

e-document

F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
31-MAY-2022		
Robert M'vondo		
Winnipeg, MAN	-1-	

-JUDICIAL REVIEW

Court File No. T-1107-22

FEDERAL COURT OF CANADA

BETWEEN:

**LARSON ANDERSON, EDWARD ALBERT, ANTHONY APETAGON,
ORVILLE APETAGON, DEON CLARKE, JOHN L. HENRY,**

Applicants,

-and -

**PAM TAIT-REAUME, ROY FOLSTER, ERIC ROSS SR., SHERRY MENOW, BESSIE
FOLSTER, GWEN APETAGON, HILDA ALBERT, STEPHANIE CONNORS, HUBERT
HART, JERLEEN SULLIVAN, DAVID SWANSON**

Respondents

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

**DUBOFF EDWARDS SCHACHTER
LAW CORPORATION
1900 – 155 Carlton Street
Winnipeg, Manitoba R3C 3H8**

**Harley I. Schachter, Neil J. Duboff, Kaitlyn E. Lewis,
Phone: 942-3361
Fax: 942-3362**

FEDERAL COURT OF CANADA

BETWEEN:

LARSON ANDERSON, EDWARD ALBERT, ANTHONY APETAGON,
ORVILLE APETAGON, DEON CLARKE, JOHN L. HENRY,

Applicants,

-and -

PAM TAIT-REAUME, ROY FOLSTER, ERIC ROSS SR., SHERRY MENOW, BESSIE
FOLSTER, GWEN APETAGON, HILDA ALBERT, STEPHANIE CONNORS, HUBERT
HART, JERLEEN SULLIVAN, DAVID SWANSON

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicant.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicants. The Applicants request that this Application be heard at the City of Winnipeg in the Province of Manitoba.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the Applicants' solicitor, or where the Applicant is self-represented, on the Applicants **WITHIN 10 DAYS** after being served with this Notice of Application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

MAY 31 2022

May __, 2022

ORIGINAL SIGNED BY
ROBERT M'VONDO

Issued by: REGISTRY OFFICER (Registry Officer)

Federal Court of Canada
363 Broadway, 4th Floor
Winnipeg, Manitoba R3C 3N9
Tel (800) 663-2096

Winnipeg Local Office Bureau local de Winnipeg
400 - 363 Broadway 400 - 363, Broadway
Winnipeg, Manitoba Winnipeg (Manitoba)
R3C 3N9 R3C 3N9

TO: REGISTRY
Trial Division, Federal Court of Canada
363 Broadway, 4th Floor
Winnipeg, Manitoba R3C 3N9
Tel (800) 663-2096

**AND TO: PAM TAIT-REAUME, ROY FOLSTER,
ERIC ROSS SR., SHERRY MENOW, BESSIE FOLSTER,
GWEN APETAGON, HILDA ALBERT**
c/o Leah Ballantyne Law Corporation
General Delivery
Pukatagwagan, MB R0B 1G0
Ph: (604) 378-1443
E: ballantynelaw@gmail.com

AND TO: STEPHANIE CONNORS
7 Waller Cres
The Pas, MB R9A 1T1

AND TO: HUBERT HART
Box 161
Norway House, MB R0B 1B0

AND TO: JERLEEN SULLIVAN
General Delivery
Norway House, MB R0B 1B0

AND TO: DAVID SWANSON
General Delivery
Norway House, MB R0B 1B0

APPLICATION

THIS IS AN APPLICATION for Judicial Review in respect of the decision of the Norway House Cree Nation Election Appeal Committee dated May 19, 2022, and received by the Applicants on May 20, 2022, whereby they decided:

- a. That the elected Chief, (the Applicant, Larson Anderson), had engaged in “corrupt practices” in respect of the election that took place March 7, 2022. The reasons given were that the elected Chief:
 - i. Took part in passing a Band Council Resolution, prior to the election process commencing, by which the band council of the day, in recognition of the covid-19 pandemic, approved of the use of online voting in addition to in- person and mail in ballots; and
 - ii. Took part in the publication, including by the Winnipeg Sun and Toronto Star, of newspaper stories that contained “campaign promises”.
- b. That due to the corrupt practices found, the office of the Chief had been vacated;
- c. That Chief Larson Anderson, would be ineligible to be a candidate in elections for Chief or for Councillor in any Norway House Cree Nation election for a period of six years; and
- d. That new elections are to be held for all Chief and Council positions because the election process used electronic online voting.

