Federal Court Cour fédérale

Date: 20150908

Docket: T-32-15

Citation: 2015 FC 1053

Ottawa, Ontario, September 8, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ANDREW ORR AND PAUL HOULE

Applicants

and

PEERLESS TROUT FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the January 8, 2015 decision of Lornes J. Ternes who, in accordance with the *Customary Election Regulations of the Peerless Trout First Nation* ("Election Regulations"), acted as the Election Appeal Arbitrator ("Arbitrator") with respect to two appeals concerning the Peerless Trout First Nation ("PTFN") election held on October 30, 2014. The application is brought pursuant to s 18.1 of the *Federal Courts Act,* RSC 1985 c 41.

Background

[2] The Arbitrator, in fact, made two decisions as two separate appeals from the subject election were placed before him.

Orr Appeal

[3] The first concerned the Applicant, Mr. Andrew Orr, who is a member of the PTFN. Mr. Orr was nominated to run for Chief in the October 30, 2014 election, but was told by the Election Officer, Mr. Albert Oostendorp ("Election Officer" or "Electoral Officer"), that he could not do so. This was because s 9.3(c) of the Election Regulations states that any elector who is a plaintiff in a civil action against the PTFN is not eligible to be nominated and Mr. Orr had commenced a civil action against the PTFN in the Court of Queen's Bench of Alberta in 2011, seeking compensation in the amount of $2,817,720.00 that he claims to be owed for his work on a PTFN land claim. This action is ongoing.

[4] By notice of appeal ("Notice of Appeal") dated October 31, 2014, Mr. Orr appealed this decision. He submitted that the Electoral Officer erred in the interpretation and application of the Election Regulations, that s 9.3(c) of the Election Regulations should be declared to be of no force and effect because it violates ss 2(b) and (d), 3, 15, 30, 35, and 36 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 ("*Charter*"), and that the provision is contrary to the rule of law and an abuse of power as it is an attempt to prevent members of the PTFN from bringing actions

against its government. The election appeal by Mr. Orr proceeded before the Arbitrator by way of written submissions.

[5] Mr. Orr also filed an action in the Court of Queen's Bench of Alberta on July 3, 2014, seeking to have s 9.3(c) declared invalid on the grounds that it was contrary to the *Charter*. Master in Chambers Smart ("Master Smart") rendered a decision in that matter on January 5, 2014, *Orr v Peerless Trout First Nation*, 2015 ABQB 5 [*Orr QB*]. The pleadings that were before Master Smart were also submitted to the Arbitrator. The *Orr QB* decision is described below because the same issues were asserted before the Arbitrator, some of which are also pursued by Mr. Orr in this judicial review.

[6] In *Orr QB*, Master Smart noted that pursuant to s 74(1) of the *Indian Act*, RSC 1951, c 29, the Minister of Indian Affairs and Northern Development may permit a First Nation to determine for itself its election code, which the members of the PTFN have done by way of the Election Regulations. However, a community election code adopted by a First Nation is subject to *Charter* scrutiny (*Taypotat v Taypotat*, 2013 FCA 192 [*Taypotat*]).

[7] Master Smart described the issues before him as follows:

> [2] Mr. Orr alleges that s 9.3(c) is unconstitutional and aimed at preventing PTFN members from bringing actions against the band. Mr. Orr asks that s 9.3(c) be declared invalid per s 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 ("*Constitution*") because it violates ss 2(b), 2(d), 3, 15, 30, 35 and 36 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 ("*Charter*").

> [3] Finally, Mr. Orr argues that s 9.3(c) is an attempt by government to prevent citizens exercising their fundamental right to bring an action against it and is *ultra vires*.

[8] In addressing Mr. Orr's argument that the purpose of s 9.3(c) was to prevent PTFN members from suing the PTFN council and therefore is *ultra vires*, Master Smart found that the cases cited by Mr. Orr did not stand for the general proposition that Canadian governments cannot enact legislation to prevent legal action against them by their citizens and, moreover, did not support the suggestion that there is a fundamental right to bring legal action against governments arising from the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (*"Constitution"*) or the *Charter*. Regarding Mr. Orr's argument that the provision violated his freedom of expression under s 2(b), Master Smart noted that Mr. Orr did not address the point that the activity of running for Chief was an attempt to convey meaning. He noted the respondent's observation that the exclusion from being a member of Council did not deprive an individual from voting or otherwise taking part in the election process, or making submissions to Council or lobbying its members, attending meetings and voicing opinions. Master Smart found the circumstances in the case before him were analogous to those in *Baier v Alberta*, 2007 SCC 31 [*Baier*] and, as in that case, there was a limit on access to a platform but not a statutory limit on freedom of expression.

[9] Similarly, Master Smart found that Mr. Orr had not addressed how nomination for public office was protected by freedom of association. The restriction on the activity did not infringe on Mr. Orr's ability to establish, belong to and maintain an association, and did not infringe his s 2(d) right of freedom of association. Master Smart also found that s 3 of the *Charter* does not apply to band council elections (*Crow v Blood Band*, [1996] FCJ No 119 at para 23 [*Crow v

Blood Band]; *Haig v Canada*, [1993] 2 SCR 995 at 1033 [*Haig*]). Additionally, he applied the two part test for s 15(1), equality, as outlined in *R v Kapp*, 2008 SCC 41 [*R v Kapp*], and found that the distinction in the case before him was that of having an unresolved civil suit against the PTFN. He found that this distinction was not based on an analogous ground to those enumerated in s 15(1) nor did it perpetuate a disadvantage so as to infringe on the equality guarantee of s 15(1) of the *Charter*. In the absence of any supporting explanation as to the alleged breach, Master Smart was also unable to conclude that s 35 or s 36 was violated such that s 9.3(c) is of no force and effect.

Houle Appeal

[10] Mr. Paul Houle is also a member of the PTFN, he ran for the position of Chief in the October 30, 2014 election.

[11] On the day of the election there were two polling stations, one at Trout Lake and another at Peerless Lake. The Electoral Officer supervised the Peerless Lake polling station with polling clerk Jackie Laboucan. Assistant Electoral Officer Earl Laboucan supervised the Trout Lake polling station with polling clerks Rose Sowan and Penny Gullion. Mr. James Alook was elected as Chief, receiving 173 votes, while Mr. Houle came in second with 129 votes.

[12] After the election, Mr. Houle filed a Notice of Appeal on November 2, 2014, alleging numerous breaches of the Election Regulations including:

- Bribery, contrary to s 16.1(c) of the Election Regulations, as Mr. Alook had promised a voter that the voter’s family would be next to receive housing;

- The ballots for the Chief and Council were in the same box, contrary to s 11.2(b) of the Election Regulations, which stipulates that the ballots should be separate;

- The ballot box from Trout Lake was brought to the Peerless Lake polling station by the Assistant Electoral Officer Earl Laboucan, and the ballots were separated with the assistance of Linda Noskiye, who was not a scrutineer, a polling clerk, or an electoral officer. This was contrary to s 12.1 of the Election Regulations, which states that the Electoral Officer or polling clerk shall open each ballot box and count the votes immediately upon the close of the polling station;

- Linda Noskiye, sister-in-law of Mr. Alook and member of the PTFN, assisted with the election, contrary to s 8.4 of the Elections Regulations which states that the Electoral Officer shall appoint polling clerks and interpreters, and that the interpreters shall not be members of the PTFN;

- The Assistant Electoral Officer instructed Linda Noskiye to assist voters at the polling station, and she remained at the polling station at Trout Lake throughout the day;

- The Electoral Officer had already been an Electoral Officer for a previous PTFN election, contrary to s 13(2) of the *Canada Elections Act*;

- There should have been two ballot accounts and vote results, one from each Electoral Officer, because there were two polling stations;

- Rose Cardinal, sister-in-law of Mr. Alook, was a scrutineer at the Peerless Lake polling station, but the necessary documentation was not provided. She remained outside of the polling station talking to voters, when she should have been inside with the Electoral Officer; and

- A blind voter may not have been handled appropriately according to the procedures outlined for dealing with the blind.

[13] The appeal by Mr. Houle proceeded by way of an oral hearing held on December 18, 2014.

Decision Under Review

Orr Appeal

[14] The Arbitrator noted that the Orr appeal was addressed entirely in writing, largely relying on the materials filed in *Orr QB*, which addressed the same questions as were pursued on the appeal before him. For the reasons he set out, the Arbitrator agreed with Master Smart's conclusion that s 9.3(c) did not offend the *Charter,* and that it was not otherwise *ultra vires* the PTFN Council. As such, he dismissed the appeal.

[15] Regarding Mr. Orr's submissions that s 9.3(c) is *ultra vires*, an abuse of process and contrary to the rule of law, the Arbitrator disagreed with Mr. Orr's position that s 9.3(c) is intended to prevent PTFN members from suing the PTFN Council and instead found that the provision was directed towards ensuring that the Chief and Councillors fully and properly carry out their duties and responsibilities under the Election Regulations. Rather than being an abuse of power or contrary to the rule of law, the Arbitrator found that the section demonstrated responsible government. He also agreed with Master Smart's conclusion in *Orr QB* that the cases cited by Mr. Orr, *Amax Potash Ltd v Saskatchewan*, [1977] 2 SCR 576 [*Amax Potash*]; *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539 [*Air Canada*]; and *Kingstreet Investments Ltd v New Brunswick (Department of Finance)*, 2007 SCC 1 [*Kingstreet*] did not stand for the general proposition that Canadian governments cannot enact legislation to prevent legal action against them by their citizens and, moreover, did not support the suggestion that there is a fundamental right to bring legal action against governments arising from the *Constitution* or the *Charter*.

[16] As to s 2(b) of the *Charter*, the Arbitrator agreed with the PTFN that s 9.3(c) of the Election Regulations is not a violation of the freedom of expression under s 2(b) of the *Charter*, reasoning that Mr. Orr continues to have the right to vote, the rights of PTFN membership and can continue to press his views in the community and with the government of the PTFN. The Arbitrator further found that it was Mr. Orr's choice to pursue the course he felt necessary in suing the PTFN, which was a direct and serious conflict with those duties expected of a Chief or Councillor. The Arbitrator also agreed with Master Smart's statement in *Orr QB* that s 9.3(c) is not a statutory limitation on freedom of expression.

