

Federal Court



Cour fédérale

Date: 20130111

Docket: T-1791-11

Citation: 2013 FC 26

Ottawa, Ontario, January 11, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

RODNEY YELLOWDIRT

Applicant

and

**THE ALEXANDER FIRST NATION
ELECTION APPEAL BOARD AND
THE ALEXANDER FIRST NATION,
AS REPRESENTED BY ITS CHIEF AND
COUNCIL, AND CHIEF HERB ARCAND,
ARMAND ARCAND, MARTY ARCAND,
CURTIS ARCAND, MARCEL ARCAND,
BERNARD PAUL AND KURT BURNSTICK**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Facts

[1] On August 11, 2011, elections took place to choose the new councillors and Chief of the Alexander First Nation Band [“the Band”]. The Band is located near the town of Morinville, northwest of Edmonton and has approximately 1818 members of which half live off-reserve.

[2] Following the election, the Applicant made an application to the Appeal Board based on a number of grounds. He namely alleged that a corrupt practice took place during the election process and that the definition of “Elector” in the *Alexander Tribal Government Customary Election Regulations* [the “Election Regulations”] is contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982, 1982 (UK), 1982, c 11*, [“the Charter”] since it excludes all of the members of the Band who live off-reserve from the electoral list.

[3] During the hearing held on September 26, 2011 before the Appeal Board, Lawrence Bruno [“Mr. Bruno”], witness for the Applicant, stated that Bernard Paul and Kurt Burnstick [“Respondents Paul and Burnstick”], councillors of the Band who were elected in August 2011, provided financial help in exchange of his family’s votes. The Chair of the Appeal Board [the “Chair”] adjourned the hearing in order to give Mr. Paul and Mr. Burnstick the opportunity to respond to the evidence.

[4] At the hearing on the following day, the Chair stated that he had spoken over the phone with Mr. Paul, that he told him about the allegations made against him and that he denied all of them and said that he would not attend the hearing. The Chair added that he had tried to reach Mr. Burnstick and that he would not proceed until he speaks with him.

[5] On September 28, 2011, the Chair informed the Applicant by e-mail that he had communicated with Mr. Burnstick by telephone, that he informed him of the allegations made

against him and that he denied all of them. At the hearing on September 30, 2011, the Chair indicated that Mr. Burnstick would not be present.

II. Decision under Review

[6] In a decision rendered on October 4, 2011, the Appeal Board rejected the Applicant's appeal which addressed the allegations of corruption against the Respondents Paul and Burnstick. As for the constitutional question raised by the Applicant regarding the definition of "Elector" under the Election Regulations, the Chair decided that considering the grounds of appeal as set out in section 29 of the Election Regulations, the Appeal Board does not have jurisdiction to decide upon such issue. Moreover, he considered that the *Canadian Human Rights Act*, RSC, 1985, c H-6 which applies on reserves, is probably a more appropriate channel to address the issue of the constitutionality of the definition of "Elector" under the Election Regulations.

III. Applicant's Submissions

[7] First, the Applicant submits that the Chair acted contrary to his obligation of procedural fairness by communicating privately with Respondents Paul and Burnstick and that it affected the impartiality of the Board.

[8] Second, the Applicant submits that the Chair erred in his interpretation of the Election Regulations by deciding that the Appeal Board does not have jurisdiction to decide upon the constitutionality of the definition of "Elector" under the Election Regulations. It has been recognized that administrative tribunals are invested with the power of adjudicating Charter challenges when invested with the power to decide upon questions of law.

IV. Respondents' Submissions

[9] As for the Applicant's first argument, the Respondents Paul and Burnstick submit that the Applicant never objected to the private communications and therefore consented to them. Moreover, the Applicant initially requested that the Chair contact them. It is submitted that at all time the Applicant was kept informed by the Chair of the said communications.

[10] The Respondents Paul and Burnstick did not make any argument to counter the Applicant's position regarding the Appeal Board's decision not to decide on the Charter challenge. The other Respondent, the Alexander First Nation Band did submit that Charter challenges of the electoral list are not subject to the jurisdiction of the Appeal Board but rather within the jurisdiction of the Electoral Officer, as outlined in sections 17 and 29 of the Election Regulations.

