

**IN THE MATTER OF A PETITION
OF EDITH DEBRA WOLFE
PURSUANT TO THE
ELECTION CODE OF THE WEI WAI KUM FIRST NATION
TO REMOVE CHRIS DRAKE AS A WEI WAI KUM FIRST NATION COUNCILLOR**

ARBITRATOR: PAUL LOVE

DECISION PURSUANT TO SECTION 56

June 3, 2018

I. Background:

I am the arbitrator appointed to hear and decide the petition of Ms. Edith Debra Wolfe (the “petitioner”) to remove Mr. Christopher Drake (the “respondent”) from his elected office as a councillor for the Wei Wai Kum First Nation (the “First Nation”). Ms. Wolfe submitted her documents to me on Monday May 28, 2018, at 4:20 p.m.

Under the *Election Code of the Wei Wai Kum Election Code* (the “*Election Code*”), I am required to examine the petition and supporting documents to determine whether these meet the requirements of the *Election Code*. If the requirements are met, and the grounds in the petition are not frivolous or unsubstantiated, I am required to schedule a review hearing.

If this matter had proceeded to a hearing, it would have proceeded on June 11 and 12, 2018.

II. Summary of Findings:

After examining Ms. Wolfe’s documents I find that her petition does not meet the requirements of s. 55 of the *Election Code*. I have no power to relax these requirements. As a result, there will be no hearing of this petition.

III. The *Election Code*:

Section 55 of the *Election Code* has a process for any elector to initiate proceedings for the removal from office of the Chief or a Councillor. The requirements in section 55, 56 and 57 are mandatory and cannot be waived by an arbitrator. I have no discretion to permit the hearing of a petition where the petitioner fails to establish the required elements of section 55.

Section 55 has the following requirements:

55. Proceedings for removal from office of the Chief or a Councillor may be initiated by:

(a) any elector submitting to the Arbitrator a petition on which shall appear:

i) the ground pursuant to section 54 on which removal of a Chief or Councillor is sought;

ii) the evidence in support of the petition;

iii) the signature of the petitioner;

iv) the signatures of at least 25 % of all eligible electors of the Band in support of the petition; and

v) a non-refundable fee of \$100; or

Section 56 to 58 set out my tasks after receiving a petition:

56. On receipt of a petition, the Arbitrator shall verify that the petition complies with section 55. If the petition does not comply, the Arbitrator shall so notify the petitioner(s) within 10 business days.

57. Where the petition complies with section 55 the Arbitrator shall:

(a) determine that the grounds put forth in the petition are either frivolous in nature or unsubstantiated, and dismiss the petition; or

(b) schedule a review hearing, which shall take place within 20 days from the date on which the petition was submitted to him.

58. Where the petition has been dismissed under subsection 57(a). the Arbitrator shall so inform the petitioner(s) in writing and provide a rationale.

IV. The Process:

After Chief Chris Roberts communicated to me that I was appointed as the arbitrator, I took steps to attempt to organize the process which includes a review of the petition and then a hearing if the requirements of the *Election Code* are met.

I had initial telephone contact with Ms. Wolfe, Mr. Drake and Mr. Kirchner, counsel for the First Nation. My initial thought was to have a conference call with all the parties to discuss the process. However, when I attempted to schedule the call I learned that Mr. Drake wished to explore obtaining legal counsel to assist him, before committing to attending a call. I asked Ms. Wolfe to hold off on serving her petition until this issue was explored, as once the petition was filed there were strict time limits. Mr. Drake is entitled to use a lawyer in this process if he chooses to do so.

Ms. Wolfe chose to deliver her petition to me on Monday May 28, 2018, in the late afternoon.

In the covering letter with the petition she stated:

. . . I have included copies of supporting statements from [names redacted Person 1 and Person 2]. I trust these documents and the petition signatures will remain confidential and not be released to other parties.

Other supporting documents such as emails and letters written to [names redacted] may be presented at the hearing.

[my emphasis]

This claim for confidentiality is unusual. The *Election Code* does not characterize the process for removal as a confidential process; it is an arbitration process. The petition is the first step in the arbitration process and the process should be a transparent process with respondents receiving copies of all documents. Further, Courts have stated that on serious issues such as removal from office, a person responding or impacted is entitled to a high degree of procedural fairness.

As a result I emailed Mr. Drake, Mr. Kirchner (counsel for the First Nation) and Chief Roberts advising that the petition was served and that a confidentiality issue was raised. I also provided them with a copy of the petition (without signatures or supporting information from Person 1 and Person 2) and a copy of the covering letter redacted.

