

Federal Court



Cour fédérale

Date: 20170113

Docket: T-1840-16

Citation: 2017 FC 46

Ottawa, Ontario, January 13, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CRYSTAL OKEMOW

Applicant

And

LUCKY MAN CREE NATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision (“Appeal Decision”) made by members of the Lucky Man Cree Nation (“LMC Nation” or “Band”) on October 23, 2016 to remove the Applicant from the office of Chief, pursuant to s 9(e) of the Lucky Man Cree Nation Election Act (“Election Act”), as she did not meet the candidate criteria specified in ss 5(c)(i) and (ii) of the Election Act.

Background

[2] The LMC Nation is located near Saskatoon, Saskatchewan and has approximately 115 registered members. On June 29, 2016, the Applicant was nominated and elected as Chief of the LMC Nation. The following week, four members of the LMC Nation appealed the Applicant's election alleging, among other things, that she was not eligible to run for that position pursuant to s 5(c) of the Election Act.

[3] As required by the election appeals provisions of the Election Act, a special band membership meeting was held on October 23, 2016 to hear and consider the appeals ("Appeal Meeting"). A "Yes" or "No" vote was held in response to the question "Do you AGREE that Crystal Okemow who was nominated to be Chief was an eligible candidate at the June 29, 2016 Lucky Man Band Election". A majority of 28 Band members voted "No", 19 Band members voted "Yes". The Election Act also provides that, when an appeal is received, an acting Chief shall be selected from and by the new Council, this was done.

[4] On October 27, 2016, the Applicant filed an application for judicial review alleging that the LMC Nation membership erred in rendering the Appeal Decision in the following respects:

- i. Denying known supporters of the Applicant to exercise their vote in the Appeal Decision by proxy, using their legal Powers of Attorney, in breach of procedural fairness;
- ii. Denying the Applicant or her counsel an opportunity to fully cross-examine the Appellant, Leona Bird, and denying any opportunity to cross-examine the Appellant, Pauline Okemow, in breach of procedural fairness;
- iii. Acting outside the scope of their authority by making their decision on grounds of discrimination;

- iv. Failing to properly interpret and apply the Election Act and the LMC Nation's Membership Code;
- v. Prejudging the matter and rendering a decision based on hearsay and opinion;
- vi. Misinterpreting and misapplying the facts; and
- vii. Rendering a biased decision.

[5] The Applicant also brought a motion, on an urgent basis, seeking an interlocutory injunction staying the Appeal Decision and enjoining the LMC Nation from holding a by-election for the position of Chief, which was to be held on November 5, 2016, pending the hearing of this application for judicial review. That motion was granted by Justice Annis on November 4, 2016. The Respondent did not object to the motion nor file a motion record.

[6] In granting the interlocutory injunction, Justice Annis noted that the question of the Applicant's family's membership has previously been raised before the Federal Court in *Okemow-Clark v Lucky Man Cree First Nation*, 2008 FC 888 ("*Okemow-Clark*") (upheld in *Lucky Man Cree Nation v Okemow-Clark*, 2010 FCA 48). In that case, Justice de Montigny quashed the decision to exclude the Applicant's family from the Band member list as this was not done in accordance with the LMC Nation's Membership Code. He remitted the matter to the Chief and Council to be dealt with in accordance with the Membership Code and the *Indian Act*, RSC 1985, c I-5 ("*Indian Act*"). Justice Annis noted that Chief and Council did not deal with the issue, prior to it being raised as a ground of appeal to prevent the Applicant from taking office.

[7] For the following reasons, I have concluded that this application must be granted.

Decision Under Review

[8] As described above, the decision under review is the determination by a majority vote of LMC Nation members in attendance at the Appeal Meeting that the Applicant was not an eligible candidate for the elected position of Chief.

Relevant Legislation

[9] The Lucky Man Cree Nation Election Act, ratified on July 21, 2000, contains the following provisions that are relevant to this application for judicial review:

5. Candidates

...

- c) No person may be a candidate for election as Chief unless:
 - i) He/she was born into the Lucky Man Cree Nation and is a Band member; or
 - ii) He/she is a direct descendant of a Lucky Man Cree Nation member and is a Band Member

...

9. Election Appeals

- a) Within five (5) days after an election, an appeal can be made by any candidate at the election or any elector who gave or tender his/her vote at the election who has reasonable grounds believing that:

...

