

Federal Court decision of Justice Favel, April 11, 2023

OCN Election Code and Board

Presented by Markus Buchart of Jerch Law

At Opaskwayak Cree Nation

May 3, 2023

Jerch Law retained on OCN Election Code issue

- OCN Chief and Council retained law firm Jerch Law in December 2021 to represent the public interest of OCN community members
- Jerch Law's retainer was to seek clarification and interpretation of the OCN Election Code from the Federal Court
- OCN instructed the firm **not** to simply justify Chief and Council's actions

Outline of the Presentation

1. Application and Judgment dismissing OCN's application
2. *Obiter dicta* comments of the Court
3. Conclusions

1. Application and Judgment dismissing OCN's application

- The following section sets out:
 - the nature of the issues
 - the application brought to Court by OCN
 - the judgment of the Court dismissing the application

What is the case about?

- The Election Code requires that, every 2 years before the next general election, a new election board be appointed by Chief and Council before the next election [Code s. 82(1), decision paras. 11 and 68]
- The Election Code says that the outgoing election board's term ends 6 months before the next Council election [Code s. 85(1) and 85(2), decision para. 68]

Was a new Election Board appointed in 2021?

- In March 2019 an election board was appointed. Its term expired after 2 years in March 2021
- Between March and November 2021, Chief and Council sought applicants in 4 postings to appoint the next election board (Decision paras. 13-19)

What happened in November 2021 causing an issue?

- There appeared to be two election boards, and legal uncertainty about which one was actually in office (Decision paras. 23-26)

How did this happen?

- In November 2021 the Chief and Council appointed the 2021 Board after receiving the applications from the 4th call for resumes (Decision paras. 19-20, 23)
- The Election Code says that when its term has expired, the election board stays on in the “interim” until a new board is appointed [Code s. 82(1) and 82(8), Decision para. 34]

Section 82 of the Election Code

- **82. Appointment of the OCN Election Board**

- (1) The Chief and Council **shall** appoint the Board six (6) months prior to Election Day in a year in which a General Election is required.
- (2) At least twenty-eight (28) Days prior to end of the term office of the Election Board, the Chief and Council **shall** post a call for resumes of OCN members who wish to sit as members of the OCN Election Board.
- (3) The call for resumes **shall** be for a period of not less twenty-eight (28) Days.

Section 82 of the Election Code

- (8) In the event all appointed positions are not filled on the Election Board, **the required number of current members will stay on until positions can be filled.**

Section 85

- **85. Term of Office**

- (1) The term of office for the Election Board will begin six (6) months prior to the next Chief and Council General Election.
- (2) Notwithstanding subsection 85(1), the term of office for the Election Board appointed pursuant to section 82 **shall** terminate six (6) months prior to the next General Election.
- (3) A minimum of one (1) or more Election Board member(s) may be re-appointed by Chief and Council for another term. The Election Board will determine which board members are eligible to be reappointed for another term. This will provide continuity for the incoming board.

Why did OCN Chief and Council take this to the Federal Court?

- Cannot have two election boards at the same time
- The Election Code does not have a procedure to resolve this situation (Decision para. 33)
- The Election Code does not have a body to appeal election board membership (Decision para. 33)

What was Chief and Council seeking in the Court application?

- Clarification and interpretation of the OCN Election Code (Decision para. 33)
- To resolve deadlock about the existence of two election boards
- OCN had no choice other than going to Court (Decision para. 33)

Decision paragraph 33

[33] I agree with the Applicant. There exists no independent decision-maker established by OCN to which the Court should defer to settle this dispute, which pertains to a course of conduct that cannot be narrowed down to a discrete decision (*Saugeen* at para 28). Accordingly, similarly to *Saugeen*, this Court must clarify the legal framework concerning the appointment of Election Board members as set out in the Election Code, Ethics Code, and Procedures Policy and apply them to the present circumstances (*Saugeen* at para 29).

Did Chief and Council “sue” the 2019 Board?

- No
- A decision was needed for healing and to bring the community together for the best interests of OCN
- Normally Court costs are awarded for successful applications
- Chief and Council made the decision *not* to ask for Court costs from the 2019 Board (Decision para. 71)

What did OCN ask the Court to do?

A) Issue an Order confirming the 2021 Board

B) Issue an Order confirming the end of the 2019 Board

What did the 2019 Board ask the Court to do?

