

O'Chiese First Nation Appeal Board

Date: 20210806

amiskwaciwâskahikan, Treaty 6
(Edmonton, Alberta) August 6, 2021

IN THE MATTER OF THE O'CHIESE FIRST NATION 2021 GENERAL ELECTION

BETWEEN:

BARRY SAULTEAUX

Appellant

and

O'CHIESE FIRST NATION, O'CHIESE FIRST NATION CHIEF AND COUNCIL, DOUGLAS BEAVERBONES, BERNADINE COLEMAN, MARTIN IRONBOW, RYAN LITTLEJOHN, HERMAN POORMAN, MALCOLM WHITFORD, PHYLLIS WHITFORD, LORETTA PETE LAMBERT, CEDRIC WHITFORD, SANDRA BEAVERBONE, ALAN BREMNER, BEVERLY BREMNER, ALLAN LITTLEJOHN, CHARLENE RATTLESNAKE, FRANCIS STRAWBERRY, LINDA STRAWBERRY, REBA STRAWBERRY and ROBERT STRAWBERRY

Respondents

Appeal Board Members: Geraldine Hill, Richard Mirasty, Brooks Arcand-Paul (Chairperson)

Per Chairperson Arcand-Paul:

DECISION

Procedural Background

- [1] OCFN is an Anishinaabe Nation, guided by codified customary election practices, governed by the *O'Chiese First Nation Appeal Regulation* (Reg. No. 2016-002), enacted under the *O'Chiese First Nation Election Act*, (the "Regulations") which this decision is based upon.
- [2] On May 20, 2021, the O'Chiese First Nation (OCFN) conducted a general election (Election).

- [3] The O'Chiese First Nation Appeal Board (Appeal Board) received three filed appeals on June 3, 2021 from the Appellant Barry Saulteaux, and two former Appellants Sarah Saulteaux and Robert Strawberry which had alleged discrepancies with the conduct of the Election.
- [4] The Appeal Board reviewed the Appeals on June 10, 2021, pursuant to 11.1 of the Regulations, within seven days of the receipt of the Appeals. At that time, it was deemed that the Appeal Board required additional information pursuant to the filed Appeals, and that the process would include a mix of an oral hearing and written submissions, but primarily via written submissions due to the COVID-19 pandemic.
- [5] On June 10, 2021, the Appeal Board communicated to the Appellants and Respondents that a mix of oral hearings and written submissions will be conducted in relation to the Appeals received by the Appellants. Oral hearings were to be conducted on June 23, 2021, with the Respondents' written submissions being due by 11:59 pm (MT) on June 23, 2021 by the Respondents. Additionally, Linda Littlejohn, agent for OCFN, was requested to provide copies of the correspondence to the Chief and Council, and to the best of the Appeal Board's knowledge such a request was complied with.
- [6] On June 22, 2021, the Chairperson wrote to OCFN's counsel in response to correspondence on June 17, 2021 stating, *inter alia*, that the June 23, 2021 hearing would proceed to assess the threshold matters that remained outstanding following the Appellants' submissions to the Appeal Board, and that the Respondents would receive minutes from the June 23, 2021 hearing. It was further communicated that the written submission deadline for the Respondents would be extended to July 9, 2021, with the successful Appellants' reply by written submission to the Respondents' written submission being due on or before July 16, 2021.
- [7] On the same day, June 22, 2021, the OCFN attempted to frustrate the process of the Appeal Board. When the Chairperson requested by telephone that a videoconference link be set up so as to provide viewing opportunities for all members of the OCFN to watch remotely, including all Respondents not identified as a relevant party to the Appeal, and to permit the relevant parties to attend remotely. When the Chairperson called agents from OCFN, it was overheard to "hang up the phone", after which the individual on the phone hung up. Beyond being unprofessional, such has been construed by the Appeal Board as flying in the face of procedural fairness by excluding the entire membership of OCFN from hearing the Appeals. The Appeal Board only desired to provide the OCFN membership with the opportunity to understand the basis

of the Appeals. In the end, only some of the Respondents, including agents of OCFN, had attended the videoconference which the Appeal Board coordinated without the assistance of OCFN's agents.

