Federal Court  Cour fédérale

Date: 20220323

Docket: T-1304-21

Citation: 2022 FC 399

Ottawa, Ontario, March 23, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

DARRYL W. WHITSTONE AND DELORES CHIEF

Applicants

and

ONION LAKE CREE NATION AND FLORENCE BLOIS

Respondents

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision of the Appeals Tribunal of the Onion Lake Cree Nation [OLCN] dated August 12, 2021 [Decision]. The Appeals Tribunal allowed Florence Blois' ["Respondent Blois"] appeal of the OLCN Election of June 18, 2018 [2018 Election], and nullified Darryl W. Whitstone's and Delores Chief's ["Mr. Whitstone", "Ms. Chief", or collectively "Applicants"] elections to Council. The Applicants were removed

from office and placed on leave as of August 25, 2021. The Applicants seek judicial review of the Decision and further seek to quash the Decision of the Appeal Tribunal and restore them to their elected office.

II. Facts

[2] OLCN is a First Nation located North of Lloydminster in Saskatchewan and Alberta. The OLCN Council is made up of one *okimaw* (Chief) and eight *onikaniw* (Councillors). The Applicants were elected as Councillors on June 18, 2018 for a four-year term.

[3] OLCN is governed by its own customary election law called the Wicekaskosiw Sakahikan Wryaskonitowin Wiyasiwewin Onion Law Cree Nation Election Law [Election Law]. The Onion Lake Cree Nation Appeals Regulation [Appeals Regulation] was enacted pursuant to the Election Law and sets out the grounds for election appeals.

[4] The Appeals Tribunal is formed under the Appeal Regulation and consists of five members appointed by Chief and Council. Pursuant to section 12.3 of the Appeals Regulation and section 18 of the Election Law, the Appeals Tribunal has authority to hear and decide election appeals and may set aside the election of one or more members of Council.

[5] Pursuant to the Appeals Regulation, a candidate has 14 days from the date of the election to submit an appeal to the Appeals Tribunal. Pursuant to section 8 of the Appeals Regulation, the appeal submissions must be in writing, in affidavit form, served personally or by registered mail, contain the signature of the appellant and be accompanied by a non-refundable fee of $500.00.

[6] After the 2018 election, the Respondent Blois sent an email (undated) to the Appeals Tribunal outlining certain allegations. On June 28, 2018, the Appeals Tribunal sent a letter to her which requested further information and documentation in support of her appeal, as well as the required monetary fee of $500, by July 6, 2018. On July 5, 2018, Respondent Blois submitted a letter to the Appeals Tribunal stating the grounds of her appeal.

[7] Despite Respondent Blois not submitting her appeal in proper form or on time, the Appeals Tribunal by letter dated July 9, 2018 - without notice to or input from the Applicants – accepted her appeal submissions thereby allowing her appeal to proceed. It gave no reasons for its decision.

[8] Both Applicants objected to the appeal proceeding given the Respondent Blois' non-compliance with the Appeals Regulation, and that they had not been given an opportunity to be heard in the earlier decision. At the request of the Applicants, the Appeals Tribunal re-opened its decision, and received submissions from the Applicants. On October 23, 2018, counsel for the Applicants made submissions to the Appeals Tribunal on this preliminary issue, namely whether Respondents Blois' appeal was properly before the Appeals Tribunal.

[9] On October 31, 2018, the Appeals Tribunal dismissed the Applicants' objections ruling that the issue was procedural not substantive and that no prejudice was occasioned.

[10] In the interim, on January 24, 2019, OLCN Chief and Council purported to unilaterally dismiss the Appeals Tribunal before it completed its hearing of the appeal. The Respondent Blois

sought relief in the Federal Court against OLCN. On October 6, 2020 Justice Strickland found in favor of the Respondent Blois, ordered the Appeals Tribunal reinstated, and ordered it to complete the hearing: *Blois v Onion Lake Cree Nation*, 2020 FC 953 [*Blois*].

[11] The hearing of the appeal resumed on July 5, 2021.

III. Decision under review

[12] On August 12, 2021 the Appeals Tribunal allowed the Respondent Blois' appeal:

> i. To nullify the Election of Delores Chief and Darryl Whitstone who are subject of the Appeal and order that the Candidates with the next highest votes as the Elected candidates; or
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> ii. If (i) is not attainable, the Tribunal orders that a By-Election be held for the two offices involved in this appeal.

[13] The Appeals Tribunal considered the Respondent Blois' claim that Mr. Whitstone owed $7,000.00 to OLCN Housing, contrary to subsection 10.6c) of the Election Law that candidates be "free of any monetary obligations or is in good financial standing pertaining to" the Band and its business corporations. The Appeals Tribunal found there was "no sufficient evidence from [Respondent Blois] to prove that [the Applicant Whitstone] was not qualified to run as candidate in the June 18, 2018 Election." In this it relied in part on a certificate Mr. Whitstone was free of any monetary obligations or is in good financial standing, issued by band officials.

[14] The Appeals Tribunal considered the Respondent Blois' claim that Ms. Chief was also not in good financial standing with the Band because she took money intended for an Elder, which she was to repay, but "the money came back to her and the [Appellant] Chief was

terminated from her job and received a settlement." The Respondent Blois claimed Ms. Chief was ineligible to run for Council in the 2018 election per subsection 10.6c) of the Election Law that candidates be "free of any monetary obligations or is in good financial standing pertaining to" the Band and its business corporations. Ms. Chief relied on a similar certificate to Mr. Whitstone's from band officials that she was free of any monetary obligations or is in good financial standing.

[15] In connection with Ms. Chief's case, a document from a consultancy firm, MNP LLP, was tendered as evidence. Ms. Chief did not give evidence in response.

[16] The Appeal Tribunal held:

> 32. Unfortunately, Respondent Chief did not attend the hearing and nor did she attend at any other time since being provided with the appeal documents. There was no evidence tendered on her behalf to explain the MNP document which noted that there are investigative steps to be undertaken regarding the issue of Elder pay cheques. MNP did recommend a review be undertaken.
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> 33. The MNP document raises a serious issue regarding the Respondent Chief and cheques issued to Elders, and at least one that was cashed and not given to the Elder. It appears that there was to be a further review of other cheques issues to Elders and other Band members of which the Respondent Chief was responsible for.
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> 34. This raises serious questions of whether of not the Respondent Chief has outstanding debt to the Band because of cheques issues to Elders and/or band members as outlined in Exhibit "B" to the Appellants affidavit dated December 18, 2018.
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> 35. The Respondent Chief has not provided any evidence to the contrary and this leaves the Tribunal with only the evidence tendered by the Appellant which has gone unrefuted.
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> 36. The Tribunal finds that the Appellant has proven her appeal against Respondent Chief.