V. Issues

[11] Two issues are raised in the present judicial proceedings:

1. Do the Chair of the Appeal Board's private communications with the Respondents Paul and Burnstick amount to a breach of procedural fairness?
2. Did the Appeal Board err in law by deciding that it does not have jurisdiction to decide upon the constitutional validity of the definition of "Elector" under the Election Regulations?

VI. Standard of Review

[12] The applicable standard of review to the question of procedural fairness is correctness

(*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, 82 Admin LR (4th) 1).

As for the Charter related issue as to which entity under the Electoral Regulations has the jurisdiction over the subject matter of the electoral list, the Supreme Court of Canada and the Federal Court of Appeal have decided that when a tribunal is interpreting its “own statute or statutes closely connected to its function, with which it will have particular familiarity” for the purpose of solving a question of jurisdiction, the applicable standard is that of reasonableness, unless the situation is exceptional (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 at para 34, [2011] 3 SCR 654, *Public Service Alliance of Canada v Canadian Federal Pilots Association and Attorney General of Canada*, 2009 FCA 223 at para 36, 98 Admin LR (4th) 25 and *Orr v Fort McKay First Nation*, 2012 FCA 269 at para 10, 2012 CarswellNat 4153).

VII. Analysis

A. *Do the Appeal Board Chair’s private communications with the Respondents Paul and Burnstick amount to a breach of procedural fairness?*

[13] The relevant sections of the Election Regulations, which apply to the Appeal Board read as follows:

1. In these Regulations:

- a) “Appeal Board” means a board consisting of such impartial person or persons who:
 - i) are not members of the Alexander Tribe, and
 - ii) are appointed by the Alexander Tribal Chief and Council.

29. Within fifteen (15) days after the posting of the written statement by

the Electoral Officer pursuant to Section 27, any elector who has reasonable grounds to believe:

- a) that there was corrupt practice in the [sic] connection with the election, or
 - b) that these Regulations were not complied with may appeal the election of a candidate or candidates by filing a written notice of appeal with the Electoral Officer which sets out the grounds of the appeal.
30. The Appeal Board shall hear the appeal with [sic] thirty (30) days of filing of the notice of appeal and shall deliver its decision with [sic] five (5) days of hearing of the appeal. The Appeal Board shall not be bound by any rules of evidence. The decision of the Appeal Board shall be final and binding. Any appeal to a Court of Law shall be found in law and not in fact.
31. Where the Appeal Board finds that a candidate or candidates have not been elected to office in accordance with these Regulations, the Electoral Officer shall hold a nomination meeting and election for the vacant office or offices in accordance with these Regulations.
32. The Alexander Tribal Chief and Council shall have the authority to remunerate the Electoral Officer and his assistants and members of the Appeal Board in such manner as it deems necessary.

[14] The Election Regulations do not confer on the Appeal Board the power to publish the notice of appeal, to issue subpoenas, to order the production of documents, nor do they stipulate the process to be followed during the hearings such as the calling of witnesses, the procedure, etc. The only sections of the Election Regulations that apply to the Appeal Board are the ones referred to in the preceding paragraph which grant the Appeal Board a limited jurisdiction.

[15] The notice of appeal contains serious allegations of corruption against elected councillors of the Band, the Chief and some employees of the Band. It also contains allegations against the

Electoral Officer and some of his employees. The evidence does not indicate that the notice of appeal was brought to the attention of any Band member or to any other individual.

[16] It is clear that the jurisdiction given by the Election Regulations to the Appeal Board is important as it has the potential of affecting seriously the reputations of members of the Band.

[17] The evidence reveals that the Chair of the Appeal Board exchanged e-mails with the Applicant and communicated with him during the hearing. The Applicant was seeking collaboration from the Chair to ensure that pertinent financial information of the Band Council would be given to the Appeal Board in order for a fair decision to be rendered. The Applicant had tried to obtain such information from a Tribal Administrator but had not been successful.

