Federal Court  Cour fédérale

Date: 20110620

Docket: T-330-11

Citation: 2011 FC 732

Ottawa, Ontario, June 20, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

FRED MUSKEGO

Applicant

and

NORWAY HOUSE CREE NATION APPEAL COMMITTEE AND ERIC ROSS, BETSY DEAFFIE AND ELEANOR MONIAS

Respondents

and

ANDREW SIMPSON

Intervener

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of the January 28, 2011 decision by the Respondents, the Norway House Cree Nation Appeal Committee (the "Appeal Committee"), and its three members, Eric Ross, Betsy Deaffie and Eleanor Monias. The Applicant, Mr. Fred Muskego, argues that the Appeal Committee's decision, which finds him guilty of corrupt practice in

connection with an election, should be quashed by the Federal Court on the grounds that the Respondent Appeal Committee did not have the jurisdiction to make it and that procedural unfairness and/or use of inadmissible evidence occurred in the decision-making process.

[2] On May 26, 2011, I declined to rule on a stay motion brought by the Applicant against the Appeal Committee's decision, and ordered instead (with the consent of the parties) that leave be granted on the application for judicial review and that it be heard by teleconference on June 14, 2011. I also granted Mr. Andrew Simpson leave to intervene.

[3] After having read the record and the written representations of all the parties involved, and after having considered their oral submissions, I have come to the conclusion that the Appeal Committee did have jurisdiction to rule as it did, and that there has been no breach of procedural fairness in the process.

I. Facts

[4] The Norway House Cree Nation ("NHCN") is a custom band. In December 1997, the NHCN adopted the NHCN *Elections Procedures Act*, and on January 23, 1998 the band was granted the right to be removed from section 74 (Elections Procedures) of the *Indian Act* to exercise self-government through a custom election system. This entitles the band to hold its elections pursuant to its own custom election code. On October 18, 2005, the amended "Norway House Cree Nation *Elections Procedures Act*" was adopted and ratified by the Chief and Council (hereinafter the *Elections Procedures Act, 2005* or "EPA").

[5] Under the EPA, regularly scheduled General Elections of the NHCN take place every four years. On March 16, 2006 one such election took place for the offices of Chief and Council (the

"2006 General Election"). The Applicant ran for the office of Chief in this election, but was unsuccessful.

[6] The EPA sets out the grounds on which election results can be appealed, and provides for a committee, appointed by Chief and Council prior to the election, to hear those appeals. Section 7.1(a) of the EPA 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 within 30 days of the election. The election of three successful candidates – Councillors Eliza Clarke, Mike Muswagon and Langford Saunders – was appealed within this 30 day period following the 2006 General Election (the "Wilson Appeal"). The Wilson Appeal was based on allegations that these individuals had illegitimately made decisions about approving some allocations of housing, trailers, and special needs funding in a way that was inconsistent with the Band Council rules and this, in an effort to gain votes for the election. The Applicant in the present application was not named in that appeal, as he had not been successful in the 2006 election.

[7] Prior to the hearing of this Wilson Appeal, a member of the Appeal Committee resigned. There are no provisions in the EPA that address the procedure to be followed when one or more of the members of the Committee resigns or is no longer able to function as a Committee member once the General Election in respect of which the Committee was established has passed. As the NHCN Chief and Council were unable to appoint a fifth member to the Appeal Committee, the Chairperson of that Committee applied for a reference to the Federal Court to determine whether the Committee of four members would have the authority to carry out the functions of the Appeal Committee. On November 9, 2006, Justice Judith A. Snider determined that the Appeal Committee would in fact

have full authority to carry out its functions with no fewer than three members, so far as these functions relate to the hearing of the appeal brought before it pursuant to the 2006 General Election.

[8] On May 10, 2007, the Respondent Appeal Committee decided that Councillors Clarke, Muswagon and Saunders were not guilty of corrupt practice, dismissing the Wilson Appeal. They made this finding because the appellants "failed to provide any witnesses which claimed they were promised special needs or a home in return for a vote".

