

Federal Court



Cour fédérale

Date: 20130312

Docket: T-1099-11

Citation: 2013 FC 223

Ottawa, Ontario, March 12, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

HUBERT D'OR

Applicant

and

**TINA ST. GERMAIN AND CHIEF AND
COUNCIL OF THE LITTLE RED RIVER
CREE NATION AND THE LITTLE RED
RIVER CREE NATION**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr Hubert D'Or challenges two decisions arising out of the election of the Chief and Council of the Little Red River Cree Nation in 2011. The first decision was taken by the Nation's Electoral Officer; the officer decided not to issue a statement or to post the results of a recount for

one of the councillor positions. The second decision was taken by the Chief and Council refusing to recognize the results of the recount.

[2] Mr D'Or believes that the recount should have resulted in his election as councillor. He asks me to declare him elected and order that the results of the recount be posted in the community as required by the *Little Red River Cree Nation's Custom Election Code 2003*, [Code]. In my view, neither decision was unreasonable. I must, therefore, dismiss this application for judicial review.

[3] There are three issues:

1. Is Mr D'Or entitled to challenge two decisions in a single application for judicial review?
2. Did the officer err by not publishing the results of the recount?
3. Did the Chief and Council err by refusing to recognize the results of the recount?

II. The Election and Recount

[4] The Nation is comprised of three communities: Fox Lake, St John D'Or Prairie, and Garden River. The Council is composed of four councillors from Fox Lake, four from St John D'Or Prairie, and two from Garden River. Mr D'Or was a candidate for one of the councillor positions in Garden River.

[5] The election took place on May 11, 2011 and the officer posted the results the following day. The results showed that Mr D'Or finished third in Garden River and, therefore, was not elected.

[6] On May 15, 2011, the officer received a request to recount the results of the votes for Chief. On May 16, 2011, she was asked to recount the votes for Fox Lake. That same day, the Chief and Council formally adopted the results of the election.

[7] On May 18, 2011, the officer announced a recount of the ballots for the position of Chief, and for the councillor positions in Fox Lake. She did not find any mistakes relating to the election of Chief, but she found an arithmetic error in respect of one of the councillor positions. She advised the Chief and Council of the error, and posted the amended results. The Chief and Council adopted the revised results.

[8] On May 31, 2011, the officer received a request for a recount for Garden River. She conducted the recount on June 16, 2011 and discovered another arithmetic error. Had the votes been counted correctly, Mr D'Or would have successfully won a councillor position. The officer advised the Chief and Council of the error but did not post the results, leaving this to the discretion of the Chief and Council.

[9] The Chief and Council concluded that it could not accept the results of the recount because the Code allows for appeals only within seven days of an election. Accordingly, it had accepted the

results of the timely recount relating to Fox Lake. However, it did not accept the results of the later Garden River recount, citing the need for finality.

III. Issue One - Is Mr D'Or entitled to challenge both decisions in a single application for judicial review?

[10] Normally, an application for judicial review must be limited to a single decision. However, the Court can order otherwise, particularly where the decisions form part of a continuing course of conduct (Rule 302, *Federal Court Rules, 1998*, SOR/98-106; *Khadr v Canada (Minister of Foreign Affairs)*, 2004 FC 1145).

[11] In my view, the two decisions in issue here form part of a continuum, representing the Nation's response to the challenge to the Garden River results. Accordingly, I will allow both to be reviewed within this application.

IV. Issue Two - Did the officer err by not publishing the results of the recount?

1. Standard of Review

[12] Mr D'Or argues that I can overturn the officer's decision if her interpretation of the Code was incorrect.

[13] In my view, the proper standard of review is reasonableness. Under the Code, the electoral officer has sole responsibility for conducting elections according to its terms (s 3 - see Annex for all provisions of the Code cited). The officer is expected to apply the Code in a manner consistent with the Nation's customs, which inform the provisions of the Code. As a resident of the community, she is better placed than the Court to make decisions affecting the Nation's business. Her expert interpretation and factual conclusions deserve the Court's deference. In similar cases, the Court has applied a reasonableness standard to decisions of an Appeal Committee, and of a Chief and Council (*Linklater v Peter Ballantyne Cree Nation Election Appeal Committee*, 2011 FC 1353 at paras 11-12; *Shotclose v Stoney First Nation*, 2011 FC 750 at paras 58-59). The same standard should apply here, both to the officer's decision and that of the Chief and Council.