[17] The Appeals Tribunal also considered the Respondent Blois' claim that Mr. Whitstone violated the Election Law by his conduct which affected the result of the 2018 Election. Pursuant to subsection 5.1e) of the Election Law, candidates must campaign "ethically, focusing of political issues and candidate platforms, instead of engaging in libel and slander". A CBC article entitled "Embassy Embarrassment" was tendered as evidence and Ms. Blois testified it was distributed to voters on behalf of Mr. Whitstone. The article was critical of some Council and Councillor conduct and spending which took place before the 2018 Election, at which time the Respondent Blois was a member of Council.

[18] According to the Appeal Tribunal, the Respondent Blois claimed the CBC article "was inaccurate and confusing article to her colleagues and herself."

[19] The Appeal Tribunal found the CBC article "is a controversial article that condemns and accuses the OLCN Chief and Council of mismanagement." The Appeal Tribunal stated:

> 43. The Tribunal finds that the Respondent Whitstone violated the Code of Ethics of the Election Law by using the CBC Article in his campaign by raising and/or asking questions to the potential voters about that article. This focused more on alleged mismanagement of the former OLCN Chief and Council than on his platform. The only plausible reason he would use the article in his campaign would be to attempt to libel or slander the incumbent council.
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> 44. The Tribunal further finds that the Respondent might have affected the outcome of the Election by his questions raised in the CBC article that would discourage potential voters from voting for the incumbent Councillors. The Appellant was an incumbent in the Election and she lost the Election by only one vote.

[20] The Appeals Tribunal found Mr. Whitstone "violated the Election Laws which might have affected the result of the OLCN Election held on June 18, 2018."

[21] The Appeals Tribunal dealt with other claims raised by Ms. Blois, which it found she had failed to prove. The Appeals Tribunal also refused to make rulings on issues not included in her initial allegations.

[22] In the result, Appeals Tribunal ordered pursuant to section 18.5 of the Election Law:

> i. To nullify the Election of Delores Chief and Darryl Whitstone who are subject of the Appeal and order that the Candidates with the next highest votes as the Elected candidates; or
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> ii. If (i) is not attainable, the Tribunal orders that a By-Election be held for the two offices involved in this appeal.

[23] On August 20, 2021 the Applicants applied for judicial review of the Decision seeking the following order from this Honourable Court:

> 1. An order granting the application for judicial review;
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> 2. An order quashing the August 12, 2021, decision of the Appeals Committee allowing the Appeal of the Respondent against the Applicants;
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> 3. An order declaring the Applicants are confirmed as the duly elected Councillors of the Onion Lake Cree Nation as of the date of their removal;
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> 4. An Order declaring the Applicants are entitled to all benefits and entitlements as of the date of their removal;
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> 5. An Order declaring there be no further redetermination for this Appeal,
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> 6. Costs of this Motion, and
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> 7. Such further and other relief as this Honourable Court deems just and appropriate.

[24] On November 12, 2021, Justice Grammond granted a motion brought by the Applicants seeking an interim stay of the Decision. Justice Grammond granted the motion in part:

> 1. The motion for a stay of the decision of the Onion Lake Cree Nation Appeals Tribunal made on August 12, 2021 is granted in part.
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> 2. Until the final determination of the application for judicial review, no one shall take the positions of the applicants on the *onikaniwak* of the Onion Lake Cree Nation and no by-election shall be held for that purpose.
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> 3. The application for judicial review is expedited.
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> 4. No costs are awarded.

IV. Issues

[25] The Applicants submit the issues are:

a) Whether the Appeals Tribunal erred in allowing the Appeal to proceed.

b) Whether the Appeals Tribunal unreasonably found the evidence submitted by the Respondent was sufficient to conclude that the Applicants breached the Appeals Regulations.

[26] The Respondent OLCN submits the issues are:

a) Did the Appeal Tribunal have the jurisdiction to accept, hear and determine Ms. Blois Appeal, notwithstanding she did not comply with the mandatory requirements found at s. 8 of the Appeal Regulations?

[27] The Respondent Blois submits the issues are:

a) Preliminary Issue – Exclusion of certain paragraphs in the Affidavit of Darryl Whitstone

b) Preliminary Issue - Impropriety of Submissions of the Onion Lake Cree Nation.

c) Standard of Review

d) Whether the Appeals Tribunal erred in allowing the Appeal to proceed; and

e) Whether the Appeals Tribunal unreasonably found the evidence submitted by the Respondent was sufficient to conclude that the Applicants breached the Appeals Regulations.

[28] I will deal with the following issues:

a) Preliminary Issue – Exclusion of certain paragraphs in the Affidavit of the Applicant Mr. Whitstone

b) Preliminary Issue – Impropriety of Submissions of the Onion Lake Cree Nation

c) Did the Appeals Tribunal err in allowing the Appeal to proceed

d) Was the Decision of the Appeals Tribunal reasonable?

V. Standard of Review

[29] The parties submit the standard of review is reasonableness, and I agree, although I will also assess allowing the appeal to proceed on procedural fairness grounds.

A. *Deference owed to decision of indigenous bodies*

[30] The Federal Court of Appeal's decision in *Porter v Boucher-Chicago*, 2021 FCA 102 [per de Montigny JA] [*Porter*] provides guidance regarding the level of deference owed to decisions of Indigenous bodies:

> [27] Deference is particularly apposite when the Federal Court reviews decisions of First Nation election appeal bodies, and even more so when such decisions concern the interpretation of an electoral code. As this Court stated in many cases, the interpretation of an election code must be informed by the customs upon which it is based and by the general understanding in the community as to why it may deviate from those customs in some respect: see *D'Or v. St. Germain*, 2014 FCA 28, 459 N.R. 197 at paras. 5-7; *Fort McKay First Nation v. Orr*, 2012 FCA 269, 438 N.R. 379 at paras. 8-12; *Johnson v. Tait*, 2015 FCA 247 at para. 28; *Lavallee v. Ferguson*, 2016 FCA 11 at para. 19; *Cold Lake First Nations v. Noel*, 2018 FCA 72, 2018 CarswellNat 1425 at para. 24. See also the excellent discussion of this question by Justice Grammond in *Pastion v. Dene Tha' First Nation*, 2018 FC 648, [2018] 4 F.C.R. 467 at paras. 16-29.

