

Federal Court



Cour fédérale

Date: 20210902

Docket: T-876-19

Citation: 2021 FC 909

Ottawa, Ontario, September 2, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KURTIS GLADUE

Applicant

and

**BEAVER LAKE CREE NATION AND
BEAVER LAKE CREE NATION CHIEF AND COUNCIL**

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, of an April 17, 2019 decision [the Decision] of the Beaver Lake Cree Nation Appeal Tribunal [Tribunal]. The Decision denied Mr. Gladue's [Applicant] appeal of the Beaver Lake Cree Nation election of March 29, 2019 [2019 Election].

[2] The Applicant claims that his rights to procedural fairness were breached and that the Decision is unreasonable. He requests that the Court quash the Tribunal's Decision and order a new election.

[3] The application for judicial review is allowed.

II. Background

[4] The Beaver Lake Cree Nation [BLCN] is an Indian band within the meaning of the *Indian Act*, RSC 1985, c I-5 and is a signatory to Treaty Six. It has conducted its elections pursuant to a custom election law [Election Law] for over 30 years. The most recent version was recently approved on January 25, 2018. The 2019 Election was the first time that an appeal was launched under the recently amended Election Law.

A. *The Election Law Committee and the Appeal Tribunal*

[5] The Election Law is a comprehensive law that addresses matters of importance to BLCN. It is intended to express BLCN's sovereignty and hold its people accountable to their own laws and customs. The Election Law is a clear expression that BLCN wishes to conduct its elections in a fair and transparent manner. It is also an inclusive law. It provides for off-reserve advance polling stations, which enable its off-reserve electors to vote. It also requires membership input when amendments are to be considered. The preamble sets out the principles of First Nations kinship and well-being as well as many technical matters.

[6] On the technical side, the Election Law provides for an Election Law Committee [Committee] comprised of five (5) BLCN members. The Committee members are responsible for appointing the Tribunal and the Electoral Officer [EO]; facilitating engagement with BLCN members where input concerning the Election Law is necessary; and overseeing general election matters (Election Law at s 17.0). A call for interest is put out to recruit Committee members. If there are insufficient applications, the BLCN Membership Liaison or the Membership Clerk may appoint members to the Committee (Election Law at s 17.2).

[7] In the autumn of 2018, the Membership Liaison recused herself upon learning that her mother would likely seek re-election for Chief. The Membership Clerk, Natasha Youngchief [Ms. Youngchief], subsequently joined the Committee. As confirmed by a November 22, 2018 email from Ms. Youngchief to the Chief and Council, the Committee met to appoint the EO. After the appointment of the EO, however, the Committee was struggling to hold meetings due to a lack of availability. As a result, Ms. Youngchief took on most Committee responsibilities herself. The identities of the Committee members do not appear to have been well known within BLCN.

[8] The Committee must appoint a Tribunal that does not have a vested interest in election matters at least four months before an election (Election Law, s 15.0). The criteria for the Tribunal's composition is set out in section 15.1 of the Election Law:

The persons appointed to the Election Appeal Tribunal shall be:

- a) First Nations;
- b) At least 25 years of age; and
- c) Of good moral character and reputation.

[9] As of January 2019, despite a public posting, there were only two applicants for positions on the Tribunal: Lillian Youngchief and Jessie Benson-Bone. Ms. Youngchief, acting alone, appointed Lillian Youngchief and Jessie Benson-Bone to the Tribunal. In February 2019, Ms. Youngchief also appointed the third member, Diane Scoville.

B. *The 2019 Election*

[10] On March 29, 2019, BLCN held its election for Chief and three Councillors. An advance poll was held in Edmonton on March 22, 2019. The EO appointed two deputy electoral officers and two interpreters. There were approximately 20 scrutineers for the various candidates, including at least one scrutineer for the Applicant.

[11] There were 335 voters in the election for Chief. Chief Germaine Anderson [Chief Anderson] was re-elected with 105 votes. The Applicant was the third-place candidate for Chief, with 82 votes. There were two spoiled ballots. Charlene Cardinal, Shirley Paradis, and Felix Lewis were elected as Councillors. Four votes separated the successful candidates from the runner ups in both the races for Chief and Councillors.

