed by the common law: *Goodyear Tire & Rubber Co. of Canada Ltd. v T. Eaton Co. Ltd.*, [1956] SCR 610 at 614. In this case, Cree custom and tradition – or Cree law – must also be considered.

[29] ACTC's articles and/or bylaws do not provide any direction on the process for resignation of its members. ACTC has no bylaws. Its articles are silent on everything but the most basic matters, including ACTC's address,

basic structure and the number of directors. With respect to the rules imposed on ACTC members, the articles state that membership interests may not be transferred, that members are entitled to hold office, and that members are entitled to vote at all meetings. These rules do not touch on resignation of membership. While the *Convention Act* and the corporation's customs must also be considered to provide interpretive guidance on this matter, the *Convention Act* is silent respecting the withdrawal of membership from an affiliate corporation. The *Convention Act* does provide a process for withdrawal of membership from the Tribal Council as a whole, requiring referendum by the membership of the Member Nations. However, in my view, a withdrawal from membership in the Tribal Council is not sufficiently akin to a withdrawal from membership in an affiliate non-profit corporation to be helpful from an interpretive perspective. The consequences of these two withdrawals are potentially quite disparate. Thus, I do not take the process proscribed under the *Convention Act* for withdrawing membership as prescriptive of the issue of how BRFN may resign its membership in ACTC, and whether it actually did.

[30] The clear principle that emerges from the common law concerning member resignation in a non-profit corporation is that resignation becomes effective when it is received, or when the resignation specifies that it is to be effective. This means that a party can give notice that it is resigning, without that notice being immediately effective. In *Morin v Saskatchewan (Métis Nation Legislative Assembly)*, 2020 SKQB 63 at paras 52-53 [*Morin*], this Court set out the fundamental common law principles relating to resignation:

[52] With respect to the law relating to resignations, the parties have referred me to a number of cases. They include *Adams v Assn. of Professional Engineers of Ontario*, 2012 ONSC 3850, 111 OR (3d) 334 [*Adams*], *Walker*

v Toronto (City) (1993), 14 OR (3d) 91 (Ont Ct) [*Walker*], *Kasumu v Musah*, 2018 ABQB 242 [*Kasumu*] and *R v Chriss*, 2016 FCA 236, 403 DLR (4th) 569 [*Chriss*].

[53] The principles that emerge from those cases are clear. They are that unless there is some legislative provision or article in the governing constitution providing otherwise:

1. A resignation is effective at the later time that it is received or when it is specified to be effective;
2. Once a resignation is submitted it cannot be withdrawn except with the agreement of the entity receiving it;
3. A resignation need not be accepted by the entity receiving it to be effective.

[31] ACTC contends that BRFN’s First Resignation BCR is a formal, and immediately effective, resignation of its membership in ACTC. In a letter dated February 20, 2020, legal counsel for ACTC wrote:

It is our Client’s position that BCR 2019/20-15 represents notification by Big River First Nation that they have terminated their membership in ACTC Inc. Thus, Big River First Nation ceased to be a member of ACTC Inc. on September 9, 2019.

(Affidavit of Chief Jack Rayne, sworn July 14, 2020, Exhibit “G”.)

[32] BRFN says it did not resign its membership in ACTC. It says that the First Resignation BCR was an internal document to BRFN and does not constitute notice to ACTC of its resignation. BRFN further says that it did not provide a resignation of its membership to ACTC and that, in any event, its ultimate resignation is subject to conditions, which have not been satisfied.

[33] I agree with BRFN. It has not resigned its membership in ACTC.

[34] While Mr. Klein did provide a copy of the First Resignation BCR to Mr. Thomas by way of a September 10, 2019 email, this email and attachment merely signalled the intention of BRFN to resign from ACTC in the future. Communicating an intention to resign is insufficient to give legal effect to a resignation: *Canada v Chriss*, 2016 FCA 236 at para 15, 403 DLR (4th) 569.

