Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20090723

Docket: A-102-09

Citation: 2009 FCA 235

CORAM: **SHARLOW J.A.**
RYER J.A.
TRUDEL J.A.

BETWEEN:

FORT MCKAY FIRST NATION

Appellant

and

STANLEY LAURENT

Respondent

Heard at Calgary, Alberta, on June 10, 2009.

Judgment delivered at Ottawa, Ontario, on July 23, 2009.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: RYER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal of the order of Justice Campbell dated February 24, 2009 declaring invalid the "Fort McKay First Nation Election Code dated December 22, 2004". The same order declared invalid the decision of Returning Officer Pauline Gauthier dated February 11, 2008 that rejected the nomination of the respondent Stanley Laurent for the election held February 25, 2008, and her declaration that Mr. Jim Boucher was acclaimed as Chief. Justice Campbell's reasons are reported as *Laurent v. Fort McKay First Nation*, 2009 FC 196. On April 2, 2009, Justice Campbell's order was stayed pending the disposition of this appeal and the hearing of the appeal was expedited.

Background

[2] Mr. Laurent was born a member of the Fond Du Lac Denesuline Nation, located 160 miles northeast of Fort McKay. Both communities are comprised of Dene people, and both are parties to Treaty No. 8. Mr. Laurent has lived on Fort McKay First Nation Reserve since 1990 with his wife. They have four children. Mr. Laurent has been involved in many community activities, including the volunteer fire department to which he was elected as Chief in 1990. He held that position until 2001. Mr. Laurent has also held several paid positions with Fort McKay First Nation and one of its corporations. In 1997, Mr. Laurent and his wife started a business that they operate from Fort McKay First Nation Reserve. Over the years they have employed approximately 50 members of the First Nation, including 18 members at the time of Mr. Laurent's affidavit sworn on March 6, 2008.

[3] Mr. Laurent has been a member of Fort McKay First Nation since 1995, when he applied for a transfer. He was required first to relinquish his membership in the Fond Du Lac Denesuline Nation, and post a notice for 30 days to permit any objections. There were none. Mr. Laurent was elected as a Councillor in 1999 for a two year term. In 2002 and 2004 he ran for Chief but was defeated both times by Chief Jim Boucher, the only other candidate.

[4] Fort McKay First Nation has always elected its Chief and Councillors by custom. There was no written election code for elections prior to 2005. Election rules were set by a band council resolution for each election. Under the election band council resolutions for 1999, 2002 and 2004, any member of Fort McKay First Nation who was of the age of 18 or older could stand for election if nominated by ten other members.

[5] After the 2004 election, a governance dispute arose between Chief Boucher and the two elected Councillors. On the application of Chief Boucher, an administrator was appointed to run the affairs of Fort McKay First Nation until the dispute was resolved. The dispute was resolved on terms that included an agreement to work toward the adoption of a written election code.

[6] More than one draft of a proposed new election code was prepared. For the purposes of this appeal it is necessary to consider only two of those drafts. One, which I will refer to as the "Old Draft", was prepared before December of 2004 and contained this provision:

> 106.1 This Code is in force and effective as of the date that it has been approved by the electors at a special meeting at which at least (50%) of the electors are in attendance.

[7] Under this provision, approval of the proposed new election code would require a "double majority", meaning that its approval would require an elector turnout representing a majority of eligible electors, as well as the affirmative vote of a majority of the electors who cast a vote. Under a double majority rule, approval of the proposed new election code would be impossible if the elector turnout represents less than a majority of eligible electors.

[8] In the draft of the proposed new election code dated December 22, 2004, which I will refer to as the "December Draft", there is no coming into force provision and no double majority rule. Therefore, the approval of the new election code in the form of the December Draft would require only the affirmative vote of a majority of votes cast.

[9] The record suggests that the double majority rule was a matter of some debate between the Chief and Councillors and the appointed administrator, but there is no clear explanation as to why it was included in the Old Draft but not in the December Draft.

