

Court File No. T-1178-21

FEDERAL COURT

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FEDERAL COURT
COUR FÉDÉRALE

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BETWEEN:

23-JUL-2021

ACHO DENE KOE FIRST NATION

Modelisa Hennessy

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-1-

Applicant

and

FLOYD BERTRAND, JAMES DUNTRA, and EUGENE HOPE

Respondents

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

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 Applicant. The Applicant requests that this application be heard at the City of Vancouver in the Province of British Columbia.

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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, 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.**

23 July 2021

Issued by: Original Signed by Modelisa
Hennessy
(Registry Officer)

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APPLICATION

This is an application for judicial review in respect of the Acho Dene Koe First Nation’s Election Appeal Committee’s (the “**Appeal Committee**”) decision in response to Floyd Bertrand and James Duntra’s appeals (the “**appeals**”) of the Acho Dene Koe First Nation election for Chief held on April 26, 2021 (the “**Election for Chief**”). The April 26, 2021 election was for both Chief and Council (together, the “**Election**”), but despite raising challenges to the entire election process, the appeals only targeted the results of the Election for Chief.

The Committee’s jurisdiction arises pursuant to the *Election Code for Acho Dene Koe First Nation* (the “**Election Code**”) and a Band Council Resolution passed by the former Chief and Council. A hearing of the appeals took place via videoconference on June 12, 2021.

On June 23, 2021, the Appeal Committee issued the following orders, with reasons to follow:

- (1) The election for Chief of the Acho Dene Koe First Nation of 2021 is hereby annulled.
 - (2) A new election for Chief of the Acho Dene Koe First Nation be held with all due haste, as quickly as can reasonably be done.
 - (3) Floyd Bertrand is to be allowed to run in the new election if he so chooses.
 - (4) The First Nation is to employ some person other than the former Election Officer as the Election Officer for the new election
- (collectively, the “**Order**”).

The reasons for the Appeal Committee’s decision were released at 9:25 AM PST on July 23, 2021 (the date of filing this Application).

In the absence of reasons, the Order created uncertainty in the Acho Dene Koe First Nation’s election process, including around the validity of the *Election Code* (the validity of which was challenged by the appeals) and the eligibility criteria for candidates (the customary practice concerning which was also challenged by the appeals). The Acho Dene

Koe First Nation has a direct interest ensuring that its elections are conducted in accordance with the *Election Act* and customary law, and that appeals of the election results are conducted and decided in a fair and reasonable way.

Given the deadline for filing an application for judicial review of the Order, the Acho Dene Koe First Nation brings this application to preserve its rights pending an analysis of the reasons of the Appeal Committee. The Acho Dene Koe First Nation intends to amend this application as necessary upon undertaking a full analysis of the reasons just provided by the Appeal Committee.

THE APPLICANT MAKES APPLICATION FOR THE FOLLOWING RELIEF:

- (a) An Order in the nature of *certiorari* quashing the Appeal Committee’s Order of June 23, 2021, in whole or in part;
- (b) An Order remitting the matter to a newly constituted Appeal Committee for reconsideration in accordance with this Court’s reasons;
- (c) A Declaration that the Appeal Committee acted beyond its jurisdiction in ordering that Floyd Bertrand be allowed to run in a future election;
- (d) A Declaration that the Appeal Committee’s Order and supporting reasons are unreasonable;
- (e) An interlocutory order pending a full and final hearing of the Application herein that the Order be stayed;
- (f) The costs of this application; and
- (g) Any such further and other relief that this Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

The Applicant

1. The Acho Dene Koe First Nation is a signatory to Treaty 11 and represents the descendants of Fort Liard Dene.

2. The Acho Dene Koe First Nation was never subject to an order under s. 74 of the *Indian Act*, RSC 1985, c I-5. The Acho Dene Koe First Nation’s Chief and Council are, and always have been, chosen according to custom, in accordance with the definition of “council of the band” under s. 2 of the *Indian Act*.

3. The Applicant, the Acho Dene Koe First Nation, has a direct interest in ensuring that the elections for Chief and Council, including election appeals, are conducted fairly and in accordance with the Acho Dene Koe First Nation’s *Election Code* and customary laws.

4. The Appeal Committee’s Order imposes obligations upon the Acho Dene Koe First Nation by requiring it to hold a new election for Chief that is inconsistent with the *Election Code* and Acho Dene Koe First Nation customary laws.