[18] The evidence also indicates that the Chair had at least one conversation with the Tribal Administrator, once the hearing had begun, regarding allegations of corruption made against Respondents Paul and Burnstick.

[19] In addition, it is agreed by all that the Chair of the Appeal Board phoned both Respondents Paul and Burnstick in order to inform them of the testimony of Mr. Bruno (who allegedly received \$1300 from the councillors in return for his family's votes) according to which they were involved in important corruption practices during the election. They both denied the allegations with some explanation and told the Chair that they would not appear at the hearing.

[20] It is also agreed that following the conversations with Respondents Paul and Burnstick, the Chair reported in writing to the Applicant and also at the hearing. There is contradictory evidence as to whether or not the Applicant requested the Chair to contact Respondents Paul and Burnstick and whether or not the Applicant had objected to the Chair contacting the individuals. There is evidence indicating that after hearing the testimony of Mr. Bruno, the Chair felt that procedural fairness required that both Respondents have an opportunity to respond to the evidence.

[21] The evidence demonstrates that the Chair of the Appeal Board in a letter to the Applicant dated September 15, 2011 explained that “[...] the onus is on the Appellant to bring compelling evidence to prove its *[sic]* allegations on a balance of probabilities.”

[22] In the context of allegations of corrupt practice, the Applicant made a request for financial information to the Tribal Administrator, which was refused for privacy reasons. Even though the Applicant requested that the Chair of the Appeal Board provide him with the relevant financial information, the Chair was not able to obtain it. It is to be noted that the Certified Tribunal Record does contain financial information of the Band: the Trial balance is dated June 30, 2011. It lists all of the Band members' names and others that received cheques from the Band. There is no Trial balance as of August 11, 2011, date of the election.

[23] The Appeal Board scheduled three days to hear the testimonies of witnesses. Following the testimony of Mr. Bruno on September 26, 2011, the Chair decided to bring the hearing to an end, until he had spoken to the Respondents Paul and Burnstick. There is some evidence that the Chair at the hearing on September 27, 2011 reported on his conversation with Mr. Paul but that he did not

wish to continue until he had spoken with Mr. Burnstick. On September 30, 2011, the Chair reported on his conversation with Mr. Burnstick and the Applicant presented oral submissions. The Certified Tribunal Record contains only a transcript of Mr. Bruno's testimony of September 26, 2011. No audio recording of the hearings is included in the Tribunal Certified Record.

[24] The Applicant was self-represented throughout the proceedings before the Appeal Board and there was no other party involved. The evidence does not reveal if a Registrar Officer was involved but the Certified Tribunal Record indicates that a Court Reporter was present and was filing and numbering the exhibits presented.

[25] This is a general portrait of the pertinent activities surrounding the issues related to the notice of appeal and some of the involvement of the Chair of the Appeal Board on these matters. The Appeal Board rendered its decision on October 14, 2011.

[26] Concerning the allegations "[...] that there was election fraud and corrupt practice committed by Kurt Burnstick, Bernard Paul and Herb Arcand contrary to section 29(a) of the Regulations [...]," the Appeal Board rendered the following decision: "[...] the Board finds that there is insufficient evidence on a balance of probabilities to find that there was corrupt practice in connection with the election against Bernard Paul and Kurt Burnstick under Section 29 of the Regulations." The Appeal Board concludes by noting "[...] that the Appeal had merit albeit for grounds outside the permitted grounds of Appeal and the Appellant presented able arguments and conducted the Appeal admirably which the Board acknowledges," without further explanation.

[27] The reasons for dismissing the allegations of corrupt practice were solely based on the testimony of Mr. Bruno. The Appeal Board found that it had “[...] difficulty with accepting some aspects [...]” of Mr. Bruno’s testimony and “[...] difficulty with the situation [...]” described by him. The Board also found “[...] some key elements of Mr. Bruno’s evidence unclear due to the Appellant asking leading questions along with a number of questions being asked together.” The Appeal Board rejected the testimony of Mr. Bruno and made the following statement:

“A more likely scenario would be a Band member with no access to money was seeking financial support from the Band vigorously approached the Band Staff and Council Members seeking financial assistance. The evidence provided by Mr. Bruno may also be a result of Mr. Bruno attempting to buttress his evidence given his financial and health hardships at that time.”