- iii) A person nominated to be a candidate in the election was ineligible to be a candidate.
- b) A person may lodge the appeal by forwarding by registered mail the written notice with particulars to the attention of the Lucky Man Cree Nation Member.

- c) In the event of an appeal of an election, the Lucky Man Cree Nation Band Manager shall immediately arrange for a special Band Membership meeting. The person lodging the appeal and the affected candidate(s) must present themselves and submit their cases and any evidence to those Band Members present to decide according to Band Custom either to uphold or deny the appeal.
- d) Where an appeal is received, the Lucky Man Cree Nation Manager shall, within five (5) days of the receipt of the appeal, forward a copy of the appeal to each voting-age Band Member. The Lucky Man Cree Nation Manager shall also enclose information regarding when the appeal will be heard.
- e) Where the Band Membership decide, at a Band Meeting consisting of a minimum of 50% plus 1 of the eligible voters, that there was a violation in connection with the election the appeal shall be upheld and the position declared vacant.
- f) Where the Band Membership decide, at the Band Meeting consisting of a minimum of 50% plus 1 of the eligible voters, that there was no violation in connection with the election, the appeal shall be denied on the grounds that the evidence presented did not indicate any infraction of the Lucky Man Cree Nation's Election Act, and the candidate shall assume office.
- g) Where an appeal is received for the position of Chief, an acting Chief shall be selected from and by the new Council until:
 - i) The appeal is denied and the recently elected Chief assumes office.
 - ii) The appeal is upheld and a by-election is held immediately to fill the position of Chief.
- ...
- i) The decision of the Band Membership shall be final and binding on all parties involved.

Issues

[10] The Applicant's written representations replicate the submissions filed in support of her motion for an interlocutory injunction and do not explicitly identify the matters at issue in this application for judicial review. Based on the notice of application, the written submissions and the record, it can be discerned that the Applicant is concerned with a denial of procedural fairness in the hearing of the appeal and, more generally, with the reasonableness of the Appeal Decision. The Respondent submits that the issues are whether the election appeal was procedurally fair and whether the Appeal Decision was reasonable. I agree that those are the issues.

Standard of Review

[11] The Applicant makes no submissions on the standard of review. The Respondent submits that the standard of review on questions of procedural fairness is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43) and that the duty of fairness is a flexible and variable standard (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22 ("*Baker*"). The Respondent submits that the Appeal Decision, including the interpretation and application of the Election Act, is to be reviewed on a standard of reasonableness (*Testawich v Duncan's First Nation*, 2014 FC 1052 at para 21 ("*Testawich*"); *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*").

[12] As I have previously set out in *Gadwa v Kehewin First Nation*, 2016 FC 597 ("*Gadwa*"), the standard of review that applies to questions of procedural fairness is correctness and the

standard of review that applies to a band's interpretation and application of its customary election act is reasonableness (at paras 17-19).

Issue 1: Was the Election Appeal Procedurally Fair?

Applicant's Position

[13] The Applicant submits that at the October 23, 2016 Appeal Meeting, three of the Band members who appealed her election, Pauline Okemow, Edwin Okemow and Leona Bird, made erroneous and unsupported submissions regarding the Election Act and the content or interpretation of s 5(c) of the Election Act, creating confusion amongst the voters.

[14] More specifically, that during the Appeal Meeting the appellants and the Applicant (as well as another member whose election was appealed) were given the opportunity to speak to the Band membership about the appeals. Although at the commencement of the Appeal Meeting the lawyer for the Band explained that the portion of Pauline Okemow's appeal impugning the Election Act was outside the scope of the Appeal Meeting, when she addressed the membership, Pauline Okemow stated that the Election Act used in the June 29, 2016 election was invalid.

[15] Further, Pauline Okemow, Edwin Okemow and Leona Bird made erroneous submissions to the Band membership stating that eligibility to be nominated for the Chief's position required both that the candidate be born into the Band and be a direct descendant, which is contrary to s 5(c) of the Election Act.

[16] Pauline Okemow also made reference to a lawyer's opinion from 1996 regarding the Election Act which formed her understanding that the Chief must be born into the LMC Nation and be a direct descendant of a LMC member, but did not provide the Applicant with the referenced documents. Pauline Okemow has also stated that her objection is to the Applicant's descendance, claiming that the Applicant is not a direct descendant of the LMC Nation because Elders of the Band, via oral history, say that the Applicant's father, Howard Okemow, is in fact not her biological father. Pauline Okemow also objected to the presence of lawyers at the Appeal Meeting and refused to answer questions put to her.

