Date: 20071001

Docket: T-603-06

Citation: 2007 FC 983

Ottawa, Ontario, October 1, 2007

PRESENT: The Honourable Mr. Orville Frenette

BETWEEN:

GORDON POLSON

Applicant

and

LONG POINT FIRST NATION COMMITTEE (LPFNEC) - MS. JESSICA POLSON,

in her capacity as President, MS. VERONICA POLSON,

in her capacity as Electoral Officer, and MS. APRILE WABIE,

in her capacity as Electoral Officer

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision by the Long Point First Nation Election Committee (the Election Committee) to deny the applicant's request for an appeal. The applicant seeks various orders: an order declaring "the Customs for Elections of the Anishinabe of Long Point, September 20, 2002" is the legal election code until such time as another revised code is

legitimately revised and adopted by a General Assembly of the citizens of the Long Point First Nation"; an order declaring "the appeal launched by the applicant is legitimate"; "an order in the nature of mandamus that an official General Assembly be convened to resolve issues directly related to the election process for the Anishinabe of Long Point First Nation"; and "an order in the nature of certiorari quashing the decision of the Election Committee repudiating the request for an appeal by the applicant". The applicant mainly alleges a breach in the amendment process of the *Customs for Elections for the Anishinabe of Long Point* (the *Customs for Elections*) which consequently vitiates the election held in February of 2006 under the newly revised *Customs for Elections*.

BACKGROUND

[2] The applicant is a citizen of Long Point First Nation (the LPFN) and a registered member of the community of Winneway, an Algonquin community of 550 habitants. The LPFN is an Indian Band pursuant to section 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5., whose Council is chosen according to the customs of the Band.

[3] In 1998, the first written election code, the *Customs of Elections*, was adopted; it is constituted of procedural regulations governing the elections of the Council in the LPFN. It was subsequently amended in 1999, 2001 and 2002. The *Customs for Elections* provides notably that an Election Preparation Meeting is to be held before every election to confirm or amend the *Customs of Elections* in place at the time before the election take place. Community notices are then sent by the

Chief and Council to every member of the community to advise them of the planned topics of the Election Preparation Meeting.

[4] On June 7, 2004, considering the need to review and update the 2002 *Customs for Elections*, the applicant offered his professional services and was then hired to provide technical support services to consult with and gather information from the general public on the current *Customs for Elections*. At an Election Preparation Meeting held August 9, 2004, members of the community were informed of the Council's decision to acquire the applicant's professional services.

[5] Presentation of the results was supposed to be conducted in an Election Preparation Meeting, on August 31, 2004 but it was postponed to October 28, 2004 due to exceptional circumstances. The applicant could not be present at the latter Election Preparation Meeting which was again adjourned to November 1, 2004. Finally, the assembly decided that the 2002 *Customs for Elections* should remain in force for the upcoming 2004 election due to these exceptional circumstances, namely the forest crisis at Twin Rapid. Therefore, the 2005 elections were conducted under the 2002 *Customs for Elections*.

[6] On October 19, 2005, an Election Preparation Meeting was convoked by the Chief and Council in order to revise the 2002 *Customs for Elections* in advance of the 2006 election. The Assembly first appointed the members of the Election Committee. Then, it proceeded with the revision of the 2002 *Customs for Elections*. A member stated that the applicant should have the opportunity to present his survey results. It was decided that the Assembly would review the applicant's survey

results presented in a document called “Our Voice is Collective” before adopting the revised *Customs for Election*. The meeting was then adjourned to October 25, 2005; the Assembly decided to adjourn the Election Preparation Meeting again in order to have a presentation of the survey results by the applicant on November 1, 2005.

[7] The Election President then received two letters from the applicant concerning the resolution of October 25, 2005. The second raised for the first time the question of the applicant’s remuneration for his presentation of the survey results and noted that he would not be able to attend the next meeting. As the Election President believed she did not have the prerogative to authorize expenses, she contacted the Chief and Council. A meeting was held on November 4, 2005 where it was decided that the LPFN did not have the budget to have the applicant make a presentation. Consequently, meetings where held by the Chief and Council where the Election Committee was present to work on the amendments of the *Customs for Election* and the study of the applicant’s report of his survey results.

