Federal Court  Cour fédérale

Date: 20220401

Docket: T-678-21

Citation: 2022 FC 456

Ottawa, Ontario, April 1, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MURIEL LABELLE

Applicant

and

CHINIKI FIRST NATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review pursuant to section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] of a March 26, 2021 decision [Decision] of the Stoney Tribal Council [STC]. In the Decision, the STC denied the Applicant's appeal of the December 8, 2020 Chiniki First Nation [CFN] election [2020 Election or Election].

[2] The parties ask this Court to determine procedural aspects of the CFN's and/or the STC's appeals processes in order to decide whether the STC breached the Applicant's rights to procedural fairness. The Applicant does not challenge the reasonableness of the Decision.

[3] The Applicant's rights to procedural fairness were breached. The application for judicial review is allowed.

I. Background

[4] The Applicant is a member of the CFN. The CFN is located in southern Alberta and is an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. CFN, Bearspaw First Nation [BFN], and Wesley First Nation [WFN] make up the Stoney Nakoda Nations [SNN]. The SNN entered into Treaty 7 on September 22, 1877. Three undivided reserves (numbers 142, 143, and 144) were surveyed and set aside for the SNN.

A. *Historic Governance and the Imposition of Elections*

[5] Historically, the SNN did not elect their leaders. Their governance model was based on a clan system where family groups or clans in each Nation selected their clan leaders. Those clan leaders would select an individual to lead the Nation, with assistance from the clan leaders. This practice changed in the 1950s when Canada introduced an elective system.

[6] On December 20, 1956, Mr. R.F. Battle, Regional Supervisor of Indian Agencies, visited the SNN at a Band meeting. The purpose of his visit was to insist that the SNN adopt an elective

system. He also wished to design a ballot where SNN members could vote on how many Chiefs and Councillors they wanted to elect. At this meeting, some SNN members were in favour of electing one Chief, while others favoured electing three Chiefs. Another group felt that the traditional model of governance should not be disturbed and insisted that this option be included on the ballot. Ultimately, the option reflecting the traditional governance structure was not included.

[7] Subsection 2(1) of the *Indian Act* states that certain Band councils are "chosen according to the custom of the band." The SNN ultimately decided to hold elections every two years for each of their respective Chiefs and four Councillors according to "custom." The first SNN election was held in 1957. Thereafter, the elected Chiefs and Councillors of each of the three First Nations would sit together as the STC. Over the years, the three Nations comprising the SNN made their own decision to alter their respective terms of office. Today, the CFN holds its elections according to custom every three years.

[8] In my view, the story of Mr. R.F. Battle's visit in 1956 illustrates very clearly that there is a difference between customs recognized under the *Indian Act* and traditional Indigenous governance structures. This was noted by the Standing Senate Committee on Aboriginal Peoples in their 2010 report *First Nations Elections: The Choice is Inherently Theirs*:

> Custom under the *Indian Act* and as used by the Department of Indian Affairs and Northern Development does not refer to any traditional method of leadership selection. Rather, it simply serves to distinguish band councils elected pursuant to the *Indian Act* from those elected according to the rules established by the band. These rules, however, may not necessarily be based on traditional methods of choosing leaders. Unless otherwise specified in this report, the use of the term custom refers to "community-designed"

> electoral codes rather than hereditary, clan or consensual based systems of leadership selection (at 8).

[9] I agree that there is a difference between traditional governance and customary elective models, but it does not follow that "custom" is not Indigenous law. This Court has held that subsection 2(1) of the *Indian Act* does not *grant* First Nations the right to run elections according to their custom (*Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 7 [*Pastion*]). As Justice Grammond recently explained in *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 [*Bertrand*]:

> [36] The *Indian Act* states that a First Nation's council is "chosen according to the custom of the band," unless the election regime in sections 74-80 is specifically made applicable to that First Nation. In doing so, Parliament referred to a set of norms that find their source and legitimacy outside of the Canadian legal system and that can be described as Indigenous law: *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paragraph 34; *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraph 7, [2018] 4 FCR 467 [*Pastion*]. In *Bone v Sioux Valley Indian Band No 290*, [1996] 3 CNLR 54 (FCTD), at paragraph 31 [*Bone*], Justice Heald mentioned that the *Indian Act*
>
> …does not confer a power upon a Band to develop a custom for selecting its council. Rather, it recognizes that an Indian Band has customs, developed over decades if not centuries, which may include a custom for selecting the Band's Chief and Councillors.

[10] Indeed, although it was in an attempt to generate support amongst SNN members for an elective system, the story of Mr. R.F. Battle's visit indicates that Crown agents recognized and engaged with the pre-existing jurisdiction of traditional Indigenous governance structures.

[11] The record before this Court indicates that the CFN is attempting to exercise its inherent jurisdiction over elections (recognized by the *Indian Act* as "custom") in a manner that attempts

to stay true to their traditional ways. It is also clear that the imposition of the elective mode of leadership has caused disputes within CFN (and other nations within the SNN) and that Canadian legal principles have also been adopted into and applied to the CFN's traditional or customary mode of governance. This proceeding exemplifies the tension between Indigenous laws and principles of procedural fairness that exist at common law. This tension, in my view, stems from the history of colonialism and the imposition of elective models on Indigenous nations.

B. *The STC and the CFN Election Regulations*

[12] The parties agree that the STC, which is comprised of the Chiefs and Councillors of the CFN, BFN, and WFN, has jurisdiction to hear election appeals. In addition to hearing election appeals, the STC also makes decisions about other issues that are common to the three First Nations.

[13] The parties also agree that since 1986, outgoing leadership established rules and procedures for every election through the issuance of a Band Council Resolution [BCR]. Throughout these reasons, I will refer to this process as the 'BCR Regime'. From 1986-1998, the BCRs were signed by outgoing leadership of the SNN but this changed as the three Nations tailored their governance to their particular circumstances. For example, outgoing leadership of the CFN began issuing their own BCRs in 2002. While the Applicant questions the fairness of the BCR Regime, she also acknowledges that this has been the "repeated practice" of the CFN.

