

Federal Court



Cour fédérale

Date: 20120103

Docket: T-458-10

Citation: 2012 FC 1

Ottawa, Ontario, January 3, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

**PROTE POKER, JOHN NUI, NYMPHA
BYRNE, ROSEMARIE POKER, NACHELLE
RICH AND DAMIEN BENUEN**

Applicants

and

**MUSHUAU INNU FIRST NATION, SIMEON
TSHAKAPESH, ANGELA PASTEEN, MARY
AGATHE RICH, SEBASTIAN RICH
(SHUSTIN), SIMON POKUE AND VERONICA
RICH VOISEY**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review seeks to set aside the results of a Band election conducted by the Mushuau Innu First Nation on March 5, 2010. For the reasons that follow, the application is granted.

Facts

[2] The Mushuau Innu First Nation (Mushuau) is located in the Davis Inlet area of Labrador. By way of background, in 1978 the Mushuau decided to be governed by a Band Council rather than a Community Council, which it had been since about 1969. In July 1983, the “Mushuau Innuaa” Corporation (the Corporation) was incorporated. In February 2000 the Corporation’s Board of Directors adopted By-Law No.1 (the By-Law). While the provisions of the By-Law have been generally followed since its adoption by the Board of Directors in 2000, it was never the subject of a vote. The By-Law incorporated the main elements of historical and current practice. Its provisions include the following:

- Article 1.2 provided for the right to vote to members who had reached the age of eighteen years;
- Article 1.6 provided that By-Law No. 1 and amendments were to be the Constitution of the Mushuau Innu;
- Article 2.2 provided for a Chief and 4 Councillors;
- Article 5 provided for an election process, specifying that;
 - i. Elections were to be called between the 25th and 35th month of the term (section 5.2);
 - ii. A voters list had to be posted at least two weeks prior to any election by the Returning Officer appointed by the Council (section 5.4);
 - iii. The candidates for Chief could each appoint two scrutineers or returning officers (section 5.5);
 - iv. The four persons receiving the highest number of votes cast would be Councillors (section 5.8);
- Article 6 provided for a Review Call.

[3] According to customary Band practices, band elections were held every two years and the marking of ballots was in secret save for exceptional circumstances where a Band member could not read or was unable to mark the ballot him or herself. Further, according to custom, the candidates’ names would be written on ballots in both English and Innu-eimun. Over the years, a

number of changes in the way voting took place occurred, such as telephone call-in voting and off-reserve voting; however, most of these changes were never approved through a Band Council resolution or a vote by Band members.

[4] In December 2003, reserve land was set apart for the Mushuau in what would become the community of Natuashish. The creation of the reserve had no effect on the electoral customs of the Mushuau.

[5] In early January 2010, at a meeting in Ottawa attended by Mr. Prote Poker, the incumbent Band Chief, a decision was made to hold Band Council elections. However, no steps were taken in furtherance of this decision until February 20, 2010, when the date of March 5, 2010 was selected for this election. Thus, on March 5, 2010, a Mushuau general election was held at Natuashish to elect a Band Chief as well as four Band Councillors (two females and two males, again according to custom). The polling was between 9:00 a.m. and 5:00 p.m. at the Band Council's office. No revised formal voters list was compiled which meant that deceased Band members may have appeared on the list of approximately 460 eligible voters.

[6] Ms. Katie Rich, the Band manager, appointed Ms. Veronica Rich Voisey to be the Returning Officer for the election. As the Returning Officer, Ms. Veronica Rich Voisey was responsible for all aspects of the election process, including the posting of the election notice, the approval and printing of ballots, the appointment of assistant returning officers and the counting of ballots. Mr. Poker, then Chief, instructed Ms. Katie Rich, the Band manager, to prepare and post notices of the March 5, 2010 election. However, when Mr. Poker returned to Natuashish on

February 20, 2010 no election notices had yet been posted. Mr. Poker therefore posted them himself.

[7] At this stage in the electoral process, two issues arise. The first concerns the calling of the election on short notice. The applicants claim that this is in contravention of the customary band practice of posting notices of an election 21 to 30 days in advance of the poll. Here, the election was called on 13 days notice. The applicants also claim that it is customary band practice for the Returning Officer to take complete control of the election process. Ms. Veronica Rich Voisey was not engaged until four days before the election.