[17] With respect to s 2(d) of the *Charter*, the Arbitrator found that s 9.3(c) of the Election Regulations did not infringe on Mr. Orr's freedom of association, agreeing with Master Smart's conclusion in *Orr QB* that Mr. Orr had not addressed how the activity of nomination for public office is one that is protected by the right to freedom of association. The restriction on the activity did not infringe on Mr. Orr's ability to establish, belong to and maintain an association. As a member of the PTFN, he and the collective of the members as electors determine who forms the PTFN Council to pursue common goals.

[18] The Arbitrator stated that s 3 of the *Charter* protects the democratic rights of Canadians. Further, in *Baier* the Supreme Court of Canada established that this includes voting and candidacy rights, but only in relation to the House of Commons and provincial legislatures (*Baier* at para 39; *Taypotat* at para 28). The Arbitrator found that *Crow v Blood Band* at para 22, cited by Master Smart in *Orr QB* also supports that s 3 does not apply to band council elections. Accordingly, the Arbitrator concluded that this *Charter* right did not apply to PTFN elections.

[19] Regarding Mr. Orr's argument that his equality rights under s 15(1) of the *Charter* were violated by the impugned provision, the Arbitrator again noted that s 9.3(c) of the Election Regulations is directed toward preventing serious conflicts of interest, and is not a perpetuation of prejudice as against Mr. Orr. The Arbitrator referred to the two part test set out in *R v Kapp*, cited by Master Smart in *Orr QB*, and agreed with Master Smart that there was no evidence to demonstrate that having an unresolved civil suit as against PTFN is an enumerated or analogous ground of s 15(1) discrimination. He also agreed that Mr. Orr would be able to run for office once the suit is resolved and that there was no disadvantage perpetuated to infringe the equality guarantee of s 15(1) of the *Charter*.

[20] As to s 1 of the *Charter*, the Arbitrator found that, in the event that he was wrong in finding s 9.3(c) of the Election Regulations was consistent with the *Charter*, then any inconsistency was demonstrably justifiable in a free and democratic society under s 1. He noted that a Chief of a First Nation who is suing his own Nation for $2.8 million dollars, even if for good reason, could not be expected to be unbiased and able to fully and properly carry out his statutory duties. Applying the test set out in *R v Oakes*, [1986] 1 SCR 103 [*Oakes*], the Arbitrator found that the objective of s 9.3(c) was pressing and substantial in intending to avoid significant conflicts of interests that would impair government members from satisfying duties and responsibilities. Further, there is a rational connection between the objective of s 9.3(c) and the means to achieve the objective, as the prohibition ensures that Council members suing the PTFN cannot use their position to gain information that would harm the PTFN in litigation. The provision is also minimally impairing, given that the disqualified elector would still retain the right to vote, lobby and influence the Council in a lawful manner. And, finally, the Arbitrator

found that the objective served by s 9.3(c) and its impact was proportional, as once the civil litigation is resolved, the elector would be able to stand for nomination.

[21] The Arbitrator also noted that Mr. Orr's written submissions asserting that ss 30, 35, and 36 were violated by s 9.3(c) had not been further developed.

[22] In the result, the Arbitrator dismissed Mr. Orr's appeal, finding that the Election Officer properly applied s 9.3(c) of the Election Regulations, which the Arbitrator found did not infringe the *Charter*. And in the event that he was wrong in that regard, the Arbitrator also found that the provision was reasonable and justified under s 1 of the *Charter*.

Houle Appeal

[23] The Arbitrator first dealt with the allegation of a corrupt election practice, a ground of appeal pursuant to s 16.1(c) of the Election Regulations. In his Notice of Appeal Mr. Houle claimed that Mr. Alook had promised an elector that the elector's family would be next to get housing benefits if the elector would vote for Mr. Alook. The electors were subsequently identified as Mr. and Mrs. Trindle. As a preliminary matter, Mr. Houle had sought to add additional witnesses because he was concerned that the Trindles would not be available to testify. The Arbitrator ruled that the Election Regulations were a complete code which set out the mandatory requirements for valid notices of appeal and that, after the timeline for Notice of Appeal had expired, he had no power to accept additional witnesses and material facts to support Mr. Houle's argument. The Arbitrator similarly ruled at the hearing when Mr. Houle sought to testify and provide hearsay evidence as to the allegations of bribery. He noted that Mr. Houle

was not previously listed as a witness and did not provide a "will say" disclosure before the hearing. The Arbitrator did not allow Mr. Houle to testify on the basis of fairness to the Respondent and in recognition that, if heard, the weight of such hearsay evidence would be minimal. Because the Trindles did not testify, and because no other evidence was presented to support the allegation of bribery, the Arbitrator found that Mr. Orr had not proven that Mr. Alook was guilty of this allegation. In doing so, the Arbitrator also took note of the unchallenged statutory declaration of the PTFN Band Manager, Mr. Chris Wilson, attaching the PTFN Interim Housing Rental Policy ("Housing Policy"). Under the Housing Policy the Peerless Trout First Nation Housing Authority ("Authority") acts as an appeal body from the housing decisions of the PTFN staff. PTFN Council members cannot sit as members of that Authority. PTFN staff and the Authority thereby provide an institutionalized insulation between the PTFN Council and housing decisions, which the Arbitrator stated was an example of sound governance.

[24] The Arbitrator then addressed Mr. Houle's the numerous allegations that the Electoral Officer and polling clerks participated in improper activities contrary to ss 16.1(d) and (e) of the Election Regulations.

[25] Regarding s 11.2(b), the Arbitrator found that there was no requirement for separate ballot boxes to hold ballots for Chief and those for Councillors. Instead, he found that having one ballot box was appropriate given that the ballots for Chief were coloured and ballots for Councillors were white.

[26] The Arbitrator found that the evidence established that Mr. Earl Laboucan, the Assistant Electoral Officer (whom the Arbitrator also referred to as the Deputy Electoral Officer), on the request of the Electoral Officer, left the polling station to transport surplus blank ballots from the Trout Lake polling station to the Peerless Lake polling station. The absence was for between one and two hours, during which time between 75 to 100 votes were cast. Subsection 11.7 of the Election Regulations requires the Election Officer to initial ballots, hand ballots to voters and supervise the ballot box. If the Assistant Electoral Officer was absent, the votes cast during that time were potentially in question. However, the Arbitrator found that the necessary absence of the Assistant Electoral Officer was regrettable but not fatal. Given that only one Election Officer is appointed and that there were two polling stations, the Arbitrator interpreted the Election Regulations as allowing polling clerks to ensure the election process is conducted in a proper way when the Electoral Officer is necessarily not available, and observed that Rose Sowan and Penny Gullion had remained and continued on in their capacity as polling clerks.

[27] The Arbitrator next addressed the issue of the counting of the Trout Lake ballots at Peerless Lake. He found that the evidence established that after the polls closed at 8:00 pm, the Deputy Electoral Officer and the two polling clerks locked the Trout Lake ballot box, left the polling station and travelled together to the Peerless Lake polling station. The Arbitrator accepted the evidence of the Deputy Electoral Officer that they did not stop and that the ballot box remained in their possession during that trip and that the reason why the ballots had not been counted at the Trout Lake polling station immediately after the closing of the polls, as required by s 12.1 of the Election Regulations, was that the Deputy Electoral Officer was under the impression that the hall had to be vacated by 8:30 p.m.

[28] The Arbitrator also found that, while the Electoral Officer was required to fill out a form titled Form #9 Ballot Account and Vote Result for each polling station under s 12.3 of the Election Regulations, he had only filled out one composite form with no information about specific polling stations.

[29] The Arbitrator found that the evidence was consistent that after the Electoral Officer and his assistant counted the votes for the Peerless Lake polling station (for the Chief only), the Deputy Electoral Officer accompanied by Ms. Sowan and Ms. Gullion proceeded to the front of the Peerless Lake hall with the Trout Lake ballot box. He accepted the evidence of the Deputy Electoral Officer that he unlocked the box, spilled the ballots on the table in front of the crowd of approximately 90 to 100 people, picked up a few ballots that fell off the table, separated the coloured Chief ballots from the white Councillor ballots and read the name off each ballot to the crowd, and showed the ballot to the crowd. He also accepted the evidence of witnesses that Penny Gullion, Rose Sowan, and Linda Noskiye sorted the ballots into coloured and white piles, and the evidence of the Deputy Electoral Officer that the Electoral Officer and his polling clerk, Jackie Laboucan, were present when the ballots were counted at the counting table, and the evidence of the Electoral Officer that that Ms. Rosie Cardinal, scrutineer for Mr. Alook, was also at the counting table.

[30] The Arbitrator then turned to the allegation that an elector had been improperly assisted. He referred to the evidence that an unidentified elector had asked for assistance at the Trout Lake polling station and, when asked by the polling clerk if he would prefer that Linda Noskiye assist him, he agreed. There was also a suggestion that one or two other electors may have been

assisted by a polling clerk but this was unclear as was who assisted them, if anyone. However, the Arbitrator found that if assistance was required, then the proper form to record the event was not completed as required by ss 11.5 or 11.6 of the Election Regulations.

[31] The Arbitrator found that the evidence was consistent that the Electoral Officer had accepted Rose Cardinal as a scrutineer for Mr. Alook, but did not provide her appointment in writing as required by s 11.4 of the Election Regulations.

[32] As to the allegations of improper activities by Ms. Linda Noskiye, the Arbitrator found that the evidence established that Ms. Noskiye, an elector, was in attendance for the entire time that the Trout Lake polling station was open, contrary to s 11.7(j) of the Election Regulations, which states that electors are to immediately leave the polling station after voting. The Arbitrator accepted the evidence of the Deputy Electoral Officer that Ms. Noskiye was in attendance to help Trout Lake election officials identify electors, and rejected the allegations that she was acting as a polling clerk by counting ballots. The Arbitrator accepted the Deputy Electoral Officer's testimony that he had asked Ms. Noskiye to help sort the ballots and that he did not see her doing anything inappropriate, untoward, or unusual to cheat. Other witnesses confirmed that she helped sort the ballots and then sat down. The Arbitrator also found that if she did aid an elector to vote, then she should have been required to fill out form #6 or #7, as appropriate, but this was not done which would draw one vote into question.