[14] On October 16, 2020, the outgoing CFN Chief and Council passed a BCR establishing the "Custom Election Regulations Governing the 2020 Chiniki Nation Council Nomination and

Elections for the Chief and Councillors" [*2020 Election Regulations*]. The *2020 Election Regulations* included modifications due to the COVID-19 pandemic. The most pertinent part of the *2020 Election Regulations* state:

> 7.3 To Vote
>
> In order to be an Eligible Voter and eligible to vote, a person must be:
>
> a. the full age of twenty-one (21) years of age on or before the Election Date…
>
> b. a registered Chiniki Nation member in accordance with the Stoney Tribe Membership Code; and
>
> c. present in person
>
> […]
>
> 23.1 APPEALS
>
> Any Eligible Voter has the right to appeal if they have reasonable grounds to believe:
>
> a. that a person nominated to be a candidate in the election was ineligible to be a candidate;
>
> b. that there was a corrupt practice with respect to the election; or
>
> c. there was any violation of these Custom Election Regulations that may have affected the result of the election.
>
> 23.2 All appeals concerning the Chiniki Nation Elections must be made in writing to the Chief Electoral Officer within ten (10) days from the Election Date… The written appeal must state the grounds for the appeal and provide particulars of the complaint…
>
> 23.3 The Chief Electoral Officer shall refer all such appeals to the Stoney Tribal Council whose decision shall be final and binding. Until such time as an appeal is decided, an appeal will not serve to invalidate either the Election results or the operations, or both, of the newly elected Chiniki Nation Council.

[15] The *2020 Election Regulations* included a number of amendments from previous BCRs including to section 23. Similarly, a new paragraph was added to the preamble of the *2020 Election Regulations* that recognized the "ongoing COVID-19 pandemic." The *2020 Election Regulations* also allowed for the use of a "ballot tabulation system", which operated according to the *Voting Machine Regulations*, enacted pursuant to the *2020 Election Regulations*. The Applicant submits that these amendments were made without consultation with CFN membership.

C. *The 2020 Election*

[16] On November 29, 2020, after the *2020 Election Regulations* were passed, the CFN Council made a unanimous motion to permit virtual voting in response to the increasing number of COVID-19 cases. Ultimately, 54 CFN members casted their votes virtually for the 2020 Election.

[17] The 2020 Election was livestreamed on Facebook. The successful candidates were Chief Aaron Young and Councillors Charles Mark, Jordie Mark, Verna Powderface, and Boyd Wesley. The other candidate for Chief, Bruce Labelle, lost by 38 votes. In total, Chief Aaron Young received 350 votes while Bruce Labelle received 312 votes.

D. *The Appeal*

[18] On December 18, 2020, the Applicant submitted her appeal to the Chief Electoral Officer [CEO]. The Applicant made three arguments:

- During the live feed of the election the CEO stated that 625 votes were cast when the polls closed. However, when the election results were released, there was a total of 662 votes (plus four votes that had been rejected). The Applicant questions where the 37 "extra" votes came from and that this discrepancy indicates that the election was "rigged."

- The *2020 Election Regulations* were not followed because section 7.2 states that an "Eligible Voter" is someone who is "present in person." This provision was breached by the implementation of virtual voting. To be enforceable, provisions permitting virtual voting had to be included in the original *2020 Election Regulations*.

- The names and treaty numbers of three voters were disclosed on the live feed, which was a breach of their privacy.

[19] On February 8, 2021, the Stoney Tribal Administrator [STA] emailed the Applicant attaching: a letter from the STA, CFN's comments related to virtual voting; the CEO's December 23, 2020 affidavit responding to the Applicant's concerns; and the CEO's supplemental affidavit addressing a typographical error. The STA's letter explained that the custom and practice of the SNN is for the STC Chiefs to decide "a procedurally fair process to hear and resolve the appeal." He advised the Applicant that her hearing would be decided in writing given the ongoing pandemic and since the Applicant's grounds of appeal were "technical and/or procedural in nature." He also asked the Applicant to provide her written response including any additional evidence by 4 p.m. on February 16, 2021.

[20] The CFN's letter stated that virtual voting was implemented due to the increasing number of COVID-19 cases. It stated that, on November 26, 2020 (days before the election), seven CFN members tested positive for COVID-19. Virtual voting ensured the safety of CFN members and

that everyone could vote, including those required to self-isolate. The CFN's letter advised that in the circumstances, virtual voting was the correct procedure to follow.

[21] The CEO's December 23, 2020 affidavit provides a breakdown of the number of votes cast, where they were cast, and the final results for the position of Chief. In total, there were 666 votes cast, four of which were rejected. Exhibit C of the CEO's affidavit is the voters list, which identifies each member who cast a ballot in the Election. It confirms that the number of votes cast in person and virtually equalled 666. The CEO concedes that three names of voters were disclosed when ballots were being counted.

[22] In the same affidavit, the CEO also explains the process for virtual voting. First, voters were notified that they had to pre-register to vote virtually. On the day of the Election, voters called the CEO to decide what platform to use for video-chat. Once on video-chat, they would show her their photo identification and send her a photo of that identification.

[23] The Applicant replied by email on February 15, 2021 stating that she would be moving forward with the hearing, where she would provide evidence and question the CEO. The STA replied the next day and reiterated that the custom is for the three SNN Chiefs to decide the procedure and that the STC would hear the matter in writing. He extended the deadline for her written submissions and evidence to February 19, 2021 at 4 p.m.

[24] On February 19, 2021, the Applicant sent the STA her written submissions. First, the Applicant stated that the CFN Chief Executive Officer and the CEO did not have the authority to

dismiss her appeal – that authority sits with the STC alone. Second, she identified what she perceived as issues within the CEO's affidavit: it was sworn before a Commissioner of Oaths outside of Alberta; the date of the advanced poll was incorrect; virtual voting was not contemplated in the *2020 Election Regulations*; and contrary to the CEO's assertions, her appeal letter adequately set out grounds of appeal. Finally, the Applicant demanded an oral hearing but stated that it could take place virtually due to the pandemic. She submitted that an oral hearing is the custom for election appeals and emphasized the importance of being able to make submissions in the Stoney language and have Elders and other Nation members present.

E. *The Hearing*

[25] On March 4, 2021, the STC met virtually over Microsoft Teams to consider the written appeal without the Applicant. One of the CFN Councillors was unable to attend the meeting, meaning that there were fourteen STC members present. The Chair of the meeting was from the BFN and did not vote. The rest of the BFN members abstained from the vote, resulting in four abstentions. The BFN members did not state why they abstained from the vote. The vote passed with nine votes in favour and zero against. The CFN candidates elected in the 2020 Election participated in the deliberations and the vote, making up four of those nine votes. Two of the CFN Councillors made and seconded the motion to dismiss the appeal.

[26] The Administrator was asked to prepare the written reasons for the Decision. The Certified Tribunal Record indicates that these reasons were actually drafted by the STC's lawyer. At least one member of the STC was not aware at the time that STC's lawyer wrote the Decision.

After the three SNN Chiefs reviewed and amended the draft reasons, they were signed by the STA and sent to the Applicant.