- The 2019 Board could have filed their own application to ask for an Order to confirm themselves as the legal Election Board
- They did not

So, what did the Court do?

On April 11 2023 Justice Favel of the Federal Court ordered:

1. OCN's application is dismissed.
2. Court requests submissions on who pays costs.

(Favel JUDGMENT page 25)

So, did the Court issue an Order confirming the 2021 Board?

- No
- The application was dismissed (Favel JUDGMENT page 25)

Did OCN violate the Election Code?

- Technically, yes (Decision paras. 63-65, paras. 56-58)
- The Election Code requires a call for resumes **28 days** before appointing Election Board members (Decision para. 62)
- OCN made 4 calls for resumes in 2021, only needed to make 1 call (Decision para. 62)
- The total time from the first call to the appointment was **254 days** (8 months 9 days)
- The judge interpreted the Election Code to require 28 days from the 4th call (Decision para. 63)

2. *Obiter Dicta* of the Court

- This section sets out all the comments made by Justice Favel
- They are *obiter dicta*, meaning not binding on the parties but within the discretion of the Court to express its opinion

Court Opinions

- Strictly speaking the only thing the Court decided was to dismiss the application (Favel JUDGMENT page 25)
- The Court expressed its opinion on other matters
- Opinions are *Obiter Dicta* and not binding Court orders

What is Obiter Dicta?

<https://legal-dictionary.thefreedictionary.com/Obiter>

- [Latin, By the way.] *Words of an opinion entirely unnecessary for the decision of the case. A remark made or opinion expressed by a judge in a decision upon a cause, "by the way", that is, incidentally or collaterally, and not directly upon the question before the court or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.*

Are *Obiter Dicta* opinions of the Court legally binding?

- No
- They are notes from the Court on its reasoning, in legal terms it is “obiter” or not part of the Judgment
- They are guidance to the parties

Obiter 1: Did OCN have legal authority to appoint the Election Board in 2019, in 2021, and in 2023?

- Yes, it did have authority. (Decision para. 68)
- Not only do they have the authority but it is a legal duty – the Election Code says they “shall” appoint the Election Board [Code s. 82(1)]
- The Court didn’t question the authority or duty to appoint, it questioned if the procedure was followed (Decision para. 68)

Election Code - Sections 82(1) and 82(5)

- **82. Appointment of the OCN Election Board**
- (1) The Chief and Council **shall** appoint the Board six (6) months prior to Election Day in a year in which a General Election is required.
- (5) At the conclusion of the posting period, the Chief and Council **shall** review all applications and appoint the members of the Election Board.

Decision paragraph 68

- [68] I do not read this to mean that the Election Board members are re-appointed for another full two-year term as the Respondents suggest. Rather, **the Election Board members continue until such time that they are replaced** by Chief and Council through the normal application.... Rather, it suggests that, in the event of a vacancy, **the Election Board members continue on an interim basis.**

Board continuity – how many constitute the Board?

- **86. Quorum**

- (1) The quorum of the Election Board shall be three (3).
- (2) In the event of unforeseen circumstances, there are vacancies resulting in too few Election Board members for quorum, **those members remaining will act as an interim quorum until the vacancies are filled** and a quorum is restored.

Obiter 2: Did the Court say the 2019 Board is still the Election Board today?

- No (Decision para. 68)
- All the Court said was that the 2019 Board was the Election Board **until** November 17 2021 (Decision para. 68)
- In fact, the Court didn't say anything about the legal status of the 2019 Board **after** November 17 2021

Decision para. 68

...Applying these provisions to the present matter, the **Respondents continued in their position on an interim basis**, despite being past their term in office, **until Chief and Council purported to fill their positions on November 17, 2021.**

Did the Court find the Chief and Council violated Conflict provisions of the Code of Conduct?

- Technically, the Councillors did not comply with a provision of the Code
- The OCN Code of Ethics and Conduct required the Chief to disclose the complaints against him before the Election Board — he **complied** [Code of Ethics and Conduct s. 11(1) and 11(2), Decision paras. 58-59, 61]
- The OCN Code of Ethics and Conduct required the Councillors to vote on whether the Chief was in a conflict and whether he could vote to break the tie (Council vote was 4-4) — they did **not comply** [Code of Ethics and Conduct s. 13(1), Decision paras. 58-59, 61]
- Apparently, OCN practice was never to conduct such votes.

