Federal Court  Cour fédérale

Date: 20200616

Docket: T-1377-19

Citation: 2020 FC 696

Vancouver, British Columbia, June 16, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

JARED MORIN

Applicant

And

ENOCH CREE NATION, ELECTION APPEAL BOARD AND SHANE PEACOCK

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by an Election Appeal Board, constituted in connection with the Maskekosihk Enoch Cree Nation #440 Election Law ("MECN Election Law"), which held that the election to the 10th councillor position in the July 17, 2019 election for the Maskekosihk Enoch Cree Nation chief and band council was overturned and that a by-election must be held. The application is brought pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

Background

[2] On September 25, 2018, the majority of voters of the Maskekosihk Enoch Cree Nation approved the MECN Election Law. It was enacted and adopted into the laws of that First Nation.

[3] The Applicant, Mr. Jared Morin, is a member of the Enoch Cree Nation. He ran for election as a band councillor in the July 17, 2019 election.

[4] The Respondent, Shane Peacock, is also is a member of the Enoch Cree Nation who ran for election as a band councillor in the July 17, 2019 election.

[5] Part 4 of the MECN Election Law concerns the appointment of an electoral officer. Although there is no evidence in the record before me as to the actual appointment of that officer with respect to the July 17, 2019 election, it is undisputed that Mr. Marvin Yellowhorn ("Electoral Officer") fulfilled that role.

[6] The affidavit evidence contained in the Applicant's record indicates that voting commenced at 9:00 a.m. on the morning of July 17, 2019 and concluded at 8 p.m. the same day. The counting of the ballots for councillors was then conducted. That count found that both Jared Morin and Shane Peacock had received 319 votes. The count of votes for chief was then conducted. During that count, a councillor's ballot was found in a ballot box intended for votes for chief. That councillor's ballot was for Jared Morin. As some candidates ran for election as chief or councillor, the outcome of the election for chief had the potential to affect the outcome

of the election to the 10th councillor position. The count of votes for chief concluded at 5:30 a.m. on July 18, 2019.

[7] The Electoral Officer decided that a break would be taken and recounts would commence at 1 p.m. The recount result was that Jared Morin and Shane Peacock had both received 319 votes. The Electoral Officer declared a tie and, in accordance with s 17.2 of the MECN Election Law, the names of Mr. Morin and Mr. Peacock were placed in a hat. The name drawn from the hat was Jared Morin. The Election Officer declared Mr. Morin as the winner of the 10th councillor position. I would add that there is some uncertainty in the record before me as to the fate and validity of the miscast, or "found", councillor's vote that was found in a ballot box intended for votes for chief.

[8] On July 23, 2019, counsel for Mr. Peacock submitted a "Brief of the Appellant" to the "Appeal Board" naming the Electoral Officer, Jared Morin and the Chief and Council of the Maskekosihk Enoch Cree Nation as "respondents", together with a supporting affidavit, sworn on the same date, of Ms. Tanya Cardinal, a scrutineer for Mr. Peacock in the election. The brief asserted that the Electoral Officer improperly handled the councillor's ballot found in the ballot box for votes for chief during the counting of the votes for chief. Specifically, that the ballot should have been considered as spoiled and not counted. In that event, Mr. Peacock would have had 319 votes and Mr. Morin would have had 318 votes, there would not have been a tie vote, and there would have been no need to conduct a tie breaking hat draw. The brief also asserted that the Electoral Officer's decision to "delay" the recount of the councillor's ballots until 1 p.m. on the afternoon of July 18, 2019 breached s 17.1 of the MECN Election Law, which requires an

immediate recount. Further, that the alleged violations of the provisions of the MECN Election Law (ss 13.3, 13.4, 14.1, 14.2, 15.5 and 17.1) may have affected the result of the election (s 20.13) and, therefore, a recount should be held pursuant to s 22.3.5(b)(ii) of the MECN Election Law, Schedule G, and excluding the disputed ballot. Alternatively, a by-election for the 10th, and final, councillor position should be directed pursuant to s 20.17(b).

[9] The Certified Tribunal Record ("CTR") contains a document entitled "Minutes of the Enoch Cree Nation Appeals Board July 24, 2019". This indicates that unanimous agreement on a decision was reached and that the Chairperson agreed to write a draft response for the Election Appeal Board review "(accepted July 25 by the Appeals Board)". The minutes are unsigned. Also found in the CTR is an undated and unsigned document entitled "Election Results Appeal" which states that the election to the 10th councillor position is overturned and that a by-election was required. These documents comprise the decision under review.