I asked them for written submissions on the confidentiality issue by the end of the business day on May 30, 2018. After receiving the replies from Mr. Drake and Mr. Kirchner, I passed the information on to Ms. Wolfe. Some of Mr. Drake's information to Ms. Wolfe was passed on to her in a redacted format. I also asked for her further

submissions in writing by May 31, 2018. She provided those further submissions on May 31, 2018.

I had two short in-person meetings with Ms. Wolfe at my office – on May 28 to receive her petition and on May 31 to obtain copies of her photo identification to validate her identity prior to depositing her cheque for her non-refundable deposit in my trust account. I have not had any in-person meetings with Mr. Drake, Mr. Kirchner or Chief Roberts.

Mr. Kirchner advised that the First Nation likely is taking a neutral position in the arbitration of Ms. Wolfe's petition:

At this point in time the Wei Wai Kum First Nation Chief in Council has not seen the Petition. We have only received the redacted version that you provided and the Council has not met since receiving it. That said, and at this point, and subject to considering the Petition itself, Council do not intend to take a position in this matter and sees its role in the arbitration as assisting the arbitrator with procedural elements and upholding the Election Code.

V. Documents Received:

A. From Ms. Wolfe:

1. A non-refundable deposit of \$100;
2. A covering letter;
3. A petition – consisting of 1 page;
4. 155 signatures;
5. Evidence consisting of:

- a. Person 1's information, consisting of:

A statement dated April 3, 2018 for a Worksafe BC Claim (4 pages);

A letter dated January 30, 2018 (2 pages);

An email from Person 1 dated February 14, 2017 marked Confidential (2 pages);

A statement of February 28, 2018 (3 pages);

- b. Person 2's information, consisting of:

An email from Person 2 to a person at the First Nation dated November 8, 2017;

An email from Person 2 to Ms. Wolfe dated May 28, 2018.

6. An email from Ms. Wolfe, dated May 31, 2018 replying to submissions made by Mr. Drake.

B. From the First Nation or its Counsel

1. A request to appoint an arbitrator dated May 10, 2018;
2. A web link to the *Election Code*;
3. A Band Council Resolution Appointing me as arbitrator;
4. A list of electors without membership numbers;
5. A list of electors with membership numbers
6. Email submissions about the confidentiality of material supplied by Ms. Wolfe;
7. An email from Counsel inquiring whether I obtained the proper list of electors.

C. From Mr. Drake:

1. May 25, 2018 email with two attachments;
2. May 29, 2018 email with four attachments – submissions, Oath of Office, Code of Conduct Acknowledgement, Governance Manual Acknowledgement..

VI. Review of the Petition:

In reviewing whether the petition meets the requirements of section 55 of the *Election Code* I have considered the documents supplied by Ms. Wolfe, the First Nations Electors List, the *Election Code* and the parties' written submissions. I have noted deficiencies under each element of section 55 of the *Election Code*.

A. Lack of clear grounds – Section 55 (a) (i)

The petition reads:

Petition to remove a Councillor from office:

As per the Election Code of We Wai Kum First Nation we are presenting this petition to have Councillor Christopher Drake removed from office

Christopher Drake has repeatedly failed to abide by the OATH OF OFFICE

2) I will familiarize myself and abide by all WEI WAI KUM Policies and Procedures

7.1 Maintaining an atmosphere of mutual respect with each other and the Band Manager.

18.1 To ensure a clear separation between political issues and band administration Council delegates management of the day to day procedural operations to the Band Manager.

18.2 The Chief Councillor is the direct supervisor of the Band Manager to deal with staffing issues in accordance with the Wei Wai Kum First Nation Personnel Policy and/or other applicable policies

18.2 (7) Issuing directives to the Band Manager by a collective decision of Council and not by Individual Councillors

CHIEF AND COUNCIL OATH OF OFFICE

4) I will not publicly criticize the decisions, laws and policies of the Wei Wai Kum First Nation. If I feel that changes would be advisable, I will provide constructive criticism or suggestion through the proper channels and processes.

Councillor Christopher Drake has been repeatedly accused of bullying and harassing Band employees and a complaint of assault has been filed by the Band Manager against him with the RCMP. These actions are in direct contravention of the CODE OF CONDUCT ACKNOWLEDGEMENT.

“Setting an appropriate example as a role model for the Wei Wai Kum First Nation, both internally and externally.

Ms. Wolfe phrased her allegations in a simpler way in her covering letter of May 28, 2018:

Mr. Drake has repeatedly failed to abide by his Oath of Office.

The repeated complaints of harassment and bullying from various Band employees by Chris Drake are in violation of the Bands Policies and Procedures as well as the Code of Conduct.

