

Date: 20080215

Docket: T-1040-07

Citation: 2008 FC 193

Ottawa, Ontario, February 15, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**ALLEN LABOUCAN, FLOYD NOSKIYE, LESLIE JOE LABOUCAN,
MONA DUMAS, ROBERT CHARLIE NANOOCHE AND
SOLOMON ST. ARNAULT**

Applicants

and

**GUS LOONSKIN, ARTHUR LABOUCAN, JOHN M. LABOUCAN,
DANIEL NANOOCHE, ALFRED JOE SEESEQUON, FLOYD AUGER,
HENRY GRANDEJAMBE, MICHAEL NANOOCHE,
LORNE TALLCREE, DELMER D'OR, LESTER NANOOCHE
AND LITTLE RED RIVER CREE NATION #447**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants were unsuccessful candidates in an election for the Chief and Councillors of the respondent Little Red River Cree Nation #447, which took place in April 2007. The individual respondents were successful candidates. The applicants contest the results of the election on the basis of a number of alleged irregularities. Those allegations were considered by an Election Appeals Committee established under the Little Red River Cree Nation Custom Election Code. The Committee concluded that irregularities and violations of the Code had indeed occurred. However,

it also found that those problems were not “so substantial as to call into question the basic legitimacy of the election results”. Accordingly, the Committee did not order a new election.

[2] The applicants argue that the Committee made an error of law in failing to impose on the respondents the legal burden of proving that the election irregularities did not affect the result. Instead, the Committee required the applicants to prove that they did. The applicants ask me to overturn the election or, in the alternative, to order a differently constituted Committee to reconsider the applicants’ case.

[3] I can find no basis for overturning the Committee’s decision so I must, therefore, dismiss this application for judicial review.

I. Issues

[4] Did the Election Appeals Committee err in law?

II. Analysis

[5] The parties agree that I can overturn the Committee’s decision if I find that its treatment of the issue of the burden of proof was incorrect.

1. Factual Background

[6] The applicants raised three issues before the Committee. First, they presented evidence that translators were not available to assist those voters whose first language was Cree. According to the Custom Election Code, translators “shall be appointed by the electoral officer” (s. 9). The electoral officer claimed that he was unable to find anyone who could serve as a translator. The evidence showed that most voters who needed help were assisted by volunteers. In one case involving two voters, there was a possibility that the person who was providing assistance might have tried to influence their votes. The Committee concluded there was insufficient evidence that the absence of translators affected the outcome of the election.

[7] Second, the applicants presented evidence that a few voters had cast their ballots elsewhere than inside a polling booth, raising questions about the secrecy of those ballots. Due to long line-ups, some voters were permitted to mark their ballots at a concession stand or in bathroom stalls. The Committee found that voters themselves were responsible for this problem because they were unwilling to wait in line. Further, there was no evidence that these voters had been unable to vote according to their consciences or that the problem was so widespread as to cast doubt on the election results.

[8] Third, the Committee considered evidence that one person may have tried to influence some voters improperly on election day. This person was not a candidate, but supported the respondent Mr. Gus Loonskin, who was ultimately elected Chief. Mr. Loonskin stated that he had not authorized this person to act on his behalf. The Committee concluded that the evidence before it was so weak that it could not make any finding of corrupt election practices.

2. The Burden of Proof

[9] The applicants submit that the Committee erred in law by upholding the election results in the face of their serious allegations. They argue that, once they have presented evidence of substantial improprieties, they have met their legal burden. At that point, the burden of proof shifts to the respondents to prove that the problems did not affect the results. If they fail to meet that burden, then the applicants are entitled to a new election.

[10] According to the Committee's reasons, it appeared to place a burden on the applicants to prove irregularities and to prove that those irregularities were so serious that they affected the results of the election. The Committee concluded, in effect, that the applicants had not met that burden and, therefore, refused to order a new election.

[11] In support of their position, the applicants point to the text of the Custom Election Code, as well as the decisions in *Dumont v. Fayant*, [1995] A.J. No. 895 (Q.B.) (QL) and *Leroux v. Molgat*, [1985] B.C.J. No. 45 (S.C.) (QL). The respondents argue that the text of the Code actually supports its position that the legal burden of proof rests at all times on the applicants. In addition, they argue that the cases cited by the applicants deal with different election schemes and do not help decide the issue in this case.

[12] In my view, the Custom Election Code (s. 21) does not make clear where the legal burden of proof lies or whether it shifts at a certain point. The Code simply states that the Committee, after hearing evidence, can:

- (1) not allow a new election because of insufficient evidence provided by the candidate appealing the election; or
- (2) not allow a new election because the activity in question did not affect the outcome of the election; or
- (3) allow a new election to be held but only for the office appealed.

[13] The cases cited by the applicants deal with a general principle that arises in election disputes that I find is equally applicable here – that is, those who contest elections should have to prove that something seriously went wrong. Election results should not be lightly disturbed. The applicants concede that no election is perfect and that there will always be irregularities. In order to meet their burden, therefore, they must show *substantial* problems with the election. It is only at that point that the burden shifts to the respondents to show that the results can still be relied on. It makes sense to put the respondent, in this case the Little Red River Cree Nation #447, to this burden as it is the body responsible for organizing elections and ensuring that the legal requirements have been met.

[14] The question remains, however, as to when the burden shifts to the respondents. It seems to me that the burden should shift at the point when the applicants have presented sufficient evidence to show that the alleged irregularities are serious enough to cast doubt on the results of the election, or that the election was tainted by a failure to respect a basic democratic principle, such as the

sanctity of ballot secrecy. At that point, the burden should shift to the respondents to show that the results were not affected.

[15] Here, the Committee found that the irregularities affected only a few voters. They did not cast doubt on the results. While there was a potential problem with ballot secrecy, the Committee correctly took account of the fact that it was a small group of voters who willingly chose to mark their ballots outside the polling booth. There was no evidence that these ballots could be seen by others or that anyone had been influenced in their choice of candidate. In the circumstances, there was no basis on which to require the respondents to show that the results of the election were unaffected.

[16] Accordingly, I must dismiss this application for judicial review with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed with costs.

“James W. O’Reilly”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1040-07

STYLE OF CAUSE: ALLEN LABOUCAN, ET AL v. GUS LOOSKIN, ET AL

PLACE OF HEARING: Edmonton, Alta.

DATE OF HEARING: February 4, 2008

REASONS FOR JUDGMENT AND JUDGMENT: O'REILLY J.

DATED: February 15, 2008

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