The Respondents

Floyd Bertrand

5. Floyd Bertrand is a member of the Acho Dene Koe First Nation who served as Chief of the Acho Dene Koe First Nation from 2003 to 2005.

6. Acho Dene Koe First Nation’s financial statements indicate that Mr. Bertrand accumulated substantial debt towards Beaver Enterprises Ltd. (“**Beaver Enterprises**”), a company owned by the Acho Dene Koe First Nation, principally during his years as Chief.

7. Mr. Bertrand’s debt was of \$27,551.94 in May 2008 and remained the same in April 2017 and in February 2021.

8. Mr. Bertrand’s candidacy to run in the elections for Chief was denied because of his outstanding debt in 2008, 2017 and again in 2021.

9. In May 2021, Mr. Bertrand appealed the results of the Election for Chief to the Appeal Committee (the details of which are included below).

James Duntra

10. James Duntra is a member of the Acho Dene Koe First Nation who ran in the Election for Chief. He received 145 votes, which put him in second place behind outgoing Chief Eugene Hope, who received 148 votes.

11. Mr. Duntra appealed the results of the Election for Chief to the Appeal Committee (the details of which are included below).

Eugene Hope

12. Eugene Hope is a member of the Acho Dene Koe First Nation and was Chief of the Acho Dene Koe First Nation from May 2017 to June 2021.

13. Mr. Hope successfully ran in the Election for Chief.

14. The appeals raised allegations against Mr. Hope, including that he engaged in corrupt election practices.

The Appeal Committee

15. On March 16, 2020, Acho Dene Koe First Nation Chief and Council appointed Garth L. Wallbridge as the only member of the Appeal Committee by way of Band Council Resolution, in accordance with s. 44 of the *Election Code*.

16. Section 44 of the *Election Code* requires that the Appeal Committee be comprised of individuals who are not members of the Acho Dene Koe First Nation. Mr. Wallbridge is not a member of the Acho Dene Koe First Nation.

17. Section 47 of the *Election Code* sets out the “Procedure for Appeals”. It states that:

47. The appellant must present the appeal in writing stating the circumstances and specifying the Electoral Offence(s) which he/she believes have been committed to the Appeal Committee within ***twenty-eight (21) days*** after election day.

[Emphasis in original.]

18. Section 48 sets out the Appeal Committee’s jurisdiction to investigate and consider appeals. It states that:

48. The Appeal Committee shall investigate the circumstances of the appellant's allegation and decide within *twenty-eight (28) days* after election day
- (1) whether the allegation is based in fact; and
 - (2) if so, whether it is sufficiently serious to nullify any part of or the entire election against which the offence(s) were committed.
- [Emphasis in original.]

19. Section 49 of the *Election Code* sets out the relief that the Appeal Committee can order, namely the ordering of a new election. It states that:

49. If the Appeal Committee decides that the offence(s) committed are sufficiently serious it may order that the result of the election against which the offence(s) was were [*sic*] committed be declared null and void and that a new election be held in its place, in accordance with the provisions of this code.

20. Section 11 of the *Election Code* also provides for appeals to the Appeal Committee of decisions of the local Returning Officer concerning candidacy in the election for Chief (and Council). It states that:

11. Each elector may nominate *only one candidate for the position of Chief and one candidate for the position of Councilor*. If the elector or candidate is not satisfied with the decision of the local Returning Officer, he/she may *appeal that decision to the Appeal Committee, whose decision on the matter shall be final*.

[Emphasis in original.]

Eligibility to run in Acho Dene Koe First Nation elections for Chief and Council

21. Section 25 of the *Election Code* sets out the eligibility criteria for running in the elections for Chief of the Acho Dene Koe First Nation. Amongst other things, it requires that eligible candidates not be in debt to the Acho Dene Koe First Nation or any of its subsidiary companies, financially or otherwise, for an amount equivalent to \$500 or more.

22. Sections 23 and 24 of the *Election Code* sets out the eligibility criteria for running in the elections for the position of Councilor. Section 24 requires that eligible candidates not be in debt to the Acho Dene Koe First Nation or any of its subsidiary companies, financially or otherwise, for an amount equivalent to \$500 or more.

23. Together, ss. 25 and 24 of the *Election Code* create the “**debt requirement**”.
24. The debt requirement has been consistently applied in Acho Dene Koe First Nation elections since at least 2008 and constitutes a customary law of the Acho Dene Koe First Nation.