- [8] OCFN was explicitly informed that any additional frustration of this process would have caused the OCFN to be in contempt of this Appeal Board. OCFN confirmed it would not frustrate the process any further, and acknowledged that it would be held in contempt of the Appeal Board should it continue doing so. While the Appeal Board appreciates that agents for OCFN may have been confused about why the Appeal Board was communicating directly with them, and not Chief and Council themselves, we verily believed that our impartiality would be affected if Chief and Council were to direct any part of these proceedings. To remain impartial and independent from the Parties, we directed all communication to the relevant administrators within OCFN.
- [9] Since the June 22, 2021 incidents, the OCFN and its agents have been cooperative with the Appeal Board
- [10] On June 23, 2021 the Appeal Board conducted further investigation at an oral hearing pursuant to 10.1 of the Regulations into the threshold matters that remained outstanding following the Appellant's submission. The oral hearing of the Appellants, their witnesses, and two of the Respondents who both appeared virtually, Loretta Pete Lambert as Electoral Officer and Douglas Beaverbones as an individual personally named in an appeal, was conducted in Red Deer, Alberta.
- [11] The Appellant Barry Saulteaux brought one witness, Nick Beaverbone, and both attended personally, in connection with Mr. Saulteaux's filed Appeal. The Appellant Sarah Saulteaux and Robert Strawberry, also attended personally, and did not introduce any witnesses in connection to their filed Appeals.
- [12] The Appellants further introduced details to their Appeals, including the confirmation that they are in fact filing an appeal with the Appeal Board. Both Ms. Saulteaux and Mr. Strawberry confirmed that they were appealing the 2021 General Election of OCFN, but were unaware of any Regulations in place for the conduct of OCFN election practices. The Appeal Board determined in the July 2, 2021 decision, that neither Ms. Saulteaux or Mr. Strawberry had filed appeals in accordance with the Regulations, and were subsequently struck from these proceedings

- [13] Mr. Saulteaux confirmed he was a Chief candidate in the 2021 General Election, and was appealing the conduct of the OCFN General Election, with the following allegations: the appointment of the Appeal Board was contrary to the Regulations; the vote count by the Electoral Officer was contrary to the Regulations; and there were glaring concerns with the Respondent Douglas Ray Beaverbones with vote-buying and his eligibility to run in the 2021 General Election. The Appeal Board determined these were triable issues which form the basis of the present decision.
- [14] On July 7, 2021, Counsel for the Respondent Chief and Council and OCFN requested a copy of the letter signed by Nick Beaverbones in relation to the Appellant's filed materials. The Chairperson replied on the same day providing a copy of the letter and requested confirmation that the request was satisfied for the Respondent Chief and Council and OCFN. Counsel for the Respondent confirmed receipt for OCFN and Chief and Council on July 8, 2021.
- [15] The Appellant wrote to the Appeal Board at various times outside of the written submission process:
- a) On June 29, 2021, the Appellant requested, *inter alia*, a copy of the hearing transcript and a demand for the Appeal Board to order disclosure from the Electoral Officer;
 - b) On July 7, 2021 the Appellant requested, *inter alia*, disclosure of all material documents from the Electoral Officer and to raise a new issue outside of the scope of the Appeal as against one Respondent, Herman Poorman, and requesting whether the Appeal Board was "in agreement with this proposed procedure"; and
 - c) On July 13, 2021, the Appellant requested, *inter alia*, the Respondents' written submissions and further disclosure requests from the Electoral Officer.

At no time did the Appeal Board respond to this correspondence as the requests would be satisfied during the appeal process and through the duty of procedural fairness.

- [16] On July 9, 2021 the Appeal Board received written submissions from the Respondents OCFN and OCFN Chief and Council, namely Douglas Beaverbones, Bernadine Coleman, Martin Ironbow, Ryan Littlejohn, Herman Poorman, Malcolm Whitford and Phyllis Whitford, through legal counsel for both Respondents. None of the remaining Respondents submitted any written submissions whatsoever, nor had they indicated they intended to submit the same.

