

Date: 20080103

Docket: T-1769-06

Citation: 2008 FC 4

Halifax, Nova Scotia, January 3, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**CHIEF VICTOR BUFFALO, on his own behalf
and on behalf of the SAMSON INDIAN BAND
also known as SAMSON CREE NATION and the
SAMSON INDIAN BAND also known as SAMSON CREE NATION**

Applicants

and

**DARRELL REGAN BRUNO,
DARWIN SOOSAY and LARRON NORTHWEST**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of the decision dated October 2, 2006, of the Samson Cree Nation Election Appeal Board (the EAB), wherein the complaints of Bruno and Soosay were upheld upon reconsideration.

[2] The applicants seek an order:

1. Quashing the October 2, 2006 decision of the EAB;
2. Declaring that the EAB does not have the jurisdiction to supervise the Electoral Supervisor's exercise of her section 16 discretion respecting the closure of polls during an election;
3. Declaring that the EAB does not have the jurisdiction to suspend or remove a sitting councillor or Chief;
4. Sending the Bruno complaint based on section 58 of the Election Law back to the EAB with express directions that on the correct legal interpretation of the Election Law, when the Electoral Supervisor locked the doors of the voting location at 6:00 p.m. on May 19, 2005, but allowed all voters already in the voting location at that time to vote, there was no violation of the Election Law; that there is no basis for the Bruno complaint; and that the Bruno complaint is invalid; and
5. Sending the Soosay complaint based on subparagraph 4(b)(i) of the Election Law back to the EAB with the express directions that, on the correct legal interpretation of the Election Law, paragraph 4(a) does not disentitle a member of the Samson Cree Nation who is otherwise eligible to run in an election under section 3, but who has been convicted of an indictable offence on or after March 8, 1993, if that member has received a pardon either through the Canadian legal system or through a Cree ceremony conducted by an elder.

[3] The respondents seek an order:

1. Upholding the decision of the EAB in respect of the Soosay complaint and ordering a new election to be held on the 15th day following the order, or such other date as is practicable;

2. Upholding the decision of the EAB in respect of the Bruno complaint and ordering a new election to be held on the 15th day following the order, or such other date as is practicable;

3. Alternatively, an order directing that it shall be proper exercise of the Electoral Supervisor's discretion to allow voters already in the voting location at the time of the 6:00 p.m. closing to cast their votes;

4. Declaring that the EAB properly exercised its powers pursuant to section 88 of the Election Law in directing that in the future the Electoral Supervisor is to seek advice and direction regarding poll closure procedure from the EAB Chairperson in advance of the 6:00 p.m. deadline; and

5. Declaring that the EAB properly exercised its powers pursuant to its Terms of Reference to make recommendations for the efficient and effective application of the Election Law (section 10) by directing that the current councillors shall suspend their respective duties as councillors immediately and shall vacate their offices effective Tuesday October 6, 2006 at 4:30 p.m., pending the re-election.

Background

[4] The Election Law of the Samson Cree Nation came into force on March 8, 1993.

[5] The Samson Cree Nation held a council election on May 19, 2005. At 5:45 p.m., there remained a long line of people outside the doors of the voting location who were waiting to obtain their ballots. At that time, the Electoral Supervisor decided to allow all of the people waiting in line

to enter the voting location. The doors to the voting location were closed at 6:00 p.m. The voters who had entered the voting location by the 6:00 p.m. deadline obtained ballots and proceeded to vote. Approximately 300 people were allowed to vote after 6:00 p.m.

[6] Later that day, twelve individuals were declared elected to council. By letter dated May 24, 2005, the respondent, Darrel Bruno complained about the election held on May 19, 2005. Bruno complained that votes had been cast in the election after the 6:00 p.m. deadline. By letter dated May 26, 2005, the respondent, Darwin Soosay also complained about the election. Soosay challenged the result of the election on the basis that certain candidates did not meet the criteria under section 4 of the Election Law, and should have been disqualified from running in the election.

[7] Paragraph 4(a) of the Election Law precludes individuals who have been convicted of an indictable offence after the date the Election Law came into force (March 8, 1993) from running as candidates in a council election. Paragraph 4(b) precludes individuals from running in a council election who have been convicted of an indictable offence before or on March 8, 1993, unless they have obtained a Cree cultural pardon or a federal pardon.

[8] As a result, the election of Larron Northwest to council was challenged by the Soosay complaint. Mr. Northwest was nominated as a candidate in the council election on May 5, 2005. While it appears that he met the criteria for nomination under section 3 of the Election Law, his eligibility under section 4 is disputed by the parties. Mr. Northwest was convicted of possessing marijuana and unsafe storage of firearms in 1998. He approached Joe Boysis, a community Elder,

and asked about obtaining a Cree cultural or traditional pardon for the convictions. He took part in a ceremony conducted by Mr. Boysis and was advised that he had been pardoned. He applied for a federal pardon, but had not obtained one at the time of the May 19, 2005 election.

[9] The EAB considered the Bruno and Soosay complaints and by decision dated June 8, 2005, found that both complaints were valid. The applicants sought judicial review of the EAB decision and the decision was quashed by order of Justice Rouleau, dated October 21, 2005. By decision dated July 4, 2006, the Federal Court of Appeal allowed the appeal in part, and remitted both complaints to the EAB for reconsideration.

[10] With respect to the Bruno complaint, the Federal Court of Appeal found that section 58 only prescribed the hours during which voting locations could remain open to receive voters. The Federal Court of Appeal also found that the Electoral Supervisor had acted in accordance with the provisions of the Election law when she permitted those voters who had entered the voting location by 6:00 p.m. to cast their ballots.

[11] In addressing the Soosay complaint, the Federal Court of Appeal found that Justice Rouleau was correct in finding that the EAB had committed a reviewable error in failing to allow Mr. Northwest an opportunity to respond to the complaint. However, the Federal Court of Appeal found that Justice Rouleau was wrong in proceeding to determine the issue of whether Mr. Northwest was qualified to run, and whether he had been pardoned prior to the date of his nomination.

