

Federal Court



Cour fédérale

Date: 20170929

Docket: T-581-17

Citation: 2017 FC 869

Ottawa, Ontario, September 29, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ADRIAN STRAWBERRY

Applicant

and

O'CHIESE FIRST NATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Adrian Strawberry seeks judicial review of a decision of the O'Chiese First Nation Election Appeal Board [Appeal Board]. The Appeal Board declined jurisdiction to hear Mr. Strawberry's appeal of the election of Darren Whitford as Chief of the O'Chiese First Nation. The Appeal Board found that Mr. Strawberry was not a candidate in the election, and rejected his appeal on that basis alone.

[2] The application for judicial review must be allowed. The Appeal Board failed to consider whether Mr. Strawberry's status as a confirmed candidate following the nomination meeting was sufficient for him to appeal the result of the election. The Appeal Board also failed to consider whether it should hear Mr. Strawberry's appeal even if he was not a candidate. Its decision to decline jurisdiction over Mr. Strawberry's appeal was therefore unreasonable.

II. Background

[3] The O'Chiese First Nation has a custom election code. Its elections are governed by the *O'Chiese First Nation Election Act* [Election Act], the *O'Chiese First Nation Election Regulations* [Election Regulations] and the *O'Chiese First Nation Appeal Regulation* [Appeal Regulation].

[4] The eligibility of persons to run for the offices of Chief or Councillor of the O'Chiese First Nation is governed by s 12.1 of the Election Act:

12.1 A person is eligible to run for office as Chief or as Councillor if that person:

- a) is a Member of the O'Chiese First Nation pursuant to the O'Chiese First Nation Membership Act;
- b) is eighteen (18) years of age or over as of the date that nominations were held for the Election;
- c) must be fluent and able to speak Anishinaabe [*i.e.*, Saulteaux] or Cree;

- d) has been a Member of the O'Chiese First Nation for a minimum of five (5) years prior to the date on which the nomination meeting is held; and,
- e) has not been convicted of an indictable offence under the Criminal Code of Canada in the five (5) years preceding the nomination meeting.

[5] On January 11, 2017, Mr. Strawberry attended the nomination meeting for the election of Chief of the O'Chiese First Nation. He informed the Chief Electoral Officer, Bernie Makokis [Electoral Officer], that he met all of the criteria for nomination.

[6] Linda Littlejohn, a First Nation staff member, asked Mr. Strawberry in Saulteaux if he spoke the language. He responded in Saulteaux: "Yes of course". Joanne Gladue, Mr. Strawberry's sister, also vouched for his language skills.

[7] Alice Strawberry also tested Mr. Strawberry's Saulteaux speaking abilities. Ms. Strawberry is the mother of Mr. Whitford, the candidate for Chief who was ultimately elected. Ms. Strawberry informed the Electoral Officer that Mr. Strawberry could speak and understand Saulteaux fluently. However, under s 12.2(e) of the Election Regulations, members of a candidate's immediate family cannot act as interpreters for the purposes of an election.

[8] Mr. Strawberry provided the Electoral Officer with a Release of Results of Criminal Record Check. The document indicated that there was a "possible match" to a registered criminal record based solely on the name(s) and date of birth provided. The document also cautioned that positive identification of a criminal record could be confirmed only by a fingerprint comparison.

Mr. Strawberry asserted before the Electoral Officer that he had not been convicted of an indictable offence under the *Criminal Code*, RSC 1985, c C-46, in the five years preceding the nomination meeting.

[9] The Electoral Officer completed Mr. Strawberry's nomination form, and indicated that his fluency in the Saulteaux language had been verified by Alice Strawberry. His photograph was taken for the ballot, and his name was written on a flip chart together with the name of Mr. Whitford, the only other candidate for the position of Chief.

[10] According to Mr. Strawberry, before he left the nomination meeting, he asked the Electoral Officer if there were any issues with his candidacy. The Electoral Officer replied: "No, everything is in order".

[11] There is no dispute between the parties that, at this point, Mr. Strawberry was a confirmed candidate for the election of Chief of the O'Chiese First Nation.

