Federal Court of Appeal | Cour d'appel fédérale

Date: 20130705

Dockets: A-102-13
A-101-13

Citation: 2013 FCA 177

CORAM: **BLAIS C.J.**
MAINVILLE J.A.
NEAR J.A.

BETWEEN:

Docket: A-102-13

GEORGE ASSINIBOINE,
MARVIN DANIELS and RUTH ROULETTE

Appellants

and

DENNIS MEECHES

Respondent

BETWEEN:

Docket: A-101-13

DAVID MEECHES

Appellant

and

DENNIS MEECHES

Respondent

Heard at Winnipeg, Manitoba, on June 25, 2013.

Judgment delivered at Ottawa, Ontario, on July 5, 2013.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: BLAIS C.J.
NEAR J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This concerns two consolidated appeals from a judgment of Russell J. of the Federal Court (the "Application Judge") dated February 26, 2013 and cited as 2013 FC 196 (the "Reasons") which declared that the Long Plain First Nation Election Appeal Committee (the "Election Appeal Committee" or "Committee") had made a final and binding decision requiring new elections for the offices of the Chief and all the councillors.

BACKGROUND AND CONTEXT

(a) Overview of the litigation

[2] The Long Plain First Nation (the "First Nation") is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. It is governed by a Chief and four councillors forming the council of the band under the *Indian Act*. They are elected for three year terms pursuant to the *Long Plain First Nation Election Act* (the "Election Act" or the "Act"), an election code adopted by the First Nation. The last elections were held in April 2012, and resulted in the election of the appellant David Meeches as Chief, and of the appellants George Assiniboine, Marvin Daniels and Ruth Roulette as councillors. Barbara Esau, who is not a party to these appeals, was also elected councillor at that time.

[3] The Election Act designates the Chief and the councillors as the "Tribal Government". This is an expression borrowed from American Indian law. Though the expression "Long Plain First

Nation Government" may be more appropriate, I will nevertheless refer to the "Tribal Government" in these reasons in light of its use in the Election Act.

[4] Various appeals challenging the results of the April 2012 elections were submitted to the Election Appeal Committee constituted under the Election Act. One of the appeals was made by the respondent Dennis Meeches, who had unsuccessfully run against the appellant David Meeches in the election for the office of Chief. After reviewing the appeals before it, the Election Appeal Committee concluded that the election process overall appeared to have been fairly conducted. It nevertheless recommended that the elections be set aside and new elections be held.

[5] An application for judicial review was subsequently filed in the Federal Court on behalf of the First Nation seeking to set aside that decision. Concurrently, a motion was brought seeking to stay the decision pending the final determination of that application. The stay motion was dismissed by Harrington J. (the "Motion Judge") on the ground that the Election Appeal Committee had simply recommended that new elections be held, and that this recommendation was not a "decision" or an "order" that had to be accepted or acted upon by the Tribal Government. The Motion Judge however noted that if an order was issued by the Election Appeal Committee calling for new elections, then a new stay motion could be submitted, if need be. The First Nation discontinued its application shortly thereafter.

[6] The respondent Dennis Meeches then initiated his own application for judicial review before the Federal Court. That application was dealt with in the judgment under appeal. The Application

Judge found that he was not bound by the prior decision of the Motion Judge. He rather concluded that the Committee had made a binding decision calling for new elections.

[7] The respondent subsequently filed a motion in the Federal Court seeking an order pursuant to Rule 431 of the *Federal Courts Rules*, SOR/98-106 compelling compliance with the judgment of the Application Judge. That motion was dismissed by Strickland J. on April 11, 2013 on the ground that the judgment was purely declaratory and could therefore not be enforced under Rule 431.

[8] The appellants subsequently sought an order from this Court staying the judgment of the Application Judge. I granted this stay on April 29, 2013 for reasons cited as 2013 FCA 114. In light of the circumstances, I further ordered that the consolidated appeals be expedited.

(b) The Election Act

[9] It is appropriate to reproduce upfront the principal provisions of the Election Act which are at issue.

[10] Article Five of the Election Act provides for the conduct of a candidate during an election. It specifically forbids vote buying and states the consequences for a candidate engaging in the practice:

> 5.4 No buying of votes in any manner, i.e. giving money, buying alcohol, or anything given or exchanged of monetary value between Nomination Day and Election Day.
>
> ...
>
> 5.11 Failure to adhere to Sections 5.1 to 5.10 will lead to disqualification of the candidate.