THE APPLICANT MAKES APPLICATION FOR:

1. An order that the application be heard on an expedited and urgent basis;

2. An interlocutory order that the Chief and Council elected on March 7, 2022, are to remain in office with the full authority of their respective offices pending a final decision of this court in these proceedings.
3. An interlocutory order staying the decision of the Norway House Cree Nation Election Appeal Committee declaring the office of the Applicant, Larson Anderson, (the elected Chief) to be vacated, pending a final decision of this court in these proceedings.
4. An interlocutory order staying the decision of the Norway House Cree Nation Election Appeal Committee purporting to remove the Councillors elected on March 7, 2022 from office, (if that is what their decision sought to effect), pending a final decision of this court in these proceedings.
5. An interlocutory injunction restraining anyone from taking steps towards holding a new election process, until the court rules on whether a new election process is required and if so, for which positions.
6. A final order declaring that the Election Appeal Committee decision was *ultra vires*, given that the hearing was conducted after the expiry of the 30 day time limit provided for in section 7.3 of the *Election Procedures Act*.
7. A final order quashing any decision of the Election Appeal Committee that they had the jurisdiction to make.

8. A final order declaring that permitting electors to vote electronically is not grounds for challenging the March 7, 2022 election results, and holding that that:
- a. The Chief and Council had the authority, by way of Band Council Resolution (“BCR”) to permit electronic voting to take place;
 - b. No one challenged that BCR within the required 30 days, and in accordance with the *Federal Courts Act*, section 18.1(2) the BCR may not now be challenged; or
 - c. In the alternative, if the Chief and Council lacked the authority to permit electronic voting to take place, allowing for such electronic voting was a decision within the jurisdiction of the Electoral Officer, and she made such a decision to utilize online voting in addition to in-person and mail in ballots;
 - d. No one challenged the decision of the Electoral Officer to allow electronic voting to take place within the required 30 days of her decision, and in accordance with the *Federal Courts Act*, section 18.1(2) the decision may not now be challenged;
 - e. The electronic voting was conducted by way of secret ballot process and was not in substitution of in-person or mail in ballots, which latter two voting processes remained available to any electors to use if they wanted to do so; and
 - f. In the alternative, if the electronic votes are not counted, the results of the election would not change in respect of the election of any of the Applicants Larson Anderson, (the Chief), and Edward Albert, Anthony Apetagon, Orville Apetagon, John L. Henry and Deon Clarke, (5 of the 6 councillors). The electronic voting thus had no material effect on the outcome of the election.

9. A final order declaring that all election appeals are dismissed instead of remitting any appeals back to an Election Appeals Committee for a rehearing.

10. A final order declaring that the none of the offices of Chief and Council have been vacated.

11. In the alternative to a decision dismissing all election appeals in their entirety, an order quashing the current decision and:
 - a. Remitting such of the election appeals that remain cognizable and appropriate to be heard afresh by an Election Appeal Committee, (if any), to be heard and determined by a newly constituted Election Appeal Committee composed of 5 different persons other than the 7 persons who made the decision challenged in these proceedings, such members to be appointed in such manner as the court directs;
 - b. Directing that the current electoral officer, Stephanie Connors, has not been removed from office, and that if, upon any rehearing before any Election Appeal Committee, a new election is required, that Stephanie Connors will conduct that new election process.

