Federal Court  Cour fédérale

Date: 20111006

Docket: T-667-10

Citation: 2011 FC 1139

Ottawa, Ontario, October 6, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

HENRY J. FELIX SR.

Applicant

and

THE STURGEON LAKE FIRST NATION,
"THE BAND"

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a Preliminary Ruling made by the Sturgeon Lake First Nation Appeal Tribunal (Appeal Tribunal), on April 12, 2010. The Appeal Tribunal dismissed a Notice of Appeal filed by the applicant challenging the outcome of a Band Council election held on March 26, 2010. For the reasons that follow, the application is allowed.

I. Background

[2] The applicant was one of five candidates running for Chief in the Sturgeon Lake First Nation's Band Council (the Band) election held on March 26, 2010. After the initial ballot count, the applicant placed second by a margin of 3 votes; he received 238 votes and the winner received 241 votes. Due to the close result, a re-count of the ballots was conducted on March 30, 2010. The re-count reduced the margin to only two votes; the applicant received 236 votes and the winner received 238 votes.

[3] The election at issue is governed by the *Sturgeon Lake First Nation Election Act, 2009* [Election Act], adopted in May 2009. This law is a recently modified codification of the Band's customary election practices.

[4] The Election Act sets out the procedure for administering elections and any disputes regarding their outcome. There are three parties responsible for ensuring that elections are conducted in accordance with the legislation; the Chief Electoral Officer (CEO), the Deputy Electoral Officer (DEO), and a three person Appeal Tribunal. These individuals are all appointed at a special meeting held prior to the election for Chief and Council members and serve the same term as the Chief and Council members (sections 3.1, 3.3(a) and 11.1 of the Election Act). The CEO and DEO are responsible for ensuring that elections are held in conformity with the Election Act and the Appeal Tribunal handles any challenges made by interested parties to election results or procedure. The Appeal Tribunal that made the decision at issue was appointed by the Band on December 3, 2009, and consisted of Larry Daniels, Irene Ermine and Elaine Naytowhow.

[5] Sections 11.3 and 11.4 of the Election Act impose the following mandate on the Appeal Tribunal:

> 11.3 The Appeal Tribunal ***shall*** supervise and administer all **Election** and **By-Election** Appeals in accordance with this ***Election Act***. The Appeal Tribunal may be-reconvened to deal with any disciplinary matters that arise during an **Elected Official's** term of office pursuant to the terms of the *Sturgeon Lake First Nation Executive Act, 2009*.
>
> 11.4 It ***shall*** be the duty of the Appeal Tribunal to certify the **Election** or **By-Election** results of the **First Nation** Council if there is an Appeal after an **Election** of **By-Election**.
>
> [Emphasis in original]

[6] On April 7, 2010, the applicant launched an appeal of the election by way of a Notice of Appeal pursuant to section 12 of the Election Act. He alleged the following infractions to the Election Act:

1. The CEO and DEO failed to consider whether candidates were disqualified under paragraph 2.5(e) of the Election Act on account of owing money to the Band;
2. Contrary to section 8.10 of the Election Act, the CEO and DEO excluded the applicant's agents from attending the advance polling station in Saskatoon on March 24, 2010 to witness the handling of the ballots and the ballot boxes;
3. Contrary to section 8.9 and section 2.7 of the Election Act, the CEO and DEO failed to appoint competent, impartial and even-handed "enablers" to help voters who required assistance with casting their vote; and

4. Contrary to paragraph 3.4(b) of the Election Act, the Band office continued to issue payments to Band members and to conduct business after nomination day, thereby providing incumbent councillors with an advantage.

[7] In light of the alleged breaches to the Election Act, the applicant requests that a new election be held.

II. The decision under review

[8] On April 12, 2010, the Appeal Tribunal met to assess the applicant's appeal and dismissed it.[1] The Appeal Tribunal outlined its reasons in a document entitled "Preliminary Hearing" (the decision). The decision states that "[t]he Appeal Board after thorough review of the documentary evidence and after making appropriate inquiries of persons directly involved dismissed the appeal on all grounds." Although it dismissed the appeal, the Appeal Tribunal made several recommendations aimed at addressing the applicant's concerns and at improving the electoral process.