[12] The EAB reconsidered the Bruno and Soosay complaints and issued a second decision on October 2, 2006. The decision reaffirmed the original position of the EAB with respect to both complaints. The EAB also directed the Electoral Supervisor to consult with the Chair of the EAB with respect to the closure of voting locations prior to future elections. In addition, the EAB suspended from office the twelve councillors declared elected, pending the results of a new council election to be held on October 17, 2006.

[13] On October 4, 2006, the applicants sought judicial review of the decision of the EAB dated October 2, 2006. On October 13, 2006, Justice Blanchard stayed, pending the disposition of this application for judicial review, the operation of the October 2, 2006 decision of the EAB, and the election scheduled for October 17, 2006. This is the judicial review of the EAB's decision dated October 2, 2006.

EAB Reasons

[14] By decision dated October 2, 2006, the EAB reconsidered the merits of the Bruno and Soosay complaints, regarding an election held by the Samson Cree Nation on May 19, 2005, as directed by the Federal Court of Appeal in its decision dated July 4, 2006.

Bruno Complaint: Poll Closure

[15] Based upon the experience of the members of the EAB, it was determined that the custom and traditional practice of the Samson Cree Nation was to cease voting at 6:00 p.m. The EAB noted that in the past, voters were turned away from the voter registration table and no further ballots were distributed after 6:00 p.m. While those with ballots were permitted to vote, the marking of a few ballots after 6:00 p.m. did not extend the time limit in section 58 by more than a few minutes and would not have extended to allow three hundred members to continue to vote after the observed poll closure.

[16] Pursuant to section 58 of the Election Law, all voting locations were to open at 9:00 a.m. and remain open until 6:00 p.m. While there were differences between poll closure procedures in other election codes, the presence of external procedures for other elections was not a basis to alter Samson traditions. The Bruno complaint was therefore allowed.

[17] The EAB also issued a direction that in future elections, the Electoral Supervisor must seek advice and direction regarding the custom and history of poll closure procedure from the Samson Cree Nation EAB Chairperson in advance of the 6:00 p.m. deadline.

Soosay Complaint: Pardon Issue

[18] Mr. Northwest was a councillor when the Election Law came into force in 1993. He therefore would have participated in development of the Election Law, and would have appreciated that indictable offences committed in 1998 would bar his participation in future council elections. His assertion that he did not understand the operation of section 4 of the Election Act lacked credibility.

[19] The EAB found that there was no conflict between sections 3 and 4 of the Election Law. Section 3 set out the basic eligibility requirements for candidacy and section 4 disqualified candidates who met the requirements under section 3, but could not satisfy the conditions with respect to criminal history. The EAB noted that a pardon ceremony held after March 8, 1993, with respect to offences committed in 1998, did not meet the requirements under paragraph 4(a) of the Election Law. The Soosay appeal was therefore allowed.

Direction

[20] A new election was ordered in accordance with paragraph 87(c) of the Election Law. The EAB also imposed conditions in order to ensure that the violations complained of were not repeated, including the suspension of current councillors from their duties as councillors, pending the new election.

Issues

[21] The applicants submitted the following issues for consideration:

1. In reconsidering the Bruno complaint, did the EAB err in law by failing to follow the express directions of the Federal Court of Appeal; that is, in failing to apply the only rational interpretation of sections 58 and 16 of the Election Law?
2. Did the EAB have jurisdiction to direct that the Electoral Supervisor, in all future elections, must consult with the Chair of the EAB respecting poll closing?
3. In reconsidering the Soosay complaint, did the EAB err in law by adopting a literal but discriminatory interpretation of section 4 of the Election Law that failed to take into account the effect of section 5 of the *Criminal Records Act*, R.S.C. 1985, c. C-47, subsection 15(1) of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (U.K.)*, 1982, c. 11 (the Charter) and the non-discriminatory culture and traditions of the Plains Cree?
4. Did the EAB have jurisdiction to suspend from office councillors who were declared elected?

[22] The respondents submitted the following issues for consideration:

1. Did the EAB err in law in its reconsideration and upholding of the Soosay appeal?
2. Did the EAB err in law in its reconsideration and upholding of the Bruno appeal?
3. Did the EAB have jurisdiction to direct that:
 - (a) “In future, the Electoral Supervisor to seek advice and direction on the custom and history of poll closure procedure from

the Samson Cree Nation Election Appeal Board Chairperson in advance of the 6:00 p.m. deadline? or that,
(b) “The current Councillors shall suspend their respective duties as councillors immediately and shall vacate their offices effective Tuesday, October 3, 2006 at 4:30 pending the re-election.”

Applicants’ Submissions

Standard of Review

[23] The applicants submitted that the interpretation of the Election Law, and the determination as to whether the facts showed a breach of the Election Law, were questions of law subject to review on the standard of correctness (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, (1998) 160 D.L.R. (4th) 193). It was submitted that the Election Law should be applied in a purposive fashion (see *Simon v. Samson Cree Nation* (2001), 205 F.T.R. 49, 2001 FCT 467).

Bruno Complaint: Poll Closure

[24] The applicants submitted that section 58 must be read in conjunction with sections 41, 51 to 52 and 59 of the Election Law. In considering these provisions, the Federal Court of Appeal determined that the only rational interpretation of the Election Law was that section 58 merely prescribed the hours during which voting locations could be open to receive voters (see *Samson Indian Band v. Samson Indian Band (Election Appeal Board)* (2006), 352 N.R. 119, 2006 FCA

249). It was submitted that the EAB erred in failing to apply the only possible legal interpretation of section 58 of the Election Law, contrary to the directions of the Federal Court of Appeal.