[33] As to the claim that the *Canada Election Act* disqualified Mr. Oostendorp from serving as the Election Officer, the Arbitrator noted that this ground was not further pursued. The

Arbitrator accepted that the *Canada Elections Act* only applies to the elections of members to the House of Commons, and that the Election Regulations are a complete written code governing PTFN elections.

[34] As to the other reasons grounding the appeal (s 12.3 - Form 9, s 11.4, s 16.2 and ss 11.6, 11.6(6) and s 11.6), they overlapped with and were addressed by the foregoing.

[35] In summary, the Arbitrator found that ss 12.1, 11.5 (or 11.6) and 11.4 of the Election Regulations were imperfectly conducted. He then examined whether these grounds for appeal materially affected the outcome of the election.

[36] The key to that analysis was s 16.8(b) of the Election Regulations, being whether one or more of the identified instances of imperfect conduct materially affected the result of the election. The Arbitrator noted that both parties relied on *Beamish et al v Miltenberger and the Returning Officer for the Electoral District of Thebacha*, [1997] NWTR 160 [*Beamish*] for the proposition that, where the election statute in question has gaps addressing controverted elections, such gaps are to be addressed by the common law, being that there is a presumption that an election result is valid and will be overturned only if it can be shown that such irregularities would have affected the results of the election on the balance of probabilities. Further, that both parties had also referenced *Opitz v Wrzesnewskyj*, 2012 SCC 55 [*Opitz*], where the majority referred to the “magic numbers test” as the test to determine, when considering an irregularity, if the election results would have been different. The test requires an election be

annulled if the number of invalid votes is equal to, or greater than, the successful candidate's plurality.

[37] The Arbitrator held that one vote may have been improperly counted, and Mr. Alook obtained 44 more votes for Chief than Mr. Houle. The Arbitrator further held that none of the three infractions materially affected the results of the election.

[38] As such, he upheld Mr. Houle's appeal but allowed the election results to stand. Finding that the appeal was fundamentally lacking in merit, he also ordered, pursuant to s 16.11 of the Election Regulations, that Mr. Houle pay half of the costs of the election appeal arbitration, including the hall rental, transcription services, the oral hearing lunch, post-election costs of the Electoral Officer and Assistant Electoral Officer related to and arising out of the election appeal arbitration and the fees and expenses of the Election Appeal Arbitrator.

Issues

[39] I would frame the issues as follows:

1. What is the applicable standard of review?
2. Did the Arbitrator err in finding that s 9.3(c) of the Election Regulations was not unconstitutional?
3. Did the Arbitrator err in not allowing Mr. Houle to add other witnesses?
4. Did the Arbitrator err in finding that the breaches of the Election Regulations regarding electoral practices did not materially affect the result?
5. Did the Arbitrator err in ordering Mr. Houle to pay costs?

Issue 1: What is the applicable standard of review?

[40] The Applicants submit that each of the matters raised in this judicial review involve constitutional analysis, statutory interpretation and questions of law, requiring the standard of correctness (*Multani v CSMB*, 2006 SCC 6 at paras 16-23, 30). Further, that issues of procedural fairness in an administrative hearing are to be reviewed on the correctness standard (*CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at paras 100-103).

[41] The Respondent agrees that correctness should be applied to the Arbitrator's interpretations of the *Constitution* and the *Charter* and to issues of procedural fairness. However, the Respondent submits that the reasonableness standard applies to the Arbitrator's findings of fact to which the *Constitution* and the *Charter* are to be applied, including whether on those facts s 9.3(c) of the Election Regulations is reasonable and justifiable in a free and democratic society (*Doré v Barreau du Quebec*, 2012 SCC 12 at paras 44, 54-48 [*Doré*]); to the Arbitrator's interpretation of the Election Regulations (*Fort McKay First Nation v Orr*, 2012 FCA 269 at paras 8-11 [*Fort McKay*]; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 16 [*Testawich*]); and, to the Arbitrator's findings of fact to which the Election Regulations are applied (*Testawich* at para 23).

[42] In my view, the second issue has two aspects. The first is whether the Arbitrator erred in finding that s 9.3(c) of the Election Regulations is not unconstitutional. As stated in *Doré* at paragraph 43, "There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para 58)". Thus, to the extent that the

Arbitrator was considering whether s 9.3(c) conflicted with s 3 of the *Charter* or unwritten democratic rights, the standard of review is correctness. *Doré* is otherwise of little assistance as it concerned a challenge to the constitutionality of a discretionary administrative decision as opposed to the constitutionality of a law.

[43] The second aspect of this issue is whether s 9.3(c) attempts to prevent members of the PTFN from bringing actions against their government and is therefore contrary to the rule of law, an abuse of power and an arbitrary action. Thus, this pertains to the Arbitrator's interpretation of s 9.3(c). In *Fort McKay*, when dealing with a First Nation Council's decision to suspend a councillor by way of a resolution, the Federal Court of Appeal stated that the question was whether that decision could be supported on a reasonable reading of the relevant provisions of the subject election code (at para 21) and applied the reasonableness standard of review when interpreting its provisions.

[44] Further, in *Testawich*, this Court referenced *Fort McKay* at paras 10-11; *D'Or v St. Germain*, 2014 FCA 28 at paras 5-6; *York v Lower Nicola Indian Band*, 2013 FCA 26 at para 6 [*York*]; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 22 [*Tsetta*]; and, *Ferguson v Lavallee*, 2014 FC 569 at para 63, in concluding that the standard for reviewing an election appeal committee's interpretation and application of election regulations is reasonableness (at paras 16 and 21). Further, that in applying the reasonableness standard the Court must defer to factual determinations made by the decision-maker (*Testawich* at para 23). Accordingly, I see no reason why the reasonableness standard would not also apply to

interpretation of the Election Regulations by the Arbitrator who was appointed to hear the election appeal in accordance with s 16 of those regulations.

[45] The third issue is framed by Mr. Houle as one of procedural fairness. The standard of correctness applies to questions of procedural fairness (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43; *York* at para 6; *Tsetta*; *Minde v Ermineskin Cree Nation*, 2008 FCA 52 at para 32; *Khela v Mission Institution*, 2014 SCC 24 at para 79; *Testawich* at para 15). The Respondent submits that this issue also encompasses the Arbitrator's interpretation of the Election Regulations. As set out above, such interpretation would attract the reasonableness standard.

[46] Similarly, with respect to the fourth issue, the Arbitrator's finding that the breaches of the Election Regulations did not materially affect the election result, this required the Arbitrator to interpret and apply the test set out in s 16.8(b) of the Election Regulations. This attracts the reasonableness standard as does the fifth issue which required the Arbitrator to interpret and apply s 16.11 of the Election Regulations concerning costs.

Issue 2: Did the Arbitrator err in finding that s 9.3(c) of the Election Regulations was not unconstitutional?

Mr. Orr's Position

[47] On judicial review Mr. Orr focused primarily on the issue of s 9.3(c) in the context of his democratic rights. He submitted that the *Constitution* contains four foundational values, which are fundamental to the constitutional law within Canada, being federalism, democracy,

constitutionalism and the rule of law, which are "clearly implicit in the very nature of a Constitution" (*Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 49-54 [*Re Secession of Quebec*]). Moreover, although unwritten, democracy is recognized in the preamble to the *Constitution* and is an "essential interpretive consideration" (*Re Secession of Quebec* at paras 61-69) originating in the Magna Carta and developed in the English Bill of Rights. Therefore, contrary to the Arbitrator's and Master Smart's decisions, Mr. Orr argued that s 3 of the *Charter* is to be interpreted to include democratic government to all citizens within Canada. It is not subject to the notwithstanding power in s 33 of the *Charter* and is to be broadly interpreted (*Charter*, ss 3-4, 33 and 35). Mr. Orr submits that although the wording of s 3 refers only to Parliament and to the legislative assemblies, it is clear from *Tsilhqot'in v British Columbia*, 2014 SCC 44 at paras 138-144 [*Tsilhqot'in*] that s 35 was not fully in the minds of the drafters when the *Charter* was drafted.

[48] Mr. Orr submits that *Baier* does not actually support the Arbitrator's decision, as it is distinguishable and primarily dealt with whether s 2(b) of the *Charter* applied, and did not address issues respecting ss 1, 3 or 15 of the *Charter* or constitutional democratic rights. Mr. Orr further submits that the Supreme Court of Canada limited *Baier*'s application in *Greater Vancouver Transportation Authority v Canada Federation of Students,* [2009] 2 SCR 295 at paras 13-16, 27 and 35-36 [*Greater Vancouver Transportation Authority*].

[49] Mr. Orr submits that the Election Regulations must comply with the constitutional right to democracy, which includes, but is broader than the rights specifically stated in s 3 of the *Charter* (*Thompson v Leq'A:Mel First Nation Council*, 2007 FC 707 at para 8 [*Thompson*]).

Drawing parallels to *Taypotat*, Mr. Orr submits that the rule of law shields all Canadians from arbitrary state action and permits a citizen to sue the government. Mr. Orr submits that s 9.3(c) is contrary to democracy and the rule of law, and is an abuse of power as it is plainly an attempt by the PTFN to prevent its members from bringing actions against the PTFN government. In order for s 9.3(c) to be justified by s 1 of the *Charter*, it must be established that there is a constitutionally valid purpose or objective achieved by the limit, and no such proof was provided by the PTFN in the appeal arbitration. Prior to the passage of the *Charter*, it was held that governments could not prevent citizens from bringing actions against them because such legislation was *ultra vires* (*Amax Potash*, *Air Canada*, *Kingstreet*). Mr. Orr takes the position that any concerns about Mr. Orr's lawsuit against the PTFN could be appropriately dealt with by the conflict of interest provisions contained in Schedule "C" of the Election Regulations. Mr. Orr therefore argues that there is no pressing or substantial concern requiring a limitation on his democratic right to run in an election.

