Federal Court  Cour fédérale

Date: 20160419

Docket: T-987-15

Citation: 2016 FC 427

Ottawa, Ontario, April 19, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

GARNET MEECHES

Applicant

and

GEORGE ASSINIBOINE, MARVIN DANIELS, BARB ESAU, ROBERT FRANCIS, GEORGE MEECHES, LIZ MERRICK, HAROLD MYERION, ANNETTE PETERS, DENNIS PETERS, MARSHALL PRINCE, THERESA SANDERSON, CHRIS YELLOWQUILL AND LONG PLAIN INDIAN BAND NO. 287ALSO KNOWN AS LONG PLAIN FIRST NATION

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a decision of the Long Plain First Nation Election Appeal Committee (the Appeal Committee), dated May 12, 2015 (the Decision). The Decision under

review concerns the April 9, 2015 election (the Election) at the Long Plain First Nation and the eligibility of a candidate who ran for a Council position.

II. Background

[2] The Applicant, Garnet Meeches, is a member of the Long Plain First Nation (Long Plain) and ran unsuccessfully in the Election for a Councillor position. Mr. Meeches lost by one vote.

[3] The Applicant argues that the Respondent, Chris Yellowquill, was not an eligible candidate and should not have been permitted to run for a Council seat.

[4] The Respondent, Long Plain, is a band within the meaning of the *Indian Act*, RSC 1985, c I-5.

[5] The Respondents Liz Merrick, Barb Esau, Marvin Daniels, and George Meeches were successfully elected as Councillors in the Election. They, together with Long Plain, oppose the application for judicial review.

[6] The Respondents Dennis Peters, Robert Francis, George Assiniboine, Theresa Sanderson, Marshall Prince, Annette Peters, Harold Myerion, and Chris Yellowquill, were also unsuccessful candidates for the four Councillor positions. They do not oppose the application.

[7] Elections at Long Plain are governed by the *Long Plain First Nation Election Act* (the *Election Act*), which is a custom code enacted by Long Plain in 2001 and amended in 2008. The *Election Act* provides that the government of Long Plain must consist of one Chief and four Councillors who hold office for a term of three years.

[8] On the issue of candidate eligibility, Article 3.1 of the *Election Act* requires the following:

a) The candidate has not been and is not disqualified by virtue of the *Election Act*;

b) The candidate has not been convicted of an indicatable offence for a period of eight months from the date of the conviction;

c) The candidate has successfully completed a drug test;

d) The candidate has a minimum of a grade 12 education or at least a minimum of five years' experience garnered from community involvement, including a letter of reference from another tribal member; and

e) The candidate has paid a non-refundable fee of $250.00.

[9] Articles 9 through 12 of the *Election Act* outline the nomination process for candidates. Article 9.5 requires potential candidates to complete a drug test and provide a completed criminal record check and a child abuse registry check (Article 9.5). Article 9.6 states:

> Criminal Record Checks that have not expired, Child Abuse Registry Checks, and drug testing results must be submitted to the Electoral Officer 14 days prior to nominations. NO EXCEPTIONS.

[10] On February 15, 2015, the Electoral Officer posted a Notice of Nomination Meeting inviting members of Long Plain to be nominated as candidates in the Election. Mr. Yellowquill submitted his nomination paper 14 days prior to the nomination meeting on March 5, 2015, but he did not submit the required checks and test results or pay the $250.00 fee.

[11] On March 13, 2015, the Electoral Officer rejected Mr. Yellowquill's nomination application on the basis that the $250.00 fee had not been paid.

[12] At the nomination meeting on March 19, 2015, Mr. Yellowquill paid the fee, and provided a "Release of Results of Criminal Record Check" (which indicated a possible match to a registered criminal record), a confirmation of a drug test with negative results, and a letter confirming he had applied for a child abuse registry check.

[13] The Electoral Officer did not permit Mr. Yellowquill to participate in the nomination meeting. On March 20, 2015, Mr. Yellowquill appealed this refusal to the Appeal Committee.

