

Case Name:

Nisichawayasihk Cree Nation v. Nisichawayasihk Cree Nation (Appeal Committee)

Between

Jerry Primrose, Agnes Melinda Spence, Shirley Louise Linklater, William Elvis Thomas, D'arcy Linklater, David M. Spence and Jimmy Hunter-Spence in their personal capacity and also on behalf of the Nisichawayasihk Cree Nation in their capacity as Chief and Council of the Nisichawayasihk Cree Nation, applicants, and Jimmy D. Spence, Carol Prince, Gordon Hart, Dennis Bunn, Shirley Linklater and Ron D. Spence comprising the Nisichawayasihk Cree Nation Appeal Committee appointed by the Nisichawayasihk Cree Nation pursuant to Section 19 of the Nisichawayasihk Cree Nation Laws Election Code, 1998-E1 dated August 9, 2002 and the said Nisichawayasihk Cree Nation Appeal Committee and Lillian Gail Gossfeld-McDonald, J.D. Moore, Glen Francois, Alpheus Moody and Carol Kobliski, respondents, and Ella Moose, intervener

[2003] F.C.J. No. 657
2003 FCT 464
Docket T-1879-02

**Federal Court of Canada - Trial Division
Toronto, Ontario
Campbell J.**

Heard: April 16, 2003.
Judgment: April 22, 2003.
(57 paras.)

Indians, inuit and metis — Government — Elections — Candidates, qualifications — Validity — Setting aside elections — Appeal tribunals — Self-government — Application of rules of natural justice.

The applicants applied for judicial review of a decision of the respondent Appeal Committee which ordered a new election for the Nisichawayasihk Cree Nation. The Nation had enacted a Code providing for its self-government, and elections were called in July, 2002. The Code provided that candidates must undergo an RCMP record check, and file within a certain time to be eligible. The electoral officer found that five persons who filed late were ineligible, as

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¶ 2 The Applicants, who are the successful candidates for Chief and Council, challenge the authority of the Appeal Committee to make the decision leading to the calls for a new election. The challenge is defended by the members of the Appeal Committee (the "Appeal Committee Respondents"), and five unsuccessful candidates who filed appeals (the "Appellant Respondents"). The Intervener Electoral Officer generally supports the Applicants' challenge. Thus, the present judicial review application requires a review of the decision of the Appeal Committee to determine whether it had the jurisdiction to, in effect, upset the expressed will of the electorate.

A. What is the distribution of power under the Code?

¶ 3 It is agreed that the Code is the result of wide consultation with the membership of the NCN, and by vote of the membership, codifies band custom governing elections and is the law to be followed in selecting officials to serve in the government of the NCN. The preamble to the Code (Applicants' Application Record, ("AAR"), Vol.1, pp.36 - 63) makes this very clear:

Whereas: The Nisichawayasihk Cree Nation believes that the Creator made the lands and the citizens of the Nisichawayasihk Cree Nation. The Creator gave us laws that define our rights and responsibilities and govern all our relationships so that we may live in harmony with nature and mankind.

Whereas: The Nisichawayasihk Cree Nation has maintained its freedom, spiritual beliefs, languages, culture and traditions and has exercised powers of self-government from the beginning of time.

Whereas: The Nisichawayasihk Cree Nation wishes to make laws in writing for the governance of its citizens, the protection of its lands, the use of its resources, and the election of its government.

Therefore this law by and with the advice of the citizens of the Nisichawayasihk Cree Nation, is enacted as follows:

¶ 4 The following selected provisions of the Code state the intention of the membership of the NCN as to how elections are to be conducted:

Appointment.

4(1) Subject to subsection (2), at least forty-five (45) days prior to the expiry of its term of office, council shall appoint an elector who communicates in Cree and English, as the electoral officer for purposes of this Code.

Powers and duties of the electoral officer.

8(1) The electoral officer shall:

(a) exercise general direction and supervision over the administrative conduct of elections;

Election order.