[10] The December Draft contained the following provision entitled “Qualification of candidates”:

> 9.1 A person may be nominated as a candidate in any election under this Code if, on the nomination day, the person:
>
> 9.1.1 is a member of the first nation;
>
> 9.1.2 is at least 18 years of age or older;
>
> 9.1.3 is not employed by the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
>
> 9.1.4 has not been convicted of any indictable criminal offenses;
>
> 9.1.5 has not been found liable in a civil court or pursuant to criminal proceedings in a respect of any matter involving theft, fraud or misuse of property belonging to the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
>
> 9.1.6 does not have a debt payable for which payment was demanded in writing 90 days prior to the nomination day, including without limitation salary or travel advances, rent, or loans, to the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
>
> 9.1.7 has not been removed from the office of chief or councillor pursuant to s. 101.3 of the Code during the preceding term of office; and
>
> 9.1.8 is a lifelong member of the first nation who has never held membership with any other first nation.

[11] Section 9.1.8 is the principal source of the dispute that has arisen in this case. It is not clear whether this provision appeared in previous drafts.

[12] Mr. Laurent alleges among other things that section 9.1.8 was included in the proposed new election code mainly for the purpose of excluding him from running for Chief or Councillor. The only explanation offered by Fort McKay First Nation for the enactment of section 9.1.8 is found in paragraph 21 of the affidavit of Larry Hewko sworn on June 27, 2008. Mr. Hewko is a chartered accountant employed as the Chief Financial Officer for Fort McKay First Nation. Paragraph 21 of his affidavit reads as follows:

> 21. With respect to the history of section 9.1.8 of the Election Code, the information which I have received from Members is that this section was added to the Election Code to address concerns respecting people who did not have a historical connection to Fort McKay. This section has been understood and applied by Fort McKay First Nation as restricting people who have made a deliberate choice to change their membership status and transfer from another First Nation. These individuals may not have a historical connection to the Fort McKay First Nation and would not have been raised within the Fort McKay First Nation's culture and traditions. As such section 9.1.8 is generally regarded as a means to protect and preserve Fort MacKay First Nation's culture, traditions and values.

[13] The Chief and Councillors determined that the December Draft would be put to the electors in a referendum. They also adopted guidelines for the conduct of the referendum. Section 1.1.7 of the guidelines sets out the following referendum question:

> Do you approve of the Election Code of Fort McKay First Nation dated for reference December 22, 2004?

[14] Section 9.1 of the guidelines provides for the adoption of the proposed new election code by a simple majority of votes cast. It reads as follows:

> 9.1 The determination of the Referendum Question shall be by simple majority of the Electors who have participated in the Referendum Vote.

[15] It is not clear when the guidelines were adopted, whether the guidelines were distributed to the electors, and if so when.

[16] On January 8, 2005, the Chief and Councillors gave notice to the electors of Fort McKay First Nation that a proposed new election code would be reviewed and voted upon by the electors at a referendum to be conducted on February 8, 2005. The referendum notice states the question as:

> Do you approve of the proposed election code for the Fort McKay First Nation from this day forward?

[17] This is slightly different from the question set out in the referendum guidelines, but no one has suggested that anything turns on the difference.

[18] The referendum notice advised the electors that the proposed new election code would change the conduct of band elections significantly. It states:

> Every Band Member is strongly encouraged to review the proposed New Election Code as it contains many new provisions which are a departure from what the Band practice has been to prior elections.

[19] The referendum notice also states that a copy of the proposed new election code would be available for review at the administrative offices, and that a copy was mailed to the electors. It is undisputed that the subject of the referendum was the December Draft. Although Fort McKay First Nation produced no evidence that it was the December Draft that was made available for review by the electors and mailed to them, Mr. Laurent did not allege the contrary. On this point, Justice Campbell stated at paragraph 8 of his reasons that there is no evidence as to which draft was made available for review by electors or mailed to them. That is a correct statement, but it seems to me that, given that it was undisputed that the December Draft was the subject of the referendum, the onus was on Mr. Laurent to establish that it was not the December Draft that was made available for review or mailed to electors. That onus was not met.