C. *Appeal*

[12] On April 3, 2019, the Applicant appealed the 2019 Election results pursuant to section 15.11 of the Election Law. The appeal set out concerns about the appointment of the Tribunal and the EO's compliance with the Election Law. Mr. Gladue specifically took issue with (1) the appointment and identities of interpreters; (2) the assistance an elector received in the voting

booth and the lack of notation about that assistance on the voter's list; and (3) the timing of the inspection of initials on the ballots.

[13] Chief Anderson, Charlene Cardinal, Shirley Paradis, Felix Lewis, and the EO were made aware of the appeal pursuant to section 15.12 (a). On April 16, 2019 they submitted written responses to the Tribunal pursuant to section 15.13.

[14] The Tribunal denied the appeal on April 17, 2019.

D. *Affidavits*

[15] On judicial review affidavits were submitted by the Applicant, Ms. Youngchief, and Shawna Johnson. Shawna Johnson was a scrutineer on behalf of Chief Anderson and observed the 2019 Election process. Ms. Youngchief and Shawna Johnson were cross-examined on their affidavits. The facts surrounding the Tribunal's appointment and the functioning of the Committee came to light during the cross-examination of Ms. Youngchief.

III. The Decision

[16] The Applicant received the Decision on April 27, 2019. Lillian Youngchief and Jessie Benson-Bone signed the Decision. Diane Scoville did not participate. The Decision is reproduced in its entirety below:

Dear Mr. Kurtis Gladue,

After review of all of the evidence provided by you and others affected by this appeal application in regard to the Beaver Lake Cree Nation Election that was held on March 22nd & 29th 2019,

the Election Appeal Tribunal has concluded that the evidence presented was not sufficient to determine that:

15.15 a)

ii. An error in the interpretation and application of the Election Law did occur (the third member of the Tribunal was not confirmed four months prior to the Beaver Lake Cree Nation Election) however, this did not materially and directly affect the outcome of the election;

iii. The Electoral Officer or the Deputy Electoral Officer did conduct themselves in accordance to their duties & responsibilities under the Election Law. Their behavior and/or actions did in no way materially and directly affect the outcome of the election. (All ballots were initialed by the Electoral Officer or Deputy Electoral Officer as Electors were verified during the registration process, all ballots were verified to have the Electoral Officer or Deputy Electoral Officer initials during the official counting of the ballots and this was witnessed by all the scrutineer's present).

Decision: After reviewing all the information submitted the Election Appeal Tribunal has denied this Appeal Submission.

15.19

All decisions of the Election Appeal Tribunal are final and binding.

Sincerely,

Quorum 2/3

IV. Issues and Standard of Review

[17] After considering the submissions of the parties, I have determined the issues for consideration are:

- (1) Was the Tribunal properly constituted?
- (2) Was there a breach of procedural fairness?

- (a) Was there sufficient opportunity for the Applicant to present his case?
 - (b) Was there an apprehension of bias?
- (3) Was the Decision reasonable?

[18] The first issue will be reviewed on the reasonableness standard. The question of whether the Tribunal was properly constituted is essentially an examination of the jurisdiction of the Tribunal. However, it also requires an interpretation of the Election Law. Jurisprudence has established that interpreting First Nations' elections codes on this basis requires a review on the standard of reasonableness (*Blois v Onion Lake Cree Nation*, 2020 FC 953 at para 23 [*Blois*]; *Sturgeon Lake Cree Nation v Hamelin*, 2018 FCA 131 at para 44).

[19] The second issue is reviewable on the correctness standard (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 49-56; *Khela v Mission Institution*, 2014 SCC 24 at para 79). However, “the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected” (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII SCC 699 at para 22 [*Baker*]).