[9] The appellant, Mr. Wilson, thereafter brought an application for judicial review of the Respondent Appeal Committee's decision to the Federal Court. On October 16, 2008, Justice Eleanor R. Dawson (as she then was) found that the Appeal Committee had erred in law in applying the test for being guilty of corrupt practice in connection with an election. She found that the Appeal Committee was obliged, pursuant to the EPA, to consider the cumulative nature of the conduct and intent of the candidates in determining whether "corrupt practice" had occurred, rather than simply limiting its inquiry to the narrow question of whether any witnesses had been promised benefits in exchange for a vote. As a result, the decision of the Committee was quashed and sent back for re-determination: *Wilson v Norway House Cree Nation Election Appeal Committee*, 2008 FC 1173.

[10] The Respondent Appeal Committee thereafter found Councillors Clarke, Muswagon and Saunders to be guilty of corrupt practice under the EPA on January 18, 2009. That decision resulted in the removal of the three councillors, under s. 9.1(f) of the EPA for having been found guilty of a corrupt practice in connection with an election. A by-election was held to fill the vacant positions on March 17, 2009. The Applicant ran for the office of councillor in this by-election and was successfully elected.

[11] The Applicant's success in the 2009 by-election was appealed in late March of 2009 by Mr. Andrew Simpson and the now deceased Mr. Edward Gamblin (the "Simpson Appeal"). This notice of appeal was filed pursuant to s. 7.1(a) of the EPA, also alleging corrupt practice on the part of the Applicant. More particularly, this appeal was based on allegations of the Applicant's corrupt practice relating only to events surrounding the 2006 General Election, rather than events surrounding the 2009 by-election.

[12] The question of whether the Respondent Appeal Committee had jurisdiction to hear this Simpson Appeal was raised by Mr. Muskego. The jurisdiction of the Committee was disputed notably on the grounds that only three of the five original members of the Committee remained (a second member having resigned since the 2006 General Election), and that the appeal was filed more than 30 days after the 2006 General Election.

[13] In response, the Respondent Appeal Committee applied for another reference to this Court, with a view to clarify the procedures to be followed by the Committee for the consideration of the Simpson Appeal. Justice Paul S. Crampton issued an Order with Reasons on October 15, 2010 (docket number T-1780-09). In this Order, Justice Crampton found that the Appeal Committee did have the jurisdiction to hear the Simpson Appeal in respect of the 2009 by-election, since that appeal was clearly an "additional election procedure resulting from any appeal", as contemplated by s. 1 of the EPA, in that the result under appeal was that of a by-election that arose from the appeal of the 2006 General Election. Justice Crampton found that the composition of the Committee, which was also disputed by the Applicant for various reasons, was such that it had jurisdiction to rule on the Simpson Appeal. The Order of Justice Crampton declared that the Committee, as it was currently constituted with three members, would have "full authority to carry out all of the functions

of the Committee as established by the EPA, insofar as such functions relate to the hearing of the Simpson appeal".

[14] Part of the dispute between the parties in the current application for judicial review is the interpretation to be given to this Order of Justice Crampton. The Respondent Appeal Committee interpreted the Order as giving it full jurisdiction to hear the Simpson Appeal regarding the Applicant's conduct, whereas the Applicant argues that Justice Crampton's decision answered only the question of the jurisdiction of a three-member committee but not the question of whether 2006 events could form the basis of the appeal. Apparently assured of their jurisdiction, however, the Respondent Appeal Committee rendered a decision on the Simpson Appeal on January 28, 2011. This decision is described below.

II. The Impugned Decision

[15] In its reasons, the Respondent Appeal Committee began by relying on Justice Crampton's Order as confirmation of its authority to make the decision, mentioning the following:

> 3. Of further relevance to this election appeal, is the Order from the Honourable Mr. Justice Crampton, FC Docket T-1780-09; which affirms that the Election Appeal Committee has maintained the jurisdiction with three original members; to hear the Simpson Appeal in respect to the special by-election that took place on March 17, 2009. In his view the appeal stems from an "additional election procedure" derived from the March 16, 2006 election.

[16] The Respondent Appeal Committee then set out the facts relating to the Wilson Appeal of the 2006 General Election results, which led to the disqualification via s. 9.1(f) of the EPA of the Councillors Clarke, Muswagon and Saunders. Their disqualification led in turn to the 2009 by-

election to fill their vacancies. This by-election led to the election of the Applicant Mr. Muskego, and then to the subsequent Simpson Appeal of his success in the by-election.