Decision under review

[10] As indicated above, the CTR contains two documents pertaining the election appeal decision. The first is entitled "Minutes of the Enoch Cree Nation Election Appeals Board July 24, 2019". This indicates that Dr. Joshua Nichols, the Chairperson, called a meeting of the Election Appeal Board to order at 5:06 p.m. on July 24, 2019, and that it was attended by Dr. Judi Malone and Mr. Kieran Quirke (the latter via teleconference). Further, that prior to the meeting, the board members had reviewed the appellant's submitted document, received on July 23, 2019, and had started to discuss ss 13.3, 13.4. 14.2. 15.5. 17.1, and 20.17(b) of the MECN Election Law as well as s 22.3.5(b)(ii) of Schedule G thereof. Unanimous agreement was

reached and the minutes reflect that Dr. Nichols agreed to "write a draft response for the review of the Election Appeals Board (accepted July 25 by the Appeals Board)". The meeting was adjourned at 5:24 pm. The minutes are unsigned.

[11] The second document is entitled "Election Results Appeal" and is undated and unsigned. This states that the Election Appeal Board received an appeal from Shane Peacock on July 23, 2019, sets out Mr. Peacock's position and then states:

> Analysis and Decision
>
> Part 17.1 of the Election Law states that "in the event of a tie vote for the position of Okimaw (Chief) or for the tenth (10th) and final position of Wiyasiwew (Councillor), the Electoral Officer shall immediately conduct a recount of the valid ballots between the Candidates that are tied."
>
> The wording of this provision explicitly requires that the CEO [the Electoral Officer] immediately conduct a recount. The purpose of this requirement is that delays in the recount of a tie compromises the transparency and thereby the legitimacy of the electoral process. When the CEO chose to depart from the Election Law and hold the recount at a later time the result of the election was compromised. This decision led to allegations regarding the inclusion of a spoiled ballot and the handling of the ballots.
>
> In these circumstances a recount is not an appropriate remedy as it does not clearly settle the issues regarding the ballots. The purpose of Part 17.1 is that the tie votes are resolved in the most transparent manner possible so that the legitimacy of the electoral process is preserved. As such, the Committee holds that the result for the 10th Councilor [*sic*] position is overturned, and a by-election must be held.

Issues and standard of review

[12] I pause here to note that while the style of cause and several of the parties' submissions and documentation refer to the Enoch Cree Nation Appeal Committee, the Enoch Nation Appeal

Committee or the Appeals Committee, the MECN Election Law refers to the Election Appeal Board. Accordingly, that is the terminology used in these reasons. Further, at the hearing of this matter, I raised this with counsel and it was agreed that the style of cause should be amended to reflect to correct name, being the Election Appeal Board. This is reflected in my order below.

Mr. Morin

[13] The Applicant frames the issues as follows:

i. Who was on the Election Appeals Committee?
ii. Who was responsible for selecting the Committee members?
iii. Why were none of the appropriate parties informed there had been an Appeal?
iv. On what grounds and merits was the Appeal based?
v. Why was the Applicant not given an opportunity to make his own submissions?

Enoch Cree Nation and the Enoch Election Board

[14] A responding record was filed on behalf of the Enoch Cree Nation and the Election Appeal Board. The written submissions in that record state that the role of a tribunal in judicial review proceedings is limited to making submissions regarding its jurisdiction to make the order or decision in question (*Li v Canada (Citizenship and Immigration*), 2004 FCA 267 at para 4 citing *Northwestern Utilities Ltd v Edmonton*, [1979] 1 SCR 684 at 709-710, 7 Alta LR (2d) 370 ("*Northwestern*")). Accordingly, as no questions of jurisdiction were raised in this matter, the Election Appeal Board makes no submissions. In this regard, I would note only that the role, if any, of a tribunal whose decision is under review is limited (*Frank v Blood Tribe*, 2018 FC 1016

at paras 48, 49). It is constrained by the principles of finality and impartiality (*Canada (Attorney General) v Quadrini*, 2010 FCA 246 at paras 16-17). Nor does "jurisdiction" encompass a failure to adhere to the rules of natural justice by an administrative decision maker (*Northwestern* at 711). Accordingly, the decision of the Election Appeal Board not to make submissions in the circumstances of this application is entirely appropriate.