Code of Ethics and Conduct, Section 11

11. Disclosure of Conflict of Interest

(1) **A person shall disclose to the Chief and Council, Board or Committee of which they are a member, any Conflict of Interest that they have in any matter before the Chief and Council, Board or Committee** and that person shall not take part in any discussion or vote on that matter.

(2) **A person shall disclose a Conflict of Interest:**

(a) at the meeting at which the matter involving the conflict is first considered;

(b) if a person is not in a Conflict of Interest situation at the time the matter is first considered then at the first meeting which is held after he or she becomes aware of the conflict;

(c) where a Conflict of Interest arises with respect to a contract or transaction after it is made, at the first meeting held after the situation arises;

(d) if an individual who is not a Council member, Appointee or Employee, but who would have a Conflict of Interest if he or she were a Council member, Appointee or Employee later becomes a Council member, Appointee or Employee, at the first meeting he or she becomes a Council member, Appointee or Employee

Code of Ethics and Conduct, Section 13

- **13. Determining a Conflict of Interest**

(1) The Chief and Council, Committee or Board shall determine by vote if a Conflict of Interest exists and the person in question may not take part in that vote.

(2) Where the Chief and Council, Board or Committee decides that a member has an interest in a matter, the member in question shall not take part in discussion or vote on that matter and they shall leave the meeting for the duration of deliberation and voting.

(3) The Chief and Council, Board or Committee may allow a member to remain in the meeting if the member has information that the Chief and Council, Board or Committee may require in considering the matter in question.

(4) Where a member is required to leave a meeting and new information is presented during discussion concerning that member or their interest in the matter, they shall be immediately informed of the nature of the information.

Decision Paragraph 58

[58] ... Drawing from the Chief and Council meeting held on November 9, 2021, **Chief Ballantyne acknowledged, prior to the passing of the Band Council Resolution** dismissing the Respondents, that the Election Board was currently investigating two complaints and in the process of ruling on an appeal, all of which were against him.

[59] **While I accept that the Applicant complied with section 11 of the Ethics Code, Chief and Council subsequently violated subsection 13(1) of the Ethics Code. Specifically, Council members did not determine by vote whether the matters before the Election Board gave rise to an actual conflict of interest.** Had the Council determined that a conflict did not exist, Chief Ballantyne would have been permitted to cast the tie-breaking vote in dismissing the Election Board members and subsequently appoint new Election Board members. ...

Decision Paragraph 61

[61] ... Rather, **had the Councillors voted on the existence of Chief Ballantyne's conflict** in accordance with the Ethics Code, regardless of the outcome of the vote, the November 9, 2021 Band Council Resolution would have been valid. ...

What did the 2019 Board argue in OCN's application?

- It wanted the Court to find the Chief was in a conflict of interest arising from a complaint filed by an OCN community member
- The 2019 Board argued the Chief should not have voted (the Chief broke a 4-4 tie on Chief and Council resulting in a 5-4 vote)
- The 2019 Board suggested that the 2021 Election Board members chosen would deal with the complaint in a favourable way to Chief Ballantyne

What was the effect of Councillors' failure to vote?

[61] In light of this conclusion, I disagree with the Applicant's argument that the Respondents assert that every appointment to office of the Election Board would give rise to a conflict of interest because the Election Board has jurisdiction over Chief and Council. Rather, **had the Councillors voted on the existence of Chief Ballantyne's conflict in accordance with the Ethics Code, regardless of the outcome of the vote, the November 9, 2021 Band Council Resolution would have been valid. In deviating from the required procedure, Chief and Council failed to act in OCN members' best interests and in a manner inconsistent with their Oath to Office ...**

(Decision para. 61 – must be read together with paras. 58 & 59 at Slide 34)

3. Conclusions

- This section reviews the appointment of the 2023 Election Board on April 12 2023, 6 months before the scheduled election in September 2023

What did OCN Chief and Council do after receiving the Court decision?

- After receiving the Court decision of Justice Favel, on April 12 2023 Chief and Council appointed a 2023 Board for the term 2023–2025 as they were required to do

Why did Chief and Council appoint a 2023 Board on April 12 2023?

- The Election Code requires this to be done every 2 years

Did the April 12 2023 appointment follow the Election Code?

- Yes
- A posting for a 2023 Board was posted February 2, 2023 as required every 2 years by the Election Code
- This was more than the minimum 28 days notice – it was 69 days later
- No conflicts of interest declared – vote was 6 in favour, 1 against, 1 abstention – no tie, no Chief vote

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