[9] With respect to the specific allegations of the applicant, the Appeal Tribunal made the following findings:

- In considering the applicant's allegation that candidate qualifications had not been adequately canvassed, the Appeal Tribunal found that the CEO and DEO had carefully reviewed all Declarations of Intent submitted. It indicated that the CEO and DEO had

contacted the Band's Finance Officer to ask if any of the candidates owed money to the Band. However, the Finance Officer had been unable to fairly make a determination in this regard due to the poor quality of the Band's financial records. The Appeal Tribunal recommended that the Finance Officer keep better records of the money owed to the Board to avoid similar problems in the future.

- With respect to the applicant's allegation that his agents had been excluded from attending at the advanced polling station in Saskatoon, the Appeal Tribunal indicated that the Saskatoon polling station was too small to accommodate voters, election officials, and agents. It pointed out that agents were present when the ballot boxes were locked prior to ballots being cast and at the end of the day when the boxes were sealed. When the polling station was too busy to accommodate them in the room itself, agents were invited to observe from the hallway. The Appeal Tribunal recommended that the Election Act be revised to require polling locations to be large enough to accommodate agents.

- On the issue of whether or not competent, impartial and even-handed "enablers" had been appointed, the Appeal Tribunal found that the Elder who had been appointed to assist voters in this regard understood the responsibility associated with the task and was competent, impartial, even-handed and respectful of each voter's right to have their ballot properly marked. The Appeal Tribunal recommended that, in the future, where a voter requires physical assistance marking their ballot, that a tribunal member, family member or the CEO should observe the proper marking of the ballot.

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[1] On the same occasion, the Appeal Tribunal examined an appeal filed by the candidate elected as Chief and dismissed his complaint, as well.

- Finally, with respect to the applicant's allegation regarding the continued use of Band resources after nomination day, the Appeal Tribunal found that nomination day was the last day that the incumbent councillors conducted business or made use of Band resources.

[10] The Appeal Tribunal also addressed the applicant's allegation that the CEO and the DEO failed to protect the integrity of the election process, the ballots and the ballot boxes. It concluded that the "CEO and DEO did everything in their power to protect the integrity of the election process and that they should be commended for a job well done."

[11] The decision was signed by Irene Ermine and Elaine Naytowhow, two members of the Appeal Tribunal. The third member of the Appeal Tribunal did not sign the decision. Instead, the decision bears the signature of a third person named Roy Kingfisher.

III. Preliminary issue

[12] The respondent contends that the Appeal Tribunal is not a "federal board, commission or other tribunal" for the purposes of the *Federal Courts Act*, RSC 1985, c F-7 [FCA] and that therefore the Federal Court has no jurisdiction to judicially review the Appeal Tribunal's decision.

[13] The respondent argues that the *Indian Act*, RSC 1985, c. I-5 mandates that First Nation Chief and Council elections be governed either by the Indian Act or by customary band law. The respondent further contends that the Band elected its Council members according to Band custom,

and has done so since 1993. The respondent also asserts that the Election Act codified the Band customary law and reflects the Band's intention to preserve its culture and language. Its purpose is to ensure that governance of the Band remains in harmony with their spirit and tradition. The respondent further argues that the Election Act was adopted as an exercise of the Band's inherent right as a First Nation and that, accordingly, the Appeal Tribunal derives its power from custom as opposed to an Act of Parliament. As such, it is not a "federal board, commission or other tribunal" and cannot be the subject of a judicial review under section 18.1 of the FCA.

[14] Paragraph 18.1(3)(b) of the FCA allows the Federal Court to quash or set aside a decision, order, act or proceeding of a "federal board, commission or other tribunal" – the applicant relies on this provision in the current case. In order for this Court to have jurisdiction, the applicant must first show that the impugned decision was made by a "federal board, commission or other tribunal" as defined in subsection 2(1) of the FCA:

Definitions	Définitions
2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
…	…
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown,	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour

other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867;	canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi constitutionnelle de 1867.

[15] It is widely accepted that a band council is a "federal board, commission or other tribunal" for the purposes of subsection 2(1) of the FCA. This Court in *Gabriel v Canatonquin*, [1978] 1 FC 124, 9 CNLC 74, as affirmed by the Federal Court of Appeal in *Canatonquin et al. v Gabriel et al.*, [1980] 2 FC 792, [1981] 4 CNLR 61 (CA), decided that even a band council elected pursuant to band custom, as opposed to the provisions of the Indian Act, is a federal board for the purposes of subsection 2(1) of the FCA. The same principle was reaffirmed by Justice Martineau in *Mohawk of Kanesatake v Mohawk of Kanesatake (Council)*, 2003 FCT 115, [2003] 4 FC 1133. In *Sparvier v Cowessess Indian Band #73*, [1993] 3 FC 142 at para 14, 63 FTR 242, Justice Marshall Rothstein reasoned that because a band council elected pursuant to customary aboriginal law is a federal board, an election Appeal Tribunal elected pursuant to customary aboriginal law is also, logically, a federal board for the purposes of the FCA.

