Federal Court  Cour fédérale

Date: 20110901

Docket: T-507-11

Citation: 2011 FC 1035

Ottawa, Ontario, September 1, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MIKE ORR

Applicant

and

JIM BOUCHER,
RAYMOND POWDER,
DAVID BOUCHIER,
RUTH MCKENZIE,
ANGELA MCKENZIE,
GERALD GLADUE
and
FORT MCKAY FIRST NATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Kelsey Becker Brookes, Returning Officer of Fort McKay First Nation, dated 24 March 2011 (Decision), which accepted Jim Boucher, Raymond Powder, David Bouchier, Ruth McKenzie, Angela McKenzie and Gerald Gladue as candidates in the Fort McKay First Nation General Election of 5 April 2011.

BACKGROUND

[2] The Applicant is a member of the Fort McKay First Nation (Fort McKay, or band). The Respondents Jim Boucher, Raymond Powder and David Bouchier served on the Fort McKay Band Council with the Applicant during the term immediately preceding the 5 April 2011 General Election. See *Orr v Fort McKay First Nation*, 2011 FC 37.

[3] On 22 March 2011, in preparation for the General Election, the Returning Officer for Fort McKay accepted nominations for the office of chief and councillors. On 22 March 2011, the Applicant approached the Returning Officer, alleging that six of the nominees did not meet the criteria set out in the Election Code, a customary law enacted by the members of Fort McKay to govern elections. On 23 March 2011, the Applicant reiterated these allegations in a letter (Letter).

[4] First, the Applicant's Letter stated that Raymond Powder, David Bouchier, Angela McKenzie and Jim Boucher were ineligible to run for office because they did not meet the criteria of s. 9.1.8 of the Election Code, which requires each nominee to be "a lifelong member of the first nation who has never held membership with any other first nation." According to the Applicant, none of these candidates were lifelong members of Fort McKay. Raymond Powder was accepted into the Fort McKay First Nation in the 1990s. David Bouchier was accepted into the Fort McKay First Nation on 9 September 1991. Angela McKenzie was accepted into the Fort McKay First Nation in the 1980s, and Jim Boucher "transferred from Fort Chipewyan Indian Band in the late 1950s, when he was a young child."

[5] Second, the Letter stated that Jim Boucher, in violation of s. 23.1.3 of the Election Code, deliberately misrepresented the facts and interfered with the election process by authorizing the Fort McKay financial officer to provide Ruth McKenzie with a letter which effectively allowed her to run for office even though she owed a "substantial sum" to the band and to the Fort McKay Group of Companies and consequently was in violation of s. 9.1.6 of the Election Code. Alternatively, Jim Boucher acted in a discriminatory manner by issuing demand letters for the repayment of debts to all candidates except for Ruth McKenzie, Angela McKenzie and Gerald Gladue.

[6] Third, the Letter stated that Ruth McKenzie, Angela McKenzie and Gerald Gladue were not eligible to run in the election because they owed the Fort McKay First Nation as well as the Fort McKay Group of Companies debts that were respectively described as "a substantial sum," "extensive monies" and "several hundreds of thousands of dollars."

[7] Finally, the Letter stated that Gerald Gladue had misrepresented the facts in violation of s. 23.1.3 of the Election Code by telling voters that the 3 March 2011 special meeting to determine the date of the General Election had been cancelled.

[8] By letter dated 24 March 2011, the Returning Officer informed the Applicant that she had accepted Jim Boucher, Raymond Powder, David Bouchier, Ruth McKenzie, Angela McKenzie and Gerald Gladue as candidates in the Fort McKay First Nation General Election. This is the Decision under review.

[9] In a separate letter addressed to David Bouchier, dated 24 March 2011, the Returning Officer issued the following warning:

> I have received a complaint that you have breached the Campaign Rules found in Part 2 of the Election Code by defaming opposing candidates and deliberately misrepresenting facts during a telephone conversation to Clara Bouchier's residence on March 23, 2011.
>
> Please cease and desist from such behaviour in the future.

DECISION UNDER REVIEW

[10] The material sections of the Decision are as follows:

> After reviewing all of the evidence before me concerning the life long membership requirement found in section 9.1.8 of the Election Code, I have decided to accept as valid those nomination papers from candidates who became members of the Fort McKay First Nation as a result of Bill C-31. The information I have received is that section 9.1.8 was added to the Election Code to ensure candidates have a historical connection to the Fort McKay First Nation and has not been used historically to restrict the candidacy rights of those members who regained their status under Bill C-31.
>
> Therefore, I have accepted David Bouchier as a candidate in the General Election.
>
> With respect to Jim Boucher and Raymond Powder, I have received letters from the Fort McKay First Nation confirming they are life long members. In any event, I have decided a person who became a member in childhood falls within the definition of life long member as it is used in section 9.1.8 of the Election Code, as he or she will have the necessary historical connection to the Fort McKay First Nation.
> Therefore, I have accepted Jim Boucher and Raymond Powder as candidates in the General Election.
>
> With respect to Ruth McKenzie, Angela McKenzie and Gerald Gladue, I have received letters from both the Fort McKay First Nation and the Fort McKay Group of Companies confirming there are no outstanding amounts owing by them. Section 9.1.6 of the Election Code requires a demand in writing have been issued at least

