

Federal Court



Cour fédérale

**Date: 20191119**

**Docket: T-1510-18**

**Citation: 2019 FC 1465**

**Ottawa, Ontario, November 19, 2019**

**PRESENT: The Honourable Mr. Justice Lafrenière**

**BETWEEN:**

**DAVID LEDOUX, KELLIE LEDOUX  
AND LOUIE TANNER**

**Applicants**

**and**

**GAMBLER FIRST NATION, GAMBLER  
FIRST NATION ELECTION COMMITTEE,  
GORDON LEDOUX, CHARLENE TANNER  
AND CURTIS DUCHARME**

**Respondents**

**JUDGMENT AND REASONS**

[1] The Applicants, David Ledoux, Kellie Ledoux and Louie Tanner seek judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision of the Gambler First Nation Election Committee [Election Committee] dated July 14, 2018 that set aside the results of the election of Chief and Council of the Gambler First Nation [GFN] held on May 31, 2018.

[2] The Election Committee ordered that a new election be held with the same candidates with the exception of David Ledoux, who was disqualified from running due to “unfair practices of carrying out the election” and for bribery of a member of the GFN the day before the election. The Election Committee also ordered that a new Chief Electoral Officer [CEO] be appointed for the new election.

[3] As stated orally at the conclusion of the hearing, the application for judicial review is granted.

I. Facts

[4] On May 31, 2018, the GFN held an election for Chief and two Councillors. David Ledoux was elected as Chief and Louie Tanner and Kellie Ledoux were elected as Councillors.

[5] Gordon Ledoux was the runner-up in the election for Chief.

[6] After the election, Gordon Ledoux filed an appeal to the Election Committee requesting that the results be set aside and a new election held. Gordon Ledoux cited nine grounds for his appeal. The Election Committee based its decision solely on the following three grounds:

(6) Bribery of Membership. David Ledoux promised Albert Tanner he would buy him a freezer full of food and Groceries after election.

[...]

(8) David Ledoux failed to provide and post a list of membership with address of membership to all Candidates. Withholding access to other candidates that should not have been posted at the band office which was not provided.

[...]

(9) There was no electoral officer present when the electoral process was being executed. The electoral officer had stated several times during the elections. [*sic*]

[7] On July 4, 2018, counsel for the Applicants submitted a letter responding to the allegations levied by Gordon Ledoux. Their response to the three allegations retained by the Election Committee reads as follows:

**Bribery of Membership:** There is no evidence presented in support of Mr. Ledoux's allegation that David Ledoux engaged in bribery during his campaign. David Ledoux expressly denies this allegation.

[...]

**List of Addresses:** Posting of the addresses of band members would constitute a violation of their privacy. There is no evidence that the failure to post the addresses had any impact on the results of the election and therefore, there is no basis for setting aside the elections results.

[...]

**Presence of Electoral Officer:** Mr. Ledoux's allegation that there was no electoral officer present during the election process is unfounded and incorrect. There is no evidence of a violation of any provision of the Election Law and therefore no basis for setting aside the election results.

[8] Counsel for the Applicants wrote that his clients denied wrongdoing or the violation of any provision of the *GFN Band Custom Election Law* [*Election Law*]. He concluded his letter as follows:

Should the Election Committee require any additional information, or desire to hold a hearing on this matter, or wish to conduct any further investigations, please let me know. My clients would be pleased to assist in any investigatory process, and provide any

additional information or testimony that the Election Committee believes necessary.

A. *Election Committee's Decision*

[9] The Election Committee met on five occasions (July 2, 2018; July 9, 2018; July 10, 2018; July 12, 2018 and July 14, 2018) to consider the written submissions it received from Gordon Ledoux, the Applicants and the CEO. During the course of its deliberations, the Election Committee heard evidence from Albert Tanner, since deceased, who was also a member of the Election Committee. This took place without the knowledge of the Applicants.

[10] Albert Tanner told the Election Committee that he was approached by David Ledoux and his wife, Rose Ledoux on May 31, 2018. Albert Tanner related that Rose Ledoux asked him if he had anything to eat at home and he replied that he did not. According to Albert Tanner, Rose Ledoux offered to buy groceries for him, which he accepted. Albert Tanner advised the Election Committee that while he did not think so at the time, he came to believe that this interaction on the day of the election was an inducement for him to vote for David Ledoux.

[11] The Election Committee issued its one page handwritten decision on July 14, 2018.

[12] On April 28, 2019, Donna McGillivray, a member of the Election Committee, filed an affidavit in response to the application summarizing the basis of the Election Committee's decision. The Applicants learned for the first time that the Election Committee made the decision based primarily on two findings, namely (1) David Ledoux attempted to bribe a member of the First Nation, Albert Tanner, with groceries the day before the election, and (2) David Ledoux did

not post membership names and addresses in the First Nation office or otherwise provide this information to other candidates. A lesser ground relied upon by the Election Committee included its finding that “although the [CEO] was present at the times specifically required under the [Election Law], there was evidence that she was not physically present, or otherwise available or reachable, for much of the campaign period.” According to Ms. McGillivray, Albert Tanner recused himself from the decision and vote regarding the bribery allegation.