Officer Beckett’s decision to reject Mr. Bertrand’s nomination for Chief

25. On February 23, 2021, Mr. Bertrand submitted his nomination papers to Mary Beckett, the local Returning Officer (“**Officer Beckett**”) to run in the Election for Chief. Among the documents submitted to Officer Beckett was a 2015 document allegedly prepared by Beaver Enterprises, indicating that Mr. Bertrand’s debts to Beaver Enterprises had been “written off”.
26. When Mr. Bertrand submitted his nomination papers to Officer Beckett on February 23, 2021, she informed Mr. Bertrand that she had obtained the accounts receivable as of February 15, 2021 for all Acho Dene Koe First Nation subsidiary companies, and that these records indicated Mr. Bertrand owed Beaver Enterprises an outstanding debt of \$27,551.94.
27. Between February 23, 2021 and March 2, 2021, Officer Beckett inquired into Mr. Bertrand’s debt to determine whether it had been “written off”. She obtained an explanation from Acho Dene Koe First Nation’s accountant of how Beaver Enterprises’ accounting system works and of the verifications that the accountant had carried out into Mr. Bertrand’s debt. The accountant explained that debts in Beaver Enterprises’ accounting system could not be “written off” without an audit trail.
28. Officer Beckett shared the detailed financial statements of Beaver Enterprises relevant to Mr. Bertrand’s debt with Mr. Bertrand.
29. On March 2, 2021, legal counsel for Mr. Bertrand sent Officer Beckett a package of documents.
30. On March 2, 2021, Officer Beckett informed Mr. Bertrand of the verifications she and the accountant had carried out to verify Mr. Bertrand’s debt. She informed him that there was no evidence of a “write off” of his debt. She separately informed him that she had reviewed the package of documents she had received from his legal counsel.

31. After the deadline for payments of debts (4:00 pm on March 2, 2021), Officer Becket prepared and posted in the community a document confirming the nominations that had been received for the 2021 Elections, and stating the nominations she had found ineligible, including Mr. Bertrand's.

32. In addition to Mr. Bertrand, two other candidates' eligibility to run in the 2021 Elections was denied by Officer Beckett: in one case because the nominee did not respect the debt requirement and in the other case because the individual failed to submit the required paperwork.

Mr. Bertrand's first Appeal to the Appeal Committee and judicial review application to the Federal Court

33. On March 3, 2021, Mr. Bertrand appealed the decision of Officer Beckett rejecting his nomination to the Appeal Committee.

34. On March 5, 2021, Mr. Bertrand filed an application for judicial review and a motion for injunctive relief to the Federal Court in relation to Officer Beckett's decision rejecting his nomination for Chief (Federal Court file T-391-21).

35. On March 17, 2021, the Appeal Committee informed Officer Beckett and Mr. Bertrand of his decision to suspend the appeal process until after the judicial review decision by the Federal Court.

36. In reasons dated March 25, 2021, and indexed as 2021 FC 257, Grammond J. found that Mr. Bertrand would not suffer irreparable harm if the Court did not issue the injunctive relief sought because Mr. Bertrand would be able to challenge the decision of his candidacy after the elections, either through the Acho Dene Koe First Nation's internal appeal process (as set out in the *Election Code*) or through the Federal Court.

37. Two other candidates whose nominations were rejected made use of the nomination appeal process prior to the Election. Their appeals were rejected by the Appeal Committee.

38. After the release of the decision of Grammond, J., on March 25, 2021, Mr. Bertrand filed another appeal to the Appeal Committee. The Notice of Appeal filed on March 25,

2021 was not provided as part of the “disclosure” that the Appeal Committee circulated in advance of the appeal hearings.

Appeals to the Appeal Committee filed after the Election

39. On April 26, 2021, the Acho Dene Koe First Nation held the Election.

40. On April 28, 2021, Mr. Duntra submitted a Notice of Appeal to the Appeal Committee setting out, *inter alia*, the following grounds of appeal:

- (i) “The online voting process was flawed resulting in the illegal prevention of many legitimate voters from exercising their voting rights. On-line voting codes or identification and/or passwords failed”;
- (ii) “Many voters who received Mail-in Ballots did not receive them in time resulting in the failure to send their ballots to Electoral Officer within the time period as prescribed by the Election Code”;
- (iii) “The then Chief Eugene Hope published false, vexatious and malicious lies about [James Duntra] on his face book page, and by other means, imputing that a vote for Jim Duntra was a vote for the previous chief Harry Deneron. These lies contributed unfairly and illegally to the election result for the position of Chief”;
- (iv) “Many Voters where [*sic*] denied assistance to get to and from Voting Stations thus being prevented from voting”;
- (v) “Many of those who voted for Eugene Hope where [*sic*] bribed or illegally induced to vote”.