[15] The written submissions of the Enoch Cree Nation state that it takes no position on the substantive merits of the Applicant's underlying appeal. Rather, the emphasis of its submission is to ensure that the MECN Election Law is respected and to provide the Court with relevant jurisprudence regarding the legal issues before it. The Enoch Cree Nation describes the issues as follows:

i. Did the Enoch Election Appeal Board breach Mr. Morin's right to procedural fairness by determining Mr. Peacock's appeal without providing Mr. Morin with notice and/or the right to be heard?

ii. If there was a breach of Mr. Morin's right to procedural fairness, what is the appropriate remedy?

iii. Does this Court have jurisdiction to award monetary damages in a judicial review?

Mr. Peacock

[16] Mr. Peacock was not named as a respondent in this application for judicial review when it was commenced. He subsequently brought a motion seeking to be added as a person directly affected by the order sought on the application. On November 1, 2019, his motion was granted by Order of Prothonotary Ring. On May 19, 2020, new counsel for Mr. Peacock wrote to the Court advising of a change of counsel, that Mr. Peacock would not be filing responding

materials, and that he would not be attending the hearing of this matter. The letter states that Mr. Peacock adopts and endorses the summary of facts and law contained in Enoch Cree Nation's written submissions and acknowledges that the Election Appeal Board did not provide the Applicant with notice of Mr. Peacock's appeal or an opportunity to make submissions in the appeal, which may have been inconsistent with the its duty of procedural fairness owed to Mr. Morin. Further, that an appropriate remedy may be to set aside the Election Appeal Board decision and refer the substance of the appeal back for redetermination, with notice to Mr. Morin.

[17] The letter goes on to indicate, amongst other things, that while Mr. Peacock does not intend to submit formal argument, he confirms his understanding that Mr. Morin does not meaningfully challenge the reasonableness of the substance of the Election Appeal Board's decision and its interpretation of the MECN Election Law. The letter also states that Mr. Peacock declines to participate in light of that understanding and his further understanding that no reasonable basis has been articulated which would justify this Court declaring Mr. Morin the 10th councillor elected and various other submissions.

[18] Mr. Peacock cannot have it both ways. Had he wished to utilize his right as a respondent to file a motion record, including written submissions, he should have done so. It is not open to him to advise that he is not participating but, in effect, to make submissions by way of a letter to the Court. I will disregard that aspect of the letter from his counsel.

[19] I note that this application for judicial review was conducted by video conference (Zoom). Prior to the hearing, by email of June 1, 2019, counsel for Mr. Peacock reconfirmed that Mr. Peacock would not be participating as a party to the hearing but that he and his counsel wished to silently observe the hearing. Accordingly, Mr. Peacock and his counsel were admitted as observers to the Zoom hearing.

Determination

[20] In my view, there is one clearly dispositive issue on judicial review: Did the Election Appeal Board breach the Applicant's right to procedural fairness?

[21] The standard of review for issues of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canada v Akisq'nuk First Nation*, 2017 FCA 175 at para 19; *Gadwa v Kehewin First Nation*, 2016 FC 597 at para 19, aff'd 2017 FCA 203 ("*Gadwa*")). This is unchanged by the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*" at para 23). A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) ("*Baker*"), and with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed (*Canadian Pacific Railway Company v Canada*, 2018 FCA 69 at para 54 ("*Canadian Pacific*")).

[22] No deference is owed to the administrative decision maker under the correctness standard. And, it is for the reviewing Court to determine if an applicant's procedural fairness rights were violated (*Canada Pacific* at paras 33-56; *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31; *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57).

[23] While, for the reasons below, a breach of the duty of procedural fairness owed to Mr. Morin is determinative in this case, the decision of the Election Appeal Board was also unreasonable as it breached the MECN Election Law. The decision was not justified based on the record before the Election Appeal Board or on the relevant legal constraints that bore upon the decision (*Vavilov* at paras 15, 99; *Gadwa* at para 17).

Preliminary Issue

[24] The Enoch Cree Nation submits that certain paragraphs of the Amended Affidavit of Jared Morin, sworn on January 8, 2020 ("Morin Affidavit"), should be given no weight. Specifically, that paragraphs 3-9 and 37 are not relevant to the issues before the Court; that paragraphs 11, 28, 30 and 31 are statements of argument, not evidence; and, as to paragraphs 10, 52 and 57, that Mr. Morin has no personal knowledge of the facts contained therein.