[16] Similarly, in both *Parisier v Ocean Man First Nation* (1996), 108 FTR 297, 61 ACWS (3d) 2 (TD) and *Okeymow v Samson Cree Nation*, 2003 FCT 737, 235 FTR 87, this Court held that since a band council constitutes a "federal board, commission or other tribunal", then an electoral officer or body appointed by the band council, that purports "to exercise authority over members of an Indian Band," also shares this status.

[17] The Appeal Tribunal in this case was formally appointed by the Band's Council on December 3, 2009, pursuant to section 4.1 of the Band's Election Act. As such, based on the rationale set out by this Court in the abovementioned cases, I conclude that the Appeal Tribunal is a "federal board, commission or other tribunal" for the purposes of the FCA and that, consequently, this Court has jurisdiction to consider the current application.

IV. Issues

[18] The parties raised several questions but they all boil down to the following two issues:

A. *Did the Appeal Tribunal err in its interpretation or application of the Appeal procedure set forth in the Election Act and, more specifically, in its interpretation or application of section 12.3 of the Election Act?*
This issue also raises the sub-question of whether the Appeal Tribunal breached its duty of procedural fairness by considering evidence beyond the applicant's submissions without providing him an opportunity to respond.

B. *Did the Appeal Tribunal render its decision without being properly constituted?*

V. Standard of review

[19] The first question relates to the interpretation of the Election Act by the Appeal Tribunal and, more specifically, to the interpretation of section 12.3 of the Election Act. Given that the applicant alleges the Appeal Tribunal overstepped its jurisdiction during the first step of the appeal process by relying on evidence that was extrinsic to the allegations contained in the appeal and did not give the applicant opportunity to respond to that evidence, this also raises the sub-question of procedural fairness.

[20] When a specialized administrative body interprets its enabling statute, the standard of review is usually reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190). The respondent points to the wording of section 12.10 of the Election Act which reads:

> 12.10 The decision of the Appeal Tribunal *shall* be final.
>
> [Emphasis in original]

[21] The respondent argues that this constitutes a privative clause and that the rest of the Election Act reveals the Band's intention to make the Appeal Tribunal's decisions final and binding. Therefore, it argues, the Appeal Tribunal's decision is owed deference and should be held against the reasonable standard of review. I disagree.

[22] A standard of review analysis in this case leads me to conclude that the Appeal Tribunal's decision must be reviewed under the correctness standard despite section 12.10 of the Election Act. First, I am of the view that this issue raises a question of law: Does section 12.3 of the Election Act allow the Appeal Tribunal, when assessing an appeal at the first stage, to rely on extrinsic evidence

and/or personal knowledge? This issue involves the interpretation of procedural provisions from the Election Act and not a factual finding. Second, the evidence does not establish that the Appeal Tribunal members have any expertise in the interpretation of procedural formalities from the Election Act. Although one member of the Appeal Tribunal previously sat on an Appeal Tribunal, the tribunal is composed of members appointed for a time-limited mandate. They have no special expertise and it is noteworthy that counsel for the respondent was present during the deliberation of the Appeal Tribunal to assist the members. For these reasons, I conclude that the Appeal Tribunal's decision must be held up to the correctness standard. In *Pelican Lake Band v Thomas*, 2007 FC 1152, 319 FTR 182, Justice Noël also held that the issue "of the proper exercise of jurisdiction by the Appeal Board" attracted a correctness review."

[23] This conclusion is reinforced by the intertwined question of procedural fairness at issue. It is well established that questions related to procedural fairness are to be reviewed under the correctness standard (*Dunsmuir* at para 50; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53, [2006] 3 FCR 392).