41. On May 5, 2021, Mr. Bertrand submitted a second Notice of Appeal to the Appeal Committee, setting out the following grounds of appeal:

- (i) “[...] band members could not vote because their e-ballot codes did not work or they were not provided any mail in ballots and were not given enough time to receive their mail in ballots and mailed [*sic*] back to ADKFN, in time for the election. In some cases, band members who

received their ballots, in the mail, wanted to vote online but needed assistance, when phoning the Election Officer their calls went unanswered and voicemails were not returned; these band members were not given the opportunity to vote in the 2021 ADKFN chief and council election”;

- (ii) “Band members living outside the community wanted to vote and wanted their voices to be heard, as is their constitutional right, they signed a [*sic*] appeal notice letter stating that they want their appeal notice letter to be submitted and accepted in ADKFN April 26, 2021 chief and council election. [...] These band members made numerous attempts to reach ADKFN election officer by telephone but were unsuccessful”;
- (iii) “Band members living in the province of British Columbia were not given a fair chance to vote, in the April 26, 2021 ADKFN chief and council election. [...] Pacific Time Zone is 1 hour behind Mountain Time Zone therefor [*sic*] when Band members living in British Columbia tried to vote just prior to 8:00 p.m. Pacific Time Zone could not cast their vote because it would have been past 8:00 p.m. Mountain Time Zone. There was no clarity of time zone in the “Election for Chief & Council Acho Dene Koe Forst Nation” [*sic*] poster”;
- (iv) “[...] witnesses at the counting of the ballots informed me that one of the councillor candidate [*sic*], Julie Capot Blanc, was present in the counting and had partaken in the counting of the ballots. In past elections for ADKFN chief and council elections candidates were not allowed in the counting procedure, candidates have always had a scrutineer present to observe the counting of ballots”.

42. On May 6, 2021, Mr. Bertrand submitted another Notice of Appeal to the Appeal Committee, which he identified as supplementing his Notice of Appeal provided to the Appeal Committee on March 25, 2021, setting out the following grounds of appeal:

- (i) “At least 8 members were unable to vote due to technical irregularities on April 26, 2021. Being outside of Fort Liard, North West [*sic*] Territories, they were unable to attend a polling station”;
- (ii) “Mail-in-ballots were not sent out 56 days in advance of the election. As a result, they were delayed in arriving with [*sic*] the individuals and at least [*sic*] members’ ballots were not received by the [*sic*] April 26, 2021 and therefore not counted. The Electoral Officer has no jurisdiction to disregard mail-in-ballots, especially where any delay is due to insufficient time provided to voters.”
- (iii) “At least two members were unable to get any ballot from the Electoral Officer upon request”;
- (iv) “Mr. Hope engaged in corrupt election practices and improperly abused his office of Chief to promote his candidacy, all with the knowing assistance of Boyd Clarke [*sic*] [...]”;
- (v) “Scrutineers were denied the opportunity to observe the Electoral Officer counting the online ballots and/or mail-in ballots”;

43. Mr. Bertrand also stated in his supplemental Notice of Appeal that he “reserves the right to provide evidence on the customary law of Acho Dene Koe First Nation which does not include a general consensus that the debt requirement is a requirement.”

44. The hearing for the appeals of Mr. Duntra and Mr. Bertrand was initially scheduled for May 22, 2021. However, the appeals made serious allegations against Eugene Hope, the former Chief and successful candidate for Chief in the Election, who was not provided notice of those allegations. The appellants agreed to adjourn the appeal hearing to allow Mr. Hope time to prepare a defence to the allegations against him.

45. The Appeal Committee held an online hearing on June 12, 2021.

46. Neither Mr. Bertrand nor Mr. Duntra called any witnesses, other than themselves, to substantiate their grounds of appeal. Officer Beckett also testified before the Appeal Committee.