[35] Though there is no statutory requirement that a member's resignation be received by a non-profit corporation, this is a principle of law that applies generally to resignations: *Morin* at para 53. A resignation must be received by a corporation before it can take effect. I agree that BRFN did not submit a formal notice of resignation to ACTC, because the mere intention to resign evidenced in the September 10, 2019 email attaching the First Resignation BCR does not stand in place of an actual resignation. As a result, I do not accept that BRFN has ever submitted its resignation to ACTC.

[36] Finally, I agree with BRFN that it is entitled to make its resignation from ACTC conditional and effective when conditions are met. This is clear because, as noted in *Morin*, a resignation can be effective at a date in the future specified by the party tendering the resignation. In addition, a resignation can be effective even if it is not accepted by the entity receiving it. In this case, BRFN has specified that its resignation is effective at the date the two conditions it has stipulated are met. In essence, it has stipulated that its resignation is effective at a specified future date. As these conditions have not yet been realized, BRFN has not resigned its membership in ACTC.

2. ACTC's Conduct in Response to BRFN's Notice of Resignation is Oppressive

[37] BRFN has not resigned its membership in ACTC. As a result, ACTC was not entitled to remove BRFN's directors from ACTC's board of directors.

[38] Section 95 of the *NPCA* addresses the circumstances under which directors of a non-profit corporation cease to hold office:

95(1) A director of a corporation ceases to hold office when he or she:

- (a) dies or resigns;
- (b) is removed in accordance with section 96; or
- (c) becomes disqualified pursuant to subsection 92(1).

(2) A resignation of a director becomes effective at the time a written resignation is sent to the corporation, or at the time specified in the resignation, whichever is later.

[39] I find that neither Chief Morin nor Mr. Lachance resigned their offices as directors of ACTC. No part of s. 95(1) of the *NPCA* operates to disqualify either of them from holding office. Further, because ACTC's articles of incorporation do not provide for cumulative voting, s. 96(1) of the *NPCA* applies in order for ACTC to remove directors in the absence of their resignation. This requires that a special meeting be held and that notice of that special meeting be given to directors, as well as an opportunity for directors to make submissions opposing their removal: *NPCA*, ss. 97(1) and (2). The evidence is uncontroverted that neither Chief Morin nor Mr. Lachance were given notice of the special meeting to remove them as directors, nor were they

given an opportunity to make submissions on the matter. As these requirements were not met, the resolutions removing these two directors are invalid.

[40] Unilaterally expelling BRFN from ACTC and improperly removing BRFN's two directors from ACTC's board of directors is oppressive conduct pursuant to s. 225 of the *NPCA*. The oppression remedy pursuant to the *NPCA* is available when the powers of the directors of a corporation have been exercised in a manner that is oppressive or unfairly prejudicial to a member or director, among others, or unfairly disregards a member's or director's interests.

[41] The leading case on the oppression remedy is *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at paras 67-68, [2008] 3 SCR 560, where the Supreme Court set out a two-step analysis for considering the oppression remedy contained under the *Canada Business Corporations Act*, RSC 1985, c C-44. The first step is to consider whether the evidence supports the reasonable expectation asserted by the applicant. The second step is to consider whether the evidence establishes that the reasonable expectation was violated by conduct falling within oppression, unfair prejudice, or unfair disregard.

[42] In this case, the evidence supports BRFN's reasonable expectation that it would not be unilaterally expelled from membership in ACTC, and that its directors would not be unilaterally removed from ACTC's board of directors, without due process. The evidence also supports that it was BRFN's reasonable expectation that it would continue to exert some authority in ACTC while it orchestrated the resignation of its membership in ACTC. BRFN's affiants clearly set out that by signalling BRFN's intention to eventually withdraw from ACTC, BRFN was attempting to set out a controlled process of resignation. BRFN had not intended to give up its portion of control of ACTC until it had

appropriate measures in place to protect funding for its members, businesses and community services. I am also mindful that BRFN’s reasonable expectations must be informed, at least in part, by Cree custom and tradition, given its membership in the Tribal Council. The evidence is uncontroverted that the Tribal Council’s founding intention was that its business affairs would be governed by the principles of respect, cooperation, consensus and equal representation. These principles also support BRFN’s reasonable expectation that it would not be unilaterally expelled from membership in ACTC, nor would its director be removed from ACTC’s board of directors, without due process.

