

Date: 20080620

Docket: T-853-07

Citation: 2008 FC 771

Ottawa, Ontario, June 20, 2008

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

**CHIEF BILLY GOODTRACK,
WILLIAM PICKENS, TERRY GOODTRACK,
LORRI MACKINTOSH, CLIFF LECAINE AND
CAROLINE LECAINE-KERR**

Applicants

and

**ELLEN BERNADETTE LECAINE,
PRESTON LECAINE, LEONARD LETHBRIDGE SR.,
ROSS LETHBRIDGE, DAVE OGLE**

Respondents

REASONS FOR ORDER AND ORDER

[1] Who is chief of Wood Mountain First Nation, Billy Goodtrack or Ellen LeCaine? Each claims to be elected in accordance with band custom; Chief Goodtrack and his four councillors by acclamation on 16 through 19 March 2006, and Chief LeCaine and her four councillors on 24 March 2006. Each acknowledges that band custom was codified. Chief Goodtrack relies upon the *Wood Mountain Band Custom Code* said to be in force since 1992, as well as the *Band Custom*

Election Regulations and Band Custom Procedures. Chief LeCaine relies upon the *Wood Mountain Lakota Nation Election Act* which came into force in 2005, and had the effect of repealing what, if anything, preceded it.

[2] Chief Goodtrack says that the 2005 Election Act is illegal, null and void. Chief LeCaine says there is insufficient evidence to establish that the 1992 Code was ever in place, but if it was, its own amending procedure was followed in repealing and replacing it with the 2005 Act. In the alternative, if the amending procedure was not followed, a broad consensus had developed which had the effect, in virtue of custom, of amending the written amending procedure.

[3] This is an application by Chief Goodtrack and his councillors by *quo warranto*. They ask by what authority Chief LeCaine and her councillors purport to hold office. If I hold that the 2005 Act is validly in place, then Chief LeCaine and her councillors are presumptively in office. Subsidiary allegations that, in any event, Chief LeCaine and councillors had not been elected in accordance with proper procedure under the 2005 Act were previously struck by Prothonotary Lafrenière.

[4] I hold that the *Wood Mountain Lakota Nation Election Act* was validly in force and effect in March 2006 and that, therefore, Chief LeCaine, and her councillors, are presumptively in office. It is not necessary to reach a definitive conclusion as to whether the 1992 Code and related documents were in place. If they were, the amending procedure was followed. If they were not, the 2005 Act reflected a broad consensus within the band.

BACKGROUND

[5] Except for a very brief spell, Chief Goodtrack had been band Chief from 1968 through 2006. At the previous election held in 2002, he was re-elected as Chief. Ellen LeCaine, Caroline LeCaine-Kerr, Ross Leftbridge and Loretta Leftbridge were elected to the four councillor positions. Some seventy band electors voted. The term of office for all five ran from 1 April 2002 to 31 March 2006.

[6] Shortly thereafter, there was a sharp divide with Chief Goodtrack and Caroline LeCaine-Kerr forming one group, and Ellen LeCaine, Ross Leftbridge and Loretta Leftbridge the other. In fact, matters had so deteriorated that by the end of 2002 they would not meet together.

[7] The band is quite small. No more than approximately 11 to 15 reside on its reserve lands. It has a total of about 217 members dispersed primarily throughout southern Saskatchewan, but also throughout Canada and the United States. At the time of the March 2006 election there appear to have been 171 qualified band electors.

[8] Ellen LeCaine, Ross Leftbridge and Loretta Leftbridge were minded to put a new election act in place. Although Chief LeCaine was shaken on cross-examination as to exactly what she knew was in place before the 2005 Act, she was at least aware of the *Band Custom Election Regulations*. Indeed, they were a sore point in that they provided that the Chief must reside on the reserve, that councillors must reside in Canada and that only those who had been a councillor during the past 10

years were eligible to run for chief. The *Wood Mountain Band Custom Code*, said to go back to 1992, is divided into various sections. The last section entitled “Amendment” provides:

1. No part of the Band Custom Code shall be amended unless 30 days written notice of such amendment, change, addition or deletion to said Band Custom Code is given to all band members either personally or by registered mail at the Band member’s last known address and unless the amendment, change, addition or deletion to Band Custom Code is first affirmed by a vote by an absolute majority of the Band electors.

[9] I do not accept Chief Goodtrack’s contention that the amendment had to be approved by the Chief and council. The amendment section of the Code stands alone.

[10] The *Band Custom Election Regulations* also dealt with amendments as follows:

Every 6 (six) years, this Band Custom Election Regulation may be reviewed and revised by a majority of duly notified eligible band members entitled to vote at a band election.