[17] Edwin Okemow addressed the Band membership about the importance of having a Chief who is a direct descendant of an LMC Nation member and who is born into the Band. He referred to documentation in his possession and stated that this indicated that the Applicant was not eligible to run for Chief. He did not provide the Applicant with the referenced documents. He also stated that he had heard from "uncles and aunties" that the Applicant had transferred and was not born into the Band.

[18] When addressing the membership at the Appeal Meeting, Leona Bird also stated that the Applicant was not eligible to hold the office as Chief because she was not born into the Band and was not a direct descendant of an LMC Nation member. She also stated that she was told by her late father and uncles that the Applicant was transferred into the Band from Little Pine First Nation which the Applicant submits was reliance on hearsay evidence. Leona Bird did not file any documentation and, while she answered some questions from the Applicant's counsel,

shortly thereafter she refused to do so and objected to the presence of lawyers at the Appeal Meeting.

[19] In essence, the Applicant submits that the Appeal Meeting was procedurally unfair because it did not allow for proper scrutiny of the evidence relied upon by the appellants as the documents referred to by Pauline Okemow and Edwin Okemow were not disclosed to her and, to her knowledge, were not submitted as part of the appeal record until after the hearing was concluded; there was reliance on hearsay evidence absent corroborating documentation or direct evidence; and, the appellants refused to answer questions put to them by her counsel.

[20] The Applicant also submits that two Band members, her sister and mother, both of whom are mentally competent but suffer from physical disabilities, were denied the opportunity to vote by proxy which presents a reasonable apprehension of bias on the part of the Chief Electoral Officer.

[21] Further, that the conduct of Pauline Okemow was malicious and an abuse of process. The issues pertaining to the Applicant and her family's membership in the LMC Nation were before this Court in 2008 in *Okemow-Clark* and were remitted back to the LMC Nation to be dealt with in accordance with its Membership Code. Pauline Okemow was Chief at the time of that decision and was responsible for resolving the ambiguity in the Membership Code. However, even though she held office from 2004 to 2012, she failed to address this issue until she raised it as an appeal ground in an attempt to prevent the Applicant from taking office.

Respondent's Position

[22] The Respondent submits that the election appeal process was procedurally fair, being an open and transparent process held in accordance with the Election Act. The Respondent had an obligation to facilitate an appeal process in conformity with Band custom and the Election Act in addition to the principles of procedural fairness, and it fulfilled that obligation.

[23] The Respondent submits that there is no requirement that the procedure followed by the Band rise to the level of formality of a court. There is no legal right to a cross-examination, particularly given the setting of the election appeal. All of the parties were given reasonable notice and had full opportunity to participate.

[24] The Applicant accepted the validity of the Election Act but took the position that the question should not have been decided by the membership and this coloured her view of the entire process.

[25] The Respondent submits that there was no legal requirement that the appellants' submissions be based on documentary evidence and, given the nature of the appeal, it was appropriate that oral history evidence be presented and relied upon by the membership in reaching its decision on the appeal. Oral history is also admissible in a court of law and must be weighed similarly to documentary evidence as "it would be inconsistent and systematically undervalued if it were never given any independent weight but only used and relied upon where

there was confirmatory evidence” (*Xeni Gwet'in First Nations v British Columbia*, 2007 BCSC 1700 at para 152 (“*Xeni Gwet'in*”).

[26] The Respondent submits that there is no basis for finding that the Chief Electoral Officer was biased by refusing to allow a vote by a proxy for two Band members. Section 8.7.4 of the Electoral Officer’s Handbook provides that “proxy voting is not permitted” and nothing in the Election Act states otherwise.

Analysis

[27] As a preliminary observation I would note that this is a somewhat unusual circumstance in the context of a judicial review. This is because the notices of appeal, submitted to the LMC Band Manager pursuant to the Election Act, and documentation - if any - submitted to the LMC Nation by the appellants in connection with the appeals are not in the record before the Court. While in the Notice of Application the Applicant made a request, pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106, that the LMC Nation provide a certified record of the requested materials not in the Applicant’s possession, including the Band membership meeting record in respect of the Appeal Decision, it appears that this was not provided by the LMC Nation or pursued by the Applicant. There is also no record of the submissions made at the Appeal Meeting, which are addressed solely by the subsequent affidavit evidence filed in this application for judicial review. And, there are no reasons for the decision, which was effected by way of a “Yes” or “No” vote. Although the Band Manager, Crystal Albert, filed an affidavit stating her belief that the process for the election was fair to the parties, she did not attach any

documents pertaining to the appeal or address the issue of documentary or other submissions made in the appeal.