[25] The jurisprudence is clear that, as a general rule, the evidentiary record before a Court on judicial review is restricted to the evidentiary record that was before the decision maker. Evidence that was not before the decision maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible. The recognized exceptions are when an affidavit: provides general background in circumstances where that information might assist the Court in

understanding the issues relevant to the judicial review, but does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision maker; brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision maker so that the Court can fulfill its role of reviewing for procedural unfairness; and, highlights the complete absence of evidence before the administrative decision maker when it made a particular finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 20; see also *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-25; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45).

[26] In my view, paragraph 9 of the Morin Affidavit, to a degree, purports to support his claim of bias in the selection of the Election Appeal Board and it is admissible as such. Similarly, portions of paragraphs 28 and 31 speak generally to the alleged absence of procedural fairness and are admissible to that extent and on that basis, although I recognize that they also encompass some elements of argument. Paragraphs 3 to 8, 11, 30 and 37 are not relevant and paragraphs 10, 52 and 57 are speculative, in that Mr. Morin does not indicate the basis for his stated belief. The offending portions of the Morin Affidavit will be disregarded (see *Coldwater First Nation v Canada (Attorney General)*, 2019 FCA 292 at paras 13-14, 18-19, 21; *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 88-91).

[27] All of that said, nothing turns the challenged paragraphs. The breach of procedural fairness is clear for the reasons set out below.

Did the Election Appeal Board breach the Applicant's right to procedural fairness?

[28] Mr. Morin submits that the Election Appeal Board breached his right to procedural fairness because he was not given notice of the appeal and was not afforded an opportunity to respond to it. Further, that the decision was procedurally unfair and in breach of MECN Election Law because the Election Appeal Board failed to ensure that the appeal documents were served on the Electoral Officer and failed to offer the Electoral Officer the opportunity to make any written report or other submissions pertaining to the appeal.

[29] In my view, there is no doubt that the Election Appeal Board decision was procedurally unfair.

[30] The Morin Affidavit states neither he nor the Election Officer were notified of the appeal. This is confirmed by the CTR, which contains no documents indicating that either Mr. Morin or the Electoral Officer were given notice of Mr. Peacock's appeal or any opportunity to respond to that appeal. The Enoch Cree Nation does not dispute this lack of notice.

[31] Rather, the Enoch Cree Nation notes that the importance of a First Nation's autonomy in their election process has been recognized by this Court, which should be reluctant to interfere in those processes (*Johnny v Adams Lake Indian Band*, 2017 FC 156 at para 28 ("*Adams Lake Indian Band*")). The Enoch Cree Nation also acknowledges, however, that a duty of fairness lies on every public authority making an administrative decision that affects the rights of an individual and that what is necessary to achieve procedural fairness varies from case to case, but that the relevant factors to be considered were set out by the Supreme Court in *Baker* at paras 23-27.

[32] The concept of procedural fairness is eminently variable and its content is to be determined in the specific context and circumstances of each case (*Baker* at para 21). Whether the duty of procedural fairness has been met in any given case depends upon the nature of the decision being made, the nature of the statutory scheme and the terms of the statute pursuant to which the administrative body operates, the importance of a decision, the legitimate expectations of the person challenging the decision, and the choice of procedure of the decision maker (*Baker* at paras 23-27).

[33] I would also note that, more generally, *Baker* at para 28 states:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[34] Significantly, notice and an opportunity to make representations have been characterized as the most basic requirements of the duty of fairness (*Orr v Fort McKay First Nation*, 2011 FC 37 at para 12 ("*Orr*"); *Gadwa* at paras 48-53). Further, the Federal Court of Appeal has stated that, "No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific* at para 56).

[35] In my view, the Election Appeal Board plainly and clearly breached procedural fairness by failing to notify the Applicant of the appeal and affording him the opportunity to address the allegations of Mr. Peacock. While the requirement to do so is not specified in the MECN

Election Law, this is a basic premise of procedural fairness that cannot be ignored when an individual, such as Mr. Morin, is directly and personally affected by the outcome of the appeal (*Orr* at paras 10-13). This alone is a sufficient basis upon which to find that the Election Appeal Board breached the duty of procedural fairness owed to Mr. Morin.

[36] However, as Mr. Morin asserts, the Election Appeal Board also erred by failing, in breach of MECN Election Law, to notify the Electoral Officer of the appeal and to obtain his written reasons for his electoral decisions.

