

Federal Court



Cour fédérale

Date: 20180412

**Dockets: T-1298-17
T-1522-17**

Citation: 2018 FC 399

Ottawa, Ontario, April 12, 2018

PRESENT: The Honourable Mr. Justice Manson

Docket: T-1298-17

BETWEEN:

**ERIC SHIRT, SHANNON HOULE, VALERIE
STEINHAUER, AND GREG CARDINAL**

Applicants

and

SADDLE LAKE CREE NATION

Respondent

Docket: T-1522-17

AND BETWEEN:

**CHIEF AND COUNCIL OF SADDLE LAKE
CREE NATION ON THEIR OWN BEHALF
AND ON BEHALF OF SADDLE LAKE CREE
NATION**

Applicants

and

ERIC SHIRT, SHANNON HOULE, VALERIE

STEINHAUER, AND GREG CARDINAL

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This matter involves two applications for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, with respect to a decision made by an election eligibility redetermination panel (the “Panel”) of the Saddle Lake Cree Nation (“SLCN”). The first application was made by Eric Shirt, Shannon Houle, Valerie Steinhauer and Greg Cardinal (the “Applicants”), who are members of the SLCN. The second application was made by the SLCN Chief and Council on their own behalf and on behalf of the SLCN. The parties all take issue with the Panel’s decision, for different reasons.

II. Background

[2] The Saddle Lake Cree Nation (the “Saddle Lake Band”) is a “band” as defined by the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. It comprises two communities: the Saddle Lake Cree Nation (“SLCN”) and the Whitefish Lake First Nation (“WLFN”).

[3] The SLCN and WLFN elect separate chiefs and councils in separately held elections. Once elected, the nine representatives of the SLCN and the four representatives of the WLFN together form the Saddle Lake Band’s “council of the band” as defined in the *Indian Act*.

Elections are governed by the Saddle Lake Tribal Custom Election Regulations [*SLTCER*], which were taken from band meetings held in 1955 and 1960 and have never been amended. A copy of those regulations is attached hereto as an appendix.

[4] This matter involves events surrounding a SLCN election that took place in June 2016 and was reviewed by this Court in *Shirt v Saddle Lake Cree Nation*, 2017 FC 364 [*Saddle Lake*]. In *Saddle Lake* at paragraphs 2-10, Justice McVeigh summarized the relevant facts as follows:

- in March 2016, an “election committee” was appointed by the SLCN Chief. As well, the SLCN Chief and Council contracted a non-SLCN individual to act as “electoral officer”. The election committee was to assist the electoral officer;
- a nomination meeting was held on June 1, 2016, and was overseen by the electoral officer;
- after the nomination meeting, several protests were submitted regarding nominees who allegedly did not meet the requirements of the *SLTCER*. The protests were given to the election committee. The electoral officer took no part in deciding eligibility;
- the election committee removed the Applicants from the official candidates list. The Applicants allegedly failed to meet residency requirements, or were in a common-law marriage, in contravention of the *SLTCER*, but no reasons were provided to them;
- the election committee met with Greg Cardinal. Eric Shirt wrote a letter to the Chief, Council and election committee. Shannon Houle protested her removal from the list and her nominator requested an explanation. No consideration was given to these submissions as the official candidates list was already sent for printing; and

- elections were held for the Councillor positions on June 15, 2016, and for the Chief position on June 22, 2016.

[5] Justice McVeigh went on to find that (*Saddle Lake* at paras 26-66):

- the SLCN has election regulations and therefore section 74 of the *Indian Act*, as well as the *Indian Band Election Regulations*, CRC, c 952 [*Indian Band Election Regulations*], do not apply;
- the SLCN does not have an election custom that is generally accepted and supported by a majority of its members;
- there is no provision in the *SLTCER* for the creation of an election committee or a protest of a nomination. Band members were entitled to know the criteria, role and process for the appointment of an election committee; and
- the election committee's procedures for determining the eligibility of the Applicants did not meet the minimum requirements of notice, opportunity to make submissions and a full and fair consideration of those submissions. Furthermore, the complete lack of reasons suggested that the negative determinations were unreasonable.

[6] Based on these findings, Justice McVeigh quashed the decision to remove the Applicants from the official candidates list. Given that the integrity of the nominee process was undermined, their eligibility needed to be properly determined. If any of the Applicants were deemed eligible, a new election was to be held (*Saddle Lake* at para 72). Furthermore, she stated at paragraph 76:

If a new election must be held, it must be done in accordance with the [*SLTCER*] and/or a custom that has the support of the majority of band members. Any process chosen by the band must be procedurally fair including a transparent process known to all

members. If a nominee is protested they must be notified and given an opportunity to respond. Any decision to remove a nominee due to a protest must be made by an unbiased decision maker(s) who gives full and fair consideration to the protest and nominee's submissions. Since none of these processes are currently defined in the [SLTCER] they must either be amended to reflect the above or a custom must be approved by a majority of the band membership. The current Chief and Council will remain in place until and if the new election is needs [sic] to be held because one or more of the applicants become eligible.