[20] The following statement appears at the bottom of the referendum notice:

> The Fort McKay First Nation Election Code, Section 106 states: […]
>
> 106.1 This Code is in force and effective as of the date that it has been approved by the electors at a special meeting at which at least (50%) of the electors are in attendance.

[21] This statement is wrong because the quoted version of section 106.1 appears in the Old Draft but not in the December Draft that was the subject of the referendum. The record does not explain how this error came to occur. Fort McKay First Nation submits that it was simply a mistake. Such a mistake may have occurred if, for example, the referendum notice was drafted when the Old Draft was under consideration, but was not changed when it was determined that the December Draft would be the subject of the referendum.

[22] Although Mr. Laurent accepted that it was the December Draft that was the subject of the referendum, he argued that it could be approved as the new election code only on the basis of the double majority rule as set out in the referendum notice.

[23] Mr. Laurent says this in paragraph 21 of his affidavit referring to his reaction to the referendum notice:

> 21. I had discussions and meeting [sic] with other members of Fort McKay First Nation, in which we discussed the referendum and the requirement that 50% + 1 of electors attend. Many of us were opposed to the New Code. In order to defeat the passage of the New Code, myself and many other members boycotted the meeting.

[24] This indicates that Mr. Laurent and "many other members" understood from the referendum notice that a double majority would be required to adopt the proposed new election code, and for that reason they all decided not to participate in the vote. If that is true, I assume that Mr. Laurent and the others were hoping that a majority of electors would refrain from voting, making it impossible for the proposed new election code to be adopted by a double majority.

[25] The referendum was held on February 8, 2005. The December Draft was approved by a majority of the electors who voted, and it was declared to be adopted. For simplicity, I will refer to the December Draft as adopted at that referendum as the "Election Code".

[26] The electors who voted on the referendum did not comprise a majority of those eligible to vote. Therefore, although a simple majority was attained, a double majority was not. Nevertheless,

no one challenged the declared result of the referendum within a reasonable time after the results were known. Indeed, not even Mr. Laurent did so until November of 2007, when he commenced an application in the Alberta Court of Queen's Bench (described below).

[27] Section 106.1.1 of the Election Code provides for a review of section 9.1.8 within 60 days after the adoption of the Election Code. That provision reads as follows:

> 106.1.1 If, within 60 days of a ratification of this Code, a meeting of the membership is held to determine whether s. 9.1.8 of this Code should be struck from this Code, and if, at a secret ballot at that meeting of the membership, 50% plus 1 or more of the voters who cast votes at that meeting vote to strike 9.1.8, then s. 9.1.8 stands removed […].

Mr. Laurent took no steps to invoke this provision within the 60 day deadline. Nor did anyone else.

[28] One of the provisions of the Election Code increased the number of Councillors from two to four, and another provision increased the term of office of the Chief and Councillors from two to four years. No one challenged the extension of the term of the incumbent Chief and two Councillors from two to four years. In 2005, a by-election was held for the two additional Councillors. No one challenged the increase in the number of Councillors pursuant to the Election Code, or the result of the 2005 election. There is no evidence that any potential candidate in that election was disqualified.

[29] An election for Chief and four Councillors was called for February 25, 2008. It is not clear when the election date was announced. The nomination date was February 11, 2008. Mr. Laurent

wished to run for the position of Chief. The only other candidate for Chief was the incumbent, Chief Jim Boucher.

[30] Mr. Laurent believed that his candidacy would be barred because he is not a "lifelong member" of Fort McKay First Nation (section 9.1.8 of the Election Code) and because he has a criminal record (section 9.1.4 – Mr. Laurent says in his affidavit that he was convicted of an offence when he was in his late teens but he does not know whether the offence was indictable). In an attempt to prevent his disqualification, Mr. Laurent commenced a proceeding in November of 2007 in the Alberta Court of Queen's Bench. He sought, among other things, a declaration that the Election Code had not been validly adopted, and alternatively that sections 9.1.3 to 9.1.8 of the Election Code are not valid because they are contrary to the *Canadian Charter of Rights and Freedoms*. Mr. Laurent then moved for an interlocutory order that would prevent Fort McKay First Nation from barring Mr. Laurent's candidacy for Chief in the election scheduled for February 25, 2008. On February 5, 2008, Justice J.M. Ross of the Alberta Court of Queen's Bench dismissed Mr. Laurent's motion (*Laurent v. Fort McKay First Nation*, 2008 ABQB 84). The Alberta proceeding has been stayed.