II. The Decision

[27] On March 26, 2021, the Applicant received the Decision dismissing her appeal. The Decision described the BCR Regime and identified this as the custom of the CFN. It also cited the "Appeals" section of the *2020 Election Regulations* (reproduced above at paragraph 14) and explained that the *2020 Election Regulations* are silent as to the procedure used on appeal. Therefore, the procedure for the hearing is determined by "SNN's unwritten custom and practices that have been in place since 1991." That "unwritten custom" is to forward the appeal to the three Chiefs of the STC to determine the appeal procedure. The STC also explained why the Applicant's appeal proceeded in writing. Next, the Decision summarized the grounds raised by the Applicant; the CEO's response as set out in her affidavits; the CFN's response, as set out in their letter; and the Applicant's written submissions.

[28] The Decision analyzed each issue raised by the Applicant. The STC found that the Applicant's first ground (discrepancies regarding the number of votes cast) fell under section 21.1(b) of the *2020 Election Regulations* (corrupt practice). However, her submission was based on something she had overheard on the livestream. The Applicant did not provide any evidence that a corrupt practice actually took place. In comparison, the CEO credibly explained how she tabulated votes, the source of all the ballots, and how the results were irrefutable. The STC favoured the CEO's evidence stating that the CEO "has credibly explained how the tabulation system works, the source of the ballots and how the final results are irrefutable when compared

to [the Applicant's] evidence…". The STC ultimately concluded that the Applicant failed to provide any evidence to doubt the final number of votes.

[29] The STC determined that the argument pertaining to virtual voting fell under section 23.1(c) (violation of the *2020 Election Regulations*). However, section 23.1(c) requires proof that the alleged violation affected the results of the Election. The STC found that the Applicant did not provide any evidence to establish the virtual voting affected the outcome of the Election.

[30] The STC also noted that the CFN permitted virtual voting because of the "exponential growth" of COVID-19 cases within the SNN. The STC accepted the evidence of the CEO and the CFN that virtual voting was permitted so that CFN members could exercise their right to vote if they were self-isolating. Additionally, the Decision explained that the process for virtual voting (video chat with the CEO) mirrored the safeguards of in-person voting. The CEO could see and speak to the voter, verify their identity, and verify the ballot. Ultimately, the STC found that virtual voting did not affect the integrity of the voting process or the number of people who could exercise their right to vote. Virtual voting, at most, was "an administrative change" to section 7.3(c) of the *2020 Election Regulations*, not a substantive change.

[31] Finally, the STC concluded that the disclosure of confidential information during the livestream does not fit within the grounds listed in section 23.1 of the *2020 Election Regulations* (ineligibility, corrupt practice, or breach of the *2020 Election Regulations*). The STC did note, however, that protecting confidential information is important. The STC recommended that future elections include additional safeguards and election workers be provided with better

training and instructions in the future. The STC noted that the Applicant did not ask for any specific remedy regarding this issue.

III. Issues and Standard of Review

[32] After reviewing submissions of the parties, the issues are best characterized as:

1. What are the customs of the CFN and STC in relation to appeals; and
2. Did the STC breach the Applicant's rights to procedural fairness by:

    (a) *Permitting the newly elected CFN Chief and Council to participate as decision-makers;*

    (b) *Refusing to hold an oral hearing; or*

    (c) *Refusing cross-examination of the CEO.*

[33] Both parties agree that correctness is the appropriate standard of review for issues of procedural fairness. However, the Respondent emphasizes that in the context of First Nation's election appeals, the content of the duty of fairness is "tailored to the particular circumstances and context of the [appeal body]. This context can and should include judicial respect for relevant custom" (*Bruno v Samson Cree Nation*, 2006 FCA 249 at para 20 [*Samson Cree*]). Further, 'judicial respect' "mandate[s] deference towards Indigenous decision-makers tasked with applying Indigenous laws" (*Pastion* at paras 21-23).

[34] I agree with the parties that issues of procedural fairness are reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada v Akisq'nuk First Nation*,

2017 FCA 175 at para 19; *Gadwa v Kehewin First Nation*, 2016 FC 597 at para 19, aff'g 2017 FCA 203; *Morin v Enoch Cree First Nation*, 2020 FC 696 at para 21; *Tourangeau v Smith's Landing First Nation*, 2020 FC 184 at para 26; *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 at para 29). On a correctness review, no deference is owed to the decision maker and the reviewing court determines if the duty of procedural fairness owed to the applicant was breached (*Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31; *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57).

[35] However, as noted in *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at paragraph 77 [*Vavilov*], "[t]he duty of procedural fairness in administrative law is 'eminently variable', inherently flexible and context-specific: *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653, at 682; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 22-23 [*Baker*]; *Moreau-Bérubé*, at paras 74-75; *Dunsmuir*, at para 79" (emphasis added). It remains true that the specific custom of a First Nation should inform the content and scope of procedural fairness.

[36] The Applicant does not challenge the reasonableness of the Decision.

IV. Preliminary Issue

[37] The Respondent submits that this Court should exercise its discretionary power under subsections 18.1(3) and 18.1(4) of the *Federal Courts Act* to withhold relief. According to the Respondent, it would be a waste of time and resources if this Court remits the matter to the STC. The Respondent states that evidence is clear that the Applicant's challenges to the 2020 Election

are bound to fail and that the opportunity to cross-examine witnesses or have an oral hearing would not change the outcome of the Decision. For all of the following reasons, I disagree.

V. Parties' Positions

A. *What are the customs of the CFN and STC in relation to appeals?*

(1) Applicant's Position

(a) *BCR Regime*

[38] The Applicant questions the legitimacy of the BCR Regime. She maintains that this is not the same as adopting a "ratified election code." She submits that the BCR Regime inappropriately gives Chief and Council the exclusive power to determine CFN election custom. This is contrary to the common law, which holds that custom is defined by the "broad consensus of the community" or Band members – not Chief and Council alone (*Bertrand* at para 50; *Shirt v Saddle Lake Cree Nation*, 2017 FC 364 at para 32 [*Shirt*]; *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 at para 36 [*Francis*]).

[39] *Shotclose v Stoney First Nation*, 2011 FC 750 at para 68 [*Shotclose*] involved the BFN and the WFN, but not the CFN. In that case, the BFN Chief and Council changed their terms in office from two years to four years by way of BCR and without a ratification vote. The Court held that "the applicants and all adult members of the [BFN] have the right to be consulted and to vote on the proposed changes to the Bearspaw Election Regulations" (*Shotclose* at Judgment, para 6). The Applicant submits that the CFN's BCR Regime similarly fails to involve CFN

members. In her affidavit, the Applicant states that she was never consulted about the contents of the CFN's *2020 Election Regulations*. With that said, the Applicant states that the BCR Regime does not necessarily invalidate the election results. The lack of consultation simply results in confusion as to the appropriate custom, which gives rise to procedural fairness concerns.

