Date: 20070824

Docket: T-799-05

Citation: 2007 FC 853

Ottawa, Ontario, August 24, 2007

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

LEONARD ALOOK and MARCEL GLADUE

Applicants

and

THE BIGSTONE CREE NATION SECOND ELECTION APPEAL REVIEW BOARD being MARIE LAVOIE, KAREN GREYEYES and MARION WOLITSKI and the Bigstone Cree Nation, and CHARLES HOULE and ERNEST AUGER

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Leonard Alook and Marcel Gladue were successful candidates in an election for Band Councillors for the Bigstone Cree Nation. After an Appeal Board determined in 2005 that there were irregularities in the electoral process, Messrs. Alook and Gladue brought this application for judicial review of the Appeal Board's findings, asserting that they were denied procedural fairness in the process, and that the Appeal Board was biased against them.

[2] For the reasons that follow, I am satisfied that the applicants were indeed denied procedural fairness in the appeal process, and that, as a result, this application must be allowed.

Background

[3] An election for Chief and Council of the Bigstone Cree Nation was held on September 17, 2002. The applicants were elected as Band Councillors.

[4] Appeals were then filed with respect to this election by the respondents Charles Houle and Ernest Auger, and by Albert Gladue. The appeal documentation asserted that there had been a variety of problems with respect to the conduct of the election.

[5] A three-person Appeal Board (the "first Appeal Board") was then established to consider the appeals, pursuant to the Bigstone Cree Nation's Election Code. In addition to reviewing the documentation filed by the appellants, it appears that the first Appeal Board also met with the appellants and obtained further information from them with respect to their appeals.

[6] At no time was either Mr. Alook or Mr. Gladue given notice of the appeal proceedings, nor was either of them provided with the substance of the allegations made by the appellants, or the evidence supporting them. Moreover, neither Mr. Alook nor Mr. Gladue was given any opportunity to be heard by the first Appeal Board.

[7] In a decision dated October 21, 2002, the first Appeal Board found there to have been significant irregularities in the electoral process, as alleged by Charles Houle and Ernest Auger. Albert Gladue's appeal was dismissed.

[8] An application for judicial review was then brought by Messrs. Alook and Gladue with respect to this decision. They argued that the first Appeal Board had failed to give them any notice of the appeals, and had denied them the opportunity to make representations with respect to the appeals. The applicants also submitted that the first Appeal Board was biased, as a result of the close relationship between some of the members of the Board, and failed candidates in the election.

[9] The application for judicial review culminated in an order being made by Chief Justice Lutfy on December 12, 2004, in which he set aside the decision of the first Appeal Board, and remitted the matter for a new hearing before a differently constituted Appeal Board.

[10] It should be noted that this order was made on the consent of the parties to that application for judicial review.

The Second Appeal Board Hearing

[11] A new Appeal Board was established in February of 2005 (the "second Appeal Board"). The second Appeal Board was also composed of three members, namely the respondents Marie Lavoie, Karen Greyeyes and Marion Wolitski.

[12] While the record is not entirely clear as to the procedure followed by the second Appeal Board, the uncontradicted evidence before the Court is that once again, neither Mr. Alook nor Mr. Gladue was given notice of the appeal proceedings, nor was either of them provided with the substance of the allegations or the evidence against them.

[13] Moreover, neither individual was afforded any opportunity to be heard by the second Appeal Board.

[14] On April 9, 2005, the second Appeal Board rendered a decision, which essentially adopted the conclusions of the first Appeal Board. Specifically, the second Appeal Board noted that two infractions of the Election Code found by the first Appeal Board to have occurred – the voting by Polling Clerks during the election, and the failure to adhere to the nomination procedure specified in the Election Code with respect to the eligibility of candidates – were sufficient by themselves to call into question the legitimacy of the election.

[15] As a consequence, the second Appeal Board ordered that the Bigstone Cree Nation hold a new election.