[50] Mr. Orr submits that the fundamental principle of democracy within the *Constitution* goes beyond limiting a *Charter* right so that any limitation on democracy is a limitation of the core fundamental rights of the *Constitution* (*Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras 24, 28-46 [*Sauvé*]). He submits that there should be considered to be a distinction between the rights under s 3 of the *Charter* and the democratic rights contained in the preamble to the *Constitution* such that the provisions of the *Charter* cannot limit the democracy that is fundamental to Canada as contained in the preamble (*New Brunswick Broadcasting Co v Nova Scotia,* [1993] 1 SCR 319 at pp 368, 373-378).

The Respondent's Position

[51] The Respondent's position is that s 9.3(c) is not unconstitutional, it does not offend any of the sections of the *Charter* previously raised, nor does it offend unwritten democratic values.

[52] The Respondent submits that s 9.3(c) does not infringe on Mr. Orr's s 2(b) *Charter* rights because that right does not guarantee any particular method or location of expression. Nor does the impugned provision infringe on Mr. Orr's s 2(d) *Charter* right to freedom of association because that right only protects against the state precluding an activity because of its associational nature, thereby discouraging the collective pursuit of goals. The Respondent points out that s 9.3(c) does not stop Mr. Orr from running for office because of its associational nature. Subsection 9.3(c) also does not infringe on Mr. Orr's s 3 *Charter* rights, because s 3 only guarantees rights in relation to the House of Commons and provincial legislatures; it does not apply to the PTFN Council (*Baier* at para 39; *Taypotat* at para 28, *Orr QB* at para 17). The Respondent submits that s 9.3(c) does not discriminate contrary to s 15(1) of the *Charter*, because it does not create a distinction based on an enumerated or analogous ground; nor does it create a disadvantage by perpetuating prejudice or stereotyping of persons who sue as plaintiffs in civil courts (*Taypotat* at para 44; *Baier* at paras 63-65; *Orr QB* at para 22)

[53] The Respondent also submits that s 9.3(c) of the Election Regulations is not invalidated by s 35 of the *Charter*, which, on the contrary, recognizes and affirms the aboriginal right of self-government of the PTFN to enact the Election Regulations, or by s 36 of the *Charter*, which is

only available to provincial and federal governments privy to the types of agreements contemplated in that section.

[54] The Respondent further submits that s 9.3(c) of the Election Regulations is not contrary to an unwritten constitutional principle or democratic right protecting a citizen's right to sue his or her government, nor, in any event, does the provision prevent a member from suing the PTFN. With respect to Mr. Orr's reliance on *Re Secession of Quebec*, the Respondent points out that in that case the Supreme Court of Canada cautioned against dispensing with the written text of the *Constitution* and, to the contrary, confirmed that there are compelling reasons to insist upon the primacy of the written *Constitution* (*Re Secession of Quebec* at para 53). The Respondent submits that Mr. Orr also ignored the Supreme Court's direction in *Baier* that s 3 protects voting rights and candidacy only in relation to the House of Commons and provincial legislature, and that it is not for the Supreme Court to create constitutional rights in respect of a third order of government where the words of the *Constitution* read in context do not do so (at para 39). Further, the Respondent argues that neither the Supreme Court in *Tsilhqot'in* or *Greater Vancouver Transportation Authority* or this Court in *Thompson* are authority for ignoring the Supreme Court's caution, and, in *Taypotat* the Federal Court of Appeal confirmed that s 3 does not apply to a First Nation's election law (at para 28).

[55] The Respondent submits that none of the "foundational principles" address whether a citizen may or may not sue a government for breach of contract nor do the cases cited by Mr. Orr establish such a constitutional right.

[56] The Respondent submits that the intention of s 9.3(c) of the Election Regulations was to avoid obvious and blatant conflicts of interest that would preclude an elected member from fully and properly carrying out his duties. Therefore, the PTFN was not abusing its self-governing powers by addressing this serious concern in the eligibility criteria.

[57] The Respondent also submits that it was reasonable for the Arbitrator to find in the alternative that, even if he was wrong and s 9.3(c) breached Mr. Orr's constitutional rights, then the provision was saved under s 1 of the *Charter* as reasonable and justifiable in a free and democratic society. The evidence established that the intention of s 9.3(c) is to avoid obvious and blatant conflicts of interest. The Respondent therefore submits that the Arbitrator reasonably and correctly found that on the facts before him there was a rational connection between the pressing and substantial objective and the prohibition enacted by the PTFN by s 9.3(c), that the section minimally impaired Mr. Orr's rights and that it was proportional.

Analysis

[58] Subsection 9.3(c) of the Election Regulations states as follows:

> **9.3 Electors Eligible for Nomination**
>
> …
>
> (c) Any Elector who is a plaintiff in a civil action against the PTFN is not eligible to be Nominated.

[59] Similarly, electors convicted of an unpardoned indictable offence or charged with an indictable offence at the time of the nomination are not eligible to be nominated, nor are electors

employed by the PTFN or a PTFN Business Entity (ss 9.3(b) and (d) of the Election Regulations).

[60] As I understand the first aspect of Mr. Orr's submission, it is that democracy is a foundational constitutional value which is unwritten but recognized in the preamble of the *Constitution*. This is distinct from and broader than the rights arising from s 3 of the *Charter*, and the *Charter* provisions cannot limit the foundation right of democracy. Further, Mr. Orr argues that s 3 of the *Charter* is not limited in application but serves to recognize that the foundational value of democracy extends to every aspect of all political institutions and all levels of governments. This is why Mr. Orr believes that it is not saved by ss 1, 33 or 35 of the *Charter*.

[61] To address this, I first set out the portion of the preamble of the *Constitution* relied upon by Mr. Orr in support of his position:

> **WHEREAS** the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

[62] Mr. Orr's argument with respect to the preamble appears to stem from and relies heavily on references to *Re Secession of Quebec*. There, in considering the first question in that matter, being whether under the *Constitution,* the National Assembly legislature or Government of Quebec can affect the secession of Quebec from Canada unilaterally, the Supreme Court of Canada conducted an analysis of the underlying constitutional principles:

[49] What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

[50] Our Constitution has an internal architecture, or what the majority of this Court in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the *Provincial Judges Reference*, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the *Manitoba Language Rights Reference*, *supra*, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.

[51] Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867* , it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

[52] **The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions.** Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree", to invoke the famous description in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.

[53] **Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference*, *supra*, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written Constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the *Provincial Judges Reference* that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference, a point made earlier in *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 462-63. In the *Provincial Judges Reference*, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".**

[54] Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, *supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". It is to a discussion of those underlying constitutional principles that we now turn.

…

[61] Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

[62] The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. **A majority of this Court in *OPSEU v. Ontario*, *supra*, at p. 57, confirmed that "the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels"**. As is apparent from an earlier line of decisions emanating from this Court, including *Switzman v. Elbling*, [1957] S.C.R. 285, *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, *Boucher v. The King*, [1951] S.C.R. 265, and *Reference re Alberta Statutes*, [1938] S.C.R. 100, the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the *Provincial Judges Reference*, *supra*, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

[63] Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in *Reference re Provincial Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158, at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation". Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day.

[64] Democracy is not simply concerned with the process of government. On the contrary, as suggested in *Switzman v. Elbling*, *supra*, at p. 306, democracy is fundamentally connected to

> substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: *Reference re Provincial Electoral Boundaries*, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the *Charter* , the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):
>
>> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.
>
> [65] In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government": *New Brunswick Broadcasting*, *supra*, at p. 387. **In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to "Every citizen of Canada" by virtue of s. 3 of the Charter.** Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters (*Reference re Provincial Electoral Boundaries*, *supra*) and as candidates (*Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876). In addition, the effect of s. 4 of the *Charter* is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.
>
> [Emphasis added]

[63] Thus, while Mr. Orr is correct that democracy is an underlying principle of the *Constitution*, the question, as recognized by the Respondent, is whether this amounts to a

constitutional guarantee that members of the PTFN can run for elected office of the PTFN Council. In my view, Mr. Orr provides no authority that would support such a finding.

[64] Further, when considering Mr. Orr's position, it is important to recall that *Re Secession of Quebec* specifically stated that the right to vote in elections to the House of Commons and the provincial legislature and to be candidates "in those elections" is granted by virtue of s 3 of the *Charter* (at para 65). It also recognized the primacy of the written *Constitution* (at para 54).

[65] Section 3 of the *Charter* states:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[66] It has been held, considering the central and fundamental role of s 3 in the *Charter,* that it is particularly important to apply a broad and purposeful interpretation to the right and that the importance of the right is signaled by its exemption from legislative override under s 33's notwithstanding clause (*Frank v Canada (Attorney General)*, 2014 ONSC 907 [*Frank*] at para 65; *Sauvé* at paras 11, 33-35). Further, that the purpose of s 3 of the *Charter* is to grant every Canadian citizen the right to play a meaningful role in the selection of elected representatives (*Frank* at para 92).

[67] However, contrary to Mr. Orr's assertion, and as pointed out by the Respondent, the Supreme Court of Canada did address s 3 of the *Charter* in *Baier*, discussed further below, in a brief but clear manner at para 39:

> Voting and candidacy rights are explicitly protected in s. 3 of the *Charter* **but only in relation to the House of Commons and provincial legislatures**. The intervener Public School Boards' Association of Alberta submits that school boards as institutions of local government have constitutional status in the "conventional or quasi-constitutional sense". However, **it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so**.
>
> [Emphasis added]

[68] Justice Rothstein in his concurring opinion remarked on Justice Lebel's comment:

> …I understand his idea to be that because the democratic rights enshrined in s. 3 of the *Charter* extend only to Parliamentary and legislative elections, the *Charter* does not protect the right to participate in other elections.
>
> (at para 56)

[69] The limitation of the application of s 3 to federal and provincial legislatures originates with the Supreme Court's decision in *Haig*, where Justice L'Heureux-Dubé affirmed that s 3 was clear and unambiguous in that it was limited to the elections of provincial and federal representatives. This interpretation was also followed in *Crow v Blood Band*, which involved an aboriginal election.