[11] Article Eight of the Election Act deals with the Election Appeal Committee. It notably provides for the following regarding the composition, duties and authorities of the Committee:

> 8.1 The Election Appeal Committee shall consist of three (3) non-Tribal members.
>
> ...
>
> 8.5 The Election Appeal Committee shall have the authority ... to investigate and determine whether any elected official has vacated his/her office as a result of the provisions of Article 18 herein.
>
> 8.6 The Election Appeal Committee shall investigate a substantial matter brought before them relating to ... an allegation pursuant to Article 5 or Article 17 upon receiving a written request to investigate. The written request shall be delivered to the Election Appeal Committee by any elector.
>
> 8.7 The Election Appeal Committee shall have the discretion to determine the scope of any investigation and upon completion; (*sic*) the Election Appeal Committee shall provide to the Tribal Government their findings within two (2) days, in writing.
>
> 8.8 In the event the Election Appeal Committee recommends that the elected official has vacated his or her office pursuant to a breach, the Tribal Government shall declare the office vacant and forthwith call a By-election. The declaration shall be in the form of a Band Council Resolution passed at a duly convened meeting of the Tribal Government.

[12] Article Twelve of the Act deals with nomination appeals. It sets out an appeal mechanism for candidates who have been found by the Electoral Officer to be ineligible to run in an election:

> 12.1 If a candidate is found to be ineligible by the Electoral Officer, with respect to his/her nomination, he/she may appeal within two (2) days of the close of the nomination meeting.
>
> 12.2 The candidate must submit a letter, with supporting documentation, stating the reasons for his/her nomination appeal.
>
> 12.3 The Election Appeal Committee will immediately convene a meeting with the ineligible candidate appealing to present his/her nomination appeal.
>
> 12.4 The Election Appeal Committee will discuss and make a recommendation within three (3) days of the nomination meeting as to whether or not the ineligible candidate is to be re-instated.

12.5 The decision of the Election Appeal Committee shall be binding and final.

[13] Article Seventeen concerns election appeals. It sets out the provisions governing an appeal of the results of an election:

> 17.1 Any candidate or elector has the right to appeal the results of an election within seven (7) days from the date of the election.
>
> 17.2 Grounds for an appeal are restricted to election practices that contravene this Election Act.
>
> 17.3 An appeal must be in writing duly signed to the Electoral Officer and must contain details and supporting documentation as to the grounds upon which the appeal is being made and include a non-refundable deposit fee of $100.00 by certified cheque, money order, bank draft or cash and which monies are to be applied toward the appeal costs.
>
> 17.4 The Election Appeal Committee shall determine as to whether or not an appeal hearing should take place.
>
> 17.5 If it is determined that there is sufficient evidence to warrant an appeal hearing, the Election Appeal Committee shall schedule a formal meeting two (2) days after the election appeal deadline.
>
> 17.6 An appeal hearing will take the form of a formal meeting consisting of:
> The Electoral Officer
> The Election Appeal Committee
> The candidate or elector making the appeal.
>
> 17.7 The decision of the Election Appeal Committee shall be irrevocable, binding, and final. The decision must be made public within (2) (*sic*) days of the appeal hearing with the decision being posted at the Tribal Government office, Administration office, and Keeshkeemaqua Conference Centre.

[14] Article Eighteen is entitled "Vacancy" and deals with various disqualifications of elected Tribal Government members, including disqualifications related to corrupt election practices:

> 18.1 Any office of the Tribal Government becomes vacant when the person who holds office:
>
> ...
>
> d. Has been found guilty of corrupt practice in connection with the election pursuant to a decision of the Election Appeal Committee. A corrupt practice shall include, but not be limited to, tampering with the election process, bribery, or coercion related to the election, campaigning while the polls are open, and anything else the Election Appeal Committee deems to be a corrupt practice.
>
> ...
>
> i. If an Ogema [Chief] or an Oginjigan [Councillor] ceases to hold office by virtue of Article 18.1 (c) to Article 18.1 (h) inclusively, he or she shall be ineligible to be a candidate for Ogema [Chief] or Oginjigan [Councillor] for the next 10 years.

(c) The Respondent's Election Appeal and the Report of the Election Appeal Committee

[15] Following his unsuccessful bid for the office of Chief in the election held in April 2012, the respondent Dennis Meeches submitted an election appeal to the Election Appeal Committee in which he raised two principal issues: (a) whether there should be new elections as a result of contraventions to the Election Act which occurred during the election, and (b) whether the elected Chief, the appellant David Meeches, had been involved in conduct that would disqualify him from holding office for 10 years and would result in the office of Chief being vacated, thereby requiring a by-election to be held for that position: affidavit of Dennis Meeches at para. 11, p. 70 of the Appeal Book ("AB"). The principal allegations of candidate misconduct raised by the respondent were that the appellant David Meeches had used band funds for his campaign and had been involved in

widespread vote buying contrary to the Election Act: *ibid*. at para. 10, pp.69-70 and pp. 121-122 of AB.

[16] The Election Appeal Committee held a series of meetings and telephone communications with a number of individuals. The Committee also held a meeting to hear the respondent and other electors. The Committee also heard the appellant and elected Chief David Meeches, but it did not hear any of the elected councillors.

[17] The Election Appeal Committee prepared a written (but undated) report of its findings which was received by the respondent at the beginning of May 2012 (the "Report").