12. In the further alternative to dismissing all election appeals, or alternatively quashing the decision in its entirety and remitting the matter back to be heard by a newly constituted Election Appeal Committee, an order declaring which offices, if any, have been vacated, and for which offices a new election is to be held, and directing the electoral officer, Stephanie Connors to conduct such elections.

13. The costs of the Applicants in this Application on a solicitor and client basis.

14. Such further and other relief as to this Court may seem just.

THE GROUNDS FOR THE APPLICATION ARE:

1. The *Federal Courts Act*, RSC 1985, c F-7, including ss. 18, 18.1 and 44, and Federal court Rules 53, Part 5 of the rules including rules 317-319, 374.
2. The decision of the Election Appeal Committee being challenged is contrary to law.
3. All interlocutory injunctive relief and the requested stay of the effect of the decision calling for a new election should be granted on the grounds that:
 - a. The Applicants have a genuine issue to be tried, and in any event, their case presents as a strong *prima facie* case;
 - b. Irreparable harm will be experienced if the interlocutory relief is not granted;
 - c. The balance of convenience favours the granting of the interlocutory relief.
4. The Election Appeal Committee had no jurisdiction to conduct the hearings that they did conduct, because any hearing that they were empowered to hold, had to take place within 30 days of the filing of the appeal, which they did not do.
5. There exists a reasonable apprehension of bias on the part of the Election Appeal Committee members who heard the appeals towards the Applicants, and they prejudged the outcome of the appeal process.

6. The Election Appeal Committee failed to conduct a process that was in accordance with the First Nation's custom election process, as well as the requirements of natural justice and procedural fairness by:
 - a. Advertising to the membership that a public hearing would take place at a certain time and place, and then not holding the hearing at that time and place, to wit:
 - i. The Hart appeal did not take place in public or at the time or location advertised by the Election Appeal Committee;
 - ii. The Sullivan appeal did not take place in public or at the time or location advertised by the Election Appeal Committee.
 - b. Holding the hearings in places other than as advertised, thus preventing members who sought to attend the hearing from being able to attend;
 - c. Refusing to disclose the procedure and process that the Election Appeal Committee intended to utilize, in the election appeal process, even when asked;
 - d. Failing to give to the elected Chief and Council any or any proper notice of the Hart or Sullivan hearing;
 - e. Failing to provide those who stood to be affected by the decision, (the Chief and Council) sufficient particulars of the appeals and allegations made;
 - f. Failing to provide those who stood to be affected by the decision (the Chief and Council) with an opportunity to make representations, tender evidence and make submissions prior to the decision being made, even though the Appeal Committee had notice that the Chief and Council wished to participate;
 - g. Failing to follow the custom code election appeal process developed over the years at Norway House Cree Nation, which includes the requirement for a public hearing

at which members of the Nation can attend, and at which public forum, those whose elected positions are the subject of the hearing, are permitted to attend, lead evidence and make submissions, all with the benefit of legal counsel if they so choose;

- h. Becoming involved in the election process by publishing, during the election process, negative comments about the Chief and Council, and advocating for the election of certain other persons to council other than those who were elected, all contrary to the duties of the Election Appeal Committee members as set forth in the *Election Procedures Act*, section 1.1(a).

7. The Election Appeal Committee erred in law by basing their decision on “facts” that were either not in evidence before them, or which alleged facts do not exist, including:

- a. Their finding that there was a “blackout period” that commenced on the nomination date and ran to the date of the election;
- b. Their finding that the media release and story published by the Winnipeg Sun and the Toronto Star on February 21, 2022, concerning a memorandum of understanding that had been in negotiation for over a year, and which was finalized on or around the end of January 2022, was a “corrupt practice,” as that term is properly defined;
- c. Their finding that the publication of the media release and story published by the Winnipeg Sun and the Toronto Star on February 21, 2022 amounted to conduct on the part of the Chief;