[70] It is also of note that the applicant in *Taypotat* sought to invalidate sections of the First Nation election legislation requiring a candidate for a band election to have attained a minimum education level. The Federal Court of Appeal dismissed the applicant's s 3 claim, relying on *Baier* to find that s 3 is limited to the elections of provincial and federal representatives, stating:

> [27] The appellant's submissions under section 3 of the *Charter* can also be easily dismissed. That section provides that "[e]very

> citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." (« Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.»)
>
> [28] The Supreme Court of Canada stated in *Haig v. Canada*, [1993] 2 S.C.R. 995 at p. 1033, that "[s]ection 3 of the *Charter* is clear and unambiguous as is its purpose: it is limited to the elections of provincial and federal representatives." The appellant nevertheless submits that section 3 extends to elections to governance structures of First Nations as these structures should be deemed as equivalent to "legislative assemblies" taking into account aboriginal peoples' inherent right to self-governance. This submission cannot however be sustained in light of *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 where Rosthstein J., writing for the majority, noted the following, at para. 39:
>
> > Voting and candidacy rights are explicitly protected in s. 3 of the *Charter* but only in relation to the House of Commons and provincial legislatures. The intervener Public School Boards' Association of Alberta submits that school boards as institutions of local government have constitutional status in the "conventional or quasi-constitutional sense". However, it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so.
>
> [29] Moreover, should section 3 of the *Charter* apply to First Nation elections, the logical result would be that non-aboriginal Canadian citizens would be entitled to participate in such elections. That result would defeat the very purpose of aboriginal self-government. I consequently find no merit in the appellant's submissions with respect to section 3 of the *Charter*.

[71] While the Federal Court of Appeal's decision was ultimately overturned by the Supreme Court (*Kahkewistahaq First Nation v Taypotat*, 2015 SCC 30), it was on other grounds.

[72] Given this clear line of authorities, it is my view that the Arbitrator did not err in finding that s 3 of the *Charter* does not apply to the PTFN election and, therefore, that s 9.3(c) is not unconstitutional because it does not conflict with s 3 of the *Charter*. Further, while the Supreme Court in *Re Secession of Quebec* found that the preamble to the *Constitution* invited the courts to turn to the unwritten underlying principles, including democracy, as a basis for filling gaps in the express terms of the constitutional text, this line of authorities also demonstrates that this is not a circumstance where such an analysis is necessary. To use the words of that Court, s 3 is clear and unambiguous and it is not for this Court to create constitutional rights in respect of a third order of government where the words of the *Constitution* read in context do not do so.

[73] I would also note that many of the cases referenced by Mr. Orr do not seem to be on point or to deal with similar issues. For example, reference is made to paragraphs 138-144 of *Tsilhqot'in* in support of the view that although the wording of s 3 refers only to Parliament and the legislative assemblies, this was not at the forefront of the minds of the drafters of the *Charter*. However, those paragraphs mainly concern the principle of interjurisdictional immunity and its relationship with s 35 of the *Charter*. In support of his assertion that the Election Regulations must comply with the constitutional right to democracy, which includes but is broader than the rights set out is s 3 of the *Charter*, Mr. Orr references *Thompson* at para 8, however, neither that paragraph or that decision stand for that proposition.

[74] Mr. Orr also submits that s 9.3(c) of the Election Regulations is contrary to the rule of law, an abuse of power and an arbitrary action as it is an attempt to prevent members of the

PTFN from bringing actions against the government of the PTFN and because it excludes a person from running for office if they do so and that this cannot be saved by s 1.

[75] Again, while it is correct that *Re Secession of Quebec* describes constitutionalism and the rule of law, that case does not state, as Mr. Orr appears to suggest, that the rule of law provides that a citizen may sue the government when there is a breach of contract between them. Rather, the rule of law, amongst other things, requires that all government action must comply with the law, including the *Constitution*.

[76] Master Smart found, and the Arbitrator agreed, that the decisions relied upon by Mr. Orr, *Amax Potash, Air Canada* and *Kingstreet,* did not stand for the general proposition that Canadian governments cannot enact legislation to prevent legal action against them by their citizens or that there is a fundamental right to bring legal action against governments under or arising from the *Constitution* or the *Charter*. Mr. Orr again cites those cases on judicial review of the Arbitrator's decision as support for the same argument. However, in *Amax Potash* the Supreme Court of Canada responded to a constitutional question finding that s 5(7) of *The Proceedings Against the Crown Act,* RSS 1965, c 87 was *ultra vires* the legislation of Saskatchewan in so far as it purported to bar recovery of taxes paid under a statute or statutory provisions which was beyond the legislation jurisdiction of the legislature of Saskatchewan. It does not stand for the proposition cited by Mr. Orr, nor do *Air Canada* or *Kingstreet*, both of which also concerned the collection and retention of taxes pursuant to *ultra vires* legislation.

[77] The Arbitrator also did not accept Mr. Orr's view of the intent of s 9.3(c) but found instead that it was directed towards ensuring that the Chief and Councillors of the PTFN could fully and properly carry out their duties and responsibilities under the Election Regulations and that it was demonstrative of good government.

[78] There was evidence before the Arbitrator to support that interpretation. Specifically, the affidavit of Mr. Alook, sworn on July 11, 2014 which states that:

> 8. Peerless Trout First Nation included section 9.3(c) in its Customary Election Regulations to ensure that no member of an already small governing Council has an obvious conflict of interest in carrying out his or her duties as a member of Council.

[79] Subsection 3.5 of the Election Regulations states that the Chief and Council shall carry out the duties as set out in Schedule "B" and in accordance with the Conflict of Interest Guidelines set out in Schedule "C" of those regulations. Amongst other duties, Schedule "B" requires the Council to ensure the financial affairs of the First Nation are managed in a responsible, transparent, and accountable manner at all times keeping in mind the First Nation's best long term interests; to develop and implement structures, by-laws, and policies to ensure the proper financial management and control of all funds and assets; and, to prepare and present an annual budget. Schedule "C" states that the Council must not directly or indirectly engage in any personal or business activity which competes or conflicts with the interests of the PTFN or compromises their ability to serve its interests. Council must deal fairly and impartially with PTFN members, showing no favouritism, prejudice or bias in any decisions affecting their rights or interests. Councillors shall not make any decisions or use their office or powers to provide extraordinary benefits for themselves personally or for their immediate family members. They

also must not use or communicate information acquired in their capacity as Councillor for their personal gain or for the benefits or harm of any other person.

[80] In my view, the Arbitrator did not err in concluding that the eligibility requirement was not an abuse of power or contrary to the rule of law. As noted by Master Smart and referenced by the Arbitrator, the cases cited by Mr. Orr do not support the suggestion that there is a constitutionally guaranteed right to bring legal action against the government. Further, the Arbitrator reasonably interpreted the Election Regulations to find that their intent was not to prevent lawsuits from being commenced by members of the PTFN against its government. It was open to him to find that the s 9.3(c) eligibility requirement was directed instead toward ensuring that the PTFN Chief and Councillors were able to fully and properly carry out their duties and responsibilities and demonstrated responsible government. It was also open to him to find that the eligibility requirement did not constitute an abuse of power, particularly in a circumstance such as this where there was a pre-existing conflict presented by Mr. Orr's significant lawsuit against the PTFN and considering the duties associated with assuming the role of Chief or Councillor described in Schedule "B" of the Election Regulations. The affidavit of Mr. Alook also supported this conclusion. Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process as well as whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). As the Arbitrator's interpretation of s 9.3(c) was reasonable, there is no basis for interference by this Court.

[81] The Arbitrator also found that, even if he was wrong about the constitutionality of s 9.3(c), it was saved by s 1 of the *Charter*. He applied the *Oakes* test in reaching that conclusion in respect of s 15(1) as well as ss 2(b), 2(d) and 3 of the *Charter*.

[82] The *Oakes* test requires that four criteria be satisfied by a law that qualifies as a reasonable limit that can be demonstrably justified in a free and democratic society:

i. sufficiently important objective – the law must pursue an objective that is sufficiently important to justify limiting a *Charter* right;

ii. rational connection – the law must be rationally connected to the objective;

iii. least drastic means – the law must impair the right no more than is reasonably necessary to accomplish the objective; and

iv. proportionate relief – the law must not have a disproportionately severe effect on the persons to whom it applies.

[83] In the context of the s 1 analysis, Mr. Orr submits that no proof of the purpose of s 9.3(c) was provided by the PTFN and, therefore, that it did not meet its burden of establishing that it served a constitutionally valid purpose or objective. However, as noted above, there was affidavit evidence on this point as provided by Mr. Alook, describing the objective of the impugned provision. As such, the Arbitrator found that the objective of s 9.3(c) is pressing and substantial as it is intended to avoid significant conflicts of interest that would impair governing members from satisfying their statutory duties and responsibilities.

[84] Mr. Orr also submits that there is no rational connection between denying the democratic right to participate as a candidate in a PTFN election and the existence of the civil action against the PTFN. However, in my view, the Arbitrator did not err in finding that there was a rational

connection between the objective of s 9.3(c) and the means to achieve the objective as the prohibition on eligibility to stand for office serves to ensure electors who are suing the PTFN cannot obtain and thereby use their position to gain information that would harm the PTFN in litigation and to ensure that they are able to carry out their duties while in office. In my view, one of, if not the most significant aspects of any Councillor's duties is concerned with the proper financial management of the PTFN. It would seem obvious that a member who is suing the PTFN for a significant sum would have a clear and pre-existing conflict. And, while Schedule "C" may well serve to identify what constitutes a conflict of interest concerning sitting Councillors, s 9.3(c) serves to preclude persons with known and obvious conflicts from assuming that office. Similarly, electors employed by the PTFN or a PTFN Business Entity would not be eligible (ss 9.3(b) and (d)) to seek office.

[85] Nor, in my view, did the Arbitrator err in finding that s 9.3(c) was minimally impairing, as an elector who has been disqualified from being nominated still retains the right to vote and the ability to lobby and influence Council members in a lawful manner. I agree with that conclusion and would add that, upon resolution of the lawsuit, eligibility to stand for office will be restored. Nor did the Arbitrator err in concluding that the objective is served by s 9.3(c) and the impact is proportional because once the civil litigation is resolved, the elector's eligibility to stand for nomination will be restored.