[8] On November 1, 2005, the Election Preparation meeting was again postponed to November 16, 2005; however, this meeting was also rescheduled as the 3-day notice was not properly given. An Election Preparation Meeting to revise the 2002 *Customs for Elections* was finally conducted on January 17, 2006, with notice being sent on January 14, 2007. Presentation of the *Customs for Elections* by Council to the General Assembly as well as its review and adoption were some of the announced topics in the notice sent to community members. Modifications to the *Customs of Elections* were then voted in and adopted unanimously by the General Assembly. The applicant was

never again consulted on his survey results. However, the minutes of the January 17, 2006 meeting shows that the Council had revised the *Customs for Elections* along with the applicant's survey result, "Our Voice is Collective".

[9] On February 15, 2006, a general election took place under direction of the Election Committee; it was conducted under the newly revised 2006 *Customs of Elections*. The validity of these elections were then contested by the applicant in a letter dated February 23, 2006, primarily because he believes the revision process of the *Customs for Elections* was not properly followed and shows bias. In a letter dated March 2, 2006, the Election Committee denied the appeal and thus, the applicant applied for a judicial review.

[10] The Election Committee denied the applicant right to appeal in the following terms:

> […]
>
> This letter is in response to your appeal received on February 28, 2006 via registered mail. The Election Committee have met to determine whether or not the appeal is legitimate as stated in Section VII – 7.2 of the "Customs for Elections of the Anishnabeg of Long Point" duly adopted by members of the community at the Election Preparation Meeting on January 17, 2006.
>
> Upon complete analysis of your correspondence and after serious consideration, your request for an appeal is denied by the Election Committee. It is important for the Election Committee to point out that your letter of appeal does no refer to any facts or anything that would constitute a reasonable ground to believe any infringement or contravention under subsection a) to c) of Section 7.1 of the "Customs for Elections of the Anishinabeg of Long Point"
>
> In other words, there is nothing, even at first sight, that constitutes a ground of appeal. The allegations and assumptions are not supported by anything. You do not raise anything that can constitute a reasonable ground of appeal. Controversy, suspicion and susceptibilities constitute in nothing a ground of appeal.

> Therefore, the Election Committee according to section 7.2 of the "Customs for Elections of the Anishinabeg of Long Point" determine that your appeal is not legitimate.
>
> In conclusion, I will not reply to any of your views since I strongly believe that we have completed the elections in the most honest and truthful means.
>
> […]

ISSUES

[11] The parties raised various issues that can be restated as follows:

- What is the appropriate standard of review?
- Did the Council fail to follow the 2002 *Customs for Elections*' procedure when it purported to amend it?
- Did the Election Committee err in denying the applicant's appeal?
- Did the Election Committee owe a duty of fairness to the applicant and did it breach that duty?
- Was there was an infringement of human rights when the President of the Election Committee openly threatened a community member with expulsion from a meeting?

ANALYSIS

I - Preliminary issues

[12] The respondents first opposed the validity of the affidavits of the applicant and of Earl Polson. They contend that the affidavits are "tendentious, opinionated, argumentative and speculative" and contain hearsay and opinions not based on personal knowledge; these affidavits are therefore contrary to Rule 81 of the *Federal Court Rules*, SOR/98-106 (the *Rules*).

[13] I agree with the respondents that the affidavits submitted by the applicant and Earl Polson are not directly related to facts of personal knowledge. Their contents should largely have appeared

in the memorandum of fact and law. When it is well establish that an affidavit must be limited to statement of facts, I will place little weight on the affidavits of the applicant.

[14] The respondents then submit that the applicant had no interest pursuant to section 18.1 of the *Federal Court Act***,** R.S.C. 1985, c. F-7 (the *Act*) as he is not "directly affected by the matter in respect" of the amendment process. The applicant did not demonstrate that he suffered a specific prejudice or a damage.