His failure to follow Band Policy and Procedures when dealing with the Band Manager and failing to follow proper procedures and failing to follow proper procedures for dealing with Band employees has lead to multiple complaints to Council, WCB and RCMP.

What is clear about the petition is that a group of persons is seeking to remove Mr. Drake as a councillor. What is unclear are the grounds for doing so.

There is however a significant difference when one compares the petition provided to the members and Ms. Wolfe's covering letter, which in my view is also part of the petition. A significant difference is that that the petition alleges "a complaint of assault against the Band Manager" and the covering letter contains no such allegation. It appears that the petitioner sought membership support for a more serious allegation than she sets out in her covering letter to me. In my view this discrepancy alone is sufficient to support a finding that the petition fails to comply with section 55 (a) i) of the *Election Code*, as it creates an uncertainty about the grounds for removal of Mr. Drake.

The intent of section 54 is to provide for the remedy of removing a councillor from office if he has engaged in serious wrongdoing. A person alleging serious wrongdoing should clearly and succinctly state the allegations and relate the allegation(s) to a particular part(s) of section 54 of the *Election Code*.

I find that the petitioner has not been clear or specific enough about the grounds she is raising for me to find that the grounds fall under section 54 of the *Election Code*. Further the discrepancy between the covering letter and the information on the petition causes me significant concern.

For the grounds of failing to abide by an Oath of Office – a very general phrase – the petitioner should have set out when and in what way Mr. Drake failed to abide by the Oath of Office.

On the issue of harassment and bullying, the petition does not properly set out a ground in section 54, with sufficient clarity. The complainant has simply said that others have complained about Mr. Drake. A ground of complaint cannot be simply that others have complained about the councillor in the past. The petitioner has to allege a specific complaint of wrongdoing.

A councillor can be removed because he has breached a particular item in section 54. If the allegation is harassment the allegation must be particular – for example:

Mr. Drake harassed [the name], between [dates] by doing the following:

[set out the acts]

If the allegation is assault, the details should be set out, including who the person was that was assaulted, where the person was assaulted, when the person was assaulted and what injuries if any are sustained.

In reading the petition I have no clear understanding of the petitioner’s allegations. Based on this petition I could not prepare a notice of hearing which would identify “. . . *all related particulars* . . .”

Mr. Drake would have no clear understanding of what was alleged or how to defend against the allegation.

Electors may have access to information that I do not have in making their decision to support a petition. An elector would clearly understand that the petition was for the purpose of removing Mr. Drake from council. My task is to assess the words used in describing the grounds for Mr. Drake’s removal, without any knowledge other than what is put before me.

A reasonable person asked to sign this petition, who read only the petition, would have no clear understanding of the alleged wrongdoing and how it related to section 54 of the *Election Code*.

As a result, I find that the petition does meet the requirement under section 54(a) i) to set out the ground pursuant to section 54 on which removal of a Councillor is sought.

B. Lack of Evidence – Section 55 ii)

The removal of a councillor from office by way of a petition process has serious consequences for the respondent. It engages the right to procedural fairness. *Johnny v. Adams Lake Indian Band*, [2017] F.C.J. No. 676, 2017 FCA 146.

It is clear that removal from office by petition is intended to be an evidence based process. It is a “political process” only to the extent that the person seeking to remove a councillor from office must demonstrate the support of 25 % of the electors.

In the screening process, as long as the petition also contains the evidence in support of the petition, the motivations of the person(s) presenting the petition, or supplying the evidence are immaterial. The issues of credibility and reliability of the evidence can be tested at an arbitration hearing.

The evidence submitted, however, must be capable of proving the allegations made. That means that the evidence would need to be admissible before an arbitrator.

The impact of not putting your full case forward with the Petition

Ms. Wolfe clearly expressed that the information submitted was only part or a sample of the evidence. She stated that if a hearing was held on the petition other statements would be provided and witnesses called at a hearing.

In my view, this is a mistaken approach to submitting a petition. Under section 60 of the *Election Code* when the arbitrator determines to hold a hearing, the arbitrator is required to prepare a notice of hearing which shall set out among other things “(a) *the nature of the hearing and all related particulars.*”

It is clear that the petition is supposed to contain all of the allegations and the evidence. It is not intended as a springboard to a hearing to “sandbag” a councillor at the hearing with previously undisclosed allegations, documents and testimony.

I appreciate that evidence gathering can be difficult for a petitioner, but the process is designed to have that evidence gathering up front before the petition is delivered to an arbitrator. The petitioner has to provide her case to the arbitrator and the arbitrator considers whether it proceeds further.