[7] On May 15, 2017, a community meeting was held to discuss the implications of *Saddle Lake*. Notice was provided and over 150 SLCN and WLFN members attended. A presentation was given, which explained that:

- the Applicants' eligibility needed to be redetermined as the process used by the election committee was not fair;
- the process of redetermination needed to address minimum fairness, which included notice to the nominee, an opportunity for the nominee to make submissions and a determination made by an unbiased decision-maker who gives full and fair consideration of the record; and
- once the Applicants' eligibility had been redetermined, if any one of the Applicants were found to be eligible then a new election must be held.

[8] As well, it was explained that two processes needed to take place: the first being the redetermination of the Applicants' eligibility; the second being the election reform process. A motion was put forward to begin reforming election procedures. That reform process is currently ongoing.

[9] Regarding the redetermination process, the SLCN Chief and Council asked the June 2016 electoral officer to consider the Applicants' eligibility. The response received from the electoral officer showed that he had predetermined the outcome of any redetermination and therefore was not in a position to make a fair redetermination.

[10] On June 6, 2017, the Applicants filed a contempt motion against SLCN, alleging that no eligibility redetermination had been completed, contrary to Justice McVeigh's order in *Saddle Lake*. Following discussions between this Court and both parties, a consent order was signed by Justice Lafrenière on July 12, 2017, ordering that:

- on or before July 30, 2017, the SLCN would appoint members of an election committee;
- on or before August 31, 2017, the election committee would hold a hearing to redetermine the eligibility of the Applicants; and
- on or before September 8, 2017, the election committee would notify the Applicants of its decision.

[11] The SLCN Chief and Council then directed the formation of a three to four member panel to see the redetermination process through. Finlay Moses, a band employee, and Norma Large, a policy advisor to the SLCN Chief and Council, were directed to provide administrative support to the yet-to-be appointed panel.

[12] Norma Large is the sister of John Large, who was elected as a Councillor in the June 2016 election and was acting Chief at the time that election was set in 2016. Her sister made a protest that resulted in the removal of the nominations of Eric Shirt and Shannon Houle. Finlay

Moses also filed a protest letter against these nominations. Neither Norma Large nor Finlay Moses selected the members or established the Panel; this was done by way of a band council motion.

[13] On July 26 and 31, 2017, the SLCN Chief and Council passed motions appointing a three-member redetermination panel (the “Panel”) and authorizing the Panel to establish its own process and procedures. The Panel members were allegedly chosen on the basis of availability, lack of any apprehension of bias, and their respect as elders within the community. Notice of the motions was made public.

[14] On August 2, 2017, the Panel sent letters to each Applicant outlining the process it would use. That process was described as follows:

- each Applicant could provide a written response to the protest letter challenging their eligibility, including any supporting documentation and their contact information, by a specified deadline;
- an interview would take place between the Panel and each Applicant, with no other persons allowed to be present, at a specified time and location, unless the Applicant could not attend that interview, in which case the Panel would rely solely on the written submissions;
- in the event that no submissions were received by an Applicant, the eligibility decision would be made solely on the basis of the information contained in the protest; and
- the Panel’s decision and reasons would be sent to each Applicant and posted publicly.

[15] Counsel for the Applicants and SLCN exchanged emails on August 3 and 4, 2017, regarding the in-person interviews. The Applicants' counsel wished to be present during the interviews, but counsel for the SLCN explained that the Panel's process did not allow this and that counsel for the SLCN would not be present either.

[16] A case management conference was held on August 17, 2017, regarding the presence of counsel at the interviews. The Applicants also alleged bias on the part of the Panel. The SLCN alleges that Justice Lafrenière told the Applicants' counsel that she was seeking judicial review without filing an application, and that the call was concluded because there was nothing before the Court to issue directions or orders on.

[17] On August 18, 2017, the Applicants filed their application for judicial review, in which they sought, among other things:

- an order removing of the Panel for bias;
- an order quashing the Panel for lack of procedural fairness;
- an order quashing the Panel for failing to comply with the decision of Justice McVeigh in *Saddle Lake*;
- an order declaring a breach of the agreement between the Applicants and the SLCN for the procedure to be used by the Panel;
- an order for a new election; and
- an order for a new electoral officer who is independent and qualified.

[18] Meanwhile, the Panel received no written responses from the Applicants by the specified deadline, nor did any Applicants appear for an interview. The Panel prepared a letter requesting that the Applicants meet with the Panel and directed that it be sent to counsel for the Applicants. The Panel received no response.