[18] With respect to the alleged contraventions to the Election Act, the Committee concluded in its Report that "[w]hile there were some deviations from the Long Plain Election Act as discussed above, the election process overall appears to have been fairly conducted." Nevertheless, it followed this conclusion with the following statement: "However, since the Election Act is a key part of the governance of the First Nation and since it was enacted to govern elections, we recommend that the election be set aside and an election process be undertaken following the Act as it is written": Report at p. 6, AB at p. 143.

[19] The Committee also considered the allegations of candidate misconduct in its Report. These allegations had been primarily made against the elected Chief, the appellant David Meeches. The

Committee made the following observations with respect to these allegations (Report at p. 5, AB at p. 142):

> The other two appeals contain allegations of misconduct primarily by the individual elected as Ogema [Chief] in the April 2012 election.
>
> The allegations include vote buying, interference with the election process and use of band funds to gain re-election.
>
> In regard to the use of band funds the examples provided include the publication of a Long Plain Newsletter just prior to the poll in Brandon. Documents were provided which indicate preparation of the Newsletter was paid for by the Tribal Government. The Committee was advised that there was a misunderstanding regarding the preparation and printing of the Newsletter. Documents show that Arrowhead Development Corporation initially paid for the newsletter. This was subsequently corrected. The Committee received receipts verifying the candidate for Omega [Chief] reimbursed Arrowhead Development Corporation and paid Mayfair Printing for the Newsletter.
>
> The appeal also alleged that a meeting room used by the same candidate was paid for with band funds. Receipts show that the meeting room was paid by the individual. Both the name of the individual and the name of the First Nation appear on the documents.
>
> ...
>
> The allegations of vote buying present considerable challenges for the Election Appeal Committee. While the Election Act provides a broad mandate to investigate matters brought to it, the allegations of vote buying rely on statements made by individuals and interpretation of conversations overheard during the conduct of the vote and reported to the scrutineers for the individual who filed the appeal.
>
> One document was provided to support the allegation of vote buying. The document is signed by an individual stating she received $20.00 to Vote for one of the candidates for Ogema [Chief]. However, the individual clearly states that she would like to remain anonymous. She was asked by the individual appealing to appear before the Appeal Committee and she advised that her statement was true and correct.

(d) The Initial Judicial Review Application and the Order of the Motion Judge

[20] Shortly after the release of the Report, a judicial review application was filed in the Federal Court in the name of the First Nation seeking to set aside the decision of the Committee and

allowing the elected Chief and councillors to remain in office (the "initial judicial review application"). Simultaneously, a motion for an interim stay of the decision of the Committee was also filed in the Federal Court.

[21] The respondent was served with the initial judicial review application and the stay motion on Wednesday May 9, 2012: affidavit of Dennis Meeches at par. 32, AB at p. 75. The stay motion was heard shortly thereafter on Friday May 11, 2012, by way of teleconference. The respondent Dennis Meeches participated in this hearing, but he was not then represented by counsel in light of the short notice.

[22] The Motion Judge dismissed the interim stay motion at the hearing on a ground which he appears to have himself raised. The pertinent extracts of his order, cited as 2012 FC 570, read as follows:

> [6] I immediately seized on the word "recommend" [in the Committee's report]. Section 18.1(2) of the *Federal Courts Act* deals with applications for judicial review "in respect of a decision or an order of a federal board, commission or other tribunal..." I raised the point that a "recommendation" is directed to somebody else, in this case, perhaps, the Tribal Government. It is not a "decision" or an "order" as such. It may or may not be accepted and acted upon.
>
> ...
>
> [8] The applicant is concerned that in context the Election Appeal Committee's "recommendation" was in fact a decision. However, the Election Appeal Committee did not recommend that any elected official has vacated office due to a breach, and therefore there is no requirement that the Tribunal (*sic*) Government declares an office vacant and calls a bi-election (*sic*). Since article 8.8 [of the Election Act] does not apply, the word "recommend" must be given its ordinary meaning.
>
> ...

> [10] The respondent raised issues which deserve comments.
>
> [11] The first is, whether the "recommendation" could be construed as a "decision" or "order". In my opinion, it cannot.
>
> ...
>
> [14] If circumstances change, in that the "recommendation" is acted upon and an order is issued for a new election, the applicant may re-present its motion, and the respondents will have full opportunity to contest.

[23] The initial application for judicial review which had been brought in the name of the First Nation was discontinued shortly after this order was issued.

THE JUDGMENT UNDER APPEAL

[24] Following the order of the Motion Judge, the respondent Dennis Meeches sent a letter to the Election Appeal Committee requesting that it clarify its position on his election appeal: affidavit of Dennis Meeches at para. 36 and exhibit H thereto, AB pp. 76 and 176-177. The Committee did not respond.

[25] The respondent consequently filed his own application for judicial review in the Federal Court seeking various types of relief for the purpose of setting aside the elections and to have new elections held.

[26] The Application Judge treated the application as principally seeking to enforce the decision of the Election Appeal Committee calling for new elections. This approach lead the Application Judge into an analysis of (a) the power of the Election Appeal Committee to compel new elections

(Reasons at paras. 75 to 87); and (b) the nature and scope of the decision which had been made by the Committee in this case (Reasons at paras. 88 to 114).