[31] Justice Favel recently held in *Gladue v Beaver Lake Cree Nation*, 2021 FC 909 [*Gladue*]:

> [22] Courts are, however, to show deference towards decisions of administrative decision-makers (*CUPE, Local 963 v New Brunswick Liquor Corp*., 1979 CanLII 23 (SCC), [1979] 2 SCR 227). This rationale applies equally, if not with more force, when courts are reviewing decisions of Indigenous bodies and includes interpretations of provisions of an election code (*Orr v Fort McKay First Nation*, 2012 FCA 269 at paras 8-12; *Lavallee v Ferguson*, 2016 FCA 11 at para 19; *Cold Lake First Nations v Noel*, 2018 FCA 72 at paras 20, 24).

[32] Justice Grammond provided the following summary of the law in relation to Indigenous self-government and deference owed to Indigenous decision-makers in *Pastion v Dene Tha' First Nation*, 2018 FC 648 [*Pastion*]:

> [22] Many forms of knowledge may be grouped under the heading of "expertise." Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue. They are also sensitive to Indigenous experience generally and to the conditions of the particular nation or community involved in the decision. They may be able to take judicial notice of facts that are obvious and indisputable to the members of that particular community or

> nation, which this Court may be unaware of. Indeed, for many Indigenous peoples, a person is best placed to make a decision if that person has close knowledge of the situation at issue (see Lorne Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012) 45 UBC L Rev 595 at 605-607). This Court has recognized that certain of those reasons militate in favour of greater deference towards Indigenous decision-makers (*Giroux v Swan River First Nation*, 2006 FC 285 at paras 54-55; *Shotclose v Stoney First Nation*, 2011 FC 750 at para 58; *Beardy v Beardy*, 2016 FC 383 at para 43). For example, in a very recent case, Justice Phelan noted that:
>
> > Given that the decisions engage the Appeal Board's knowledge and expertise of the community norms and experiences and is an internal decision of a community's electoral laws, as part of the respect owed to aboriginal peoples in the governance of their internal affairs, the Board's decision should be accorded a high degree of deference within the reasonableness range of outcomes.
> >
> > (*Commanda v Algonquins of Pikwakanagan First Nation*, 2018 FC 616 at para 19)
>
> [23] The idea that the legislature intends for administrative decision-makers to be afforded deference has a particular resonance in the Indigenous context. For at least three decades, it has been a policy of the federal government to recognize Indigenous self-government (see, for example, Government of Canada, Federal Policy Guide: Aboriginal Self-Government (1995)). The enactment of Indigenous election legislation, such as the Election Regulations at issue in this case, is an exercise of self-government. The application of laws is a component of self-government. It is desirable that laws be applied by the same people who made them. Therefore, where Indigenous laws ascribe jurisdiction to an Indigenous decision-maker, deference towards that decision-maker is a consequence of the principle of self-government.

B. *Principle of Procedural Fairness*

[33] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That

said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[34] I also understand from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions <u>other than a review related to a breach of natural justice and/or the duty of procedural fairness</u>), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added]

[35] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

C. *Reasonableness*

[36] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at

> para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[37] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added]

[38] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[39] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> [Emphasis added]

[40] The Federal Court of Appeal recently confirmed in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] that the role of this Court is not to reweigh and reassess evidence except where a decision-maker committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is not part of our role:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

VI. Relevant sections of the Election Law and Appeals Regulation

A. *Section of the Election Law*

> **Section 5** CODE OF ETHICS
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> **5.1** Candidates must campaign:
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> …
>
> **e)** ethically, focusing on political issues and candidate platforms, instead of engaging in libel and slander;
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> …
>
> **Section 10** CANDIDATE REQUIREMENTS
>
> ...

10.6 A candidate must produce to the Electoral Officer at the time of the Nomination Meeting the following: …

c) a candidate must provide confirmation letter signed by the Director of Finance verifying that he/she is free of any monetary obligations or is in good financial standing pertaining to Wicekaskosiw Sakahikanibk and its business corporations.

…

12 SCHEDULE FOR THE ELECTION

12.1 No later than sixty days prior to the Election Day, the Okimaw and Onikaniwak shall by Onikaniwak Resolution:

a) appoint the Chief Electoral Officer, the Deputy Electoral Officer, and Election Officials including the Appeal Committee

b) set the date of the Nomination Meeting;

c) set the Election Day;

d) set the amount and payment method of the Electoral Officers and Election Officials;

e) appoint the Appeals Tribunal Members.

…

Section 18 APPEALS TRIBUNAL

18.1 The Appeals Tribunal will be appointed at the same time as the Electoral Officers and Election Officials are appointed. …

18.3 The Appeals Tribunal shall meet within fourteen days from the day of the Notice of Appeal. …

18.5 The Appeals Tribunal will decide to:

a) Uphold the Election; or

b) Nullify the Election of the Candidate(s) who is the subject of the Appeal(s) and order that the candidate(s) with the next highest votes as the elected candidate(s); or

c) order that a By-Election be held for the office involved.

…

18.7 If the candidate is not satisfied and is not in agreement with the Appeals Tribunal decision, the candidate can request an Appeal of the last resort for an Appeal Hearing to be conducted though a Citizens Meeting.

18.8 If, after attempting to reach consensus on the disposition of the Appeal of the Tribunal's decision, consensus cannot be reached, a By-Election shall be held for the position in question.

B. *Sections of the Appeals Regulation*

5. Composition of Appeal Tribunal

…

5.6 The Appeals tribunal is responsible to conduct, hear, and determined in accordance with the Act and its Regulations any Appeal from an Election.

6. Timing

6.1 A Candidate may, within fourteen (14) days from the date on which the Election was held, submit an Appeal to the Appeals Tribunal.

7. Grounds for Appeal

7.1 An Appeal submitted must sufficiently outline one or more of the following:

a) that the person declared elected was not qualified to be a Candidate;

b) that there was a violation of the Act and its Regulations in the conduct of the Election that might have affected the result of the Election; or

c) that there was corrupt or fraudulent practice in relation to the Election.

