

Frog Lake 2023 General Election Appeal

Hans McCarthy

Appellant

George Stanley

Appellant

and

William Quinney

Respondent

Decision of the Election Appeal Committee

Heard by: Tanner Stanley (Chair); Elaine Carter; Doris Okanee; and Linda Potts.

Decision of the Election Appeal Committee:

1. These are two of four Appeals of the 2023 Frog Lake General Election held on April 26, 2023 (the “Election”) heard by the Election Appeal Committee (the “Committee”) at the Appeal Hearings held on June 10, 2023 at Frog Lake (the “Hearing”).
2. The Election and its Appeals are governed by the Frog Lake First Nations Election Code dated November 12, 2023 (the “Code”).

Preliminary Matters

3. Hans McCarthy and George Stanley (the “Appellants”) filed their Appeals on April 28, 2023 and May 16, 2023 respectively. George Stanley submitted that his Appeal was filed in support of Hans McCarthy’s Appeal and the Appeal Committee exercised its discretion under section 9.6(b) of the Code to combine their Appeals and hear them together.
4. The Committee further exercised its discretion under section 9.6(b) of the Code to schedule the Hearings after the period for filing appeals had expired.
5. In a Notice of Appeal Hearings and Deadlines dated May 17, 2023 the Committee established the process for seeking to participate in an Appeal Hearing and a deadline of

May 30, 2023 for filing documents and submitting the names of witnesses who would be called.

6. William Quinney sought to participate in these Appeal Hearings by submitting an application to respond on May 17, 2023. The Committee accepted William Quinney's application to Respond on the basis that, as the Band Manager, he had relevant evidence that would help the Committee determine the truth of the matter.
7. Hans McCarthy objected to William Quinney's participation as a Respondent and the Committee advised that preliminary submissions could be made on the matter at the Hearing. At the outset of the Hearing no motion or preliminary submissions were made to have William Quinney removed as a Respondent. However, during the course of the Hearing Hans McCarthy made submissions with respect to the role of the Band Manager in relation to Chief and Council acting indirectly. The Committee finds that those submissions confirmed the relevance of the Band Manager's evidence to the Appeal.

Grounds of Appeal

8. The Appellants alleged that, during the Election Period, Council entered into a contract or agreement that was not in the ordinary course of Frog Lake First Nation's business.
9. The Code sets out four grounds for appealing the result of an Election in section 9.1(a)(i):
 - A. an error was made in the application of the Election Code that would have directly affected the outcome of the Election;
 - B. there was a violation of this Election Code or the Candidate Campaign Code of Conduct that would have directly affected the outcome of the Election;
 - C. a sufficient number of ineligible individuals voted so as to affect the outcome of the Election; or
 - D. a sufficient number of rejected or spoiled ballots were cast to affect the outcome of the Election.
10. The Appellants' allegations are that there was a violation of section 5.10(a)(i) of the Election Code that would have directly affected the outcome of the Election fall under ground (B).

Remedy Sought

11. The remedies that the Committee has the power to grant when the results of an Election are appealed are set out in section 9.3(e)(i) of the Code. In addition to determining any constitutional matters the Appeal Committee may:
 - dismiss the appeal;
 - order a recount; and/or
 - set aside an Election, in whole or in part, and call for a new Election for one or more positions.

12. The Appellants submitted that they were not seeking a particular remedy and left it to the Committee to determine the appropriate outcome.

Burden of Proof

13. In *Opitz v Wrzesnewskyj*, 2012 SCC 55 (“*Opitz*”) the Supreme Court of Canada made it clear that overturning an Election should not be done lightly.
14. The role of the Committee is primarily to determine the truth of matters brought before it. The Election Code requires an Appellant to have reasonable and probable grounds for their Appeal (section 9.1(a)(i)).
15. The legal burden of proof for establishing the grounds of a claim or appeal in most circumstances is a balance of probabilities.
16. Taking these factors into account the Committee has determined that the Appellant has the burden to prove the grounds of their Appeal on a balance of probabilities. This means that an Appellant must evidence that all aspects of the grounds of appeal are more likely to have occurred than not.

Issues

17. There are two issues raised in this appeal:
 1. Did Council enter into a contract or agreement that is not in the ordinary course of Frog Lake’s business during the Election Period; and
 2. If so, did it directly affect the outcome of the Election.