[27] Dealing first with the power of the Election Appeal Committee, the Application Judge recognized that a distinction was set out in the Election Act between, on the one hand, a complaint concerning the impeachable conduct of an incumbent leading to the vacancy of an elected position (sections 8.5, 8.8 and 18.1 of the Act), and, on the other hand, an appeal of the results of an election based on election practices which contravened the Act (sections 17.1 to 17.7 of the Act).

[28] The Application Judge further recognized that in the case of a complaint concerning the impeachable misconduct of an incumbent, the Election Act provides that the resulting "recommendation" of the Election Appeal Committee is binding on the Tribal Government (section 8.8 of the Act), while in the case of an appeal of the election results, the Committee must make a "decision" which is "irrevocable, binding, and final" (section 17.7). He further noted that section 17.7 of the Act does not stipulate on whom this "decision" is binding. Applying a purposive interpretation to the Election Act, the Application Judge concluded that a decision by the Election Appeal Committee under section 17.7 is binding on the Tribal Government, which must act upon it forthwith: Reasons at para. 87.

[29] He opined that by calling for a new election in this case, the Committee was essentially declaring that the Tribal Government was not legitimate: Reasons at para. 101. In his view, it would therefore be both improper and somewhat absurd to allow the affected members of the Tribal

Government to disregard the view of the Committee: Reasons at para. 103. He further found that "[n]owhere in the Election Act can I find a 'recommendation' that is not mandatory", and he concluded from this that a recommendation under that Act "is a decision that has binding effect, and must be acted upon": Reasons at para. 107.

[30] The Application Judge recognized that his conclusion on the mandatory effect of the Committee's recommendation was directly contradictory to the prior order of the Motion Judge. However, he did not deem himself bound by that order on the following grounds: (a) he was deciding the matter on a different record; (b) the Motion Judge's order was interlocutory rather than final, and (c) that order was not persuasive since it was made on a different basis: Reasons at paras. 111-112.

[31] Turning his mind to the nature and scope of the decision which had been made in this case by the Committee, the Application Judge recognized that though the Committee had found that there were some deviations from the Election Act during the elections, it had nevertheless concluded that the election process overall appeared to have been fairly conducted.

[32] Nevertheless, relying on *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Application Judge was of the view that the Committee's findings had to be understood in the context of its Report read as a whole, as well as in the context of the entire record that was before it. After reviewing the record himself, he found that the Committee had called new elections on the ground of candidate

misconduct which was sufficient to affect the outcome of the election. He concluded as follows at paras. 95 and 114 of his Reasons:

> [95] Having made these findings, the Election Appeals Committee then moves to its Decision, and this is to the effect that, even though overall the election appears to have been fairly conducted (i.e. the deviations were not widespread) those deviations that did occur require that the election be set aside and a new election called. The rationale is that the "Election Act is a key part of the governance of the First Nation." In other words, those deviations that did occur had "a material effect on the outcome of the election" so that it should be set aside.
>
> …
>
> [114] When I look at the evidence before the Election Appeal Committee in this case, I see that there was evidence of vote buying. Instead of coming to conclusions on this issue the Election Appeal Committee tells us that the "allegations of vote buying present considerable challenges for the Election Appeal Committee." Rather than make recommendations on vote buying, the Election Appeal Committee decides to simply recommend a new election because of material deviations from the Election Act. It chooses not to tell us specifically what deviations it has in mind. The Election Appeal Committee would know, of course, that a decision on vote-buying and a recommendation under paragraph 8.8 would exclude the elected officials concerned from running for office again for 10 years. That could be a very unfortunate consequence for the Long Plain First Nation as well as the individuals involved. Hence, those individuals accused of vote buying should have breathed a sigh of relief that the Election Appeal Committee opted instead to treat the whole matter under Article 17 and decide that a new election was required.

THE ISSUES IN APPEAL

[33] The issues raised by this appeal may be described as follows:

a. Did the Application Judge err in determining that he was not bound by the reasons set out in the order of the Motion Judge?

b. If not, did he err in holding that the Election Appeal Committee had the power to compel new elections under Article 17 of the Election Act?

c. If not, did he err in determining that in this case the Election Appeal Committee had made an irrevocable, binding and final decision to compel new elections?

d. If not, should the decision of the Election Appeal Committee nevertheless be set aside?

(a) Were the reasons in the order of the Motion Judge binding on the Application Judge?

[34] The appellants principally rely in this appeal on their submission that the Application Judge was precluded from deciding the respondent's application for judicial review on a different ground than that set out by the Motion Judge in his order dismissing the interim stay motion in the initial judicial review application. The appellants submit that the principles of issue estoppel, of abuse of process and of collateral attack all precluded the Application Judge from deciding the matter as he did.