- [17] The Appeal Board met in Edmonton, Alberta on July 12, 2021 to open and review the documents from the Electoral Officer to determine relevancy. At that time, it was determined that the ballots for Chief were missing, and this was communicated immediately to the Electoral Officer to remedy.
- [18] On July 13, 2021 the Appeal Board provided the relevant documents to the Appellant, but not to the Respondents as no disclosure request had been received by the Respondents at any time during the process. Indeed, had such a request been received, the Respondents would have been provided with the relevant documents.
- [19] On July 16, 2021 the Appeal Board received written submissions from the Appellant, through his legal counsel. On the same day, the ballots for the Chief were received by the Chairperson from the Electoral Officer.
- [20] On July 29, 2021 the Respondents submitted additional correspondence refuting, *inter alia*, the allegations raised in the Appellant's written submissions. While we appreciate the issues raised in the Respondents' communication, these concerns have already been identified by the Appeal Board and shall not form the basis of the Respondents' written submissions as they have been submitted outside of the process outlined by the Appeal Board. The Appeal Board did not respond to the July 29, 2021 correspondence from the Respondents.

Issues

- [21] The Appeal Board determined the following issues to assess pursuant to Mr. Saulteaux's appeal:
- 1) Appeal Board Eligibility (s. 5.2 and s. 5.3);
 - 2) "that the person declared elected was not qualified to be a Candidate" pursuant to s. 7.1(a) of the Regulations, namely candidate, and now Chief, Douglas Ray Beaverbones;
 - 3) "that there was a violation of the Act and its Regulations in the conduct of the Election that might have affected the result of the Election" pursuant to s. 7.1(b) of the Regulations;
 - 4) "There was corrupt practice or fraudulent practice in relation to the Election" pursuant to s. 7.1(c) of the Regulations; and
 - 5) Discrepancies with the ballot counting by the Electoral Officer, pursuant to the *O'Chiese First Nation Election Regulations* (Reg. No. 2016-001).

[22] The Respondents also raised two separate issues outside of the scope of the Appeal Board's July 2, 2021 decision in which the issues were specifically elucidated. Such issues included:

- 1) Whether the Respondents' were denied their rights to natural justice and fairness by the failure to: (a) provide the complete particulars of the grounds for appeal, especially the evidence of Nick Beaverbone; and (b) the failure to permit cross-examination of the witnesses called by the Appeal Board; and
- 2) Whether there was any basis for concluding that the Respondent OCFN was attempting to "frustrate the process of the Appeal Board" without providing the Respondent any notice of the particulars and circumstances of this allegation and an opportunity to respond to any such allegations, and whether the Respondent's right to natural justice and fairness were infringed by such a conclusion.

[23] The Appellant raised a new issue that had not been raised in the originating document of the Appellant surrounding an allegation that the Respondent "Herman Poorman purchased the vote of Priscilla Strawberry for \$40".

[24] With respect to the new issues raised by the Parties, the Appeal Board will not opine on the merits of any of the new issues raised outside of the scope of the present Appeal.

[25] However, with respect to the Respondents' raising of new issues, the procedural record demonstrates that the Respondents had course corrected their behaviour by a) requesting the letter by Nick Beaverbone, and acknowledging the satisfaction of the same on July 8, 2021. Further, the Respondent was provided notice of the process on June 10, 2021 and as revised on June 22, 2021, attended the threshold hearing and received the hearing transcript provided thereafter, and provided written submissions as outlined throughout this process; and b) acknowledging that OCFN agents were confused with their responsibilities to the Appeal Board and since receiving notice of their impugned conduct, the OCFN's agents have been cooperative.

[26] Further, in the alternative that the Respondents, or even to further entertain the Appellant's assertion, that the parties verily believe they were not afforded procedural fairness, we need only look at the jurisprudence provided by all parties (*Weekusk v Thunderchild First Nation Band Council* (2014 FC 845); *Halcrow v Kapawe'no First Nation*

(2021 FC 219); and *Alexander First Nation v Burnstick* (2021 FC 618), to determine that, based on this procedural background:

- a) The Respondents, as the elected Chief and Council, who had a genuine interest in knowing the issues raised by the Appellant that would purport to affect their rights, were afforded notice, the right to make representations via written submissions refuting such allegations raised in the issues brought forward by the Appellant;
- b) The Respondents and Appellants were indeed afforded a successfully discharged duty of procedural fairness;
- c) This duty was discharged to provide meaningful notice, as evidenced by the June 10 2021 communication sent to the Parties communicating the process;
- d) The June 10, 2021 Notice included the relevant enclosures of the specific allegations made;
- e) The Respondents had received not only the specific allegations, but the threshold hearing held on June 23, 2021 further expanded upon those issues raised by the Appellant;
- f) The Respondent was able to make written submissions through this process, in which they chose to respond to the specific allegations raised by the Appellants; and
- g) The Appellant had a chance to respond to the arguments made by the Respondent in their July 9, 2021 written submissions.

