Date: 20081016

Docket: T-1054-07

Citation: 2008 FC 1173

Ottawa, Ontario, October 16, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

ALPHIUS J. WILSON, GILBERT HART, ANDREW MOORE

and WILLIAM A. SIMPSON

Applicants

and

ERIC ROSS, BETSY DEAFFIE, ELEANOR MONIAS and GERTRUDE MEIKLE COMPRISING THE NORWAY HOUSE CREE NATION ELECTION APPEAL COMMITTEE and ELIZA CLARKE, MIKE MUSWAGON and LANGFORD SAUNDERS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] On March 16, 2006 an election was held at Norway House Cree Nation (NHCN or Band). The applicants, Alphius J. Wilson, Gilbert Hart, Andrew Moore, and William A. Simpson, ran unsuccessfully for positions of band councillor. The respondents Eliza Clarke, Mike Muswagon and Langford Saunders were incumbent councillors who successfully ran for re-election (three successful candidates).

[2] NHCN is a custom band. It, therefore, held its election under the terms of its own Elections Procedures Act. The Elections Procedures Act sets out grounds upon which election results may be appealed, and provides for the establishment of an Appeal Committee to hear appeals.

[3] Of relevance to this application is subsection 7.1(*a*) of the Elections Procedures Act. It allows any candidate or elector who has reasonable grounds to believe "that there was a corrupt practice in connection with the election" to appeal the election of a candidate or candidates.

[4] The applicants filed an appeal pursuant to subsection 7.1(*a*) of the Elections Procedures Act alleging corrupt practice on the part of the three successful candidates.

[5] The Appeal Committee heard evidence on February 20 and 21, 2007, and on April 3 and 4, 2007. The Appeal Committee dismissed the appeal on May 10, 2007, for reasons delivered on June 26, 2007. This is an application for judicial review of that decision.

[6] The application for judicial review is allowed because the Appeal Committee erred in law in its interpretation of what constitutes corrupt practice.

The Grounds of the Appeal

[7] The corrupt practice alleged by the applicants may be summarized as follows:

(i) Shortly before the election, the three successful candidates signed and delivered letters that advised certain members of the Band that their "application/request for housing has been approved for the 2005/06 fiscal year." Houses or trailers were

said to be allocated to the recipients of the letters. The recipients were told that they would be contacted in order to discuss where they would like their house or trailer to be situated. (More than 70 people received such letters and 95 letters were sent out.)

(ii) Just prior to the election, the three successful candidates provided an extraordinary amount of special needs funding to members of the Band.

(iii) The three successful candidates did not provide information to other candidates, and used information available to them as councillors in order to gain an unfair advantage over the applicants.

(iv) The three successful candidates participated in secret meetings, particularly one held on January 9, 2006, at which housing allocations were discussed.

(v) The three successful candidates participated in the allocation of housing, but did not follow the housing policy which had been adopted by the Band in 2005.

The Evidence

[8] The Appeal Committee received a number of documents in evidence. Exhibit 3 was the NHCN Housing Policy Manual. The policy was adopted and approved by the chief and council on July 6, 2005 (see Exhibit 2).[1] The significance of this date is that the March 16, 2006 election was the first election held after the adoption of the Housing Policy.

[9] Relevant provisions of the Housing Policy are found in Chapter 2, entitled "Guiding Principles." Paragraphs 1.A. (iii) and (v) state:

> iii. Individuals on either the [Norway House Cree Nation Housing Authority] or Council cannot make final decisions or imply to NHCN members any guarantees for renovations, new housing or favorable decisions.
>
> […]
>
> v. Chief and Council have the ultimate authority and final decisions in all Housing Policy matters.

[10] The Appeal Committee heard testimony from a number of witnesses and wrote in its reasons that it "accepted the evidence of all of the witnesses as being forthright and truthful", although it gave little weight to the evidence of Farah Balfour, a witness who left the hearing before she could be cross-examined.

[11] Two of the witnesses were successful candidates in the election: Marcel Balfour and Eric Apetagon. Marcel Balfour had been a band councillor. He was elected as chief on March 16, 2006. Eric Apetagon was a band councillor who was re-elected on March 16, 2006.

[12] With respect to the letters sent about the allocation of houses or trailers, Chief Balfour testified that:

- He had searched for, but had not found, any minutes of any meeting where the chief and council approved and ratified names of band members who were allocated either a house or a trailer.