Mr. Drake has the right to notice of the case that he must meet, before the hearing. This is particularly so in this process which is intended to be a speedy process to hear the petition for removal. There are very short time frames.

In assessing whether “*there is evidence in support of the petition*”, I put no weight on any assertion that “others will come forward with further evidence.” I have to assess what is provided now. In fact, had this matter gone to a hearing, my present view, subject to hearing persuasive contrary argument from the parties, would be to disallow any new evidence which was not provided with the petition. This is simply a matter of fairness.

Problems with the “Evidence”

There are many problems with the “evidence” supplied in support of this petition. My concern is with the quality of the material presented which must be capable of being proof of wrongdoing. The *Election Code* speaks to “evidence.”

When allegations consist of events experienced or conduct of a person— such as harassment, assaults or other misbehavior, a person must have actually witnessed or experienced the acts. It is not sufficient to simply say I was harassed, assaulted or that

an oath of office is breached. In order to supply evidence in support of the petition, it must be in the form of a statement from a person or persons.

Section 55 of the *Election Code* uses the word “evidence” and not “statement.” I note that there is a difference and use of the word “evidence” implies that there is a degree of solemnity about the statement – usually a statement made under oath or affirmation. I note that for a personal observation to be evidence, it has to be in the form of testimony or a sworn statement. At a hearing evidence might consist of oral testimony and documents. At this stage evidence accompanying a petition must be in writing. For any statement or document for it to be evidence it must be in or attached to a statutory declaration.

The *Canada Evidence Act* applies to this process and section 41 that sets out the form of a statutory declaration. It requires the following declaration:

I, _____, solemnly declare that (state the fact or facts declared to), and I make this solemn declaration conscientiously believing it to be true, and knowing it is of the same force and affect as if made under oath.

In a statutory declaration, the person making the declaration sets out the facts, usually in numbered paragraphs. It is a formal document which is sworn or affirmed to be true before a lawyer, notary or a commissioner for taking oaths. The person making it is aware that he or she is making the declaration for a specific process, that of supporting the petition.

There can be penalties or sanctions for the making of a false statutory declaration.

As Ms. Wolfe intended me to consider the information of two separate persons, there should have been a statutory declaration from each person, setting out the facts they allege in support of the petition. In this decision I have described them as Person 1 and Person 2. I have set out my reasons for maintaining this later in this decision.

Part of my task is to notify the petitioner of the rejection of her petition – this means giving reasons for rejecting the petition. One of these reasons is very poor quality of the “evidence” provided. Perhaps at a hearing I would receive better quality evidence, but as I identified earlier, at this stage the information must be sufficiently convincing that I can say that there is some evidence capable of proving the allegations alleged.

Below I identify some of my larger or global concerns about all the information provided with the petition, as well as my specific comments about the individual written documents submitted. I have done this without disclosing the name or the position of the person providing the information.

The Wei Wai Kum First Nation is a small community and it may be possible to for persons reading this decision to guess about the events and persons involved. That is unfortunate, but it is my view that the petitioner is entitled to reasons why her petition does not comply with section 55 of the *Election Code*.

Global Problems:

No Proof of Term of Office:

I am unable to conclude whether the acts alleged against Mr. Drake were acts that he committed when he was in office. I was able to determine that at least one of the documents submitted related to events before Mr. Drake was a councillor.

I have no evidence in Ms. Wolfe's petition which shows me when he commenced in office and the length of his term.

This is a fundamental gap in the evidence which alone warrants a rejection of the petition.

Oath of Office and Code of Conduct:

There is an allegation that Mr. Drake violated an Oath of Office and the Code of Conduct. Ms. Wolfe has not provided a copy of an oath or Code of Conduct. I cannot determine from the petition that Mr. Drake signed these documents, however, Mr. Drake provided copies of these documents and so the gap is cured by his information.

No Proof of Violation of the Band's Policies and Procedures:

The petition alleges a violation of the Band's Policies and Procedures. This is a very broad allegation. The petition is not supported with a copy of the Band's Policies and Procedures and I have no way to assess whether there is any evidence that Mr. Drake violated policies or procedures.

This is a fundamental gap in the evidence which alone warrants a rejection of the petition.

No proof of Harassment:

There is no uniform definition of harassment, and that can vary from workplace to workplace. The petitioner did not submit a copy of the applicable harassment policy.

This is a fundamental gap in the evidence which alone warrants a rejection of the petition.

The information provided does not clearly set out the facts that might constitute harassment. A statement by an individual that they felt harassed, or they reported harassment or heard others complain of harassment, or they went off on a leave or filed a WCB complaint about harassment is not evidence sufficient for me to conclude that there is a factual basis for harassment. The material submitted must contain facts.