Appellants’ Evidence

18. The Appellants submitted documentary evidence and gave sworn testimony in support of their Appeal at the Hearing.
19. The documentary evidence submitted by the Appellants included a Statement of Claim filed March 23, 2023, an invoice for repairs, a screenshot of a facebook post, photographs of trucks, and an article dated May 1998.
20. The Appellants also submitted correspondence from James Nobels dated April 22, 2023 at the Hearing.

Sworn Testimony

21. The Appellant Hans McCarthy provided testimony with respect to his past experiences with Council beginning with an employment dispute originating in October 2015 and also including disputes with respect to education funding, housing allocation, and housing standards and safety.

22. The Appellant submitted that these past experiences were relevant to proving an ongoing practice of scapegoating of administration to keep Council out of legal trouble.
23. The Appellant proceeded to provide further testimony with respect to the character of the Respondent to which the Respondent objected. The Committee determined that the character of the Respondent Band Manger was not relevant to determining the issue of whether Council violated section 5.10(a)(i), upheld the objection, and directed the Appellant to limit his evidence to relevant matters. The Appellants determined that their evidence would resume with the testimony of George Stanley.
24. The Appellant George Stanley testified that Council filed the Statement of Claim included in the Appellants documents on March 23, 2023. He testified that during the Election Period a \$500,000 payment was offered to make the lawsuit go away, that billable hours were not invoiced by Witten, that Council gave direction to Witten LLP, and that Witten LLP was in contact with opposing counsel on April 6 and April 21. With respect to the invoice and photographs of trucks included in the Appellants' documents George Stanley testified that Council gave the direct order to have the work done.
25. During cross-examination and in the Committee's own questions the source of the Appellant's documents was questioned. George Stanley testified that the documents were public documents.
26. At the close of the Appellant's case George Stanley sought to submit a further document evidencing an offer to settle during the Election Period. The Respondent objected to the document on the basis that the documents deadline had passed and the document was hearsay. The Committee admitted the document but acknowledged that it was hearsay and would be given little weight.

Respondent's Evidence

27. The Respondent submitted documentary evidence and gave sworn testimony at the Hearing.
28. The documentary evidence submitted included email correspondence with Witten LLP and Council meeting minutes dated November 7, 2023.

Sworn Testimony

29. The Respondent testified that Council gave the instructions to proceed with the lawsuit initiated by the Statement of Claim filed on March 23, 2023 at a Council meeting held on November 7, 2022. He testified that he carried forward with that action as shown by his email correspondence with Witten LLP included in his documents. He testified that Council did not hold Council meetings after February 2023 and that it was the job of administration to file the Statement of Claim.
30. During cross-examination the role of administration in carrying out Council's instructions was questioned. The Respondent testified that whether decisions are made by Council or

by administration depends on the situation and that administration went forward with filing the Statement of Claim based on the instruction given in November 2022.

Analysis

Did Council Enter an Agreement outside of Ordinary Business During the Election Period

31. In their evidence and submissions the Appellants have raised four allegations of violations of section 5.10(a)(i).
 1. retaining a lawyer to file the Statement of Claim;
 2. filing the Statement of Claim;
 3. offering to settle the lawsuit initiated by the Statement of Claim; and
 4. authorizing vehicle inspections.

Retaining a Lawyer

32. The Parties did not dispute that retaining a lawyer was an agreement entered into directly by Council. The issue is whether Council entered into this agreement during the Election Period and whether it is within the ordinary course of business.
33. The Committee finds that the email correspondence between the Respondent and Witten LLP persuasively demonstrates that Whitten LLP was retained well before the Election Period.
34. The Appellants have the burden of proving that a contract or agreement is outside of the ordinary course of business. Neither of the Parties made submissions directly on the issue of what was inside or outside of the ordinary course of business. The Committee finds that the Appellants did not meet their burden of proof on this issue.
35. In the alternative, the Committee finds that retaining a lawyer is within the ordinary course of business. The Committee interprets ‘outside of the ordinary course of business’ to mean that it would be unusual or noteworthy if it was done at any time during a Council’s term in office. The Committee does not find retaining a lawyer to be unusual or noteworthy.

Filing a Statement of Claim

36. The Parties do not dispute that the Statement of Claim was filed during the Election Period. The Appellants submitted that the Statement of Claim was filed by Council indirectly. The Respondent submits that administration filed the Statement of Claim, not Council.
37. The Committee finds that the Statement of Claim was submitted indirectly by Council. The Committee acknowledges that there may be situations in which administration acts independently. However, the Statement of Claim was filed on behalf of Frog Lake First Nation as a Plaintiff, and it is Council not administration that has the authority to act on behalf of the First Nation in legal proceedings.