- d. Their finding that there were community members who were denied the right to participate in the election (section 7 of their decision);
 - e. Their finding that those members who lacked an internet connection were denied an opportunity to vote, when those persons could still vote in person or by mail-in ballot if they so chose.
8. Failing to consider relevant evidence that was or should have been and would have been before them, including:
- a. The fact that the Chief and Council had the authority to authorize the use of electronic voting;
 - b. The fact that no one complained, until after the election, that the use of online voting, authorized as it was in an emergent situation during a Covid-19 pandemic, was inappropriate or unfair to any candidate or elector, and no one challenged the decision of the band council in this regard;
 - c. The fact that the Electoral Officer had the authority to and did adopt electronic voting as a means of voting, as she was entitled to do, (see *Election Procedures Act* Article 5.1), and the fact that no one challenged her decision until after the election;
 - d. The fact that the company retained to coordinate the online voting, “One Feather” is a well respected, professional and secure online voting platform that has successfully assisted over 195 First Nations in Canada with their electronic voting requirements, and the secrecy of the vote was not in any way compromised;
 - e. The fact that the February 21, 2022 announcements in the *Winnipeg Sun* and in the *Toronto Star* were reporting on a Memorandum of Understanding that was being

negotiated for over a year and which was finalized on or around the end of January 2022;

- f. The fact that the *Election Procedures Act* does not identify that there is a “blackout” period during which the Chief and Council are prohibited from exercising their offices;
- g. The fact that the *Election Procedures Act* does not prevent any candidate from making election promises generally, or in speaking to their achievements while in office, as politicians regularly do;
- h. The fact that members who lacked an internet access could still vote in-person or via mail in ballot if they chose;
- i. The fact that the band membership at large overwhelmingly adopted and utilized the electronic voting portal, and hence there was a broad consensus adopting that form of voting sufficient for it to be considered part of their custom;
- j. The fact that the number of people who voted in the recent election, when the ways of voting were combined (in-person, mail in ballot, and electronic), and when compared to the last few elections, demonstrates that electors who wanted to vote were not denied the opportunity to do so;
- k. In the alternative, excluding from the vote count, each and every electronic vote cast, would not have changed the election results in respect of any of the elected members of Chief and Council, save for the position of 1 Councillor (Councillor David Swanson).

9. The Election Appeal Committee erred in law in holding that the Chief, Larson Anderson, was guilty of a corrupt practice under Article 9.1 of the *Election Procedures Act*, and in particular:
- a. In taking part in passing a Band Council Resolution that authorized the Electoral Officer to utilize electronic voting in addition to other means of voting;
 - b. By finding that the February 21 2022 publication, by the Winnipeg Sun and the Toronto Star, of an article about the signing of a memorandum of understanding by Norway House Cree Nation with a nickel mining company was a “campaign promise” made by Larson Anderson, and in finding that that such a publication was a “corrupt practice” at all, much less one for which the elected chief is somehow responsible for.
10. The Election Appeal Committee erred in law by improperly delegating the decision making process to their legal counsel who wrote the decision. The particulars currently known are that:
- a. The decision itself records, at page 2 and page 10 the name and address of the lawyer evidencing that the decision appears to be the product of the lawyer’s opinions and conclusions;
 - b. The lawyer met with the Election Appeal Committee numerous times during meetings at which the appeals were being considered, and the lawyer took part on the deliberation process;
 - c. The lawyer electronically transmitted the decision to counsel for the Chief and Council with a file name of “Final draft Hart-Sullivan Appeal.pdf.”

d. The Applicants are entitled to know the extent of legal counsel's involvement in the formation and writing of the decision on the merits. If legal counsel was acting in two capacities, that is, as both legal advisor to the Election Appeal Committee, as well as a delegated decision writer, the applicants are entitled to know the details of the decision writer's opinions and conclusions on the facts, and her reasons for same. Not everything a lawyer writes is protected from disclosure merely because they are a lawyer.

11. The Election Appeal Committee erred in law if their decision is interpreted as requiring a new electoral officer to be appointed, when the *Election Procedures Act* does not provide for a substitute to be appointed by them.