8. Submission

8.1 An Appeal submitted to the Appeals Tribunal must:

a) be in writing and set out in an affidavit sworn before a notary public or duly appointed commissioner for taking oaths the facts substantiating the grounds for the Appeal accompanied by any supporting documentation;

b) be served either personally or by registered mail to the Appeals Tribunal;

c) contain the signature of the person initiating the Appeal; and

d) be accompanied by a non-refundable fee in the amount of five hundred ($500.00) dollars.

9. Procedure

9.1 Upon receipt of an Appeal, the Appeals Tribunal shall:

a) in the case where the appeal is submitted in accordance with this Act and its Regulations, forward a copy together with supporting documents by registered mail to the Respondents from the Election; or

b) in the case where the appeal is not submitted in accordance with the Act and its Regulations, inform the Candidate in writing that the Appeal will not receive further consideration.

10. Investigation

10.1 The Appeals tribunal may, if the material that has been filed is not adequate for deciding the validity of the Election complained of, conduct such further investigation into the matter as the Appeals Tribunal deems necessary.

11. Conduct of Review

…

11.4 In their deliberations, the Appeals Tribunal may, in its sole discretion:

a) examine the record;

b) question the Appellant, the Respondents and any witnesses;

c) cause the appearance of any witnesses of the Candidate or the Respondents or any witnesses who may, in the Appeals Tribunal's opinion, assist in the deciding the Appeal;

d) conduct the proceedings in any way in which the Appeals Tribunal, in its sole discretion, deems appropriate in order to decide the Appeal.

12. Decision

…

12.2 All decisions shall be final and binding on all parties, in accordance to Wicekaskosiw Sakahican Wiyaskonitowin Wiyasiwewin [Election Act].

12.3 After a review of all of the evidence received, the Appeals Tribunal shall rule:

a) that the evidence presented is not sufficiently substantive to determine that:

i. a violation of the Act or the Regulations had taken place that might have affected the results of the Election:

ii. that the person declared elected was not qualified to be a Candidate; or

iii. there was a corrupt practice or fraudulent practice in relation to the Election that might have affected its results.

and dismiss the Appeal; or

b) that all evidence and information gathered allows for the reasonable conclusion that:

i. a violation of the Act or the Regulations had taken place that might have affected the results of the Election:

ii. that the person declared elected was not qualified to be a Candidate; or

> iii. there was a corrupt practice or fraudulent practice in relation to the Election that might have affected its results,
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> and uphold the Appeal by setting aside the Election of one or more members of Council.
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> …
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> **12.5** The decision of the Appeals Panel is final and not subject to appeal, in accordance with the Wicekaskosiw Sakahican Wiyaskonitowin Wiyasiwewin [Election Act].

VII. Analysis

A. *Preliminary Issue – Exclusion of certain paragraphs in the affidavit of the Applicant Mr. Whitstone*

[41] The Respondent Blois, submits paragraphs 14-30 of the Affidavit of the Applicant Whitstone is an attempt to re-litigate the issue of the acceptance of her initial appeal. She submits these paragraphs should not be given any weight, because it is inappropriate for the Applicants to present their argument on the law or their interpretation of the law as evidence before the Court. While Ms. Blois does not cite to case law specifically under this preliminary issue, she relies on *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 [*Nguyen*] to submit judicial review is not "an opportunity for re-litigation":

> [2] The Court is not asked to, nor may it, reweigh the evidence. Judicial review is not an opportunity to re-litigate the case below, nor is it in any way a trial *de novo*. The over-arching consideration is not whether the decision below is right or wrong, but whether it is reasonable or unreasonable. The key question is whether the Decision falls within the range of outcomes that is defensible on the facts and the law.

[42] The Applicants did not make submissions on this preliminary issue. I agree that generally affidavits on judicial review should stick to the facts, and not argue the law. However and with respect, in conducting judicial review of a decision of the Appeals Tribunal, this Court is entitled to consider the entire decision including decisions on subsidiary issues including procedural matters, preliminary and other objections, evidentiary rulings, process decisions and the like. Moreover, *Nguyen* [a judgment of mine] does not address the issue for which it is cited. Instead *Nguyen* stands for the position, reiterated in *Vavilov* at para 125, that judicial review is not a place to review findings of fact including credibility assessments, inferences and the weight of evidence in particular cases, which is principally the role of the first level tribunal. *Vavilov* and *Doyle* confirm that a reviewing court should not interfere with a tribunal's factual findings. The reviewing court must generally refrain from "reweighing and reassessing the evidence considered by the decision maker."

[43] I note the Respondent Blois also cites to *Syndicat des professeurs du collège de Lévis-Lauzon v. CEGEP de Lévis-Lauzon*, [1985] 1 SCR 596 at page 610 for the proposition the Decision of the Appeal Tribunal on whether or not to allow this appeal to proceed notwithstanding non-compliance with Appeal Regulations 6.1 and 8.1, "is not subject to judicial review." With respect, the Respondent Blois offers no support from the jurisprudence of this Court or the Federal Court of Appeal. I also note the case deals with a matter of labour law arising from the civil law Province of Quebec, which judgment resolved a disputed point of Quebec jurisprudence on which the Quebec Court of Appeal issued a split decision. I am not persuaded this judgment applies to the matter now before this Court, which is judicial review of

an appeal under the OLCN's recently adopted First Nation Election Law and Appeal Regulations.

B. *Preliminary Issue - Impropriety of Submissions of the Onion Lake Cree Nation*

[44] The Respondent Blois also submits OLCN should not be allowed to make submissions on this judicial review, notwithstanding it is a named Respondent. She submits OLCN is simply meant to produce a complete certified tribunal record [CTR] and allow the reviewing Court to see what the law and background facts are. She argues OLCN should not take a position on the manner in which the Appeal Tribunal shall interpret the 2018 Election, that OLCN is in conflict of interest with its own institutional role in this regard, and that OLCN's submissions should be given no weight. The Applicants did not make submissions on this issue either.

[45] In this connection, I note the decision-maker in this judicial review is actually the Appeals Tribunal, not OLCN. The Appeals Tribunal supplied the CTR while OLCN filed a memorandum and addressed the Court in oral submissions at the hearing.

[46] I am not persuaded OLCN should not be a party, nor that it should be deprived of the ability to give the Court the benefit of its insight into the First Nation's Election Law and Appeals Regulation. I understand the Respondent Blois may not – and does not – agree with OLCN's views on various matters particularly as it is presently constituted, but that is neither unexpected nor a reason to exclude those views from consideration. I will add that I found OLCN's submissions informative and useful, and note they did not simply repeat the submissions of the Applicants. For example OLCN took no position on the merits of the two

disqualifications, only on the interpretation of the Electoral Law and Appeal Regulations. This with respect was quite proper.