[15] The respondents also allege that the application does not adhere to the requirement of Rule 302 of the *Rules*:

302. Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.	**302.** Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

As the application is aimed at two decisions by two distinct bodies, a decision of the electors to amend the *Customs for Elections* and the decision of the Election Committee to deny the applicant's appeal, the respondents believe the Federal Court should strike the first. While the Federal Court has discretion to waive adherence to the requirement that an application for judicial review be limited to a single order, the applicant has to show that the several orders are part of a continuing process.

[16] The respondents further contend that the applicant tries to transform this application for judicial review against a decision of the Election Committee into an action to annul the 2006 *Customs for Elections* and thereby, the election. They believe the Election Committee had no

jurisdiction to entertain an appeal of the amendment process. As the applicant contests the amendment process of the *Customs for Elections* followed by the Council and, thereby the election conducted under the revised *Customs for Elections*, the pertinent question here is clearly whether or not the applicant directed his application for judicial review against the right bodies.

[17] Under the *Customs for Elections*, a voter can appeal an election by sending a letter to the Electoral President when he has reasonable grounds to believe "there was corruption in relation to the election"; "that there was a violation of the present regulation, that could damage the outcome of an election"; or, "that a person presented as a candidate at an election was ineligible". Under the 2002 *Customs for Elections*, the Electoral Committee would call a general assembly of the voters and, if necessary, appoint an Appeal Board (section 7.3(A) of the 2002 *Customs for Elections*). The only difference with the 2006 *Customs for Elections* is that the Election Committee has the discretion to determine the legitimacy of the appeal before calling the general assembly as well as the Appeal Board (sections 7.2 and 7.3 of the 2006 *Customs for Elections*).

[18] I do not think that the Appeal Board, appointed by the Election Committee, was the appropriate tribunal. In fact, the appeal process has been created only to deal with problem in the election process. The *Customs for Elections* (both 2002 and 2006) also states that the Appeal Board can, ultimately, invalidate the election of a candidate and call another election which I believe, is its only power. Even if it had done so, the same problem would remain; I do not believe it has the power to invalidate *Customs for Elections* and to call a General Assembly.

[19] Therefore, I think the applicant had to direct his judicial review against the Chief and Council and not against the Election Committee, see: *Roseau River Anishinabe First Nation v. Roseau Fiver Anishinabe First Nation (Council),* [2003] 2 C.N.L.R. 345 [*Roseau River Anishinabe First Nation*]. I do not think the Appeal Board had the jurisdiction to hear an appeal against the amendment process followed by the Council, especially where I believe the Appeal Board has no pertinent power to invalidate the *Customs of Elections* and to call a general assembly.

[20] The respondents then submits that the Federal Court clearly does not have jurisdiction over the electors or the Band's decision to amend the *Customs for Elections* as it is not directed against "an order of a Federal Board, Commission or other Tribunal" (sections 2(1), 18 and 18.1 of the *Act*). However, I believe that the applicant is clearly challenging the decision of a Chief and Council related to the amendment of the *Customs for Elections* and not an electors' or Band's decision.

[21] Therefore, I believe the Federal Court has jurisdiction to entertain an application for judicial review against an alleged failure to follow the procedure for amending customs by the Chief and Council, see: *Roseau River Anishinabe First Nation.* It is trite law that a Band Council is a "Federal Board, Commission or other tribunal', see: *Rider v. Ear*, [1979] 4 C.N.L.R. 119; *Gabriel v. Canatonguin*, [1980] 2 F.C. 792 (F.C.A.); and *Trotchie v. The Queen*, [1981] 2 C.N.L.R. 147. In *Mohawk of Kanesatake v. Mohawk of Kanesatake (Council),* 2003 FCT 115, Justice Martineau held:

> **12.** I consider that the Court has jurisdiction pursuant to sections 18 and 18.1 of the Federal Court Act, R.S.C. 1985, c. F-7, to entertain the present application, and as the case may be, to set aside the impugned decision, to grant declaratory or injunctive relief with

> respect to the custom of the Band and its purported application by the Council, its Executive Director Barry Bonspille or any election officer or other person, purportedly acting in the name of the Council or under the authority of the impugned decision or of the Code.