[31] Mr. Laurent submitted his nomination papers on February 11, 2008. He was aware of the requirement to submit a criminal record check, but he says that he could not obtain one in time for the nomination deadline. Returning Officer Pauline Gauthier rejected his nomination. She explained her reasons in a letter dated February 11, 2008. That letter reads in relevant part as follows:

The Fort McKay First Nation Election Code states:

> Qualification of candidates
>
> 9.1 A person may be nominated as a candidate in any election under this Code if, on the nomination day, the person:
>
> 9.1.1 is a member of the first nation;
>
> […]
>
> 9.1.4 has not been convicted of any indictable criminal offenses;
>
> […]
>
> 9.1.6 does not have a debt payable for which payment was demanded in writing 90 days prior to the nomination day, including without limitation salary or travel advances, rent, or loans, to the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
>
> […]
>
> 9.1.8 is a lifelong member of the first nation who has never held membership with any other first nation.
>
> […]

Further more nomination papers state:

> That the following documents must be submitted with the nomination papers and candidates acceptance:
>
> 1. Certification of membership status (section 9.1.1);
> 2. […]
> 3. Criminal records check result (section 9.1.5);
> 4. Letter from the responsible finance officer of the first nation or the first nation group of companies confirming that the candidate has not been delinquent in the repayment of any debts to the first nation or any related business corporation or other entity owned or controlled, in whole or in part, by the first nation (section 9.1.7 [sic]); and
> 5. […]

Upon reviewing your nomination papers you do not meet the following requirements:

1. You are not a lifelong member of Fort McKay First Nation

> as required in Section 9.1.1 [sic].
>
> 2. You have not provided us with a Criminal Record Check section 9.1.5.
>
> 3. You have not provided us with a letter from the Finance Officer of Fort McKay Group of Companies
>
> Based on this we are returning your nomination papers and your name will not appear on the ballot for the general election held on February 25, 2008.

[32] Mr. Laurent had correctly predicted one of the grounds on which his candidacy would be rejected, namely, that he is not a "lifelong member of the first nation who has never held membership with any other first nation" as required by section 9.1.8 of the Election Code. The other two grounds were the lack of documentation as required by section 13.2 of the Election Code relating to his criminal record (section 9.1.4) and debts owed to Fort McKay First Nation and its related and controlled corporations (section 9.1.6).

[33] As the only other candidate for Chief was the incumbent Chief Jim Boucher, the Returning Officer declared that he was acclaimed as Chief.

[34] On March 11, 2008, Mr. Laurent filed in the Federal Court a notice of application for judicial review. He sought among other things a declaration that the Election Code was not properly promulgated and is invalid, and alternatively a declaration that sections 9.1.3 to 9.1.8 of the Election Code are invalid because they breach Mr. Laurent's rights under sections 3 and 15 of the Charter and subsection 35(1) of the *Constitution Act, 1982*.

[35] Justice Campbell concluded that there was a community consensus that the adoption of an election code required a double majority, and that the leadership of Fort McKay First Nation acted improperly in declaring the Election Code to be adopted by a simple majority. On that basis, he made an order declaring the Election Code to be invalid, and also declaring that the decision of the Returning Officer rejecting Mr. Laurent's nomination was invalid for want of jurisdiction, as was her declaration that Chief Boucher was acclaimed as Chief. Fort McKay First Nation appealed that order. As mentioned above, Justice Campbell's order was stayed pending the disposition of this appeal.

Analysis

[36] The appeal by Fort McKay First Nation raises a number of grounds of appeal. I will discuss them in the order in which they appear in its memorandum of fact and law.