[17] The Respondent Appeal Committee then described the evidence filed by both parties, noting in particular that counsel for Mr. Simpson (who brought the appeal), rather than filing any new evidence, relied on transcripts of the previous Election Appeal Hearings from the Wilson Appeal (which had concerned the events surrounding the 2006 General Election).

[18] The Respondent Appeal Committee described the Appellant Simpson's allegation that Mr. Muskego was guilty of corrupt practice in that Mr. Muskego was part of the group who was found to have engaged in corrupt practice, an allegation based on the evidence brought forward at the Wilson Appeal hearings:

> [14] [The Appellants] submit that Mr. Fred Muskego was a part of the group whose conduct triggered s. 9.1(f) of the *Elections Procedures Act*, resulted in the by-election that took place in March, 2009. The difference of fact between the previous appeal and the one currently under decision, is that the respondent Fred Muskego was unsuccessful in the 2006 election. So although the respondent was named as a party to the previous appeals, the respondent no longer held public office, and was not subject to the jurisdiction of the Election Appeal Committee under the Wilson appeal, nor to the consequence of s. 9(1)(f) under the *Elections Procedures Act*.

[19] The Respondent Appeal Committee sets out Justice Dawson's legal test for determining corrupt practice, according to which the Committee was required to consider the "cumulative nature of the conduct of the successful candidates" as well as the motive or intent behind the alleged corrupt practice to determine whether the conduct was directed to improperly affect the result of the election.

[20] The Respondent Appeal Committee concluded that the Simpson Appeal was a "continuation of the March 16, 2006 election that resulted in appeals that found a corrupt practice in connection with an election, resulting in the by-election of which is the subject of this appeal decision".

[21] The Respondent Appeal Committee adopted Justice Crampton's Reasons to the effect that Mr. Muskego "has not adduced sufficient evidence … that he would not receive a full and impartial hearing from the currently constituted committee".

[22] The Respondent Appeal Committee then recapped the findings of the Wilson Appeal, wherein it was found that Councillors Clarke, Muswagon and Saunders:

a) met in secret;

b) failed to follow NHCN approved written policy with respect to housing allocations;

c) failed to make decisions that required council approval and ratification;

d) failed to provide information to other candidates;

e) used information available to them as councillors at the time in order to gain an unfair advantage; and

f) failed to follow NHCN policy with respect to special needs funding by providing an extraordinary amount of special needs funding to band members prior to that election.

[23] The Appeal Committee again adopted the reasons of Justice Crampton to the effect that the Simpson Appeal was based on the same facts as the Wilson Appeal. It concluded that, "based on the previous Wilson Appeal, taking into regard the cumulative activities of the Respondent, that his individual actions constitutes [*sic*] a finding of corrupt practice under the *Elections Procedures Act*" and allowed the appeal. The Appeal Committee applied s. 9.1(f) of the EPA, rendering Mr. Muskego guilty of corrupt practice in connection with an election, and thus ineligible to be a candidate for a period of six years.

III. The Issues

[24] This application for judicial review raises essentially two issues:

1. Did the Respondent Appeal Committee have jurisdiction to hear the Simpson appeal?

2. Did the Respondent Appeal Committee breach procedural fairness in allowing Mr. Simpson to submit past evidence from the 2006 General Election as evidence in the 2009 by-election hearing? Has the Applicant's defence been prejudiced as a result of its doing so?

IV. Analysis

[25] Pursuant to the decision of the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, the applicable standard of review for the first question is that of reasonableness. Writing for the majority, Justices Michel Bastarache and Louis LeBel stated that reasonableness will be the governing standard where the question relates to the interpretation of the tribunal's enabling statute or "statutes closely connected to its function, with which it will have particular familiarity" (at para 54). Since the EPA is clearly the "home" statute of the Appeal Committee,

deference is warranted. Accordingly, this Court shall intervene only if the decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", or if the reasons are lacking in justification, transparency or intelligibility (at para 47).

[26] With respect to the procedural fairness issue, it is trite law that the standard of review is that of correctness: see, for example, *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539, at para 100; *AG of Canada v Sketchley*, 2005 FCA 404, at para 53. When applying that standard, no deference is due.