[35] The fundamental flaw in the appellants' submission is that the Motion Judge dismissed the interim motion to stay the decision of the Election Appeal Committee, thus precluding the respondent Dennis Meeches from appealing that order. Indeed, an appeal does not lie against the reasons for an order or judgment: *Rathiopharm Inc. v. Pfizer Canada Inc.*, 2007 FCA 261, 367 N.R. 103; *Konecny v. Ontario Power Generation*, 2010 FCA 340 at para. 7. Further, as a result of the discontinuance of the initial application for judicial review, the respondent was also precluded from challenging the initial judicial review application on its merits. The appellants' reliance on issue estoppel, abuse of process and collateral attack is consequently somewhat suspect.

[36] These doctrines form part of a public policy favouring the finality of judicial decisions and which is designed to advance the interest of justice: *Danyluk v. Ainsworth Tecnologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 ("*Danyluk*") at para. 19. In this case, these doctrines are being advanced by the appellants in a context which precludes the interest of justice. As noted by Justice Binnie in *Danyluk* at para. 1 a "judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

[37] In the recent decision of *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, 356 D.L.R. (4th) 595 at paras 40-41, Justices Cromwell and Karakatsanis explained that these doctrines apply where there was a fair opportunity for the parties to put forward their position, to adjudicate the issues and to have the decision reviewed. Though these comments were made in the context of a claim of issue estoppel following a decision of a police disciplinary tribunal, they are nevertheless applicable to this case:

> [40] If the prior proceedings were unfair to a party, it will likely compound the unfairness to hold that party to its results for the purposes of a subsequent proceeding. For example, in *Danyluk*, the prior administrative decision resulted from a process in which Ms. Danyluk had not received notice of the other party's allegations or been given a chance to respond to them.
>
> [41] Many of the factors identified in the jurisprudence, including the procedural safeguards, the availability of an appeal, and the expertise of the decision maker, speak to the opportunity to participate in and the fairness of the administrative proceeding. These considerations are important because they address the question of whether there was a fair opportunity for the parties to put forward their position, a fair opportunity to adjudicate the issues in the prior proceedings and a means to have the decision reviewed. If there was not, it may well be unfair to hold the parties to the results of that adjudication for the purposes of different proceedings.

[38] In this case, the interim motion for a stay was filed at the same time or shortly after the initial judicial review application, leaving little time for the respondent Dennis Meeches to secure legal counsel and to organize an appropriate response. As a result, the hearing of that motion was held without the benefit of argument from counsel for the respondent. In addition, the ground on which the motion was decided was raised by the Motion Judge himself at the hearing, thus leaving little opportunity for the respondent to properly address that issue. More important, however, is the fact that the Motion Judge was deciding whether or not to grant an interim stay on the basis of an incomplete record and limited arguments on the merits of the underlying application. All these factors lead me to conclude that the Application Judge properly exercised his discretion in determining that he was not bound by the reasons of the Motion Judge.

[39] As a general rule, a judge on an interim motion should not decide the merits of the underlying proceedings when determining whether to issue a stay. Applying the tripartite test set out in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 ("*RJR-MacDonald*"), a judge deciding a stay motion must, of course, make a preliminary assessment of the merits of the underlying proceedings to ensure that there is a serious issue to be determined in those proceedings. However, the threshold for a serious issue is low, since it is usually met if the underlying proceedings are not frivolous or vexatious: *RJR-MacDonald* at p. 337.

[40] Consequently, at the stage of a motion for a stay, a "prolonged examination of the merits is neither necessary nor desirable": *RJR-MacDonald* at p. 338. It is only in exceptional circumstances that a judge deciding a stay motion should engage in an extensive review of the merits of the

underlying proceedings, such as when the right which the stay seeks to protect can only be exercised immediately or not at all, or when the result will impose such hardship on one party as to remove any potential benefit from proceeding further with the litigation: *ibid*. None of these exceptional circumstances existed when the Motion Judge decided the stay motion.

[41] There are important judicial policy considerations at issue here. It is indeed usually inappropriate to determine the respective rights of litigants in the absence of a complete record and of full argument on all the pertinent issues. A judge deciding a stay motion should therefore be restrained in his or her approach to the merits of the underlying proceedings, and must strive not to decide substantive issues unless special circumstances dictate otherwise.

(b) Does the Election Appeal Committee have the power to compel new elections under Article 17 of the Election Act?

[42] The appellants further submit that the Application Judge erred in law by finding that the Election Appeal Committee had the power to call a new election under Article 17 of the Election Act. For the appellants, the only compelling power vested in the Committee is to be found in sections 8.7 and 8.8 of the Election Act, reproduced above, providing for the removal of an incumbent from office for misconduct. They submit that in order to call for a new election under Article 17 of the Election Act, the Committee must first find impeachable misconduct under Article 8. Since no finding of misconduct was made in this case, the appellants conclude that sections 8.7 and 8.8 do not apply, and no election may consequently be called under Article 17.

[43] I cannot accept these submissions.

