

Federal Court



Cour fédérale

Date: 20111124

Docket: T-864-11

Citation: 2011 FC 1353

Ottawa, Ontario, November 24, 2011

**PRESENT:** The Honourable Madam Justice Bédard

**BETWEEN:**

**HAROLD RALPH LINKLATER**

**Applicant**

**and**

**PETER BALLANTYNE CREE NATION  
ELECTION APPEAL COMMITTEE  
(CHRISTINE CUSTER,  
MARGARET BALLANTYNE,  
FREDERICK BALLANTYNE, IDA SWAN,  
BERNADETTE BALLANTYNE, RENE JOBB  
AND BEATRICE GAMACHE),  
PETER BALLANTYNE CREE NATION AND  
TED MERASTY**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision made by the Peter Ballantyne Cree Nation Election Appeal Committee (the Appeal Committee), dated May 6, 2011, wherein it

dismissed a Notice of Appeal filed by the applicant in relation to a Band election held on April 14, 2011, for Chief and Council.

[2] Ted Merasty, the Head Electoral Officer (HEO) for the Band Election, and the Peter Ballantyne Cree Nation (the Cree Nation) each filed a respondent's record and provided oral submissions at the hearing. The Appeal Committee chose not to file a respondent's record but filed an affidavit from Ida Swan, a member of the Appeal Committee. Counsel for the Appeal Committee participated in the hearing and made brief comments.

[3] For the reasons that follow, the applicant's application for judicial review is allowed.

#### I. Background and decision under review

[4] The applicant was one of five candidates for the position of Chief of the Cree Nation in a Band Council election held on April 14, 2011. He lost by nine votes.

[5] On April 15, 2011, the applicant requested a ballot recount. On April 20, 2011, the HEO issued a letter to the members of the Band explaining that, after seeking legal advice, he had determined that there was no provision in the *Peter Ballantyne Cree Nation Band Custom Election Act and Procedures, 1994* [the Election Act] that provided for a recount of the ballots for Chief. Rather, the right to a recount was limited to candidates for Councillor pursuant to paragraph 10.19(b) of the Election Act.

[6] The Election Act sets out the procedure for administering elections and disputes regarding the election process. In particular, section 11 of the Election Act provides for an election appeal process. On April 26, 2011, the applicant launched an appeal of the election by way of a Notice of Appeal pursuant to paragraph 11.4(a) of the Election Act.

[7] The Notice of Appeal alleged that the following practices occurred and violated the Election Act within the meaning of paragraph 11.5(a) of the Election Act:

...

- a) The Electoral Officer, Ted Meresty [*sic*], was ineligible to act as the Electoral Officer by reason of being an immediate family member (brother) of Angela Merasty who was the successful Councilor [*sic*] candidate for Pelican Narrows within the meaning of s. 7.2;
- b) The Electoral Officer, Ted Meresty, [*sic*] was not sworn in by a Council of Elders as required by s. 7.3;
- c) The Electoral Officer and Deputy Electoral Officers did not provide separate ballot paper for the position of Chief and those for Councillors as required by s. 7.4(i);
- d) The Electoral Officer and Deputy Electoral Officer did not provide different coloured ballots for the position of Chief and those for Councillors as required by s. 7.4(j);
- e) The Electoral Officer and Deputy Electoral Officers did not personally count all of the ballots but rather used an electronic counter contrary to by s. 7.4(m); and
- f) The Electoral Officer refused to recount the votes cast for Chief, notwithstanding than [*sic*] less than ten voted [*sic*] separated the Appellant from the Chief Elect contrary to s. 10.19(b).

...

[8] In addition, the applicant alleged that illegal activity occurred which could discredit the integrity of the Cree Nation government within the meaning of paragraph 11.5(b) of the Election Act. In particular, the applicant alleged that the elected Chief, Darrell McCallum, engaged in corrupt election practices by offering bribes to electors in order to attract their vote. In support of this allegation, the applicant submitted affidavits from Jade Beatty and Arnold Dorion, two members of the Cree Nation, who both stated that the elected Chief had offered them money in exchange of their votes.

[9] The Appeal Committee met on May 5, 2011 to discuss the applicant's Notice of Appeal and to decide whether a full appeal hearing would be held. The Committee decided against holding an appeal hearing. On May 6, 2011, the Appeal Committee posted written confirmation that there would not be an appeal hearing held in respect of the April 14, 2011 election. The Appeal Committee's decision was signed by six out of the seven Appeal Committee members. The only individual who did not sign the decision was Bernadette Ballantyne, the applicant's sister.

## II. Issues

[10] This application for judicial review raises the following issues:

- a) Did the Appeal Committee err in its decision not to hold an appeal hearing?
- b) Did the Appeal Committee fail to observe a principle of natural justice and/or procedural fairness by denying the applicant an opportunity to make representations and by creating a reasonable apprehension of bias?