> 90 days prior to Nomination Day. If a decision was made not to issue a demand for payment, candidates are not in violation of section 9.1.6 of the Election Code.
>
> Therefore, I have accepted Ruth McKenzie, Angela McKenzie and Gerald Gladue as candidates in the General Election.
>
> With respect to the allegation Jim Boucher and Gerald Gladue have violated section 23.1.3 of the Election Code, I point out that section 23.1 of the Election Code deals with Fair Campaigning. The allegations raised go to eligibility not campaigning and have been addressed earlier in this letter. In any event, the Election Code does not authorize the Returning Officer to remove candidates who are found to have violated the Campaign Rules found in Part 2 of the Election Code.

ISSUES

[11] The Applicant, in argument, raises the following issues:

a. Whether the Returning Officer's interpretation of the Election Code is correct; and

b. Whether the Returning Officer erred in finding that the candidates in question were eligible to run in the General Election as "lifelong" members of Fort McKay and that their actions did not constitute either "corrupt practice" or "misrepresentation of the facts."

[12] The Respondents raise the following issue:

Whether the Court should grant judicial review, given that the Applicant has an adequate alternative remedy under the Election Code.

STATUTORY PROVISIONS

[13] The relevant provisions of the Election Code are as follows: Namely, 1.1, 9.1, 23.1, 80.1, 81.1 and 90

1.1 In this Code

1.1.1 "Act" means the *Indian Act*, R.S.C. 1970, c. I-5 [*sic*], as amended;
1.1.2 "administration" means all the employees of the "first nation";
1.1.3 "advance vote" means a vote taken in advance of election day;
1.1.4 "by-election" means an election other than a general election of run-off election;
1.1.5 "campaigning" means any act by a candidate or of an individual, individuals or an organization on behalf of a candidate which is calculated to influence at least one voter to vote or not to vote for any particular candidate or candidates;
1.1.6 "campaign materials" means any item, design, sound, symbol, or mark that is created or copied in any form for the purposes of "campaigning";
1.1.7 "candidate" means an elector who has been nominated pursuant to this Code;
1.1.8 "chief" means the member of the "council" elected to the office of chief and who also serves as the chief executive officer of the "first nation";
1.1.9 "confidential information" means:

1.1.9.1 information which could prejudice the "first nation's" negotiating or financial position if it became publically available;
1.1.9.2 information which was provided by a "member" in confidence;
1.1.9.3 information about a "member" in respect of which that "member" had a reasonable expectation of privacy; and

1.1.9.4 information which is sought by one "member" about another "member", except where the relationship between the two "members" is that of parent/guardian and minor child or dependant adult and trustee;

1.1.10 "corrupt election practice" means

1.1.10.1 attempting or offering money or other valuable consideration in exchange for:

1.1.10.1.1 an elector's vote; or

1.1.10.1.2 the falsification of an declaration of a ballot account, vote result, or declaration of election result; or

1.1.10.2 threatening adverse consequences, coercing or intimidating an elector or an election official for the purposes of influencing:

1.1.10.2.1 an elector's vote; or

1.1.10.2.2 a ballot account, vote result, or declaration of election result; or

1.1.10.3 forging documents or providing false or misleading information for the purposes of influencing:

1.1.10.3.1 an elector's vote; or

1.1.10.3.2 a ballot account, vote result, or declaration of election result; or

1.1.11 "council" means the body of members elected and holding the office of chief or councillor at that time who are empowered to act on behalf of the "first nation";

1.1.12 "councillor" means a member of the council;

1.1.13 "elder" means a person who is an aged and respected member knowledgeable in the practices, customs, traditions and ways of the "first nation";

1.1.14 "election" means a general election, by-election, or run off election held pursuant to this Code;

1.1.15 "election official" means the returning officer or a polling clerk;

1.1.16 "elector" means a person who is eligible to vote pursuant to section 34;

1.1.17 "form" means one of the documents attached hereto as Schedule "A", as applicable;

1.1.18 "general election" means an election held for all the council positions to fill vacancies caused by the passage of time;

1.1.19 "general meeting" means a meeting of the "electors" for which at least 2 days "meeting notice" has been given to discuss matters of general concern to the "first nation";

1.1.20 "first nation" means the Fort McKay First Nation;

1.1.21 "list of electors" means the list of those persons eligible to vote pursuant to section 34;