[12] Shortly after the nomination meeting, Mr. Whitford questioned Mr. Strawberry's fluency in the Saulteaux language. The Electoral Officer informed Mr. Strawberry of the concern without disclosing its source. Mr. Strawberry agreed to take another fluency test by January 13, 2017, and the Electoral Officer assured him that his name would remain on the list of confirmed candidates in the interim. This procedure had been followed with respect to a candidate for Councillor, Herman Poorman, whose fluency had also been questioned.

[13] On January 12, 2017, Mr. Whitford submitted a written statement to the Electoral Officer in which he challenged Mr. Strawberry's fluency in Sauteaux. On January 13, 2017, the Electoral Officer sent an e-mail message to Mr. Strawberry, informing him that his name would be withdrawn from the list of candidates due to correspondence from the community challenging his fluency. The Electoral Officer also informed Mr. Strawberry that he could appeal the decision to Geraldine Hill, Chair of the Appeal Board.

[14] Mr. Strawberry submitted an appeal to the Appeal Board and, on January 30, 2017, the Appeal Board directed the Electoral Officer to arrange a fluency test by February 2, 2017. However, on January 31, 2017, the Band Manager of the O'Chiese First Nation wrote to Ms. Hill to inform her that the Appeal Board did not have jurisdiction to consider an appeal from Mr. Strawberry because he was not a candidate in the election. The Band Manager also refused to pay any costs incurred by the Appeal Board respecting Mr. Strawberry's appeal.

[15] Mr. Strawberry did not undergo a further fluency test. The election proceeded on February 16, 2017 without Mr. Strawberry's name or photograph on the ballot. Mr. Whitford was named Chief by acclamation.

[16] The next day, Mr. Strawberry appealed the result of the election to the Appeal Board.

[17] On March 20, 2017, the Electoral Officer sent an e-mail message to Ms. Hill with the following instructions:

“send back adrians bond and state that the electoral officer had invalidated him as candidate therefore the appeal board has no

jurisdiction to a hearing. I will takefull responsibility for my decision.” [sic throughout]

[18] On March 22, 2017, Ms. Hill wrote to Mr. Strawberry and informed him that the Appeal Board did not have jurisdiction over his appeal because the Electoral Officer had declared him to be ineligible as a candidate. Mr. Strawberry seeks judicial review of this decision.

III. Issues

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

- A. What is the standard of review?
- B. Was the decision of the Appeal Board to decline jurisdiction over Mr. Strawberry’s appeal procedurally fair?
- C. Was the decision of the Appeal Board to decline jurisdiction over Mr. Strawberry’s appeal reasonable?

IV. Analysis

- A. *What is the standard of review?*

[20] Questions of procedural fairness are subject to review by this Court against the standard of correctness (*Desnomie v Peepeekisis First Nation*, 2007 FC 426 at para 11; *Parenteau v Badger*, 2016 FC 535 at para 36).

[21] Administrative bodies must be correct in their determinations of true questions of jurisdiction (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 59 [*Dunsmuir*]). However, true questions of jurisdiction are rare (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at 34).

[22] When a tribunal interprets its “own statute or statutes closely connected to its function, with which it will have particular familiarity” for the purpose of solving a question of jurisdiction, the applicable standard is reasonableness unless the situation is exceptional (*Yellowdirt v Alexander First Nation Election Appeal Board*, 2013 FC 26 at 12). I am therefore satisfied that the merits of the Appeal Board’s decision are subject to review by this Court against the standard of reasonableness.

B. *Was the decision of the Appeal Board to decline jurisdiction over Mr. Strawberry’s appeal procedurally fair?*

[23] Mr. Strawberry argues that the decision of the Appeal Board to decline jurisdiction over his appeal was procedurally unfair because the Appeal Board was neither independent nor impartial, and it did not give adequate reasons to explain its decision.

[24] The legal test for a reasonable apprehension of bias is: what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? (*Committee for Justice & Liberty v Canada (National Energy Board)* (1976), [1978] 1 SCR 369 (SCC) at 386).

[25] Mr. Strawberry notes that the Band Manager of the O'Chiese First Nation refused to pay any costs incurred by the Appeal Board respecting Mr. Strawberry's first appeal. The Electoral Officer subsequently engaged in correspondence with the Appeal Board regarding payment of its invoices. While the timing and context of these communications may be cause for concern, I cannot say that they clearly undermined the Appeal Board's independence or impartiality.