(b) *Election Appeals*

[40] The Applicant submits that the STC custom for an election appeal is to hold an oral hearing. The hearing is in person; appellants usually make submissions in the Stoney language; Elders and CFN members are present; appellants may question the CEO; and the impugned Chief and/or Councillors participate as respondents, not decision-makers.

[41] The Applicant outlines the appeal procedures used in the 2012 and 2018 CFN election appeals as well as the procedures used at the 2017 BFN appeal. In all of those appeals, the hearings were held in person and appellants had the opportunity to question witnesses. In the 2017 BFN appeal and the 2018 CFN appeal, the newly elected Chief and Councillors acted as respondents.

(2) Respondent's Position

(a) *BCR Regime*

[42] According to the evidence of Elder Wesley (a CFN Elder), Elder Kaquitts (a WFN Elder), and Councillor Mark, the custom of the CFN is to pass a BCR setting out regulations for the upcoming CFN election (the BCR Regime). Every BCR makes procedural changes to ensure

the election runs smoothly and that all eligible voters can exercise their right to vote. The substantive rights of CFN members are not altered by the BCR Regime and have not changed since 1986. Over the past 35 years, members of the CFN have never challenged this custom or questioned the procedural changes made over time.

[43] Therefore, through "repetitive acts in time" the BCR Regime constitutes a custom that is "generally acceptable to members of [CFN]" (*Francis* at paras 22-27). As a result, the *2020 Election Regulations* are in fact "ratified", contrary to the Applicant's submissions.

[44] The Respondent also submits that this case is distinguishable from *Shotclose*. In *Shotclose*, the Chief and Council altered substantive rights by extending their terms without consulting members. In this case, virtual voting was merely a procedural change to ensure that all members could exercise their right to vote. This change is analogous to a pre-existing provision that enables the CEO to collect votes from CFN members that are hospitalized.

(b) *Election Appeals*

[45] The only evidence before this Court regarding STC and CFN custom are two affidavits from Elder Wesley and Elder Kaquitts. To rely on an alleged custom, the Applicant has the burden of establishing that custom – her opinion does not suffice (*Louie v Canada (Indigenous Services)*, 2021 FC 650 at paras 39-43). The Applicant has not offered any evidence to support her position that the custom of the STC is to hold an oral hearing. She also chose not to cross-examine the Elders on their evidence.

[46] The affidavit evidence of the Elders and Councillor Mark establish that the custom for election appeals is for the three Chiefs of the STC to reach a consensus about what procedure will be used, taking into account "what is fair in the circumstances." If the Chiefs cannot reach a consensus, the entire STC decides the procedure. The STC will then hear the appeal according to that procedure. In this case, a written hearing was most appropriate given the technical/procedural nature of the Applicant's appeal and the ongoing pandemic. All of this was explained to the Applicant in the February 8, 2021 letter.

[47] It is also STC custom that upon their election, successful candidates immediately become members of the STC and may participate as decision-makers "as their conscience may guide them in the circumstances." The relevant "circumstances" may include advice or direction received from the Chiefs. Finally, after the STC makes a decision, it is custom for the Administrator to prepare the written reasons on behalf of the STC for the Chiefs' approval.

B. *Did the STC breach the Applicant's rights to procedural fairness?*

[48] The Applicant states that her common law rights to procedural fairness were breached because the newly elected CFN Council participated as decision-makers; she was denied an oral hearing; and she was not allowed to question the CEO. Furthermore, the Applicant had a legitimate expectation that the hearing would take place according to CFN custom.

[49] The Respondent states that in the "particular circumstances and context" of this case, taking into account STC custom, the Applicant was afforded procedural fairness. She received

notice of the hearing, an opportunity to make submissions, an extension of time to make those submissions, and written reasons.

(1) Was it unfair that the newly elected CFN Chief and Council participated as decision-makers?

(a) *Applicant's Position*

[50] The STC violated the principle of *nemo judex in causa sua* (no one is judge in his own cause) by allowing the successful candidates to participate as decision-makers (*Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, 84 DLR (4th) 105 [*Pearlman*]). The Applicant states that the successful candidates had a significant interest in the outcome of the appeal since they were being asked to invalidate the very election that put them in office, meaning they "had the highest personal interest of any member of the [First Nation]" (*Halcrow v Kapawe'no First Nation*, 2021 FC 219 at para 57).

[51] The Applicant acknowledges that a legislature may authorize a breach of the *nemo judex* principle through statute. The Applicant submits, however, that the *2020 Election Regulations* are not a statute because they are not a ratified election code. Therefore, the exception to the *nemo judex* principle does not apply.

[52] The CFN Council elected in the 2020 Election should have recused themselves from the vote. This was the process followed in the 2017 BFN appeal and the 2018 CFN appeal. In the 2018 CFN appeal, the successful candidates acted as respondents. The successful candidates' failure to recuse themselves violates CFN custom *and* creates a reasonable apprehension of bias.

[53] In *Shotclose*, the Court held that "[a]n informed individual viewing the matter realistically and practically would conclude that the Chief and Council were parties to the controversy that had direct interests, including a pecuniary interest, in the outcome. It was not open to them to decide the length of their own terms of office, other than through resignation" (at para 96). The Applicant states that the same reasoning can be applied to this case and that the successful CFN candidates should not have voted on whether the Election was invalid. On its own, a breach of the *nemo judex* principle is enough to allow this judicial review.

(b) *Respondent's Position*

[54] The Applicant was not denied procedural fairness when the successful CFN candidates acted as decision-makers. Two of the *Baker* factors that are particularly relevant in this case are "the nature of the statutory scheme" and "the choice of procedure made by the tribunal itself" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at paras 21-28 [*Baker*]).

[55] Here, the nature of the statutory scheme includes the *2020 Election Regulations* and the unwritten custom of the STC for election appeals. Section 23.3 of the *2020 Election Regulations* expressly refers all election appeals to the STC. The unwritten custom of the STC is that successful candidates become part of the STC immediately upon their election and may participate in appeals "as their conscience may guide them." When considered as a whole, this statutory framework, consisting of both written and unwritten custom, falls squarely within the exception of the *nemo judex* principle, allowing decision-makers to act in a conflict of interest where authorized by statute.