[47] Further, in my respectful view, the time to move to strike a memorandum or remove a party from a proceeding is well before the hearing itself. Such requests may and should be brought by notice of motion to the case management judge if there is one, or on a regularly scheduled Court day, or in writing under Rule 369 if applicable. In this manner the Court at the hearing may focus on the merits of the appeal.

C. *Did the Appeals Tribunal err in allowing the appeal to proceed?*

[48] The Applicants submit the Appeals Tribunal did not follow the requirements of the Appeals Regulations in allowing the Respondent's appeal to proceed:

- Ms. Blois' emails dated June 28, 2018 and July 5, 2018 do not meet the requirements of section 8.1 a) because they are not affidavit form nor are they signed before a Notary Public or Commissioner for Oaths;
- the July 5, 2018 was submitted beyond the 14-day period mandated by section 6.1 of the Appeals Regulations; and
- section 9.1(b) of the Appeals Regulations states where an appeal is not submitted in accordance with the Elections Law and its Regulations, the Appeals Tribunal "shall … inform the Candidate in writing that the Appeal will not receive further consideration."

[49] The relevant sections are:

> **6.1** A Candidate may, within fourteen (14) days from the date on which the Election was held, submit an Appeal to the Appeals Tribunal.

> **8.1** An Appeal submitted to the Appeals Tribunal must:
>
> a) be in writing and set out in an affidavit sworn before a notary public or duly appointed commissioner for taking oaths the facts substantiating the grounds for the Appeal accompanied by any supporting documentation;
>
> b) be served either personally or by registered mail to the Appeals Tribunal;
>
> c) contain the signature of the person initiating the Appeal; and
>
> d) be accompanied by a non-refundable fee in the amount of five hundred ($500.00) dollars.
>
> **9.1** Upon receipt of an Appeal, the Appeals Tribunal shall:
>
> a) in the case where the appeal is submitted in accordance with this Act and its Regulations, forward a copy together with supporting documents by registered mail to the Respondents from the Election; or
>
> b) in the case where the appeal is not submitted in accordance with the Act and its Regulations, inform the Candidate in writing that the Appeal will not receive further consideration.
>
> [Emphasis added]

[50] The Applicants note the Appeals Tribunal in its October 31, 2018 decision on this point characterized the Respondent's failure as a "procedural matter and not anything substantial" and that "the Respondents would not be prejudiced" if the appeal went ahead. I note also the Appeals Tribunal in its August 12, 2021 final decision stated "there are no consequences outlined in the Regulations for not filing [the appeal] in affidavit form…"

[51] The Applicants submit the Appeal Tribunal's conclusions are at odds with the clear and non-discretionary language of the Appeals Regulation, such that the Appeals Tribunal was obliged to dismiss the Respondent Blois' appeal.

[52] The Respondent OLCN in this respect agrees with the Applicants. OLCN points to section 5.6 of the Appeal Regulation and submits the Appeal Tribunal's decision-making powers are limited to those powers expressly provided to it under the Election Law and Appeal Regulations:

> **5.6** The Appeals tribunal is responsible to conduct, hear, and determined in accordance with the Act and its Regulations any Appeal from an Election.
>
> [Emphasis added]

[53] The Respondent Blois points to section 10.1 and 11.4 of the Appeal Regulations:

> 10.1 The Appeals Tribunal may, if the material that has been filed is not adequate for deciding the validity of the Election complained of, conduct such further investigation into the matter as the Appeals Tribunal deems necessary.
>
> 11.4 In their deliberations, the Appeals Tribunal may, in its sole discretion: …
>
> > (d) conduct the proceedings in any way in which the Appeals Tribunal, in its sole discretion, deems appropriate in order to decide the Appeal.
>
> [Emphasis added]

[54] The Respondent Blois also points to sections 12.2 and 12.5 of the Appeals Regulation which state:

> 12.2 All decisions shall be final and binding on all parties, in accordance to Wicekaskosiw Sakahican Wiyaskonitowin Wiyasiwewin [Election Act].
>
> 12.5 The decision of the Appeals Panel is final and not subject to appeal, in accordance with the Wicekaskosiw Sakahican Wiyaskonitowin Wiyasiwewin [Election Act].
>
> [Emphasis added]

[55] On my review of the record, in this case the Appeal Tribunal effectively granted the Respondent Blois an extension of time within which to file her appeal material. It granted procedural relief on a rational basis namely the absence of prejudice to the Applicants, and the procedural nature of their issues. I do not see these as jurisdictional issues, although they were preliminary issues in the sense of their timing.

[56] In this respect, the Appeals Tribunal had to decide the effects of sections 10.1 and 11.4 of the Appeals Regulations (deciding how to proceed) on the requirements of subsections 6.1, 8.1, 9.1, 12.2 and 12.5 (appeal manner and form requirements).

[57] In other words the Appeals Tribunal was required to interpret and construe the Appeals Regulations. In this connection, I agree with the Applicants and OLCN that the interpretation of this First Nation's Election Law and Appeal Regulations is reviewable on the reasonableness standard, see *Blois* at para 24; *Sturgeon Lake Cree Nation v Hamelin*, 2018 FCA 131 [per Laskin JA] at para 44; *Lecoq v Peter Ballantyne Cree Nation*, 2020 FC 1144 [per Favel J] at para 30.

[58] With respect, I am not persuaded the Appeals Tribunal's interpretation of its procedural powers in the manner it did was unreasonable.

[59] In the final analysis, the Respondent Blois did file her appeal in affidavit form, she did provide the required $500 security, her appeal was signed, and her appeal contained grounds sufficiently expressed to enable the Appeal Tribunal to consider and adjudicate them.

[60] In my view, sections 10.1 and 11.4 of the Appeal Regulations give this Appeal Tribunal the authority to grant extensions of time and other procedural relief. In this case, such procedural relief was required otherwise the appeal would have been defeated by its form rather than substance.

[61] Construed in light of the high degree of deference this Court must give First Nation election codes and procedural remedies granted by First Nation election appeal bodies (*Porter* at para 27, *Gladue* at para 22, and *Pastion* at para 22), sections 10.1 and 11.4 of the Appeal Regulations constitute the OLCN Appeal Tribunal master of proceedings before it, and I find no merit in the argument its conduct of the appeal proceedings in this case constituted reviewable error.