VI. Analysis

A. *Did the Appeal Tribunal err in its interpretation or application of the Appeal procedure set forth in the Election Act, and more specifically in its interpretation or application of section 12.3 of the Election Act? Did the Appeal Tribunal breach its duty of procedural fairness by considering evidence beyond the applicant's submissions without providing him an opportunity to respond?*

[24] As previously discussed, the Band's Council elections are governed by the Band's Election Act. It will be helpful at this point to refer once more to section 11.3 of the Election Act which sets out the Appeal Tribunal's mandate:

> 11.3 The Appeal Tribunal ***shall*** supervise and administer all **Election** and **By-Election** Appeals in accordance with this ***Election Act***. The Appeal Tribunal may be-reconvened to deal with any disciplinary matters that arise during an **Elected Official's** term of office pursuant to the terms of the *Sturgeon Lake First Nation Executive Act, 2009*.
>
> [Emphasis in original]

[25] The Election Act also sets out the procedure for lodging an appeal challenging an election outcome. The Appeal Tribunal must follow a two-step process. According to section 12.3, the Appeal Tribunal must first decide whether to allow an appeal hearing based on the sufficiency of the evidence presented in the complaint:

> 12.3 The Appeal Tribunal ***shall***, within seven (7) days of receiving the complaint, rule on whether to allow or disallow an Appeal Hearing based on the sufficiency of the evidence presented in the complaint.
>
> [Emphasis in original]

This initial decision is referred to as a "Preliminary Ruling".

[26] If the Preliminary Ruling allows the complaint to proceed, sections 12.5 to 12.8 of the Election Act outline the second step. In particular, section 12.6 indicates that, in the event of a positive Preliminary Ruling, the appellant shall present his or her case, the respondents are entitled to make full answer and defence, and the appellant will have an opportunity to make submissions by way of rebuttal:

> 12.6 At the Appeal Hearing, the Appellant(s) ***shall*** present his, her or their case. All proper Respondents are entitled to make full answer and defence. The Appellant(s) ***shall*** then have an opportunity for rebuttal. Any of the parties [Appellants, Respondents] may be represented by legal or other counsel each at their own expense. The Appeal Tribunal may have legal counsel whose professional fees shall be paid by the Band.
>
> [Emphasis in original]

[27] This process ensures that all parties involved have an opportunity to present evidence, to counter evidence adduced by the other parties and to present submissions before a final decision is made.

[28] The applicant contends that the Appeal Tribunal contravened the appeal procedure established by the Election Act when it considered evidence beyond what he presented in his complaint.

[29] The respondent admits that it considered elements that were extrinsic to the allegations contained in the appeal. The Appeal Tribunal stated in its decision that it dismissed the appeal "after thorough review of the documentary evidence and after making appropriate inquiries of persons directly involved". In its submissions, the respondent argued that the Appeal Tribunal's inquiry was limited to the empirical knowledge of the Appeal Tribunal members. On that matter, the respondent states the following at paragraph 28 of its Memorandum of Fact and Law:

> 28. The Appeal Tribunal met and carefully considered each of the allegations made by the two Appellants with reference to the empirical evidence they had by virtue of having been in attendance to

> all of the Polls from their opening to their closing and for the Count and re-count of the ballots.

However, when reading the Appeal Tribunal's decision, it is clear that the tribunal relied both on the personal knowledge of the Appeal Tribunal members and on information that they obtained from third parties.

[30] The respondent takes the position that it was reasonable for the Appeal Tribunal members to rely on their personal knowledge in reaching their conclusion. To that effect, the respondent stated the following at paragraph 63 of its Memorandum of Fact and Law:

> 63 (…) There is no evidence to suggest that they acted unreasonably in the circumstances. They carefully set out their findings and recommendations in their Preliminary Ruling and having considered the materials before them and their empirical knowledge of the allegations made and the events described to them, they determined that there was no factual foundation for proceeding.

[31] The respondent contends further that the Appeal Tribunal is vested with a discretionary power granted by the membership when the Election Act was adopted and that it exercised this discretion within the boundaries of the Election Act. The respondent further argues that there is no evidence that the Appeal Tribunal members acted in bad faith, acted for improper purpose or motive, considered irrelevant factors or failed to consider relevant factors.

[32] The respondent also highlights that some issues raised by the appeal concern matters that could not be corrected if a by-election was to be called, while others had no impact on the outcome of the election (para 65 of the respondent's Memorandum). These considerations were not

mentioned in the Appeal Tribunal's decision and were only advanced in the respondents Memorandum and oral arguments at the hearing. These elements may well have been factors that the Appeal Tribunal considered, but they were not accounted for in the decision. In the context of Judicial Review, a tribunal's decision cannot be complemented by considerations offered *ex post facto*. Accordingly, since the Court does not know if the Appeal Tribunal considered those elements, the respondent's argument regarding the impact of the issues on the election result will be disregarded.