[28] That said, I agree with the Respondent that the content of the duty of procedural fairness owed in the context of the election appeal in this matter falls on the lower end of the spectrum. The nature of the Appeal Decision and the process described in s 9 of the Election Act does not resemble judicial decision-making such that significant procedural protections would be required. It is an informal, community based decision-making format.

[29] In *Parenteau v Badger*, 2016 FC 535, Justice Manson held that procedural fairness in the context of the removal of a councillor requires that the party know the case against him or her and be given the opportunity to be heard:

[49] It is well established that the Applicants were entitled to due process and procedural fairness in being dismissed from their positions as Councillors (*Sparvier v. Cowessess Indian Band No. 73*, [1993] F.C.J. No. 446 (Fed. T.D.) at para 57; *Felix 3*, above, at para 76; *Orr v. Fort McKay First Nation*, 2011 FC 37 (F.C.) at para 14). In this context, the Applicants were entitled to know the case against them, and be given an opportunity to be heard (*Duncan v. Behdzi Ahda First Nation*, 2003 FC 1385 (F.C.) at para 20; *Desnomie v. Peepeekisis First Nation*, 2007 FC 426 (F.C.) at paras 33, 34).

[30] In my view, for the reasons set out below, the Applicant was entitled to notice, an opportunity to make submissions and a full and fair consideration of those submissions by the decision-makers (*Baker* at para 22; *Gadwa* at paras 47-53). Section 9 of the Election Act, in essence, required that the Applicant be given notice of the appeal and that she, as well as the appellants, be given the opportunity to present their cases and any supporting evidence. The

Applicant does not dispute that she was given an opportunity to respond to the allegations at the Appeal Meeting, which she did, presenting and explaining seven documents to establish that she is born into and/or is a direct descendant of a member of the LMC Nation and is a Band member.

[31] The Election Act does not provide the Applicant with the right to cross-examine appellants and nor does it require that she be given notice of all documentation that will be used by the appellants at the hearing. However, the Applicant asserts that Pauline Okemow and Edwin Okemow, in their submissions to the LMC Nation members at the Appeal Meeting, both referred to documents in their possession which they submitted supported their contention that the Applicant was not an eligible candidate for election as Chief. In my view, if the appellants were making such an assertion, which went to the heart of the appeals, it was a breach of procedural fairness not to provide those documents to the Applicant and the Band members in attendance at the Appeal Meeting.

[32] Section 9(c) of the Election Act states that the person lodging the appeal and the affected candidate must present themselves “and submit their cases and any evidence to those Band Members present to decide according to Band Custom either to uphold or deny the appeal”. In this matter, the Appeal Meeting was held and immediately thereafter a vote was taken. Thus, although the Election Act specifically contemplates the submission of evidence, in this case the appellants appear not to have submitted the documentary evidence that they purported to rely upon in support of their oral submissions. The failure to submit those documents to permit review and consideration of them resulted in a breach of procedural fairness as the Band

members in attendance at the Appeal Meeting who voted as to the Applicant's eligibility to hold office as Chief decided that question based on an incomplete factual record.

[33] Further, in this application for judicial review the Respondent does not dispute the validity of the Election Act as ratified on July 21, 2000. Rather, it submits that s 5(c) requires that a candidate for Chief must i) be born into the LMC Nation and be a Band member, or ii) be a direct descendant of an LMC member and be a Band member. The Respondent submits that the Applicant's membership in the Band is not at issue but that there remains a genuine issue as to whether she was born into the LMC Nation or is a direct descendant of an LMC Nation member.

[34] However, in her amended affidavit sworn on December 1, 2016 and filed in response to the application for judicial review, Pauline Okemow stated:

2. I appealed the June 29, 2016 election because I felt that the wrong Election Act was used and that Crystal Okemow was not eligible to be a candidate for the position of Chief. My main concern is with the word "or" in section 5c of the Election Act, which sets out the eligibility requirements for Chief. To my recollection I never saw the word "or" in there and before it was always that a candidate for chief had to be born into Lucky Man and a direct descendant of a Lucky Man Cree Nation member.