[62] Second, the Applicants submit the Appeals Tribunal failed to provide adequate reasons for allowing Respondent Blois' appeal, which prevented them from being able to meaningfully participate in the decision-making process which had a great impact not only on their employment but on their reputation in the community. The Applicants rely on *Preston Sound v Swan River Nation*, 2003 FC 850 [per Heneghan J] [*Preston Sound*] to submit the Appeals Tribunal decision of July 9, 2018 allowing the appeal to proceed, "did not refer to the provision of the Election Law or Appeals Regulation pursuant to which the appeal was granted" and

therefore, “there is no way to determine on what basis, if any, the Appeal Committee decided to allow the appeal.”

[63] Respectfully, I note the decision under review in this Court is the Decision dated August 12, 2021, although it may and will consider both preliminary decisions dated October 31, 2018 and the letter allowing the appeal to proceed dated July 9, 2018. In *Preston Sound* the reasons for the decision to uphold the appeal was contained in a short one-sentence letter. This is distinguishable from the case at bar in which the Appeals Tribunal provided 29 paragraphs of reasons for their Decision to partially grant Ms. Blois’ appeal. *Preston Sound* is distinguishable.

[64] I am also of the view there was no breach of procedural fairness in the Decision of October 31, 2018, which was a reconsideration by the Appeal Tribunal of its earlier decision of July 9, 2018 allowing the appeal to proceed. Before making the October 31, 2018 reconsideration decision, the Appeal Tribunal afforded both Applicants the ability to make submissions. Both were heard through counsel to the extent they wished to participate. If there was a breach of fairness in the Appeal Tribunal coming to its conclusion of July 9, 2018, a point I need not decide, it was cured by the Appeal Tribunal’s decision to reopen the issue, and reconsider it in light of submissions by counsel for both Applicants. I mention this because the Applicants raised a procedural fairness argument concerning the July 9, 2018 decision at the hearing; I am unable agree with it.

[65] Third, the Applicants submit there was a reasonable apprehension of bias of the Appeals Tribunal favouring the Respondent Blois. The test for a reasonable apprehension of bias is

recently reiterated in *Taykwa Tagamou Nation v. Linklater*, 2020 FC 220 [per Strickland J] at para 96: “The test for an apprehension of bias is what would an informed person, viewing the matter realistically and practically, and having thought the matter through, have concluded (*Committee for Justice and Liberty et al. v National Energy Board et al*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394, 68 DLR (3d) 716; *Sparvier v Cowessess Indian Band No 73*, 1993 CanLII 2958 (FC), [1993] 3 FC 142, 1993 CarswellNat 808 at para 65 (FCTD); *Johnny v Adams Lake Indian Band*, 2017 FCA 146 at para 43).”

[66] The Applicants submit at para 37 of their memorandum:

> 37. In this case, one of the Appeals Tribunal members was in a conflict of interest and was present and presumably participated in the decision to allow the Appeal to proceed in the face of its non-compliance with the explicit language of the Appeals Regulation. This indication of a conflict of interest would certainly cause an informed person, viewing the matter practically and having thought it through, to conclude that the Appeals Tribunal was unlikely to be fair and unbiased in making its penultimate decision to proceed. Further, the Appeals Tribunal only communicated with the Respondent Blois and not the Applicants.

[67] The Applicants do not explain why a member of the Appeals Tribunal was in a conflict of interest; however, para 7 of the Decision reveals “Elder Leona Carter recused herself from further participation in the appeal of Florence Blois due to a conflict of interest because the appellant, Florence Blois is her sister.” Since she recused herself, I see no basis for the allegation of bias.

[68] The Applicants also submit the Appeals Tribunal “only communicated with the Respondent Blois and not the Applicants,” but and with respect this does not appear to be well

founded. Paragraph 8 of the Decision states “official notices were sent out to respondents; Darryl Whitstone, Hubert Pahtayken and Delores Chief by registered mail.” In addition at para 32 the Decision states “Respondent Chief did not attend the hearing and nor did she attend at any other time since being provided with the appeal documents”. I find the Appeals Tribunal communicated with both these Applicants. Moreover, if the Applicants in their submissions refer only to the July 9, 2018 letter allowing the appeal to proceed, once again I note that decision was reconsidered with the benefit of submissions from their counsel such that there was no procedural unfairness.

[69] Fourth, the Applicants submit the Decision of the Appeals Tribunal was unreasonable because “the Appeals Tribunal failed to collect any evidence whatsoever, and only relied on the submissions of the appellant”. The Applicants rely on *Morin v. Enoch Cree Nation*, 2020 FC 696 [per Strickland J] at paras 48, 50 [*Morin*] to submit a decision is presumptively unreasonable where it is based on a “one-sided and incomplete factual record”. In *Morin* the Election Appeal Board failed to notify the Electoral Officer of the appeal and failed to obtain and consider a report from him, which contributed to the lack of procedural unfairness afforded to Mr. Morin.

[70] This is not the case here because the Applicants were given notice of the appeal hearings, the Applicants chose to send their legal counsel instead, and the CTR reveals they submitted materials before the Appeals Tribunal [Tab 10 of the CTR]. Therefore, *Morin* is distinguishable and there is no merit to the Applicants’ submissions in this regard.

[71] The Respondent Blois submits the Appeals Tribunal properly applied a flexible approach to the Appeals Regulations, pointing to Justice Favel's decision in *Lecoq v Peter Ballantyne Cree Nation*, 2020 FC 1144 with which I agree:

> [67] I find that there is no error on the part of the Appeal Tribunal in accepting Mr. McCallum's appeal. There must be a balance struck between abiding by wording and formalities of the Code and access to justice for those wishing to challenge an outcome. A notarized copy of an appeal letter or document can suffice in commencing an appeal, but the evidence contained in such a document will still need to be tested, as described earlier. The work of the Appeal Tribunal does not end simply by accepting documents commencing an appeal.

[72] This argument once again appears to focus on the July 9, 2018, initial decision which, as noted already, was reconsidered with the benefit of submissions from counsel for both Applicants resulting in the decision of October 31, 2018 to proceed. As noted earlier, sections 10.1 and 11.4 of the Appeal Regulations make the OLCN's Appeals Tribunal master of proceedings before it, which is a complete answer to this aspect of the application for judicial review.