[26] More troubling is the e-mail message from the Electoral Officer to the Appeal Board on March 20, 2017. In this communication, the Electoral Officer appears to dictate the result of Mr. Strawberry's appeal by instructing the Appeal Board to return the nomination fee and decline jurisdiction because the Electoral Officer had invalidated Mr. Strawberry's candidacy.

[27] The O'Chiese First Nation argues that there is no evidence that the Appeal Board acted on the Electoral Officer's instructions, even though the Appeal Board's decision was made just two days after those instructions. In my view, an informed person, viewing the matter realistically and practically, and having thought it through, would have serious doubts about the independence and impartiality of the Appeal Board. However, in light of my determination below, it is unnecessary to reach a definitive conclusion on this point.

[28] The adequacy of reasons is no longer a free-standing ground for judicial review (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14). Nevertheless, a tribunal's reasons must be justifiable, intelligible and transparent (*Dunsmuir* at para 47). The reasons of the Appeal Board for declining jurisdiction are terse, but they are clear and intelligible. The Appeal Board declined jurisdiction over

Mr. Strawberry's appeal because the Electoral Officer had invalidated his candidacy. In my view, Mr. Strawberry's complaint about the reasons provided by the Appeal Board for its decision is best addressed in the analysis of whether the decision was reasonable.

C. *Was the decision of the Appeal Board to decline jurisdiction over Mr. Strawberry's appeal reasonable?*

[29] Section 6.1 of the Appeal Regulation limits the right of appeal to a candidate:

A Candidate may, within fifteen (15) days from the date on which the Election was held, submit an Appeal to the Appeal Board.

[30] A candidate is defined in s 1.1(d) of the Election Act as "an individual who meets the requirements to run for office and has been nominated to run for office for any Election in accordance with this Act and its Regulations".

[31] Section 7.1 of the Appeal Regulation specifies the grounds of appeal as follows:

An Appeal submitted pursuant to the preceding section must sufficiently outline one or more of the following:

- a) that the person declared elected was not qualified to be a Candidate;
- b) that there was a violation of the Act and its Regulations in the conduct of the Election that might have affected the result of the Election; or
- c) that there was corrupt or fraudulent practice in relation to the Election.

[32] Mr. Strawberry maintains that he was a candidate, and his appeal fell squarely within s 7.1(b) of the Appeal Regulation. He says that the conduct of the Electoral Officer in confirming his candidacy and then disqualifying him did not comply with the Election Act and Regulations, and might have affected the election result.

[33] The O’Chiese First Nation responds that matters pertaining to the nomination and eligibility of candidates fall within the exclusive jurisdiction of the Electoral Officer. The role of the Appeal Board is limited to matters that are raised following an election by those who were candidates. The O’Chiese First Nation takes the position that any concern Mr. Strawberry may have had regarding the conduct of the Electoral Officer prior to the election should have been the subject of an application for judicial review to this Court.

[34] The powers of the Electoral Officer are described in s 7.1 of the Election Regulations:

The Chief Electoral Officer is responsible for managing and executing all pre-electoral, electoral and post-electoral processes and procedures included in the Act and its Regulations. The Chief Electoral Officer may make such orders and issue such instructions consistent with the provisions of the Act and Regulations as he or she may deem necessary for the effective administration of an Election or By-Election.

[35] Section 7.3 of the Election Regulations states that “the Chief Electoral Officer shall provide all of the necessary means and do all acts that may be required for the purpose of holding an Election”. The section specifies certain duties, including the preparation of a list of eligible nominees from among those nominated.

[36] The Election Regulations contain detailed provisions regarding the nomination process:

17.1: Once the nomination meeting is declared open by the Chief Electoral Officer, the nomination meeting shall remain open for at least three (3) hours for the purpose of receiving nominations of Candidates.

[...]

17.3: The Chief Electoral Officer shall record the name of the Candidate, the nominator and the seconder and confirm to those present at the meeting that the proposed Candidate is eligible to be elected to the position of Chief or Councillor for the purpose of this Election.

[...]