[8] Ms. Veronica Rich Voisey subsequently alerted Mr. Poker to a problem with the alignment of the candidates' names on the ballots and the corresponding circle but was instructed by Mr. Poker to use the ballots in any case. No scrutineers were appointed by any of the candidates for the office of Chief.

[9] The applicants also contend that:

- Off-reserve voting in Happy Valley, Goose Bay, and St. John's took place without scrutineers present and that non-residents also participated in the election.
- The ballots were defective because the check boxes beside each candidate's name were not properly aligned.
- While the candidates were listed in alphabetical order on the ballot they were listed first name first, last name second, contrary to custom.
- The ballots were written in English only and as a result those Band members who do not read English would not have been able to read the candidates names had they also been, according to custom, printed in Innu-eimun.
- Ms. Veronica Rich Voisey did not allow for a scrutineer to be present during ballot counting.

- Ballot counting did not begin until one-hour after the election, contrary to the custom of counting immediately following the station's closure.
- The number of ballots printed for use by voters and those left over following the vote has not been disclosed.

[10] No serious quarrel is taken with many of these facts. For the disposition of this application however, four aspects of the electoral process are of particular concern: the call of the election on short notice contrary to the By-Law; the control of the ballot boxes following the vote; the number of spoiled ballots; and the failure to account for the number of ballots printed.

[11] Natural justice is a question of law and thus correctness is the appropriate standard of review per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. For the reasons that follow I find that the Band's March 5, 2010 election was not conducted in accordance with the principles of natural justice.

[12] Turning to the first ground on which the results must be set aside, Article 5.3 of the Band Constitution was violated which provides that elections will be held one month after the date of the election call. In this case, the election call was made February 20, 2010 for a vote on March 5, 2010. I do not consider this to be a technical defect; rather, it goes to the heart of the process itself. Mr. Sebastian Rich, Councillor, testified that he was unaware of the election call until a few days before the close of nominations.

[13] The polling ended at 5:00 p.m. Ms. Veronica Rich Voisey, the Returning Officer, had control of the ballot boxes up until this point. Thereafter, custody of the ballot boxes becomes unclear. It was conceded by counsel for the applicant that the right of the returning officer to

maintain control of the ballot boxes became an issue between Ms. Katie Rich and some members of the Band with the result that the RCMP were called. The RCMP declined to take custody of the boxes, and, in the end, Simeon Tshakapesh took control of the boxes. Counting began at 6:00 p.m. and Simeon Tshakapesh was elected Chief. The votes were recorded as follows:

Chief

Simeon Tshakapesh	136 votes chief elect
Prote Poker	116
George Rich	83
Mary Janes Edmonds	47
Spoiled	2

Females

Angela Pasteen	152 councilor elect
Mary Agathe Rich	101 councillor elect
Rose Marie Poker	84
Nympha Byrne	84
Martha Piwas	83
Nachelle Poker	79
Janet Gregoire	40
Stella Rich	24
Alberta Toma	16
Spoiled	45

Males

Sebastian Rich (Shutin)	105 Councillor Elect
Simon Pokue	103 Councillor Elect
John Nui	96
Gerry Gregoire	91
DamienBenuen	73
Gerry Pasteen	68
Thomas Poker	52
Veryan Piwas	40
Andrew Rich	33
James Nui	21
Matthew Piwas	18
Toby Pokue	9
Hank Rich	7
Spoiled	15

[14] The most compelling evidence in support of the application comes from the Returning Officer, Ms. Veronica Rich Voisey, who has been the returning officer in three prior band elections, and two provincial and federal elections. She testified:

- That she was contacted by the Band Manager Ms. Katie Rich to be the returning officer five days before the vote. Ms. Veronica Rich Voisey said this was very short notice;
- She was not supplied with an updated voters list, and when she requested one from the Band Manager, was told she did not need one;
- That the Band Council told her not to worry about the misalignment of the boxes to the candidates names issue;
- That the nomination papers did not come to her but instead went to the Band Manager, Ms. Katie Rich;
- That as part of her normal duties she would engage assistant returning officers in Goose Bay and St. John's, but was told by Ms. Katie Rich, the Band Manager, this was done "and there was no need to be involved in that arrangement." Consequently, Ms. Veronica Rich Voisey, as Returning Officer, had "no knowledge of how those people were appointed."
- That she "acknowledges" that there were certain irregularities involved in this election; but avers that they were solely as a result of the interference by the Band Council then in power.