[73] The Respondent Blois also relies on *Strilets v Vicom Multimedia Inc.*, 2000 ABQB 616 [*Strilets*] which indicates strict adherence to the non-permissive language of an act should not be so narrowly interpreted:

> [28] Overall, the object of the *Provincial Court Act* is to provide a procedure whereby a more substantial number of the public at large are able to advance a claim, without the necessity of attaining counsel. It would be unjust and contrary to the purpose of the legislation to find that this provision is mandatory and not permissive. A narrow interpretation is inconsistent with the purpose and context of the statute.

[74] At the hearing, counsel for the Respondent OLCN raised *Kehewin Cree Nation v Mulvey*, 2013 ABCA 294 at para 19 [*Kehewin*] to submit statutory interpretation of the word "shall" means "mandatory":

> [19] In any event, the *Provincial Court Act* says that the transcript "shall" be filed within three months. At common law, and by statute, "shall" is mandatory, not merely directory. See the *Interpretation Act*, RSA 2000, c I-8, s 28(2)(f); *Rocky View (Municipal District) v McKinnon*, 2009 ABCA 268, 460 AR 280 (para 21) and cases cited; *Baron v R (Minister of National Revenue)* 1993 CanLII 154 (SCC), [1993] 1 SCR 416, 440, 146 NR 270 (paras 31-32). That renders academic any debate about whether s 46(3)'s time limit does not compel action.

[75] However, counsel for the Respondent Blois, in response points to para 30 of *Kehewin* to emphasis the Alberta Court of Appeal recognizes "There is a canon of construction that where legislation is ambiguous or unclear, then sometimes the court will interpret it in a laxer or more forgiving manner."

[76] Overall, I find in this case that a properly appointed First Nations Appeals Tribunal reconsidered the preliminary application, heard from counsel for these Applicants, reserved and determined it should allow the appeal to proceed in order for the Appeals Tribunal to conduct its important electoral role. Such a decision is owed very considerable deference, especially in light of the Decision being one of an Indigenous body surrounding the interpretation of provisions of its own election law and regulations (*Porter* at para 27, *Gladue* at para 22, and *Pastion* at para 22). Therefore, I respectfully agree with the Respondent Blois that the Appeals Tribunal acted reasonably in allowing the appeal to proceed.

D. *Was the Decision of the Appeals Tribunal reasonable?*

(1) Delores Chief

[77] At the appeal of the 2018 Election, Respondent Blois claimed neither of the Applicants were qualified to run for election as both had monetary obligations to OLCN contrary to section 10.6(c) of the Election Law.

[78] The Appeals Tribunal held there was insufficient evidence to find Mr. Whitstone not qualified to run for Election but found Ms. Chief was not qualified to run for Election. The Applicants submit this conclusion was based on a statement by the consultancy firm of MNP LLP which was not conclusive evidence. However, in this regard, I note Ms. Chief failed to provide evidence to the contrary. The Appeals Tribunal found:

> 33. The MNP document raises a serious issue regarding the Respondent Chief and cheques issued to Elders, and at least one that was cashed and not given to the Elder. It appears that there was to be a further review of other cheques issued to Elders and other Band members of which the Respondent Chief was responsible for.
>
> 34. This raises serious questions of whether or not the Respondent Chief has outstanding debt to the Band because of cheques issued to Elders and/or band members.as outlined in Exhibit "B" to the Appellants affidavit dated December 18, 2018.
>
> 35. The Respondent Chief has not provided any evidence to the contrary and this leaves the Tribunal with only the evidence tendered by the Appellant which has gone unrefuted.

[79] In my respectful view, the Appeals Tribunal made a decision based on the evidence before it. I agree the evidence may appear inadequate to the Applicant Chief, but am unable to

say there was no evidence on which the Appeals Tribunal could make its decision in relation to her case. I am bound by both the Supreme Court of Canada and the Federal Court of Appeal not to engage in the reweighing of evidence, inferences or findings of fact, yet and with respect, this is what the Applicant Ms. Chief asks me to do. In this respect see *Vavilov* at para 125 and *Doyle* at paras 3-4, cited above.

[80] In addition, the Applicant Ms. Chief was afforded an opportunity to respond to MNP LLP consultant's report, but chose not to. If she had contrary evidence, she cannot be heard now to say she didn't have an opportunity to present it.

[81] Given these considerations and that the Appeals Tribunal deserves considerable deference by the Court, I have concluded its Decision in relation to Ms. Chief is reasonable. It is justified by the facts and constraining law, intelligible and transparent.

(2) Darryl W. Whitstone

[82] The Applicants submit the Appeals Tribunal erred in concluding the Applicant Whitstone engaged in libel and slander by discussing a publicly available CBC article, thereby violating section 5.1(e) of the Election Law. The Applicants submit the Decision "is devoid of any discussion of the elements of a cause of action in defamation (covering libel and slander), evidence supporting that cause of action, and potential defences to that cause of action" (*Wilson v Switlo*, 2011 BCSC 1287 at para 132-154; aff'd in 2013 BCCA 471). They say no evidence was submitted or referred to during the course of the hearing that established the CBC article

itself was libelous or slanderous; however, it was on that basis alone the Applicant Whitstone was removed from office.

[83] The Applicants point to section 7.1(b) of the Appeals Regulation:

> **7. Grounds for Appeal**
>
> **7.1** An Appeal submitted must sufficiently outline one or more of the following: …
>
> > b) that there was a violation of the Act and its Regulations in the conduct of the Election that might have affected the result of the Election; or …

[84] The Applicants rely on para 25 of *Opitz v Wrzesnewskyj*, 2012 SCC 55 [*Opitz*] as the leading case for interpreting whether the violation of the Election Law and the Appeal Regulations "might have affected the result of the Election":

> [25] "Affected the result" asks whether someone not entitled to vote, voted. Manifestly, if a vote is found to be invalid, it must be discounted, thereby altering the vote count, and in that sense, affecting the election's result. "Affected the result" could also include a situation where a person entitled to vote was improperly prevented from doing so, due to an irregularity on the part of an election official. That is not the case here and we need not address it.

[85] With respect, the better passages from *Opitz* are:

> [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.

[86] The Appeals Tribunal specifically noted the Respondent Blois lost by one vote. That then is the "magic number" set out in *Opitz*. Therefore I must reject the submission that in this respect the Appeals Tribunal erred in its findings regarding the Applicant Whitstone. The holding that what he did might have affected the result of the election was reasonable in that it is both justified by the legal constraints and defensible on the facts of this case.