12. Grounds for the replacement of the current cohort of Election Appeal Committee members are that:

- a. There is a reasonable apprehension of bias in the current Election Appeal Committee members hearing any further appeals if any are to be remitted back;
- b. The current 7 members of the Election Appeal Committee:
 - i. Were in fact bias towards the elected Chief and Council,
 - ii. Did in fact prejudge the outcome of the election appeal;
 - iii. Contacted a potential new electoral officer for the purposes of conducting new elections prior to their decision being made;
 - iv. Improperly misled the electorate and the candidates and elected Chief and Council by:

1. Advertising that the appeal hearings would be in public, when they were conducted in private;
 2. Failing to hold the hearings at the time, place, and location that they advertised they were to be held;
 3. Implying, in their decision (at para 11 in respect of the Sullivan appeal), that the Electoral Officer participated in the appeal, when in reality the Electoral Officer was not invited to make any representations, nor was she permitted to participate or provide any evidence at the hearing;
 4. Refusing to disclose to the Chief and Council what process the Appeal Committee would be using to conduct the appeal, even when asked to do so, and even when it was communicated to them that the Chief and Council wished to attend to participate in the appeal process.
- v. Held both hearings in secret, but claiming, (at para 29 of their decision), that the “hearings”, (at which only the appellants were permitted by them to attend and participate) was a process that is in keeping with the rule of law or the *Election Procedures Act*, and that such a process is a “flexible and quasi formal process.”
- vi. Participated in the election process after they were appointed to office, contrary to article 1.1 (a) of the *Election Procedures Act*.
- c. Justice requires that any re-hearing or any appeal be heard by a new and different panel;

- d. A hearing that has the appearance of being fair and in accordance with the law would not be possible in front of the current members of the Election Appeal Committee given the manner in which they conducted the appeal hearings that are the subject of this court process.

13. Such further and other grounds as counsel may advise and this Honourable Court may allow.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The decisions of the Norway House Cree Nation Election Appeal Committee dated May 19, 2022;
2. The material to be filed in any interlocutory proceedings;
3. Other affidavits to be filed;
4. Such further and other documentary evidence as counsel may advise and this Honourable Court may allow.

REQUEST FOR MATERIAL RELEVANT TO THE APPLICATION

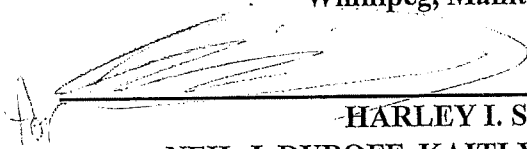
Pursuant to Rules 317 and 318 of the Federal Court Rules, the Applicants request that within twenty days from the date of service of this Application, the Respondents provide the Applicants with all of the material that was before the Election Appeal Committee when the decisions were being considered and made and including, without limitation:

- a. Notes and minutes of Election Appeal Committee meetings, concerning the matters in issue;
- b. Notes and minutes of the purported appeal hearings on May 9th and 12th, 2022;

- c. All notes, documents, memorandum or correspondence on which the Election Appeal Committee relied, including memos, letters or notes and emails to or from their lawyer, Leah Ballantyne, who either wrote or assisted in the drafting of the decision;
- d. An unedited electronic copy of the recording of the appeal hearings alleged to have been conducted on May 9 and 12, 2022 including any recording of the deliberations and announcement of the appeal result itself, and any other recordings concerning the matters in issue in the possession power or control of the Election Appeal Committee or their lawyer.

May 31, 2022

**DUBOFF EDWARDS SCHACHTER
LAW CORPORATION
1900 – 155 Carlton Street
Winnipeg, Manitoba R3C 3H8**



**HARLEY I. SCHACHTER
NEIL J. DUBOFF, KAITLYN E. LEWIS
Counsel for the Applicants**

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 31st

day of MAY A.D. 20 22

Dated this 31st day of MAY 20 22

Robert M'Vondo
REGISTRY OFFICER
AGENT DU GREFFE