- 10(3) Upon receipt of a resolution under subsection (2), the electoral officer shall immediately issue an order:
- (a) fixing the date, not more than fourteen (14) days and not fewer than seven (7) days from the date of the order for the filing of nomination papers by the candidates;
 - (b) fixing the date of the election no less than seven (7) days and no more than fourteen (14) days from the date of the close of nominations;
 - (c) fixing the date for a nominating meeting to be held, which date shall be no more than three (3) days after the date for filing nomination papers;
 - (d) fixing the date and time of advance polls; and
 - (e) fixing the location of the polling places and the hours during which the polls will be open,

and post the order in at least five (5) conspicuous places on reserve.

Candidate qualifications.

- 12(1) A person is qualified and eligible to be nominated for, and elected to, the positions of chief or councillor if the person:
- (a) is an elector;
 - (b) is able to communicate in the English or Cree languages;
 - (c) is ordinarily resident on reserve on [sic] the lands immediately adjacent to the reserve as determined by the factors in ss. 12(2) prior to the date of the nominating meeting referred to in ss.12(5); and
 - (d) at the time nomination papers are filed provides the electoral officer with a written criminal records check confirming the person has never been convicted of an indictable offence,

but a person shall not run for the positions of chief and councillor during the same election.

- 20(1) Within seven (7) days after the election any candidate may request a recount by submitting such request to the electoral officer, in which case the electoral officer shall give all candidates and electors three (3) days notice that a recount has been requested, following which the electoral officer shall immediately convene a meeting of the candidates and the deputy returning officer to recount the ballots.

Factors to consider.

20(2) During the recount the electoral officer shall:

- (a) carefully examine all ballots used in the election and decide whether ballots were properly considered spoiled, discarded or rejected, and if not, include such ballots in the count of votes for each candidate; and
- (b) following the recount either:
 - (i) declare the candidates with the most votes elected, or
 - (ii) if there is a tie between the candidates with the most votes, declare the candidates tied and request council to call a by-election for the candidates who are tied, in accordance with section 11.

Appeal of electoral officer's decision.

20(3) Any candidate who requested a recount pursuant to subsection (1) may appeal the decision of the electoral officer to the Appeal Committee within seven (7) days of the decision.

Recount by Appeal Committee.

20(4) Upon receipt of an appeal, the Appeal Committee shall within seven (7) days convene a panel of at least three (3) members to conduct a recount in accordance with subsection (4).

Corrupt practice appeal.

20(5) Within seven (7) days after the election any candidate or elector who voted may file an appeal with the Appeal Committee if that person has reasonable grounds to believe there was:

- (a) a violation of this Code which may affect the results of the election; or

20(11) For appeals filed under subsection (6), the Appeal Committee may uphold the decision, or where it finds the grounds of appeal have been established, it may substitute its decision for that originally made.

Final decision.

20(12) A decision of the Appeal Committee pursuant to subsections (9), (10), and (11) shall be final and binding on all electors.

Judicial review.

20(13) A decision of the Appeal Committee may be reviewed by a court of competent jurisdiction solely by reason that the Appeal Committee failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction under this Code.

¶ 5 Two important features of the Code give an indication of how the self government intention of the NCN membership is to be viewed: the Oath of Allegiance that elected officials are required to take, and the provisions of s.20(13) as quoted above. The Oath of Allegiance required to be taken by the newly elected Chief and each Counsellor, which is a schedule to the Code (AAR, Vol.1, p.60), reads as follows:

I ----- before the Creator and members of the Nisichawayasihk Cree Nation, do swear or solemnly affirm that I will be faithful and bear true allegiance to the laws of the Nisichawayasihk Cree Nation and Canada.

¶ 6 Thus, while the self government interests of the NCN are paramount, the Code recognizes that these government interests are, nevertheless, to be conducted within the laws of Canada. The Code provides certain rights to the NCN membership with respect to elections, but so do the laws of Canada. The Code lays out an internal appeal procedure according to the provisions of the Code to challenge aspects of an election, but it also provides an external review procedure by the Federal Court of Canada according to the laws of Canada. It seems clear that the intention of the NCN membership in providing these rights of challenge, is to guarantee that the results of an election are fair and just for all; that is, no one gains an advantage.

¶ 7 Thus, with respect to an election, the Code places power in the hands of a number of people to ensure that the results of the election are fair and just according to the law expressed in the Code.