[33] With respect to the applicant's allegation that the Appeal Tribunal failed to observe the principles of natural justice and procedural fairness, the respondent contends that the appellant had an opportunity to seek legal advice before filing his Notice of Appeal and discuss the sufficiency of any supporting documents with a lawyer (para 73 of the respondent's Memorandum).

[34] Although counsel for the respondent insisted on several occasions on the good faith of the Appeal Tribunal members, this element is not at issue. The applicant did not argue that the Appeal Tribunal members acted in bad faith and the evidence does not show any bad faith on the part of any of the electoral officers or the Appeal Tribunal members. The issue is whether the Appeal Tribunal followed the procedure provided in the Election Act. With respect, I am of the view that it did not.

[35] The Appeal process is a two-stage process. During the first stage, the Appeal Tribunal's mandate is limited to determining whether the appeal is supported by sufficient evidence to warrant a full hearing. Section 12.3 of the Election Act clearly expresses the criteria upon which the Appeal

Tribunal must base its initial decision: the tribunal shall rule whether to allow an Appeal Hearing based on the sufficiency of the evidence presented in the complaint. It is important to keep in mind that the first step of the appeal process is not adversarial. The Appeal Tribunal must make its decision based only on the allegations contained in the complaint. Indeed, Section 12.3 specifically references evidence presented in the complaint and not evidence gathered by the Appeal Tribunal.

[36] Justice Danièle Tremblay-Lamer considered an almost identical set of facts and law in *Abbott v Pelican Lake First Nation*, 2003 FCT 340, 231 FTR 69 [*Abbott*]. At paragraph 21, Justice Tremblay-Lamer described the appeal procedure as being a two-step process, with the first step being focussed solely on the contents of the complaint:

> …The appeal… is a two-step process. At the initial stage, the Board is to review the complaint and determine within seven days "whether to allow or disallow an Appeal Hearing based on the sufficiency of the evidence presented in the complaint ...". This decision is based on the complaint alone…

[37] Justice O'Keefe also commented on an appeal tribunal's mandate at the first stage of the appeal process in *Bill v Pelican Lake Indian Band*, 2006 FC 679, 294 FTR 189 [*Bill*] affirmed in *Bill v Pelican Lake Indian Band*, 2006 FCA 397, 154 ACWS (3d) 259. He stated the following:

> **47**. To summarize, an appeal proceeding under the *Act* is a two-step process. First, after receiving a complaint, the Appeal Board determines whether it should allow or disallow an appeal hearing based on the sufficiency of the evidence. Second, if it decides to proceed with the appeal hearing, then all concerned parties must be given notice of the date of the appeal hearing and the hearing must be held within 14 days of receiving the complaint. The appellants must present their arguments at the appeal hearing and the respondents are entitled to respond.

[38] I agree with the principles outlined by my colleagues.

[39] I conclude that the Appeal Tribunal did not respect the procedure and the parameters set forth in section 12.3 of the Election Act. In assessing whether there was sufficient evidence to move to the second stage of the appeal process, the Appeal Tribunal went beyond the evidence referenced in the Notice of Appeal and the applicant's Affidavit of Particulars. The Appeal Tribunal members should have limited their analysis to the evidence referenced in those documents. The legislation does not permit them at that stage, to rely on personal knowledge or evidence gathered from third parties.

[40] I also consider that by not respecting the limits set out in section 12.3 of the Election Act, the Appeal Tribunal acted improperly and breached its duty to act fairly. If the Appeal Tribunal wished to look beyond the applicant's submissions, it should have given the applicant an opportunity to hear and rebut the opposing evidence in the context of a hearing pursuant to section 12.6 of the Election Act.