B. *Subsequent Proceedings before this Court*

[13] On August 13, 2018, the Applicants commenced the underlying application seeking to quash the Election Committee’s decision on numerous grounds, including the Election Committee’s violation of the duty of procedural fairness.

[14] The Applicants originally named the GFN as the sole Respondent. After the new election held on August 31, 2018, as directed by the Election Committee, Gordon Ledoux was elected as Chief and Charlene Tanner and Curtis Ducharme were elected as Councillors. The Applicants subsequently amended their Notice of Application to add the Election Committee and the newly elected Chief and Councillors as respondents. Only the GFN filed a Notice of Appearance to oppose the application.

[15] The proceeding later became bogged down by interlocutory motions brought by the parties. The Applicants moved for a declaration that they had the right to control the affairs of the First Nation pending the resolution of the application for judicial review. The GFN countered

with a motion to disqualify Adam Touet and the W Law Group from acting on behalf the Applicants on the basis that they were in a conflict of interest.

[16] The two motions were dismissed by Mr. Justice William Pentney on March 27, 2019 in *Ledoux v Gambler First Nation*, 2019 FC 380. In doing so, Justice Pentney was particularly critical of the Applicants' conduct in failing to apply to stay the decision of the Election Committee or seek to delay or stop the second election from being held. The Applicants instead ignored these events and continued to act as *de facto* Chief and Council. Justice Pentney recognized however that there may be merit to the underlying application at paragraph 7:

On the limited record before me, it appears that one faction may have ignored the basic precepts of the rule of law, and now seeks to solidify its control through an order of the Court. On the other hand, serious questions have been raised about the electoral appeals process and the way the second election was conducted.

[17] It appears that the Applicants have continued to the date of the hearing of the present application to remain in control of the day-to-day operations of the First Nation, as well as its bank accounts, notwithstanding the dismissal of their motion and the strong rebuke by Justice Pentney.

## II. Analysis

[18] The GFN raised two preliminary issues that I will address briefly before turning to the issues raised by the Applicants.

[19] First, the GFN submits that the proceeding was not properly commenced as the Election Committee was not originally named as a respondent. Without necessarily agreeing with the GFN that the tribunal whose decision is being challenged should have been named as a responding party, I note that the Notice of Application was served in a timely manner on a representative of the Election Committee, as well as an employee of the GFN and Gordon Ledoux, who was the appellant before the Election Committee. The Applicants were also granted leave by Prothonotary Mandy Aylen, the case management judge, to amend the Notice of Application to add the Election Committee as a respondent. In the circumstances, I am satisfied that to the extent that there may have been a joinder issue when the proceeding was commenced, it has since been corrected.

[20] Second, the GFN submits that the Applicants have not come to Court with clean hands and should be denied standing to continue the application. There is some merit to this argument. It is clear on the record before me that the Applicants ignored the decision of the Election Committee and the results of the second election to gain a strategic advantage. As a result, they opened themselves to the possibility of dismissal of their application, as judicial review is a discretionary power.

[21] When exercising its discretionary power, the Court considers all the relevant facts, including the applicant's conduct between the date of the administrative decision and that of judicial review. The Court must also consider the integrity of administrative processes, prevent abuses of administrative processes, and preserve the public interest in the conduct of administrative decision-making.

[22] While the Court does not condone the actions of the Applicants in taking the law into their own hands, it remains the interests in this case go beyond those of the parties, as stated by Mr. Justice Donald Rennie in *Poker v Mushuau Innu First Nation* 2012 FC 1 at paragraph 30:

[...] 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.

[23] The will of the members of the GFN in electing its leaders is at the heart of this proceeding, and not the personal interests of the Applicants. The Court should therefore be reluctant to decline relief where serious questions have been raised about the electoral appeal process, such as in this case.

[24] The Election Committee was clearly bound by a duty of fairness. Madam Justice L'Heureux-Dubé wrote in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, [*Baker*] at paragraph 20 that “[t]he fact that a decision is administrative and affects ‘the rights, privileges or interests of an individual’ is sufficient to trigger the application of the duty of fairness.”

[25] The Applicants submit that they were entitled to a high degree of procedural fairness based on the significant importance of the Election Committee's decision to them personally. I agree. The Election Committee's decision directly engaged the Applicants' rights, interests, and



privileges because if implemented, it would remove them from elected office for the GFN, strip them of their salary and, in the case of David Ledoux, potentially damage his reputation.