¶ 8 It is important to make mention of the relationship to be expected of those that hold power. The preamble makes it very clear that it is to be one of respect. The respect necessary for the good governance of the NCN can only be accomplished by adherence to the words of the Code; it is the law.

B. How should the Code be interpreted?

However, the explanation in the Handbook of the various provisions of the Code is only descriptive of the provisions themselves. Thus, apart from the words of the Code itself, this Handbook does not provide any evidence to assist in determining what community members wanted to accomplish in their law governing their elections.

¶ 12 The second "Handbook" is the Nisichawayasihk Cree Nation Election Officials' Handbook (IR, p.78-96). It is agreed that this document was not in wide circulation at the time of the election under review but is only intended for the use of those persons charged with election responsibility. The Officials' Handbook contains an opinion about the meaning to be placed on s.20(6) of the Code which is cited in support of the argument advanced by the Respondent Appeal Committee. This argument is addressed in Section C(4) below.

¶ 13 In my opinion, apart from the Officials' Handbook being some evidence of the intended meaning of s.20(6), there is no other reliable evidence which, in addition to the words of the Code, gives insight into the intended meaning of its provisions.

C. What is the correct interpretation of the powers and responsibilities conferred by the Code?

¶ 14 With respect to the analysis which follows, I find that the correct interpretation of the powers and responsibilities of the Electoral Officer, any Appellants, and the Federal Court comes only from the words of the Code itself.

1. The Electoral Officer

¶ 15 The usual powers and duties which might be expected of an Electoral Officer are set out in s.8(1). However, s.8(2) provides "special powers", the most wide-ranging being that found in s.8(2)(e) which gives the Electoral Officer the power to "generally adapt the provisions of this Code to existing circumstances". It is important to note that no direction limit is placed on this extraordinary power. The latter part of s.8(2) also provides an emergency power. Some examples provided as to what would constitute an emergency are "flood, forest fire or death of a member or other person". However, it appears from the words of the provision that this list is not exhaustive; examples are given only as guidance to the Electoral Officer to help her or him decide what constitutes an emergency.

¶ 16 In my opinion, the extraordinary power stated in s.8(2)(e), and the emergency power are jurisdiction conferring provisions, and, as such, the actions of an Electoral Officer taken pursuant to them can be challenged in a properly brought appeal to the Appeal Committee, and the decision of the Appeal Committee can be reviewed in a properly brought judicial review application to the Federal Court as allowed according to s.20(13) of the Code.

2. Appellants

¶ 17 Only the appeal provisions of s.20(5) and s.20(6) are in issue before me for decision in the present application. These two provisions set out certain mandatory requirements for an appeal to be brought to the Appeal Committee. Thus, the power of an Appellant to raise a challenge under either provision comes with certain stated responsibilities. Under both

¶ 22 In their written and oral presentations, both counsel for the Respondent Appeal Committee and counsel for the Appellant Respondents have argued that the jurisdictional decisions of the Appeal Committee should stand and not be judged by such a strict standard as correctness. Two arguments are offered: because the Code is an expression of NCN self-government, the Appeal Committee is in the best position to decide what the Code means; and, indeed, the law of Canada requires that jurisdictional decisions of the Appeal Committee be judged on the more tolerant standard of whether they are merely "reasonable". As a result, the Respondents argue that the Appeal Committee "has the right to be wrong", and everyone should accept this. I do not accept these arguments.

¶ 23 As explained above, even within the NCN's aspiration for self-government, the preamble to the Code requires the Appeal Committee to follow the law expressed in the Code, and also the law of Canada. Under the Code, the Appeal Committee is only one of a number of holders of power; it does not have a paramount authority.

¶ 24 In my opinion, the legal argument presented by the Respondents does not stand up to rigorous inspection. In the course of the hearing, the Respondents argued that the well recognized authority cited above requiring jurisdictional matters to be decided on the standard of correctness has, in some way, been overtaken by recent pronouncements of the Supreme Court of Canada. In particular, the case of *New Brunswick v. Moreau-Bérubé*, [2002] 1 S.C.R. 249 was cited as an example.