These points should have been fully addressed in statutory declarations.

Use of Documents Created for another purpose:

The underlying problem with the “evidence” submitted by Ms. Wolfe is that she used documents that were created by other persons for other purposes in an attempt to prove an allegation. The danger with this approach is that the document may not be proof of a fact, other than the fact the person wrote the document. For example, an email written as a complaint to your boss is evidence that you believe you had a complaint and you intend to complain. It is not proof of the truth of the facts of your complaint.

What needs to be shown at this point are facts amounting to misconduct and not evidence that a person complained of misconduct. A past complaint only becomes relevant if the issue is whether the person complained in the past. What I have to decide is whether there is evidence supporting allegations in a petition.

The simple solution to this problem is to present information targeted to the allegations in the petition, in the form of a statutory declaration.

I now wish to identify the deficiencies in the unsworn statements that were provided which also lead me to conclude that Ms. Wolfe has not provided evidence in support of the petition.

Information of Person 1:

The information provided by Person 1 consists of a Statement dated April 3, 2018 for a Worksafe BC Claim (4 pages), a letter dated January 30, 2018 (2 pages), an email dated February 14, 2017 to a person marked Confidential (2 pages) and a statement of an incident (3 pages).

Worksafe BC Claim (4 pages)

The material references Mr. Drake’s action of attempting to oust another member from Council.

It references Mr. Drake running for Council in an election.

It references certain people leaving, resigning or going off on stress leave. It references the person having verbal and written documentation received from others of incidents of bullying and harassment.

It references that [another person] was feeling he was out voted and he felt bullied and harassed.

It provides a list of names of persons who would be willing to speak to a WorkSafe Investigator.

This document appears to have been created for a WorkSafe B.C. matter.

An allegation that Mr. Drake made an attempt to oust a person from Council is a bald allegation. Without a great amount of detail it is not proof of wrongdoing. An allegation that Mr. Drake ran for political office with the First Nation is not a fact proving harassment, a breach of policy or oath of office. Further, the document appears to refer to events before Mr. Drake became a councillor and the removal remedy under section 54 is for acts while in office.

Other than making bald assertions, there is no evidence of the “who, what, where, when and how” to show concrete facts, that might constitute harassment. This document has no value as evidence supporting the petition.

February 14, 2017 email

This email sets out a number of problems involving Mr. Drake and others “over the last year.” Some of the complaints appear to relate to actions taken by Mr. Drake to oust another council member on grounds related to corruption. It is difficult to ascertain which acts could be capable of supporting an allegation of harassment and what allegations are simply the writer’s dislike of the political tactics Mr. Drake used.

This email would not be admissible evidence at arbitration. It appears to refer to events and conduct before Mr. Drake was a councillor and therefore is not evidence of misconduct while he was holding office. It appears to be irrelevant information.

January 30, 2018 letter

Much of what is in this letter is irrelevant and unrelated to any allegations against Mr. Drake and relates to other persons. It appears to constitute the writer’s complaint of harassment.

The letter sets out the writer’s feelings but without setting out any facts capable of constituting harassment of the writer by Mr. Drake.

The letter provides further information to a person that the writer was not able to provide at an earlier meeting.

The writer reports an incident in an office and it is unclear whether this is claimed as an assault or an act of harassment. The writer called the RCMP, because the writer claimed to feel unsafe.

Without further surrounding information it is difficult to assess this incident. Calling the RCMP is not proof of misconduct; it is proof of that the writer intended to complain about conduct. The letter does not report the full details including any action taken by the RCMP. I can infer that no criminal convictions appear to have been involved because this is not alleged anywhere.

This document would not be admissible at an arbitration hearing, other than to prove the writer had made a complaint. It could not be introduced as proof of the facts in the letter. As I noted earlier a councillor cannot be removed from office under section 54 because of a complaint received. What the petitioner needs to establish is an evidentiary basis for her petition - facts and not complaints.

If the facts of “who, what, where, when and how” – were set out in a statutory declaration that would constitute some evidence. The letter itself, however, is not evidence and would not be admissible in an arbitration to establish a harassment complaint.

February 28, 2018 statement

This statement speaks to the writer’s fear of seeing head lights in the parking lot of the First Nations Office when the writer attended at the office after hours. There is no assertion that Mr. Drake was involved. The writer contacted the police who apparently took no action other than telling her someone would be in contact with her.

This statement has no evidentiary value and could not be introduced at an arbitration hearing as evidence. It does not prove harassment, breach of oath of office or a breach of policies.