[26] The GFN submits that the Election Committee fulfilled its duty of fairness to the Applicants in making its decision. I disagree. As the Supreme Court noted in *Baker* at paragraph 22:

[...] the purpose of participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[27] Counsel for the GFN submits that neither the *Election Law*, nor any applicable statute or the common law, require that there be an oral hearing of an appeal. While that may be, the Election Committee decided to hear evidence. By opting to do so, the Election Committee recognized that additional evidence was required in order to make a determination. By depriving the Applicants an opportunity to challenge Albert Tanner's evidence and to adduce evidence in rebuttal, the Election Committee breached fundamental rules of procedural fairness – the right to know the case to be met and the right to be heard. In the circumstances, the Election Committee's decision as it relates to the bribery charge must be quashed.

[28] As for the other two other findings of the Election Committee (the failure of David Ledoux to post membership names and addresses and the CEO's failure to be present during the election process), the belated reasons provided by Ms. McGillivray do not satisfy the

requirement for justification, transparency and intelligibility in the decision-making process, a key element of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[29] Section 19.1 of the *Election Law* only provides for an appeal if a candidate or elector “has grounds for believing that there was an error or violation of [the Election Law] during the election process that might have affected the outcome of the election.” The Election Committee does not explain how the alleged violations affected the outcome.

[30] Moreover, the Election Committee does not explain on what basis it concluded that David Ledoux was personally responsible for posting the membership list and or what evidence it relied on beyond a bald assertion by Gordon Ledoux that the membership list was not posted. The allegation is disputed by the Applicants as well as the CEO. The latter asserts in an affidavit filed in reply to Ms. McGillivary’s affidavit that the voter’s list was in fact posted in various locations on April 5, 2018 (that is, prior to the first election).

[31] As for Gordon Ledoux’s complaint that “there was no electoral officer present when the electoral process was being executed” [emphasis added], the allegation was rejected by the Election Committee which, according to Ms. McGillivary, found that the CEO was present at the times specifically required under the *Election Law*. The Election Committee inexplicably went on to conclude that there was evidence that the CEO “was not physically present, or otherwise available or reachable, for much of the campaign period” [emphasis added]. However, that was not the allegation before the Election Committee. It was wholly improper for the Election Committee it to reach such a conclusion without notice to the Applicants and CEO.

[32] For the above reasons, I conclude that the Election Committee's decision was fundamentally flawed and unreasonable and should accordingly be set aside.

[33] The normal practice is to refer the matter back for redetermination. However, in some cases, this Court has refrained from doing so: see *Hudson v Canada (Indian Affairs and Northern Development)*, 2007 FC 203, at paragraphs 111 and 112. In the particular circumstances of this case, I conclude that it would not serve the interests of justice to remit the matter back to the Election Committee.

[34] First, the evidence submitted by Gordon Ledoux to the Election Committee was vastly insufficient to support his allegations of corrupt practice by David Ledoux or violations of the *Election Law*. The case is even more difficult to make given that the only witness to the alleged bribery has since passed away. Second, even supposing that there were violations of the *Election Law*, there was no evidence before the Election Committee that those violations might have affected the election results, given the gap in votes between the candidates. Finally, a rehearing of the appeal would only result in further delay and uncertainty for the community. The contested election took place almost one and a half years ago. After this length of time, the community is entitled to finality.

### III. Costs

[35] While costs should generally follow the event, the Court has a discretion to depart from this principle for good reason. In fixing costs, the Court may under Rule 400 of the *Federal Courts Rules*, SOR/98-106, consider the conduct of any party which tended to shorten or

unnecessarily lengthen the duration of the proceeding and whether any step in the proceeding was improper, vexatious or unnecessary.

[36] In my view, the Applicants' conduct, by starving the GFN of funds to defend the Election Committee's decision and preparing a certified tribunal record, was wholly improper and deserving of sanction. Although the Applicants were ultimately successful in this proceeding, they failed to move promptly to seek interlocutory relief and unnecessarily lengthened the duration of the proceeding.

[37] At the end of the day, the Court must do substantial justice between the parties in all of the circumstances. I conclude that members of the GFN should not be required to bear the costs for the Applicants' poor choices. In the circumstances, I consider it just and appropriate to award costs instead to the GFN in the fixed amount of \$8,000.00, inclusive of disbursements and taxes, to be paid to its solicitors of record.

**JUDGMENT IN T-1510-18**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed.
2. The decision of the Gambler First Nation Election Committee is quashed.
3. The Respondent, Gambler First Nation, is granted its costs for this proceeding, hereby fixed in the amount of \$8,000.00, inclusive of disbursements and taxes.

"Roger R. Lafrenière"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1510-18

**STYLE OF CAUSE:** DAVID LEDOUX, KELLIE LEDOUX AND LOUIE  
TANNER v GAMBLER FIRST NATION, GAMBLER  
FIRST NATION ELECTION COMMITTEE, GORDON  
LEDOUX, CHARLENE TANNER AND CURTIS  
DUCHARME

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** NOVEMBER 14, 2019

**JUDGMENT AND REASONS:** LAFRENIÈRE J.

**DATED:** NOVEMBER 19, 2019

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