Further, the Procedure outlined in section 9 of the Regulations was complied with by the Appeal Board at all times during this Appeal.

[27] With respect to the Appellant's new allegation raised as against Herman Poorman, the Appeal Board cannot accept the new allegation outside of the scope of the issues raised in the originating Appeal. To do so would require a new hearing of this specific issue. The Appellant had the opportunity to raise such an issue within the timelines prescribed under the Regulations. To do so at the eleventh hour is not only unfair to Mr. Poorman, but also an abuse of process. Accordingly, we will not opine on any issues involving the purported issue raised by the Appellant.

[28] In the alternative, that the Appellant would further suggest that even if one voter was persuaded by a candidate offering money, namely Mr. Poorman, through vote buying we understand that the case law, as further elucidated below, requires this Appeal Board to assess on a balance of probabilities that the one vote would affect the

outcome of the election. Accordingly, we respectfully do not believe that such an outcome would have caused a significant effect on the results of the election. To overturn the decision of a majority of the citizens of the OCFN because of the mistake of one candidate is not in the best interests of the OCFN.

Applicable Law

[29] Hearsay evidence may be admitted if it is demonstrated that the evidence is reliable and that its admission is necessary (*Canadian Tire Corp Ltd. V. P.S. Partsource Inc.* (2001 FCA 8). Hearsay evidence through an affidavit may be permissible, however an adverse inference can be drawn where hearsay evidence is introduced instead of first-hand evidence and no adequate explanation is provided for why the best evidence is not available (*Ottawa Athletic Club Inc. v Athletic Club Group Inc.* (2014 FCA 8 at para 117).

[30] In *Papequash v Brass* (2018 FC 325), Justice Barnes of the Federal Court of Canada stated:

“[33] The Applicants carry the burden of proof of establishing, on a balance of probabilities, that a contravention of the Act has occurred that is likely to have affected the election results: ... Where sufficient evidence of corruption is adduced, the evidentiary burden may shift to the Respondents.

[34] Not every contravention of the Act or regulations will justify the annulment of a band election. A distinction is not infrequently made between cases involving technical procedural irregularities and those involving fraud or corruption. In the former situation, a careful mathematical approach (eg reverse magic number test) may be called for to establish the likelihood of a different outcome. However, where an election has been corrupted by fraud such that the integrity of the electoral process is in question, an annulment may be justified regardless of the proven number of invalid votes. One reason for adopting a stricter approach in cases of electoral corruption is that the true extent of the misconduct may be impossible to ascertain or the conduct may be mischaracterized. This is particularly the case where allegations of vote buying are raised and where both parties to the transaction are culpable and often prone to secrecy: see *Gadwa v Kehewin First Nation*, 2016 FC 597.

...

[36] In light of the above statement, the idea that serious electoral fraud can vitiate an election result cannot be seriously doubted. What must not be overlooked,

however, is the Court’s admonition that a reviewing court retains a discretion to decline to annul an election even in situations involving fraud or other forms of corruption.“ [emphasis added]

[31] In *Papequash*, the Respondents had committed such widespread and egregious conduct in relation to the election that such conduct was determined by both the Federal Court and the Federal Court of Appeal, that had such an effect on the results of the election, and the Applicants had introduced sufficient evidence by way of affidavits of witnesses, that it was entirely probable that the impugned conduct affected the election results.

[32] As Justice Mainville J. A. wrote for the coram of the Federal Court of Appeal in *Meeches v Meeches* (2013 FCA 177):

“As a general rule, and contrary to an impeachment, an election will not be set aside if the results do not appear to have been affected by the alleged irregularities” [emphasis added]

[33] Section 32 of the Regulations stipulates the conduct of counting the ballots. While the Appeal Board expanded the scope of the relevant sections of the Regulations in the July 2, 2021 decision on threshold matters, the Parties narrowly focussed on the issue of the actual ballot counting process under section 32.6 and 32.7 of the Regulations – including the official results versus the verbal declaration made by an anonymous person during the ballot count.

