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# Fairness and First Nation Governments

By Sacha R Paul



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In the case of *Bighetty v Barren Lands First Nation*, 2014 FC 171 ("Bighetty"), a Chief was removed from her position after the receipt of a community petition. The Federal Court of Canada upheld the removal of the Chief. It is a case that serves to illustrate the benefits of involving legal counsel in (a) drafting custom election codes so as to reduce the chances of litigation and (b) the process leading to the removal of a Chief or Councillor from office so that the process proceeds fairly.

Barren Lands First Nation is a remote Dene community located in Northern Manitoba. Like many other First Nations across Canada, it is a "custom" government. This means that the community prepared a custom election code, which was ultimately approved by Canada, allowing it to opt out of the provisions of the *Indian Act* dealing with election/governance.

In this case, the Federal Court was relatively critical about how the custom code was drafted. The judge wrote that the custom code "leaves a lot to be desired." In my experience, custom codes are drafted to reflect community needs. The side effect is that the code may not be as clear as it could be.

The lack of clarity in custom codes can create legal problems. In the event that a dispute in a First Nation over governance cannot be resolved at the community level then either party may take it to the Federal Court for determination. In this way, the final decision over the governance of a First Nation is in the hands of the Federal Court. The Federal Court then is called upon to interpret custom codes which can be vague on material terms, such as the process to remove an elected official.

In this particular case, the custom code was not abundantly clear as to whether or not the community petition *automatically* lead to the removal of the Chief if there were enough signatures to the petition or if the petition only triggered the convening of a tribunal which would then hold a hearing to determine whether or not the Chief would be removed. Ultimately, the Federal Court determined that the custom code called for a simple "recall" petition and, with enough signatures, the Chief could be removed without any further hearing.

What this case illustrates is the need to have custom codes reviewed to make sure that they are as clear as possible. Ultimately, a lack of clarity in a custom code can lead to disputes down the road. These disputes are costly. Inevitably, disputes over who should be Chief or on Council will normally lead to an injunction hearing whereby one party seeks to remove someone from office or remain in office. This is then followed by a hearing on the merits. These two steps come at costs to those involved, including the community. To the extent that a process for removal can be clear, it can eliminate the need for Federal Court applications and hopefully contain disputes at the community level where they are best addressed.

The applicant, Ms Bighetty, also alleged that she was treated unfairly by the First Nation in her removal and wanted the opportunity to respond to the allegations which prompted the petition. The law demands that any tribunal act fairly. Yet, the Federal Court examined the issue of fairness in an interesting way. As opposed to considering whether the removal process was fair, the Federal Court considered the actions of the applicant in the removal process. The court indicated that the applicant never asked for the opportunity to be heard by the tribunal that considered the petition. Instead her reaction was to set up a parallel structure to address her status as the Chief and not to accept service of the petition calling for her removal. The court wrote at paragraph 52, “The Applicant had her opportunity and she chose a course of conduct which deprived herself of such an opportunity to be heard.”

This case illustrates that it is important for those in the midst of a governance dispute at a First Nation to get advice as quickly as possible as to the steps to be taken. As seen in this case, if the court perceives that a party is not acting appropriately then the court will be less willing to side in that person’s favour. It means that whether or not you are a Chief or Councillor being removed or a tribunal considering the removal of a Chief and Councillor, you should be getting legal advice as quickly as possible as to the appropriate steps. It is entirely appropriate for tribunals to get advice from legal counsel about the appropriate process so that they can make sure that the process followed is fair. Of course, the tribunal itself will make the decision on removal but legal counsel can assist in making sure that all the i’s are dotted and the t’s are crossed.

The *Bighetty* case then serves as a reminder that the involvement of legal counsel in drafting custom codes and also in navigating the removal process is a prudent course of action and a way to hopefully minimize the need to bring community disputes to the Federal Court.

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Sacha's practice is focused primarily on Aboriginal law, with an emphasis on business development on Aboriginal territory. His practice also includes civil litigation, insurance, and administrative law.

Sacha articulated at the firm in 2002. In 2003, Sacha left the firm for one year to clerk to the Honourable Justice Ian Binnie of the Supreme Court of Canada.