- He had not been given notice of any meeting to deal with the allocation of housing.
- At the time the letters were sent out, no houses or trailers had been delivered, approved or funded for NHCN.
- By letter dated March 6, 2006 (Exhibit 8) CMHC advised NHCN that it would have to re-submit its housing submission to CMHC and reduce the number of units it sought from 70 units to 47 trailers and houses in total.

[13] Eric Apetagon's evidence on this point included the following:

- Prior to the election, no council meeting and no band council resolution approved the allocation of housing.
- No housing application made by NHCN could be approved by the responsible minister until the chief and council had made a decision with respect to the amount of equity the band would put forward, and he was not aware of any meeting before the election of chief and council to make this allocation.
- He was asked to sign the letters sent notifying members of the Band that they had been allocated a house or trailer, but he did not sign them. The main reason he did not sign the letters was that nothing had been approved or finalized, the band had simply made a submission or application for housing.
- There was no legitimate reason for the letters to be sent out during the election campaign.

[14] With respect to the special needs funding, Chief Balfour testified that:

- The Band had a written policy (Exhibit 18) with respect to special needs requests.
- The policy requires a person to be on social assistance in order to be eligible for special needs funding. Before the election, some special needs funding was paid to persons who were not on social assistance.
- His office prepared Exhibit 13, which is a list of all special needs funding paid between December 2005 and March 2006.
- Exhibit 13 reflects that in the months of December 2005 and January 2006 the special needs funding for each month was in the range of $10,000.00 to $12,000.00. In the month prior to the election, February 2006, the amount paid on account of special needs funding was $54,833.83. In the first 16 days of March 2006 a total of $12,000.00 was spent on special needs funding. Approximately $2,000.00 was spent in March 2006 following the election.

[15] Councillor Apetagon testified that he did not sign a February 8, 2006 special needs allocation because it was near the end of the fiscal year, and he was concerned that "we wouldn't have the money to pay for it." There was no discussion among the chief and council about whether recipients were eligible or whether funds were available.

The Decision of the Appeal Committee

[16] The Appeal Committee's conclusion with respect to the allegation arising out of the letters sent with respect to the house or trailer allocation was as follows:

> 68. No one except Farah Balfour testified they were promised a house in exchange for a vote. The effect of the letters may have been to leave that impression on some voters'

> minds but there was no direct evidence that this was the case.
>
> 69. The Committee concludes that the evidence falls short of establishing a corrupt practice on the letters alone. Particularly where the Respondents testified they were following their mandate as elected officials. This was even more so since such letters had been sent out in the past just prior to elections and previously in 2004 as confirmed by Councillor Apetegon.

[17] With respect to the special needs allocation, the Appeal Committee wrote:

> 75. None of the Appellants' witnesses testified they received or were promised special needs in exchange for a vote. All the individuals who received special needs were known to the Appellants and could have been called as witnesses. None were.
>
> 76. The Committee concludes that the evidence falls short of establishing a corrupt practice on the Special Needs Allocations.

[18] With respect to what, as a matter of law, constitutes corrupt practice, the Appeal Committee found:

> 77. The Appeal Committee has considered *Sideleau v. Davidson*, [1942] 3 D.L.R. 609 for the following principles:
>
> i. Certain conduct will give rise to a presumption of corrupt practice
>
> ii. The distribution of money and alcohol to local organizers in the course of an election who were not asked to give any account of their disbursements, created a presumption and allowed the Court to draw and [*sic*] inference that it was intended for the corruption of electors;
>
> iii. It is not necessary to prove a systematic scheme of corrupt practices capable of influencing votes on a substantial scale

> 78. In this situation, special needs funding and the allocation of housing is in the regular course of business of the band and its council. Nothing in the Elections Procedures Act suspends council activity during the campaign period. Therefore, the Committee considers that the Respondents had primary "lawful purpose".
>
> 79. Therefore the Appellants must have proof of such corrupt practices outside of the Councillors regular duties (i.e. allocating housing or providing special needs funding) or the Applicants must prove that they conducted their regular duties in a corrupt manner (e.g. gave special needs money or items to wealthy band members, re-allocated housing from needy band members to non-needy band members) or gave excess special needs to members.

[19] The Appeal Committee concluded that:

> 82. In the Appeal, the Appellants failed to provide any witnesses which claimed they were promised special needs or a home in return for a vote.
>
> 83. The Respondents testified they were conducting their regular duties, for which they have a lawful purpose. [emphasis in original]

What is Corrupt Practice?

