

Frog Lake 2023 General Election Appeal

Esther Moyah

Appellant

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. This is one 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. Esther Moyah (the “Appellant”) filed this Appeal on May 9, 2023. The Committee exercised its discretion under section 9.6(b) of the Code to schedule the Hearings after the period for filing appeals had expired.
4. 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.
5. The Committee did not receive any applications to intervene, respond, or participate in this Appeal.

Grounds of Appeal

6. The Appellant alleged that the Electoral Officer did not carry out the counting of electronic votes properly; did not provide proper notice and instructions for the electronic vote; did not properly verify the identity of Electors who voted electronically; failed to maintain

security peace and order at the vote count; failed to properly supervise the vote count; and failed to properly protect and maintain the ballots.

7. 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.
8. The Appellant's allegations are of errors under section (A) and/or violations under section (B).

Remedy Sought

9. 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.
10. The Appellant has sought for the Committee to set aside the Election and call for new Election or By-Election under sections 9.1(e)(i)(B)(2) and 9.1(e)(i)(D).
11. The Appellant also sought for the Committee to ensure that One Feather is not retained as the Electoral Officer in the future. The Code does not give the Committee the power to make a declaration or order of this nature. The Committee can only grant remedies that the Code gives it the power to grant.
12. The Appellant has not sought a recount under section 9.1(e)(i)(B)(1).

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 seven issues raised in this appeal:
 - a. Was the counting of electronic votes carried out properly;
 - b. Were Electors given notice of the electronic vote;
 - c. Were Electors who voted electronically properly verified;
 - d. Was the Electoral Officer able to administer the vote count;
 - e. Did the Electoral Officer properly supervise the vote count;
 - f. Did the Electoral Officer protect and maintain the ballots; and
 - g. Did any errors or violations directly affect the outcome of the Election.

Evidence

18. The Appellant submitted documentary evidence and gave sworn testimony in support of her Appeal at the Hearing.
19. The Appellant also called a witness, Ruby Stanley, who gave sworn testimony.
20. The documentary evidence submitted included five unsworn statements from Electors and excerpts from the *Election Act*, RSA 2000 c E-1.

Sworn Testimony – Esther Moyah

21. The Appellant testified that many people did not know that they could vote online until Election Day and that some people did not know they could vote online until she told them. She also testified that the Election Official did not know how to maintain peace and order at the Polling Station.

Sworn Testimony – Ruby Stanley

22. Ruby Stanley testified that she was present at the vote count. She testified that she was present as a scrutineer for two Candidates and was also a tally recorder. She witnessed the Electoral Officer open the ballot box and dump the ballots on the table. As a tally recorder she was given a list of names and would check off each box as the Electoral Officer said the names. Each tally recorder was given a sheet with some names but not all the Candidates names so as they were recording votes they were not able to cross check. Every time a tally sheet was filed with 100 marks for a Candidate she was given another sheet.

During the vote count she witnessed Rhonda take over Esther's tally sheets when Esther went to the washroom.

23. With respect to the electronic votes Ruby Stanley testified that the Electoral Officer did not show the tally recorders what was on the computer, she just wrote down the numbers herself.
24. Ruby Stanley witnessed a people gathering around the Polling Clerk during the vote count, but did not believe that it prevented her from doing her job properly. She believes that the Polling Clerk was a professional and that she was focused on what she was doing. During the vote count Ruby Stanley pointed out an error to the Polling Clerk and told her that she could correct it, but the Polling Clerk told her that she would redo it herself. She testified that after she went home from the vote count she found more mistakes in the photos that Rita Quinney had taken.
25. In response to questions from the Committee, Ruby Stanley testified that she did not believe that the number of votes added up to the number of tally marks. She does not believe that the numbers were double checked and does not believe that it was properly added up. She also testified that she did not ask the Polling Clerk to recount the votes because there were too many mistakes.