2. The Provisions of the Code

[14] The Code requires the officer to open all ballot boxes and, "subject to review on recount or an election appeal," take note of any objections to the ballot papers (s 17). This is the only reference in the Code to a recount.

[15] After the election, the officer must seal the ballot papers and keep them for 60 days, or until she receives a notice of appeal, in which case she must deliver the sealed ballots to the appeal committee (s 19). Appeals must be filed within 7 days of the election, and may be based on any one of the following grounds:

- a candidate was ineligible;
- a candidate was nominated by someone who was ineligible;

- an ineligible person voted;
- an eligible person was not allowed to vote; or
- a candidate engaged in unfair and unacceptable, or corrupt behaviour (s 21).

[16] The Code does not specifically identify a recount as a ground of appeal.

[17] An election appeals committee composed of three persons selected by the electoral officer rules on appeals. The committee has the authority to allow a new election to be held for a particular office, or to refuse to allow a new election either because the appeal was based on insufficient evidence or because the activity alleged did not affect the outcome (s 21).

3. Was the Officer's Decision Unreasonable?

[18] Mr D'Or argues that the officer unreasonably failed to publish the results of the Garden River recount. He contends that the Code requires the officer to do so.

[19] As mentioned, there is little in the Code about recounts. Recounts are clearly contemplated (s 17), but there is no procedure governing them, and no specific duty on the officer to carry them out on request or to publish the results if she does.

[20] The Code requires the officer to prepare and sign a statement of the number of votes for each candidate. She must then declare publicly the candidates having the greatest number of votes (s

17). Again, these obligations do not apply specifically to recounts. The question, then, is whether the officer acted reasonably in the absence of any specific guidance in the Code.

[21] In my view, the officer acted reasonably. Rather than take any specific action on the recount, she referred the matter to the Chief and Council. There was nothing in the Code that prevented her from doing so and, given the lack of specific rules, her decision was prudent and respectful of the superior authority of the Chief and Council. She did not contravene any provisions of the Code.

[22] There is some concern surrounding the fact that the officer posted a notice about the earlier recount she carried out (relating to Fox Lake) and did not do so in respect of the Garden River request. However, without specific rules relating to recounts, some inconsistency is bound to occur. Since the propriety of the earlier recount is not an issue before me, I need not decide whether the officer acted reasonably there.

V. Did the Chief and Council err by refusing to recognize the results of the recount?

[23] Mr D'Or maintains that the Chief and Council acted unreasonably when it ruled that the recount request was out of time. There is no time limit on recounts under the Code. The only time limit is the 60-day period during which the officer must maintain possession of the ballot papers. Mr D'Or contends that a reasonable reading of the Code would suggest that recount requests could be entertained at any time during that 60-day period. The effect of the Chief and Council's decision was to disenfranchise those voters who selected Mr D'Or as their councillor.

[24] In my view, the Chief and Council reasonably concluded that the 7-day appeal period should apply to recounts. While the grounds of appeal set out in the Code do not specifically include recounts, the applicable provision (s 21) is clearly not exhaustive. It is permissive.

[25] The intent of the Code is to deal with challenges to election results swiftly, so that the community's leadership is not put in doubt for an extended period. It would be consistent with that objective to interpret the appeal provision of the Code as covering recounts, which is obviously a particular kind of challenge to election results. There is no evidence of any custom relating to recounts that would suggest an alternate procedure or time frame that would fill the gap in the Code. Absent specific rules for recounts, the appropriate route for challenging election results is by way of an appeal (see, e.g., *Thunderchild First Nation Appeal Tribunal v Awasis*, 2007 FC 705).

[26] Mr D'Or cites s 17 of the Code which refers to a "review on recount or an election appeal." He suggests that this provision clearly differentiates between recounts and appeals, so the appeal rules should not be interpreted as applying to recounts.

[27] In my view, s 17 of the Code recognizes that appeals could be based on an erroneous counting of votes or other grounds, namely, those set out in s 21 of the Code. The reference to a recount in s 17 does not suggest, on its own, that the Code treats recounts differently from other kinds of appeals.