[41] The circumstances in *Lavallee v Louison*, 91 ACWS (3d) 337, [1999] FCJ no 1350 (QL) [*Lavallee*] were very similar to the case at issue. The appeal tribunal members relied on their own personal knowledge in deciding the appeal without offering the applicant an opportunity to respond to contradictory evidence. Justice Sharlow determined that the Appeal Tribunal had not acted in fairness. She stated the following:

> **63.** I do not suggest that the Tribunal members should have been forbidden from attending the election and the count. But having done so, it was unfair for them to then rely on their own personal knowledge when determining that Mr. Lavallee's appeals had no merit, without first giving him fair notice of the factual evidence that contradicted his allegations. He should have been allowed to respond

> to that contradictory evidence before the Tribunal decided whether any or all of his three ppeals [*sic*] warranted a hearing.
>
> **64.** I would go further and say that even if the contradictory evidence had come from someone other than the Tribunal members, such as a neutral observer like Mr. Louison as Chief Electoral Officer, Mr. Lavallee in fairness should have been told about that evidence, and should have been given an opportunity to respond to it before the Tribunal determined whether an appeal hearing was warranted.

[42] Justice Tremblay-Lamer also dealt with a similar situation in *Abbott* where the CEO and the DRO were present at the initial meeting of the Appeal Tribunal and made representations. Justice Tremblay-Lamer determined that the Appeal Tribunal contravened the procedure set forth in their Election Act and breached their duty of procedural fairness by allowing the CEO and the DRO to participate in the meeting. She expressed the following:

> 24. … At issue here is not the substance of the decision itself, but rather, the manner in which it was reached. In this regard, contrary to the respondent's submission, the fact that the Act has a privative clause is not relevant to the question at issue of whether the Board acted fairly.
>
> 25. In my opinion, it was improper for the CEO and the DRO to have been present and to have made representations at the initial meeting of the Board. The presence of the CEO and the DRO cannot be characterized as neutral….
>
> 26. Furthermore, Mr Turner provided each member of the Board with a document entitles “Response to the Notice of Appeal to the General Election held on February 28th, 2001”. This document set forth Mr Turner’s opinion that the appeal was without merit and should have been dismissed summarily in the absence of a formal hearing. This type of information should only have been provided at the formal hearing, where the applicants would have had an opportunity to present their case and an equal opportunity to respond.

[43] After citing Justice Sharlow in *Lavallee*, Justice Tremblay-Lamer similarly concluded that "it was improper for the Board to hear the opinion of Mr. Turner without giving the applicants an opportunity to respond" (para 28).

[44] In *Bill*, Justice O'Keefe dealt with a reverse situation. The Appeal Tribunal in that case allowed the appeal because all parties did not receive appropriate notice of the summary hearing. He concluded that the Appeal Tribunal contravened the procedure prescribed in the Act and breached the principles of procedural fairness. He stated the following:

> **50**. Thus, by rendering the decision it did on March 15, 2004, the Appeal Board failed to follow the procedure required by the *Act*.
>
> **51.** Further, the Appeal Board conducted the appeal proceeding in a way that raises procedural fairness concerns.…
>
> **52.** Because the Appeal Board did not properly follow the appeals procedure stipulated in the *Act* and did not give the applicants adequate notice of the appeal hearing (and hence, the applicants did not have an opportunity to respond to the allegations raised against them), the decisions of the Appeal Board in respect of the March 5 election should be set aside.

[45] These findings equally apply to this case.

[46] At the hearing, counsel for the applicant raised other concerns about the role that the Appeal Tribunal members played in the electoral process. Notably, he raised the fact that the Appeal Tribunal members were present at the polls and witnessed facts that they later adjudicated. The Court has similar concerns.

[47] In its submission, the respondent admitted that the Appeal Tribunal members were involved in different stages of the electoral process. For example, evidence shows that the Appeal Tribunal members participated in the decision regarding the location of the advance poll in Saskatoon. The evidence also showed that the Appeal Tribunal members were present when voters were assisted by Elder/Interpreter Margaret Ermine. Both the matter of locating the advance poll in Saskatoon and the matter of Elder Margaret Ermine's assistance were at issue in the appeal. The Appeal Tribunal members placed themselves in a very delicate situation. One cannot act as judge, witness and party. The Appeal Tribunal's members must keep a safe distance from the electoral process in order to remain neutral and maintain the appearance of neutrality expected from them.

[48] In summary, I conclude that the Appeal Tribunal exceeded its jurisdiction in assessing whether there was sufficient evidence to warrant an appeal hearing. Further, by relying on evidence extrinsic to the complaint and denying the applicant an opportunity to respond to contradictory evidence, the Appeal Tribunal breached its duty of procedural fairness.

[49] I am also of the view that the involvement of the Appeal Tribunal members in the electoral process should be reviewed to ensure that they do not participate in making decisions that can later be disputed in the context of an appeal.