[16] It is this decision that is at issue in this application for judicial review.

Issues

[17] Messrs. Alook and Gladue raise two issues on this application. Firstly, they say that they were denied procedural fairness in relation to the hearing conducted by the second Appeal Board, by being denied the right to know the case that they had to meet, and by being denied the right to respond to it.

[18] Secondly, the applicants say that by essentially adopting the findings of the first Appeal Board as their own, the second Appeal Board was tainted by the bias that affected the proceedings before the first Appeal Board.

Standard of Review

[19] No submissions were made with respect to the standard of review that should be applied to the decision of the second Appeal Board.

[20] Both issues identified by the applicants raise questions of procedural fairness. In *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404, at ¶ 52-53, the Court noted that the pragmatic and functional analysis does not apply where judicial review is sought based upon an alleged denial of procedural fairness. Rather, the task for the Court is to isolate any act or omission relevant to the question of procedural fairness, and to determine whether the process followed by the decision-maker in question satisfied the level of fairness required in all of the circumstances.

Participation of the Respondents at the Hearing

[21] It should be noted that although none of the respondents filed any submissions in response to this application, counsel for the Bigstone Cree Nation appeared at the hearing "as a courtesy to the Court". Counsel explained that the Bigstone Cree Nation took no position in relation to the merits of the application, as it was of the view that it had an obligation to remain neutral in this matter.

[22] Two members of the second Appeal Board, namely Marie Lavoie and Marion Wolitski also appeared at the hearing.

[23] Given that the applicants were seeking solicitor and client costs against the respondents, all of the respondents appearing at the hearing were permitted to make submissions on the issue of costs.

Analysis

[24] I will deal first with the propriety of the procedure followed by the second Appeal Board in this matter.

[25] At the outset, it bears noting that the Bigstone Cree Nation has a written Election Code. This document sets out the process whereby the results of an election may be challenged, and further provides the authority for the establishment of Appeal Boards to consider the merits of challenges to election results. The Election Code does not, however, make provision for any

participatory rights on the part of successful candidates whose election is being challenged through the appeal process.

[26] That being said, it is well established by decisions of this Court that while it is important that Bands have autonomous processes for the election of governments, minimum standards of procedural fairness or natural justice are nonetheless required: see, for example, *Sparvier v. Cowessess Indian Band No. 73* (1993), 63 F.T.R. 242, at ¶ 47.

[27] In *Sparvier*, Justice Rothstein noted that candidates in Band elections are affected by decisions of Appeal Boards, and are thus entitled to fair hearings. At a minimum, this requires that affected individuals are entitled to notice of the allegations, and that they be provided with an opportunity to make representations: see *Sparvier* at ¶ 52.

[28] In this case, there is no doubt that these minimum standards were not met. While Messrs. Alook and Gladue had undoubtedly become aware of the nature of the allegations made against them through the judicial review proceedings taken in relation to the decision of the first Appeal Board, they were never provided with notice of these allegations in the context of the second Appeal Board proceedings.

[29] Even more importantly, neither individual was ever provided with any opportunity to respond to those allegations before the second Appeal Board.

[30] As a consequence, I am satisfied that the conduct of the proceedings carried out by the second Appeal Board was unfair to Messrs. Alook and Gladue, and that, as a result, the April 9, 2005 decision of the second Appeal Board must be set aside.

[31] I will also deal briefly with the allegation that a reasonable apprehension of bias existed with respect to the second Appeal Board.

[32] The test for determining whether actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: that is, the question for the Court is what an informed person, viewing the matter realistically and practically - and having thought the matter through – would conclude: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394.

[33] In my view, Messrs. Alook and Gladue have not demonstrated the existence of a reasonable apprehension of bias on the part of the second Appeal Board. Even if I were to accept that the decision of the first Appeal Board was tainted by bias, the fact that the second Appeal Board seemingly adopted the reasoning of the first Appeal Board does not, by itself, demonstrate the existence of a reasonable apprehension of bias on the part of the second Appeal Board.