[25] The EAB applied a Samson Cree custom, and found that voters inside the voting location should not have been allowed to vote after 6:00 p.m. It was noted that the custom relied upon by the EAB was not found in the Election Law, and it was submitted that the EAB erred in applying this custom rather than the Election Law itself, contrary to paragraph 49 of the Federal Court of Appeal decision in *Samson Indian Band* above.

[26] The applicants submitted that the EAB erred in failing to respect: (1) the scope of the Electoral Supervisor's discretion under section 16 of the Election Law; and (2) the correct exercise of this discretion in allowing voters inside the voting location to vote after 6:00 p.m., contrary to the directions found at paragraphs 44 and 46 of the Federal Court of Appeal decision. It was also submitted that the EAB erred in failing to follow the direction in paragraph 47 of the Court's decision, which was in the nature of a directed verdict.

[27] The applicants noted that the Bruno complaint had already been remitted to the EAB for reconsideration, and that the Court's express directions had been ignored by the EAB in favour of an unwritten custom. It was submitted that the Bruno complaint should be sent back with a declaration and a specific direction that the EAB must dismiss the Bruno complaint.

Soosay Complaint: Pardon Issue

[28] The applicants noted that the EAB applied the literal meaning of paragraph 4(a) of the Election Law, and found that Mr. Northwest was disqualified from running in the election because, whether he had a pardon or not, he had been convicted of an indictable offence after March 8, 1993. It was submitted that the EAB failed to apply the modern principle of statutory interpretation, which requires that the words of an Act be read in their entire context, in their ordinary sense harmoniously with the object of the Act and the intention of Parliament.

[29] The applicants submitted that when read in its entire context, the literal meaning of paragraph 4(a) of the Election Law was contrary to the spirit of the legislation and the intent of the electors of the Samson Cree Nation, who had enacted it. It was noted that paragraph 5(b) of the

Criminal Records Act:

... removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject by virtue of any Act of Parliament ...or of a regulation made under an Act of Parliament.

[30] The applicants submitted that in reconsidering the Soosay complaint, the EAB should have:

(1) confirmed the intention of the electors of Samson who enacted the Election Law, that Cree pardons are equal to any pardon granted through the Canadian legal system; and (2) interpreted paragraph 4(a) in keeping with the anti-discriminatory intention of Parliament in enacting section 5 of the *Criminal Records Act*, and in keeping with section 15 of the *Charter* (equality rights) and the non-discriminatory traditions of the Plains Cree.

[31] The applicants submitted that the EAB's decision with respect to the Soosay complaint should be quashed, since the EAB had applied the wrong legal interpretation of paragraph 4(a) of the Election Law. Further, it was submitted that since Mr. Northwest had received a federal pardon on October 26, 2006, the decision should be quashed as having been issued on an assumption of fact that no longer pertained (see *Smith v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 144 (T.D.)).

[32] The applicant submitted that the Soosay complaint should be sent back to the EAB with a declaration and specific direction that the correct interpretation of paragraph 4(a) of the Election Law did not disentitle a member of the Samson Cree Nation who was otherwise eligible to run in an election, but was convicted on an indictable offence on or after March 8, 1993, if the member had received a federal or Cree cultural pardon.

Direction to Electoral Supervisor Re: Poll Closure

[33] The applicants submitted that the EAB's powers were limited to those set out in sections 86 to 89 and 95 to 101 of the Election Law. It was submitted that these sections did not give the EAB the power to supervise the Electoral Supervisor's exercise of her discretion during the election, such as requiring mid-election consultation with the EAB Chair regarding poll closure procedures. It was submitted that the EAB's decision should be quashed to the extent that it purported to create a supervisory power for the EAB over the Electoral Supervisor's exercise of discretion with respect to poll closure.

Suspension of Elected Councillors

[34] The applicants submitted that the Election Law did not authorize the EAB to suspend from office councillors who were declared elected by the Electoral Supervisor, even where the EAB had determined that there would be a new council election. Under the Election Law, councillors hold office for three years from the date of their election. Section 82 of the Election Law indicates that the date of any election is the date upon which the Electoral Supervisor declared the result of the election. It was submitted that a councillor's term of office ended on the three year anniversary of the date upon which the Electoral Supervisor declared the councillor to be elected, unless his or her replacement was declared elected.

[35] The applicants submitted that the term of office for the councillors elected on May 19, 2005 began on that date. It was submitted that the removal of a sitting councillor was serious and could only be done prior to the expiration of his or her term if provision was made for such suspension or removal (see *Simon* above). It was submitted that the EAB's decision should be quashed to the extent that it purported to suspend the sitting councillors until not only the new election called for October 17, 2006, but also until the EAB vetted and approved the qualifications of successful candidates in that election.

Respondents' Submissions

Preliminary Considerations

[36] The respondents submitted that in order to have the order of the EAB for a new councillor election overturned, the applicants had to show that the EAB had erred in law with respect to both the Bruno and Soosay complaints. It was submitted that the consequence of failure to prove an error regarding either matter would leave the order of the EAB for a new election standing in respect of that matter.

[37] The respondents submitted that an adverse finding by the Court with respect to the EAB's directions regarding: (1) the Electoral Supervisor's obligation to seek advice regarding poll closure procedure; and (2) the suspension of the elected councillors, should result in a re-direction with respect to the specific EAB directives.

Bruno Complaint: Poll Closure

[38] The respondents noted that the custom of the Samson Cree Nation with respect to what should take place at 6:00 p.m. in voting locations was not expressed in the Election Law. Further, it was submitted that there was no other clear evidence of the custom.

[39] The respondents submitted that the facts confronted by the Courts in prior related proceedings were not those confronted by the present Court. It was submitted that the EAB clarified

the evidentiary deficiency by finding that based upon its combined experience; the custom of the Samson Cree Nation was to cease voting at 6:00 p.m. The respondents submitted that the Court should honour the Cree custom concerning the cessation of voting, as found by the EAB, and should uphold the EAB's decision in respect of the Bruno complaint.