[14] On March 22, 2015, the Electoral Officer provisionally confirmed Mr. Yellowquill as a candidate pending the receipt of his completed criminal record check and child abuse registry check.

[15] On March 23, 2015, the Appeal Committee allowed Mr. Yellowquill's nomination appeal, finding that he met the nomination requirements.

[16] The Long Plain Election was held on April 9, 2015. Both the Applicant and Mr. Yellowquill were unsuccessful in their bids for a Council position. The Applicant's fifth place finish was confirmed by a recount.

[17] Article 17 of the *Election Act* provides that any candidate or elector has the right to appeal the results of an election within seven days of the election on the grounds of election practices that contravene the *Election Act*.

III. Decision under Review

[18] Following the election, the Applicant appealed the results of the Election to the Appeal Committee and raised a number of grounds. The grounds relevant to this judicial review are the

Applicant's arguments that candidates were allowed to submit receipts for the record checks rather than the results themselves, and Mr. Yellowquill was permitted to run as a candidate despite his ineligibility. The Applicant submits the Appeal Committee erred in determining that Mr. Yellowquill was an eligible candidate to run in the Election, as he never provided the necessary checks as required by Articles 9.5 and 9.6 of the *Election Act*. An appeal hearing was requested.

[19] On May 12, 2015 the Appeal Committee determined that an appeal hearing was not warranted. On the issue of candidate eligibility, the Appeal Committee concluded as follows:

> During our investigation we learned that the Electoral Officer was not able to receive Child Abuse Registry Checks by the *Act*'s prescribed deadline due to the fact that the prescribed timelines for this process are too narrow, therefore, had made a decision that permitted the participation of a Nominee in the 2015 election who did not have their actual Child Abuse Registry Check provided. The Committee has found notes that all elected candidates reported completed check results prior to the election and that no candidate had been removed or disqualified from the election process.
>
> The Electoral Officer received all required documents prior to Mr. Yellowquill's name appearing on the ballot.
>
> The *Act* prescribes that the Nomination meeting notice is to be posted 32 days before the nomination meeting and that the Criminal Record Check, Child Abuse Registry Check and drug testing results must be submitted 14 days before the nomination meeting with no exceptions. However, the Electoral Officer did accept a receipt as proof that a Child Abuse Check had been requested with the provision that the results would be required before the election ballots were printed. There is no provision in the *Act* for this action however, it is clear the prescribed timeline creates unfair disadvantage for Tribal members to participate in elections who are not familiar with the election process. The Act is silent and presumes that Nominees are informally participating in the election process by collecting the required Checks and drug test before formally accepting their nomination. A Tribal member who does not know that he or she has been nominated until the day of the nomination meeting would not be able to comply with the *Act's* requirements. The *Act* does not provide a fair process for Tribal

> members to participate in Tribal elections. In accepting a receipt, the Electoral Officer created a process for fair participation subject to a Nominee meeting the criteria and if the criteria had not been met, the Nominee would have been removed or disqualified as an election candidate. This decision of the Electoral Officer did not affect the outcome of the 2015 election.

[20] The Appeal Committee did recommend an amendment to the *Election Act* to permit the processing of child abuse registry checks within a timeframe that can be adhered to.

[21] On the question of whether Mr. Yellowquill was ineligible to be a candidate for the Election, the Appeal Committee found that it "heard the appeal" and affirmed "the decision". It can likely be assumed that the Appeal Committee was referencing its previous March 23, 2015 decision finding Mr. Yellowquill to have met the nomination requirements.

IV. Issues

[22] The Applicant and the Respondents have raised a number of issues which I have summarized as follows:

a) Did the Appeal Committee have jurisdiction to rule on candidate eligibility?

b) Was the decision of the Appeal Committee reasonable?

V. Standard of Review

[23] The Applicant submits that correctness is the applicable standard of review, whereas the Respondents submit that the standard of reasonableness is appropriate.