[28] Mr D'Or also submits that he could not appeal the officer's decision, since he could only do so after the officer had posted the results of the recount. Since she did not do so, an appeal was

unavailable. Clearly, Mr D'Or could have appealed the results of the original Garden River Election within 7 days. Had he done so, the appeal provisions of the Code would have applied, an appeal committee would have been struck, and it could have decided on the appropriate remedy.

[29] Therefore, I cannot conclude that the Chief and Council erred by failing to recognize the results of the recount for Garden River.

VI. Conclusion and Disposition

[30] In the absence of any explicit rules regarding recounts, I cannot conclude that the officer erred by failing to post the results of the recount for the Garden River Councillor Election.

Similarly, I cannot conclude that the Chief and Council acted unreasonably by refusing to accept the results of the recount. I must, therefore, 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

Annex

Little Red River Cree Nation's Custom Election Code 2003

Counting of Votes

17. As soon as possible after the close of the polls, the electoral officer or deputy electoral officer shall, in the presence of any candidates or their agents who are present, open all ballot boxes and:

- (a) examine the ballot papers and reject all ballot papers:
 - that have not been supplied by him or her,
 - by which votes have been given for more candidates than are to be elected, or,
 - on which anything appears by which the voter can be identified, and
- (b) declare a ballot paper containing the names of candidates for more, on which votes are given for more candidates for any office, than are to be elected, to be void as regards all the candidates for such office, but such ballot paper shall be good as regards the votes for any other offices in respect of which the voter has not voted for more candidates than are to be elected, and
- (c) subject to review on recount or on an election appeal, take a note of any objection made by any candidate or his or her agent to any ballot paper found in the ballot box and decide any question arising out of the objection... [Emphasis added]

Disposition of Ballot Papers

19. The electoral officer shall, after the election poll, deposit all ballot papers in a sealed envelope and retain possession of the ballots for sixty (60) days or until he or she is served with a notice of appeal at which time he or she will forward the ballot papers, in the sealed envelope, along with the voters' list and other documentation relevant, to the appeal committee.

Election Appeals

21. Within seven (7) days following an election and the posting of the written statement by the electoral officer, a candidate may appeal the outcome of an election.

An appeal shall be made in writing to the electoral officer stating and detailing or providing particulars of the reason or reasons for the appeal.

An appeal may be based on any one of the following:

- a candidate in the election was not eligible to be a candidate by virtue of these provisions,
- a candidate in the election was nominated by persons not eligible to nominate,
- person(s) who voted were not eligible to vote,
- person(s) eligible to vote were not allowed to vote, or,
- a candidate was practicing unfair and unacceptable or corrupt election practices, for example: bribery, threats or intimidation of electors, electoral officer, polling clerks, or other persons assisting in the election.

Upon receiving an appeal, the electoral officer shall appoint an election appeals committee consisting of three (3) persons who are:

- knowledgeable and well informed concerning First Nation governance,
- not electors of the Nation,
- not employees or contractors of the Nation, and,
- not reside in either Fox Lake, Garden River, or John D'or Prairie.

Within seven (7) days of receiving a notice of appeal, the electoral officer shall organize a meeting for the election appeal committee to hear evidence concerning the appeal.

The appeals committee shall not be bound by any rules of evidence.

The electoral officer shall inform all candidates who may have an interest in the meeting.

The electoral officer shall conduct the meeting but shall not vote in any decision of the election appeal committee.

The election appeal committee shall deliver a written decision within five (5) days of hearing the evidence regarding the appeal and shall have the authority to:

- (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.

The electoral officer shall inform Council, all candidates who may be affected, and other interested persons of the decision of the election appeals committee.

The decision of the appeals committee shall be final and binding upon all parties. Any appeal to a Court of Law shall be founded in law only, and not in fact.

A new election, if allowed, shall be organized and conducted by the electoral officer within fourteen (14) days following the written decision of the election appeals committee.

The only candidates in the new election shall be those eligible candidates nominated in the previous election.

In addition to the provisions under this section, all applicable election procedures and regulations herein provided shall be used in a new election.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1099-11

STYLE OF CAUSE: HUBERT D'OR
v
TINA ST. GERMAIN, ET AL

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 10, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: March 12, 2013

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