In addition, the Appeal Board qualified his evidence as “unclear and vague.”

[28] The three members of the Appeal Board did not rely in their decision on other testimonies and only referred to Mr. Bruno’s testimony to dismiss it. The Appeal Board did note that the issuance of cheques is a routine practice of the Band and that it is justified by different Band policies. However, they also mention that the issuance of cheques without reason or unsolicited by members of the Band after the election has been called or within 30 days of the election by certain Council members would raise an *indicia* of corrupt practice. They referred to case law of this Court to support that comment (*Wilson v Norway House Cree Nation*, 2008 FC 1173, 172 ACWS (3d) 1) which had been submitted by the Applicant.

[29] The evidence of Mr. Bruno was that he had received a \$1300 cheque from the Band Administration through the intervention of the Respondents Paul and Burnstick. He also received

\$200 in cash from Respondent Burnstick who first gave it to his mother who then gave it to him.

There was also some money that was left at the store for his personal use to buy gas. It is his testimony that these sums of money were given after the election was called sometime in the middle of July (see the Applicant's Record, Mr. Bruno's testimony at page 34). The Appeal Board concluded that "[...] a transaction occurred" but that "[...] there was no evidence that the Notice (Exhibit 16) was still in effect when this transaction occurred." The Notice referred to is the Notice of the Election dated July 13, 2011 announcing the Election for August 11, 2011.

[30] Having now reviewed the reasons of the Appeal Board's decision concerning the allegations of corrupt practice and the general portrait of the pertinent activities surrounding this issue including the involvement of the Chair of the Appeal Board, two matters must be discussed: What is the proper test to be applied when assessing principles of fairness and examining whether there is an apprehension of bias and what are the requirements expected from the Appeal Board?

[31] It is well known that the proper test applicable to the behaviour of a tribunal when assuming its duties which may raise an apprehension of bias is:

"[...] what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would he think [...] more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

(See *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978]1 SCR 369, 9 NR 115, 68 DLR (3d) 716, at para 40 [*Committee for Justice and Liberty*].)

[32] In addition, it is also necessary, in such a situation to take into consideration the special circumstances of the tribunal in order to identify which appropriate standard is applicable (see *Committee for Justice and Liberty*, supra, at para 43).

[33] The principal attributes of the Appeal Board are that the panel members cannot be members of the Band and that they are appointed and remunerated by the Chief and Council. The Appeal Board is vested with the jurisdiction to deal with important matters such as allegations of electoral corrupt practice and non-compliance with the Election Regulations. This jurisdiction may bring about the cancellation of elections. The Appeal Board is not bound by any rules of evidence. The decisions are final and binding and any appeal of its decision is to be founded in law and not in fact. Therefore, the Appeal Board makes final factual determinations which may impact on the credibility of elected officers and members of the Band.

[34] The Election Regulations are silent on the powers, procedure such as notices to be given, and hearing process of the Appeal Board. It is informative to note that the Chair of the Appeal Board considered that the Applicant had the onus to bring compelling evidence to prove his allegations on a balance of probabilities and that he had to bring individuals to testify in order to give direct evidence regarding the issuance of cheques. In addition, the Chair of the Appeal Board explained that the individuals affected by the evidence may wish to attend and give evidence contrary to the Applicant's evidence but that the Applicant would have the opportunity to ask them questions regarding the alleged transactions (see the letter from the Chair of the Appeal Board, dated September 16, 2011, at Tab D of the Certified Tribunal Record).

[35] The Appeal Board has the basic attributes of a judicial decision maker. It makes final factual determinations which include credibility findings and questions of law. Ultimately, its decisions, which can be appealed or reviewed, can bring about the cancellation of elections. Furthermore, the Chair of the Appeal Board understood that the onus was on the Applicant in bringing forward *viva voce* testimony and that he had the right to cross-examine witnesses. This is what a judicial tribunal is all about.