Summary about Person 1’s information

In summary, most of the information supplied about Person 1 was information created for purposes other than to support this petition. Most of the information is too vague to be capable of warranting a hearing. Part of the information relates to a period when Mr. Drake was not a councillor and therefore would not be admissible at an arbitration hearing.

None of the documents would be admissible at an arbitration hearing for proof of wrongdoing by Mr. Drake. If the witness was challenged that he or she had never complained in the past, the documents would be admissible for that limited purpose. They might constitute proof of a complaint, but a councillor cannot be removed because others have complained about him; misconduct has to be established. Some of the information might amount to evidence if facts were set out clearly in a purpose specific document such as a statutory declaration. The form of this information precludes its use as evidence of misconduct.

Information Provided by Person 2

The material from Person 2 consists of two emails. In my view, neither of these emails constitutes evidence for the reasons set out below.

Email of November 8, 2017:

The text of this email reads as follows:

I would like to formally make a complaint about Councillor Chris Drake and his ownership of the website www.endcorruption.ca . Councillor Drake has now signed a Code of Conduct and Oath of Office Declaration and he should be aware that he is now in breach of these documents by his ownership of the website and the message it portrays. Since all Councilors should be aware of their Oath of Office and Code of Conduct I will not elaborate on how he is breaching them. I would like to request that Council address this to have a decision on this.

[my emphasis]

The email of November 8, 2017, is not evidence of Mr. Drake's wrongdoing. It is evidence that the person sending the email made a complaint to the First Nation seeking action from the First Nation.

Evidence might consist of:

- (a) A copy of the website pages;
- (b) A copy of the Code of Conduct;
- (c) A copy of the Oath of Office
- (d) Information as to how the website breached both the Oath of Office and Code of Conduct.

The email of November 8, 2017, is not evidence which supports the petition.

Email of May 28, 2018

The email of May 28, 2018, states as follows:

Chris personally involved him self [sic] in all areas of my employment once he became a councilor.

He harassed [name redacted] to where he quit.

Councillors are not elected to perform administrative duties.

He then harassed people who were going around with a petition about him.

His website broke all the rules of oath.

He then released a report without council consent on the day it was presented to council.

These are bald assertions, without any surrounding context or detail. For example, there is no “who, what, when, where or how” which allows me to find that it has any evidentiary value. Further, It is unclear whether Person 2 had any first hand observations. This email has no evidentiary value – it is an allegation and not evidence.

Conclusion about Section 55(a) ii)

The material supplied as evidence is so lacking that it does not meet the standard of evidence capable of proving any of the allegations advanced. The “evidence” is not sufficient for this petition to go to a hearing.

C. Signature of the Petitioner - Section 55 (a) iii):

Ms. Wolfe is a person who is eligible to present a petition as she is a member of the First Nation. She signed a covering letter and a request to appoint an arbitrator. She has not signed on the first page of the petition, but she signed on page 11 as supporting the petition. This is sufficient to comply with the signature requirement of section 55 (a) iii).

D. Membership Support – Demonstrate 25 % Support of Electors – Section 55(a) iv)

The petition requires the signatures of at least 25 % of all of the eligible electors (“electors”) in support of the petition. I obtained from the First Nation two lists of electors. I was first supplied with a list without band membership numbers and then I was supplied with a list showing each elector’s membership number. There are 605 electors. In order to reach the threshold of 25 % Ms. Wolfe must show that the petition bears the signatures of 152 different electors.

The support issue should have been an easy one to determine, but it was not as easy as I anticipated.

Is an Eligible Elector a Mentally Competent Elector?

In an attachment to an email of May 29, 2018, Mr. Drake raised issue about whether an eligible elector is one mentally capable of making a decision as well as being of age and on the electors list. The list of persons who have supported the petition has not been disclosed to Mr. Drake. Mr. Drake provided a list of three persons who he believed have dementia arguing that they might not have the capacity to make an informed decision. One of these persons has signed the petition. Ms. Wolfe did not respond to this allegation.

The petitioner should not put forward signatures from persons who are not capable of understanding what is sought in the petition. The legal test for capacity is a low threshold – the person must appreciate the nature of the document they are asked to be signed. Generally, the law presumes capacity unless incapacity is otherwise demonstrated. As the *Election Code* gives me no power to conduct a hearing about challenges to the capacity of the elector, I have not taken Mr. Drake's argument into account in determining whether the petition meets the 25 % support threshold.

It is my view that an eligible elector is one that is simply a person listed on the First Nation's list. I must however be satisfied that the person who signed the petition was on the membership list and supported the petition. Support for the petition is demonstrated by analyzing the petition, the signatures and the elector's list.