[20] The Elections Procedures Act does not define what constitutes corrupt practice. Moreover, there appears to be little jurisprudence on the point.

[21] In *Hudson v. Canada (Minister of Indian Affairs and Northern Development)* (2007), 309 F.T.R 52, this Court observed, at paragraph 85, that direct evidence of explicit efforts to buy votes is not the only kind of evidence that could lead to a finding of corrupt electoral practice.

[22] In *Sideleau v. Davidson*, [1942] S.C.R. 306, the Supreme Court of the Canada recognized that certain conduct will permit an inference to be drawn that conduct is intended to corrupt electors.

[23] In my view, no exhaustive definition can be given as to what constitutes corrupt practice in the context of an election. However, at least one core concept of corrupt practice is any attempt to prevent, fetter, or influence the free exercise of a voter's right to choose for whom to vote. What is relevant is the motive or intent behind the impugned conduct. Is the conduct directed to improperly affecting the result of an election?

The Applicable Standard of Review

[24] In *Dunsmuir v. New Brunswick* (2008), 372 N.R. 1, at paragraph 62, the Supreme Court of Canada instructed that the first step in the process of judicial review is to ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a particular category of question.

[25] In my view, the relevant category of question in this case is whether the Appeal Committee applied the proper test at law as to what constitutes corrupt practice.

[26] In *Giroux v. Swan River First Nation* (2006), 288 F.T.R. 55; varied on other grounds (2007), 361 N.R. 360 (F.C.A.), this Court conducted a pragmatic and functional analysis and

concluded that little deference was owed to an appeal committee's legal interpretation of what constitutes a corrupt election practice under a customary election regulation. The standard of review to be applied was correctness (see paragraphs 54 and 55 of the decision).

[27] In my view, this is the proper standard to apply. This conclusion reflects in this case the presence of a privative provision in section 7.3 of the *Elections Procedures Act* which allows an appeal to the Court on questions of law. Review on the correctness standard also reflects the nature of the question. While the Appeal Committee has superior expertise on matters such as band custom, the courts have greater expertise with respect to the interpretation of legislation and regulations.

[28] The conclusion that the proper standard of review is correctness is also consistent with the admonition given by the Supreme Court of Canada in *Dunsmuir*, at paragraph 60, that courts must continue to review on the standard of correctness "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.'" Here, the concept of "corrupt practice" is common to many customary band election regulations, and is found in paragraph 12(1)(*a*) of the *Indian Band Election Regulations*, C.R.C., c. 952. It is therefore an important, general question of law that is outside the area of expertise of the Appeal Committee.

Application of the Standard of Review

[29] In paragraph 68 of its reasons, quoted above, the Appeal Committee acknowledged that the effect of the housing letters may have been to leave the impression on some voters that they were

promised a house in exchange for a vote. However, the Appeal Committee required the applicants to provide direct evidence that a voter was of this belief. As well, the Appeal Committee required the applicants to prove that an elector received or was promised special needs funding in exchange for his or her vote.

[30] By so concluding, the Appeal Committee erred in law. The requirement that an elector come forward to testify that their vote was bought imposes too high a burden on a party who alleges corrupt practice. Further, such a requirement is contrary to the conclusion of the Supreme Court of Canada in *Sideleau* that certain conduct will permit an inference of corrupt practice to be drawn. It is also contrary to the conclusion of this Court in *Hudson* that direct evidence of explicit efforts to buy votes is not required in order to establish corrupt practice.

[31] The Appeal Committee relied upon prior conduct where housing letters were sent out before an election, to justify the conduct. However, in my view the Appeal Committee was obliged to expressly consider whether this was, or remained, a proper practice, particularly in light of:

- The adoption in 2005 of the NHCN Housing Policy which prevented individuals, or a group of individuals, from deciding upon, or implying, the existence of a housing commitment.
- This Court's ruling in *Balfour v. Norway House Cree Nation*, [2006] 4 F.C.R. 404. There, at paragraphs 49 and 55, this Court commented upon the practice of a sub-group of councillors meeting in order to make decisions. Justice Blais wrote:

> 49. In light of the above, I find that it is permissible for a sub-group of Band Council members to meet outside the formal confines of Band Council meeting to