¶ 25 *Moreau-Bérubé* concerns a challenge to a conclusion reached by the Judicial Council of New Brunswick that a judge should be removed from office due to contentious remarks she made from the bench. In *Moreau-Bérubé*, the issue before the Supreme Court of Canada was with respect to the standard that should be used to review the conclusion reached, not with respect to whether the Judicial Council had jurisdiction to reach the conclusion. That is, the decision-making jurisdictional authority of the Judicial Council to reach the conclusion it did was not in question; it had the jurisdiction to reach a conclusion because the case had been referred to it after an inquiry had been conducted. In the present case, unlike that in *Moreau-Bérubé*, the decision-making authority of the Appeal Committee is in question; therefore, I find there is no change in the law.

¶ 26 I find that the standard against which the decision of the Appeal Committee must be judged with respect to its own jurisdiction to act is correctness. That is, in my opinion, the Appeal Committee does not have the right to be wrong; it has the obligation to be right.

4. The Appeal Committee

¶ 27 For the purposes of the present judicial review, the Appeal Committee is required to correctly decide whether it has the authority to act on an appeal filed under either s.20(5) or s.20(6) of the Code. Thus, ascertaining the correct meaning of these two provisions is essential. As mentioned above, the Respondents rely on portions of the Officials' Handbook as a guide to the interpretation of s.20(6) of the Code. The portions relied upon are as follows:

After the nomination papers have been filed and before the nomination meeting, the Electoral Officer must review all of the nomination papers and

statement is a correct interpretation, then whether an appeal is filed under s.20(5) or s.20(6), a qualified candidate is protected from a challenge of the decision of the Electoral Officer. Since the appeals filed in the present case challenge the status of successful qualified candidates, this opinion does not only point to the conclusions the Respondents foster. Third, in the third passage quoted above, the statement supporting the Respondents' position is only made by way of example. As such, it is inconclusive.

¶ 31 For these reasons, I give no weight to the Officials' Handbook as a guide to interpretation.

D. What happened in the electoral process to generate appeals?

¶ 32 Decisions made by the Electoral Officer prior to the election generated the appeals which are at the base of the decisions under review. Section 12(1) of the Code sets out candidate qualifications; prior to the Nomination Meeting of August 14, 2002, the Electoral Officer made decisions with respect to certain candidates, qualifying two where a question existed as to their residence, but disqualifying 17 for failure to meet the criminal record requirement, and five for failing to meet the filing deadline requirement.

¶ 33 At the nomination meeting on August 14, 2002, the Electoral Officer announced her disqualification decisions. But, as a result of consultation with all candidates and the community at that event, the Electoral Officer changed her mind; she qualified all 5 who filed late, and qualified all 17 on the criminal record deficiency by adopting a creative response to a very difficult problem.

¶ 34 The written criminal record check required by s.12(1)(d) is expected to be provided by the RCMP. However, it appears that there was wide spread misunderstanding about what information and time is required of the RCMP to obtain a written confirmation that a candidate does not have a criminal record. The Electoral Officer became aware very late in the electoral process that the RCMP checks could not be provided before the election by those that had applied for one, in good faith, to the RCMP. The Electoral Officer's decision to rectify the problem experienced by these candidates was to take a sworn declaration from each of them that they did not have a criminal record. On this basis, all 17 were allowed to stand for election.

¶ 35 At the conclusion of the Electoral Officer's decision-making at the Nomination meeting, there were no objections or complaints about the residence of any candidate that she had announced, and there were no objections or complaints on any ground to the eligibility of any candidate that she announced (see: the Affidavit of Ella Moose, sworn February 26, 2003, IR, pp. 4-10).

¶ 36 It is clear that all of the Electoral Officer's decisions respecting candidate qualifications were made under s.8(1) and/or s.8(2) of the Code.

E. What jurisdictional decisions did the Appeal Committee make?

¶ 37 In its decision of October 22, 2002, the Appeal Committee made a number of findings with respect to "violations" of the Code (see AAR, pp.9-18).

¶ 38 An appeal was filed by each of the Appellant Respondents: Glen Francois, Carol

papers in apparent contravention of s.12(3) of the Code, the Electoral Officer did not have proper authority to reverse these disqualifications and permit late filing of nomination papers. In making these findings, the appeal filed by Ms. Gossfeld-McDonald was not specifically mentioned.