A. *Did the Respondent Appeal Committee have jurisdiction to hear the Simpson Appeal?*

[27] Mr. Muskego submits that the Respondent Appeal Committee has exceeded its jurisdiction in hearing this appeal outside of the 30-day period following the 2006 election by wrongly finding that the 2009 by-election was some sort of "continuation" of the 2006 election and thus accepting an appeal filed shortly after the 2009, and not the 2006, election. If by-elections such as the 2009 election were considered "continuations" of General Elections, the Applicant argues that there would be no finality to the General Elections and the 30-day limitation period would be undermined.

[28] Mr. Muskego stresses that s. 7.1 of the EPA provides that the election of a candidate may only be appealed within 30 days of his election. He maintains that, contrary to the Appeal Committee's assertion in its Reasons for Decision, he was not named as a party in the Wilson Appeal of the 2006 General Election. Since he was not named in any appeal filed within 30 days of the 2006 election, he argues that his behaviour with respect to that election cannot now form the subject of an appeal, and that to allow otherwise would be to render the 30-day deadline of s. 7.1 meaningless. He submits that the Appeal Committee does not therefore have the jurisdiction to hear

the Simpson Appeal, which concerns events surrounding the 2006 General Election and was filed more than 30 days after that election.

[29] In addition, the Applicant notes that s. 7.1 clearly states that a candidate or elector can appeal "within 30 days" if that person believes that there was "corrupt practice in connection with THE election", rather than "in connection with ANY election". The Applicant reads this as meaning that an elector may file an appeal only in respect of practice relating to an election that took place in the last 30 days, not practice relating to any past election.

[30] Finally, the Applicant contends that to call the 2009 by-election a "continuation" of the 2006 General Election would create chaos for election procedures in that it would extend the appeal period indefinitely and give rise to a myriad of situations and hypothetical questions not contemplated by the EPA. For example, he argues it would mean that there would be no finality for unsuccessful candidates in any election, since they would always be vulnerable to appeals relating to their conduct in past elections if they ever were to run in a future by-election.

[31] Before addressing these arguments, it is helpful to reproduce in full the relevant provisions of the EPA:

> 1.1 In this Act:
>
> **a) Appeal Committee** means a committee consisting of five (5) persons appointed by the Norway House Cree Nation Chief and Council which persons shall not participate or be involved in the election process in any manner whatsoever, including, but not limited to not being an Electoral Officer, Scrutineer, Candidate, and may not be involved in working for or on behalf of any candidate from the time election is called to the date of voting. The Appeal Committee shall be appointed four (4) months prior to the date of an election. The five (5) member Appeal Committee shall consist of five (5) members of the Norway House Cree Nation.

The persons appointed as referred to above are appointed for the purposes of dealing with any appeal from any of the matters related to the election as set out herein including any additional election procedures resulting from any appeal.

7.1 Within thirty (30) days after the posting of the written statement by the Electoral Officer, pursuant to Article 5.15, any candidate or elector who has reasonable grounds to believe:

a) that there was a corrupt practice in connection with the election, or

b) that these procedures were not complied with, or

c) a person did not qualify to be a candidate or elector as defined herein,

may appeal the election of a candidate or candidates by filing a written notice of appeal with the Electoral Officer setting out the grounds of the appeal.

7.2 Upon receipt of the above appeal, the Electoral Officer shall forthwith cause a meeting of the Appeal Committee to be convened.

7.3 The Appeal Committee shall hear the appeal within thirty (30) days of the filing of the notice of appeal and shall deliver its decision within ten (10) days of the hearing appeal. The Appeal Committee shall not be bound by any rules of evidence. The decision of the Appeal Committee shall be final and binding. Any appeal to a Court of Law shall be founded in law and not in fact.

Where the Appeal Committee finds that a candidate or candidates have not been elected to office in accordance with these procedures, that candidate whose election violated these procedures shall vacate the office to which he/she was elected, and the Electoral Officer shall hold a nomination meeting and election for the vacant office or offices in accordance with Article 4 of these procedures.

9.1 The office of Chief or Councillor becomes vacant when a person who holds that office:

(…)

f) is guilty of a corrupt practice, accepting a bribe, dishonestly or malfeasance, in connection with an election.