[37] Section 20.7 of the MECN Election Law requires that the Chairperson of the Election Appeal Board notify the Electoral Officer of an appeal and that the Electoral Officer shall, as soon as possible, forward to the Chairperson the written reasons for their decision. Here, the CTR, with respect to an Appeal Notice of Hearing, states that the Election Appeal Board, "objects to providing these documents as no such documents exist". As to all correspondence with the Electoral Officer including the Notice of Appeal, the Election Appeal Board states that it, "objects to providing these documents as it does not have any relevant correspondence with the Electoral Officer". Indeed, the only materials listed as considered in the appeal are those submitted by Mr. Peacock. The Enoch Cree Nation does not dispute that the Electoral Officer was not advised of the appeal.

[38] The Election Appeal Board failed to comply with the s 20.7 of the MECN Election Law. Moreover, it made its decision without any input from the Electoral Officer, the person responsible for running the election. This is significant. For example, it meant that only the

submissions of Mr. Peacock's counsel and the affidavit of Mr. Peacock's scrutineer were considered by the Electoral Appeal Board. This included the argument concerning how the Electoral Officer handled the councillor's ballot cast in the chief's ballot box. Counsel for Mr. Peacock made an argument that the fact that the ballot was apparently entered into the wrong ballot box meant that it was a spoiled ballot and should not be counted. Counsel for Mr. Peacock also asserted that the "found" ballot could not be identified as such during the recounts. It had not been returned to the chief's ballot box, although the Electoral Officer thought it had, and the "found" ballot could not be distinguished from the other councillor ballots. Counsel for Mr. Peacock submitted that the inclusion of an invalid ballot during the recount resulted in the tie, as the Electoral Officer declared, and the tie breaking hat draw only occurred because of the inclusion of the invalid ballot. In sum, Mr. Peacock's challenge is, in reality, a challenge to the validity of the "found" ballot.

[39] The MECN Election Law states that voters who have cast their ballots shall, in the presence of the Electoral Officer or their assistant(s), deposit their ballots in the appropriate ballot box (s 14.2). Further, that when ballots are being counted, the Electoral Officer shall reject any ballots that have not been initialed by the Electoral Officer, do not give a clear indication of the voter's intention, contain votes for more candidates than are positions available for election, or contain a mark that can identify a voter (s 15.3). All such rejected ballots shall not be counted and on the back of each rejected ballot the Electoral Officer shall write "rejected", note the reason for the rejection, and initial the ballot (s 15.4). The Electoral Officer must also separately count the valid ballots cast for each candidate and prepare and sign a written statement indicating

the date of the election, the total number of votes cast, the total number of votes cast for each candidate and the total number of rejected ballots (ss 15.5-15.6).

[40] The placing of an otherwise valid ballot into the wrong ballot box does not appear to fall into any of the circumstances set out in the MECN Election Law that would result in the Electoral Officer declaring it to be invalid.

[41] However, the Election Appeal Board did not address this. Instead, it found that s 17.1 of the MECN Election Law required an "immediate" recount in the event of a tie. It interpreted "immediate" literally and to mean that the Electoral Officer should have required the election assistants – who had been working continuously since about 8:00 a.m. on July 17, 2019 – to continue working at 5:30 a.m. on July 18, 2019 to conduct the councillor recounts. Putting aside the reasonableness of that interpretation given the circumstances facing the Electoral Officer, the Election Appeal Board also concluded, without hearing from the Electoral Officer, that holding the recount "at a later time" resulted in the election being compromised as the Electoral Officer's decision to do so led to the allegations regarding the inclusion of a spoiled ballot and the handling of the ballots.

[42] Had the Electoral Officer been provided with an opportunity to give a report, the information contained in that report may not have supported the Election Appeal Board's conclusion. For example, if the Electoral Officer had explained why, in his view, the "found" ballot was valid, and was able to confirm that it was included in the recounts even though it could not be distinguished from the other councillor ballots, then the declared tie was valid. If the

"found" ballot was somehow subsequently "lost" and was not included in the recounts, this would have been to Mr. Morin's detriment, but he accepted the declared tie. Moreover, the issue of the "found" ballot arose not during, or as a result of the delayed recount, but after the initial councillor count was concluded and during the subsequent count of the Chief's votes. At that time, and prior to the recounts being conducted at 1 p.m., the Electoral Officer declared the ballot to be valid.