3. I recall since 2004 when I first got elected there has always been a protest when Crystal Okemow is nominated. Her membership is not in question – it is her descendency. Indian Affairs cannot give anyone band membership, but can put a person on a list from a band they are affiliated with. To my knowledge, Crystal Okemow is not a direct descendant of a Lucky Man Cree Nation member because according to our Elders of the Band say her father is not Howard King but another man. So if DNA testing were done the finding will probably [be] that she is not a direct descendant of Lucky Man.

[emphasis in original]

[35] Pauline Okemow goes on to state that the July 7, 2000 meeting at which the Election Act was approved should be invalid because 50% plus one of the membership was required to pass anything and not enough members were in attendance.

[36] When cross-examined on her affidavit, Pauline Okemow confirmed that, in her view, the Election Act that should have been used was a version in which s 5(c) did not contain the word “or” and had always stated “and”, however, that when she went to the Band office “to check it out to see if there was anything there, it wasn’t even there”. Further, that the Election Act used in 2004 and 2008 when she was elected as Chief never had the word “or” as she had deposed in her affidavit.

[37] The uncontradicted affidavit evidence of the Applicant states that at the Appeal Meeting, counsel for the Respondent made a preliminary ruling that the portion of Pauline Okemow’s appeal impugning the Election Act by which the election was run was outside the scope of the Appeal Meeting. However, that Pauline Okemow made submissions about the invalidity of the Election Act used in the subject election, referring to a lawyer’s opinion. Further, Pauline Okemow, Edwin Okemow and Leona Bird all made submissions that the Election Act required the Applicant to both be born into the LMC Nation and be a direct descendant of an LMC Nation member in order to be an eligible candidate for election as Chief.

[38] Based on the evidence before me, it appears that Pauline Okemow’s allegations as to the invalidity of the Election Act were, contrary to her submissions at the Appeal Meeting, never supported by any documentary evidence. Further, that her submissions and those of

Edwin Okemow and Leona Bird that s 5(c) required both that the Applicant be born into the LMC Nation and be a direct descendant of an LMC Nation member were similarly unsupported and erroneous.

[39] In fact, as is evident from the LMC Nation General Board Meeting minutes of July 7, 2000, which are attached as an exhibit to the Applicant's affidavit filed in support of this application for judicial review, a motion concerning s 5(c)(i) and (ii) and proposing the current wording that:

- c) No person may be a candidate for election for Chief unless
 - i) He/she was born into the Lucky Man Cree nation and is a Band member; or
 - ii) He/she is a direct descendent of a Lucky Man Cree nation member and is a Band member

was proposed by Edwin Okemow and was carried. There is no evidence that the wording of ss 5(c)(i) and (ii) has subsequently been varied. Further, Edwin Okemow's submissions at the Appeal Meeting as to the content of s 5(c) were in contradiction of his own proposal for ratification of that provision as it stands in the current Election Act.

[40] In the result, the Applicant's submission that the LMC Nation members in attendance at the Appeal Meeting were, as a result of these unfounded allegations, left confused as to the eligibility requirements, has merit in the absence of any evidence to the contrary. In that regard, I note that in the Applicant's uncontradicted affidavit she states that at the Appeal Meeting, after her documents were submitted and she had responded to questions, Cindy Okemow, a Band member, addressed the Band stating that although the Applicant had proven that she was born

into the Band this was not sufficient, the Applicant should also provide a DNA sample to prove that she was a direct descendant of an LMC Nation member. If this assertion was representative of the views of the voting members, then it suggests that they were not basing their decision on the application of the facts and the clear wording of ss 5(c)(i) and (ii) but were instead imposing an alternate interpretation of that provision requiring not only that the Applicant be both born into the Band, which she had established, but that she prove by DNA sampling that she was also a direct descendant of an LMC Nation member. This is the same view stated by Pauline Okemow when cross-examined on her affidavit.

[41] In my view, in these circumstances, the Applicant was denied procedural fairness as the appellant, Pauline Okemow, sought to and caused the jurisdiction of the Appeal Meeting to be exceeded, and thereby prejudiced the decision-making process, by bringing into question the validity of the Election Act and/or the applicable version of the Election Act. Further, by the erroneous and unfounded allegations by the appellants as to the content of s 5(c) of the Election Act.