[86] Mr. Orr relies on *Sauvé* to argue that if prisoners cannot be restricted from voting because the cost to our core democratic values would be too high, then his right to run for office should also not be denied on the ground that he has a breach of contract action against the PTFN. In my

view, *Sauvé* does not provide analogous support for Mr. Orr's position. In that case, the Supreme Court of Canada was dealing with a prisoner's right to vote, which is protected by s 3 of the *Charter*, and found that the provision denying that right failed the rational connection part of the *Oakes* test. In the present case, we are dealing with an elector's ability to run for office in a band election, which is not protected by s 3 of the *Charter*, and the rational connection is met. Nor does *Figueroa v Canada (Attorney General)*, 2003 SCC 37, also relied on by Mr. Orr support his position. The *Oakes* test must be applied in the context specific to the case under consideration.

[87] In my view, the Arbitrator did not err in concluding that s 9.3(c) of the Election Regulations is not inconsistent with Mr. Orr's s 3 *Charter* rights nor in his alternate analysis that, in any event, any such inconsistency is saved by s 1. Further, I am not satisfied by Mr. Orr's submissions that there is a separate constitutionally guaranteed right to run for office in a band council election premised on the underlying principle of democracy, nor that s 9.3(c) is an abuse of authority or contrary to the rule of law.

Issue 3: Did the Arbitrator err in not allowing Mr. Houle to add other witnesses?

Mr. Houle's Position

[88] Mr. Houle takes issue with the fact that the Arbitrator strictly applied the requirements of the Election Regulations with respect to Mr. Houle, but did not do so when considering the alleged breaches of the Election Regulations by the PTFN. The Arbitrator found the breaches to be "imperfectly conducted" election practices which could be overlooked. Mr. Houle argues that

an election appeal tribunal must act in accordance with procedural fairness (*Sparvier v Cowessess Indian Band No 73*, [1993] 3 FC 142 [*Sparvier*]).

[89] Specifically, Mr. Houle submits that the period of 5 days given to file a Notice of Appeal is unreasonably short, particularly with respect to a corrupt election practice. Mr. Houle further submits that the Arbitrator erred in finding that he did not have the power to accept additional witnesses. Mr. Houle argues that the Arbitrator breached his duty of procedural fairness by failing to determine the procedure to be followed with regard to fairness and equality, as required under s 16.5(f) of the Election Regulations, in deciding that he could not hear the testimony of other witnesses, including Mr. Houle, regarding the bribery allegations, when the Trindles were not available. Mr. Houle submits that the Arbitrator should have allowed the hearsay evidence as the test for doing so was met in these circumstances (*R v Smith*, [1992] 2 SCR 915, pp 932-4 [*Smith*]).

The Respondent's Position

[90] The Respondent submits the Arbitrator's interpretation of ss 16.1, 16.2, 16.5, 16.6 and 16.7 of the Election Regulations in not permitting additional witnesses or new allegations to be made at the hearing and not allowing hearsay evidence was reasonable and correct and that the Arbitrator did not breach the rules of procedural fairness or natural justice. Referring to the case cited by the Applicants, *Sparvier*, the Respondent points out that the most basic requirements of natural justice are that of notice, opportunity to make representations and an unbiased tribunal, all of which were provided by the Arbitrator. The Respondent takes the position that, given the

statutory election/governance regime established by the Election Regulations, more was not required.

[91] The Respondent submits that the mandatory language of s 16.2, the specified powers of the Arbitrator found in ss 16.5 and 16.8, and the express restriction of the Arbitrator to those powers as found in ss 16.5 and 16.8 of the Election Regulations means that the Arbitrator had no power to extend the 5-day limitation either directly or indirectly (*Kehewin Cree Nation v Mulvey*, 2013 ABCA 294 at paras 4, 9-11).

[92] The Respondent also submits that the proposed hearsay evidence did not fall within the parameters for the admissibility of hearsay evidence laid down in the *Smith* case, as neither the necessity nor reliability components of the test were met. Therefore, it was reasonable and correct for the Arbitrator not to hear Mr. Houle's hearsay evidence.

Analysis

[93] The following provisions of the Election Regulations are relevant to this issue:

> 16.2 **Notice of Appeal**
>
> (a) A Notice of Appeal in writing and signed by the Appellant shall be forwarded to the Electoral Officer outlining the grounds for the Appeal and with a cash deposit or certified cheque payable to the PTFN of One Hundred Dollars ($100.00) delivered to the Electoral Officer. The Notice of Appeal shall state:
>
>> …
>>
>> (iv) the names of any witnesses the appellant intends to call or a statement that the appellant does not intend to call any witnesses; and,

(b) The Notice of Appeal must be received in the prescribed Form by the Electoral Officer within five (5) days of the Election Day.

…

(d) The Electoral Officer shall reject and return any appeal documents that:

> (i) are not received within 5 days of the Acclamation, Election, By-election, or Run-off Election as the case may be.
>
> (ii) are not received with the required filing fee; or
>
> (iii) do not contain all the information required by section 16.2(a).

…

16.5 **Election Appeal Arbitrator Powers**

The Election Appeal Arbitrator has the following powers:

(a) To determine the time, place and date of the appeal hearing;

(b) To determine whether the appeal hearing is open to Members and who may or may not attend the appeal hearing;

(c) To determine questions or law arising in the course of the appeal hearing;

(d) To rule on any objections made in the appeal hearing;

(e) To order production of documents which are material and relevant to the appeal;

(f) To determine the procedure to be followed having regard for fairness and equality between the parties to the hearing;

(g) To determine the manner in which evidence is to be admitted; and

(h) The Arbitrator is not bound by rules of evidence and has the power to determine admissibility, relevance and weight of any evidence.

16.6 **No Powers**

The Election Appeal Arbitrator does not have the power:

> (a) To subpoena any witness or compel any person to give evidence at an appeal hearing excepting that the Electoral Officer is a compellable witness; or
>
> (b) To order any relief not specifically permitted by these Regulations.
>
> 16.7 These Regulations set out all the powers of the Election Appeal Arbitrator and neither the Arbitration Act of Alberta or the Commercial Arbitration Act of Canada or any other like legislation applies to the Election Appeal Arbitrator or to appeal hearings under these Regulations.

[94] In *Sparvier*, Justice Rothstein, then of this Court, found that principles of natural justice and procedural fairness apply to band election processes:

> [57] While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

[95] As pointed out by the Respondent, Justice Rothstein at paras 61 to 63 then went on to state that the basic requirements applicable to an appeal tribunal for a band election issue was an unbiased tribunal, notice, and the opportunity to make representations (also see *Polson v Long Point First Nation*, 2007 FC 983 at para 47).

[96] As stated by the Supreme Court of Canada in *Baker v Canada*, [1992] 2 SCR 817, the content of the duty of procedural fairness is to be determined in the specific context of each case (at para 21). And, as stated by the Federal Court of Appeal in *Meeches v Meeches*, 2013 FCA

177 [*Meeches*], referencing *Mavi v Canada (Attorney General)*, 2011 SCC 30 (at para 38), the question in every case is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context".

[97] In this case, the Arbitrator was of the view that the Election Regulations are a complete code that set out mandatory requirements for valid appeal notices such as identifying grounds and supporting material facts and the names of witnesses that the appellant relies on. He concluded that he had no power to accept additional witnesses to support Mr. Houle's argument after the timeline for the Notice of Appeal had expired. In his decision, he states that he made a similar ruling at the oral hearing on December 18, 2014 when Mr. Houle sought to testify and provide hearsay evidence as to the allegations of bribery but was not listed as a witness and did not provide a "will say" disclosure before the hearing. The Arbitrator did not permit him to testify "in fairness to the Respondent and in recognition that if heard, the weight of such hearsay evidence would be minimal".

[98] With respect to Mr. Houle's submission that the 5 day appeal period is unreasonably short, it must be noted that this is the timeframe stipulated by s 16.2(b) of the Election Regulations which were adopted by the PTFN, it was not a time period imposed by the Arbitrator. Mr. Houle has not challenged the validity of that provision. Further, the Election Regulations require the Election Officer to reject any appeal document not received within that period (s 16.5(d)(i)) and the Arbitrator does not have the power to order any relief not

specifically permitted by the Election Regulations (s 16.6(b)). Accordingly, in my view, the Arbitrator did not have authority to amend the appeal period.

[99] As to Mr. Houle's reference to the procedural fairness requirement of adequate notice as described in *Sparvier*, in my view, it is of little assistance or relevance in these circumstances. There, Justice Rothstein, then of this Court, stated:

> [82] The *Cowessess Indian Reserve Elections Act* is silent on the issue of notice, nor do the authorities set out, in terms of hours or days, guidelines as to what does or does not constitute adequate notice. What is adequate notice must be determined on the circumstances of each case. Clearly, a notice period of less than twelve hours is very short. Such a short notice period raises a number of concerns: (a) relevant persons may not be available; (b) there is practically no time to investigate the facts relating to the subject matter of the appeal; (c) it is unreasonable to expect the participants to adequately organize and prepare their representations. No evidence was led to indicate any compelling reason for the Tribunal commencing its proceedings upon such short notice.

[100] Here, unlike *Sparvier*, the Election Regulations are not silent. They clearly stipulate that the appeal period is 5 days. Further, that compliance with that period is mandatory and that the Arbitrator had no powers other than those stipulated which did not include a power to extend the stipulated appeal period.

[101] Mr. Houle also asserts that the Arbitrator was required to determine the procedures to be followed having regard to fairness and equality, pursuant to s 16.5(f) of the Election Regulations, but that he failed to do so, thereby breaching his duty of procedural fairness. In my view, this is not supported by the record.

[102] Subsection 16.5 sets out the Arbitrator's powers. These include the power to rule on any objection (s 16.5(d)), to determine the procedure to be followed having regard for fairness and equality between the parties to the hearing (s 16.5(f)) and to determine the manner in which the evidence is to be admitted (s 16.5(g)). The Arbitrator is not bound by rules of evidence and has the power to determine admissibility, relevance and weight of any evidence. The Election Regulations also require that the names of any witnesses must be included in the Notice of Appeal and that the Electoral Officer shall reject any notice that does not include that information.

[103] Here, in regard to the allegation of bribery, only Hilda and Joseph Trindle were named as witnesses in the Notice of Appeal. At the hearing, Mr. Houle sought to give evidence, in the absence of the Trindles, as to what they might have said had they appeared as witnesses. Thus, if adequacy of notice was at issue, this was to the detriment of the responding parties, not Mr. Houle. At the hearing, all counsel made submissions on the issue. The transcript of the hearing indicates that the Arbitrator acknowledged that he was faced with an issue revolving around "fairness and equality" and "notice". He also stated that he could not see the value in Mr. Houle's evidence "because I think the weight, if any I give to it, would be severely compromised".