[36] Therefore, the basic principles of natural justice apply in order to ensure that a fair process exist and that guarantees that all the evidence presented to the Board, which may directly or indirectly impact on the decision to be made, is heard by all.

[37] In the case at bar, the Chair breached procedural fairness by communicating privately with two important witnesses against whom serious allegations of electoral corrupt practice consisting of facilitating the issuance of a \$1300 cheque by the Band Administration in return for votes, which are revealed by the testimony of Mr. Bruno. During the conversations, issues of substance were addressed: “[t]he allegations were discussed, the testimony of Mr. Bruno was also dealt with, and both Respondents Paul and Burnstick denied the allegations and refused to appear and testify.” This is vital evidence communicated directly to the Chair but not directly to the other two panel members, the Applicant and the public. The Chair did report the conversations to the Applicant and the other panel members but this is not a remedy to the breach committed. This crucial information could not be dealt with in public like it should have been and the Applicant had no opportunity to test the version given by the two individuals through cross-examination. If the Chair of the Appeal Board wanted to be fair to the Respondents Paul and Burnstick by communicating the testimony of

Mr. Bruno to them, he was unfair to the Applicant. The means by which the contradictory evidence should have been dealt with is a public hearing, which must be accessible to all. There is in no way to know what impact these conversations had on the Appeal Board members but any neutral observer, in such a situation, would have serious concerns about the objectivity of the decision-making process followed.

[38] The breach is so fundamental that the argument to the effect that because the Applicant did not object to the Chair's private communications with Respondents Paul and Burnstick and that he even requested the Chair of the Appeal Board to contact the Respondents cannot be accepted by this Court as the Chair's actions that followed are simply not acceptable. Moreover, it is to be noted that there is contradictory evidence with regard to both of these matters. A Chair of a tribunal communicating privately with witnesses, does not assume his role properly and is not acting in the interests of justice.

[39] The fundamental objective of the judicial process is to ensure that all evidence is presented publicly, in order that it be heard by all interested parties who can test the evidence through proper procedure thereby guaranteeing the integrity of the judicial process. For the Chief, the Band Council and the members of the Band, it is of utmost importance that justice be administered in a non-arbitrary way, in accordance with the rule of law. Fair and honest elections preserve the democracy of the Alexander First Nation Band. The tribunal set up to ensure democratic vitality must be open and fair in order to guarantee the sanctity of the electoral results. It did not assume this responsibility in this case.

[40] Therefore, an informed person, viewing the matter as a whole with proper knowledge of the issues and having thought about the facts and the principles involved, would more likely than not conclude that, consciously or unconsciously, the Chair of the Appeal Board and the Board itself have not decided the matter fairly. The behaviour of the Chair of the Appeal Board amounted to a fundamental breach to procedural fairness and as such, the decision rendered is invalid.

[41] On this ground alone, the matter should be returned to the Chief and councillors so that at a different panel of the Appeal Board be appointed and assigned to deal with the Applicant's allegations of electoral corrupt practices. As a last comment, in fairness to the Chair of the Appeal Board, the Court did not identify any evidence of negative intent on the part of the Chair.

B. Did the Appeal Board err in law by deciding that it does not have jurisdiction to decide upon the constitutional validity of the definition of "Elector" under the Regulations?

[42] The second issue raised by the Applicant in this case is whether the Appeal Board erred in deciding that it did not have the jurisdiction to consider the constitutionality of the definition of "Elector" under section 1 of the Regulations. It relied on section 17 of the Election Regulations to conclude that the Electoral Officer, who deals with disputes related to electoral eligibility, should be seized with such matter, to the exclusion of the Appeal Board.

[43] Before deciding whether the Appeal Board has jurisdiction to decide on the constitutionality of the definition of "Elector," it is necessary to look at the Regulations as a whole, at the provision granting jurisdiction to the Appeal Board and to other adjudicative bodies to identify which administrative entity should deal with the matters arising in relation to the electoral list.