Analysis

Was the Counting of Electronic Votes Carried Out Properly

26. The Appellant submitted that the Polling Clerk violated section 8.6(a) of the Code by not counting the electronic votes in the presence of an Elector and not having a Candidate or Scrutineer review the electronic voting to see how many votes the Candidates received.
27. The Committee finds that there were Electors and Scrutineers present at the vote count when the electronic votes were counted. Counting the votes in the presence of Electors, Candidates, and Scrutineers does not require the Electoral Officer to allow any person to handle or personally review ballots or electronic systems. The Committee was not persuaded, based on the evidence provided, that those present could not have looked over the Polling Clerk's shoulder to observe and scrutinize whether she was making any mistakes in recording the electronic votes.

Were Electors Given Notice of the Electronic Vote

28. The Appellant submitted that the Electoral Officer violated section 8.5.3(b) of the Code by failing to give proper notice of the electronic vote. The unsworn statements included in the Appellant's documents are statements from five Electors stating that they did not receive instructions for electronic voting by mail or electronically. The Committee also notes that some of the same unsworn statements indicated they were successful at casting their vote electronically.

29. Section 8.5.3(b) does not require electronic voting to be provided by mail. It would not be a violation of section 8.5.3(b) for an Elector Officer to only provide electronic voting instructions electronically. While the Appellant submitted that posting the instructions online only was not sufficient because many people do not have access to the internet, the Committee finds that posting notice and instructions electronically is a reasonable means of providing instructions to those who have access to the means to vote electronically.
30. The Committee also finds that the Notice of Election, which is mailed out to Electors (and was also posted in the Band Office, on facebook, on FLFN's website, and on the FLFN mobile application), does include notice of the electronic vote and instructions for electronic voting, including the web address and required identification. The Committee also notes that approx 437 of the 1071 votes were cast electronically.

Were Electors Who Voted Electronically Properly Verified

31. The Appellant submitted that some Electors voted electronically with only their status number. She submitted that this is not sufficient identification to properly identify a member and erred in her application of section 8.5.3(c)(iv) of the Code.
32. Section 8.5.3(c)(iv) only requires Electors to verify their identity to the satisfaction of the Electoral Officer. This section does not require any specific forms of identification nor multiple methods of identification.
33. The Notice of Election states that in order to vote electronically you must provide your status number, date of birth, email address, and phone number on the onefather website.
34. The Committee finds that the Electoral Officer has the discretion to determine which forms and the extent of identification they are satisfied with. The Committee finds that the standard of review for the Electoral Officer's exercise of their discretion is reasonableness. This means that the Electoral Officer must make a reasonable decision when they decide what forms of identification and how much identification they require to verify an Elector's identity.
35. The evidence that Electors voted with only their status number is hearsay. This means that it was not known directly by anyone who gave sworn testimony, it is only something that was known from second-hand sources or from unsworn statements. On the basis of the evidence provided the Committee is not persuaded that Electors voted electronically without also providing their date of birth, email address, and phone number. The Committee finds that the identification required by the Electoral Officer was reasonable and that she did not err in her application of section 8.5.3(c)(iv).