[56] The STC should be "granted significant latitude to choose its own procedures" (*Samson Cree* at para 22). In the 2018 CFN appeal, appellants targeted the personal conduct and integrity of the candidates (buying votes, voter intimidation, etc.). The nature of these accusations explain why the successful candidates recused themselves in 2018. In contrast, the Applicant's appeal was technical/procedural in nature. Additionally, the Applicant does not allege actual bias or bad faith. In these circumstances, it was appropriate for the CFN Council to participate as decision-makers.

[57] Alternatively, this application should be dismissed because even if all four of the successful CFN Council members did not vote, the appeal would have been dismissed by a vote of 5-0.

(2) Was it unfair that the STC denied the Applicant an oral hearing?

(a) *Applicant's Position*

[58] An oral hearing was required by CFN custom and the principles of procedural fairness. Without an oral hearing the Applicant could not present her case "fully and fairly" (*Baker* at para 30). In the context of a First Nation election appeal, a written hearing was inadequate because the Applicant could not make her submissions in the Stoney language or have Elders participate. It is important to be able to make submissions in the Stoney language because some words do not translate into English.

[59] The Applicant was willing to have an oral hearing virtually due to the pandemic but was not invited to the virtual meeting of the STC. The successful candidates were effectively given an oral hearing while the Applicant was refused that same right.

(b) *Respondent's Position*

[60] An oral hearing is not the custom of the STC, nor is it required by the principles of procedural fairness. The minimum standard of procedural fairness requires that an appellant has the opportunity to make submissions so that the matter can be resolved based on a full and fair consideration of the record (*Samson Cree* at para 22; *Shirt* at paras 52-53, 57).

[61] In the letter dated February 8, 2021, the STA informed the Applicant about STC custom; what procedure would be used on appeal; why the Chiefs chose that procedure; and the deadline for providing written submissions. The STC subsequently extended that deadline. Ultimately, the STC gave the Applicant an opportunity to make her case in writing. By her own choice, her written submissions were brief and focused almost entirely on her demand for and oral hearing and cross-examination.

(3) Was it unfair that the STC denied the Applicant an opportunity to cross-examine the CEO?

(a) *Applicant's Position*

[62] The Applicant was denied the opportunity to cross-examine the CEO on her affidavit despite immediately identifying issues with it and requesting the right to cross-examination. The

CEO's evidence directly contradicted the Applicant's position and the STC ultimately preferred the CEO's evidence without giving the Applicant a chance to test that evidence.

(b) *Respondent's Position*

[63] Where a statute is silent on the right to cross-examination, courts are generally reluctant to impose procedures or technical rules of evidence unless required by natural justice (*Armstrong v Canada (Commissioner of the Royal Canadian Mounted Police)*, [1998] 2 FC 666 (CA) at para 15, 156 DLR (4th) 670). Natural justice does not always require cross-examination (*James Lipkovits v Canadian Readio-Television and Telecommunications*, [1983] 2 FC 321 at 6, 17 ACWS (2d) 445]. While both the *2020 Election Regulations* and the STC custom are silent as to the right of cross-examination, the custom defers to whatever procedures the Chiefs agree are appropriate in the circumstances. Alternatively, if the Chiefs cannot agree, the STC will decide the procedures. Therefore, the statutory scheme in this case may permit cross-examination in some circumstances but not in others.

VI. Analysis

[64] Before looking at the specifics of the CFN and STC customs, it is useful to set out some of the key principles governing customary elections. When Indigenous parties from the same First Nation disagree about the appropriate custom governing an election, this Court may determine the custom upon reviewing the evidence (*Shotclose* at paras 47, 69, 78). As the parties have pointed out, it is important for this Court to do so in this case because a First Nation's

custom ought to be considered when assessing the content of procedural fairness (*Samson Cree* at para 20).

[65] In addition, the burden does not always sit with an applicant to prove a specific custom. Rather, the onus sits with the party relying on an alleged custom (*Francis* at para 21). In some cases, the burden will rest with a respondent (*Taypotat v Taypotat*, 2012 FC 1036 at para 28; *Taykwa Tagamou First Nation v Linklater*, 2020 FC 220 at para 66). When both parties rely on an alleged custom, courts should assess the evidence of both parties (*Shotclose* paras 68-88).

[66] Justice Strickland recently provided a helpful summary on the key principles governing custom elections in *Da'naxda'xw First Nation v Peters*, 2021 FC 360 [*Da'naxda'xw*] at paragraph 72:

> In summary, custom requires evidence of a practice and the manifestation of the will of the First Nation's members to be bound by that practice (*Francis* at para 26). Establishing band custom requires evidence demonstrating that the custom is firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus (*Francis* at para 36; *Beardy* at para 97; *Shirt* at para 31). Chief and Council alone cannot determine that a change in circumstance comprises a new custom, there must be broad consensus among the membership (*Shirt* at para 32; *Bertrand* at para 37; *Shotclose* at para 69). Similarly, custom is not frozen in time, but any change requires a broad consensus of the membership (*McLeod* at para 10; *Francis* at para 24). The inquiry into whether a custom enjoys broad consensus is fact and context specific and the evidence may demonstrate that there is no consensus (*McLeod* at para 17, *Shirt* at para 40, *Taypotat v Taypotat*, 2012 FC 1036 [*Taypotat*]). Custom may be demonstrated by a one-time event like a referendum or majority vote, by a series of events, or possibly acquiescence (*McLeod* at paras 18-19, *Francis* at para 30, *Awashsish* at para 44)…and the existence of a band custom and whether or not it has been changed with the

> substantial agreement of the band members will always depend on the circumstances (*Taypotat* at para 30).

[67] I will now apply the above principles to the circumstances of this matter.

A. *What are the customs of the CFN and STC in relation to appeals?*

(1) BCR Regime

[68] The Applicant concedes that the BCR regime does not invalidate the Election and that the BCR Regime has been a "repeated practice" of the CFN. However, the Applicant also submits that the BCR Regime is not equivalent to a ratified election code because outgoing leadership failed to consult CFN members before changing the *2020 Election Regulations*. As a result, the exception to the *nemo judex* principle is not engaged and the *2020 Election Regulations* cannot be said to be part of the 'statutory scheme' when determining the content of procedural fairness.

[69] The Applicant cites *Shotclose* for the proposition that CFN members "have the right to be consulted and to vote on the proposed changes to the…Election Regulations." In that case, the issue was whether the BFN's custom for changing the terms of office was to consult an Elder's Advisory Committee or provide members an opportunity to discuss and vote on the changes (*Shotclose* at paras 73-74). The Court took issue with the BFN's unilateral amendment of the *Election Regulations* and the BFN's attempt to substantively change the law by changing the term of office from two to four years. However, the Court did not impugn the BCR Regime itself. In fact, the Court noted that the applicants could not appeal to the STC since a BCR was not passed for the 2010 election (*Shotclose* at para 98).