> Any person who ceases to hold office by virtue of Article 9.1(f) shall not be eligible to be a candidate for a period of six (6) years.

[32] Having carefully read the EPA, and more particularly section 1a) granting jurisdiction to the Appeal Committee, I am of the view that Mr. Muskego's argument is without merit. That provision clearly confers on the Committee the jurisdiction to deal with "any additional election procedures resulting from any appeal". The by-election that took place on March 17, 2009 was clearly one such "additional election procedure" resulting from the Wilson Appeal and, as such, was indeed a continuation of the March 16, 2006 General Election.

[33] This is indeed the conclusion arrived at by my colleague Justice Crampton in his Order of October 15, 2010, wherein he stated:

> I am satisfied that the Committee has the jurisdiction to hear the Simpson appeal in respect of the special election that took place on March 17, 2009. In my view, that appeal is clearly an "additional election procedure resulting from any appeal", as contemplated by Article One of the EPA. It is a follow-up appeal from the initial appeal that was filed in connection with the 2006 General Election, in respect of which the Committee was properly established in accordance with Article One of the EPA.
>
> Motion Record of the Applicant, at pp. 106-107.

[34] It is true that this Order was the result of an application of the essential purpose of which was to determine if the Appeal Committee, then comprised of only three rather than five members, still had authority to hear the Simpson Appeal. Nevertheless, I think it is fair to assume that Justice Crampton was well aware of the time limitation issue. Had he believed that the Committee had lost jurisdiction because the appeal was not brought within 30 days of the 2006 elections, he would most definitely not have ruled that the Committee had "full authority to carry out all of the functions of

the Committee as established by the EPA, insofar as such functions relate to the hearing of the Simpson Appeal". It is at least implicit in his Order that Mr. Simpson was not precluded from bringing his appeal after the 2009 by-election simply because more than 30 days had passed since the 2006 election. Furthermore, the Order never suggests that the Appeal Committee should have been precluded from considering 2006 events in its examination of the Simpson Appeal; indeed, since the 2009 by-election under appeal was intimately connected to the previous General Election of 2006, it is unsurprising that 2006 events would be pertinent to the 2009 appeal.

[35] Since Mr. Muskego has not challenged this Order by way of judicial review, he is now precluded from collaterally attacking it now through the back door.

[36] As for the decision of Justice Michael L. Kelen in *Kootenhayoo v Alexis First Nation (Council)*, 2003 FC 1128, upon which the Applicant relies, I agree with the Respondent and the Intervener that it is easily distinguishable because the wording in the EPA in that case was significantly different from the EPA before the Court today. In that case, the relevant provision provided that any elector "may appeal the results of an Election, By-election, or run-off Election" within five consecutive days. Interpreting that provision, Justice Kelen found that the drafters evidently viewed each of these elections as a distinct circumstance and contemplated the possibility that any one of the three might give rise to an appeal. This is clearly not the case with respect to s. 1(a) of the EPA in the case at bar, where there is no mention of by-election or run-off election but only a reference to "any additional election procedures resulting from any appeal". For that reason, the reasoning of Justice Kelen in *Kootenhayoo* can be of no import in the context of the present case.

[37] Finally, I do not think it can seriously be contended that allowing the Committee to rule on the Simpson Appeal would create chaos for election procedures, that it would render the 30-day limitation period nugatory, and that there would be no finality for unsuccessful candidates as they would risk having to defend appeals against them indefinitely. While it is true, as noted by my colleague Justice Crampton, that the EPA is lacking in clarity with respect to some aspects of the procedure to be followed when one or more members of the Committee resigns, section 1(a) makes it very clear that the Appeal Committee may only entertain an appeal that has been brought within 30 days of an election or of any other electoral procedure resulting from an appeal. My reading of that provision leads me to believe that an Appeal Committee would not have jurisdiction to hear an appeal relating to a by-election that has taken place before the last General Election, since a person elected in such a by-election would only hold office until the next General Election.

[38] For all the foregoing reasons, I find that the Appeal Committee could reasonably conclude that it had jurisdiction to hear this appeal.