18.2: Each nomination must be made before the close of the nomination meeting with Chief Electoral Officer and each nomination shall include:

- a) a written nomination in the prescribed form as provided by the Chief Electoral Officer;
- b) the signature of two eligible Voters along with their statement of belief that the Candidate is eligible to be nominated and hold office;
- c) a statutory declaration in the prescribed form signed by the Candidate indicating his or her acceptance of the nomination;
- d) a Letter of Clearance, CPIC record or letter of pardon, if required; and
- e) a non-refundable deposit payable to the O'Chiese First Nation Administration in amount as required under the Act.

18.4: At the end of the nomination meeting, the Chief Electoral Officer shall:

- a) if only one person has been nominated for election as Chief, declare that person to be elected by acclamation;

[...]

- c) where more than the required number of persons are nominated for election as Chief or Councillors, announce that an Election will be held.

18.5: On the day following the nomination meeting, the Chief Electoral Officer shall post in at least one conspicuous place on the Reserve a list of nominees, their nominators and seconders and the offices for which they are nominated.

[...]

19.5: A person who fails to file the documents in accordance with the Act and its Regulations shall not be a Candidate in the Election, and his or her name shall not appear on the ballot for the Election.

19.6: No person shall accept candidacy in an Election if that person is not eligible to be a Candidate in accordance with the Act and its Regulations.

[...]

19.8: A Candidate may withdraw his candidacy within three (3) days after the date on which the nomination meeting was held by submitting a written withdrawal of nomination to the Chief Electoral Officer. Nomination fees will not be refunded.

[37] There is no dispute that the Electoral Officer confirmed Mr. Strawberry as a candidate at the nomination meeting that took place on January 11, 2017. There is nothing in the Election Regulations or elsewhere that empowers the Electoral Officer to disqualify a candidate once the candidate has been confirmed. According to Mr. Strawberry, if there were any concerns regarding his eligibility to be a candidate, the nomination meeting should have been adjourned until the concerns had been addressed. Alternatively, once his candidacy was confirmed at a public nomination meeting, the only way in which Mr. Strawberry could be disqualified prior to the election would be for the Electoral Officer to reconvene the nomination meeting and address the matter in the presence of the community.

[38] There is considerable force to Mr. Strawberry's argument. At a minimum, the Appeal Board should have considered whether Mr. Strawberry's status as a confirmed candidate following the nomination meeting was sufficient for him to appeal the result of the election.

[39] Even if Mr. Strawberry was not considered to be a candidate in the election, this would not necessarily preclude him from appealing the outcome. As the Federal Court of Appeal held in *Wolfe v Ermineskin*, 2001 FCA 199 at paragraph 6, regulations will not prevent an appeal board from properly investigating a complaint in a fair manner, including, where appropriate, by providing an opportunity for a person who was not a candidate in the election to put before the board evidence in support of a complaint.

[40] In *D'Or v St Germain*, 2013 FC 223 at paragraphs 24 and 25; aff'd, *D'Or v St Germain*, 2014 FCA 28, Justice James O'Reilly held that challenges to band election results should be dealt with swiftly, so that the community's leadership is not put in doubt for an extended period of time. Provisions that govern appeal procedures should be understood as permissive, rather than exhaustive. This consideration ought to have informed the Appeal Board's decision whether to decline jurisdiction over Mr. Strawberry's appeal.

[41] The Appeal Board failed to consider whether Mr. Strawberry's status as a confirmed candidate following the nomination meeting was sufficient for him to appeal the result of the election. The Appeal Board also failed to consider whether it should hear Mr. Strawberry's appeal even if he was not a candidate. Its decision to decline jurisdiction over Mr. Strawberry's appeal was therefore unreasonable.

V. Conclusion

[42] The application for judicial review is allowed. Mr. Strawberry requests costs in the lump sum of \$25,000.00, but has not provided a draft bill of costs. His counsel describes this amount as close to, but less than, the costs actually incurred. The O'Chiese First Nation suggests that a more reasonable quantum of costs would be \$10,000.00, citing *Coutlee v Lower Nicola First Nation*, 2015 FC 1305 at paragraphs 23 and 24.

[43] There is nothing in the conduct of the O'Chiese First Nation respecting the application for judicial review to justify an award of costs on a solicitor-client basis. I therefore agree that an award of costs in a lump sum of \$10,000.00 is appropriate.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed.

Costs are awarded to the Applicant in a lump sum of \$10,000.00.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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