[44] The Applicant is contesting the constitutionality of the definition of “Elector” based on section 15 of the Charter which excludes from the voter’s list non-resident members of the Band.

Section 1 of the Regulations defines “Elector” as follows:

1. In these Regulations:

[...]

(c) “Elector” means a person who:

- (i) is the full age of twenty-one (21) years, and
- (ii) is a member of the Alexander Tribe, and
- (iii) is ordinarily resident or has resided on the Alexander reserve for a period of no less than one (1) month, and
- (iv) is not the Electoral Officer or his appointed assistant.

[...]

[45] The provision conferring jurisdiction on the Appeal Board to review the election of a candidate is section 29, which reads as follows:

29. Within fifteen (15) days after the posting of the written statement by the Electoral Officer pursuant to Section 27, any Elector who has reasonable grounds to believe:

- (a) that there was corrupt practice in the [sic] connection with the election, or
- (b) that these Regulations were not complied with may Appeal the election of a candidate or candidates by filing a written notice of appeal with the Electoral Officer which sets out the grounds of the Appeal.

[46] If the Appeal Board finds that corruption occurred or that the election process was not held in compliance with the Regulations, it has the power to grant one specific remedy which is to hold a new election for the vacant office or offices:

30. Where the Appeal Board finds that a candidate or candidates have not been elected to office in accordance with these Regulations, the Electoral Officer shall hold a nomination meeting and election for the vacant office or offices in accordance with these Regulations.

[47] Moreover, section 17 of the Regulations provides a means to contest the names that are included in the voter's list or those that are omitted from the list:

17. Any person who:

- (i) disputes the name of an Elector included on the voter's list, or
- (ii) believes his name should be included on the voter's list may apply to the Electoral Officer for determination of the matter at any time up to 8:00 pm on the date of the election. The Electoral Officer shall be final and binding. Any Appeal to a Court of Law shall be found in law and not in fact.

[48] In *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765, the Supreme Court of Canada established an approach to follow in order to identify whether or not a tribunal, board or administrative body has the necessary prerequisites to deal with Charter arguments. It was decided at paragraph 22 that even if it is found that such bodies can deal with Charter related matters, they may do so only if the subject matter to be dealt with falls within their jurisdiction:

“[...] If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant Charter remedies, in relation to *Charter* issues arising in the course of carrying on its statutory mandate. [...]” [My emphasis.]

This requirement is also stated at paragraphs 78 and 81, where the Court indicates that administrative tribunals “[...] have the authority to resolve constitutional questions that are linked to

matters properly before them” and to “[...] consider and apply the *Charter* - and *Charter* remedies - when resolving the matters properly before [them].”

[49] Moreover, it goes without saying that recognizing that the tribunal or board can deal with questions of law and Charter arguments does not give an automatic jurisdiction over all subject matters. The legislation under which the tribunal or board operates must confer a specific jurisdiction over the subject matter. In accordance with this approach, the question to answer in the case at bar is which administrative body has the jurisdiction over the definition of “Elector” and the electoral list. This is a matter of statutory interpretation.

[50] The Election Regulations have a straightforward wording: section 17 clearly gives the jurisdiction to deal with all matters arising from any disputes concerning the electoral list to the Electoral Officer. It has the jurisdiction to include or exclude members of the Band on the electoral list. The decisions rendered are final, binding and can only be appealed on questions of law. There is, therefore, a specific venue for appealing decisions by the Electoral Officer.

[51] The Appeal Board’s jurisdiction established by section 29 of the Election Regulations does not refer to “Elector,” electoral list or to disputes that may arise in relation to such subject matters. It has jurisdiction over corrupt practice related to the election and any disputes concerning any non-compliance with the Election Regulations. The remedy under that jurisdiction is the cancellation of the election. Furthermore, as seen earlier, it has its own process for appeal to a Court of Law, which may only be based on questions of law.