Soosay Complaint: Pardon Issue

[40] The respondents noted that only in the context of the EAB's reconsideration of the Soosay complaint did it come to light that Mr. Northwest had been convicted of two indictable offences after the date that the Election Law had come into force. As a result, pursuant to paragraph 4(a) of the Election Law, the EAB confirmed that Mr. Northwest was disqualified from running in the election.

[41] The respondents submitted that consistent with the "plain meaning" principle of statutory interpretation enunciated in *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, section 4 of the Election Law broke the eligibility of candidates into three categories. Pursuant to paragraph 4(a), a Samson member was disqualified if he was convicted of an indictable offence after March 8, 1993. The respondents noted that Mr. Northwest was convicted of such an offence in 1998, and was accordingly disqualified under this category.

[42] Pursuant to paragraph 4(b) of the Election Law, Samson members convicted of an indictable offence on or prior to March 8, 1993 were barred from running for council, unless they had obtained

a Cree cultural or federal pardon. It was submitted that since Mr. Northwest was convicted of indictable offences in 1998, he did not fall within this category.

[43] The respondents submitted that the intent of the Samson electors was clear from the drafting of the provision. Those convicted prior to March 8, 1993 were entitled to a “grand fathering” provision by way of the pardon process, whereas those convicted after that date were expressly excluded from becoming eligible candidates. It was submitted that reading the pardon provisions under paragraph 4(b) into paragraph 4(a) defied any reasonable interpretation of section 4. The respondents submitted that such an interpretation of section 4 suggested that the pardon provisions could also be read into paragraph 4(c), thereby removing any disqualification, provided a pardon was obtained.

[44] The applicants suggested that paragraph 5(b) of the *Criminal Records Act* must be read into paragraph 4(a) of the Election Law. If this was true, it was submitted that the applicants were arguing that the Election Law was “an Act of Parliament ...or a regulation under an Act of Parliament”, and further, that the electors were not entitled to disqualify such candidates as they saw fit based upon their cultural values.

[45] Together with the *Charter* arguments raised by the applicants, it was submitted that this would suggest that the issue of the power of self-government of the Samson Cree Nation with respect to the Election Law was being put into issue by the applicants. The respondent did not elaborate upon the argument, given that it was not substantively fleshed out by the applicants.

However, the respondents noted that the contemplated legislative scheme set out in the *Indian Act*, R.S.C. 1985, C. I-5, provided a mechanism by which Indian bands could become exempt from the Canadian law legislative framework and were granted, for the purpose of creating their election law, the full and uncompromised powers of self-government.

[46] With respect to the *Charter* issue, the respondents noted that it was improper that the applicants, who were the enacting body of the impugned legislation, were complaining when they had the power to amend it. It was submitted that should an allegation of discrimination be made, it was the alleged sufferer of such discrimination who should seek redress through judicial review. In the alternative, it was submitted that the section 15 *Charter* arguments had no merit. The respondents noted that paragraph 4(a) of the Election Law applied to all band members equally.

[47] The respondent submitted that the EAB's decision with respect to the Soosay complaint did not disclose a reviewable error.

Direction to Electoral Supervisor Re: Poll Closure

[48] The respondents submitted that the directions of the EAB involved the exercise of its proper powers pursuant to section 88 of the Election Law. Section 88 states that when a new election is ordered, it shall be held in accordance to the customs described in the Election Law, subject to further requirements imposed by the EAB in order to avoid a repetition of the violation complained of. It was submitted that the powers under section 88 were affirmed in the Terms of Reference for

the EAB, which state that the EAB may make recommendations for the efficient and effective application of the Election Law.

[49] The respondents noted that the EAB only directed that the Electoral Supervisor “seek advice and direction” with respect to poll closure procedure. It was submitted that this direction should not be interpreted as removing any of the Electoral Supervisor’s discretion to accept or reject the advice. The respondents noted that any decisions made by the Electoral Supervisor in the exercise of his or her discretion would be determined by the EAB on appeal, therefore the direction of the EAB with respect to seeking advice regarding poll closure was consistent with section 88 of the Election Law.

Suspension of Elected Councillors

[50] The respondents submitted that the direction by the EAB which suspended the councillors constituted a proper exercise of its powers pursuant to section 88 of the Election law and the EAB Terms of Reference. The affidavit of Darwin Soosay was cited, wherein he stated that when sitting councillors ran for re-election, a leave of absence was taken two weeks prior to the election date, which was consistent with section 10 of the Election Law. In Soosay’s opinion, the EAB’s direction that the elected councillors be suspended from their duties was consistent with section 10 and the well known practice of the applicants.

Analysis and Decision

Standard of Review

[51] In *Okeymow v. Samson Cree Nation* (2003), 235 F.T.R. 87, 2003 FCT 737), Justice Russell applied the pragmatic and functional approach to the determination of the standard of review applicable to questions of law and jurisdiction addressed by the EAB with respect to the Election Law, and stated the following at paragraphs 25 to 33:

The Supreme Court of Canada has enunciated a pragmatic and functional approach to standard of review analysis in the context of administrative decisions. See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 and *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18, 2003 SCC 19. There are four main factors to be taken into account: a) whether there is a privative clause; b) the expertise of the board; c) the purpose of the Act as a whole and the provision in particular; and d) the nature of the problem. A pragmatic and functional analysis of the decision before me leads to conclude that the applicable standard is correctness.

Privative Clause

Section 90 of the Election Law states that the decision of the Appeal Board is final and binding. While this is not a particularly strongly worded privative clause, it nevertheless demonstrates that the band intends a limited avenue of review. This suggests more deference.

Expertise

[...]

Section 80 of the Election Law requires only that persons appointed be 25 years of age, non-Samson members and of good character and reputation. There is no requirement that they have any particular expertise. This suggests less deference.

Purpose of the Act

[...]