[19] On August 31, 2017, the Panel made its decision. It found that Eric Shirt had been eligible to run in the election that was held in June 2016, but the other Applicants had not been eligible. The reasons for decision do not explain why those findings were made. However, the reasons state that:

- letters were sent to each Applicant inviting them to an interview and requesting supporting documentation. No response was received, but the Panel heard allegations of bias;
- the Panel reviewed material provided by Norma Large, including Federal Court records, affidavits and cross-examinations of Eric Shirt and Shannon Houle, the *SLTCER* and redetermination process, and minutes from the recent membership meeting;
- the *SLTCER* contained irregularities and impeded the selection of quality leaders; and
- the June 2016 election was not conducted in compliance with the SLCN tribal laws and customs.

[20] Although the Panel stated that they received no response from the Applicants, the Applicants allege that two members of the Panel did meet separately with Eric Shirt during the month of August prior to their decision.

[21] On October 5, 2017, the SLCN filed its application for judicial review, in which it sought an order quashing the Panel's decision.

[22] The SLCN submits that the Applicants' application for judicial review was premature because it was filed before the Panel's decision was made.

[23] I agree that absent exceptional circumstances, parties cannot proceed to the courts until the administrative process has run its course (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] at para 31). Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances, as long as that process allows the issues to be raised and an effective remedy to be granted (*CB Powell* at para 33).

[24] However, once the Panel made its final decision, the SLCN filed its own application for judicial review in which it submits that the Panel's decision was unreasonable and should be quashed. In response to that application, the Applicants rely on the same written submissions that they submitted in their initial application.

[25] Accordingly, the Applicants' written submissions are properly before this Court and will be considered, but the only relief this Court may grant is that which is sought by the SLCN in its application for judicial review. The Applicants' application for judicial review in file T-1298-17 is dismissed.

III. Issues

[26] The issues are:

- A. Does this Court have jurisdiction over the SLCN?
- B. Were the Applicants afforded procedural fairness?
- C. Was the Panel's decision reasonable?
- D. What is the appropriate remedy?

IV. Standard of Review

[27] The standard of review for issues relating to procedural fairness is a correctness standard. The Panel's decision regarding the Applicants' eligibility is reviewable on a reasonableness standard.

V. Analysis

A. *Does this Court have jurisdiction over the SLCN?*

[28] The SLCN raises the issue of whether it is a "federal board, commission or other tribunal" as contemplated in sections 2, 18 and 18.1 of the *Federal Courts Act*, since it is the Saddle Lake Band and not the SLCN that is recognized as a band under the *Indian Act*.

[29] This Court has consistently upheld its supervisory powers over band elections held under custom (*Ratt v Matchewan*, 2010 FC 160 [*Matchewan*] at para 105). Furthermore, as this Court stated in *Matchewan* at paragraph 106:

Consequently, whether the selection process is carried out by election pursuant to the *Indian Act*, or pursuant to custom, the Federal Court has supervisory jurisdiction over the process, and over those bodies, such as electoral officers, appeals boards or elders councils, purporting to exercise authority under the process.

[30] As such, I find that this Court has jurisdiction in this matter.

B. *Were the Applicants afforded procedural fairness?*

[31] The Applicants raise three issues relating to procedural fairness. First, they allege that they had no way of knowing what materials were before the Panel. Second, they allege that their counsel was not permitted to attend the interviews. Finally, they allege a reasonable apprehension of bias because Norma Large and Finlay Moses determined which individuals would comprise the Panel and then provided the Panel with materials and instructions.

[32] I find there was procedural fairness on all three fronts. Firstly, the Applicants were provided with the letters protesting their eligibility to run in the election. As well, they were provided with the opportunity to make written submissions, provide supporting documentation and attend an in-person interview. These procedures satisfy the requirements of notice and opportunity to make submissions, which Justice McVeigh found lacking in the original process (*Saddle Lake* at para 65). It was the Applicants who decided to not avail themselves of the procedures available to them.

[33] Secondly, prohibiting the Applicants' counsel from attending the interviews was not a breach of procedural fairness. There was no agreement between the parties, nor any requirement in Justice Lafrenière's order, that counsel must be present during the interviews. A motion by SLCN Chief and Council, of which notice was made public, authorized the Panel to establish its own procedures. The Panel decided, and provided notice to the Applicants well in advance, that only the Panel members and one Applicant could be present at each interview. Moreover, there was nothing precluding counsel from preparing the Applicants in advance of the interviews or helping to draft their written submissions.