[42] As stated by Justice Mosley in *Testawich*, “mere compliance with the Regulations does not guarantee fairness. The Court must review the administrative proceedings in substance and query whether they conformed to the fundamental principles of natural justice” (at para 38). While that case is distinguishable on its facts, the affidavit evidence in this matter establishes the Applicant may have been prejudiced by the unfounded submissions as to the validity of the Election Act and the content and requirements of s 5 of the Election Act. In the absence of

evidence to the contrary, the Appeal Meeting procedure failed to conform to the fundamental principles of natural justice.

[43] Further, while it may be, as the Respondent contends, that with respect to some issues it would be appropriate for oral history evidence to be presented and to be relied upon by the Membership at the Appeal Meeting, I do not agree that the question of whether the Applicant's father was actually her biological father falls into this category. Pauline Okemow's affidavit evidence was that, according to the Elders, the Applicant's father was not Howard King but was another man. When cross-examined on her affidavit on this issue, she stated that her father, Andrew King, and Rod King have "always been very vocal about that" and added that just lately she had heard her auntie, Joan Braaten, say the same thing. Her father and Rod King are no longer living and, when asked if her aunt might be able to provide an affidavit, Pauline Okemow responded that she had no idea. Pauline Okemow attributes her submission as to the Applicant's biological father to "oral tradition".

[44] The Respondent relies on *Xeni Gwet'in* in support of the use of oral history evidence. That case pertains to the use of oral history in the context of a dispute over Aboriginal land title. In my view, this has little relevance to an allegation attributed to Pauline Okemow's father, uncle and aunt, that they believed the Applicant's father was not her biological father.

[45] The Supreme Court of Canada, drawing from the Report of the Royal Commission on Aboriginal Peoples, has described oral history as being the Aboriginal historical tradition of passing on legends, stories, and accounts through generations in oral form (*Delgamuukw v*

British Columbia, [1997] 3 SCR 1010 at para 85 (“*Delgamuukw*”). Further, that oral histories pose unique evidentiary challenges as they consist largely of out-of-court statements that have been passed through an unbroken chain across generations of a particular Aboriginal nation to the present day (*Delgamuukw* at para 86; also see *Chief Chipeewayan Band v R*, 2001 FCT 858 at para 51 (“*Chipeewayan*”) (upheld in *Chief Chipeewayan Band v R*, 2002 FCA 221 with leave to appeal to the SCC denied in *Chief Chipeewayan Band v R*, 307 NR 400)). Aboriginal oral history evidence, including that which relates to an individual’s ancestry, has primarily been introduced before courts in respect of Aboriginal rights and titles claims or matters involving the interpretation of Indian treaties where the court is tasked with adjudicating historical and pre-historical facts and must give due weight to the historical perspectives of Aboriginal peoples in such contexts (see for example *Delgamuukw*; *Chipeewayan*; *Mitchell v Minister of National Revenue*, 2001 SCC 33 (“*Mitchell*”); *Alderville v Canada*, 2015 FC 920; *Canada v Benoit*, 2003 FCA 236 (“*Benoit*”) (leave to appeal to the SCC denied in *Benoit v Canada*, [2003] SCCA No 387)).

[46] Even if Pauline Okemow’s evidence concerning the Applicant’s biological father could properly be classified as oral history evidence, and I do not believe that it can, the jurisprudence is clear that oral history evidence must be both useful and reasonably reliable before it is admitted and that this determination must be made on a case-by-case basis (*Mitchell* at paras 31-32; *Benoit* at para 100; *Delgamuukw* at para 87). I am not satisfied that Pauline Okemow’s evidence as to the identity of the Applicant’s biological father can be considered reasonably reliable. The use of this hearsay information, in the guise of oral history evidence, may well have also prejudiced the outcome of the Appeal Meeting.

[47] The Applicant also alleges an abuse of process arising from the failure of Pauline Okemow, as former Chief, to address the issue of the Applicant's family's Band membership since the 2004 dispute which led to the *Okemow-Clark* decision in 2008, instead only raising the matter as a ground of appeal upon the Applicant's election as Chief. In *Okemow-Clark* the LMC Nation and Roderick King, made a decision to take away the membership in the LMC Nation of the applicants in that action, which included the Applicant's father, Howard Okemow, and his descendants, including the Applicant, which resulted in their ineligibility to vote or run in the September 2004 election. Justice de Montigny quashed the decision to exclude the applicants from the Band list and remitted the question of the membership of the applicants back to the Chief and Council to be dealt with in accordance with the Membership Code of the LMC Nation. However, he also held that:

[40] In the meantime, the status quo should be maintained. The uncontradicted affidavit evidence of Roberta Okemow-Clark is that all applicants were eligible to vote in the 2000 election and that three of the applicants were elected as Band Councillors. Unless and until the applicants are removed from the Membership List in due compliance with the *Membership Code* and the *Indian Act*, they shall therefore immediately be reinstated as Band Members of Lucky Man Cree Nation, with full rights and privileges of Band Membership, for themselves and for their descendants. In particular, they shall be eligible to vote and to seek nominations and office as candidates in any upcoming election to be called and held.