[43] Accordingly, the Election Appeal Board's finding that the holding of the recount "at a later time" resulted in the election being compromised, because the decision to delay the recounts from immediately after 5:30 a.m. to 1 p.m. led to the allegations regarding the inclusion of a spoiled ballot and the handling of the ballots, is somewhat suspect. The allegations of a spoiled ballot were made at the time the ballot was discovered, as is clear from the affidavit of Ms. Tanya Cardinal, Mr. Peacock's scrutineer. Ms. Cardinal's affidavit was before the Election Appeal Board when it made its decision. She deposes that she confronted the Electoral Officer and told him that the newly discovered ballot could not be included in the councillor count as it had been placed in the wrong ballot box and was therefore a spoiled ballot. The Electoral Officer disagreed. Ms. Cardinal deposes that the Electoral Officer again rejected her view that the ballot was invalid and should be put aside. She states that after the chief's ballot count the Electoral Officer began to pack up the boxes and put the "found" ballot in a councillor box as she was talking to him. Although she believed the Electoral Officer had placed the found ballot into a councillor ballot box, at the recount the Electoral Officer said he had placed it in the chief's ballot box where he had originally found it. However, the "found" ballot was not found in any chief's ballot box or anywhere else that the Electoral Officer looked. He then went to every

councillor ballot box and had the assistants count the ballots in those boxes. Ms. Cardinal states that as far as she is aware the "extra ballot was never identified and made available for review since no one could tell it apart from the other white ballots, and it was unclear which ballot box it had been placed in overnight, if any". This last point is speculative and seems to contradict her evidence that she saw the Electoral Officer place the ballot in a councillor ballot box.

[44] In any event, the dispute as to the validity of the found ballot did not arise due to any delay in the recount. Further, had the Election Appeal Board notified the Electoral Officer of the appeal, as it was required to do, he would have been able to provide information concerning the validity of the vote in question and if it was ultimately counted in the councillor election results.

[45] And, while s 20.18 of the MECN Election Law states that within a minimum of 7 days from the date upon which the appeal was commenced the Election Appeal Board shall meet and make its determination with respect to the disposition of the appeal, s 20.19 also states that should the Election Appeal Board require more detailed data and facts pertaining the appeal, a maximum of 6 weeks will be permitted to allow it to "make a confident decision". And, in making its decision, the Election Appeal Board may consider any evidence it deems relevant, including evidence obtained though personal inquiries (s 20.20). Upon making its determination, the Election Appeal Board shall provide council and the appellant with written reasons for its decision, including particulars of evidence relied upon (s 20.21).

[46] Schedule "G" of the MECN Election Law sets out the duties and responsibilities of the Election Appeal Board. One of the Chairperson's duties is, upon receipt of a written appeal and

the required fee, to notify the Electoral Officer that an appeal has commenced and to request from the Electoral Officer: the ballots; the list of voters; the Electoral Officer's statement of results; any related documentation supporting a breach of the MECN Election Law, including issues of improper voting practice; and, any other material as required by the Election Appeal Board to determine the decision on the validity of the appeal (ss 22.3.2(a), 22.3.2(c)). The Election Appeal Board is required, within 72 hours from the date upon which an election appeal was commenced, to meet and make its determination on the validity of the appeal and the option to extend as set out in the MECN Election Law (s 22.3.4(b)). In making its determination it may consider any evidence it deems relevant, including all correspondence and documentation submitted by the Electoral Officer and the appellant (s 22.3.4(c)).

[47] All of this is to say that the MECN Election Law not only requires that an electoral officer provide written reasons for their decision in the event of an appeal (see s 20.7), but also it makes provision for the acquisition of further information, including from the electoral officer, that is necessary for making a well-founded decision. However, in this matter, the Election Appeal Board failed to even inform the Electoral Officer of the appeal, it did not obtain his written reasons for his decision, and it considered only materials filed by Mr. Peacock in reaching its decision. The Election Appeal Board erred by failing to notify the Electoral Officer of the appeal and in failing to obtain the Electoral Officer's written reasons for his decision, in breach of s 20.7 of the MECN Election Law. This was unreasonable and rendered its decision unreasonable (*Adams Lake Indian Band* at paras 23-25).

[48] I would also observe that the effect of failing to notify the Electoral Officer of the appeal, and at a minimum, obtaining and considering a report from him, was to contribute to the lack of procedural unfairness afforded to Mr. Morin. This is because the Election Appeal Board based its decision on a one-sided and incomplete factual record without affording Mr. Morin the opportunity to address this by requiring compliance with s 20.7, or otherwise.