47. Acho Dene Koe First Nation took no position on the appeals, as recommended by the Appeal Committee.

48. On June 23, 2021, the Appeal Committee issued the Order (set out above).

49. The Appeal Committee stated that reasons for its Order would follow. The Acho Dene Koe First Nation received reasons from the Appeal Committee on the morning of July 23, 2021, the date this Application was filed.

The Appeal Committee acted beyond its jurisdiction in issuing the Orders

50. The Order goes beyond the jurisdiction of the Appeal Committee, which is conferred and limited by ss. 11 and 44-49 of the *Election Code*.

51. First, the Order purports to require that Mr. Bertrand be allowed to run in the new election for Chief despite the *Election Code* only authorizing the Appeal Committee to order, if it finds that the “offence(s) committed are sufficiently serious”, that the results of the Election are null and void and that a new election be held in its place, in accordance with the provisions of the *Election Code* (s. 49 of the *Election Code*).

52. Second, the Appeal Committee does not have jurisdiction to determine the eligibility of a nominee for a new election, and therefore order that the nominee be permitted to run in a new election.

53. Third, the Appeal Committee did not have jurisdiction to consider the validity of the *Election Code*, or any part of it. No provision of the *Election Code* directly or implicitly confers on the Appeal Committee the jurisdiction to disregard provisions of the *Election Code*.

54. The Appeal Committee also went beyond its jurisdiction in ordering that a new Electoral Officer be appointed to conduct the new election for Chief.

The Appeal Committee’s order that Mr. Bertrand be allowed to run in the new election for Chief and his order that a new Electoral Officer be appointed are unreasonable

55. The Appeal Committee’s Order and supporting reasons are unreasonable.

56. First, it was unreasonable for the Appeal Committee to interpret the debt requirement as set out in the *Election Code* and established by customary law as being restricted to a debt that is “recoverable by action” and not “statute-barred”, in the absence of any evidence that this represents the broad consensus of the community and, indeed, contrary to the evidence before the Appeal Committee that the debt requirement has been enforced since at least 2008 without regard for the age of the debt.

57. Second, it was unreasonable for the Appeal Committee to order that Mr. Bertrand be allowed to run in the new election for Chief based on the record before it, and before Officer Beckett, of Mr. Bertrand’s outstanding debt of \$27,551.94.

58. Third, it was unreasonable for the Appeal Committee to order that Mr. Bertrand be allowed to run in the new election for Chief, instead of referring the matter back to Officer Beckett or to a newly appointed Chief Electoral Officer, in the absence of evidence of whether Mr. Bertrand meets all other eligibility criteria set out in s. 25 of the *Election Code*, or as otherwise established by customary law.

59. Fourth, it was unreasonable for the Appeal Committee to order that the Acho Dene Koe First Nation employ some other person than Officer Beckett as the Chief Electoral Officer for the new election for Chief, in the absence of any evidence that Officer Beckett acted in a biased manner or has otherwise “lost the confidence of a substantial number of members of the [Acho Dene Koe First Nation].”

General

60. *Federal Courts Act*, RSC 1985, c F-7, ss. 18(1), 18.2;

61. *Federal Court Rules*, SOR/98-106, Rule 373.

62. Such further and other grounds as counsel may advise and this Court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

63. Affidavit of Shadie Bourget (to be sworn); and

64. Other affidavits of which counsel may so advise, and this Court may permit.

65. The Acho Dene Koe First Nation requests that, pursuant to Rules 317 and 318 of the *Federal Court Rules*, the Appeal Committee send to the Acho Dene Koe First Nation and to the Registry a certified copy of the following material that is not in the possession of the Applicants but is in the possession of the Appeal Committee:

- (i) The recording of the initial appeal hearing, which took place on May 22, 2021 via videoconference, and which resulted in an adjournment of the appeal hearing;
- (ii) The recording of the appeal hearing, which took place on June 12, 2021 via videoconference;
- (iii) Mr. Bertrand's Notice of Appeal sent to the Appeal Committee on March 3, 2021;
- (iv) Mr. Bertrand's Notice of Appeal sent to the Appeal Committee on March 25, 2021; and
- (v) Any other material that the Appeal Committee considered in issuing the Order that was not provided to the Acho Dene Koe First Nation.

July 23, 2021



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I HEREBY CERTIFY that the above document is a true copy of the original <i>issued out of</i> the Court on <u>23/07/2021</u> Dated <u>26/07/2021</u>  <i>Modelisa Hennessy</i> Registry Officer