[52] Moreover, after considering the Election Regulations as a whole, this Court comes to the conclusion that there is no indication that would allow this Court to imply that the Appeal Board has jurisdiction over issues that can arise under the Election Regulations other than the legality of the election of a candidate. The purpose of the jurisdiction of the Appeal Board is to inquire as to the legality of the election process.

[53] In fact, the Election Regulations provide a specific procedure to address the issue of whether or not a person falls within the definition of “Elector,” question indirectly raised by the Applicant by challenging the constitutional validity of the said definition. Indeed, section 17 states that the question of the inclusion or exclusion of a person from the voter’s list should be submitted to the Electoral Officer. The clear intent of the drafter was to confer upon the Electoral Officer jurisdiction to interpret the definition of “Elector.” Therefore, the power to interpret the definition of “Elector” rests with the Electoral Officer to the exclusion of the Appeal Board which does not have any jurisdiction over that subject matter.

[54] Although it is beyond the scope of the present judicial review to decide upon the Electoral Officer’s jurisdiction over Charter challenges, it would seem that the Regulations could be interpreted in a way that would allow it. Indeed, section 17 states that the review of the decision of whether or not a person is to be considered an “Elector” for the purpose of an election is subject to the jurisdiction of the “Court of Law,” provided that the appeal raises a question of law. What flows from a reading of section 17 is that the Electoral Officer has jurisdiction to decide questions of law arising under that provision. In response to a question from the Court, counsel for the Applicant

agreed that the Electoral Officer had the jurisdiction to deal with questions of law including Charter challenges concerning the inclusion or not of electors on the electoral list.

[55] Before concluding on this issue, the Court notes that there are alternative remedies that the Applicant can follow in order to challenge the constitutionality of the definition of “Elector” under the Election Regulations, which only allow on-reserve Band members to vote. As far as this Court knows, the Applicant has not raised this issue with the Electoral Officer. He will have this opportunity at the next election. Furthermore, there is an inclusive community process that he can get involved in with the Chief, the Council and the community. Such an approach could resolve any Charter challenge associated with this eligibility issue. In most cases, such mode of resolving this kind of dispute is more beneficial than any Court-imposed point of view.

[56] In conclusion on this issue, the Appeal Board rightly and reasonably decided that it does not have jurisdiction over the Applicant's section 15 Charter challenge, of the definition of “Elector,” pursuant to section 1 of the Election Regulations.

VIII. Conclusion

[57] On the first issue, it is this Court's decision that the Chair of the Appeal Board breached the principle of procedural fairness by communicating privately with Respondents Paul and Burnstick to discuss evidence of electoral corruption and that as a result of such behaviour, a neutral observer, knowledgeable about the facts and the issues being dealt by the Appeal Board would more likely than not conclude, that consciously or unconsciously, the Chair and the Appeal Board have not decided the matter fairly. On that ground alone, the allegations of corrupt practice made by the

Applicant after the August 2011 election are to be reconsidered and therefore, the matter is sent back to the Chief and Council so that they may select and appoint a different panel of the Appeal Board to deal with this issue.

[58] On the second issue, the Appeal Board rightly and reasonably concluded that the Appeal Board does not have jurisdiction over the Applicant's challenge of the definition of "Elector" pursuant to section 1 of the Election Regulations under section 15 of the Charter.

IX. Costs

[59] Having considered the requests made by all counsel concerning costs, I find that the Applicant should be granted costs. Indeed, he has assumed a heavy burden in pursuing this matter. As a result of all of this, the Band will certainly gain from his persistent work.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the judicial review of the decision of the Appeal Board dated October 4, 2011 is granted in part and that the allegations of electoral corrupt practice must be returned to the Chief and Council in order that a new panel of the Appeal Board be selected in accordance with the Election Regulations, to deal with these allegations as described in the notice of appeal. Costs are in favour of the Applicant.

“Simon Noël”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1791-11

STYLE OF CAUSE: RODNEY YELLOWDIRT v THE
ALEXANDER FIRST NATION ET AL

PLACE OF HEARING: Edmonton, Alberta

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**REASONS FOR JUDGMENT
AND JUDGMENT:** NOËL J.

DATED: January 11, 2013

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