[11] Even on Chief Goodtrack’s evidence, and he was also shaken on cross-examination, it is not clear exactly when these Regulations came into force. Certainly, there is no evidence that there had been any review or revision in the six years prior to the 2005 Election Act coming into place. I hold that the review and revision procedure was no bar to what Chief LeCaine and the others did.

[12] The evidence is that there had been at least thirty days written notice given to all band members. Some, such as Chief Goodtrack, ignored the process by refusing to take up their registered mail. According to Chief LeCaine, the first approval was at an open meeting at which about forty electors attended. They were unanimous in their support. Thereafter, a resolution was

sent to those who had been unable to attend the general meeting. They were asked if they approved the adoption of an immediate implementation of the Act. They had to identify themselves by name, address, treaty number, answer either yes or no, and sign. This procedure spread out over at least two months. A total of eighty-six voted “yes”; no one voted “no”. This represents an absolute majority of Band electors. It may be that even more approved the measure. However, since there is no record of who voted at the open meeting, and since they may then have later affirmed in writing, I am not taking that meeting into account. Apart from Chief Goodtrack and his councillors, there is no evidence as to how many of those who chose not to vote were purporting to boycott the process.

[13] Chief Goodtrack and his councillors were acclaimed in March 2006 for a new term. There is no evidence as to how many electors acclaimed them over what was a four-day election period. The results of the election on 24 March 2006 are that there were 171 eligible voters of whom 88 voted.

[14] These latter results were sent to the Department of Indian and Northern Affairs, who on 31 March 2006 recorded the results of that custom election in accordance with the *Wood Mountain Lakota Nation Election Act* of 2005, with a term of office commencing 1 April 2006 and expiring 31 March 2010.

[15] In April 2006, Chief Goodtrack and his councillors took proceedings in this Court against the Department, and others, in judicial review of the recording of the 24 March 2006 election results. However the position of the Department, as upheld by Mr. Justice Strayer (*Wood Mountain First Nation v. Canada (Attorney General)*, 2006 FC 1297, 55 Admin. L.R. (4th) 293), is that its

role in band elections by custom, as opposed to under the *Indian Act*, is simply to record results.

That recording was not a decision subject to judicial review. It also offered to mediate, but that was rejected.

DISCUSSION

[16] The leading case dealing with band custom is *Bigstone v. Big Eagle*, 52 F.T.R. 109, [1992] F.C.J. No. 16 (QL). That was a difficult case in that it dealt with a newly re-established band, a band which had been dissolved some ninety years earlier. In discussing what had to be “contemporary custom”, Mr. Justice Strayer was of the view that the validity of a new constitution is one of “political, not legal, legitimacy”. He asked, “. . . is the constitution based on a majority consensus of those who, on the existing evidence, appear to be members of the band”?

[17] The following statement of his has been followed time and time again:

Unless otherwise defined in respect of a particular band, “custom” must I think include practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus.

[18] Obviously, custom may differ from one band to another, but as Madam Justice Reed noted in *McLeod Lake Indian Band v. Chingee*, 153 F.T.R. 257, [1998] A.C.F. no 1185 at paragraph 19:

I am of the view that approval by majority of the adult members of the Band is probably is a safe indication of a broad consensus (the age of majority being a matter for the band to determine).

[19] It is fair to say that on the one hand an absolute majority of the band supported the 2005 Election Act, and not a single band member voted against it. The amending procedures called for a

vote. However, a vote is simply a means of signifying a choice, an indication that one approves or disapproves, accepts or rejects. The band voted and their voice shall be heard. Furthermore, in the election held pursuant to that Code the following year, an absolute majority of band electors again voted.

[20] On the other, the Code, upon which Chief Goodtrack relies, also called for amendments by a majority of eligible electors. He can hardly argue that custom actually required something more.

ORDER

UPON APPLICATION for judicial review and *quo warranto* in respect of the respondents purporting to exercise authority with respect to the Wood Mountain First Nation No. 160, calling upon them to prove the authority with which they act, and for a declaration that they have no such authority;

THIS COURT ORDERS that:

1. The application is dismissed.
2. It is declared that the *Wood Mountain Lakota Election Act* was validly adopted by the Wood Mountain First Nation No. 160 in 2005, and that the respondents hold office by virtue of an election held 24 March 2006 pursuant to that Act which election remains valid until proved otherwise.
3. The whole with costs.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-853-07

STYLE OF CAUSE: CHIEF BILLY GOODTRACK ET AL v.
ELLEN BERNADETTE LECAINE ET AL

PLACE OF HEARING: Vancouver, B.C.

DATE OF HEARING: June 11, 2008

REASONS FOR ORDER: HARRINGTON J.

DATED: June 20, 2008

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