Whether the application should have been dismissed for delay

[37] Fort McKay First Nation argues that Mr. Laurent's application should have been dismissed because it was not commenced within 30 days of the adoption of the Election Code as required by subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Justice Campbell rejected this argument because the application was a challenge to the decision of the Returning Officer dated February 11, 2008, and was brought within the 30 day period following the date on which Mr. Laurent says he received that decision. Justice Campbell concluded that it was open to Mr. Laurent to present, as grounds challenging the Returning Officer's decision, the argument that

the Returning Officer acted without jurisdiction because the Election Code had not been validly adopted. I agree with Justice Campbell that Mr. Laurent's application was not filed late.

[38] Despite my conclusion on the timing question, I note that Fort McKay First Nation raises a number of valid arguments as to why a challenge to the validity of the Election Code should be made as soon as possible after its adoption. The strongest point is that entertaining Mr. Laurent's challenge to the Election Code so long after its adoption, and after it had been relied upon for almost three years, has the potential to cause instability and uncertainty in the affairs of Fort McKay First Nation. However, those considerations do not affect the jurisdiction of the Federal Court to consider an application for judicial review of the decision of a Returning Officer pursuant to section 18.1 of the *Federal Courts Act*. They are more properly treated as factors in determining whether the Federal Court should exercise its discretion not to hear the application or, if the decision of the Returning Officer is found to be flawed, to fashion a remedy that takes the delay into account.

Palpable and overriding factual error

[39] Fort McKay First Nation argues that Justice Campbell's decision cannot stand because it is based on a palpable and overriding factual error.

[40] As I read Justice Campbell's decision, it is rooted in his factual conclusion that there was community consultation in the drafting of the proposed new election code. He states at paragraph 5 of his reasons that this is an undisputed fact. However, this factual conclusion is not based on any evidence in the record. Mr. Laurent's affidavit states that he was not aware of any such consultation.

Indeed, it is one of his complaints that the drafts were prepared by Chief Boucher and his advisers without consultation.

[41] Justice Campbell also concluded, based on his understanding that there had been community consultation, that there was community consensus that the approval of the proposed new election code would require a double majority, consistent with the statement in the referendum notice quoting section 106.1 of the Old Draft. This point is emphasized several times in his reasons, as indicated in the following excerpts (my emphasis):

> 27. As mentioned, the *Code* is the final result of a consultative process in which a number of drafts were produced.
>
> […]
>
> 30. It must be remembered that the development of the written custom election code was the result of a consultation with the Fort McKay First Nation membership. Thus, regardless of the nature of the internal leadership debate as described, the terms of the *Code* itself must be taken as an expression of the will of the membership of the Fort McKay First Nation that the referendum was required to be passed by a majority of the electors of the Fort McKay First Nation. There is no evidence that the membership provided the leadership with any authority to deviate from this expression of will.
>
> 31. I find it is fair to say that the creation of s. 106.1 at some time during the consultative process leading up to the referendum vote is evidence of the high importance given by the Fort McKay First Nation electors to the changes to the governance custom of the Fort McKay First Nation, including the qualifications required of candidates running for office. By s. 106.1, a majority of the electors of the Fort McKay First Nation would be required to attend a referendum vote meeting, and

> the referendum would only be passed by a majority vote of that voting body. Indeed, the statement in the *Code* that a majority vote of the Fort McKay First Nation electors is required to put the *Code* into effect, while not requiring the majority of the electors to attend a referendum vote meeting, is further evidence of the high importance of the proposed changes. In contrast, there is no evidence on the present record of any authority granted by the electors to the issuance of the contrary voting provision stated in the *Referendum Guideline*s that the *Code* can be put into effect merely by a simple majority of the votes cast in a referendum vote.
>
> […]
>
> 40. A second question is: is there any cogent evidence from which to infer that there is a consensus of acceptance of the leadership's failure to follow the standard for referendum approval stated in the *Code* as above described? It is important to remember that the *Code* is an expression of Fort McKay First Nation custom, and, by that custom, there are clear provisions regarding putting the *Code* into force and effect, and for amending it. In the present case, the custom election consensus of the membership of Fort McKay First Nation, as expressed in the *Code* itself, is to have the *Code* passed by a majority of the electors; this consensus was apparently disregarded by the leadership. Thus the question becomes: is this disregard acceptable by custom? Finding an answer to the question is all about the quality of the evidence.