[20] As noted in *Blois*:

[26] Issues of procedural fairness are reviewed on the correctness standard (*Mission Institution v. Khela*, 2014 SCC 24 (S.C.C) at para 79; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (S.C.C) at para 43; *Canada v. Akisq'nuk First Nation*, 2017 FCA 175 (F.C.A) at para 19; *Gadwa v. Kehewin First Nation*, 2016 FC 597 (F.C) at para 19, aff'd 2017 FCA 203 (F.C.A); *Morin v. Enoch Cree First Nation*, 2020 FC 696 (F.C) at para 21; *Tourangeau* at para 26). On a correctness review, no

deference is owed to the decision maker and the reviewing court determines if the duty of procedural fairness owed to the applicant was breached (*Elson v. Canada (Attorney General)*, 2019 FCA 27 (F.C.A) at para 31; *Connolly v. Canada (National Revenue)*, 2019 FCA 161 (F.C.A) at para 57).

[21] Concerning the merits of the Decision, since this matter does not fall under a category warranting a correctness standard as identified in *Vavilov*, the reasonableness standard applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). For a decision to be reasonable, a reviewing court “must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the required degree of justification, intelligibility, and transparency” (*Vavilov* at para 100). If the decision is found to be internally coherent, includes a rational chain of analysis, and is justified based on the facts and law, it will be reasonable (*Vavilov* at para 85).

[22] Courts are, however, to show deference towards decisions of administrative decision-makers (*CUPE, Local 963 v New Brunswick Liquor Corp.*, [1979] 2 SCR 227). This rationale applies equally, if not with more force, when courts are reviewing decisions of Indigenous bodies and includes interpretations of provisions of an election code (*Orr v Fort McKay First Nation*, 2012 FCA 269 at paras 8-12; *Lavallee v Ferguson*, 2016 FCA 11 at para 19; *Cold Lake First Nations v Noel*, 2018 FCA 72 at paras 20, 24).

[23] In addressing whether the decision was reasonable, the Court is unable to revisit or reweigh the evidence, make its own findings of fact, or substitute its own preferred outcome for that of the decision maker (*Canada (Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55).

V. Parties' Positions

A. *The Constitution of the Tribunal*

[24] The Applicant states that fundamental defects in the appointment and composition of the Tribunal render its Decision a nullity and, therefore, the Decision should be quashed (*Abbott v Pelican Lake Band Appeal Board*, 2003 FCT 340 at paras 17-19 [*Abbott*]; *Mercredi v Fond du Lac Denesuline First Nation*, 2018 FC 1272 at paras 42, 45 [*Mercredi*]).

[25] In particular, the Applicant alleges that the Committee was non-functioning when it appointed the Tribunal; only two of three Tribunal members were involved in determining the appeal and rendering the Decision; the Committee failed to appoint a Tribunal four months prior to the 2019 Election as required by the Election Law; and the Tribunal members were not all First Nations as required by the Election Law.

[26] The Respondents submit that assessing the Tribunal selection process requires consideration of the realities of the community. Some BLCN members experience poverty, which has the effect of low BLCN membership participation on committees. As well, any irregularity in the Tribunal's appointment is immaterial since it did not affect the 2019 Election outcome. The Respondents state that prior to the 2019 Election Ms. Youngchief advised Chief and Council about the challenges of eliciting applications on at least two occasions. At that time, the Applicant was a member of Council and he raised no concerns until he lost.

[27] In addition, the Respondents submit that the Election Law does not define the term “First Nations” and therefore the appointment of Jessie Benson-Bone and Diane Scoville, who are Métis, was permitted.

[28] Finally, the Respondents state that there is no requirement for a unanimous decision and that two out of three Tribunal members constituted quorum.

B. *Procedural Fairness*

(a) *The Denial of an Opportunity to Respond*

[29] The Applicant submits that his rights to procedural fairness were breached for two reasons. First, the Tribunal did not provide him with the responses from the Chief and Council and the EO. Second, the Tribunal did not give him an opportunity to reply.

[30] The Respondents submit that an appellant does not have a right of reply based on the provisions of the Election Law.

(b) *An Apprehension of bias*

[31] The Applicant submits that a lack of disclosure of family connections between the Tribunal, election nominees, and the Committee created a reasonable apprehension of bias.