B. *Did the Respondent Appeal Committee breach procedural fairness in allowing Mr. Simpson to submit past evidence from the 2006 General Election as evidence in the 2009 by-election hearing? Has the Applicant's defence been prejudiced as a result of its doing so?*

[39] The Applicant contends that it was unfair for the Appeal Committee to read in as evidence the transcripts of the Wilson Appeal relating to the 2006 General Election. These transcripts, according to the Applicant, include the testimony of then Chief Mr. Balfour and then Councillor Mr. Apetagon, who were cross-examined by the three former councillors (Clarke, Muswagon, and Saunders). In contrast to the former councillors, the Applicant was never given the opportunity to cross-examine the witnesses Balfour and Apetagon, whose testimony apparently inculpated him.

The Applicant also claims that these two witnesses' testimony should be called hearsay since they did not attend the hearing.

[40] Finally, the Applicant submits that his defence has been prejudiced, as three years have passed since he lost the 2006 General Election; had he known that his conduct would have been called into question, he would have collected evidence, documents and witnesses to assist him. Now that so much time has gone by, he argues that his ability to prepare a proper defence is impaired.

[41] While somewhat compelling at first sight, these arguments must nevertheless be rejected. First of all, and most importantly, it appears that Mr. Muskego had the opportunity to object to the inclusion of the Wilson Appeal evidence but declined to do so, and also declined to call any witnesses. This is stated in the unchallenged affidavit of Mr. Eric Ross, Chairperson of the Appeal Committee:

> 21. Legal Counsel for the Mr. Andrew Simpson read-in all the evidence from the previous 2006 Election Appeal. Prior to the Election Appeal Committee accepting the evidence for inclusion to the at-present Simpson Appeal, I provided Mr. Muskego an opportunity to object to the inclusion of this evidence; which found his former colleagues guilty of a corrupt practice in connection with an election. Mr. Muskego had no objection and was willing to have the evidence sworn into the record.
>
> 22. During the Simpson Appeal, Mr. Muskego did not provide any compelling evidence that he was not a part of a group of councillors whose joint actions culminated in the previous 2006 Election Appeal decision under s. 7.1 of the EPA. No new witnesses were brought forth, and the hearing concluded at 5:00 pm, January 18, 2011.

[42] It is a well-established principle that a party must raise an issue of procedural fairness at the first opportunity. The failure to do so will amount to an implied waiver: see, for example, the

decision of this Court in *Kamara v Canada (Minister of Citizenship and Immigration)*, 2007 FC 448:

> [26] …The jurisprudence of the Court is clear; such issues dealing with procedural fairness must be raised at the earliest opportunity. Here, no complaint was ever made. Her failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. See *Restrepo Benitez et al v MCI*, 2006 FC 461 (CanLII), 2006 FC 461 at paras 220-221, 232 & 236, and *Shimokawa v MCI*, 2006 FC 445 (CanLII), 2006 FC 445 at paras 31-32 citing *Geza v MCI*, 2006 FCA 124 (CanLII), 2006 FCA 124 at para. 66.

The same rule is confirmed in *Uppal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 338, at paras 51 and 52.

[43] Even making room for the fact that Mr. Muskego was not represented by counsel before the Appeal Committee, I am still of the view that he should have objected at that point in time to the introduction as evidence of the Wilson Appeal transcripts. Indeed, Mr. Muskego strenuously objected to the jurisdiction of the Appeal Committee, but said nothing about the nature of the evidence being considered. Mr. Muskego does not state otherwise in his own affidavit, and did not seek to cross-examine Mr. Ross on his affidavit. Nor did he file any further affidavit in the context of the current application for judicial review, as he was given the possibility to do. Accordingly, I find that it is now too late to raise the unfairness of the process followed by the Appeal Committee.

[44] Mr. Muskego could have provided evidence, documentary or through witnesses, to show that he was not part of the group of councillors whose joint actions culminated in the previous 2006 Election appeal decision. He could also have chosen to call as witnesses Balfour and Apetagon and to examine them on the basis of their testimony in 2006. He clearly had notice as to the type of corrupt practice he was allegedly guilty of, as there are explicit references in the decision of the

Committee dealing with the Wilson Appeal to some of the actions he had engaged in (see, for example, paras 49 and 54 of that decision, Motion Record of the Applicant, at pp. 73-74). Yet, he chose to focus his argument on the jurisdiction of the Appeal Committee, and did not introduce a shred of evidence contradicting the finding of the Committee on the Wilson Appeal.