[70] *Shotclose* provides useful guidance. I similarly find that the BCR Regime is a customary practice for the conduct of CFN elections. The record shows that it is an accepted practice for Chief and Council to pass BCR's to ensure that the upcoming election runs smoothly, so long as those changes do not affect the substantive rights of electors.

(2) Election Appeals

[71] The parties dispute two aspects of STC custom: (a) what procedure is used on appeals and how that procedure is determined and (b) whether successful candidates can participate as decision-makers.

[72] The Respondent submits that it is custom for the three Chiefs to decide the procedure for each election appeal. Furthermore, that the successful candidates may participate in the appeal as their "conscience may guide them in the circumstances," including as decision-makers. As I discuss in the next section, even if the Respondent establishes that these are the customs of the STC, such customs are ultimately contrary to basic rules of procedural fairness. While the content of the duty of procedural fairness is context specific and should include judicial respect for relevant custom (*Samson Cree* at para 20), the law is well established that custom cannot ignore or trump principles of natural justice or the duty of fairness (*Beardy v Beardy*, 2016 FC 383 at para 126; *Felix v Sturgeon Lake First Nation*, 2014 FC 911 at para 76; *Shirt* at para 54).

[73] While this case could be decided on issues of procedural fairness alone, both parties have asked this Court to determine the STC custom for election appeals. I agree that determining some

elements of the custom may assist and bring clarity to the community. Therefore, I will endeavour to do so where possible.

(a) *What procedure is used on appeals and how is it determined?*

[74] The evidence pertaining to STC election appeals includes affidavits from Elder Wesley, Elder Kaquitt, and Councillor Mark; the transcript of Councillor Mark's cross-examination; the Applicant's affidavit; and the transcript of the Applicant's cross-examination. The Respondent also submitted the meeting minutes of the 2012 CFN appeal; the STC's written reasons for the 2017 BFN appeal; the STC's written reasons for the 2018 CFN appeal; and partial minutes from the 2018 CFN appeal that pertain to procedure.

[75] When Councillor Mark was cross-examined on his affidavit, he was asked questions about the 2020 election appeal including processes used and what was discussed. He was asked whether anyone asked why the Applicant was not present; what the Chiefs' opening remarks were; what was discussed with respect to conflicts of interests and recusals; what discussions took place regarding the merits of the appeal; and whether the CFN was given an opportunity to respond to the appeal at the hearing. In answer to these questions, Councillor Mark stated that he did not recall even though he was present and participated in the discussions. By contrast, he was able to recall details about past elections. I draw a negative inference from what I characterize as Councillor Mark's evasive testimony.

[76] On cross-examination Councillor Mark also suggested that, pursuant to unwritten custom, the three SNN Chiefs (instead of the STC) could decide the merits of the appeal themselves if

they wished to exercise their discretion and exclude the STC. This is contrary to section 23.3 of the *2020 Election Regulations*, which states that the STC has jurisdiction to hear appeals. I note that although Councillor Mark was the Respondent's witness, the Respondent does not seem to accept this position, as they have not argued this point. This discrepancy points to a lack of consensus regarding the STC's actual custom and further impugns the reliability of Councillor Mark's evidence.

[77] Turning to the Elder's affidavits, I wish to acknowledge the important role that Elder Wesley and Elder Kaquitts play in their community as knowledge keepers. I also acknowledge that the Elders may have needed assistance completing their affidavits and that there may have been a language barrier between the Elders and those assisting them. However, upon reviewing the Elder's affidavits, I cannot assign them substantial weight. Both affidavits use the exact same language when discussing material elements of the alleged custom. Respectfully, the degree of replication calls the veracity of the affidavits into question.

[78] Finally, the objective evidence does not corroborate the Respondent's position. In the minutes of the 2012 election appeal, the STC noted that there was no BCR in place that discussed how appeals are to be conducted. In response, former Chief Labelle and Chief Wesley recommended deciding the process by motion. The minutes do not explain the contents of this motion but it appears that some elements of the procedure during the appeal were decided by the entirety of the STC, not by the Chiefs alone. The appeal was also open to the public as evidenced by the large number of observers. Likewise, the minutes indicate that Councillor Keith Lefthand recalled the open nature of the appeal process used in 2002.

[79] In addition, at the 2017 BFN appeal, the appellant and his lawyer made oral submissions. The decision letter from that appeal indicates that the appellant did not question the CEO because the appeal concerned his disqualification from candidacy, not the way the CEO carried out the election. It is also notable that the newly elected BFN Council did not participate because of the direct impact the proceedings had on them.

[80] The 2018 CFN appeal decision also indicates that the meeting was open. This appeal concerned matters such as recounts, availability of the CEO, and allegations of vote buying by unnamed individuals. The CFN Council did not speak but their lawyer was able to speak and the CFN Council recused themselves as decision-makers.

[81] In comparison, the record in the present matter indicates that the 2020 Election appeal was the first ever STC appeal to proceed in writing. The Respondent does not dispute this. While the 2017 BFN appeal began with a written protest hearing, the ultimate hearing itself was held in person. Exhibits I, M, R, and O of Jennifer Bobrovitz's affidavit indicate that for past appeals, appellants made submissions in the Stoney language, there were elders present, and that the CEO was present to answer questions. I find that this evidence sufficiently demonstrates that in-person hearings are "firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus" through a "series of events" (*Da'naxda'xw* at para 72).

(b) *Can successful candidates participate as decision-makers?*

[82] For the followings reasons, I find that there is insufficient credible evidence to determine whether successful candidates may participate as decision-makers according to STC custom.

[83] The Applicant points out that the CFN Council recused themselves in the 2017 and 2018 appeals. This supports the Applicant's position that, based on recent examples, the custom is for successful candidates to recuse themselves. However, in the 2012 appeal, the newly elected CFN Council did participate as decision-makers. There was one abstention in the 2012 election but neither party addressed this and the identity of that person is unknown.

[84] Councillor Mark stated that the successful candidates in 2018 recused themselves due to the nature of the allegations (vote buying, voter intimidation, and other corrupt practices) and because of the Chief's directions.

[85] In 2012, when the CFN Council acted as decision-makers, the nature of the allegations did not impugn the credibility of the successful candidates. They related to the possibility of a recount; spoiled ballots; the carelessness of scrutineers; eligibility requirements; and irregularities in the voters list.