The Band has codified its customs and traditions with regard to the selection of a Chief and Council in its Election Law. In other words, it has created provisions for the administrative regulation of its election procedures. It therefore does not appear that the purpose of the Election Law requires the careful balancing of a variety of interests. Nor has the Band, in the words of Muldoon J., infused open-textured legal principles into the provisions. This analysis suggests less deference.

Nature of the problem

The Applicant asserts that the Chairman of the Appeals Board has exceeded her jurisdiction. Alternatively, the Applicant implies that the Chairman committed an error of law by misinterpreting the Election Law. Both errors of jurisdiction and law require a correctness standard.

My overall conclusion is that these factors suggest that a correctness standard should be applied to the Chairman's decision that the appeal process could not be invoked by the Applicant. While a privative clause exists, which might raise the standard to reasonableness *simpliciter*, its broad, undefined wording does not, in my view, sufficiently counter the three other factors, all of which strongly suggest the standard of correctness. I note as well that Muldoon J. in *Grand Rapids, supra*, also concluded that a correctness standard should be applied in that case.

[52] The issues in the case at hand involve questions of law, including the EAB's interpretation of both section 58 and paragraph 4(a) of the Election Law; and issues of jurisdiction, including the authority of the EAB to issue directions with respect to poll closure, and the suspension of elected councillors pending a new election. I would adopt the reasoning of Mr. Justice Russell to arrive at the appropriate standard of review. In my view, these issues should be reviewed on the standard of correctness.

[53] **Issue 1**Did the EAB err in law in its reconsideration and upholding of the Bruno complaint?

The Federal Court of Appeal stated the following in *Samson Cree Nation* above, with respect to the Bruno complaint (see paragraphs 39 to 40, 47 and 50):

I am thus satisfied that the only customs and traditions which governed the election of the Band Council on May 19, 2005, are those which are set out in the Election Law. Customs and traditions which may come into existence and which may differ from those appearing in the Election Law are, in my view, of no relevance unless the Election Law is modified in accordance with section 109 thereof. However, evidence of prevailing election practice and custom may be relevant in resolving ambiguities or filling gaps in the Election Law.

For the reasons that follow, I am of the view that the Judge was correct in concluding that the Board erred in ordering a new election within two weeks of its determination.

[...]

When these provisions are considered together, it becomes apparent that the terms "voting location", "polling booth", "poll" and "ballot box" have different meanings. In my view, while a "polling booth" and a "poll" can be found within a "voting location", they are not the same thing as a "voting location". Thus, the only possible interpretation of these provisions, when read together, is that section 58 only prescribes the hours during which "voting locations" will be open to receive voters.

[...]

To conclude on this point, there cannot be much doubt that the Board's Reasons do not provide a reasonable basis for its conclusion. As I have already indicated, its interpretation of section 58 leads to an absurd result and, in any event, cannot be supported by the various provisions of the Election Law. In these circumstances, past practice of Electoral Supervisors in respect of the closing of the polls -- to which the Board refers somewhat elliptically in its Reasons -- is not relevant. On the issue in dispute in this appeal, the Election Law admits of only one rational interpretation.

[...]

[...] in regard to the Bruno complaint, I would return the matter to the Board for reconsideration on the basis that the Electoral Supervisor acted in accordance with the provisions of the Election Law when she permitted those voters who had entered the gymnasium by 6:00pm on May 19, 2005, to cast their ballots for the candidate of their choice.

[Emphasis Added]

[54] Section 58 of the Election Law states:

58. All voting locations shall be open at 9:00 am and shall be open until 6 pm.

[55] Upon reconsideration of the Bruno complaint, the EAB reaffirmed its previous determination, despite the findings of the Federal Court of Appeal. The EAB concluded as follows:

The basis of the Bruno appeal is Section 58 of the Election Law.

[...]

In its reconsideration of this issue the EAB relied on more than twenty years of experience of each of the EAB members with the 1993 Election Law and Samson Elections predating the Election Law which were conducted under the *Indian Act*.

Based on the combined experience and knowledge of the EAB members, the Panel concurred that the issue of poll closure time has not previously arisen on appeal in Samson Cree Nation elections because voting has always ceased at 6:00 p.m. The custom of the Samson Cree Nation is to cease voting at 6:00 p.m.

[...]

[...]The traditional practice of the Samson Cree Nation is to cease voting at 6:00 p.m. In past elections, voters were turned away from the Electoral Officer's voter registration table and no more ballots were distributed. Voters registered with ballots in-hand were

permitted to mark and deposit their ballots. In past elections, marking of the few ballots after 6:00 p.m. did not extend the time limit set out in section 58 by more than a few minutes and would not have extended to allow approximately three hundred (300) members to continue to vote long after the observed poll closure.

[...]

The Samson Cree Nation members have spoken through the wording of their Election Law and in their practices in prior elections.

[56] As noted by the Federal Court of Appeal, the only logical interpretation of section 58 of the Election Law is that the provision prescribes the hours during which "voting locations" will be open to receive voters.

[57] I would note that the EAB appears to have ignored the basis upon which the Federal Court of Appeal remitted its decision for reconsideration. The Federal Court of Appeal returned the matter to the EAB for reconsideration on the basis that the Electoral Supervisor had acted in accordance with the provisions of the Election Law when she permitted those voters who had entered the gymnasium by 6:00 p.m. on May 19, 2005, to vote.

[58] The Federal Court of Appeal held in *Samson Indian Band* above, that the only customs and traditions which governed the election held on May 19, 2005 were those set out in the Election Law. The Election Law sets out when voting locations will close; however, it does not codify the Samson Cree First Nation's custom with respect to the deadline for casting ballots in a council election. This Court and the EAB are bound by the findings of the Federal Court of Appeal.