1.1.22 "member" means a person who has been accepted into membership by the first nation pursuant to custom or a membership code duly enacted by the first nation;

1.1.23 "membership list" means the list of members maintained by the first nation;

1.1.24 "meeting notice" means any means or combination of means of communication that may be reasonably expected to inform the "electors" of the date, time, and place of a

"general meeting" or "special meeting", including:

1.1.24.1 posting a written notification at a publically accessible area of the "first nation's" administration offices;

1.1.24.2 posting an electronic notification on the "first nation's" web site;

1.1.24.3 personal delivery of a written notification to an "elector" including leaving a copy at the "elector's" home;

1.1.24.4 electronic delivery of a written notification to an "elector's" email address;

1.1.24.5 facsimile transmittal of a written notification to an "elector's" facsimile telephone number;

1.1.24.6 transmittal of a written notification sent by any form of postal or couriered delivery;

1.1.24.7 telephone communication to an "elector's" home or office telephone number by an individual charged by the council with the responsibility of giving "notice";

1.1.24.8 personal communication to an "elector" by an individual charged by the council with the responsibility of giving "notice";

1.1.25 "polling clerk" means a person appointed by the returning officer to assist in the election ;

1.1.26 "returning officer" means a person appointed under this Code as a returning officer and includes a person acting in the returning officer's place;

1.1.27 "special meeting" means a meeting of the "electors" for which at least 7 days "meeting notice" has been provided and which has been called for the purpose of considering and voting on an issue of importance; and

1.1.28 "voting station" means the place where an elector votes.

…

9.1 A person may be nominated as a candidate in any election under this Code if, on the nomination day, the person:

9.1.1 is a member of the first nation;
9.1.2 is at least 18 years of age or older;
9.1.3 is not employed by the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
9.1.4 has not been convicted of any indictable criminal offenses;
9.1.5 has not been found liable in a civil court of pursuant to criminal proceedings in a respect of any matter involving theft, fraud or misuse of property belonging to the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
9.1.6 does not have a debt payable for which payment was demanded in writing 90 days prior to the nomination day, including without limitation salary or travel advances, rent, or loans, to the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
9.1.7 has not been removed from the office of chief or councillor pursuant to s. 101.3 of the Code during the preceding term of office; and
9.1.8 is a lifelong member of the first nation who has never held membership with any other first nation.

…

23.1 Campaigning shall not include or involve:

23.1.1 defamation of opposing candidates;
23.1.2 sabotage of an opposing candidate's campaign;
23.1.3 deliberate misrepresentation of facts; or
23.1.4 threats against administration including threats of dismissal or discipline.

…

80.1 The appeal arbitrator:

80.1.1 shall be either a lawyer qualified to practice law in the province of Alberta or a retired judge or justice of any level of court; and
80.1.2 may not be any person who has previously represented the first nation, the affected candidate or appellant, any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation, or the Athabasca Tribal Council.

81.1 A candidate or elector who voted in the election, may appeal an election on the basis that:

81.1.1 the returning officer made an error in the interpretation or application of the Code which affected the outcome of the election;
81.1.2 a person voted in the election who was ineligible to vote and provided false information or failed to disclose information relevant to their right to vote and their participation affected the outcome of the election;
81.1.3 a candidate who ran in the election was ineligible to run and provided false information or failed to disclose information relevant to the validity of their nomination;
81.1.4 a candidate engaged in conduct contrary to section 23 and the

> candidate's conduct affected the outcome of the election; or
>
> 81.1.5 a candidate was guilty of a corrupt election practice or benefited from and consented to a corrupt election practice.
>
> …
>
> 90.1 No decision, order, directive, declaration, ruling or proceeding before the appeal arbitrator shall be questioned or reviewed in any court by application for judicial review or otherwise and no order shall be made or process entered or proceedings taken in any court whether by way of injunction, declaratory judgment, prohibition, quo warranto, or otherwise to question, review, prohibit, or restrain the appeal arbitrator or the appeal arbitrator's decision or proceedings before the appeal arbitrator.
>
> 90.2 Notwithstanding section 90.1 a decision, order, directive, declaration, ruling, or proceeding of the appeal arbitrator may be questioned or reviewed by way of an application for judicial review in the Federal Court of Canada but only on the basis that the appeal arbitrator erred in law or failed to observe a principle of natural justice.

STANDARD OF REVIEW

[14] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[15] The Applicant challenges the Returning Officer's interpretation of the Election Code, specifically of the term "lifelong" membership. Justice Douglas Campbell, in *Nisichawayasihk Cree Nation v Nisichawayasihk Cree Nation (Appeal Committee)*, [2003] 3 CNLR 141 (QL) at paragraph 9, observed that the band's Electoral Code is "a statement of the electoral law of the NCN. As such, it is akin to a 'statute' passed by the Government of Canada or one of the Provinces or Territories." Statutory interpretation is a question of law, which is reviewable on the correctness standard. See *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 60.