[42] My review of the record discloses no evidence of a community consensus on the question of whether the adoption of an election code would require a double majority or a simple majority of the electors voting on a referendum. Since there was no evidence of community consultation, it was not reasonably open to Justice Campbell to infer that such a consensus had been reached as a result of community consultation.

[43] I am compelled to conclude that the order of Justice Campbell is based on a palpable and overriding factual error. In my view, it is necessary and appropriate for this Court to consider *de novo* the arguments raised by Mr. Laurent in his application.

Legal effect of the incorrect statement in the referendum notice

[44] Mr. Laurent argues that the Chief and Councillors, having quoted the double majority rule in the referendum notice, were bound to apply it and were not free to require only a simple majority. Fort McKay First Nation argues the contrary.

[45] In my view, the members of Fort McKay First Nation are entitled to expect that information sent to them regarding the affairs of the band is fairly presented, reasonably accurate, and not misleading. When a referendum is proposed, the electors should be given all of the information they reasonably require to form an intelligent judgment on whether and how to vote. This is the standard that has been adopted for corporate affairs generally (see *Goldex Mines Ltd. v. Revill et al.* (1975), 7 O.R. (2d) 216). There cannot be a lesser standard for the affairs of a self-governing First Nation.

[46] However, this general principle does not mean that Fort McKay First Nation is necessarily bound to abide by an incorrect statement in the referendum notice. Rather, the legal effect of the incorrect statement depends upon whether enough electors were misled to affect the result of the vote. There will rarely be direct evidence on this point, but there must be some evidence from which a court may reasonably draw an inference.

[47] The incorrect statement in the referendum notice may have been capable of leading electors to believe, incorrectly, that if they opposed the proposed new election code, they could effectively vote against it by not voting as long as the elector turnout was less than a majority.

[48] However, the mere possibility of such an erroneous belief cannot justify invalidating the result of the referendum. There must be evidence that is reasonably capable of supporting the inference that enough electors were misled in that manner to affect the outcome. In that regard, I observe that it is not reasonable to infer that the false statement misled all electors, or all electors who opposed the adoption of the proposed new election code.

[49] The only evidence on this point is found in the affidavit of Mr. Laurent which suggests that, based on his understanding of the double majority rule, he and “many other members” who opposed the proposed new election code decided not to vote in the referendum. If Mr. Laurent had believed that the double majority rule would govern the referendum, he could have protested the result of the referendum immediately after learning that the double majority rule had not been applied. He did not do so, and his affidavit offers no explanation for that. More importantly, Mr. Laurent does not name the other members to which he refers, or even say how many there were.

[50] In my view, it is not reasonable to infer from the record that the incorrect statement in the referendum notice misled enough electors to affect the outcome of the referendum. It follows that Mr. Laurent’s application for a declaration that the Election Code is invalid cannot succeed.

Acquiescence

[51] Fort McKay First Nation argues that, even if there was a fatal flaw in the referendum process because of the incorrect statement in the referendum notice, the conduct of Fort McKay First Nation after the adoption of the Election Code should be taken as evidence of a broad consensus of the electors favouring the Election Code. Justice Campbell rejected this argument. It is argued by Fort McKay First Nation that he did so because he misconstrued it as an argument in which past customs of Fort McKay First Nation were being relied upon as a saving provision.

[52] As evidence of acquiescence amounting to broad consensus, Fort McKay First Nation points to the uncontested 2005 elections for two Councillors, the lack of any protest against the right of Chief Boucher and the two Councillors that were elected in 2004 to continue in office for the four year term set out in the Election Code, and the numerous items of business that were conducted on the basis of the governance provisions of the Election Code, against which no protest was ever made by any elector, including Mr. Laurent.