The Membership Support Evidence

The best evidence of a supporting elector is when the elector provides a legible name, signature and a Band membership number. When I examined the petition and the membership list, many of the members provided band membership numbers which corresponded to their name. Where the person signing did not supply a membership number I counted the signature as support as long as I could find a similar name on the membership list. I did not reject any signatures on that basis.

The petition has 155 names. I examined the list of names provided and discovered the following problems:

- One person signed the petition twice – once with his Band number and one without his Band number. These signatures appear on pages 5 and 11. One of these cannot stand as support for the petition.

- One person who signed the petition is not on the list of electors. In a written submission Mr. Drake advised that this person was deceased. This signature cannot be counted as support as the person is not on the list of electors.
- One of the names and signatures is unreadable. The name also provides a Band membership number. The membership number provided is not a membership number on the list of electors. This signature cannot stand as support for the petition.

However, there are also three instances where the person signing identified a Band membership number, but the name did not correspond to the membership number provided. This is a significant red flag, particularly because there are three demonstrated irregularities.

I must be certain, at least on a balance of probabilities, that the person signing is the member and supports the petition. I cannot hold a hearing to resolve the discrepancy with oral testimony. The burden in this process is on the petitioner to provide the elector support evidence. I find that where the membership number did not correspond to the name, the signature cannot count for support.

As a result, I find that 6 signatures must be struck from the support for the petition as I am not satisfied on the basis of the electors list and the signatures that these eight signatures are from persons who are eligible electors.

As Ms. Wolfe requested that I treat the signatures on the petition as confidential I have not identified the six problematic signatures by name or membership number.

Signatures must be “in support of the Petition”

Further, to find that an elector supports the petition, there must be a connection between the signature and a petition. This means that there must be some words about the petition on the same page containing signatures. This demonstrates that signatures are part of, and in support of, the petition. Again, this should be a simple determination.

For many of the signature pages submitted (15 out of 22), the petition is printed on the flip side of the page. This is not the best practice as the person signing can sign the petition without seeing or being shown the petition. A better practice would be for signatures to appear immediately under the wording of the petition, using as many pages as necessary, even if a page only contained one signature because of the length of the petition. In my view this is not a fatal flaw and these signatures with the petition on the flip side count as in support of the petition.

There is a very real danger, however, when a petitioner submits a page of signatures with no reference at all to the petition. It raises the issue of whether the person signing

knew they were signing this petition which could result in the removal of Mr. Drake as a Band Councillor. Ms. Wolfe's materials contain seven pages containing signatures where no petition appears on the flip side of the page.

The following pages contain signatures with no words relating to a petition or allegations against Mr. Drake on the flip side (the stand alone pages):

P 4 – 1 signature

P 8 – 3 signatures

P 12 – 2 signatures

P 18 – 1 signature

P 19 – 1 signature

P 21 – 1 signature

P 22 - 33 signatures

Sub-Total – 42 signatures

As nothing connects these signatures to the petition, this is a fatal flaw. I am not satisfied that these 42 signatures are "in support of the petition", as required by section 55 iv) of the *Election Code*. Four of the six flawed signatures are on the stand alone pages.

After making the appropriate deductions from the 155 signatures submitted by Ms. Wolfe, for two problem signatures (connected to the petition) and the 42 signatures that are not connected to the petition (also containing 4 of the flawed signatures), I find that the petition is supported by 111 of 605 electors. This is 18.3 % of the electors, which does not meet the requirement of section 55 (a) iv) the signatures of at least 25 % of all electors of the Band in support of a petition.

VII. DISCLOSURE ISSUES

A. Disclosure of the Names of Persons signing the Petition:

While I have examined the list of names of persons who signed the petition, at Ms. Wolfe's request, I have not disclosed this list to either Mr. Drake or to the First Nation.

Both Mr. Drake and the First Nation have provided submissions on the issue of disclosure of the membership support evidence.

Ms. Wolfe has asked for privacy for the membership support evidence. She fears repercussions if the names are released.

Mr. Drake said he would like disclosure of the membership support evidence as he would like to be able to call the persons on the list as witnesses to offer proof of inducements they were offered to sign the petition. Mr. Drake says that misrepresentations were made to induce electors to sign the petition.

Mr. Kirchner provided the position of Chief Roberts, as there was not enough time to consult with Council and obtain Council's position prior to the deadlines for submission. He stated that there may be policy issues that require the attention of the Council. Mr. Kirchner stated that the *Election Code* does not require disclosure of the membership support evidence, it requires verification by the arbitrator and it should be a black and white issue. Mr. Kirchner stated that in the interests of community harmony the names of persons supporting the petition should not be disclosed. Mr. Kirchner stated that disclosure could have a chilling effect on those who genuinely believe a councillor has engaged in wrongdoing and should be removed from office. This would undermine the purpose of the removal provisions which is to ensure good governance of the First Nation.