[45] As for the fact that Mr. Muskego was not a party to any of the appeals in the General Election, it is easily explainable. It is very clear from s. 7.3 of the EPA that the Committee only has jurisdiction to hear an appeal against a candidate who has been elected. Had Mr. Muskego been successful in the election, he would most likely have been a named party to the original 2006 Wilson Appeal (see the uncontested affidavit of Eric Ross, at para 13).

[46] Furthermore, there may be other grounds for accepting the evidence, in addition to the Applicant's having consented to it at the time of the appeal hearing. The Applicant now submits that the transcripts are inadmissible as hearsay, but it is possible that they were in fact admissible as an exception to the hearsay exclusion. In the cases of *R v Starr*, 2000 SCC 40, *R v Khelawon*, 2006 SCC 57 and *R v Mapara*, 2005 SCC 23, the Supreme Court of Canada found that statements made out of court are admissible where the conditions of reliability and necessity are met. Here, the transcripts clearly meet the criterion of reliability, since the witnesses testifying in the 2006 gave evidence on substantially the same events as were considered in the 2009 appeal and they were cross-examined at that point by ex-Councillors Clarke, Muswagon, and Saunders, who were, in 2006, accused of engaging in the same guilty conduct as the Applicant. I do not have enough information to establish whether the criterion of necessity was met, since it is not clear whether the witnesses were available to re-testify, but in any event, it is not necessary for me to make a ruling on

hearsay given that s. 7.3 of the EPA provides that the Appeal Committee is not bound by the rules of evidence and therefore has the discretion required to accept evidence such as these transcripts.

[47] As a result, I find that there has been no breach of procedural fairness by the Appeal Committee, and that Mr. Muskego was not prevented from making a full defence against the allegations of corrupt practices.

[48] Before concluding, I must address briefly the alternative relief sought by the Applicant. As already mentioned, the Applicant seeks a declaration from this Court to the effect that if the Respondent Appeal Committee's decision is upheld and he is declared ineligible, the period of ineligibility shall last until 2012 (i.e. six years from the events of 2006) rather than until 2017 (i.e. six years from the date of the Appeal Committee's decision). It would, I believe, be unwise and inappropriate for this Court to pronounce on that question.

[49] In its decision, the Appeal Committee declared the Applicant ineligible for a period of six years, without further specification. This sanction reflects the wording of section 9.1 of the EPA, pursuant to which "[a]ny person who ceases to hold office by virtue of Article 9.1(f) shall not be eligible to be a candidate for a period of six (6) years".

[50] As quite properly noted by the Intervener, this alternative relief was not mentioned in the Applicant's notice of application, and was raised for the first time in his written submissions. Moreover, the issue is academic for the time being, since we do not know whether the Electoral Officer will interpret his ineligibility as expiring in 2012 or in 2017. If ever the Applicant is prevented from running as a candidate in an election taking place after 2012, he will be entitled to apply to the Electoral Officer for a determination, pursuant to s. 5.3 of the EPA. It is only on the

basis of such a determination that Mr. Muskego could bring an application for leave and judicial review, according to s. 18.1 of the *Federal Courts Act*. It is therefore premature for the Court to rule on this issue.

[51] This application for judicial review is therefore dismissed, with costs.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed, with costs.

"Yves de Montigny"

_____

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-330-11
STYLE OF CAUSE:	FRED MUSKEGO v NORWAY HOUSE CREE NATION APPEAL COMMITTEE ET AL
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 14, 2011
REASONS FOR ORDER AND ORDER:	de Montigny J.
DATED:	June 20, 2011

APPEARANCES:

Fred Muskego	FOR THE APPLICANT (ON HIS OWN BEHALF)
Leah Ballantyne	FOR THE RESPONDENTS
Wayne M. Onchulenko	FOR THE INTERVENER

SOLICITORS OF RECORD:

Fred Muskego	FOR THE APPLICANT (ON HIS OWN BEHALF)
Leah Ballantyne Law Corporation Barrister, Solicitor, Notary Public Winnipeg, Manitoba	FOR THE RESPONDENTS
Levene Tadman Golub Law Corporation Winnipeg, Manitoba	FOR THE INTERVENER