[15] Ms. Veronica Rich Voisey's statement under oath that these irregularities did not have "any significant effect on the outcome of the election" requires comment. First, it is inconsistent with the role of a Returning Officer to adopt a partisan position on the electoral process. Neutrality and independence of a Returning Officer is to be fostered if the band is to have confidence in the electoral process. Second, Ms. Veronica Rich Voisey's opinion that the irregularities did not have a significant effect on the outcome is irrelevant. Factually, the statement is so imprecise as to be meaningless. Third, her statement is also inconsistent with the obvious mathematics of the 45 spoiled ballots in the vote for female councillor, and fourth, it is not the accuracy of the vote and

ballots cast, but the integrity of the election process itself from inception to announcement of results and re-count if necessary, that is the core object of judicial review.

[16] The respondent contends in argument, that the votes cast are accurately reflected in the results posted. This “unofficial recount” misses the central point of this application for judicial review which is that the fairness of the processes. The Band’s confidence in the fairness of that process is paramount. Put otherwise, the fact that the votes were accurately counted in an otherwise irregular election does not assuage concerns about the integrity of the election process.

[17] With respect to the spoiled ballots, the third ground, there were, in the election of two female councillors, 45 spoiled ballots. This represents 13% of all votes cast. The origin of the high number of spoiled ballots lies in the misalignment of names on the ballot noted earlier. The closeness of votes for female councillors establishes both a causal and material relationship between the irregularity and the outcome of the vote. Any one of five candidates could have been elected had the 45 spoiled ballots been counted in their favour.

[18] I turn now to the fourth material irregularity and that was continuity of the ballot box. The Returning Officer did not want to keep custody of the ballot box. The ballot box did not remain in the continued control of the Returning Officer. Ms. Katie Rich sought to take control of the box from the Returning Officer, Ms. Veronica Rich Voisey. In the end, the ballot box ended up neither in the custody of the Returning Officer or the Band Manager, but in the hands of the newly elected Chief. The cross-examination of Simeon Tshakapesh, then seeking office as Chief, is telling:

Q. Well, if you didn't want anything to do with it, why did you take it?

A. Well, I was asked by Veronica, "take the ballot box" and I didn't want to take it, and that's the reason why I called the RCMP to take it, and they didn't – they refused to take it, so why would I – I mean, as the Chief what – my hands were tied. I had to do something about it, but I gave it to my wife and she put it somewhere else safe and now Gary has it.

Q. Okay. So you decided to take possession of the ballot box –

A. After the RCMP refused to take it.

Q. Okay. Why would you not leave it with Veronica Voisey?

A. Because she wasn't home, because Katie has been after the ballot box.

Q. But Katie would not have had entrance to Veronica's house. She doesn't live with Veronica, does she?

A. She was there in the front of her house at that time when she – when the RCMP, whole crowd showed up.

Q. But she didn't – she couldn't go in, break into the house, if she broke into the house –

A. She could. She could. She could. She's really capable of doing that stuff.

Q. Well, if she had broken into the house and tried to steal the ballot box, she could have been charged, would you agree?

A. She wouldn't broke in [sic]. She would go in there, but there was somebody staying there. She would have taken the ballot box, because she's been after Veronica a whole number of times trying to get a ballot box in the hands. I don't know why. Normally, I don't – the Band have possession in the ballot box.

[19] Finally, drawing from the evidence of Mr. Poker, I note as well that there was evidence that deceased members were on the voters list; the number of phone-in ballots was not known; the

process for identifying and verifying the identity of the phone-in voters was not known and there was an unexplained one hour gap between the close of polls and the counting of votes.

[20] The number of total ballots printed was never disclosed, despite requests. Given the absence of a current voter list as required, lack of continuity of the ballot boxes, the absence of scrutineers in the tallying of the vote, such a lack of control over the electoral process is undeniably material to the integrity of the election results.

[21] The substantive content of natural justice and the duty of fairness will be dictated by the circumstances: *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653, at p 682; *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, at para 21. Although the March 5, 2010 election is not an adjudicative process, the natural justice principles of fairness and impartiality are applicable. As Justice Robert Mainville stated in *Algonquins of Barriere Lake v Algonquins of Barriere Lake (Council)*, [2010] FCJ No 185 (*Mitchikinabikok Inik*),

...those who carry out and supervise leadership selection processes for public bodies, such as a band council, are required at a minimum to project and demonstrate a degree of fair play and impartiality such as to ensure a credible result from those processes.