[16] The Applicant further challenges the Returning Officer's finding that, pursuant to the Election Code, the candidates in question are not prohibited from running in the General Election due to their conduct or circumstances. This is a question of mixed fact and law, as it involves the application of legal standards (the interpretation of the Election Code) to a set of facts. See *Democracy Watch v Campbell*, 2009 FCA 79 at paragraphs 21-24.

[17] There is no standard of review with respect to the issue raised by the Respondents. Whether an adequate alternative remedy was available to the Applicant in the circumstances is a question that the Court must determine; it is not a question earlier determined by an administrative decision maker that is now before the Court for review.

[18] In *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3, [1995] SCJ No. 1 (QL) at paragraphs 37-18, Chief Justice Lamer commented on the factors relevant to determining whether adequate alternative remedy exists. He stated:

> … I conclude that a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant.
>
> In this case, when applying the adequate alternative remedy principle, we must consider the adequacy of the statutory appeal procedures created by the bands, and not simply the adequacy of the appeal tribunals. This is because the bands have provided for appeals from the tribunals to the Federal Court, Trial Division. I recognize that certain factors will be relevant only to the appeal tribunals (i.e., the expertise of members, or allegations of bias) or to the appeal to the Federal Court, Trial Division (i.e., whether this appeal is intra vires the bands). In applying the adequate alternative remedy principle, all these factors must be considered in order to assess the overall statutory scheme.

[19] If the Court should find that an adequate alternative remedy was available to the Applicant, it must then consider relevant factors and reach a reasonable conclusion regarding the exercise of its discretion as to whether it should hear the judicial review application despite the existence of an adequate alternative remedy. See *Spidel v Canada (Attorney General)*, 2010 FC 1028 at paragraph 12; *Froom v Canada (Minister of Justice)*, 2004 FCA 352; and *McMaster v. Canada (Attorney General)*, 2008 FC 647 at paragraphs 23 and 27.

ARGUMENTS

The Applicant

The Returning Officer Erred in Finding that Certain of the Nominees Were "Lifelong" Members of the Fort McKay First Nation

[20] The Applicant notes that s. 13.4 of the Election Code provides:

> A nomination paper is not valid nor shall it be acted on by the returning officer unless the candidate meets the requirements set out in section 9.1.

[21] Section 9.1.8 provides:

> A person may be nominated as a candidate in any election under this Code if, on the nomination day, the person is a lifelong member of the first nation who has never held membership with any other first nation.

[22] The *Oxford English Dictionary* defines "lifelong" as "lasting or remaining in a particular state throughout a person's life."

[23] The Applicant submits that, in light of the foregoing, the Returning Officer erred in accepting David Bouchier, Jim Boucher and Raymond Powder as candidates in the General Election because they are not "lifelong" members of Fort McKay. Specifically, the Applicant challenges her finding that a person (such as David Bouchier) "who became [a member] of the Fort McKay First Nation as a result of Bill C-31" or a person (such as Jim Boucher or Raymond Powder) who "became a member in childhood falls within the definition of life long member as it is used in section 9.1.8 of the Election Code" because "he or she will have the necessary historical connection to the Fort McKay First Nation." This finding that "lifelong" is synonymous with "historical connection" is unexplained and unsupported. It is inconsistent not only with the above-

noted dictionary definition of "lifelong" but also with the jurisprudence of both the Federal Court and the Alberta Court of Queen's Bench.

[24] The Applicant submits that s. 9.1.8 of the Election Code was successfully applied in February 2008 to bar the electoral nomination of Stanley Laurent, who was born a member of the nearby Fond Du Lac Denesuline Nation but who transferred to Fort McKay in 1995. See *Laurent v Fort McKay First Nation*, 2008 ABQB 84 at paragraphs 4, 33 and 36; *Laurent v Gauthier and Fort McKay First Nation*, 2009 FC 196 at paragraph 3; *Laurent v Fort McKay First Nation*, 2009 FC 257 at paragraph 3-4; *Laurent v Fort McKay First Nation*, 2009 FCA 235 at paragraphs 2, 12, 32, 57-58 [*Laurent FCA*]. The Applicant contends that the facts of the instant application with respect to Jim Boucher, formerly a member of the nearby Fort Chipewyan First Nation, warrant an outcome similar to those in the above-noted cases. The Applicant further contends that Raymond Powder and David Bouchier also are not "lifelong" members of Fort McKay because they "were not recognized as being 'Indian' under the Indian Act, until the passage of Bill C-31" and because they did not become members of Fort McKay until the 1990s when their grandmothers and mothers became members of Fort McKay.

The Returning Officer Erred in Accepting Candidates Who Had Engaged in Corrupt Practices

[25] The Applicant argues that the Returning Officer erred in accepting as candidates David Bouchier, Jim Boucher and Gerald Gladue, all of whom had engaged in corrupt practices.