[48] Thus, the *Okemow-Clark* decision in 2008 concerned only LMC Nation Band membership and not the eligibility provisions of s 5(c) of the Election Act requiring that a candidate must be born into the LMC Nation or be a direct descendant from an LMC Nation member that are at issue in this matter. Further, in her amended affidavit, Pauline Okemow stated that the Applicant's membership in the LMC Nation is not in question and the Respondent

echoes this in its submissions. As such, I am not convinced that an abuse of process has occurred in this regard.

[49] Nor do I agree with the Applicant's submissions that she was denied procedural fairness on the basis that her sister and mother could not vote by proxy. Section 8.7.4 of the Electoral Officer's Handbook is attached as an exhibit to the affidavit of the Chief Electoral Officer. This states that "No legal document whether it be a power of attorney, guardianship, mandate or any other legal document can grant a person the right to vote on behalf of another elector. Proxy voting is not permitted" [emphasis in original]. The Applicant has not contested the application of this provision nor does the Election Act provide for voting by proxy. Accordingly, the Applicant's submission of bias because of the Chief Electoral Officer's refusal to allow proxy voting is without merit.

[50] Regardless, based on my above findings that it was a breach of procedural fairness not to provide the Applicant and the Band members in attendance at the Appeal Meeting with the documents referenced and purported to be relied upon by the appellants; that the appellant, Pauline Okemow, caused procedural fairness to be breached by causing the jurisdiction of the Appeal Meeting to be exceeded by bringing into question the validity of the Election Act and making unfounded and erroneous allegations as to the applicable version of the Election Act; that a denial of procedural fairness potentially arose from the unfounded and erroneous allegations of the appellants as to the current content and requirements of s 5(c) of the Election Act; and, the use of hearsay evidence, in the guise of oral history evidence, all of which may have prejudiced the outcome of the Appeal Meeting, I am satisfied that the application must be granted.

Issue 2: Was the Decision Reasonable?

[51] Even if I am in error as to the breach of procedural fairness, because there is sufficient evidence to establish that the Band members attending the Appeal Meeting may have been misled as to the eligibility requirements under s 5 of the Election Act, this also renders their decision unreasonable in the absence of evidence to the contrary.

[52] The Respondent submits that the purpose of the eligibility provisions in the Election Act are to preserve the descendancy of the LMC Nation and that the question of the Applicant's descendancy from the original members of the LMC Nation continues to be an issue in the context of the eligibility to hold the office of Chief pursuant to s 5(c) of the Election Act, interpreted in accordance with Band custom.

[53] In this regard, the Respondent submits that "descendant of a Lucky Man member" refers to the original members of the LMC Nation and not those who later transferred into the Band. In addition, "Born into the Band" is also understood in a strict sense as being born to a bona fide member of the Band and accepted as a full member of the community.

[54] The Respondent submits that there is a question as to whether Howard Okemow, the Applicant's father, was in fact a member of the LMC Nation, considering his parents were members of Little Pine First Nation and it is widely held that he was improperly added to the Band. In addition, there is a question as to whether he was in fact the Applicant's father based on knowledge passed on by Elders of the Band. Further, the Applicant's mother, Grace, was a

former member of Piapot First Nation. The Respondent submits that this history has caused considerable controversy over the years in a Band that is struggling to preserve its cultural identity. There is reason to doubt whether the Applicant is in fact “a direct descendant of a Lucky Man Cree Nation member”, or “born into the Lucky Man Cree Nation”, as understood in light of Band custom.

[55] The Respondent submits that the decision by the membership on the election appeal reflected the membership’s understanding of the custom of the Band and the eligibility provisions of the Election Act in the context of the history and culture of the LMC Nation. Given the lack of clarity in the evidentiary record, the history of which has been a matter of considerable controversy for many years, the outcome falls into the defensible range of reasonable possibilities. The substitution of a different decision would be contrary to the custom of the Band and the will of its membership.