[49] I appreciate that the Election Appeal Board appears to have based its decision entirely on its interpretation of s 17.1 of the MECN Election Act which, in the event of a tie vote between candidates for councillor, requires the Electoral Officer to conduct an "immediate" recount, and that the interpretation and application of First Nation's election law is an issue of reasonableness (see *Johnny v Adams Lake Indian Band*, 2016 FC 1399 at para 11). However, this was not the basis of Mr. Morin's challenge to the Election Appeal Board's decision and the parties did not address the point in their submissions. And, even if that interpretation were reasonable in the circumstances before the Electoral Officer, which is open to question but upon which I make no finding, the decision is still unreasonable because it concludes that the failure to conduct an immediate recount at 5:30 a.m. led to the allegation regarding the inclusion of a spoiled ballot. That conclusion is contrary to the evidence before the Election Appeal Board. The evidence indicated that the issue of the allegedly spoiled ballot arose at the time of the counting of the ballots for chief and the Electoral Officer apparently made a finding, at that time, that the ballot was valid. These events occurred before the "delay" took place. As to the allegations concerning the improper handling of the ballots as a result of the delay in the recount, in the absence of the required written reasons of the Electoral Officer, these remained allegations and, as such, did not

properly ground the Election Appeal Board's finding that in the circumstances a recount was not an appropriate remedy.

[50] In sum, the Election Appeal Board breached the duty of procedural fairness owed to Mr. Morin by failing to give him notice of the appeal, and as a result, deprived him of the opportunity to address the appeal allegations. The Election Appeal Board also erred by failing to notify the Electoral Officer of the appeal and in failing to obtain the Electoral Officer's written reasons for his decision, in breach of s 20.7 of the MECN Election Law. This was unreasonable and rendered its decision unreasonable. The Election Appeal Board also unreasonably found that the "delay" in the recount of the councillor votes was the cause of the challenge to the validity of the "found" ballot.

[51] Having reached this conclusion, it is not necessary to address the Applicant's other submissions. However, in my view, to the extent that the Applicant is alleging that five previous members of the Enoch Cree Nation council comprised what he terms "The Quorum" and that this entity interfered with the election or the appeal of the election, the evidence he has submitted is insufficient to establish that claim. For example, the affidavit of Lisia Morin, sworn on January 15, 2020, deposes that the Ethics Committee appointed the Election Appeal Board. None of the former councillors identified by the Applicant as comprising "The Quorum" were members of the Ethics Committee. Further, as to the Applicant's allegations of bias, the mere fact that Mr. Quirke, a member of the Election Appeal Board, is also Facebook friends with other councillors and with Mr. Peacock is insufficient, in and of itself, to meet the test for a reasonable apprehension of bias as set out by Justice de Grandpré, writing in dissent, in *Committee for*

Justice and Liberty et al v National Energy Board et al, [1978] 1 SCR 369 at 394, 1976 CanLII 2 (SCC) (see, for example, *DeMaria v Law Society of Saskatchewan*, 2015 SKCA 106 at para 49).

Remedy

Mr. Morin

[52] In his Notice of Application, the Applicant seeks a declaration of this Court that he is the 10th elected councillor of the Enoch Cree Nation; that he be paid as a councillor from the date of the election until the matter is resolved by this Court; that no elections, by-elections or runoff elections of the Enoch Cree Nation be held until after this matter is determined; or, alternatively, for a new Enoch Cree Election Appeal Board to be constituted with all new members; that any hearings be publically posted, listing the date, time and place, and that all affected parties and the Electoral Officer be ordered to take part or be present; and, costs of this application. In his written submissions, he seeks similar, but not identical relief and adds that he seeks an order for general, special and aggravated damages in addition to punitive and exemplary damages against the Election Appeals Board. In the alternative, he seeks a new hearing by an unbiased and properly constituted Election Appeal Board.

Enoch Cree Nation

[53] The Enoch Cree Nation submits that the Federal Court has no jurisdiction to award damages in judicial review proceedings (*Brake v Canada*, 2019 FCA 274 at paras 23, 26-27 ("*Brake*")) and that Mr. Morin's request for monetary relief or damages must be dismissed. Further, that this relief was not sought in the Notice of Application. It also refers to *Maple Lodge*

Farms Ltd v Canada (Food Inspection Agency), 2017 FCA 45 at paras 51-52 with respect to the principles that guide a court in determining whether it should quash the administrative decision and remit the matter back for redetermination, or whether doing so would serve any practical or legal purpose when the administrative decision maker could not reasonably reach a different outcome, in which case the decision should not be quashed.