[26] David Bouchier allegedly defamed opposing candidates and deliberately misrepresented facts during a telephone conversation to Clara Bouchier's residence on 23 March 2011, which constitutes a violation of s. 23.1.1 and 23.1.3 of the Election Code.

[27] Jim Boucher allegedly arranged for the financial officer of the Fort McKay Group of Companies to provide Ruth McKenzie with a letter that effectively allowed her to run as a candidate in the General Election, despite her outstanding debt to the band and to the Fort McKay Group of Companies. He did this to "stack" the council with his supporters. The Applicant submits that this constitutes interference in the election process and a misrepresentation of the facts.

[28] Gerald Gladue allegedly misrepresented the facts by accepting a letter from the financial officer of the Fort McKay Group of Companies, which effectively allowed him to run as a candidate in the General Election, despite his outstanding debt to the band and to the Fort McKay Group of Companies. In addition, the Applicant alleges that Gerald Gladue improperly interfered with the vote to determine the date of the General Election by telling members of the electorate that the 3 March 2011 special meeting when the vote was to be held had been cancelled.

[29] The Applicant submits that these actions violate the Fair Campaigning provisions set out in s. 23 of the Election Code and, in addition, constitute corrupt practices, a term defined by Justice Eleanor Dawson of this Court in *Wilson et al. v Ross et al.*, 2008 FC 1173 at paragraph 23, as "any attempt to prevent, fetter, or influence the free exercise of a voter's right to choose for whom to vote" with the intention of improperly affecting the result of an election. The Supreme Court of Canada held in *Sideleau v Davidson* (1942), [1942] SCR 306, 3 DLR 609, that a corrupt practice

intended to affect the result of an election will void an election. Section 81.1.5 of the Election Code provides that a member of the electorate may appeal an election where "a candidate was guilty of a corrupt election practice."

[30] The Applicant further submits that, in light of the foregoing, the Returning Officer erred in accepting David Bouchier as a candidate in the General Election. Moreover, she erred in failing to deal with the allegations made against Jim Boucher and Gerald Gladue, having concluded in her Decision that "the Election Code does not authorize the Returning Officer to remove candidates who are found to have violated the Campaign Rules found in Part 2 [including s. 23.1] of the Election Code."

There Was No Adequate Alternative Remedy under the Elections Code

[31] The Applicant notes that s. 78.1 of the Election Code provides for the appointment of an election appeal arbitrator "for the purposes of determining any controversy arising from an election." However, the Returning Officer in her Decision failed to inform him of the existence of an election appeal arbitrator.

[32] Further, in the Applicant's view, he followed the correct procedure under the Election Code by making his appeal to the Returning Officer, given that he was requesting a review of the nominations. The Election Code defines the nomination procedure separately and distinctly; therefore it is the Election Code's "nomination" provisions, rather than its general "election" provisions, that apply in the circumstances. As Part 7 of the Election Code indicates, it is

appropriate to bring before the election appeal arbitrator controversies "arising from an election." Section 1.1.14 of the Election Code defines "election" as "a general election, by-election, or run off election held pursuant to this Code." In contrast, the Applicant's complaint was specifically related to the nomination procedure and not generally to the election.

[33] In the alternative, the Applicant argues that s. 78.1 of the Election Code required the Returning Officer to appoint an election appeal arbitrator. However from 23 March until 31 March 31 of 2011 no election appeal arbitrator was available to receive complaints. The appointed election appeal arbitrator had been injured and was unable to carry out the duties of his office. His replacement was not formally appointed until 31 March 2011.The Applicant submits that judicial review is the appropriate procedure to follow when, as here, the provisions of the Election Code are not in effect.

The Respondents

The Applicant Had an Adequate Alternative Remedy under the Election Code

[34] The Respondent argues that the Election Code provides a comprehensive appeals process for the timely resolution of disputes which, in turn, provides Fort McKay's government with certainty as to who has the authority to make decisions that are binding on the First Nation. The Applicant availed himself of that process by filing an appeal to the election appeal arbitrator on 20 April 2011. The election appeal arbitrator heard the matter on 27 April 2011 and dismissed it, with reasons, on 2 May 2011. In bringing this application for judicial review, the Applicant is

undermining Fort McKay's procedural choices and its desire for timely justice by engaging in serial litigation or attempting to split his case.

[35] The grounds for appeal are enumerated in ss. 81.1.1–81.1.5 and the qualifications of the appeal arbitrator are set out in ss. 80.1.1–80.1.2 of the Election Code. The appeal arbitrator has broad jurisdictional powers including the power to determine questions of law and to compel the returning officer to give evidence and to account for the conduct of the election.