[59] I have considered the reasons provided by the EAB in support of its finding that the Bruno complaint should be upheld. The EAB noted that in past elections, no more ballots were distributed after 6:00 p.m., and those with ballots in-hand were permitted to vote. The EAB noted that the time limit set out in section 58 of the Election Law would not have extended to allow three hundred voters to cast their ballots after 6:00 p.m. I would note the Federal Court of Appeal's statement in *Samson Indian Band* above, wherein it was found that past practice of Electoral Supervisors in respect of poll closure was not relevant, since the Election Law admitted of only one rational interpretation on the issue.

[60] In my view, having considered: (1) the only rational interpretation of section 58 and the Federal Court of Appeal's finding in this respect; (2) the fact that the Samson Cree Nation regarding the casting of ballots was not codified in the Election Act; and (3) the irrelevance of the past practice of Electoral Supervisors with respect to poll closure, I am of the opinion that the judicial review should be granted on this basis. The decision of the EAB is set aside.

[61] **Issue 2**

Did the EAB err in law in its reconsideration and upholding of the Soosay complaint?

The Federal Court of Appeal found as follows with respect to the Soosay complaint, at paragraphs 23 to 25 of *Samson Cree Nation* above:

However, I am satisfied that the Judge was wrong in proceeding to determine the issue of whether Mr. Northwest was qualified to run and, more particularly, whether he had been pardoned prior to the date of his nomination. In my view, having determined that there was a breach of natural justice, the Judge could not substitute himself to the Board and make a determination on the merits of the complaint.

Section 86 of the Election Law makes it clear that it is up to the Board to "make a determination as to the validity of the complaint". In my view, the Judge was bound to set aside the Board's decision and refer the matter back to the Board for redetermination, with such directions as he considered to be appropriate in the circumstances.

I would add that there appears to be, at the very least, an arguable case as to whether a pardon can be invoked in respect of a conviction on an indictable offence made after the date of the coming into force of the Election Law. There also appears to be an arguable case as to whether the pardon at issue was obtained through a Cree cultural and traditional ceremony conducted by an elder of the Band recognized for that purpose by its Chief and Council.

I do not wish to be taken as suggesting that the appellants should succeed on these points. I simply wish to point out that, on the evidence as it now is, the determination of the points raised by the appellants is not a foregone conclusion. It will be up to the Board to make the determination on the evidence that will be before it.

[Emphasis Added]

[62] When the matter was referred back to the EAB by the Federal Court of Appeal, the EAB again had to determine whether Mr. Northwest was disqualified under section 4 of the Election law which reads:

4. A Samson member is not eligible to become or remain a Chief or a member of the Council for the Samson Cree Nation if he:

(a) is convicted of an indictable offence after the date this Declaration comes into force;

(b) has an existing criminal record which includes an indictable offence as at the date this Declaration comes into force:

(i) unless such member has been granted a pardon through a Cree cultural and traditional ceremony conducted by an elder of the Samson Cree Nation recognized for such purpose by Chief and Council; or

(ii) unless such member has been granted a pardon through the legal system.

[63] On redetermination, the EAB confirmed its earlier decision and ruled that the Soosay complaint was valid; that is, Mr. Northwest was not entitled to become a member of council as he had an existing criminal record which included an indictable offence after the date the declaration came into force, i.e., March 8, 1993.

[64] The EAB's decision read in part as follows:

By his own admission, Mr. Northwest was a sitting Councillor when the Election Law came into force in 1993. [...] He must be taken to have appreciated that indictable offences committed in 1998 would bar his participation in future Council elections. Mr. Northwest's assertion that he did not understand the operation of Section 4 is not credible.

[...]

It is not Mr. Northwest's character that is in issue. It is not whether he is a good person or a bad person, how much time he has done and in what circumstances or institutions. It is whether he has met the requirements of Section 3, whether he was disqualified by virtue of Section 4(a). A pardon ceremony after March 1993 could not be construed as following the rules which Mr. Northwest was uniquely positioned, as a sitting Council member in 1993, to have full knowledge of [...].

The EAB finds no need to refer to external interpretation aids to understand the meaning of Section 4 and how it should be applied. The EAB will not contort the plain meaning of Section 4 by reference to external statutes to determine the intent of the Samson Cree membership. The drafters and the membership intended to set a standard for their leadership. That standard has been clearly and explicitly set out in Section 3 and 4. Changing that standard is a decision for the Samson Cree membership.

The EAB finds that there is no conflict between Section 3 and Section 4 of the Election Law. Section 3 sets out the basic eligibility requirements for candidacy. Section 4 disqualifies candidates who have met Section 3 requirements but cannot satisfy the conditions with respect to criminal history. The two sections work together and must be read as a two-step inquiry into a candidate's background.

[65] In order to determine the meaning to be given to section 4, I will apply the “plain meaning” principle of statutory interpretation set out in *Rizzo* above to section 4. It appears to me that the clear meaning of subsection 4(a) is that a Samson member who commits an indictable offence after the date that the Election Law came into force, cannot become or remain a chief or a member of council. Subsection 4(b) clearly states that a Samson member cannot become or remain a chief or a member of council if on the date the Election Law came into force (March 8, 1993) unless the person has been granted a pardon through a Cree cultural and traditional ceremony conducted by an elder of the Samson Cree Nation who is recognized for such purpose by the Chief and council or unless a pardon has been granted to the member through the legal system.

[66] I would agree with the respondent that reading the exception found under paragraph 4(b) into the other two subparagraphs of section 4 would render the provision illogical. The wording of section 4 of the Election Law clearly sets out that individuals convicted of indictable offences prior to the Election Law coming into force could benefit from a “grand fathering” provision allowing them to obtain pardons and run in elections; however, this option would not be available to individuals convicted of such offences after March 8, 1993.

[67] In the case at hand, the EAB noted that Mr. Northwest had been convicted of two indictable offences in 1998. The EAB found that he was disqualified from running as a candidate in the

election, pursuant to subsection 4(a) of the Election Law, given that he had been convicted of indictable offences after March 8, 1993. In my view, this constituted a correct interpretation of the Election Law, given the plain meaning of the text of the provision. I would not grant this application for judicial review upon this basis. Neither am I persuaded that subsection 5(b) of the *Criminal Records Act* should be read into or added to subsection 4(1) of the Election Law.