> discuss issues concerning the Band. However, a distinction must be drawn between the latter and what has occurred in the present matter. That is, it is not permissible for the sub-group of Band councillors to make decisions in secret and subsequently have those decisions rubber stamped at future Band Council meetings without regard to the Band Council guidelines or the provisions of the *Indian Act*.
>
> […]
>
> 55. I would like to emphasize that the ratification process mentioned by the respondents is a myth. Resolutions cannot be adopted in secret meetings, and then subsequently ratified at a duly convened meeting without being discussed and debated. The resolution itself must be passed at a duly convened meeting. It cannot be the product of a secret meeting and subsequently rubber stamped at a later date at a duly convened meeting. Resolutions cannot be the product of predetermined decisions. They must be debated and passed in accordance with the rules and guidelines of the Band and in accordance with the principles of democracy. In the present matter, there are many examples which illustrate that the ratification process of Band Council resolutions was inherently biased. I will now turn my attention to one such example. [emphasis added]

[32] Further, the Appeal Committee was obliged to consider the cumulative nature of the conduct of the three successful candidates.

[33] It was also required to consider their intent. It was incumbent on the Appeal Committee to consider, for example, for what purpose the three successful candidates acted as they did, and whether they were attempting to improperly influence the outcome of the election. While an election does not suspend council activity, councillors must carry out those duties in a scrupulously fair and honest fashion. Benefits must be distributed on the basis of merit. When a benefit is

conferred not based on merit, but rather based upon an intent to influence an elector, a corrupt practice occurs.

[34] By requiring, at paragraph 79 of its reasons, the applicants to prove things like whether the three successful candidates gave special needs money to the wealthy, or gave excessive special needs allocations, or re-allocated housing from needy to non-needy band members, the Appeal Committee erred. The core question to be answered was whether the three successful candidates by their conduct, viewed as a whole, intended or attempted to improperly influence the outcome of the election.

Remedy

[35] The application for judicial review will be allowed because the Appeal Committee erred in law in its interpretation of what constitutes corrupt practice.

[36] The applicants seek an order that the merits of the election appeal not be referred back to the Appeal Committee, but rather that this Court make a finding of corrupt practice. This relief is not available on judicial review. See paragraph 5 of the decision of the Federal Court of Appeal in *Giroux*, cited above.

[37] In the alternative, the applicants seek an order that the appeal be remitted to the Appeal Committee with directions that the Appeal Committee find the housing/trailer allocation letters and the increased special needs funding to be corrupt practice.

[38] This Court does have jurisdiction, pursuant to subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 to issue directions of great specificity. See, for example, *Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 at paragraphs 17 and 18 (F.C.T.D.) and *Turanskaya v. Canada (Minister of Citizenship and Immigration)* (1997), 210 N.R. 235 (F.C.A.). However, this jurisdiction is to be exercised with caution.

[39] In the present case, there were questions with respect to the motives or intent of the three successful candidates that were not answered by the Appeal Committee. I am not prepared to substitute my view of the evidence for that of the Appeal Committee on the important issue of the existence of corrupt practice. I will, however, make certain directions, as set out in the judgment that follows these reasons.

[40] Counsel asked that the issue of costs be reserved so that they could make written submissions on the issue of costs. The issue of costs is reserved.

1. The Norway House Cree Nation Housing Authority has not yet been created.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision of the Appeal Committee dated May 10, 2007 is hereby set aside. The matter is remitted to the Appeal Committee for redetermination in accordance with these reasons and the directions contained in this judgment.

2. The Appeal Committee shall consider the allegation of corrupt practice on the basis of the existing evidentiary record. The Appeal Committee should receive additional evidence only if it considers such evidence to be necessary in order to allow it to determine the appeal in a manner consistent with these reasons.

3. The Appeal Committee shall commence receiving evidence or submissions within 60 days of the date of this judgment.

4. The issue of costs is reserved.

5. Counsel for the applicants shall serve and file written submissions with respect to costs within 21 days of the date of this judgment. Such submissions shall not exceed five pages in length and shall attach a draft bill of costs in order to facilitate a lump sum award of costs, if it is determined that costs should be awarded. For certainty, the draft bill of costs shall

not form part of the written submissions, so that the draft bill of costs may be attached to five, or fewer, pages of written submissions. An affidavit may be served and filed in support of any claim to disbursements.

6. Counsel for the respondents Clarke, Muswagon and Saunders shall serve and file any responding submissions within 21 days of receipt of the applicants' submissions. Such submissions shall not exceed five pages in length. A responding draft bill of costs or affidavit may also be served and filed.

7. Thereafter, the applicants shall have seven days in which to serve and file any reply submissions, not to exceed three pages in length.

"Eleanor R. Dawson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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