[22] Consequently, I think the judicial review should have been directed against the Council. I also believe the Federal Court is the appropriate forum to hear the review. However, concerning this process, the respondents further contend that, in any event, the application was filed more than thirty days after the decision was made, contrary to the requirement of section 18.1(2) of the *Act*. The application for judicial review was introduced on April 6, 2006 while the violation of the amendment process took place in January of the same year. I agree with the respondents' contention and, even if the proper parties were correctly identified at the beginning, this application would not have been in the 30-day period to file an application as the amendment took place in January and the application was only filed on April 6, 2006. As I have doubts on the feasibility of reviewing the amendment process, strengthened by the fact that a long time elapsed since the alleged violation and as I do not believe that the amendment process was not properly followed, I would not grant an extension of time to file another applicant nor will I permit to change the designation of the parties.

[23] I would therefore dismiss this application for judicial review. However, I believe that the other issues need to be addressed by this Court at least to address parties' submissions.

II- What is the appropriate standard of review?

[24] In *Giroux v. Swan River First Nation*, 2006 FC 285 [*Swan River First Nation*] (orders modified by the Federal Court of Appeal, 2007 FCA 108), Justice Dawson conducted a pragmatic and functional analysis regarding decisions of a Band Election Appeal Committee:

> [54] I respectfully disagree with that conclusion. Dealing with the required elements of the pragmatic and functional analysis I am of the view that:
>
> 1. The absence of a clause either prohibiting or granting any right of appeal from the Committee is a neutral factor, which implies neither deference nor enhanced scrutiny.
>
> 2. While courts have greater expertise with respect to the interpretation of legislation and regulations, the Committee has significantly greater expertise on matters such as knowledge of the Band's customs (for example whether Membership applications were posted in the past). The Committee also has superior expertise on factual matters such as whether the 2002 petition said to have been distributed by Mr. Giroux contained the names of all eligible voters.
>
> 3. I accept that the intent of the *Indian Act* and the Regulations is to provide autonomy to bands such as the Swan River First Nation and that this counsels deference. At the same time, to the extent that the Committee was adjudicating upon Mr. Giroux's right to hold office greater scrutiny of its decision is warranted.
>
> 4. I disagree that the question before the Committee should be characterized as a pure question of law. The inquiry was far more fact based: did Mr. Giroux engage in a corrupt election practice and did ineligible voters vote in the election. Great deference should be accorded to the Committee's factual determinations. To the extent that the Committee was obliged to consider what, as a matter of law, constitutes a corrupt election practice under the Regulations, little deference is owed to the Committee's legal interpretation of the Regulations.
>
> [55] In summary, I conclude that the Committee's legal interpretation of the Regulations should be reviewed on the standard of correctness and its conclusions of fact on the most deferential standard, patent

> unreasonableness. Questions of mixed fact and law should be reviewed on the intermediate standard of reasonableness *simpliciter*.

I agree with my colleague Justice Dawson; therefore, the Election Committee's decision should only be reviewed if patently unreasonable.

[25] As for the issues regarding procedural fairness, I believe the standard of correctness is applicable, see *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539.

III- Did the Council fail to follow the 2002 *Customs for Elections*' procedure when it purported to amend it?

[26] The applicant submits the 2006 *Customs for Election*s had not been ratified by a duly convened General Assembly and he believes that the notices did not conform to section 15.1 of the 2002 *Customs for Elections*. He states that there was no reason to believe the Election Preparation Meeting could qualify as a duly convened General Assembly. The Respondents argue that an Election Preparation Meeting constitutes a General Assembly and hence, that it was held in this case. They also contend that the need for notice was always followed by the Election Committee.

[27] Section 15.1 of the 2002 *Customs for Elections* provides that:

> **15.1** When General Assembly of the Members is called, the Council must post a Notice of General Meeting of the Electors of the Long Point Fist Nation and send notices to each residence of the community of Winneway, stating the place, time and date at least three (3) days prior to the date of the meeting.