[44] The Election Act is clear and unambiguous as to the authority of the Election Appeal Committee, which is set out in multiple provisions throughout the Act. When the Committee recommends under Article 8 that the office of an elected official be vacated for impeachable misconduct, the Tribal Government must declare the office vacant and forthwith call a by-election: sections 8.7 and 8.8 of the Act. When the Committee makes a recommendation as to whether or not a candidate who was found ineligible by the Electoral Officer is to be reinstated, its decision is binding and final: sections 12.4 and 12.5 of the Act. When the Committee makes a decision following an election appeal under Article 17, its decision is "irrevocable, binding, and final": section 17.7 of the Act. This is clear and unambiguous language.

[45] The submission that the decision of the Committee under section 17.7 is unenforceable since it does not indicate to whom it is addressed is incongruous and illogical. The Election Act is the result of an exercise in self-government by the membership of the First Nation. When the membership of the First Nation specifies that a decision of the Election Appeal Committee under Article 17 is "irrevocable, binding, and final" it should be clear to all concerned, including the appellants, that such a decision binds the First Nation as a whole, including all its governance structures such as the Tribal Government and the Electoral Officer. Were it otherwise, this would lead to the bizarre proposition that a decision pursuant to Article 17 of the Election Act could be ignored at whim of an illegitimately elected Tribal Government.

(c) Has the Election Appeal Committee made a decision to compel new elections?

[46] Largely relying on the reasons of the Motion Judge, the appellants further submit that the Election Appeal Committee has made a non enforceable "recommendation" to call a new election, rather than a "decision" as provided for under section 17.7 of the Election Act.

[47] The turn of phrase the Committee used was the following: "we recommend that the election be set aside and an election process be undertaken following the Act as it is written." The Application Judge found that this turn of phrase should be viewed as a binding decision. I agree.

[48] Depending on the context, a "recommendation" may be viewed as non-binding advice or as a binding decision: compare *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385 with *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3 at paras. 42-43; see also *R. v. British Coal Corp.*, [1935] UKPC 33, [1935] A.C. 500.

[49] In *Therrien (Re)*, above, the issue was whether a "recommendation" from the Quebec Court of Appeal to remove a provincial judge from office could be viewed as a final decision. Justice Gonthier found that, in light of the context, it could be so viewed. He noted at para. 43 that "the report of the Court of Appeal amounts to much more than the expression of a mere opinion; rather, it is substantially in the nature of a decision".

[50] A contextual and purposive analysis is thus required in this case to ascertain whether the recommendation made by the Election Appeal Committee is to be viewed as advice or as a binding decision.

[51] Throughout its provisions, the Election Act calls for the Election Appeal Committee to make "recommendations", but it treats such recommendations as binding decisions. Thus, section 8.8 of the Act provides that when the Committee "recommends that the elected official has vacated his or her office, the Tribal Government shall declare the office vacant and forthwith call a By-election." Likewise, when dealing with a nomination appeal, section 12.4 of the Act provides that the Committee will "make a recommendation ... as to whether or not the ineligible candidate is to be reinstated", while section 12.5 sets out that this recommendation is "binding and final".

[52] Consequently, applying a contextual and purposive approach to the matter, when a "recommendation" to hold a new election is made by the Committee, this "recommendation" should be treated as a decision which is "irrevocable, binding, and final" under section 17.7 of the Act.

[53] When the Election Appeal Committee issued its report with the recommendation that new elections be held, it could not have intended that its conclusion would be simply advisory and without any effect. Calling for a new election is precisely the purpose of an election appeal under Article 17, and the binding effect of such a conclusion is indisputable in light of section 17.7 of the Act. Consequently, irrespective of the precise wording used by the Committee in its report, when it

called for a new election to be held, this constituted a binding decision under the meaning of section 17.7.

(d) Should the decision of the Election Appeal Committee nevertheless be set aside?

[54] As an alternative relief, the appellants seek in effect a judicial review of the decision of the Election Appeal Committee. They submit that the Committee (a) erred in law and in fact by calling for new elections; and (b) breached the principles of procedural fairness in reaching its decision. Consequently, in the event their other submissions are rejected, they seek that the decision of the Committee be set aside and that the matter be returned to it for a new determination.

[55] The respondent notes that the appellants had the opportunity to challenge the decision of the Election Appeal Committee through the initial judicial review application, but chose to discontinue that application. The respondent concludes from this that the appellants should not be allowed to raise such a challenge. I disagree.

[56] It cannot be ignored that the appellants discontinued the initial judicial review application by relying on the reasons set out in the order of the Motion Judge. Taking into account the overall circumstances, the fact that in his own application the respondent himself was seeking to quash and set aside the decision of the Committee, and also taking into account the paramount interest of ensuring the fairness of these proceedings, it is appropriate to address the arguments raised by the appellants challenging the validity of the Committee's decision. Moreover, the evidentiary record supporting such a challenge was before the Application Judge.

[57] I will first discuss the alleged errors of fact and law committed by the Committee.