[32] The Respondents state that there was no apprehension of bias arising from any connections. Further, any familial ties must be assessed in the context of small First Nation communities, which inherently have individuals who are closely linked.

C. *The Reasonableness of the Decision*

[33] The Applicant states that the Tribunal failed to conduct a proper review and inspection of relevant voting material. This led to evidentiary gaps and resulted in an unreasonable Decision. Further, the length of the Decision is problematic and fails to address the grounds of appeal raised by the Applicant.

[34] The Respondents submit that the Decision is reasonable as the Tribunal properly assessed the materials required, made reasonable determinations on each of the issues, and provided sufficiently detailed reasons.

VI. Analysis

A. *The Constitution of the Tribunal*

[35] I find that the Tribunal was not properly appointed as there was no functioning Committee that appointed the Tribunal. Ms. Youngchief, acting alone, appointed the Tribunal. There is no authority for this within the Election Law. This determination alone is sufficient to allow the application for judicial review.

[36] The relevant sections of the Election Law concerning the Committee's composition are reproduced below:

17.0 The Election Law Committee will be independent of the Beaver Lake Cree Nation Chief and Council and will consist of:

- a) One (1) Beaver Lake Cree Nation elder;
- b) One (1) Beaver Lake Cree Nation youth (18-25);
- c) One (1) Non-Resident Beaver Lake Cree Nation member,
- d) One (1) Resident Beaver Lake Cree Nation member; and
- e) The Beaver Lake Cree Nation Membership Liaison. If there is no Membership Liaison, this spot shall be filled by the Beaver Lake Cree Nation Membership Clerk.

17.1 The Election Law Committee will be selected through a call-out application process whereby all interested Beaver Lake Cree Nation members will be asked to submit an application of interest, including the reasons why the member is qualified to serve as an Election Law Committee member.

17.2 If there are insufficient applications of interest, the Beaver Lake Cree Nation Membership Liaison or Membership Clerk will appoint Election Law Committee members who he or she thinks would best serve the roles and responsibilities of the Committee.

[37] The Applicant submits that the proper appointment of the Tribunal required a properly constituted Committee, which did not occur. The Election Law allows the Membership Clerk, Ms. Youngchief, to appoint four other members to the Committee should there be a lack of interest. It does not, however, permit one member of the Committee to act alone. The Applicant submits that Ms. Youngchief was the only member of the Committee involved in the appointment process of the Tribunal and that this is not permitted under the Election Law.

[38] The Respondents submit that section 17.2 of the Election Law contemplates that there may be insufficient interest for participation on the Committee, which is not surprising given the conditions of poverty that exist within the community (*Anderson v Alberta (Attorney General)*, 2019 ABQB 746 at paras 60,66). I acknowledge that this reality may exist. However, in the absence of language empowering Ms. Youngchief to do what she did, I find she had no authority to appoint the Tribunal on her own.

[39] This conclusion requires an interpretation of the Election Law. *Rizzo & Rizzo Shoes Ltd, Re*, [1998] 1 SCR 27 [*Rizzo*] is the governing case on statutory interpretation. Justice Iacobucci wrote at paragraph 21:

[21] Although much has been written about the interpretation of legislation (see, e.g., *Ruth Sullivan, Statutory Interpretation* (1997); *Ruth Sullivan, Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec* (S.C.C.); *Royal Bank v. Sparrow Electric Corp.* (S.C.C.); *Verdun v. Toronto Dominion Bank* (S.C.C.); *Friesen v. R.* (S.C.C.).

[40] *Rizzo* stands for the proposition that, where the words of a provision are clear and unambiguous, the meaning that naturally flows from them should be given a high degree of weight in the interpretive process. This meaning will only be rebutted when there is considerable evidence that the ordinary meaning is not harmonious with the law in question or if the Court adopts a different meaning. The Federal Court of Appeal has ruled that custom election codes enacted by First Nations are to be interpreted using this approach (*Boucher v Fitzpatrick*, 2012 FCA 212 at para 25).