In the present case, the Election Committee posted a notice on January 14, 2007 advising community members of the January 17, 2006 evening meeting. While the 2002 *Customs for Elections* does not precise expressly if the requirement is three clear juridical days, I believe the notice was properly given three days in advance.

[28] In accordance to 2002 *Customs for Elections*, an Election Preparation Meeting is "a general meeting of the electors called by Chief and Council, three (3) months before the end of their existing mandate to revise and adopt with the general assembly the election rules and procedures" (section 1.0) (emphasis added). I understand that this meeting was a continuation of the October 19, 2005 Election Preparation Meeting called by the Chief and Council and that it was adjourned several times before finally taking place on January 17, 2006. The notice announced as topics the review and adoption of the Customs for Elections.

[29] On my reading of section 1.0 of the 2002 *Customs for Elections*, an Election Preparation Meeting constitutes a General Assembly. The fact that the notice was erroneously sent by the Election Committee instead of the Chief and Council is a mistake which I do not believe is fatal to the process. Furthermore, section 1.9 of the 2006 *Customs for Elections* states: **"ELECTION PREPARATION MEETING"** means a general assembly of the electors called by the Chief and Council, three (3) months before […]. (Emphasis in original)

[30] I also believe that the 2006 *Customs for Elections* were duly ratified by members as the minutes shows it was unanimously approved. Section 15.4 of the 2002 *Customs for Elections* states

that "[a] General Assembly of the electors convened to legitimize a vote will consist of at least 50% of the electors present at the General Assembly". The minutes of the January 17, 2006 Election Preparation Meeting shows that 3 Election Committee members, 6 Council members and 50 community members attended the meeting. The Electoral President stated that the 2006 *Customs for Elections* had to be adopted by the assembly and then called a vote. 22 persons were in favour and nobody was against or abstained from the vote. At the hearing, the respondents' counsel explained the difference between the number of persons present at the beginning of the meeting and the persons who finally voted by the fact that, the meeting was on an evening and the vote by the General Assembly held at the end, some persons must have left before the end. However, the amendment was adopted unanimously and thus, I cannot agree with the applicant's submission.

[31] Furthermore, the respondents' counsel submits that no evidence was provided by the applicant to show that the previous amendments to the *Customs of Elections* were differently adopted. My colleague Justice Blais, in *Awashish v. Conseil de Bande des Atikamekw d'Opitciwan*, 2007 CF 765, held:

> [37] Dans *Bigstone c. Big Eagle* (1992), 52 F.T.R. 109, le juge Strayer notait :
>
> Sauf si elle est définie par ailleurs dans le cas d'une bande donnée, la « coutume » doit inclure, à mon sens, des pratiques touchant le choix d'un conseil qui sont généralement acceptables pour les membres de la bande, qui font donc l'objet d'un large consensus. […]
>
> Pour ce qui est de la validité de la constitution, la question véritable semble donc se rattacher à sa légitimité politique, et non juridique : la constitution résulte-t-elle de l'accord de la majorité de ceux qui, d'après la preuve produite, paraissent être des membres de la bande? C'est une question qu'un tribunal ne doit pas chercher à trancher en l'absence de critères juridiques discernables qu'il peut appliquer.

> Certes, l'exercice de la surveillance judiciaire peut être justifié par d'autres motifs, s'il y avait une preuve claire de fraude ou d'autres actes imputables aux défendeurs, qui ne sauraient de toute évidence être autorisés par la Loi sur les Indiens, mais aucune preuve ne m'a été présentée quant à de telles activités.
>
> […]
>
> [40] […] Suivant la même logique, je ne crois pas qu'il était nécessaire pour le Conseil de procéder par voie référendaire pour s'assurer de l'appui de la majorité de la population avant d'adopter le *Code électoral*. Nous n'avons pas devant nous une situation où le *Code électoral* aurait été élaboré et adopté en secret. La population a été consultée tout au long du processus et le *Code électoral* a été adopté lors d'une assemblée publique.
>
> [41] L'aspect le plus convaincant de l'argument des demandeurs quant à la validité du *Code électoral* est que celui-ci a été utilisé pour l'élection de 2005, à laquelle les électeurs de la communauté ont participé en grand nombre, et que la validité du Code n'a pas été remise en question avant ou pendant l'élection. […]
>
> [42] […] Je suis donc satisfait que l'acquiescement de la communauté à l'utilisation du Code électoral lors des élections de 2005 constitue une preuve suffisante pour démontrer que le *Code électoral* reflétait « des pratiques touchant le choix d'un conseil qui sont généralement acceptables pour les membres de la bande, qui font donc l'objet d'un large consensus » (Bigstone, précité)