[34] Moreover, I do not find that there is a reasonable apprehension of bias. While Norma Large and Finlay Moses have connections to the SLCN Chief and Council, as well as the protest letters, there is no evidence that they unduly influenced the Panel's decision. They were asked to provide support to the Panel, but it was the Panel that made the final decision regarding eligibility. As noted by this Court in *Sparvier*, 1993 CarswellNat 808 (WL)(FC) [*Sparvier*] at paragraph 75:

If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.

[35] While the Panel's lack of justification for its decision may suggest a problem with the reasonableness of its decision, there is simply not enough evidence to support the Applicants' allegations of bias.

C. *Was the Panel's decision reasonable?*

[36] The SLCN submits that the Panel's decision was unreasonable because its reasons for decision are completely devoid of any information or evidence that shows how or why the Panel made its findings. Furthermore, it submits that the Panel acted beyond its jurisdiction by making determinations regarding the conduct of the June 2016 election.

[37] In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process, and whether a decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

[38] A decision-maker's reasons do not need to address or explore every argument or issue raised and in some circumstances the court may "supplement" by considering reasons that "could be offered" in support of a decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 12; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, at para 54).

[39] However, the decision-maker's reasons should allow the reviewing court to understand why a decision was made and determine whether the conclusion is within the range of acceptable outcomes, which is not the case here.

[40] The Panel's reasons fail to identify any basis whatsoever on which its decision was made. The Panel had one task: determine whether the Applicants satisfy the eligibility requirements set out in the *SLTCER*. The *SLTCER* provide that an individual who is nominated to run in an election cannot:

- be a civil servant;
- be absent, unless he or she has provided written acceptance of the nomination;
- be living in a common law marriage;
- maintain his or her home off the reserve, unless his or her family or main place of residence is on the reserve, and he or she works off the reserve;
- have been convicted under the *Criminal Code*, RSC 1985, c C-46; or
- be under the age of 21 as of the day of the nomination.

[41] The Panel's reasons do not refer to these requirements, do not identify whether each Applicant met or failed to meet any of these requirements, and do not offer any information as to how or why each Applicant met or failed to meet any of these requirements.

[42] As such, the Panel's decision is not justified, transparent and intelligible, and it is impossible for this Court to determine whether the outcome is defensible in respect of the facts and the law.

[43] As well, I agree with the SLCN that the Panel went beyond its jurisdiction by finding that the June 2016 election was not conducted in compliance with tribal laws and customs. The notice of the band council motion dated July 26, 2017, stated that the Panel was authorized to “review and redetermine whether the [Applicants] were, as of June 1, 2016, eligible to stand as candidates” in the June 2016 election. The Panel also stated in its reasons that its mandate was to “[d]etermine the eligibility of four community members vying for leadership in the June 2016 election.”

[44] However, given that I have already found the Panel’s decision to be unreasonable, this jurisdictional issue is not determinative.

D. *What is the appropriate remedy?*

[45] The SLCN submits that the Panel’s decision should be quashed and the matter sent back to the Panel for reconsideration.

[46] I agree. As Justice McVeigh found, the integrity of the June 2016 election remains in doubt and the eligibility of the Applicants must be properly determined. If any of the Applicants are deemed eligible, a new election shall be held.

[47] The Panel shall reinitiate the redetermination of eligibility, provide the Applicants with the letters protesting their eligibility, allow the Applicants to make written submissions, and then provide availability on reasonable notice for an interview for each Applicant. The Panel must then provide sufficient reasons and justification in support of its final decision.

[48] At the hearing, counsel for the Applicants emphasized that the redetermination process needs to occur as soon as possible, given that the SLCN Chief and Council continue to represent the SLCN despite the impugned legitimacy of the June 2016 election. I agree. I also note that the Applicants previously had to obtain an order of this Court to ensure that the initial redetermination process occurred in a timely manner. For those reasons, I find that the Panel shall complete its process and notify the Applicants of its decision within two months of the date of this decision.

JUDGMENT in T-1298-17 and T-1522-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in T-1298-17 is premature and is dismissed;
2. The application for judicial review in T-1522-17 is allowed. The matter is sent back for reconsideration by the Panel. The Panel shall reinitiate the redetermination of eligibility, provide the Applicants with the letters protesting their eligibility, allow the Applicants to make written submissions, provide availability on reasonable notice for an interview for each Applicant, and then provide sufficient reasons and justification in support of its final decision. The Panel shall complete this process and notify the Applicants of its decision within two months of the date of this decision.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1298-17

STYLE OF CAUSE: ERIC SHIRT ET AL v SADDLE LAKE CREE NATION

AND DOCKET: T-1522-17

STYLE OF CAUSE: CHIEF AND COUNCIL OF SADDLE LAKE CREE
NATION ET AL v ERIC SHIRT ET AL

PLACE OF HEARING: EDMONTON, ALBERTA

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DATED: APRIL 12, 2018

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