

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140203

Docket: A-130-13

Citation: 2014 FCA 28

**CORAM: BLAIS C.J.
SHARLOW J.A.
GAUTHIER J.A.**

BETWEEN:

HUBERT D'OR

Appellant

and

**TINA ST. GERMAIN AND
CHIEF AND COUNCIL OF THE
LITTLE RED RIVER CREE NATION**

Respondents

Heard at Edmonton, Alberta, on February 3, 2014.

Judgment delivered from the Bench at Edmonton, Alberta, on February 3, 2014.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Edmonton, Alberta, on February 3, 2014).

SHARLOW J.A.

[1] Mr. Hubert D'Or is appealing the judgment of the Federal Court (Justice O'Reilly) dated March 12, 2013 (2013 FC 223). That judgment dismissed Mr. D'Or's application for judicial review of two decisions arising out of the 2011 election for the Chief and Council of the Little Red River Cree Nation. The judge, applying the standard of reasonableness, found no error in either decision.

Facts

[2] The facts are not in dispute. They are fully stated in paragraphs 4 to 9 of the judge's reasons and are reproduced here for ease of reference:

[4] The Nation is comprised of three communities: Fox Lake, St John D'Or Prairie, and Garden River. The Council is composed of four councillors from Fox Lake, four from St John D'Or Prairie, and two from Garden River. Mr D'Or was a candidate for one of the councillor positions in Garden River.

[5] The election took place on May 11, 2011 and the [electoral] officer posted the results the following day. The results showed that Mr D'Or finished third in Garden River and, therefore, was not elected.

[6] On May 15, 2011, the [electoral] officer received a request to recount the results of the votes for Chief. On May 16, 2011, she was asked to recount the votes for Fox Lake. That same day, the Chief and Council formally adopted the results of the election.

[7] On May 18, 2011, the [electoral] officer announced a recount of the ballots for the position of Chief, and for the councillor positions in Fox Lake. She did not find any mistakes relating to the election of Chief, but she found an arithmetic error in respect of one of the councillor positions. She advised the Chief and Council of the error, and posted the amended results. The Chief and Council adopted the revised results.

[8] On May 31, 2011, the [electoral] officer received a request for a recount for Garden River. She conducted the recount on June 16, 2011 and discovered another arithmetic error. Had the votes been counted correctly, Mr D'Or would have successfully won a councillor position. The officer advised the Chief and Council of the error but did not post the results, leaving this to the discretion of the Chief and Council.

[9] The Chief and Council concluded that it could not accept the results of the recount because the Code allows for appeals only within seven days of an election. Accordingly, it had accepted the results of the timely recount relating to Fox Lake. However, it did not accept the results of the later Garden River recount, citing the need for finality.

Statutory framework – the election code

[3] The 2011 election was governed by the 2003 election code of the Little Red River First Nation. Several aspects of the election code are relevant to the issues raised in this case. They may be summarized as follows:

- (a) Pursuant to section 21, the result of an election may be appealed within 7 days following the posting of the election result. An election appeal may be based on any of five listed grounds. An incorrect count or computation of the votes is not on that list.
- (b) Section 21 also deals with the security of completed ballot papers. The electoral officer is required to deposit all ballot papers in a sealed envelope and retain them for 60 days or until he or she is served with a notice of appeal, at which time the electoral officer must forward to the appeal committee the sealed envelopes containing the ballot papers.
- (c) Section 17 relates to the counting of the votes after the polls close. It provides among other things that the electoral officer or a deputy electoral officer, as soon as possible after the close of the polls, must open all ballot boxes in the presence of the candidates and their agents who are present. Paragraph 17(c) provides that, “subject to review on recount or on an election appeal, the electoral officer or deputy electoral officer must take a note of any objection made by any candidate or his or her agent to any ballot paper found in the ballot box and decide any question arising out of the objection” (my emphasis).

- (d) Paragraph 17(c) is the only provision in the election code that contemplates the possibility of a recount. The election code has no specific procedure for the conduct of a recount.

The application for judicial review

[4] Mr. D'Or sought judicial review of the decision of the electoral officer not to post the results of the June recount for Garden River, and the decision of the Chief and Council not to adopt the results of the June recount. The judge permitted both questions to be determined in a single application. That aspect of his judgment is not challenged.

Standard of review

[5] The judge applied the reasonableness standard of review to both decisions. In this Court, Mr. D'Or argued in his memorandum of fact and law that the judge should have applied the correctness standard. We agree with the judge that the standard of review is reasonableness.