[34] One core concept of corrupt practice is any attempt to prevent, fetter, or influence the free exercise of a voter’s right to choose for whom to vote. What is relevant is the motive or intent behind the impugned conduct. Is the conduct directed to improperly affecting the result of an election? (*Gadwa v Kehewin First Nation*, 2016 FC 597 at para 79)

[35] At common law, bribery occurs when a vote is procured from an elector for valuable consideration. Both the impugned candidate and compromised elector must agree to the exchange of consideration in return for a promise to vote a certain way and, at common law, no bribery occurs if no condition is placed on the consideration given. (*Henry v. Roseau River Anishinabe First Nation*, 2017 FC 1038, at para 57)

[36] Finally, the Supreme Court of Canada’s “magic number test” has been elucidated in *Opitz v Wrzesnewskyj*, (2012 SCC 55, at para 73) which requires that an “election should be annulled when the number of rejected votes is equal to or greater than the

successful candidate's margin of victory." [emphasis added]

Reasons for Decision

I. No Violation of the Act and its Regulations in the conduct of the Election that affected the results

[37] The Appeal Board does not believe that there were violations of the Regulations based on the written submissions of the Parties, and while basing such a conclusion on the foregoing law, we do not agree that any such actions would have affected the result of the election.

[38] The evidence presented by the Appellant does not meet the required threshold as set out above. It is difficult to agree with the Appellant's assertions, along with the hearsay evidence presented with we acknowledge is admissible to this present appeal, that it was probable that every issue raised by the Appellant actually occurred.

[39] In the event that first-hand evidence was introduced in the Appeal or at the threshold hearing, the Appeal Board may have been persuaded, but it was not and we are not persuaded by the hearsay evidence submitted by the Appellant.

II. Appeal Board eligibility

[40] Any contravention that could have occurred with respect to the eligibility of the Appeal Board has no basis on the election whatsoever. The fact that the Appeal Board members were appointed late did not have any basis in affecting the results of the electors.

[41] While we agree with the Appellant that the Electoral Officer should have complied with the timelines set out in the Regulations for Chief and Council to have received notice of the five individuals forty days before the election, the appointment of same did not affect the election results in any way.

III. Douglas Ray Beaverbones was proper candidate

[42] We are not persuaded by the argument put forward by the Appellant that the Respondent, Douglas Ray Beaverbones, was not qualified to be a candidate under the Regulations. The Appellant takes a very strict interpretation of section 23.2 of the Regulations, which would not warrant an overturning of the results of the election.

[43] It is difficult to conclude that Mr. Beaverbones was not qualified as a candidate. Even in the event that Mr. Beaverbones went by any other alias, his photo appeared beside his

name which was printed on the ballot. There could not have been any confusion by a potential voter on Mr. Beaverbones' identity. To make such an assertion is baseless, and frivolous to the process of democratic elections on the OCFN.

[44] The Appeal Board believes that a Candidate may use any part of their legal name, and there will be no corresponding confusion given the fact that a photo is used on the ballot. To prevent further confusion on section 23.2 of the Regulations, the Appeal Board recommends a bifurcation of this section to reflect that aliases may be used in the event that a candidate goes by a different name at the time of an election.

IV. No evidence of corrupt practice or fraudulent practice in relation to the Election

[45] The burden to demonstrate that corrupt or fraudulent practice occurred during the Election is on the Appellant who is alleging the corrupt behaviour. Based on the evidence provided by the Appellant, the Appeal Board is not convinced that any of the candidates' conduct raised in the originating Appeal has met this onus. While we agree that hearsay evidence can be accepted in the present Appeal, there was low probability that the Appellant's witness, Nick Beaverbone, possessed sufficient knowledge to demonstrate that there was corrupt practice by Douglas Ray Beaverbones.

[46] In Nick Beaverbone's testimony, it was very clear that he was not sure as to the reason why money had been exchanged while he was at the residence of Marlene Whitehorse. Further he was not sure what was being said between Douglas Ray Beaverbones and one of his brothers. Although Mr. Beaverbone may have felt uncomfortable with the situation, and the fact that money was present during the game of cards does not lead the Appeal Board to believe that there was a probable corrupt or fraudulent practice by the Respondent Mr. Beaverbones or any of the Respondents.