[32] In her affidavit, Ms. Jessica Polson explained that no member ever raised the question of the invalidity of the Election Preparation Meeting held on January 17, 2006. The modifications to the *Customs for Elections* were discussed by the Assembly and the *Customs for Elections* was then unanimously adopted. She says that the election took place on February 15, 2006 since no contestation of the 2006 *Customs for Elections* or of the January 17, 2007 Election Preparation Meeting was made.

[33] Therefore, the validity of the amendment process is even more convincing if we consider the fact that the latter Election Preparation Meeting is a continuation of previous adjourned meetings where revision and adoption of the *Customs for Elections* was always announced topics; the community had been consulted in the whole process; the *Customs for Elections* had been adopted during of a public assembly; there is no evidence that the validity of the amendment process has been contested by any other community member; and there is no evidence that the participation rate at the election was particularly low. Consequently, I conclude that the 2006 *Customs for Elections* was approved by a large consensus and thus, was validly adopted.

IV- Did the Election Committee err in denying the applicant's appeal?

[34] The applicant contends that the 2002 *Customs for Elections* gives to the Appeal Board the exclusive jurisdiction for assessing the validity of an appeal and that its decision must be ratified by a General Assembly:

> **7.2** If the two (2) weeks following the date of an election, a candidate or a voter at the election has reasonable grounds to believe;
>
> a) that there was corruption in relation to the election, or
> b) that there was violation of the present regulation, that could damage the outcome of an election, or
> c) that a person presented as a candidate at an election was ineligible,
>
> he/she can appeal by sending to the "Electoral President", via registered mail the details of these assumptions
>
> **7.3 (A)** The Electoral Committee shall then call a general assembly of the voters to report on the nature of the appeal, if deemed necessary, to appoint an Appeal Board formed of at least one (1) Elder and two (2) voters from the Long Point First Nation who are involved in the appeal. If the Electoral President does not call this voters general assembly, the Long Point First Nation Director

> General shall do so as prescribed in this regulation and act as the Electoral President.

Therefore, the applicant believes the Election Committee had no jurisdiction to deny his request for appeal.

[35] The respondents retort that the 2006 *Customs for Elections*, in effect at the election, give the prerogative to the Election Committee to determine the legitimacy of the appeal; if it believes the appeal is valid, it then calls a general assembly of voters. The pertinent provisions of the 2006 *Customs for Elections* are the following:

> **7.1** If the two (2) weeks following the date of an election, a candidate or a voter at the election has reasonable grounds to believe;
>
> a) that there was corruption in relation to the election, or
> b) that there was violation of the present regulation, that could damage the outcome of an election, or
> c) that a person presented as a candidate at an election was ineligible,
>
> he/she can appeal by sending to the "Electoral President", via registered mail the details of these assumptions
>
> **7.2** The "Election Committee" must determine whether or not the appeal is legitimate and report the findings to the person making the appeal and the Director General.
>
> **7.3** If the appeal is legitimate, the "Election Committee" shall the call a general assembly of the voters to report on the nature of the appeal within one (1) week. If deemed necessary, the General Assembly will appoint an Appeal Board. The Appeal Board will determine the final decision. If the Electoral President does not call a general assembly of voters, the Long Point First Nation Director General shall do so as prescribed in this regulation and act as the Electoral President.

[36] Both submissions are correct; the issue is to determine which *Customs for Elections* was in effect at the time of the election. However, as I concluded the amendment process was correctly followed and thus, that the 2006 *Customs for Elections* was valid, I have to agree with the respondents' submission. The Election Committee had the prerogative to determine whether or not the appeal is legitimate in accordance with section 7.2 of the 2006 *Customs for Election*s. Notwithstanding that finding, the Federal Court has to determine whether or not the Election Committee's decision to reject the request for appeal was correct.