[6] Both decisions were based on an interpretation of the provisions of the election code. We agree with the judge that the interpretation of the election code must be informed by the customs upon which it is based, and that the electoral officer and the Chief and Council are likely to have a better understanding of the relevant customs than the Court. We note that Mr. D'Or presented no evidence of any custom of the Little Red River Cree Nation, much less any custom that casts doubt on the propriety of either of the decisions under review.

[7] The judge also concluded that the electoral officer may be presumed to have knowledge of the Nation's customs because she is a resident of the community. Mr. D'Or pointed out in his

memorandum that the election code requires the electoral officer to be a person who is not a member of the Little Red River First Nation or a resident of any of its communities. The judge erred in fact on this point, but we do not consider that factual error to be sufficiently serious to warrant a reversal of the judge's determination of the standard of review.

Application of the standard of review

[8] As indicated above, the judge concluded that the decision of the electoral officer to refer the June recount to the Chief and Council without posting the results was reasonable, and the decision of the Chief and Council to disregard the June recount was also reasonable.

[9] With respect to the decision of the electoral officer, he noted specifically that nothing in the election code precluded the electoral officer from referring the matter to the Chief and Council as she did. Also, as the judge said at paragraph 21 of his reasons, "given the lack of specific rules, her decision was prudent and respectful of the superior authority of the Chief and Council." We note that the election code provides no express guidance in the matter of recounts, and in particular it does not stipulate a time limit for a recount request or for the completion of a recount. Therefore, the electoral officer faced a situation in which more than one possible course of action might reasonably have been open to her. We agree with the judge that it was open to her in these circumstances to consult the Chief and Council and, based on their advice and what we presume was her final interpretation of the election code as to the timeliness of the recount request for Garden River, to refrain from posting the result of the June recount.

[10] As to the decision of the Chief and Council, the judge noted that this decision was based on their interpretation of the election code. The Chief and Council concluded that the timing for a recount request should be the same as for an election appeal, that is, within 7 days following the posting of the election result on May 12, so that the recounts requested on May 15 and 16 were timely, but the recount requested on May 31 and completed in June was not. Therefore, the result of the June recount could not properly be recognized. The judge found that to be a reasonable interpretation of the election code.

[11] Mr. D'Or argues that the interpretation of the election code summarized above is incorrect. He argues that a recount is not the same as an appeal, and that the five permitted grounds of appeal listed in section 17 is intended to be exhaustive and therefore the appeal procedure cannot be used to challenge the correctness of a vote count. He also argues that because the election code requires the electoral officer to be independent of the Chief and Council, the electoral officer acted improperly in permitting the Chief and Council to determine the consequence of the June recount.

[12] According to Mr. D'Or's interpretation of the election code, the procedural aspects of a recount, including its timing, are entirely within the discretion of the electoral officer. He argues that if a recount is conducted and an error is found that changes the outcome, the electoral officer has no choice but to post the results and, in effect, declare the outcome on the basis of the corrected count and, by necessary implication, restart the 7 day election appeal period.

[13] We do not accept Mr. D'Or's argument. In our view, the election code is ambiguous with respect to the conduct of recounts, in the sense that the words of the applicable provisions are

capable of bearing more than one interpretation. We agree with the judge that the interpretation of the election code adopted by the Chief and Council is reasonable. It is consistent with the words of the election code, read in their entire context (including the provisions relating to the permitted grounds of appeal), and it results in an election process that fairly balances the electoral rights of the voters with the need for timeliness and certainty of outcome.

[14] To adopt the interpretation proposed by Mr. D'Or, we would have to conclude that when the members of the Little Red River First Nation adopted its election code, they intentionally chose an election appeal process with a relatively short appeal period, while choosing at the same time a process for recounts in which the timing rests entirely on the discretion of the electoral officer. Based on the record before us, we doubt that any such result was intended.

Conclusion

[15] For these reasons, this appeal will be dismissed with one set of costs in favour of the respondents, except Tina St. Germain who did not appear. Such costs are fixed at \$1,500 all inclusive.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-130-13

(APPEAL FROM A JUDGMENT OR ORDER OF THE HONOURABLE MR. JUSTICE O'REILLY DATED MARCH 12, 2013, DOCKET NO. (T-1099-11))

STYLE OF CAUSE: HUBERT D'OR v. TINA ST.
GERMAIN AND CHIEF AND
COUNCIL OF THE LITTLE RED
RIVER CREE NATION

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: FEBRUARY 3, 2014

REASONS FOR JUDGMENT OF THE COURT BY: BLAIS C.J.
SHARLOW J.A.
GAUTHIER J.A.

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

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