[86] The 2017 BFN appeal dealt with eligibility requirements (more specifically, the residency on reserve requirement). In that appeal, the appellant did not raise issues about the character of the successful candidates. Nonetheless, the successful candidates abstained from the vote. The 2017 decision stated, "Finally, three members of the [STC] did not participate in this decision and abstained from voting on the Motion that approved the above decision. The two [BFN]

Councillors from Morley, Councillors Anthony Bearspaw and Lenny Wesley, were in direct conflict of interest since any decision made by the [STC] would have a direct impact on them." This indicates that, contrary to what the Respondent suggests, the nature of the allegations is not a determining factor.

[87] At the very best, the Applicant has established that the successful candidates recused themselves in the two most recent election appeals. However, as recent as 2012, the successful candidates did participate as decision-makers. While customs can evolve over time, and as the Court is being asked to determine part of the custom, I find that the Applicant's evidence is insufficient to establish that there is a broad general consensus amongst members of the SNN that successful candidates may not participate as decision-makers. Since the documentary evidence is conflicted, we are left only with the Applicant's evidence. Her affidavit simply states her opinion about recusals. She does not provide any additional affidavits of other Band members or Elders to corroborate her claim that recusals are custom. Furthermore, she did not cross-examine Elder Wesley or Elder Kaquitts to challenge their evidence.

[88] Ultimately, like this Court found in *Shirt*, I similarly find that there is no general consensus regarding whether newly elected Chiefs and Council can participate as decision-makers (see *Shirt* at paras 40-41). Even if I did find that such general consensus existed, for the reasons discussed below, such a custom is still procedurally unfair (*Shirt* at para 55).

[89] In my view, if members of a community disagree about the nature of a community's Indigenous laws and there is no clear indication as to what that custom is, it is best left to the

community to resolve those issues by exercising their inherent jurisdiction. This is consistent with this Court's jurisprudence, which emphasizes the importance of being as least intrusive as possible when dealing with First Nations' governance disputes (*Shirt*; *Loonskin v Tallcree*, 2017 FC 868; *Sweetgrass First Nation v Gollan*, 2006 FC 778). I urge the parties to consider the most appropriate method for determining what the SNN membership accepts as the STC custom for election appeals. It is key that the SNN come to a broad consensus amongst its members about the appropriate procedure for election appeals at the STC. For those laws to withstand scrutiny under Canadian law, they must ultimately be procedurally fair. Not only will this bring clarity for the community, but it will also avoid similar disputes in the future.

[90] In conclusion, the documentary evidence submitted by the Respondent substantiates the Applicant's position that the procedure for appeals has always been the same: the STC hears appeals in person; appellants can make their submissions in the Stoney language; elders and other CFN community members can participate; and the CEO is available to answer questions. The evidence of these procedures are found in the 2012 appeal minutes from the CFN appeal; the 2018 decision regarding the BFN appeal; and the 2018 CFN appeal decision. Respectfully, for all the reasons articulated above, I favour that evidence over the evidence of Councillor Mark, Elder Kaquitts, and Elder Wesley.

B. *Did the STC breach the Applicant's rights to procedural fairness?*

[91] It is quite fair to question the rigid application of procedural fairness principles to Indigenous laws. What constitutes "fairness" is subjective and coloured by our lived experiences

and cultures. Quite simply, what is fair in Euro-Canadian society may not be fair in Indigenous communities and vice versa. The Federal Court of Appeal dealt with this issue in *Samson Cree*:

> 19 … The appellants take issue with the Judge's conclusion that the Board, "like any other tribunal", is bound by the principles of natural justice, asserting that his findings "reflect a fixed and ethnocentric application of the terms 'natural justice and fairness'"... In my opinion, this submission misjudges the doctrine of procedural fairness and mischaracterizes the Judge's ruling.
>
> 20 The jurisprudence recognizes that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case"... The doctrine is flexible and context-specific, as "[a]ll of the circumstances must be considered in order to determine the content of the duty of procedural fairness"… Therefore, while the Board is indisputably subject to the duty of fairness,… the content of this duty is tailored to the particular circumstances and context of the Board. This context can and should include judicial respect for relevant custom.
>
> 21 …The Federal Court jurisprudence concerning procedural fairness in the context of custom Band elections demonstrates that the content of the duty in this context must take into account and respect relevant custom of the Band in question...
>
> [Citations Omitted.]

[92] Thus, *Samson Cree* provides some space for Indigenous laws or customs to be measured against a culturally appropriate yardstick. Of course, the difficulty in this case is that the parties disagree on what that custom is. In light of my finding that it is CFN and STC custom to hold in-person election appeals, I find that the Applicant’s rights to procedural fairness were breached. It is also helpful and necessary to assess what the process was in other SNN Nations’ appeals.

(1) Was it procedurally unfair that the newly elected CFN Council participated as decision-makers?

[93] In *Therrien (Re)*, 2001 SCC 35 [*Therrien*], the Supreme Court of Canada "commented on the basic elements associated with procedural fairness. That is, the right to be heard and the right to an impartial hearing" (*Balfour v Norway House Cree* Nation, 2006 FC 213 at para 67). At paragraph 82 of *Therrien*, the Supreme Court stated:

> Essentially, the duty to act fairly has two components: the right to be heard (the *audi alteram partem* rule) and the right to an impartial hearing (the *nemo judex in sua causa* rule). The nature and extent of the duty may vary with the specific context and the various fact situations dealt with by the administrative body, as well as the nature of the disputes it must resolve… Thus, in *Baker*, *supra*, at paras. 23-28, L'Heureux-Dubé J. specifically pointed out that several factors have been recognized in the jurisprudence as relevant to determining what is required by the duty of procedural fairness in a given set of circumstances. While she did not provide a comprehensive list of such factors, she referred to: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) respect for the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures. It is from this perspective that I will now consider the allegations of breach of the rules of procedural fairness made by the appellant in the instant case.

[94] The Supreme Court went on to determine whether the right to be heard and the right to an impartial hearing had been breached in light of the degree of procedural fairness owed according to the *Baker* factors.

[95] The Respondent says that two of the most important *Baker* factors in this case are the nature of the statutory scheme and the choice of the procedure made by the STC. In my view, the statutory scheme in question has not been established with any degree of certainty. While the *2020 Election Regulations* state that the STC hears appeals, it does not state who makes up the

STC or when those members become part of the STC. While custom may typically fill this gap, there is insufficient evidence to indicate that STC custom is for successful candidates to immediately form part of the STC and participate as decision-makers, particularly in matters that have a direct bearing on them. This finding also means that the exception to the *nemo judex* principle has not been made out. The 'statutory scheme' authorizing a breach of the *nemo judex* principle is not complete without evidence that this is in fact the custom of the STC.