[36] Section 90.2 of the Election Code expressly contemplates that decisions of the appeal arbitrator may be the subject of judicial review proceedings in this Court but s. 90.1 prohibits any proceedings that would deprive the arbitrator of jurisdiction to determine those matters property within his or her purview. The provisions are as follows:

> 90.1 No decision, order, directive, declaration, ruling or proceeding before the appeal arbitrator shall be questioned or reviewed in any court by application for judicial review or otherwise and no order shall be made or process entered or proceedings taken in any court whether by way of injunction, declaratory judgment, prohibition, quo warranto, or otherwise to question, review, prohibit, or restrain the appeal arbitrator or the appeal arbitrator's decision or proceedings before the appeal arbitrator.
>
> 90.2 Notwithstanding section 90.1 a decision, order, directive, declaration, ruling, or proceeding of the appeal arbitrator may be questioned or reviewed by way of an application for judicial review in the Federal Court of Canada but only on the basis that the appeal arbitrator erred in law or failed to observe a principle of natural justice.

[37] The Respondent argues that judicial review is a discretionary remedy that should not be granted where, as here, there is an adequate alternative remedy. Underlying this principle is a

concern for the efficacious administration of justice. As the Supreme Court of Canada stated in *Harelkin v University of Regina*, [1979] 2 SCR 561, [1979] SCJ No 59 (QL), "The courts should not use their discretion to promote delay and expenditure unless there is no other way to protect a right." In applying this principle to First Nations decision-makers, the Supreme Court of Canada in *Matsqui Indian Band*, above, at paragraph 44, held that, where the scheme furthers the promotion of "Aboriginal self-government, issues should be resolved within the system developed by Aboriginal peoples before recourse is taken to external institutions."

[38] The Respondent further submits that the Election Code's appeals process provides certainty to First Nations governments.

[39] The Respondent challenges the Applicant's assertion that his complaint respecting the nomination procedure does not constitute a complaint respecting an election and that, accordingly, his complaint is properly determined in a judicial review proceeding as it is not within the election appeal arbitrator's jurisdiction. The Federal Court of Appeal in *Laurent FCA*, above, at paragraph 66, found that the applicant had an adequate alternative remedy under s. 81.1.1 (the appeal provisions) of this same Election Code for disputes concerning alleged errors of the returning officer in dealing with nominations. Similarly, in the instant case, if the Applicant believed that the Returning Officer erred in accepting Jim Boucher, Raymond Powder, David Bouchier, Ruth McKenzie, Angela McKenzie and Gerald Gladue as candidates in the General Election, he should have appealed to the appeal arbitrator as expressly set out in the Election Code. Instead, he has raised certain issues before the appeal arbitrator and others before this Court.

[40] Alternatively, the Applicant relies on the accident which befell the election appeal arbitrator as a justification for side-stepping the Fort McKay First Nation's chosen system of dispute resolution. The Respondents submit that a qualified arbitrator was in place well before the election and the declaration of election result. There were no limitation issues affecting the Applicant's ability to put forward his concerns using the appeal process prescribed by the Election Code, and there was no suggestion that the appeal process was inadequate or biased. Indeed, the Applicant availed himself of the appeal process. In the interests of efficiency and certainty, he could have and should have included in his appeal the issues raised in these proceedings, as they are specifically contemplated by sections 81.1.1 and 81.1.3–81.1.5 of the Election Code.

ANALYSIS

[41] Having now heard counsel and reviewed the full record, I have to conclude that, notwithstanding the able arguments of Applicant's counsel, Ms. Kennedy, the Respondent is correct that judicial review and the relief sought by the Applicant should not be granted in this case because the Applicant has failed to avail himself of an adequate alternative remedy.

[42] On 22 March 2011, the Applicant made a verbal complaint to the Returning Officer. The next day, he set out his complaints in a letter to her dated 23 March 2011. On 24 March 2011, the Returning Office rendered her Decision and, on that same day, the appeal arbitrator was injured and could no longer fulfill the duties of his office. On 25 March 2011, the Applicant filed in the Federal Court a Notice of Application for judicial review of the Returning Officer's Decision. On 29 March 2011, a second appeal arbitrator was appointed but he had to recuse himself later that day due to a

conflict of interest. On 31 March 2011, the third and final appeal arbitrator was appointed. On 5 April 2011 the election was held and the votes were counted; presumably the results were declared on that same date.

[43] Section 82.1 of the Election Code provides that an election appeal must be filed with the returning officer no later than 14 days following the declaration of the election result which, in this case, would mean by 19 April 2011. Therefore, it seems to me that the Respondent is correct that there were no limitation issues affecting the Applicant that would prevent him from making an appeal to the appeal arbitrator. The election results were declared on 5 April and there was an appeal arbitrator available to hear the Applicant's complaint on that day and even as early as 31 March.