B. *Did the Appeal Tribunal render its decision without being properly constituted?*

[50] The applicant also takes issue with the fact that the decision under review was signed by Irene Ermine, Elaine Naytowhow and Roy Kingfisher, whereas the Band members appointed to the

Appeal Tribunal on December 3, 2009 were Irene Ermine, Elaine Naytowhow and Larry Daniels. He argues that therefore the Appeal Tribunal was not properly constituted when it denied his appeal.

[51] The affidavit submitted by Elaine Naytowhow and Irene Ermine indicate that Larry Daniels was present when the Appeal Tribunal considered the appeal and that Roy Kingfisher signed as a witness, not as a member of the tribunal. Their evidence indicates that Mr. Daniels agreed to each of the statements set out in the Tribunal's decision. It was only at the end of the process that he refused to sign the decision. He would not provide a reason for his refusal.

[52] Giving the respondent the benefit of the doubt, the best that can be said is that the Appeal Tribunal considered the appeal together and that Mr. Daniels, at the last minute, decided not to approve the decision. There is no indication in the Election Act that the decision of the Appeal Tribunal must be unanimous. However, as noted by Justice Tremblay-Lamer in *Abbott*, above at paragraph 21, an objection by a member of the tribunal is "a strong indication that there is enough evidence to go to a formal hearing and that a summary dismissal is inappropriate in the circumstance."

[53] While I do not consider that the Appeal Tribunal was improperly constituted, I do find that the refusal by one of the three members of the Appeal Tribunal to endorse the Preliminary Ruling dismissing the applicant's appeal is a strong indication that there was sufficient evidence to warrant a formal hearing under sections 12.5 to 12.8 of the Election Act.

[54] For the foregoing reasons, this application for judicial review is allowed.

VII. Remedies sought

[55] The applicant asks the Court to set aside the decision rendered by the Appeal Tribunal and to order a new election. He relies on Rules 3 and 4 of the *Federal Courts Rules*, SOR/98-106 (the Rules). In the alternative, the applicant asks the Court to refer the appeal back to a newly constituted Appeal Tribunal. As a last resort, the applicant asks the Court to return the appeal to the existent Appeal Tribunal for determination in accordance with the Election Act and issue directions to the Appeal Tribunal.

[56] The Court does not have jurisdiction to set aside the election results and order a new election. Rules 3 and 4 of the Rules do not allow the Court to go as far as creating a substantive relief that is not provided for in the Election Act. Rule 3 is an interpretation rule and Rule 4, often called the “Gap Rule”, is procedural in nature and does not allow the Court to invent relief not contemplated in the applicable legislation. The responsibility of deciding whether the election results should be set aside and if a new election is warranted rests with the Appeal Tribunal and the Court must not usurp that role.

[57] Moreover, even though I consider that justice would be better served if the matter was remitted to a newly constituted Appeal Tribunal, I am of the view that the Court does not have jurisdiction to refer the matter to a differently constituted Appeal Tribunal as there are no provisions in the Election Act to constitute another Appeal Board apart from the situation where the current members indicate that they are unable or unwilling to serve for the full term of their appointment

(section 3.3 of the Election Act). Justice O'Keefe reached the same conclusion in *Bill* (para 59). I would strongly suggest, though, that the Band consider amending the Election Act to allow the Court to constitute a new Appeal Tribunal when such a remedy would protect the interest of the parties involved and promote the sound administration of justice and the electoral process.

[58] The matter will be remitted to the Appeal Tribunal. However, I do not find, in the circumstances of this case, that it would be reasonable to ask the Appeal Tribunal to re-assess, at the preliminary stage, the Appeal filed by the applicant. Therefore, I am of the view that the process should be restarted at the stage of an appeal hearing and should be conducted in accordance with the Election Act and in fairness to all parties involved.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed;
2. The Appeal Tribunal's decision dated April 12, 2010 dismissing the appeal filed by the applicant is set aside;
3. The appeal is remitted to the Appeal Tribunal;
4. The Appeal Tribunal is to convene an appeal hearing pursuant to section 12.3 of the Election Act within 30 days of the date of this Judgment;
5. The appeal hearing is to be governed in accordance with sections 12.5 to 12.8 of the Election Act;
6. No costs are awarded given that the Band has accepted to pay the legal fees of the applicant's counsel.

"Marie-Josée Bédard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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