[22] This means that the Band's election must be conducted by a fair and impartial process and if it has not been, the appropriate remedy must be granted.

[23] Further, guidance as to the application of the principle comes from the decision of Justice James O'Reilly in *Laboucan v Little Red River Cree Nation No 447*, 2008 FC 193 at para 13, who wrote:

...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... to this burden as it is the body responsible for organizing elections and ensuring that the legal requirements have been met.

[24] The fact that the Band election was conducted by a secret ballot process, albeit a flawed process, indicates that Band custom reflects democratic principles and, therefore, the election must conform to the fundamental principles of natural justice and fairness: *Salt River First Nation 195 v Marie*, 2003 FCA 385. As Justice Marshall Rothstein stated in *Long Lake Cree Nation v Canada (Minister of Indian and Northern Affairs)*, [1995] FCJ No 1020 (FCTD) at para 31:

Councils must operate according to the rule of law whether that be the written law, custom law, the *Indian Act* or whatever other law may be applicable. Members of Council and/or members of the Band cannot take the law into their own hands. Otherwise, there is anarchy. The people entrust the Councillors to make decisions on their behalf and Councillors must carry out their responsibilities in a way that has regard for the people whose interest they have been elected to protect and represent. The fundamental point is that Councils must operate according to the rule of law.

[25] As described above, I find that substantial problems pervaded this election. The problems began with the call on short notice, continued through the mechanics of the election process, including loss of control of the number of ballots printed and culminated with the unacceptably high number of spoiled ballots and the loss of control of the ballot and box. It cannot be said that the principles of fairness and impartiality were respected in the election process.

[26] Accordingly, the Court orders that the March 5, 2010 election results be set aside and that a new election be called and conducted according to customary band practices and the existing Band by-laws within three (3) months following the issuance of this decision.

[27] A writ of *quo warranto* is also issued; however, it is stayed until the new election is complete so that the Band is not without a Chief and four councillors during the new election process.

[28] The remedies available under section 18.1 of the *Federal Courts Act*, (RSC, 1985, c F-7) are both extraordinary and discretionary. Their antecedence lies in the historic prerogative relief of the courts of equity. One of the governing principles is that an applicant seeking extraordinary and discretionary relief must come to the court with clean hands, that is to say, they must, in their conduct, be beyond reproach: *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3.

[29] In this context it was argued that the applicant, Mr. Poker, ought to be denied relief given his involvement in some of the events and decisions which precipitated the unfair election. There is also evidence that alcohol was used by candidates on both sides, to influence the outcome.

[30] The Court makes no findings in regard to this later allegation. In any event, regardless of which individual or individuals may have cause or contributed to the shortcomings in the process, the paramount consideration in considering whether to grant or withhold relief is the Band membership's confidence in the electoral process itself. There is an overarching public interest in

ensuring that Band confidence in Band elections is merited, as it strengthens Band governance. In consequence, given the importance of the electoral process, relief will not be withheld.

[31] The parties are requested to make submissions with respect to costs within 20 days of the date of this decision.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The March 5, 2010 election results are set aside and a new election is to be called and conducted according to customary Mushuau Innu First Nation band practices and the existing Band by-laws within three (3) months following the issuance of this decision.
3. A writ of *quo warranto* is issued, however, it is stayed until the new election is complete so that the Band is not without a Chief and four councillors during the new election process.
4. The parties are requested to make submissions with respect to costs within 20 days of the date of this decision.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-458-10

STYLE OF CAUSE: PROTE POKER, JOHN NUI, NYMPHA BYRNE,
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PASTEEN, MARY AGATHE RICH, SEBASTIAN
RICH (SHUSTIN), SIMON POKUE AND VERONICA
RICH VOISEY

PLACE OF HEARING: St. John's, Newfoundland and Labrador

DATE OF HEARING: September 8, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: January 3, 2012

APPEARANCES:

Jennifer Gorman FOR THE APPLICANTS

William Kennedy FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Benson Myles FOR THE APPLICANTS
St. John's, NL

Kennedy Belbin FOR THE RESPONDENTS
Mount Pearl, NL