[53] This Court accepted new evidence in the form of the affidavit of Kelsey Becker Brookes sworn on June 8, 2009. Ms. Brookes is a lawyer whose law firm was retained to oversee a referendum of Fort McKay First Nation held on March 13, 2009. Ms. Brookes was appointed as the Returning Officer for that referendum. The referendum question was:

> Do you agree that the Fort McKay First Nation Election Code (dated December 22, 2004) has been our recognized customary election law since February 8, 2005?

[54] Ms. Brookes was advised that 386 people were eligible to vote on this referendum. Her report of the results states that 273 ballots were cast, of which 176 were marked “yes”, 96 were marked “no”, and 1 was rejected. Thus, this referendum achieved a double majority.

[55] The validity of the decision of the Chief and Councillors to hold the March 13, 2009 referendum has been challenged by Mr. Laurent. I express no opinion on that point. I observe, however, that the result of the March 13, 2009 referendum is evidence that the Election Code has significant support among the electors of Fort McKay First Nation.

[56] Even if I had been persuaded that it would be reasonable to infer that the incorrect statements in the referendum notice could have affected the outcome, I would have concluded that it would not be appropriate to declare the Election Code to be invalid on that basis. In my view, there is sufficient evidence of acquiescence given the time that elapsed between the February 8, 2005 referendum and Mr. Laurent’s challenges in the Alberta Court of Queen’s Bench and the Federal Court, the fact that the Election Code has been the basis of one election and numerous decisions of the Chief and Councillors in the conduct of the affairs of Fort McKay First Nation, the lack of any other challenges to the Election Code, and the result of the March 13, 2009 referendum.

Constitutional challenges to sections 9.1.3 to 9.1.8.

[57] Mr. Laurent’s Federal Court application included a challenge to sections 9.1.3 to 9.1.8 of the Election Code based on the Charter and subsection 35(1) the *Constitution Act, 1982*. Justice Campbell did not consider it necessary to deal with Mr. Laurent’s Charter arguments, and so we do

not have the benefit of his analysis. On a preliminary point, I would note that the existence of significant community support for the Election Code cannot by itself defeat Mr. Laurent's constitutional challenges to sections 9.1.3 to 9.1.8.

[58] Sections 9.1.3 to 9.1.8 permits a person to be nominated as a candidate for Chief or Councillor only if the person:

> 9.1.3 is not employed by the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
>
> 9.1.4 has not been convicted of any indictable criminal offenses;
>
> 9.1.5 has not been found liable in a civil court or pursuant to criminal proceedings in a respect of any matter involving theft, fraud or misuse of property belonging to the first nation or any related business corporation or other entity which is owned or controlled, in whole or in par, by the first nation;
>
> 9.1.6 does not have a debt payable for which payment was demanded in writing 90 days prior to the nomination day, including without limitation salary or travel advances, rent, or loans, to the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
>
> 9.1.7 has not been removed from the office of chief or councillor pursuant to s. 101.3 of the Code during the preceding term of office; and
>
> 9.1.8 is a lifelong member of the first nation who has never held membership with any other first nation.

[59] Fort McKay First Nation argues that Mr. Laurent should have raised his constitutional challenges in an election appeal under the Election Code. The argument is that the Federal Court should decline to entertain Mr. Laurent's constitutional arguments because the Election Code would have provided him with an adequate alternative remedy.

[60] Part 7 of the Election Code provides for the appointment of an appeal arbitrator to resolve disputes arising from an election based on any of the grounds listed in section 81.1, if an appeal is filed with the returning officer within 14 days after the declaration of the election result. Section 81.1 reads in relevant part as follows:

> 81.1 A candidate or elector who voted in the election, may appeal an election on the basis that:
>
> 81.1.1 the returning officer made an error in the interpretation or application of the Code which affected the outcome of the election […].