[47] Further, it is unclear whether Nick Beaverbone, or any of those in attendance at Ms. Whitehorse's house, had been so affected by Douglas Ray Beaverbones' alleged vote buying. As elucidated in *Gadwa*, there is an absence of evidence that the free exercise of the voting rights to choose for whom to vote of any of those individuals at Ms. Whitehorse's house was ever affected by the visitors on election day.

[48] In the alternative, where the Appellant made out a successful demonstration that those in attendance at Ms. Whitehorse's residence accepted the valuable consideration, the principles in *Roseau River* were not established for any of the conditions from any other individuals in the house. In fact, the Appellant did not provide any evidence from any of the other individuals at Ms. Whitehorse's house at the time to corroborate the evidence

of Nick Beaverbone. Accordingly, it is difficult to find the likelihood that an exchange of consideration by Douglas Ray Beaverbones corresponded to a promise to vote a certain way by any of the individuals at Ms. Whitehorse's house on Election Day.

[49] Regardless of whether money was exchanged between Douglas Ray Beaverbones and any of the individuals at Ms. Whitehorse's house on election day, Nick Beaverbone confirmed that he had no understanding that Douglas Ray Beaverbones had provided the money for the purposes of the vote buying when he answered a question from the Appeal Board as to why the money was exchanged with "No they didn't say what the money was for, they just gave 100\$ each. They didn't what. It's for. Nothing."

V. Ballot Count by the Electoral Officer

[50] While one can appreciate the confusion that might have ensued in light of the COVID-19 precautions in place at the polling place, the Electoral Officer has the final authority under the Regulations to post the final tally of the votes actually cast. Anonymous utterances from unknown persons that the Appellant could not identify at any point during the Appeals through any evidence, including first-hand and hearsay evidence, and relying on a number that was not authorized by the Electoral Officer, who has had many years of experience in conducting First Nations election, could not justify setting aside the results of a democratically elected Chief and Council during a global pandemic and sending electors back to the polls on the precipice of another wave of COVID-19.

[51] It is difficult to even logically apply how the "magic number" test from *Opitz* could even be met in light of the foregoing facts. While it is unfortunate that the Appellant was not successful in the election, basing most of his arguments on unofficial utterances at the polling place by anonymous individuals should not be the basis for overturning an election where the will of the people, through the use of democratic processes, duly elected the present Chief and Council.

[52] We agree with the Respondents that there were no discrepancies with the conduct of the ballot counting based on the insufficient evidence provided by the Appellant who had the burden of proof to demonstrate just that.

[53] To be certain of the numbers recorded by the Electoral Officer, the Appeal Board conducted a count of the Ballots for Chief received. The Appeal Board counted 524 ballots for Chief accordingly:

- 1) Douglas Beaverbones (200);

- 2) Barry Saulteaux (167);
- 3) Cedric Whitford (155).

The Statement of Results signed by the Electoral Officer has a number differential for the candidate with the lowest amount of votes, with the number 154. Although the Appeal Board found an additional vote for Mr. Whitford, we do not believe there was any additional discrepancy in the results that would have affected the outcome between Mr. Beaverbones and Mr. Saulteaux, where there was a marked difference of 33 votes. The rejected ballots for Chief were recorded as 2. Accordingly, the “magic number” test has not been met in the present appeal to annul the Election results.

Remedy

- [54] For the foregoing reasons, this Appeal is dismissed.
- [55] The election results of the May 20, 2021 General Election shall be upheld, and the current Chief and Council have been duly elected pursuant to the 2021 General Election.
- [56] We again would like to remind the Parties of section 14.1 of the Regulations that “[e]ach party will cover all of their own costs for an Appeal including... solicitor/client fees”.
- [57] Lastly, this “decision of the Appeal Board is final and not subject to appeal” pursuant to section 12.5 of the Regulations.



Brooks Arcand-Paul
Chairperson
O'Chiese First Nation Appeal Board

TO:

O'Chiese First Nation Membership

E. Duffy, Counsel for Appellant Barry Saulteaux

A. Alibhai, Counsel for the Respondent OCFN and OCFN Chief and Council

L. P. Lambert, Self-represented for Respondent Loretta Pete Lambert