38. A Statement of Claim initiates legal proceedings, and is issued by a single party. An agreement or contract is a mutually beneficial exchange of promises by two parties. In an agreement each side promises something and the other gets something in return. Agreements are also binding and there are consequences for not holding up your side. There are no promises made in a Statement of Claim and there is no mutually beneficial exchange. It makes sense not to allow unusual or noteworthy agreements right before an Election so that a new Council isn't stuck with its consequences. Filing a Statement of Claim does not have similar consequences, a Statement of Claim can be withdrawn – usually with no or minimal costs. The Committee finds that filing a Statement of Claim, is not entering into a contract or agreement and does not violate section 5.10(a)(i).
39. The Committee was not persuaded that filing the Statement of Claim was an agreement, nor outside of the ordinary course of business.

Offering to Settle a Lawsuit

40. The only evidence of an offer to settle the lawsuit initiated by the Statement of Claim was hearsay evidence. Both the testimony given by George Stanley and the letter he submitted at the Hearing are second-hand information from James Nobel who did not attend as a witness to give sworn testimony.
41. On the basis of hearsay evidence alone, the Committee is not prepared to accept that, on a balance of probabilities, an offer to settle the lawsuit was made.
42. If an offer to settle was made, but not accepted, during the Election Period the Committee would not find that Council had entered an agreement. The Committee finds that an attempt or offer to enter into an agreement does not violate section 5.10(a)(i). If the Code intended to disallow attempts and/or offers, then it would have stated so explicitly. This is evidenced by a comparison to section 5.11(a)(ii) which expressly disallows not only entering into employment contracts but also extending any employment offers during an election period.

Authorizing Vehicle Inspections

43. The Parties did not dispute that work done by Dewfab on vehicles owned by Waskonaman Askih is an agreement. The only evidence of when this agreement may have been entered is the date noted as fulfilling payment obligations “paid in full” on the invoice submitted by the Appellants – April 18/23 and April 21/23. The date of entering into an agreement and fulfilling the payment obligations under said agreement are not the same.
44. The Committee finds that fleet vehicle inspections and service is not unusual or noteworthy and would reasonably be within the ordinary course of Frog Lake First Nation’s business.
45. Without testimony from anyone with direct knowledge of the service agreement to speak to, the Committee cannot conclude that a new service agreement was entered into during

the Election Period. The Nation would grind to a halt if it could not fulfill payment obligations during an Election Period. The Committee does not find this payment invoice to be reliable evidence. The question of where the invoice came from was also never satisfactorily answered. The Committee is not persuaded that it is a public document. The invoice is hearsay as presented and without any evidence of its source it is a very-low quality hearsay.

Was the Outcome Directly Affected

46. All grounds of Appeal under the Code require the Appellant to demonstrate that the outcome of the Election was affected.
47. In both Canadian elections (*Opitz* at para 71) and First Nations' customary elections (*Johnstone v Mistawasis Nehiyawak First Nation*, 2022 FC 492 at paras 83-88) the legal test that is applied for determining whether the outcome of an Election was affected is the 'magic numbers' test.
48. This test asks whether the number of impugned votes is greater than the margin of victory.
49. In this case there were no impugned votes. The Appellants did not lead any evidence that would prove on a balance of probabilities that the violations they alleged affected any votes cast in the Election.
50. Although procedural irregularities ought to be taken seriously, it has been recognized that the standard for Elections cannot be perfection (*Opitz*, at 46 & 50). Overturning the result of an Election disenfranchises all those who voted and frequent Elections undermine trust in the Electoral system and breed apathy (*Opitz*, at 48).
51. The requirement that Appellants provide persuasive evidence that the results of an Election were affected by a violation of the Code ensures that Elections are only overturned for substantive reasons.
52. In the absence of persuasive evidence that any votes were affected by the allegations, the Committee cannot conclude that the outcome of the Election was affected.

Summary

53. The Committee is not persuaded that, on a balance of probabilities, Council violated section 5.10(a)(i) of the Code by entering into an agreement outside of the ordinary course of Frog Lake's business during the Election Period.
54. The Committee concludes that the outcome of the Election was not affected by a violation of section 5.10(a)(i).

Decision

55. For the reasons above, the Committee dismisses the Appeal by a simple majority vote.

Dated: June 23, 2023

Tanner Stanley
Name


Signed

Chair of the Frog Lake First Nation Elections Appeal Committee