[44] The Applicant says that the Returning Officer in her Decision failed to inform him of the existence of an election appeal arbitrator. This does not mean that he did not know one existed. The Applicant has made an appeal to the appeal arbitrator and he has served on the band council himself, so presumably he had the knowledge and wherewithal to find out what steps he could take to challenge the Returning Officer's Decision. There is no evidence that the Applicant did not know about the appeal process under the Election Code or that he needed to be told anything.

[45] The Applicant also argues that Part 7 of the Election Code indicates that it is appropriate to bring before the election appeal arbitrator only those controversies "arising from the election." He argues that his controversy does not arise from the election but rather from the nomination procedure and that the jurisdiction of the election appeal arbitrator is limited to hearing election-

related matters, which excludes nomination-related matters. Therefore, judicial review must be the correct procedure under the Election Code.

[46] I am unconvinced by the Applicant's argument. I think that, with respect to the proper procedure for the resolution of nomination disputes, very little hangs on the fact that Part 7 of the Code refers to controversies "arising from an election." In coming to this view, I have considered that, although the Code is called an "Election" Code, nevertheless it deals with nomination procedure in Part 1. Furthermore, Part 1 is entitled "Election Procedure" but nonetheless deals with nomination procedure. In my view, it is reasonable to infer from this that nomination procedure is part of election procedure and, consequently, that the election appeal arbitrator is responsible for both. Also, the grounds of appeal refer specifically to the very complaints that the Applicant wishes to make in this case.

[47] Also, presuming that the members of Fort McKay adopted the Election Code for the purpose of having a complete code for the governance of elections, it seems unlikely that they intended to have one procedure for reviewing controversies "arising from an election" but a different (and, by nature, less expedient) procedure for controversies arising from a nomination. This makes little sense for all of the reasons noted by the Respondent regarding the importance of self-government and the speedy resolution of disputes for first nation communities.

[48] The Applicant seeks to rely upon the decision of Justice Paul Rouleau in *Sucker Creek Indian Band v Calliou*, [1999] FCJ No 1135, but, in my view, the context and the issues in that case bear little relationship to the present set of facts. Justice Rouleau was dealing with a different

election code a year after the fact when there was no electoral officer and the timing issues, all of which caused problems for the provisions of the code in question. No such problems arise on the present facts and, in any event, the Federal Court of Appeal in *Laurent* indicated that a nomination appeal has to be made to the appeal arbitrator using the specific provisions of the Election Code. See *Laurent* at paragraph 66.

[49] Fort McKay operates under this Election Code which is a customary law enacted by the members of Fort McKay.

[50] The Election Code has a comprehensive appeal process.

[51] Specific grounds of appeal are enumerated in the Election Code and include the following:

> 81.1.1 the returning officer made an error in the interpretation or application of the Code which affected the outcome of the election;
>
> 81.1.2 a person voted in the election who was ineligible to vote and provided false information or failed to disclose information relevant to their right to vote and their participation affected the outcome of the election;
>
> 81.1.3 a candidate who ran in the election was ineligible to run and provided false information or failed to disclose information relevant to the validity of their nomination;
>
> 81.1.4 a candidate engaged in conduct contrary to section 23 and the candidate's conduct affected the outcome of the election; or
>
> 81.1.5 a candidate was guilty of a corrupt election practice or benefited from and consented to a corrupt election practice.

[52] Appeals are heard by an individual who must have certain professional qualifications and who must be impartial. The Election Code states as follows:

> 80.1 The appeal arbitrator.
>
> 80.1.1 shall be either a lawyer qualified to practice law in the province of Alberta or a retired judge or justice of any level of court; and
>
> 80.1.2 may not be any person who has previously represented the first nation, the affected candidate or appellant, any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation, or the Athabasca Tribal Council.

[53] The appeal arbitrator has broad jurisdictional powers including the power to determine questions of law and to compel the returning officer to give evidence and to account for the conduct of the election.

[54] The election code requires timely disposition of disputes and a decision must be rendered no later than 27 days following the declaration of the election result:

a. Appeals must be filed within 14 days of the declaration of election result;

b. A notice of hearing must be issued and delivered to all affected parties within three days of the expiry of the limitation period;

c. The hearing must take place no later than five days from the issuance of the notice of hearing; and

d. The arbitrator must give his or her decision no later than five days after the appeal hearing.

[55] The Election Code expressly contemplates that decisions of the appeal arbitrator may be the subject of judicial review proceedings in this Court and prohibits any proceedings that would deprive the arbitrator of jurisdiction to determine those matters properly within his or her purview. The Election Code states:

> 90.1 No decision, order, directive, declaration, ruling or proceeding before the appeal arbitrator shall be questioned or reviewed in any court by application for judicial review or otherwise and no order shall be made or process entered or proceedings taken in any court whether by way of injunction, declaratory judgment, prohibition, quo warranto, or otherwise to question, review, prohibit, or restrain the appeal arbitrator or the appeal arbitrator's decision or proceedings before the appeal arbitrator.
>
> 90.2 Notwithstanding section 90.1 a decision, order, directive, declaration, ruling, or proceeding of the appeal arbitrator may be questioned or reviewed by way of an application for judicial review in the Federal Court of Canada but only on the basis that the appeal arbitrator erred in law or failed to observe a principle of natural justice.