[104] Given this, it is my view that the Arbitrator did consider and exercise his power to determine what evidence was to be admitted, based on the stipulated notice requirements of the Election Regulations and having regard to fairness and equality. Moreover, he also specifically addressed the limited weight, if any, that he would assign to Mr. Houle's evidence if he had

found it to be admissible. Considerable deference is owed to procedural rulings made by tribunals with the authority to control their own process (*Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at para 231).

[105] In sum, in my view the Arbitrator reasonably interpreted and applied the Election Regulations as regards to the acceptance of new witnesses, after the time period in the Notice of Appeal had expired or to permit Mr. Houle to testify to provide hearsay evidence. Further, given the clear language of the Election Regulations and his reasons, he did not breach his duty of procedural fairness arising from the relevant provisions.

[106] I would also note that, as set out in *Smith*, in order to admit hearsay evidence, two components must be established: necessity and reliability. Mr. Houle expressed concern that the Trindles, the alleged witnesses to the accusation of bribery, would not be available to testify. The only evidence on the record as to why the Trindles were unavailable is Mr. Houle's affidavit sworn on January 13, 2015 in support of this application for judicial review. This states that his aunt, Hilda Trindle, had told him about how Mr. Alook had promised her and her husband a house if they voted for him. The affidavit also states that the Trindles only speak Cree, and that it was difficult for Ms. Trindle to get around as she is in a wheelchair. However, the mere fact that Mr. Houle's aunt and uncle speak only Cree and that his aunt is confined to a wheelchair does not explain why they were not available to give evidence concerning the alleged bribery. There is no evidence that an interpreter could not have been arranged nor that transportation was not available. In the absence of evidence explaining their lack of availability, the necessity component of the hearsay test was not met. Nor was there evidence to establish the reliability of

Mr. Houle's proposed hearsay evidence. Thus, while the Arbitrator is not bound by rules of evidence, I am not satisfied that he erred in finding that such hearsay evidence should be excluded. Similarly, the Arbitrator was also empowered to make determinations regarding the weight of any evidence and I am not persuaded that he erred in finding that, in any event, it would have carried minimal weight. Finally, I would note that s 16.13 of the Election Regulations restricts judicial review to issues of law or natural justice and that this privation provision creates a presumption of deference to the Arbitrator's weighing of the evidence and conclusions on the facts (*Société d'énergie de la Baie James c Noël*, 2001 SCC 39 at paras 68-69).

[107] In any case, jurisprudence has cautioned against reading in powers that do not expressly exist in an election code. In *Jackson v Piikani Nation,* 2008 FC 130, the issue was whether the Chief Electoral Officer could find a candidate ineligible to run for an election on a ground that was not outlined in the First Nation band's electoral code, but was in keeping with the First Nation's traditional values. The Court was asked to read in these grounds by virtue of the preamble which, it was submitted, should be considered as an overarching principle, however, the Court declined to do so.

[108] Similarly, in *Fort McKay*, the Federal Court of Appeal refused to read in an inherent power, reasoning:

> [17] Even if a custom or inherent power exists, it may be ousted by express legislative language: *Lafond v. Muskeg Lake Cree Nation*, 2008 FC 726, 330 F.T.R. 60 (Eng.) (F.C.). Here, in my view, even assuming a custom or inherent power exists, for the reasons explained above, the *Election Code* ousts it.

> [18] The *Election Code* sets out very detailed, carefully constructed, and precisely worded provisions regulating when and how councillors may be removed or suspended. It would be surprising if such demanding regulation could be so easily circumvented by relying upon an undefined, general, inherent power, as the Chief and Council suggest.

[109] Given the clear language of the Election Regulations, including their inflexibility with respect to the Arbitrator's powers, and the fact that Mr. Houle is not actually challenging the validity of s 16.2(b), in my view the Arbitrator reasonably interpreted and applied the Election Regulations and did not err or breach procedural fairness by refusing to allow Mr. Houle to add other witnesses or to give hearsay evidence.

[110] And, as will be addressed below, contrary to Mr. Houle's submissions, the Arbitrator did not ignore the breaches of the Election Regulations or hold Mr. Houle to a different and stricter standard of compliance with those requirements. Rather, he acknowledged the breaches but found that, pursuant to s 16.8(b), they did not materially affect the result of the election.

Issue 4: Did the Arbitrator err in finding that the breaches of the Election Regulations regarding electoral practices did not materially affect the result?

Mr. Houle's Position

[111] Mr. Houle submits that the Arbitrator erred in finding that the absence of the Deputy Electoral Officer was regrettable but not fatal. Given that the Election Regulations require that either the Electoral Officer or the Deputy Electoral Officer must initial every ballot, all of the ballots cast during his approximately two hour absence should have been considered void. In

that event, the number of void ballots would have exceeded the difference in votes between Mr. Alook and Mr. Houle, which would have materially affected the votes.

[112] Mr. Houle also submits that it was not open to the Arbitrator to find that Linda Noskiye was in attendance to help Trout Lake election officials identify electors, given that the Election Regulations required voters to leave the voting station after voting. Further, Linda Noskiye assisted a voter without completing the required form, causing one vote to be void; that at least three voters required interpreters but the forms required by s 11.5(b) and 11.6(a)(ii) were not completed causing those votes to be void; that contrary to s 12.1 Linda Noskiye participated in the counting of the ballots; that the counting of the Trout Lake polling station ballots at Peerless Lake polling station was contrary to s 12.1; and, that the Deputy Electoral Officer's failure to record the number of ballots at each polling station contrary to s 11.7(k), all of which improperly and directly affected the conduct of the election contrary to s 16.1(f). Mr. Houle submits that proof of an irregularity may itself be sufficient to discount a vote (*Opitz* at para 43). Here, the election was conducted so badly that it was not in accordance with the law of elections and it must be vitiated (*Yukon (Chief Electoral Officer) v Nelson*, 2014 YKSC 26 [*Yukon*]). As such, Mr. Houle submits that the Arbitrator erred in concluding that these breaches did not affect the result.

The Respondent's Position

[113] The Respondent submits that the Arbitrator's interpretation and application of s 16.8(b) to all election irregularities and breaches of the Election Regulations alleged in the Notice of Appeal were reasonable and correct.

[114] The Respondent takes the position that the Arbitrator acted reasonably in finding that three of the alleged irregularities and breaches of the Election Regulations had been established but did not materially affect the result of the election. Subsection 16.8(b) requires and restricts the Arbitrator to asking if any of the established grounds of appeal materially affected the result of the election, including "Corrupt Election Practices" or "Falsification of an Electoral Report" or any other ground that may be raised under s 16.1. If any of the established grounds of appeal, individually or taken together, did not materially affect the result of the election, then the decision must be to allow the election results to stand. In adopting the "materially affected" test for all established grounds of appeal, the Respondent submits that the PTFN has effectively adopted the common law rule that an election is presumed valid and "… should be vitiated only if it is shown that there were such irregularities that, on a balance of probabilities, the result of the election might have been different" (*Beamish*; *Meeches*) which is determined by the "magic number test" (*Optiz* at para 71). Given the statutory regime established by s 16.8, the "magic number test" and the 44 vote margin of victory, the Arbitrator's dismissal of the Houle appeal was reasonable and correct.

[115] The Respondent also submits that Mr. Houle is effectively asking the Court to find that the Arbitrator should have ignored the plain wording of s 16.8(b) and called a new election even though none of the established grounds of appeal materially affected the result of the election. The Respondent states that this would have been an error of law.

Analysis

[116] The party seeking to annul an election bears the legal burden of proof (*Opitz* at para 52).

[117] In *Flookes v Shrake,* [1989] 100 AR 98 (Alberta Court of Queen's Bench) [*Flookes*], a party brought a number of claims of irregularities and non-compliance with the provincial legislation for elections. Based on the legislation, the Alberta Court of Queen's Bench held that "[a]n election will not be declared void if it is shown to the satisfaction of the court that the election was conducted in accordance with the Act and the irregularity, failure, non-compliance or mistake did not materially affect the result of the election" (para 48). The Court further held that not every breach or failure to comply with the statute would result in the election being ruled invalid, distinguishing between mandatory provisions and directory provisions. Recognizing that irregularities are likely to occur in every election in large urban centres, the Court stated that the question is whether the errors or irregularities are such that they affect the result of the election or cause a substantial injustice.

[118] *Flookes* was subsequently affirmed by the Supreme Court of Canada in *Opitz*, which outlined the test for such situations:

> [71] To date, the only approach taken by Canadian courts in assessing contested election applications has been the "magic number" test referred to in *O'Brien* (p. 93). On this test, the election must be annulled if the rejected votes are equal to or outnumber the winner's plurality (*Blanchard*, at p. 320).
>
> [72] The "magic number" test is simple. However, it inherently favours the challenger. It assumes that all of the rejected votes were cast for the successful candidate. In reality, this is highly improbable. However, no alternative test has been developed. No evidence has been presented in this case to support any form of statistical test that would be reliable and that would not compromise the secrecy of the ballot.
>
> [73] Accordingly, for the purposes of this application, we would utilize the magic number test. The election should be annulled when the number of rejected votes is equal to or greater than the successful candidate's margin of victory. However, we do not rule out the possibility that another, more realistic method for assessing

> contested election applications might be adopted by a court in a future case.
>
> [74] The following approach should be followed in determining whether there were "irregularities ... that affected the result of the election": An applicant must prove that a procedural safeguard designed to establish an elector's entitlement to vote was not respected. This is an "irregularity". An applicant must then demonstrate that the irregularity "affected the result" of the election because an individual voted who was not entitled to do so. In determining whether the result was affected, an application judge may consider any evidence in the record capable of establishing that the person was in fact entitled to vote despite the irregularity, or that the person was not in fact entitled to vote.
>
> [75] If it is established that there were "irregularities ... that affected the result of the election", a court may annul the election. In exercising this discretion, if a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election. For the purposes of this application, the "magic number" test will be used to make that determination.