Was the Electoral Officer Able to Administer the Vote Count

36. The Appellant submitted that the Electoral Officer erred in their application of section 6.6(a)(i)(II) and 8.1(k) of the Code by failing to maintain security, peace, and order at the Polling Station during the vote count.
37. Section 6.6(a)(i)(II) of the Code empowers the Electoral Officer to remove any individual who interferes with her ability to administer the Election from the Polling Station. Section 8.1(k) gives the Electoral Officer the power to remove any Scrutineer who interferes with the operation of the Election from the Polling Station.
38. Both of these sections give the Electoral Officer the discretion to remove individuals. The Committee finds that the standard of review for the Electoral Officer's exercise of their discretion is reasonableness.
39. The Appellant submitted that the provisions of Alberta's Electoral Act are a good model for the standards of maintaining security, peace, and order. The Electoral Officer is required to follow the provisions of the Code. The Committee will not hold the Electoral Officer to the standards set out in other legislation by requiring her to do anything other than what the Code requires of her or to exercise her discretion in any particular manner other than reasonably.
40. The Committee is not persuaded that any Elector interfered with the Electoral Officer's ability to administer the vote count or that any Scrutineer interfered with the operation of the vote count. Esther Moyer's evidence was that it was a chaotic environment. Ruby Stanley's evidence was that she was able to focus and that the Polling Clerk was a professional who she believed was able to focus.
41. Taking into account the importance of the vote Count being done in the presence of Electors and Scrutineers, the decision to remove individuals cannot be taken lightly. A person may interfere with the administration or operation of the vote count if they are purposefully or obstinately in the way, shouting, heckling, or otherwise being a nuisance, or handling election materials without the Electoral Officer's permission.
42. In this case the only evidence of interference is from the overall ambiance of a chaotic environment. The Committee does not find that any individual's contribution to that alleged ambiance of chaos constituted interference that would empower the Electoral Officer to have them removed. As the Committee has concluded that the conditions that would empower the Electoral Officer to remove an individual were not satisfied, the Committee cannot find her decision not to exercise that power unreasonable.

Did the Electoral Officer Properly Supervise the Vote Count

43. The Appellant submitted that the Electoral Officer violated section 6.4(a)(i) of the Code by failing to properly supervise all persons appointed to assist in the vote count.
44. The evidence before the Committee is that another individual took over the Appellant's role as a tally recorder when the Appellant went to the washroom. It is orderly and efficient to have appointees take over for another appointee in these circumstances. The Committee does not find that this constitutes a failure to properly supervise appointees.

Did the Electoral Officer Protect and Maintain the Ballots

45. The Appellant submitted that the Electoral Officer violated section 6.4(a)(iv) of the Code by failing to properly protect and maintain the ballots.
46. The evidence before the Committee is that the ballots were dumped out onto a table. There is no evidence presented that ballots were left uncounted as a result. There is no evidence that any ballot was destroyed, rendered unreadable, misplaced, taken, etc whilst on the table. The Committee is not persuaded that the ballots were not protected and maintained.

Was the Outcome Directly Affected

47. All grounds of Appeal under the Code require the Appellant to demonstrate that the outcome of the Election was affected.
48. 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.
49. This test asks whether the number of impugned votes is greater than the margin of victory.
50. In this case the margins of victory are the difference between the number of votes for the Candidate elected to the sixth Councillor position and the Candidate for Councillor who came in seventh; and the difference between the number of votes for the Candidate elected as Chief and the Candidate for Chief who came in second.
51. The Final Electoral Officer's Report lists 277 votes for Wanda Stanley as the Candidate elected to the sixth Councillor position and 208 votes for Hans McCarthy as the Candidate for Councillor who came in seventh. Thus, the margin of victory for the magic numbers test is 69 votes for Councillor. The Final Electoral Officer's Report lists 395 votes for Gregory Desjarlias as the Candidate elected for Chief and 186 votes for Stoney Dion as the Candidate for Chief who came in second. Thus, the margin of victory for the magic numbers test is 209 votes for Chief.

52. In order to prove on a balance of probabilities that the alleged miscount directly affected the outcome the Appellant must provide persuasive evidence (*Bird v Paul First Nation*, 2020 FC 475 at para 30) that, on a balance of probabilities, more than 69 votes for Councillor or 209 votes for Chief were impugned.
53. In this case votes may have been impugned if there was reliable evidence that electronic votes were not cast by an Elector or an Elector cast more than one Electronic vote; if there was reliable evidence that a failure to provide instructions in electronic voting prevented Electors from being able to vote; or if there was reliable evidence that errors or violations of the Code at the vote count resulted in a miscount or in ballots being lost or destroyed before they were counted. The Appellant provided testimony that did not provide any evidence of this nature and has not demonstrated that the outcome of the Election would have been affected.
54. The Committee has concluded that none of the alleged errors or violations were proven on a balance of probability. As a result, it cannot conclude that there are any impugned votes. The Committee also finds that the Appellant has not proven that the alleged errors or violations would have affected the outcome of the election if they had been proven.

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