[24] The issues raised by the Applicant are questions of fact, questions of mixed fact and law, and questions concerning the interpretation of the *Election Act*. The jurisprudence establishes that the reasonableness standard applies to an election appeal committee's interpretation of its election regulations: *Orr v Fort McKay First Nation*, 2012 FCA 269 at para 11; *Jacko v Cold*

Lake First Nation, 2014 FC 1108 at para 13 [*Jacko*]; *Testawich v Duncan's First Nation Chief and Council*, 2014 FC 1052 at para 16.

[25] Therefore the issues for determination in this case will be considered in the context of reasonableness and the "the existence of justification, transparency and intelligibility within the decision-making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. This Court should only intervene if the Appeal Committee decision is unreasonable in the sense that it falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Analysis

A. *Did the Appeal Committee have jurisdiction to rule on candidate eligibility?*

[26] The Respondents argue this application for judicial review was filed late, as what is really being challenged is the decision to allow Mr. Yellowquill to run as a candidate. The decision allowing Mr. Yellowquill to run was made on March 23, 2015, and therefore the present application, which was filed on June 12, 2015, was filed beyond the 30-day time limit prescribed by subsection 18.2(2) of the *Federal Courts Act*. The Respondents also contend that candidate ineligibility is not a ground for an election appeal under Article 17.2 of the *Election Act*, and the Appeal Committee did not have the jurisdiction to rule on this ground.

[27] The Applicant on the other hand argues that he is challenging the Appeal Committee's decision to uphold the election results, and therefore his application was filed within the appropriate time lines.

[28] I agree with the Applicant. Candidate eligibility and the approval of candidates by the Electoral Officer necessarily affect the results of an election and fall within the concept of "election practices" as contemplated by the *Election Act*. This was also the conclusion of the Honourable Justice Russell in the *Jacko* case, where he concluded at paragraph 73:

> The fact that someone can be kept off the ballot for ineligibility by the Elections Officer at the nomination stage does not mean that an appeal based upon ineligibility cannot be made to the Appeal Committee following the election.

[29] The availability of a nomination appeal under Article 12 of the *Election Act* does not exclude candidate ineligibility as a ground of appeal under Article 17. Subsequent facts about a candidate's ineligibility may arise only after the nomination stage of the election process. Additionally, a right of appeal under Article 17 is extended to any candidate or elector, whereas only a candidate found ineligible by the Electoral Officer has standing to bring a nomination appeal under Article 12.

[30] I therefore find the Appeal Committee had jurisdiction to consider candidate eligibility and I find the application was filed within the necessary time frame.

B. *Was the decision of the Appeal Committee reasonable?*

[31] The Applicant submits the Electoral Officer and the Appeal Committee contravened the *Election Act* when they allowed Mr. Yellowquill to run in the election. As Mr. Yellowquill's ineligibility could have materially affected the results of the election, the Applicant submits the Appeal Committee erred in confirming the election results.

[32] Specifically, the Applicant argues the Appeal Committee made contradictory findings when it concluded the "timelines were too narrow", despite finding that all elected candidates

reported completed check results prior to the Election. It was only Mr. Yellowquill who could not meet the timelines. Furthermore, the Applicant submits that the Appeal Committee was clearly wrong when it found the Electoral Officer had "received all required documents" prior to Mr. Yellowquill's name appearing on the ballot.

[33] With respect to interpreting the *Election Act*, the Applicant states that its wording is clear and mandatory in nature. He also asserts that it does not contain any language which allows for a "provisional" candidate. The Applicant argues section 9.5 and 9.6 of the *Election Act* are unambiguous, and no legislative interpretative aids are necessary to give effect to their plain and common sense meanings. The provisions require a prospective candidate to submit completed checks prior to the candidate's nomination. They do not permit the "provisional" approval of a candidate if those checks are not provided.