## III. Standard of review

[11] The first issue involves the interpretation of the Election Act and the application of its provisions to the facts of this case. Therefore, it does not raise a pure question of law but rather a question of mixed fact and law which should be reviewed according to the reasonableness standard.

[12] The Court's role when reviewing a decision against the reasonableness standard is explained in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190:

. . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[13] The second issue involves questions of procedural fairness which will attract the correctness standard of review.

#### IV. Analysis

##### A. *Did the Appeal Committee err in its decision not to hold an appeal hearing?*

[14] The appeal process is governed by section 11 of the Election Act. Subsections 11.1 and 11.3 provide that an Appeal Committee, composed of one elder from each community, is appointed at a nomination meeting for the term between elections.

[15] The appeal process is set forth in subsections 11.4 to 11.9 of the Election Act which read as follows:

## 11. APPEALS

...

4. The following procedures govern an appeal of the election results:

- (a) Any candidates may appeal the results of the election within fifteen (15) days from the day of the election in writing.

5. Grounds for an appeal are restricted to:

- (b) Election practices which violate the Act.
- (c) Illegal activity related to the Election, which might discredit the integrity of the Indian Government of the Peter Ballantyne Cree Nation.

6. The appeal committee will rule on whether to allow or disallow an appeal hearing.

7. If it is judged that there is sufficient evidence to warrant an appeal, the appeal committee may order a hearing within ten (10) days after receiving a written appeal.

8. An appeal hearing will take the form of a formal meeting consisting of the Appeal committee. The appeal committee may:

- (a) Uphold the election.
- (b) Order a new election within thirty (30) days of the upholding of an appeal decision.

9. The decision of this Appeal committee is final.

[16] The Appeal Committee's decision is quite laconic. It reads as follows:

We, the members of the appeal committee have met on Thursday, May 5 and reviewed all the eligible appeals filed in connection with the 2011 PBCN Election. There is not sufficient evidence to warrant an appeal. We will not be proceeding with any appeal hearing.

[1] The applicant contends that it is implicit from the Election Act that, at the first stage of the appeal process, the Appeal Committee is supposed to review the allegations and evidence submitted by the appellant and determine whether there is sufficient evidence to warrant the holding of an appeal hearing. The applicant argues that in light of the evidence he submitted – the affidavits from independent members of the Cree Nation – and the infractions to the Election Act that he identified in his Notice of Appeal, the Appeal Committee should have ordered a full hearing. The applicant contends that in refusing to order an appeal hearing, the Appeal Committee ignored the allegations and the evidence that he submitted. In doing so, the Appeal Committee refused to exercise its jurisdiction and acted unreasonably.

[2] The Cree Nation admits that there were technical breaches to the Election Act but contends that they were due to financial difficulties of the Cree Nation and a lack of resources. However, the Cree Nation argues that there were reasonable grounds on which to refuse to hold a full hearing since none of the alleged breaches to the Election Act had a material effect on the outcome of the election. In addition, the complaint relating to the recount of the ballots for Chief was outside of the jurisdiction of the HEO.

[3] The Cree Nation further argues that the Appeal Committee was within its right and discretion to refuse to hold a hearing and that the Appeal Committee's decision was almost unanimous. The HEO concurs with the Cree Nation.

[4] I consider that the Appeal Committee's decision is unreasonable for the following reasons.

[5] Although the appeal process provided in the Election Act is somewhat succinct, it clearly involves a two-step process. It appears from subsections 11.6 and 11.7 that, at the preliminary stage of the process, the Appeal Committee's mandate is to determine whether there is sufficient evidence to warrant an appeal. In order to make this decision, the Appeal Committee must assess the allegations contained in the Notice of Appeal and the evidence submitted by the appellant. Usually, at this preliminary stage, the Appeal Committee does not make a full enquiry but analyses the allegations on their face. In this case, the evidence shows that the Appeal Committee did not have any evidence before it other than the evidence provided by the applicant. If, in light of the Notice of Appeal, the Appeal Committee concludes that there is sufficient evidence, it must then proceed to hold an appeal hearing.

[6] As mentioned above, the Appeal Committee's decision is very laconic. It simply states that "there is not sufficient evidence to warrant an appeal."

[7] This decision cannot stand for two reasons.