[56] I would note, first, that there is no record of what evidence was put before the Band membership in attendance at the Appeal Meeting concerning the interpretation of s 5(c) of the Election Act or Band custom. Further, that the Respondent’s submissions concerning the Band’s interpretation of this provision is not based on any evidence in the record that was before the decision-makers. The purported history of the Band set out in the facts section of the Respondent’s submissions is primarily, and very loosely, based on the cross-examination evidence of Pauline Okemow. Based on the record before this Court, it is not possible to determine if, in fact, the decision was based on a reasonable interpretation of s 5, utilizing Band custom.

[57] Further, the question of Howard Okemow's membership in the LMC Nation was addressed by this Court in *Okemow-Clark*. This Court held that he and his descendants would continue to be LMC Nation Band members with all attendant rights, including to hold office, until such time as his membership was addressed by the Chief and Council. There is no evidence that the Chief, which was Pauline Okemow until the election of the Applicant, subsequently addressed the membership of Howard Okemow in the context of the LMC Nation Membership Code and the *Indian Act*. Accordingly, it is unreasonable for the Respondent to now suggest, eight years later, that Howard Okemow's membership is in issue. If the Appeal Decision was based on this premise, as the Respondent submits, then it too is unreasonable. And, as addressed above, the evidence questioning the identity of the Applicant's biological father is not oral history evidence, it is also disputed by the sworn evidence of the Applicant. In my view, if this was another basis upon which the Appeal Decision was made, it was also unreasonable.

[58] What was available to the Band members in attendance at the Appeal Meeting and is in the record before the Court by way of her affidavit, is the documentary evidence submitted by the Applicant to establish that she was both born into the LMC Nation and that she is a direct descendant of a member of the LMC Nation. The appellants, with the exception of Pauline Okemow, provided no affidavits in response to the application and the affidavits filed by Pauline Okemow, the Band Manager and the Chief Electoral Officer do not address the evidence that was before the decision-makers. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable

outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47). In this matter, the absence of an evidentiary record concerning the appeals essentially removes the Court's ability to assess the existence of justification, transparency and intelligibility within the decision-making process. And, based on the evidence filed in this application, I cannot conclude that the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. For this reason also the application is granted.

[59] There is one final point that I feel compelled to address. It is, perhaps, the elephant in the room. The Applicant in her submission raised the question of whether s 5(c) of the Election Act is discriminatory. The issue was not pursued and she did not challenge the validity of that provision. Counsel for the Respondent acknowledged that the eligibility requirement of being born into the LMC Nation or of being a direct descendant of an LMC Nation member has, perhaps, a somewhat unsavoury aspect. I would note that the only evidence before this Court as to the founding and history of the LMC Nation, upon which the interpretation of s 5(c) was purported to be based in accordance with Band custom, and of those who are purported to be its founding members, is the limited cross-examination evidence of Pauline Okemow. This Court could not, nor is it the role of the Court, to make a determination as to whether the Applicant was born into the LMC Nation or is a direct descendant of an LMC Nation member based on that very limited evidence. However, the validity of the eligibility requirement of being born into the LMC Nation or a direct descendant of an LMC Nation member, exactly how those terms are to be interpreted or defined, and, which members fall into those categories is an issue that should be dealt with directly by the LMC Nation, other than in the context of an appeal of an election, to avoid ongoing uncertainty and avoidable election appeals.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The October 23, 2016 decision of members of the Lucky Man Cree Nation removing the Applicant from the elected office of Chief on the basis that she did not meet the candidate criteria specified in s 5(c) of the Lucky Man Cree Nation Election Act is hereby quashed and the Applicant is reinstated as Chief in accordance with her election to that office on June 29, 2016.
3. The Applicant shall have her costs. In the event that the parties cannot agree as to the quantum of the costs to be paid to the Applicant, they may file brief written submissions to the Court, not to exceed two pages in length, within 10 days of the issuance of this decision.

“Cecily Y. Strickland”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1840-16

STYLE OF CAUSE: CRYSTAL OKEMOW v LUCKY MAN CREE NATION

PLACE OF HEARING: SASKATOON, SASKATCHEWAN

DATE OF HEARING: DECEMBER 15, 2016

JUDGMENT AND REASONS: STRICKLAND J.

DATED: JANUARY 13, 2017

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