[34] A contrary interpretation of the *Election Act* is offered in the affidavit of Ms. Esau. The Applicant argues that Ms. Esau's affidavit should not be considered as she in an interested party with a stake in the outcome. I need not consider this affidavit to determine the matter.

[35] At the hearing, I also declined to hear oral submissions from Mr. Yellowquill as he had not filed any evidence in support or in opposition to the Application.

[36] The Respondent on the other hand argues that the proper interpretative approach, if there is any ambiguity, is outlined in *Opitz v Wrzesnewskyj*, 2012 SCC 55 at paragraph 37:

> [37] It is well recognized in the jurisprudence that where electoral legislation is found to be ambiguous, it should be interpreted in a way that is enfranchising: *Haig v. Canada*, [1993] 2 S.C.R. 995. Although he was in dissent in that case, Cory J. made the following observations at pp. 1049-50, with which

> L'Heureux-Dubé J., for the majority, at p. 1028, expressed total agreement:
>
> > The courts have always recognized the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it. This traditional approach is not only sound it is essential for the preservation of democratic rights. The principle was well expressed in *Cawley v. Branchflower* (1884), 1 B.C.R. (Pt. II) 35 (S.C.). There Crease J. wrote at p. 37:
> >
> > > The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with. . . . It looks to realities, not technicalities or mere formalities, unless where forms are by law, especially criminal law, essential, or affect the subject-matter under dispute.
> >
> > To the same effect in *Re Lincoln Election* (1876), 2 O.A.R. 316, Blake V.C. stated (at p. 323):
> >
> > > The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise . . . .
> >
> > It can be seen that enfranchising statutes have been interpreted with the aim and object of providing citizens with the opportunity of exercising this basic democratic right. Conversely restrictions on that right should be narrowly interpreted and strictly limited. [Emphasis deleted.]

[37] While the Applicant argues that recourse to this approach is not necessary to give effect to the clear language of the *Election Act*, in the circumstances I agree with the Respondent that

any ambiguity should be interpreted in such a way as to enfranchise and allow participation in the election process.

[38] With this as the operating assumption, the issue is whether the Appeal Committee reasonably interpreted the *Election Act*.

[39] The Appeal Committee outlined its reasoning for proceeding in the manner it did in the interests of fairness. It identified the issue as whether the Electoral Officer was entitled to permit the participation of Mr. Yellowquill in the absence of a child abuse registry check. It noted that although there is no provision in the *Election Act* for the Electoral Officer to have done so, the prescribed timelines create an unfair disadvantage for Long Plain members who are unfamiliar with the election process. By accepting a receipt confirming that Mr. Yellowquill had applied for a child abuse registry check, the Appeal Committee found the Electoral Officer created a process for fair participation in the Election.

[40] I cannot say that the Appeal Committee acted unreasonably by upholding the provisional candidacy of Mr. Yellowquill. While the Appeal Committee itself found irregularities and deviations from the *Election Act*, this alone does not make its decision unreasonable.

[41] Article 1.9 confers authority on the Electoral Officer to "govern and conduct" the procedures of elections pursuant to the *Election Act*. In finding the Electoral Officer was entitled to relax the Act's strict requirements to enable Mr. Yellowquill's participation in the Election, the Appeal Committee adopted a broad and flexible interpretation of the *Election Act* consistent with enfranchisement. The Appeal Committee's interpretation of the *Election Act* was not unreasonable.

VII. Conclusion

[42] For the reasons outlined above, I dismiss the application for judicial review. The decision of the Appeal Committee was within the range of reasonable outcomes.

[43] Both parties seek costs. Although I have dismissed this judicial review, I do not find the Applicant was unreasonable in bringing the application and his arguments are not without merit. The Appeal Committee itself noted there were deviations from the *Election Act*, and the appeal prompted the Appeal Committee to recommend amendments. For these reasons, I decline to award costs against the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed; and

2. Each party is to pay their own costs.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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