[58] The appellants basically submit that the deviations in the elections identified by the Committee were not material enough to affect the results of the election, and that consequently, the Committee did not act reasonably in calling for new elections. They add that there was no evidence before the Committee which could have supported a finding of vote buying, and that in any event, any allegation of vote buying must be dealt with under Article 8 of the Election Act rather than under Article 17.

[59] Section 17.2 of the Election Act sets out that the grounds for an election appeal under Article 17 are "restricted to election practices that contravene this Election Act." This surely includes allegations of vote buying, a practice which is specifically prohibited by section 5.4 of the Act. Consequently, the Committee was empowered under Article 17 to consider allegations of candidate misconduct related to the election, including allegations of vote buying.

[60] Thus the Committee has a choice between two paths when assessing allegations of candidate misconduct related to an election, including allegations of vote buying: (a) it may treat such allegations under Article 8 of the Act: section 8.6; or (b) it may also treat these allegations under Article 17.

[61] Under Article 8, the Committee focuses on the allegations of misconduct by the concerned individual in the context of impeachment proceedings: sections 8.5 and 8.7. Where the Committee

determines the allegations are founded, the incumbent must vacate the position to which he or she was elected, and a by-election must be held forthwith to replace the incumbent: section 8.8 of the Act. In addition, the incumbent is ineligible to run in an election for Chief or councillor for a period of ten years: para. 18.1(*i*) of the Act. These measures apply whether or not the misconduct had a material effect on the results of the election. This is an important distinction with Article 17 of the Election Act.

[62] Article 17 deals with another matter: the election practices themselves. Under an election appeal pursuant to this Article, the issue to be determined by the Committee is whether the election practices that contravened the Election Act could have materially affected the results of the election: section 17.1. In this case, the focus is not on the impeachment of a candidate found to have contravened the Act, but rather on the election practices themselves, so as to ensure the legitimacy of the results of an election, and by necessary implication, the electoral legitimacy of the Tribal Government itself: sections 17.6 and 17.7.

[63] As a general rule, and contrary to an impeachment, an election will not be set aside if the results do not appear to have been affected by the alleged irregularities. This rule was put forward in *Camsell v. Rabesca*, [1987] N.W.T.R. 186 and in *Flookes and Longe v. Shrake* (1989), 100 A.R. 98, 70 Alta. L.R. (2d) 374 (Q.B.), and it has been affirmed by the Supreme Court of Canada in *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76 ("*Opitz*") at paras. 55 to 57. The rule was expressed as follows in *Flookes and Longe v. Shrake*, above:

> So the rule, then, on a review of these authorities and subject to statutory modification, could be stated, in my view, as follows: that the vote should be vitiated only if it is shown

> that there were such irregularities that, on a balance of probabilities, the result of the election might have been different; and secondly, that the vote could not be said to have been a vote, that is, it was not conducted generally in accordance with electoral practice under existing statutes.

[64] This is precisely how the Election Appeal Committee viewed its mandate under Article 17: "In considering these deviations the Committee asked whether the deviation from the provisions of the Act would have a material effect on the outcome of the election.": Report at p. 2, AB at p. 139.

[65] In the election for the position of Chief, the appellant David Meeches received 618 votes while the respondent Dennis Meeches received 586 votes. Had 17 of the votes cast for David Meeches been allocated to Dennis Meeches, the latter would have been elected Chief. Dennis Meeches sought to have a new election called on the ground that this small discrepancy in votes was attributable to the alleged misconduct of David Meeches, including use of band funds to support his campaign, and widespread vote buying.

[66] The Election Appeal Committee recognized that some band funds had been used by the appellant David Meeches to support his campaign. It however noted that these funds had been subsequently reimbursed: Report at p. 5, AB at p. 142. The Committee also recognized that there were widespread allegations of vote buying by the appellant David Meeches, and some evidence supporting these allegations: *ibid*. David Meeches himself recognizes that he gave money to a voter on the Election Day, but he submits that this was a charitable loan: affidavit of David Meeches at para. 2, reproduced at pp. 219-220 of the AB. It is however useful to note that section 5.4 of the

Election Act prohibits "giving money" "or anything given or exchanged of monetary value between the Nomination Day and Election Day."

[67] The Application Judge found that the Election Appeal Committee had concluded that new elections were required on the ground of candidate misconduct which was sufficient to affect the outcome of the election: Reasons at paras. 95 and 114 reproduced above. I agree with the Application Judge that this is a reasonable understanding of the decision of the Committee with respect to the election for the position of Chief, taking into account the overall circumstances and the record as a whole. As aptly stated by Justices Rothstein and Moldaver in *Optiz* at para. 43, "[f]raud, corruption and illegal practices are serious. Where they occur, the electoral process will be corroded." See also *Sideleau v. Davidson (Controverted election for the Electoral District of Stanstead)*, [1942] S.C.R. 306.

[68] However, since the allegations of candidate misconduct affecting the result of the election primarily concerned the elected Chief David Meeches, I fail to understand how the Committee could have called for new elections for the positions of the councillors in light of the evidence before it. Indeed, no serious allegations of vote buying or of other electoral misconduct were made against the elected councillors. As the Committee noted in its Report, the allegations of misconduct were all primarily made against David Meeches: Report at p. 5, AB at p.142.