Analysis

[54] In *Vavilov*, the Supreme Court of Canada found that it may be appropriate for a court to decline to remit a matter back to the decision maker when it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose (*Vavilov* at para 142). In my view, this is not such a circumstance. A particular outcome is not inevitable given the unresolved issue of the validity, role and consequence of the "found" ballot. Further, the Electoral Officer has not been given the opportunity to explain his decisions concerning the "found" ballot and the holding of the councillor recount at 1 p.m. on the day when the counting of election ballots was completed at 5:30 a.m. In other words, based on the record before me, in particular in the absence of any evidence from the Electoral Officer, I cannot conclude that the only possible decision by a new election appeal board is that Mr. Morin was the validly elected 10th councillor in the July 17, 2019 election.

[55] I acknowledge the submission of counsel for Mr. Morin, made at the hearing of this matter, indicating that approximately one third of the election term has now passed and that Mr. Morin has been deprived of the councillor position during that time. However, given the one

vote differential and, as indicated above, in the absence of evidence from the Electoral Officer, and based on the record before me I am unable to determine with certainty if Mr. Morin was duly elected, as he claims. Nor am I convinced that any delays in bringing on the judicial review hearing of this matter were, as he asserts, due to the intentional actions of the Respondents designed to cause further unfairness.

[56] As to damages, s 18(1) of the *Federal Courts Act* describes the remedies available to this Court. These are administrative law remedies, including certiorari, prohibition and mandamus, available as against an administrative tribunal. Section 18(3) states that these remedies may only be obtained on application for judicial review made under s 18.1 of the *Federal Courts Act*. Thus, while this Court may set aside the Election Appeal Board's decision, monetary relief such as the general, special and aggravated damages in addition to punitive and exemplary damages sought by the Applicant, are normally not available in an application for judicial review. The Applicant did not propose that the application should be treated as an action, pursuant to s 18.4(2), or consolidated with an action, pursuant to Rule 105 of the *Federal Courts Rules*, SOR/98-106 (see *Lee v Canada (Attorney General)*, 2012 FCA 241; *Meggeson v Canada (Attorney General)*, 2012 FCA 175 at paras 33-34; and, *Brake* at paras 23, 26). Indeed, at the hearing of this application for judicial review, the Applicant conceded that the Court lacked jurisdiction to award monetary damages in this matter.

[57] As to costs, given that Enoch Cree Nation did not challenge Mr. Morin's allegation that the Election Appeal Board breached procedural fairness, and given that Mr. Morin has been successful in his application for judicial review in that the decision of the Election Appeal Board

will be quashed and remitted back for redetermination, it is appropriate that he should be awarded the costs of his application as against the Enoch Cree Nation. At the hearing of this matter I requested the parties to discuss the amount of a costs award, and if mutual agreement was reached, to advise the Court of this within five days from the hearing If not, I would make a determination. The parties subsequently advised that they could not reach an agreement on costs. Accordingly, I am exercising my discretion pursuant to Rule 400(3) to award nominal costs in the amount of $2500.00 to be paid by the Enoch Cree Nation to Mr. Morin (see *Tourangeau v Smith's Landing First Nations*, 2020 FC 184 at paras 69-70). As Mr. Peacock did not participate in this hearing, there shall be no order of costs against him.

JUDGMENT IN T-1377-19

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to name the Election Appeal Board as the properly described respondent in the place of the Enoch Cree Election Committee;

2. The application for judicial review is granted. The July 25, 2019 decision of the Election Appeal Board overturning the July 17, 2019 election of Mr. Morin as the 10th councillor of the Enoch Cree Nation, and requiring a by-election, is quashed;

3. The matter will be remitted back to a differently constituted election appeal board, to be constituted within 30 days of the date of this decision, for reconsideration and taking into consideration these reasons; and

4. Mr. Morin shall have his costs of this application in the all inclusive amount of $2500 as against the Cree Enoch Nation.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1377-19
STYLE OF CAUSE:	JARED MORIN v ENOCH CREE NATION, ELECTION APPEAL BOARD AND SHANE PEACOCK
PLACE OF HEARING:	VIDEO CONFERENCE BY ZOOM
DATE OF HEARING:	JUNE 3, 2020
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JUNE 16, 2020

APPEARANCES:

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Keltie Lambert	FOR THE RESPONDENTS (ENOCH CREE NATION AND ELECTION APPEAL BOARD)

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