[68] The applicants submitted that the EAB's interpretation of subsection 4(a) of the Election Law violated section 15 of the *Charter* because it discriminated against people who had committed an indictable offence after March 8, 1993 but had obtained pardons. As the written submissions of the applicants, the oral argument and factual background on this issue were not elaborated on to any great extent, I will not deal with this argument. The respondent's written and oral submissions were similar.

[69] **Issue 3**

Did the EAB have jurisdiction to direct that the Electoral Supervisor, in all future elections, must consult with the Chair of the EAB respecting poll closing?

In its decision, the EAB issued the following direction to the Electoral Supervisor:

The Electoral Supervisor's experience with *Indian Act* election procedure may have suggested a solution to the problem of 300 voters in a line-up at 6:00 p.m. However, the Samson Cree Nation is not governed by the *Indian Act* legislation and procedure. In future, the Electoral Supervisor is to seek advice and direction on the custom and history of poll closure procedure from the Samson Cree Nation Election Appeal Board Chairperson *in advance* of the 6:00 p.m. deadline.

[70] The applicants submitted that under the Election Law, the EAB did not have the jurisdiction to supervise the Electoral Supervisor's exercise of discretion during an election, including requiring that he or she consult with the EAB Chairperson regarding poll closure procedures. The respondents submitted that the direction issued by the EAB with respect to poll closure procedure was within its jurisdiction under section 88 of the Election Law.

[71] The duties of the Electoral Supervisor are set out in section 16 of the Election Law:

16. The Electoral Supervisor shall be recognized as the person authorized to conduct the entire administration and process of the election. The role of the Electoral Supervisor shall include the responsibility for:

- (a) plans and preparations for conducting an election,
- (b) providing assignments and directives to his Assistants,
- (c) monitoring, reporting on progress and maintaining contact as necessary to the Samson Cree Nation Council and to Samson members concerned,
- (d) obtaining any required information and materials from the Samson Cree Tribal Administration,
- (e) preparing a Samson Voter's List and other lists for appropriate posting,
- (f) knowing the entire content of the Election Law.

[72] Section 88 of the Election Law states:

88. In the event that a new election is ordered, that election shall be held in accordance with the customs described herein, subject, however, to such further requirements, conditions, or directions as may be imposed by the Board in order to avoid a repetition of the violation complained of.

[73] I concluded that the EAB erred in finding that section 58 of the Election Law had been violated when registered voters proceeded to vote after 6:00 p.m. Given my conclusion with respect to this issue, I do not believe that the EAB had jurisdiction to issue a direction to the Electoral Supervisor to consult with the EAB Chairperson with respect to poll closure issues.

[74] Section 58 of the Election Law was not violated, and a new election would not be held upon that basis; therefore, I do not believe that the EAB had the authority to issue such a direction to the Electoral Supervisor, since on the facts of this case, the direction was not imposed in order to avoid a repetition of a violation.

[75] **Issue 4**

Did the EAB have jurisdiction to suspend from office councillors who were declared elected?

In its decision, the EAB stated the following in suspending the elected councillors from office:

The current Councillors shall suspend their duties as Councillors immediately and shall vacate their offices effective Tuesday, October 3, 2006 at 4:30 p.m. pending the re-election.

[76] The applicants submitted that the EAB did not have any authority under the Election Law to suspend councillors from office who had been declared elected, even where a new election was to be held. The respondents submitted that the EAB was acting within its jurisdiction pursuant to section 88 of the Election Law when it chose to suspend the elected councillors pending the new election.

[77] The Election Law does not set out whether elected councillors should be suspended from office pending a new election. Section 88 states that when a new election is ordered, it shall be held in accordance with the customs described in the Election Law, subject to such further directions as may be imposed by the EAB in order to avoid a repetition of the violation complained of. While the power in section 88 is broad, it is fettered in that the actions of the EAB must be “in order to avoid a repetition of the violation complained of.” To ignore this requirement would be to fail to give meaning to the words as provided in the section. In my opinion, the actions of the EAB in this case were not done in order to avoid a repetition of violation complained of.

[78] Furthermore, I do not agree with the respondent’s submission that the EAB’s actions were in line with section 10 of the Election Law. Section 10 provides employees with the opportunity to take a leave of absence without pay in order to facilitate their full participation in all elections. My understanding of this section is that while the employee must be given a leave of absence without pay, it is up to them whether or not they accept it. Therefore, suspending the councillors as the EAB did is not in line with this provision.

[79] I would therefore allow the judicial review with respect to the Bruno complaint.

JUDGMENT

[80] **IT IS ORDERED that:**

1. The decision of the EAB with respect to the Bruno complaint is set aside.
2. The decision of the EAB with respect to the Soosay complaint is upheld.
3. It is declared that the EAB did not have the jurisdiction to direct the electoral supervisor in all future elections, to consult with the chair of the EAB respecting poll closure.
4. It is declared that the EAB did not, on the facts of this case, have the jurisdiction to suspend from office councillors who were declared elected.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Criminal Records Act*, R.S.C. 1985, c. C-47:

- | | |
|---|---|
| <p>5. The pardon</p> <p>(a) is evidence of the fact</p> <p>(i) that, in the case of a pardon for an offence referred to in paragraph 4(a), the Board, after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and</p> <p>(ii) that, in the case of any pardon, the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character; and</p> <p>(b) unless the pardon is subsequently revoked or ceases to have effect, requires the judicial record of the conviction to be kept separate and apart from other criminal records and removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament, other than section 109, 110, 161, 259, 490.012 or 490.019 of the Criminal Code or subsection 147.1(1) of the</p> | <p>5. La réhabilitation a les effets suivants:</p> <p>a) d'une part, elle sert de preuve des faits suivants:</p> <p>(i) dans le cas d'une réhabilitation octroyée pour une infraction visée à l'alinéa 4a), la Commission, après avoir mené les enquêtes, a été convaincue que le demandeur s'est bien conduit,</p> <p>(ii) dans le cas de toute réhabilitation, la condamnation en cause ne devrait plus ternir la réputation du demandeur;</p> <p>b) d'autre part, sauf cas de révocation ultérieure ou de nullité, elle entraîne le classement du dossier ou du relevé de la condamnation à part des autres dossiers judiciaires et fait cesser toute incapacité ou obligation — autre que celles imposées au titre des articles 109, 110, 161, 259, 490.012 ou 490.019 du Code criminel ou du paragraphe 147.1(1) de la Loi sur la défense nationale — que la condamnation pouvait entraîner aux termes d'une loi fédérale ou</p> |
|---|---|

National Defence Act, or of a regulation made under an Act of Parliament. de ses règlements.

The *Samson Cree Nation Election Law*, March 8, 1993, revised September 27, 2004 (see respondents' record vol. 1, pages 63 to 79):

ELIGIBILITY FOR OFFICE:

3. Subject to Paragraph 4, any person who is:

(a) of the full age of twenty-one (21);

(b) whose name appears on the Samson Voters list controlled by the Samson Cree Nation; and

(c) who has been ordinarily resident on the Samson or Pigeon Lake Reserve for a period of not less than six (6) months immediately preceding an election; and/or who is ordinarily resident within 100 km radius of reserve numbers 137, 138, 138 (A) reserve boundaries

is eligible to become a candidate for either Chief or Council in that election.

DISQUALIFICATION

4. A Samson member is not eligible to become or remain a Chief or a member of the Council for the Samson Cree Nation if he:

(a) is convicted of an indictable offence after the date this Declaration comes into force;

(b) has an existing criminal record which includes as indictable offence as at the date this Declaration comes into force:

(i) unless such member has been granted a pardon through a Cree cultural and traditional ceremony conducted by an elder of the Samson Cree Nation recognized for such purpose by Chief and Council; or

(ii) unless such member has been granted a pardon through the legal system.

(c) was guilty, in connection with an election, of corrupt practice, accepting or offering a bribe, dishonesty or other wrongful conduct.

SAMSON CREE NATION EMPLOYEE

10. In order to facilitate their full participation in all elections, any employee who is nominated as a candidate for office in an election, and accepts that nomination, will be given a leave of absence **without pay** pending the final determination of that election.

DUTIES OF THE ELECTORAL SUPERVISOR AND HIS ASSISTANTS:

16. The Electoral Supervisor shall be recognized as the person authorized to conduct the entire administration and process of the election. The role of the Electoral Supervisor shall include the responsibility for:

- (a) plans and preparations for conducting an election,
- (b) providing assignments and directives to his Assistants,
- (c) monitoring, reporting on progress and maintaining contact as necessary to the Samson Cree Nation Council and to Samson members concerned,
- (d) obtaining any required information and materials from the Samson Cree Tribal Administration,
- (e) preparing a Samson Voter's List and other lists for appropriate posting,
- (f) knowing the entire content of the Election Law.

PREPARATION FOR ELECTION:

41. In addition, there shall be on public display, a ballot with the photograph and name in alphabetical order of all candidates at all voting locations, and at each polling booth designated for Elders.

...

THE POLL:

...

51. The Electoral Supervisor shall ensure that the instructions referred to in Paragraph 49 and 50 are clearly posted in each polling booth and at all other public areas made available for voting.

52. The Electoral Supervisor or his Assistant shall, in the presence of the person who has returned his ballot, deposit the ballot in a ballot box.

...

TIME OFF FOR SAMSON CREE NATION EMPLOYEES

...

58. All voting locations shall be open at 9:00 am and shall be open until 6 pm.

59. Immediately following the close of the polls, the Electoral Supervisor shall, in the presence of such candidates or their agents as may be present, open the ballot box or boxes, examine the ballots, and;

(a) reject any ballots that are not initialled by the Electoral Supervisor or his Assistant;

(b) reject any ballot that, in the opinion of the Electoral Supervisor, are not clearly marked, and;

(c) reject or accept, at the discretion of the Electoral Supervisor, any ballots which are marked in accordance with Paragraph 53.

...

COMMENCING AN APPEAL:

...

87. The Samson Election Appeal Board may:

...

(c) declare the complaint to be a valid complaint and order that a new election be held within two (2) weeks of the date of the Board's determination.

88. In the event that a new election is ordered, that election shall be held in accordance with the customs described herein, subject, however, to such further requirements, conditions, or directions as may be imposed by the Board in order to avoid a repetition of the violation complained of.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1769-06

STYLE OF CAUSE: CHIEF VICTOR BUFFALO, on his own behalf
and on behalf of the SAMSON INDIAN BAND
also known as SAMSON CREE NATION and the
SAMSON INDIAN BAND also known as
SAMSON CREE NATION

- and -

DARRELL REGAN BRUNO, DARWIN SOOSAY
and LARRON NORTHWEST

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: July 3, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: January 3, 2008

APPEARANCES:

David C. Rolf FOR THE APPLICANTS

Conan Taylor and FOR THE RESPONDENTS
Shawn Beaver Darrel Regan Bruno and Darwin Soosay

W. Scott Schlosser, Q.C. FOR THE RESPONDENT
Larron Northwest

SOLICITORS OF RECORD:

Parlee McLaws LLP FOR THE APPLICANTS
Edmonton, Alberta

Taylor Beaver LLP FOR THE RESPONDENTS
Edmonton, Alberta Darrel Regan Bruno and Darwin Soosay

Schlosser Cook FOR THE RESPONDENT
Edmonton, Alberta Larron Northwest