[37] The applicant made a request for appeal to the Election Committee as he had 'reasonable grounds to believe that there was corruption in relation to the election' and 'that there was [a] violation of the present regulation that could damage the outcome of an election'. He alleged the violation of the *Customs for Elections* amendment process and corruption in this process. The Election Committee rejected his request of appeal as his allegations where not supported by anything relevant. Deference in this situation is necessary and the Federal Court should only grant the judicial review if the Election Committee's decision was patently unreasonable.

[38] I do not believe the applicant could have "reasonable grounds to believe that there was corruption in relation to the election". Neither did the applicant justify to the Election Committee his contentions of a "violation of the present regulation that could damage the outcome of an election". Even if reasonable grounds to believe is lower than a civil standard, it is still a standard which requires some evidentiary foundation. The applicant does not state any supporting reasons to his allegations. The 2006 *Customs for Elections* clearly mentions that a person who doubts the election

process has to send details of these assumptions (section 7.1). Therefore, I do not think the Election Committee's denial on this point is patently unreasonable.

[39] Furthermore, the respondents' counsel correctly pointed out at the hearing that no significant changes were made to the *Customs for Elections.* As I explained before, the main difference with the 2006 *Customs for Elections* is that the Election Committee has the discretion to determine the legitimacy of the appeal before calling the General Assembly as well as the Appeal Board (sections 7.2 and 7.3 of the 2006 *Customs for Elections*). Consequently, even if I was inclined to accept that the amendment process was not properly followed, I could not see how it could potentially "damage the outcome of an election".

V- Did the Election Committee owe a duty of fairness to the applicant and did it breach that duty?

[40] The applicant believes he was entitled to a stricter standard of fairness and hence, that the Election Committee had to hear him. He contended he had a legitimate expectation the appeal would go before the General Assembly and that he was prejudiced.

[41] I believe the Election Committee owes a basic duty of fairness to the applicant. In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 [*Baker*], the Supreme Court held that the duty of procedural fairness is flexible and depends of the context of every particular circumstance. The criteria set out in *Baker* to determine the degree of procedural fairness owed are the following: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; the

importance of the decision to the individual or individuals affected; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the agency itself.

[42] First, the decision made by the Election Committee was regulatory. The purpose of the appeal process is to discover improper conduct or processes that might vitiate an election process. The Election Committee has to decide whether or not the allegations are legitimate and what constitutes reasonable grounds to believe.

[43] Second, the scheme is intended to reflect the customary election practices of the LPFN, which are adopted after a consultation process in the community. The process to be followed to contest an election is to submit written allegations to the Electoral President. In light of these allegations, the Election Committee has to decide the legitimacy of the appeal.

[44] Third, the applicant is not directly affected by the decision of the Election Committee to reject his appeal.

[45] Fourth, the applicant contends he had legitimate expectations on the basis of custom that the appeal would go before the General Assembly. In saying so, the applicant indirectly says he has legitimate expectations that 2002 *Customs for Elections* would be applied. I respectfully believe the applicant could not have these expectations when the 2006 *Customs for Elections* were in effect and where they clearly mention the power of the Election Committee to determine the legitimacy before calling a General Assembly.

[46] Fifth, the process expressly chosen by the community is written submissions at the preliminary level before the Election Committee. Therefore, I do not believe the applicant was entitled to an oral hearing at this preliminary stage.

[47] Considering the above factors, I think the applicant was entitled to a basic procedural fairness before the Election Committee such as, the right to an unbiased tribunal, the right to notice, and an opportunity to make representations. In accordance to this latter right, the applicant was clearly provided with the opportunity to make written submissions and I can not agree with his submissions that he was entitled to an oral hearing.