[61] Section 78.1 requires the returning officer to appoint an appeal arbitrator not less than 20 days prior to the day fixed for the election. The qualifications for an appeal arbitrator are stated in section 80.1, which reads as follows:

> 80.1 The appeal arbitrator:
>
> 80.1.1 shall be either a lawyer qualified to practice law in the province of Alberta or a retired judge or justice of any level of court; and
>
> 80.1.2 may not be any person who has previously represented the first nation, the affected candidate or appellant, any related business corporation or other business entity which is owned or controlled, in whole or in part, by the first nation, or the Athabaska Tribal Council.

[62] Section 88.1 of the Election Code gives the appeal arbitrator a number of powers, including the power to determine questions of law arising in the course of the appeal hearing. Section 89.2 provides that the appeal arbitrator may dismiss the appeal, grant the appeal but deny any corollary relief on the basis that the grounds established by the appellant did not affect the election result, or grant the appeal and order corollary relief which may include a new election.

Pursuant to section 90.2 of the Election Code, the decision of an appeal arbitrator may be challenged in the Federal Court in an application for judicial review, but only on the basis that the appeal arbitrator erred in law or failed to observe a principle of natural justice.

[63] Mr. Laurent argues that he should not have been required to follow a procedure in the Election Code when he was challenging its validity. That argument must fail, given that he has failed to establish that the Election Code is invalid.

[64] Mr. Laurent argues in the alternative that he should not have been required to follow the appeal procedure in the Election Code because it is inherently biased against him, and because it would not result in an appropriate remedy.

[65] There is no evidence to support Mr. Laurent's argument that the appeal process is inherently biased against him. In my view, the qualifications for the appeal arbitrator as set out in section 80.1 provide a substantial safeguard against any such possibility. Further, any allegation of bias could be the subject of an application for judicial review of the decision of the appeal arbitrator.

[66] I agree with Fort McKay First Nation that an appropriate remedy is possible through the appeal process. It is true that Mr. Laurent could not have obtained a decision invalidating the Election Code, but that argument is no longer open to him. Mr. Laurent could have challenged the decision of the Returning Officer to reject his nomination on the basis of sections 9.1.4, 9.1.6 and 9.1.8. His appeal could have relied on the ground stated in section 81.1.1 of the Election Code,

specifically that the Returning Officer erred in her application of sections 9.1.4, 9.1.6 and 9.1.8 because the application of those provisions to Mr. Laurent resulted in a breach of his rights under the Charter and subsection 35(1) of the *Constitution Act, 1982*. The findings of fact and law that would have to be made by the appeal arbitrator to determine that ground of appeal are within the stated powers of the appeal arbitrator (see *Martin v. Nova Scotia (Worker's Compensation Board)*, [2003] 2 S.C.R. 504 and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585). Any determination by the appeal arbitrator on a point of law, or any failure by the appeal arbitrator to observe a principle of fundamental justice, would be reviewable by the Federal Court.

[67] I agree with Fort McKay First Nation that the election appeal procedure in the Election Code provides an adequate alternative remedy for Mr. Laurent's constitutional challenges to sections 9.1.3 to 9.1.8. I would decline on that basis to entertain his constitutional challenges in this application for judicial review.

The merits of the constitutional arguments

[68] Given the conclusions stated above, it would not be appropriate to comment on the merits of Mr. Laurent's constitutional challenges. I observe, however, that it would be difficult to reach a substantive conclusion on the constitutional issues based on the record of this case. It would be unfortunate if the important constitutional questions raised by Mr. Laurent fell to be determined on the basis of the failure of Mr. Laurent to meet the onus of proving a constitutional breach, or the failure of Fort McKay First Nation to meet the onus of justifying any breach that may be found.

Conclusion

[69] For these reasons, I would allow this appeal and set aside the order of the Federal Court. Making the order the Federal Court should have made, I would dismiss Mr. Laurent's application for judicial review. As Fort McKay First Nation has not sought costs, none should be awarded.

"K. Sharlow"
J.A.

"I agree.
C. Michael Ryer J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATE OF HEARING:	June 10, 2009
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CONCURRED IN BY:	RYER J.A. TRUDEL J.A.
DATED:	July 23, 2009

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