¶ 43 In its decision, the Appeal Committee also concentrated a good deal of effort on the decision of the Electoral Officer at the nomination meeting allowing persons to run for election despite not being able to comply with the precise criminal record check requirements of s.12(1)(d). On this point, the Appeal Committee confirms that, during its deliberations, the Electoral Officer pointed out her special powers in s.8(2) of the Code. However, in effective response, the Appeal Committee went so far as to state that s.8(2) is "so vague as to render it meaningless", and found that certain of the candidates had not complied with s.12(1)(d).

¶ 44 In the end result, on each of the findings just described, the Appeal Committee called for a new election pursuant to s.20(10) of the Code. By s.20(10), only with respect to s.20(5) appeals, when the Appeal Committee decides that the grounds of an appeal are established and the outcome of the election has been affected, the Appeal Committee is required to notify the Electoral Officer and the Council, and upon being so notified, the Council is required to call a new election. But, it is important to note that it appears the Council also has a responsibility to make a decision; upon receiving notice it is only required to call a new election if it determines that the outcome of the entire election was affected.

¶ 45 In any event, it seems that the Appeal Committee's calls for a new election were intended to be the notice that it found it was required to give. As it is clear it had no authority to do anything else, for the purposes of this application, I find that the "calls for a new election" constitute a decision to give "notice" pursuant to s.20(10) of the Code.

F. Was the Appeal Committee correct in the jurisdictional decisions it made?

¶ 46 The Applicants' primary argument, supported by the intervener Electoral Officer, is that the Appeal Committee had no jurisdiction to render an opinion with respect to any of the decisions made by the Electoral Officer at the August 14, 2002 nomination meeting. On what I consider to be the correct interpretation of the words used in s.20(5) and s.20(6) of the Code, I completely agree.

¶ 47 In my opinion, s.20(5) and s.20(6) are not ambiguous provisions; read together with s.20(1)-(4), they speak to a well thought out general appeal scheme intended by the membership of the NCN.

¶ 48 Section 20(5) is intended to deal with problems experienced during the course of an election. The provision begins with the heading "Corrupt Practice Appeal" and goes on to describe the circumstances upon which an appeal can be brought, that is, either for a violation of the Code which may affect the results of the election already held, or a corrupt practice in connection with the election already held which may affect the results of the election. As the provision is focussed on problems experienced within an election already held, an appeal must be filed within 7 days of the election.

¶ 49 On the other hand, s.20(6) is intended to deal with problems experienced going into an election. The provision speaks to only a certain kind of problem: a "decision" that

but follow the exact provisions as written.

¶ 56 It is clear on the record that no appeal was filed by any party alleging as a ground the Electoral Officer's decision with respect to criminal record checks required under s.12(1)(d). The Code is clear: the Appeal Committee can only act on properly filed appeals. I find that the Appeal Committee has no jurisdiction to act on its own motion to introduce grounds of appeal not stated in a properly filed appeal document.

¶ 57 Therefore, by purporting to act under s.20(5) on what are s.20(6) appeal issues arising from the decisions the Electoral Officer made at the nomination meeting of August 14, 2002, I find that the Appeal Committee was not correct in the jurisdictional decisions it made. Accordingly, I find that the Appeal Committee had no jurisdiction to give notice pursuant to s.20(10) of the Code.

ORDER

For the reasons provided, for want of jurisdiction, I hereby quash the Nisichawayasihk Cree Nation's Appeal Committee's decision of October 22, 2002 to give notice pursuant to s.20(10) of the Nisichawayasihk Cree Nation Laws Election Code.

In my opinion, none of the individual parties to this judicial review, whether they be Applicants, Respondents, or Intervener, should bear any costs for bringing this matter to decision. I have no doubt of the good faith of all concerned to seek a ruling on the correct interpretation of the Nisichawayasihk Cree Nation Election Code, and no one should be, in effect, penalised for seeking this result.

Accordingly, I make no order as to costs, but respectfully suggest that the Nisichawayasihk Cree Nation itself, through its Chief and Council, provide reasonable reimbursement to individual parties who have incurred personal out-of-pocket or legal expenses.

CAMPBELL J.

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