[8] First, it lacks any justification. The Appeal Committee did not indicate why it considered that there was insufficient evidence to warrant an appeal. One is left without knowing whether the Appeal Committee considered the applicant's allegations and evidence. This failure to explain why and how the Appeal Committee reached its decision can be seen from a procedural fairness perspective or from a substantive point of view: the Appeal Committee failed to provide adequate reasons and its decision lacks justification, transparency and



intelligibility. In *Jakutavicius v Canada (Attorney General)*, 2011 FC 311, at para 31 (available on CanLII), Justice Zinn discussed in a very appropriate way the two facets of insufficient reasons:

The reasons provided for a decision may fulfill the requirements of procedural fairness in the sense that the reasons meet the goals of focusing the decision maker on the relevant factors and evidence, providing parties with the assurance that their representations have been considered, allowing parties to effectuate any right of appeal or judicial review they might have and allowing reviewing bodies to determine whether the decision maker erred, and providing guidance to others who are subject to the decision maker's jurisdiction: *VIA Rail Canada v National Transportation Agency*, [2001] 2 F.C. 25 (CA), at paras. 17-21. Yet the same reasons which meet procedural muster may render the decision unreasonable as a matter of substantive review. It is in this context that one examines, based on the reasons provided, the justification, transparency and intelligibility of the decision. Justification requires a decision maker to focus on relevant factors and evidence. Transparency requires a decision maker to clearly state the basis for the decision reached. Intelligibility requires a decision maker to reach a result that clearly follows from the reasons provided.

[9] These principles apply to this case.

[10] In its memorandum of fact and law, the Cree Nation supported the Appeal Committee's decision by indicating that the alleged breaches did not have a material effect on the election outcome. With respect, the Cree Nation cannot supplement *ex post facto* the Appeal Committee's decision. Moreover, the Cree Nation cannot provide reasons on behalf of the Appeal Committee.

[11] I also consider that the outcome reached by the Appeal Committee is unreasonable in light of the allegations and the evidence provided by the applicant. The applicant's

allegations related to the two grounds set out in the Election Act on which an election may be appealed: violations of the Election Act and illegal activities that may discredit the integrity of the election process which, in turn, could discredit the entire Cree Nation. The allegations made by the applicant were serious and some of them could very well have an effect on the outcome of the election; the evidence submitted called for a thorough analysis. I am of the view that the outcome reached by the Appeal Committee was not one that is defensible in respect of the facts and the role of the Appeal Committee at the preliminary stage of an appeal process. Therefore, it was unreasonable for the Appeal Committee to conclude that there was insufficient evidence to allow an appeal. By deciding not to hold a full hearing, the Appeal Committee ignored relevant evidence and failed to exercise its jurisdiction. Accordingly, its decision cannot stand. The Appeal Committee should have ordered the conduct of a hearing and the Court will order that such a hearing be held.

[12] I wish to add that, although the Election Act is laconic and somewhat unclear with respect to the manner in which an appeal hearing is to be conducted, it is essential, in order to be fair, that it be conducted in a manner that will permit the applicant and all other parties involved to submit evidence and to make full submissions to the Appeal Committee before it reaches its decision.

[13] Considering my conclusion on this first issue, it is not necessary that I deal with the issue of procedural fairness. However, I wish to comment on the allegations that the HEO overstepped his role in the appeal process. The Election Act is silent as to the administrative support that is to be given to the Appeal Committee. There is no evidence that the HEO

acted in bad faith or for any reason other than helping the Appeal Committee by offering it logistical and administrative support. The applicant contends that the HEO participated in the Appeal Committee's deliberations and/or influenced the Appeal Committee's decision. These allegations are not supported by the evidence. In his affidavit, the HEO states that he refrained from making any comments that could be construed as submissions in his favour and that he was not present when the Appeal Committee deliberated.

[14] The applicant requested costs on a solicitor-client basis but I do not see any justification for such an order in this case. It appears clearly from the parties' submissions that there was no bad faith or abuse on the part of the Appeal Committee members, the HEO or the Cree Nation's representatives.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that**

1. The application for judicial review is allowed.
2. The Appeal Committee’s decision is set aside.
3. The appeal is remitted back to the Appeal Tribunal.
4. The Appeal Committee must convene an appeal hearing pursuant to subsection 11.7 of the Election Act within 10 days following reception of this judgment.
5. Costs are ordered in favour of the applicant.

“Marie-Josée Bédard”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-864-11

**STYLE OF CAUSE:** HAROLD RALPH LINLATER v PETER  
BALLANTYNE CREE NATION ELECTION APPEAL  
COMMITTEE (CHRISTINE CUSTER,  
MARGARET BALLANTYNE,  
FREDERICK BALLANTYNE, IDA SWAN,  
BERNADETTE BALLANTYNE, RENE JOBB AND  
BEATRICE GAMACHE),  
PETER BALLANTYNE CREE NATION AND TED  
MERASTY

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** November 10, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** BÉDARD J.

**DATED:** November 23, 2011

**APPEARANCES:**

Kimberly Clark	FOR THE APPLICANT
David Burlingham	FOR THE RESPONDENT (Peter Ballantyne Cree Nation Election Appeal Committee)
Gordon Kirby	FOR THE RESPONDENT (Peter Ballantyne Cree Nation)
Anil K Pandila	FOR THE RESPONDENT (Ted Merasty)

**SOLICITORS OF RECORD:**

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