[41] Applying the rules of statutory interpretation to the above sections, it is clear that if there was insufficient interest in the Committee, Ms. Youngchief could have appointed additional Committee members to assist her. However, the Election Law does not afford the Membership Clerk with residual powers to act alone on behalf of the entire Committee. On the contrary, I view the above provisions as an intent to foster broad BLCN participation on the Committee. Ms. Youngchief's actions are not consistent with this intent. By making this finding I am not suggesting that Ms. Youngchief acted with ill intentions. I recognize that Ms. Youngchief was under time constraints with the impending 2019 Election and that she was faced with a lack of participation, which she informed Chief and Council of.

[42] I find that the Committee was not functioning and the Election Law does not empower a sole member of the Committee to act alone and appoint the Tribunal. As a result, I find that the Tribunal was improperly constituted. This finding of a lack of jurisdiction is sufficient to grant the application for judicial review. It is therefore unnecessary to consider the merits of the

Decision (*Abbott* at para 17). The finding of the serious flaw in how the Tribunal was constituted also renders it unnecessary to consider the submissions on procedural fairness.

VII. Conclusion

[43] The judicial review is allowed.

[44] In *Abbott* the Court found that the board was not properly constituted and that there was no mechanism in the custom election law to appoint a new member (*Abbott* at para 19). The Court nevertheless remitted the matter back to a board to be properly constituted to decide the matter in accordance with the custom election law. Similarly, in the present matter there is no mechanism for the appointment of a new Tribunal. These are exceptional circumstances. Exceptional and complex situations may call for exceptional measures or remedies (*Mercredi* at paras 50-54).

[45] Considering the lack of legislative guidance, and in light of this Court's intentions to be the least intrusive it can be (*Shirt v Saddle Lake Cree Nation*, 2017 FC 364; *Loonskin v Tallcree*, 2017 FC 868; *Sweetgrass First Nation v Gollan*, 2006 FC 778), the Court must fashion an appropriate remedy in these exceptional circumstances.

[46] To ensure that BLCN's jurisdiction is respected, there must be a new Tribunal appointed by a fully functioning Committee. As such, I order that BLCN, or Ms. Youngchief as the Memerchip Clerk, immediately re-constitute or re-appoint the Committee so that it can appoint a Tribunal which will consider the Applicant's appeal afresh.

[47] I strongly urge the Tribunal to develop rules of procedure to guide them in how a decision will be arrived at, including quorum requirements and majority decision-making. These rules do not have to be extensive or complicated. I also recommend that they be distributed to the Applicant and any parties appearing before the re-constituted Tribunal.

A. *Costs*

[48] The Applicant seeks leave to file submissions on the amount, or scale, of costs within 10 days of receipt of a decision in this matter. The Respondents make no submissions. I agree with the Applicant and will receive submissions on costs within 10 days of this judgment and reasons.

JUDGMENT in T-876-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The Court orders that the BLCN and/or Ms. Youngchief, in her capacity as the Membership Clerk, appoint a new Committee within 15 days of this Order in accordance with the process set forth in the Election Law.
3. Once appointed, the Committee will appoint a Tribunal within 15 days of its appointment pursuant to the criteria set forth in the Election Law.
4. Once the Tribunal is re-constituted, the Tribunal will, within 15 days, consider the information before the previously appointed Tribunal and determine the appeal in accordance with the Election Law.
5. The parties will make submission on costs within 10 days of this Order.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-876-19

STYLE OF CAUSE: KURTIS GLADUE V BEAVER LAKE CREE NATION
AND BEAVER LAKE CREE NATION CHIEF AND
COUNCIL

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: MARCH 24, 2021

JUDGMENT AND REASONS: FAVEL J.

DATED: SEPTEMBER 2, 2021

APPEARANCES:

Janet L. Hutchinson FOR THE APPLICANT

Catherine Boies Parker FOR THE RESPONDENTS
John Trueman
Robin Gage

SOLICITORS OF RECORD:

Hutchinson Law FOR THE APPLICANT
Sherwood Park, Alberta

Arvay Finlay LLP FOR THE RESPONDENTS
Victoria, British Columbia