(also see *Meeches* at paras 63 and 700).

[119] Mr. Houle refers to *Yukon* to suggest that the law in Canada remains as set out in *Ta'an Kwäch'än Council (Re)*, 2006 YKSC 62 at paras 17-20, being the common law principle summarized in *Beamish* by a quote from *Morgan v Simpson*, [1974] 3 All ER 722 to the effect that if an election was conducted so badly that it was not substantially in accordance with the law of elections, the election is vitiated, irrespective of whether the result was affected or not.

[120] It is of note, however, that in *Yukon* there were no legislative or regulatory provisions on the procedures to be followed in the event of an election irregularity. For that reason, the referenced common law principles were to be taken into account. However, the Court then went

on to find that in order to determine whether the result of the election had been materially affected by the irregularity, it was to have regard to the magic numbers test, which it applied. Although the Court found that only two votes were invalid because they were not cast in accordance with the provisions of the election legislation, those two rejected votes equaled the candidate's margin of victory over the unsuccessful candidate, and as such, under the magic number test the election had to be vitiated and annulled. *Beamish* and *Meeches* also employed the magic numbers test.

[121] Unlike *Yukon*, in this case, s 16.8(b) of the Election Regulations explicitly acknowledges that, while there may be valid grounds for an appeal, the election results will still stand unless the infraction materially affected the result. That is, in effect the Election Regulations adopted the rule as set out by the Supreme Court of Canada in *Optiz*, as follows:

> 16.8 Within five (5) days of the conclusion of the Hearing, the Election Appeal Arbitrator shall promptly make one of the following decisions:
>
> (a) …
>
> (b) To uphold the grounds of an Appeal but allow the results of the Election to stand, as the infraction did not materially affect the result of the Election; or
>
> …

[122] The Arbitrator in his reasons acknowledged s 16.8 and interpreted this provision as requiring him to ask two questions and, depending on the answers, to make one of three decisions. The first question was whether the evidence established a ground of appeal as set out in the Notice of Appeal. He confirmed that he had found three instances where the election process was imperfectly conducted and irregular, none of which related to corrupt election

practices. He then asked if one or more of the instances of imperfect conduct materially affected the result of the election. The Arbitrator concluded that only one vote may have been improperly counted, that Mr. Alook had obtained 44 more votes for Chief than Mr. Houle and that none of the three imperfections materially affected the result of the election. Accordingly, in my view, the Arbitrator did not err in his approach to determining whether the irregularities materially affected the results of the election.

[123] And, even if there were three voters requiring interpretation for whom the required forms were not completed, this would not have materially affected the margin of votes between Mr. Houle and the successful candidate. With respect to Mr. Houle's submission that more than 60 ballots would have been void because the Deputy Electoral Officer left the polling station for approximately two hours and was therefore unable to initial the ballots, I am not convinced by this argument. First, I would note that s 11.7(b) requires all ballots given to electors be first initialled by the Electoral Officer. After a ballot is marked by the elector the elector is then required to fold it to conceal the names of the candidates and his or her mark on the face of the ballot and to expose the Electoral Officer's initials (s 11.7(h)). The Electoral Officer is then required to verify the initials on the ballot before depositing the ballot into the box. However, s 12.2(a)(i) states that any ballot that does not bear the initials of the Electoral Officer or polling clerk is to be considered void. This suggests that the polling clerk can also initial the ballot.

[124] The Arbitrator noted that, pursuant to the Election Regulations only one Electoral Officer is appointed, and no provision is made for the appointment of a deputy electoral officer. In this matter there were two polling stations. He therefore interpreted the Election Regulations so as to

permit polling clerks to ensure the election process was conducted in a proper way when the Electoral Officer was necessarily, as in this case, not available. Therefore, the absence of the Deputy Electoral Officer was not fatal. In my view, that interpretation was not unreasonable particularly as other provisions of the Election Regulations also permit a polling clerk to effect such responsibilities. For example, the Electoral Officer or the polling clerk shall record the total number of ballots (s 11.7(k)); the Electoral Officer or polling clerk may refuse to allow a person to vote in stipulated circumstances (s 11.8(a)); the Electoral Officer or the polling clerk shall maintain order in the polling station (s 11.9(a)); and, upon close of the polling stations the Electoral Officer or the polling clerk shall open the ballot boxes, count and record the number of votes case for each candidate. It is also of note that polling clerks are appointed by the Electoral Officer pursuant to Schedule "A" of the Election Regulations, Duties of the Electoral Officer, which also states that the Electoral Officer shall supervise and ensure that all elections are concluded in accordance with the Election Regulations.

[125] In fact, in the Statutory Declaration of Mr. Oostendorp, the Election Officer states as follows:

> 16. I am told that there may be an issue over Earl Laboucan coming to the Peerless Lake polling station and handing me a bundle of blue ballots. I had called him around 4:30pm and asked if the Trout Lake polling station had extra blue ballots. About 15 minutes after I called he arrived and handed me the bundle, told me there was 75 blue ballots and he left to return to the Trout Lake polling station. In his absence from the Trout Lake polling station all of the ballots cast were first initialled by one of the Trout Lake Polling Clerks.

[126] Accordingly, in my view, the Arbitrator reasonably interpreted the Election Regulations to permit the polling clerks to oversee the voting process in this circumstance.

[127] Finally, I would note that the Arbitrator in his decision dealt with each of the allegations made by Mr. Houle and the evidence pertaining to those allegations. His weighing of the evidence was reasonable as were his factual findings based on the evidence. Further, as is evident from the record and the Arbitrator's reasons, this was not a circumstance where an election was generally and pervasively conducted badly. Rather, while here, as recognized by the Arbitrator, while there were irregularities and, in three instances, the election process was imperfectly conducted, these did not materially affect the election result.

Issue 5: Did the Arbitrator err in ordering Mr. Houle to pay costs?

Mr. Houle's Position

[128] Mr. Houle submits that the provision for costs in s 16.11 of the Election Regulations does not apply to the present circumstances. Here the Arbitrator found that Mr. Houle had valid grounds of appeal because there were breaches of the Election Regulations, even though the Arbitrator did not set aside the election. Mr. Houle submits that an appeal cannot be so lacking in merit as to constitute an abuse of process when the appeal is upheld and breaches of the Election Regulations have been found.

The Respondent's Position

[129] The Respondent takes the position that the Arbitrator's decision to exercise his power to order Mr. Houle to pay costs was reasonable. The Respondent submits that reading s 16.11 with the common law principles adopted in s 16.8(b) clearly warns against examining the election record in search of technical administrative errors and that, by analogy, success on the merits of

the appeal must mean whether an established ground of appeal could materially affect the result of the election (*Cf Regina v Cronin,* [1875] OJ No 22). The Respondent also submits that the abuse of process does not require that there be any misconduct in bringing the proceedings subsequently challenged as an abuse of process (*R v Keyowski*, [1988] 1 SCR 657 at p 659 [*R v Keyowski*]). In this matter, no reasonable person reading the Election Regulations and the Notice of Appeal would have thought that the grounds of appeal could have materially affected the election results. Therefore, the Arbitrator's cost award is reasonable.

Analysis

[130] The Arbitrator ordered Mr. Houle to pay half of the costs for the appeal, based on the following provision in the Election Regulations:

> 16.11 Notwithstanding paragraph 16.10 above if the Election Appeal Arbitrator determines that an appeal was so lacking in merit as to constitute an abuse of the Appeal process he may order the appellant to pay all or a portion of the costs of the appeal hearing, including the fees and disbursements of the Election Appeal Arbitrator, or the costs of the affected candidates or both.

[131] The Arbitrator found that, because none of the three infractions of the electoral process which he upheld as grounds of appeal could have materially affected the outcome of the 44 vote plurality of the successful Chief candidate, the appeal was fundamentally lacking in merit and ordered Mr. Houle to pay one half of the costs of the appeal.

[132] In my view, it was not reasonable for the Arbitrator to uphold Mr. Houle's appeal, but then order costs against him because his appeal was fundamentally lacking in merit. Given his findings, pursuant to s 16.8(b) of the Election Regulations, the Arbitrator was required to uphold

the grounds of the appeal but to allow the results of the election to stand as the infractions did not materially affect its outcome, which is what he did. However, he made no analysis of whether the appeal was so lacking in merit as to constitute an abuse of process. The very fact that the Arbitrator upheld Mr. Houle's appeal suggests that it had some merit.

[133] Mr. Houle points out that Black's Law Dictionary defines abuse of process as "The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope". In the administrative law context, abuse of process can refer to unacceptable delay (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44), collateral attacks and repeated relitigation of the same issues (*Coombs v Canada (Attorney General)*, 2014 FC 232, affirmed in *Coombs v Attorney General of Canada*, 2014 FCA 222; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 64), bald allegations in a pleading not supported by material facts (*Astrazeneca Canada Inc v Novopharm Ltd*, 2010 FCA 112), and pleadings lacking material facts and particulars (*Baird v R*, 2006 FC 205, affirmed in 2007 FCA 48). In the present circumstances, there were irregularities in the electoral process as well as three breaches of the Election Regulations as found by the Arbitrator. Accordingly, in my view, the appeal was not so lacking in merit as to constitute an abuse of process as has been described in prior jurisprudence.

[134] I also do not agree with the Respondent's analogy to the merits of the case in the context of a criminal matter, being in reference to guilt or innocence of the offence charged, to whether an established ground of appeal could materially affect the outcome of the appeal. Subsection 16.11 does not reference the outcome of the appeal and s 16.8(b) appears to recognize that an

appeal can be validly brought, even if it does not materially affect the outcome. Nor do I think the Respondent’s reference to *R v Keyowski* to be of any assistance in this matter.

[135] Finally, I do not agree that no reasonable person reading the Notice of Appeal would have thought that the pleaded grounds of appeal, individually or together, could have materially affected the outcome. The Notice of Appeal, amongst other things, alleged corrupt election practices which, if established, could have had such an effect.

[136] For these reasons, I find the Arbitrator’s costs award not to be reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed and the Arbitrator's decision is upheld with the exception of his order as to costs;
2. The Arbitrator's award of costs against Mr. Houle is quashed; and
3. Given the mixed outcome above, there shall be no order as to costs with respect to this application for judicial review.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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