[69] Thus there was no evidence before the Committee of candidate misconduct on the part of the elected councillors. The Election Appeal Committee further concluded that the election process

overall appears to have been fairly conducted. Moreover, the vote tabulation does not show that the results of the elections for the councillors might have been different in light of the irregularities or the allegations of vote buying. As an example, there was a 122 vote margin between the respondent Marvin Daniels (519 votes) and the next unsuccessful candidate who received the most votes (397 votes): Electoral Officer's Report, AB pp.80-81.

[70] The only allegations concerning the elected councillors were alleged administrative irregularities in the conduct of the elections which could not have affected the results of the elections of the councillors. Justices Rothstein and Moldaver have recently held in *Opitz* at para. 2 that administrative irregularities in elections are often inevitable and, owing to the need for finality and public confidence in election results, cannot in and of themselves amount to a reasons for annulling an election.

[71] Taking into account all the circumstances and the applicable legal principles, it was unreasonable for the Committee to call new elections for the elected positions of councillors.

[72] In light of this conclusion, the submissions of the appellant councillors concerning the alleged breaches of procedural fairness by the Election Appeal Committee need not form the basis of this Court's decision. I will simply note that in calling new elections for their positions without hearing the affected elected councillors, the Election Committee breached the principles of procedural fairness. In future election appeals, the Committee would be well advised to ensure that all affected councillors are heard prior to a decision being made.

[73] However, though he appeared before the Committee, the appellant David Meeches nevertheless also alleges breaches of procedural fairness. He submits that the Committee did not provide him with the specifics of the allegations of misconduct (vote buying) which had been made against him, and that this was a breach of procedural fairness: affidavit of David Meeches at para. 3, AB at pp. 220 to 222.

[74] A duty of procedural fairness is incumbent on every public authority making an administrative decision which affects the rights, privileges or interests of an individual: *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 at par. 38. The question in every case, however, is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context".

[75] The requirements of procedural fairness must consequently be assessed contextually in every circumstance, taking into account the legislative and administrative context: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at p. 682; *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at p. 743*; Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 21; *Therrien (Re)*, above, at para. 82; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 at para. 9; *Canada (Attorney General) v. Mavi*, above, at para. 39.

[76] As I have already noted, the Election Appeal Committee decided to treat the allegations of misconduct under Article 17 of the Election Act rather than under Article 8. The requirements of

procedural fairness are different under Article 17, which deals with the legitimacy of the election results, than under Article 8 which deals with individual misconduct leading to impeachment and a ten year disqualification from office.

[77] There is no formal requirement under Article 17 of the Act that a copy of the election appeal documentation be forwarded to any candidate. Nevertheless, in this case the Committee did call the elected Chief David Meeches to a hearing, and he was fully aware that the principal issue of concern to the Committee was the allegation of vote buying made against him. The Committee gave him an opportunity to provide his views on this matter. In these circumstances, I cannot conclude that the Committee breached the rules of procedural fairness such as to vitiate its decision concerning the election for the position of Chief.

CONCLUSIONS

[78] For the reasons set out above, I would grant the appeals in part, set aside the judgment of the Application Judge, and giving the judgment that the Federal Court should have given, I would set aside that part of the Election Appeal Committee decision which set aside the elections for the position of the councillors ("Oginjigan") and called new elections for these elected positions. I would confirm that part of the Election Appeal Committee decision which set aside the election for the office of Chief ("Ogema") and called a new election for this elected position, and order the First Nation's officials and employees, including the appellant members of the band council or Tribal Government and the Electoral Officer, to organize forthwith in accordance with the Election Act a new election for the remainder of the term of office of Chief. Such election is to be held on the days

determined by the Electoral Officer, but no sooner than forty-five (45) days, and no later than seventy-five (75) days from the date of this judgment.

[79] To avoid any ambiguity, since the decision of the Election Appeal Committee was made pursuant to Article 17 of the Election Act, and since no recommendation was made by the Committee under sections 5.4 or 8.8 of the Act, the appellant David Meeches may continue to occupy the office of Chief until such time as the results of the election called for above are known. In addition, and for the same reason, he is not disqualified to run for office in that new election as a result of the decision of the Election Appeal Committee.

[80] The respondent should be entitled to costs in the Federal Court, and in this Court in appeal docket A-101-13, and such costs should be assumed by the appellant David Meeches. There should be no order for costs in appeal docket A-102-13.

"Robert M. Mainville"
J.A.

“I agree.
Pierre Blais C.J.”

“I agree.
D.G. Near J.A”

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-102-13 A-101-13
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE RUSSELL DATED FEBRUARY 26, 2013, NO. T-1068-12.	
STYLE OF CAUSE:	*Meeches v. Meeches*
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	June 25, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	BLAIS C.J. NEAR J.A.
DATED:	July 5, 2013

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