On balance, I find that the membership support evidence should not be disclosed. I am persuaded that good governance of the First Nation has the potential to be undermined if electors are not able to raise legitimate concerns about a councillor for determination in an impartial arbitration process. Disclosure of names on a petition could have a chilling effect on electors bringing forward legitimate concerns. Further, it is a small community and members need to be able to put this issue behind them without fear of consequences – whether those fears are well founded or not I am unable to assess.

Under the *Election Code* there is no effective way to consider challenges raised such as “inducements”, “misrepresentations” or “incompetency”, as the arbitrator cannot hold a hearing to verify that the petition complies with section 55. There is therefore no useful purpose served in disclosing the names of persons who signed the petition. Here, as a result of my final decision there is also no need to disclose the membership support evidence as there is not going to be a hearing of this petition.

B. Disclosure of the Evidence Supporting the Petition:

Mr. Drake seeks disclosure of the evidence submitted with the petition so he can properly know the case against him and prepare his defence.

Mr. Kirchner stated that the evidence, including both the content and the name, were necessary for Mr. Drake to be able to conduct a defence to the petition. They should be disclosed and any hearing delayed until the disclosure was made. Further, Mr. Kirchner

stated that prior to ordering disclosure, the arbitrator should ascertain with Person 1 and Person 2 that they intended their information to be disclosed and give them an opportunity to withdraw their statements.

Ms. Wolfe submitted in reply in her email of May 31, 2018:

*. . . The documents provided were provided with the understanding that they were samples of the complaints made against Mr. Drake and that we would be providing further documents from other employees once the petition was validated and a hearing scheduled as the additional documents would not be released to us until the Band had confirmation that the petition would proceed to a hearing. We ask that the names be kept confidential until it is determined that we will proceed to a hearing and at that time they may be provided to the other parties involved.
In response to Mr. Drakes letter [sic]*

In my view, the burden has to be on the petitioner to ensure that she has the consent of the persons to supply their information to the arbitrator in support of a petition. It is unworkable, given the time frames in this process, to place the duty on the arbitrator to inquire whether the persons providing evidence intended to provide evidence that may be disclosed. That is one of the reasons the evidence should be in the form of a statutory declaration, so the importance of providing the information is suitably impressed on the person supplying information to the petitioner.

Since I am rejecting the petition, I have chosen not to disclose the identities of Persons 1 and 2 or copies of the documents submitted by Ms. Wolfe.

Ordinarily, a person who provides evidence in support of a petition should have no reasonable expectation of privacy. The information is provided for the purpose of constituting evidence against a Councillor, which will be given under oath or affirmation at an arbitration hearing.

In this case neither Person 1 nor Person 2 is the petitioner or one of the persons requesting the appointment of an arbitrator. I have no knowledge of whether the petitioner informed them that petitioner would provide their information for use at an arbitration, which would also include disclosure to the respondent. Some of the information produced refers to medical conditions. The information also references other persons, including employees, who may have absolutely no knowledge of this petition.

My concern would have been fully addressed had the evidence been presented in the form of a statutory declaration, as the person making the statutory declaration would

have been in a formal setting before a lawyer, notary or commissioner for the taking of oaths, making the statement under oath or affirmation, knowing it was made for use in a process to remove a councillor.

Had this matter proceeded to a hearing, I would have provided the respondent, Chief Roberts and Mr. Kirchner with a full unedited copy of the statements submitted as part of the petition. Given my ruling dismissing this petition, it is not necessary for anyone to have access to the information of Person 1 and Person 2. At this point I see no compelling reason to disclose this information to Mr. Drake, or the First Nation.

C. Conclusions:

In summary, the petition of Ms. Wolfe, submitted on May 28, 2018, for the removal of Councillor Christopher Drake, does not comply with section 55 of the *Election Code*. The petition does not comply because it:

- fails to specify the grounds on which the removal is sought (section 54(a)i));
- fails to provide evidence in support of the petition (section 54(a)ii));
- fails to meet the threshold of 25 % of the support of eligible electors in support of the petition (section 54(a)iv)).

As a result there will be no hearing of this petition.

The *Election Code* provides that the \$100 paid by Ms. Wolfe is non-refundable. I will be remitting payment of this non-refundable deposit to the Wei Wai Kum First Nation, as the *Election Code* provides that the payment is to be made to the arbitrator but does not provide that it is remuneration to the arbitrator.

Dated at Campbell River, British Columbia

This 3rd day of June, 2018



Paul Love,

Arbitrator