[56] Judicial review is a discretionary remedy and it is well-established that it should not be granted in circumstances where the Applicant has an adequate alternative remedy. Underlying this principle is a concern for efficacious administration of justice. As stated in *Harelkin*, above, "the courts should not use their discretion to promote delay and expenditure unless there is no other way to protect a right."

[57] Legislative intention is also an important consideration. *Harelkin* states:

> While of course not amounting to privative clauses, provisions like ss. 55, 66, 33(1)(e) and 78(1)(c) are a clear signal to the courts that they should use restraint and be slow to intervene in university affairs by means of discretionary writs whenever it is still possible for the university to correct its errors with its own institutional means. In using restraint, the courts do not refuse to enforce statutory duties imposed upon the governing bodies of the university. They simply

> exercise their discretion in such a way as to implement the general intent of the Legislature.

[58] As the Respondents point out, these same principles have been applied to First Nation decision-making bodies. Upholding a decision of the Federal Court of Appeal, the Supreme Court of Canada stated as follows in *Matsqui Indian Band* at paragraph 44:

> It was open to Joyal J. to conclude that allowing the respondents to circumvent the appeal procedures created by the bands in their assessment by-laws would be detrimental to the overall scheme, in light of its policy objectives. It is not unreasonable to conclude that since the scheme is part of the policy of promoting Aboriginal self-government, issues should be resolved within the system developed by Aboriginal peoples before recourse is taken to external institutions.

[59] As the Respondents say, Fort McKay has established a process under its own customary laws to resolve election disputes in a timely and effective manner. First Nation governments, like any other government, need to have certainty. Every member, every candidate, and all third parties the First Nation government deals with on a day-to-day basis need to know who has authority to make decisions binding on the First Nation. If there is any dispute about that, it needs to be resolved in a timely way.

[60] Recognizing that there is no benefit in allowing these matters to languish, the Election Code ensures that disputes are dealt with quickly. The procedural choices and the desire for timely justice should not be undermined by allowing an alternative process to run parallel to the dispute resolution system expressly chosen by the First Nation.

[61] In my view, the Applicant attempts to rely upon the Federal Court of Appeal decision in *Laurent FCA*, above, but does not address that court's decision on adequate alternative remedy. Giving consideration to the same Election Code that applies to this matter, the Federal Court of Appeal ruled that an applicant has an adequate alternative remedy under the appeal provisions of the Code. In particular, this would include alleged errors of the returning officer in dealing with nominations:

> 66. Mr. Laurent could have challenged the decision of the Returning Officer to reject his nomination on the basis of sections 9.1.4, 9.1.6 and 9.1.8. His appeal could have relied on the ground stated in section 81.1.1 of the Election Code, specifically that the Returning Officer erred in her application of sections 9.1.4, 9.1.6 and 9.1.8 because the application of those provisions to Mr. Laurent resulted in a breach of his rights under the Charter and subsection 35(1) of the *Constitution Act, 1982*.

[62] The case at bar deals with similar issues. If the Applicant believed that the returning officer made errors in dealing with the eligibility of a candidate, he had the right to appeal to the appeal arbitrator as expressly set out in the Election Code.

[63] Alternatively, the Applicant seeks to rely on a quirk of timing and accident (literally) as the arbitrator originally appointed was injured and could not continue.

[64] I agree with the Respondents that the accidental injury of an arbitrator should not be the basis on which a system of dispute resolution - carefully considered and enacted by a ratification vote of the Members of Fort McKay - is set aside or ignored. The Applicant was not prejudiced or inconvenienced during the short period of time it took to appoint a replacement arbitrator.

[65] A qualified arbitrator was in place well before the election and the declaration of election result. There were no limitation issues affecting the Applicant and he had the opportunity to put forward his concerns using the appeal process prescribed by the Election Code. There is no evidence to suggest that the appeal process was inadequate or that the process was tainted by bias or otherwise. Indeed, the Applicant availed himself of the appeal process with the assistance of his legal counsel.

[66] The Applicant could have and should have included in his appeal all the issues raised in these proceedings. The matters and allegations in the case at bar are specifically contemplated by sections 81.1.1, 81.1.3, 81.1.4, and 81.1.5 of the Election Code. Had the Applicant brought these matters forward under the appeal provisions, the issues would have been resolved long before this matter will be decided and the unnecessary expense and use of valuable judicial resources could have been avoided.

[67] For all of the above reasons, I think this application must fail.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed with costs to Fort McKay First Nation.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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