Remedy

[34] As noted above, I am satisfied that the proceedings before the second Appeal Board were unfair to Messrs. Alook and Gladue, and that, as a result, the April 9, 2005 decision of the second Appeal Board must be set aside.

[35] Where a finding has been made that a reviewable error has been made in arriving at a decision, the normal practice is to send the matter back for a new decision to be made. However, in this case, there is little to be gained in so doing. The disputed election took place in 2002, and it appears that there has been at least one intervening Band election since that time. The applicants evidently chose not to stand for re-election in that election. In these circumstances, there is nothing to be gained by referring this matter back for a third hearing of the election appeal.

[36] As a consequence, while I am satisfied that the applicants were denied procedural fairness in relation to the proceedings before the second Appeal Board, I decline to remit the matter for a further hearing.

Costs

[37] The applicants seek solicitor and client costs in connection with this application, submitting that the procedural errors in the conduct of the first appeal which gave rise to the consent order of Chief Justice Lutfy in December of 2006 were well known in the community, and that the second Appeal Board nevertheless went on to make precisely the same errors the second time around.

[38] The applicants point out that virtually no procedural guidance was provided to the second Appeal Board by the Band. According to the applicants, this supports an order of solicitor and client costs being made against the Band.

[39] Counsel for the Bigstone Cree Nation concedes that given the recognition that the hearing before the first Appeal Board was flawed, as is reflected by the order setting aside the first Appeal Board's decision going on consent, there was some duty on the Band to provide procedural guidance to the second Appeal Board, in order to ensure that the same mistakes were not made again. Nevertheless, counsel for the Band submits that its failure to do so does not support an order for solicitor and client costs.

[40] Ms. Lavoie and Mr. Wolitski point out that they served on the second Appeal Board on a voluntary basis, and received no guidance whatsoever from the Band with respect to the procedure that they were to follow in connection with the conduct of the appeal. In this regard, a copy of the letter constituting the second Appeal Board was provided to the Court, which simply directs the second Appeal Board to "review and make a decision".

[41] I am of the view that in the particular circumstances of this case, it is appropriate that an award of costs be made in favour of the applicants, and that the order should be made solely against the Band. In addition to the grounds advanced by the applicants in support of such an award, I would further note that the Bigstone Cree Nation's Election Code is clearly inadequate, as it makes

no provision for any participatory rights on the part of successful candidates whose election is challenged, and thus provides no procedural guidance to Appeal Boards.

[42] That said, I am not persuaded that the conduct of the Bigstone Cree Nation was such as would justify an award of solicitor and client costs being made against it.

[43] For these reasons, considering the factors set out in Rule 400(3) of the *Federal Courts Rules*, and in the exercise of my discretion, I order that the Bigstone Cree Nation is to pay the applicants' costs of this application, which I fix at $3,000.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, and the April 9, 2005 decision of the second Appeal Board is set aside.

2. For the reasons previously given, I decline to remit the matter for a further hearing.

3. The applicants are entitled to their costs of this application from the Bigstone Cree Nation, in the amount of $3,000.

"Anne Mactavish"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-799-05
STYLE OF CAUSE:	LEONARD ALOOK and MARCEL GLADUE v. THE BIGSTONE CREE NATION SECOND ELECTION APPEAL REVIEW BOARD being MARIE LAVOIE, KAREN GREYEYES and MARION WOLITSKI and the Bigstone Cree Nation, and CHARLES HOULE and ERNEST AUGER
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	August 22, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Mactavish J.
DATED:	August 24, 2007

APPEARANCES:

Mr. Ian H. Gledhill	FOR THE APPLICANTS
Mr. Leighton Decore	FOR THE RESPONDENT (Bigstone Cree Nation)
Mr. Marion Wolitski	ON HIS OWN BEHALF
Ms. Marie Lavoie	ON HER OWN BEHALF

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