[48] As for the applicant's submissions of bias regarding the Election Committee, in *Swan River First Nation*, Justice Dawson held:

> **42.** The test at law for the existence of the reasonable apprehension of bias was described in the following terms by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at page 394:
>
> […] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".
>
> **43**. As a matter of law, a high threshold must be met in order to establish either bias or the apprehension of bias. See: R. v. S. (R.D.), [1997] 3 S.C.R. 484 at page 532; and Wewaykum Indian Band v. Canada, [2003] 2 S.C.R. 259 at paragraph 76.

[49] The applicant supports his apprehension of bias from the Election Committee as it disregarded his survey result and by its meetings behind "closed doors". I do not believe it was the duty of the Election Committee to have regard for his survey results as it is the responsibility of Chief and Council to "Formulat[e], review[] and recommend[] amendments to […] Customs for Elections Regulation, By-Laws, Legislation" (section 14.5 of the *2002 Customs for Elections*). Therefore, I cannot agree with the applicant on the Election Committee's disregarding of his survey results. Furthermore, the Chief and Council did take into consideration his final report even if the applicant did not present his result himself. I would point out that the Assembly decided to hear his presentation but finally was not able to because of the applicant's demand for remuneration which the Chief and Council could not give him. In addition, the contract signed by the applicant clearly states that the Chief and Council are not bound by his survey results.

[50] As for the meetings behind "closed doors", Ms. Veronica Polson, in her affidavit, explains that the Election President received a letter from the applicant concerning the resolution of October 25, 2005 that held he would be given the opportunity to present his survey findings. At that point, the applicant raised the question of his remuneration for his presentation for the first time. As the Election President believed she did not have the prerogative to authorize expenses, she contacted the Chief and Council. A meeting was held on November 4, 2005 where it was decided that the LPFN did not have the budget to have the applicant make a presentation. Consequently, meetings were held for the Chief and Council as well as the Election Committee to work on the amendments of the *Customs for Election* and the study of the applicant's report of his survey.

[51] I cannot agree with the apprehension of bias raised by the applicant against the Election Committee; no evidence was provided by the applicant to support his allegations of bias. Furthermore, they are speculative as he was not present at these meetings. I would therefore reject the applicant's contention of a breach of procedural fairness.

VI- Was there was an infringement of human rights when the President of the Election Committee openly threatened a community member with expulsion from a meeting?

[52] Finally, the applicant believes M. Earl Polson's right to freedom of expression was violated by the Election Committee when he was threatened with expulsion. The Court does not have to take into consideration this issue. In fact, the alleged violation would have taken place at an Election Preparation Meeting where Mr. Earl Polson would supposedly have been threatened with expulsion. Where the judicial review is based on a denial of appeal by the Election Committee, the alleged violation is based on a different situation which renders this issue irrelevant.

[53] Moreover, I would simply point out that the applicant cannot allege a violation of someone else's right, see: *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 619 and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. The relevant provision of the *Canadian Charter of Human Rights and Freedoms* is as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[54] The same remark is applicable in regard to section 49 of the *Charter of Human Rights and Freedoms,* R.S.Q., c. C-12:

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom. In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.	**49.** Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte. En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur à des dommages-intérêts punitifs.

Freedom of expression is a personal right; the term “victim” clearly presumes the existence of an individual prejudice which the applicant does not have.

[55] Therefore, I would dismiss this application for judicial review.

COSTS

[56] In this proceeding, the applicant had demanded costs against the respondents. However at the conclusion of the hearing, he declared he would be satisfied if each party paid their respective costs.

[57] The council for the respondents in his submissions did not comment on the issue but in his pleadings, he asked for costs.

[58] In the particular circumstances of this case considering the relations between the parties, I decide that each party should pay for their own costs.

ORDER

THIS COURT ORDERS that

- This application for judicial review is dismissed;
- Each party is to pay their own costs;
- No questions are certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-603-06
STYLE OF CAUSE:	Gordon Polson v. Long Point First Nation Committee (LPFNC) et al.
PLACE OF HEARING:	OTTAWA, Ontario
DATE OF HEARING:	September 20th 2007
REASONS FOR ORDER AND ORDER BY:	ORVILLE FRENETTE
DATED:	October 1st 2007

APPEARANCES:

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