[96] Furthermore, while the STC "should be granted significant latitude to choose its own procedures… basic procedural safeguards must be in place" (*Samson Cree* at para 22, emphasis added). Past case law indicates that the minimum degree of procedural fairness owed to parties in custom election cases included notice, an opportunity to make submissions/give a response, and full and fair consideration of their submissions. The Court noted that an oral hearing is not always necessary to satisfy these requirements (*Shirt* at paras 53-57; *Samson Cree* at 22). However, for the reasons discussed below, I conclude that procedural fairness did require an oral hearing in this case, whether in-person or online.

[97] The Respondent submits that these basic procedural safeguards were afforded to the Applicant. I agree. However, neither *Shirt* nor *Samson Cree* dealt with reasonable apprehension of bias on the part of a decision-maker. Consistent with the *nemo judex* principle, I find that another minimum requirement of procedural fairness is an impartial decision-maker (see also *Baker* at para 45).

[98] One of the circumstances where the principle of *nemo judex* will be violated is where a decision-maker has or is perceived as having a pecuniary or personal interest, either direct or indirect, in the outcome of the hearing before them (*Pearlman* at 883). In the present case, I find that the CFN Council had both.

[99] The test for determining if a reasonable apprehension of bias exists is whether a right-minded person, applying themselves to the question and obtaining the required information, would think it is more likely than not that the decision-maker did not decide fairly (*Baker* at para 46; *Johnny v Adams Lake Indian Band*, 2017 FCA 146 at para 43).

[100] I agree with the Applicant that the reasoning in *Shotclose* can be applied to this case. In both cases, Chief and Council participated in a decision that had a bearing on their terms in office. While the successful CFN Council were not the sole decision-makers in this case (unlike *Shotclose*), this does not negate a reasonable apprehension of bias. I agree that in this case "[a]n informed individual viewing the matter realistically and practically would conclude that the Chief and Council were parties to the controversy that had direct interests, including a pecuniary interest, in the outcome" (*Shotclose* at para 96). The STC said as much itself in the 2017 BFN decision, which was as much "technical and/or procedural" in nature as the present appeal. It should not be open to successful candidates to decide whether the election, which affords them financial benefits, prestige, and authority, is invalid.

[101] In the alternative, the Respondent submits that the Court should dismiss this application because even if all four of the successful CFN candidates did not vote, the STC would have still

dismissed the appeal. In my view, this is speculative. It is difficult to determine whether the voting would have occurred differently had the CFN members not been present.

[102] This breach of procedural fairness alone is enough to grant this judicial review. However, since I have found that it is STC custom to hold an in-person hearing where the CEO is present to answer questions, I will briefly consider the Applicant's other grounds related to procedural fairness.

(2) Was it unfair that the Applicant was denied an oral hearing?

[103] The *2020 Election Regulations* and the custom of in-person hearings makes up the 'statutory scheme' of the STC. This statutory scheme, coupled by the legitimate expectation of the Applicant, weighs in favour of a high degree of procedural fairness. Further, the nature of the Decision was of particular significance given that it had a bearing on STC and CFN governance and leadership. While the Applicant was not a candidate herself, as a member of the CFN, the outcome of the decision was of particular importance to her and the community as a whole. As such, I find that the Applicant should have been afforded an oral hearing, consistent with the custom of the STC.

[104] I am not persuaded that the Applicant's appeal was "technical and/or procedural" in nature and thus, could proceed by writing. The CEO herself stated that the Applicant's first ground fell under section 23.1(b) of the *2020 Election Regulations* (corrupt practice). As already mentioned, even if the appeal was "technical" in nature, it was no more "technical" than the 2017 BFN appeal, which proceeded in person according to STC custom. I also note that the STC was

prepared to hear in-person oral submissions from each of the 13 appellants at the 2018 CFN hearing.

[105] I acknowledge the exceptional circumstances that the CFN found themselves in during the election appeal. The community was battling the COVID-19 pandemic and I have no doubt that their top priority was ensuring the safety of their community members. However, the STC could have easily accommodated the Applicant's request for a virtual oral hearing. The perceived merits of an appeal should not dictate the degree of procedural fairness an appellant is afforded.

(3) Was it unfair that the Applicant was denied an opportunity to cross-examine the CEO?

[106] For the reasons set out in paragraphs 103 to 105, I also find that the Applicant should have been afforded an opportunity to ask the CEO questions about her affidavit.

[107] Furthermore, the closer the administrative process is to a judicial process the more likely the procedural protections afforded will be similar to those owed in a formal trial (*Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 30, 69 DLR (4th) 489). The documentary evidence shows that the custom of the STC is a formal meeting consisting of fifteen decision-makers where appellants are expected to make submissions and answer questions. I also note that in past appeals, legal counsel has also been present. Additionally, there is no right of appeal of the STC's decision, which results in the need for a higher degree of procedural fairness. For these reasons, I find that the STC appeal process has a judicial

component to it and that “there is some level of formality and testing of the evidence required in the hearing process” (*Lecoq v Peter Ballantyne Cree Nation*, 2020 FC 1144 at para 46).

VII. Conclusion

[108] The application for judicial review is allowed. The appeal process was not held in accordance with CFN and STC custom and the Applicant’s rights to procedural fairness were violated. The matter is remitted to the STC for re-determination. That hearing must take place in accordance with established STC custom and adhere to principles of procedural fairness. The CFN leadership may not participate as decision-makers.

[109] Only the Applicant has made fulsome submissions on costs. It is preferable to allow the parties to make further submissions, taking the outcome of the application into account (*Bertrand* at 104).

JUDGMENT in T-678-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted to the STC for re-determination of the Applicant's appeal, which hearing shall be held by no later than May 16, 2022. The hearing will be held in-person or virtually as the STC may decide.
2. The CFN representatives shall not participate as members of the STC for the purposes of determining the Applicant's appeal.
3. The matter of costs will be determined pursuant to the following timeline:
    a. The Applicant will serve and file their written submissions on costs with the Court by 4:00 p.m. (EST) on April 18, 2022; and
    b. The Respondent will serve and file their written submissions on costs with the Court by 4:00 p.m. (EST) on May 6, 2022.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-678-21
STYLE OF CAUSE:	MURIEL LABELLE v CHINIKI FIRST NATION
PLACE OF HEARING:	HELD BY VIDEOCONFERNCE
DATE OF HEARING:	OCTOBER 25, 2021
JUDGMENT AND REASONS	FAVEL J.
DATED:	APRIL 1, 2022

APPEARANCES:

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