[87] The Applicants also rely on case law involving First Nations who opt into the *First Nations Elections Act*, SC 2014, c5 [*FNEA*] to submit "a party seeking to demonstrate that an irregularity has 'affected the result' of an election must establish, with persuasive evidence, that someone not entitled to vote, voted, or that someone entitled to vote was improperly prevented from doing so." However, I respectfully submit *Opitz* and the *FNEA* cases are distinguishable because this is not a case where alleged votes were illegally cast. Moreover, contrary to cases such as *Opitz*, this Court is sitting on judicial review of a First Nation's election Appeals Tribunal, and not on an appeal of an election itself, such that deference is owed to the Appeals Tribunal, (*Porter* at para 27, *Gladue* at para 22, and *Pastion* at para 22).

[88] The Respondent Blois submits, and I agree the Applicant Whitstone is asking this Court to reweigh the evidence and facts of this case, which is prohibited by *Vavilov* at para 125, *Doyle* at paras 3-4, and by *Nguyen* at para 2. There was evidence led by Respondent Blois as to when the CBC article was presented at the election campaign. Its contents are on the face of the document. The Applicants took almost no part in the Appeals Tribunal hearing. At multiple times throughout the Appeal process, the Applicants either failed to show up or only their lawyer was present.

[89] I conclude the Appeals Tribunal heard and reviewed the evidence provided and found that it was sufficient to reach the conclusion it did. Once again, it may be said the evidence was slim, however the reasons of the Appeal Tribunal explain how it came to its decision and I am unable to say there was no evidence to support its assessment of the evidence. The First Nation has decided to word its Election Law and Appeals Regulations as it has. No doubt subsection 5.1e) of the Election Law, requiring candidates to campaign "ethically, focusing of political issues and candidate platforms, instead of engaging in libel and slander" casts the net broadly, however, that is OLCN's choice. It is not for this Court to re-write OLCN's Electoral Law or Appeals Regulations.

VIII. Conclusion

[90] In my respectful view, the Appeals Tribunal's decisions in relation to both Applicants Chief and Whitstone are justified, transparent and intelligible. They add up, and contain no fatal flaws. They are supported by the facts before the Appeals Tribunal, and considered with

deference as required by the indigenous election jurisprudence outlined above. I find both decisions reasonable. Therefore judicial review must be dismissed.

IX. Costs

[91] The Applicants seek costs and at the hearing submitted solicitor-client costs should be awarded to them in the amount of $10,000 all inclusive, or all inclusive tariff costs in the alternative.

[92] The Respondent OLCN submit solicitor-client costs are not appropriate and said costs should only be awarded to the successful party in accordance with the Federal Court tariff. At the hearing, counsel for the Respondent OLCN further submitted this is not an appropriate case for solicitor-client costs and said no costs should be made either in favor or against the Nation. I agree no costs should be awarded for or against the Respondent OLCN.

[93] The Respondent Blois relies on *Roseau River Anishinabe First Nation v Nelson*, 2013 FC 180 [per Russell J] for the proposition solicitor-client costs should be awarded in public cases such as this one where the parties have totally ignored the current jurisprudence with respect to First Nations and the deference that is afforded to their institutions, which are carrying out their duties under First Nation Election Codes. At the hearing, counsel for Respondent Blois submitted solicitor-client costs should be awarded at $14,000 all inclusive (having first requested $24,000 which included costs of $10,000 incurred before Justice Grammond, which however cannot be double counted), and if she is not successful in this matter, then tariff costs should be awarded at $5,000 lump sum all inclusive.

[94] Justice Favel in *Anderson v Nekaneet First Nation*, 2021 FC 843 summarizes the principles of costs awards in the context of a First Nation's governance dispute:

> [91] My colleague Justice Sébastien Grammond has summarized the principles surrounding the awarding of costs in *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119 [*Whalen*]. There, he relied on *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [*Okanagan*] in setting out the following principles related to the awarding of costs at paragraphs 3-5:
>
> > The first and more traditional goal of costs awards is the indemnification of the successful party. […]
> >
> > Thus, costs awards provide incentives to make rational use of scarce judicial resources. […] Likewise, costs awards are thought to discourage frivolous or vexatious lawsuits, because litigants who bring such lawsuits know they will have to indemnify the defendant.
> >
> > Thirdly, costs awards have the potential of facilitating access to justice.
>
> [92] In addition to these principles, Rules 400-422 of the *Federal Courts Rules* also apply. Rule 400(1) provides that the trial judge has full discretion on awarding costs. This discretion is to be exercised judicially. As well, the default mechanism for awarding costs is a tariff (*Whalen* at para 8).
>
> [93] Other tools a Court has at its disposal are "solicitor and client costs", typically used to sanction a party's wrongful conduct in a proceeding, as well as lump sum awards, pursuant to Rule 400(4) of the *Federal Courts Rules* (*Whalen* at paras 10 and 11).
>
> [94] As my colleague Justice Luc Martineau stated in *Eurocopter v Bell Helicopter Textron Canada Ltee*, 2012 FC 842 [*Eurocopter*] at paragraph 9: "the exercise of costs assessment involves an inescapable risk of arbitrariness and roughness on the part of the Court."
>
> [95] Another principle can be found in *Knebush v Maynard*, 2014 FC 1247, where the Court stated that if a judicial review properly addresses a question of First Nation's law, it is a matter of public interest on the basis that the First Nation has benefited by the clarity and the resolution of the issue (at para 60). As such,

> individuals may be entitled to costs. The Court in *Coutlee v Lower Nicola First Nation*, 2015 FC 1305 and *Strawberry v O'Chiese First Nation*, 2017 FC 869 applied similar reasoning.

[95] There is no reason costs should not follow the event. I do not see a reason to depart from tariff and conclude a lump sum award is appropriate. In my discretion, I award costs to the Respondent Blois in the lump sum all-inclusive amount of $5,000.00.

JUDGMENT in T-1304-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. The Applicants shall pay to the Respondent Blois lump sum all-inclusive costs fixed in the amount of $5,000.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1304-21
STYLE OF CAUSE:	DARRYL W. WHITSTONE AND DELORES CHIEF v ONION LAKE CREE NATION, AND FLORENCE BLOIS
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	MARCH 3, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	MARCH 23, 2022

APPEARANCES:

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Keltie Lambert	FOR THE RESPONDENT (ONION LAKE CREE NATION)
Arman Chak	FOR THE RESPONDENT (FLORENCE BLOIS)

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