[43] The question of whether ACTC’s conduct was oppressive turns on whether the evidence establishes that BRFN’s reasonable expectation was violated by conduct that is unfairly prejudicial or unfairly disregards the interests of members or others.

[44] In *Regina Soccer Association Inc. v Saskatchewan Soccer Association Inc.*, 2016 SKCA 4, 472 Sask R 230, the Saskatchewan Court of Appeal held that in the context of the oppression remedy under the *NPCA*, the use of the term “oppression” in describing sanctionable behaviour connotes “burdensome, harsh and wrongful” conduct, “a visible departure from standards of fair dealing”, an “abuse of power” going to the probability of how the corporation’s affairs are being conducted and more generally a “wrong of the most serious sort” (at para. 19).

[45] I find that by removing BRFN’s directors from ACTC’s board of directors and by treating BRFN as having unconditionally resigned its membership in ACTC, ACTC has effectively and unilaterally terminated BRFN’s portion of control in the corporation. Its actions have deprived BRFN

of its rights as a member, including its rights to participate in decision making, and the opportunity to negotiate, with equal authority, its planned withdrawal from ACTC. This conduct severely upsets the balance of power that previously existed between the Member Nations in their governance of ACTC. It is therefore burdensome, harsh and is a marked departure from fair standards of dealing. In short, the conduct is oppressive.

3. BRFN is Entitled to Relief

[46] ACTC argues that BRFN’s directors have breached their fiduciary obligations owed to the corporation. It alleges that BRFN has taken a larger share of funding flowing through ACTC than it was entitled to do. It also contends that BRFN is seeking agreements that are detrimental to similar agreements of ACTC. ACTC says that because the oppression remedy is an equitable remedy, it would be unfair in these circumstances for the court to provide BRFN with relief.

[47] I do not agree that the evidence supports that BRFN’s directors have breached, or will breach, the fiduciary duties owed by them to ACTC. The evidence on this point is highly controverted. It is speculative to say what BRFN will do in the future if its membership within ACTC is restored. Should BRFN act oppressively in the future, it is open to ACTC to bring an application to this Court for relief, based on that evidence. However, I am not persuaded that BRFN has acted unfairly up to now.

[48] BRFN is entitled to relief under the *NPCA*’s oppression remedy. This Court has the authority to grant a broad range of remedies in response to oppressive conduct, which are set out under s. 225(2) of the *NPCA*.

[49] Among other things, BRFN asks that I order that ACTC’s articles be amended to require all resolutions of the corporation be passed by unanimous consent of all directors. In my view, this goes too far to swing the balance of power, which was tilted by ACTC’s oppressive conduct, to weigh in favour of BRFN. It would effectively give BRFN veto power over the business of the corporation, which is not appropriate.

[50] It is appropriate to restore the balance of power that previously existed between the parties. Once BRFN’s membership and representation in ACTC is restored, it will be put back in its original position to negotiate the consequences of its resignation of membership in ACTC. If ACTC’s board of directors pass future resolutions which BRFN considers oppressive, it is open to BRFN to make another application to the court for relief. However, I am not satisfied that it is necessary to upset the *status quo* in order to achieve a fair resolution of the parties’ issues.

III. RELIEF

[51] I therefore make the following order:

- (a) Big River First Nation shall be added to the register and other records of Agency Chiefs Tribal Council Inc. as a member of the corporation;
- (b) Two current directors of Agency Chiefs Tribal Council Inc., to be chosen by Agency Chiefs Tribal Council Inc., shall be replaced as directors by two representatives from Big River First Nation, namely Chief Jack Rayne and Council Member Robert Rabbitskin;

- (c) Agency Chiefs Tribal Council Inc. shall not change its articles until such time as Big River First Nation’s resignation from Agency Chiefs Tribal Council Inc. is effective; and,
 - (d) Agency Chiefs Tribal Council Inc. shall not change its directors until such time as Big River First Nation’s resignation from Agency Chiefs Tribal Council Inc. is effective.
- [52] As Big River First Nation is largely successful in its application, it shall have the costs of this application, on Column II of the Tariff.

J.
M.R. McCREARY