Federal Court Cour fédérale

Date: 20180621

Docket: T-1808-17

Citation: 2018 FC 648

Ottawa, Ontario, June 21, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

JOE PASTION

Applicant

and

DENE THA' FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Joe Pastion, appealed the results of the recent election for Chief of the Dene Tha' First Nation to that Nation's Election Appeal Board [the Board]. Prior to the election, Mr. Pastion held the position of Chief. He lost his bid for re-election to James Ahnassay, who won the election with 158 votes. Mr. Pastion was the runner-up with 129 votes, losing by a total of 29 votes.

[2] The basis of Mr. Pastion's appeal was that one candidate, Mr. Didzena, who received 44 votes, was ineligible, as he was not ordinarily resident on one of the Nation's reserves. Mr. Pastion complained about this situation to the Board. The Board rejected the complaint, finding that there had been no "infraction of the regulations" and that, even assuming there was such an infraction, it "did not significantly affect the results of the election."

[3] Mr. Pastion now seeks judicial review of the decision of the Board. He argues that the number of votes received by Mr. Didzena was greater than the difference between the number of votes received by himself and by Mr. Ahnassay. In election law, this is often called the "magic number" test. Mr. Pastion argues that because the number of votes received by an ineligible candidate exceeded the "magic number," one cannot be sure that the results of the election would have been the same, had the name of that ineligible candidate not appeared on the ballot.

[4] I am dismissing this application, because a fair reading of the Board's decision reveals that it did not accept that Mr. Didzena was ineligible. It rather concluded that any challenge to his eligibility should have been pursued at an earlier stage of the process. Thus, the Board made a reasonable decision when it rejected Mr. Pastion's appeal.

[5] In order to explain my reasons for reaching this conclusion, it is necessary to step back and to review the basic principles governing the intervention of the Federal Court in First Nations governance matters. I will discuss the nature of the election regulations made by the Dene Tha' First Nation. Next, I will explain why reasonableness is the standard of review in this

case. I will then be in a position to analyse the decision made by the Board in Mr. Pastion's appeal and explain why it was reasonable.

I. Applicable Law

[6] The legal rules governing this case are found in the *Dene Tha' First Nation Election Regulations 1993* [Election Regulations]. It was adopted by the Dene Tha' First Nation.

[7] No specific provision of Canadian law empowers the Dene Tha' First Nation to enact those regulations. Rather, the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] states, in section 2, that, for certain First Nations such as the Dene Tha', the council is "chosen according to the custom of the band." As we will see below, the reference to "custom" in the *Indian Act* must be understood in a broad sense and refers to what is more properly called Indigenous law.

[8] Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land. Chief Justice McLachlin of the Supreme Court of Canada wrote, more than fifteen years ago, that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty" (*Mitchell v MRN*, 2001 SCC 33 at para 10, [2001] 1 SCR 911). In a long line of cases, from *Connolly v Woolrich* (1867), 11 LCJ 197, 17 RJRQ 75 (Que SC), aff'd (1869), 17 RJRQ 266, 1 CNLC 151 (Que QB), to *Casimel v Insurance Corp of BC* (1993), 106 DLR (4th) 720 (BCCA), Canadian courts have recognized the existence of Indigenous legal traditions and have given effect to situations created by Indigenous law, particularly in matters involving family relationships (for a survey, see Sébastien Grammond, *Terms of Coexistence:*

Indigenous Peoples and Canadian Law (Toronto: Carswell, 2013) at 374-385; see also *Alderville Indian Band v Canada*, 2014 FC 747).

[9] Despite the occasional recognition of Indigenous law by Canadian courts, the overall tendency was, for a long period, one of denial and suppression (see Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2018) 51 UBC L Rev 105). This was particularly apparent in the domain that is directly relevant to this case, namely community governance. As early as 1869, Parliament enacted provisions allowing the government to suppress traditional systems of governance and replace them with elected councils to govern the affairs of communities (*An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6, s 10). In technical terms, this was accomplished through the addition of a First Nation's name to a regulation that contains the names of all First Nations which must conduct elections according to the *Indian Act*. Several First Nations resisted the imposition of elected governance or retained their traditional systems in parallel to the elected band councils (see, for example, the situation described in *Logan v Styres* (1959), 20 DLR (2d) 416 (Ont HC)).

[10] There has recently been a renewed interest in Indigenous legal traditions. They are the object of academic research and teaching (see, for example, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitution*]; *Indigenous Law and Legal Pluralism*, a special issue of the McGill Law Journal, vol 61 no 4 (2016); Hadley Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018)). The Truth and

Reconciliation Commission of Canada pointed out that the recognition of Indigenous peoples' power to make laws is central to reconciliation (*Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 202-207). And the United Nations' *Declaration on the Rights of Indigenous Peoples* (UN GA Res 61/295, 61st Sess, Supp No 53 (2007)) echoes these aspirations in Article 34:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

[11] Over the last forty years or so, the federal government has recognized and supported the desire of First Nations to "revert to custom," by removing their names from the list of First Nations that must hold elections according to the *Indian Act*. The government is prepared to do so, however, only where a First Nation adopts a "custom" that provides for regular elections. In practical terms, those First Nations are allowed to vary the parameters of the electoral process set by the *Indian Act*, but must still adhere to democratic principles.

[12] Despite the restrictions flowing from government policy, many First Nations have enacted laws regarding various aspects of their governance, including elections. One aspect of that law-making power must be emphasized. As Justice Mandamin of this Court explained:

> The capacity of [the First Nation] to make laws concerning matters of leadership and governance are not derived from the *Indian Act* or other statutory power. Rather it is a result of the exercise of the First Nation's aboriginal right to make its own laws concerning governance.
>
> (*Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 34 [*Gamblin*]; see also *Canadian Pacific Ltd v Matsqui Indian Band*, [2000] 1 FC 325 (CA) at para 29)

[13] Hence, what the *Indian Act* describes as "custom" is often the written product of public deliberation within a First Nation. As Professor Borrows notes, Indigenous peoples are fully entitled to use the written form to express their laws, and that does not make those laws any less Indigenous (Borrows, *Indigenous Constitution* at 42-44; see also *Henry v Roseau River Anishinabe First Nation*, 2017 FC 1038 at para 13 [*Henry*]; Naiomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and not Later" (2016) 67 UNBLJ 211 at 232). Perhaps the phrase "Indigenous legislation" would be more apt than "custom" to describe the Election Regulations.

[14] In enacting legislation for the selection of its leadership, a First Nation may, if it so chooses, rely on the mechanisms of Western democracy. It may also provide for a mechanism that blends Western democracy and Indigenous tradition. For example, in this case, the Election Regulations provide that the nomination of candidates must be approved by a Senate of Elders, and members of that Senate of Elders may also be invited to form part of an election appeal board. Needless to say, the manner in which various sources of law are blended is a matter for each First Nation to decide and this Court should respect that choice.

II. The Role of the Federal Court in First Nation Elections

A. *Jurisdiction*

[15] The parties are in agreement that this Court has jurisdiction to review decisions of the Board. Indeed, there is a long line of cases holding that this Court has jurisdiction to review decisions regarding the validity of First Nation elections, including where the decision is made

by a body created by the election laws of the First Nation, such as the Election Appeal Board in this case (see, for example, *Canatonquin v Gabriel*, [1980] 2 FC 792 (CA); *Ratt v Matchewan*, 2010 FC 160 at paras 96-106; *Gamblin* at paras 29-63). In exercising that jurisdiction, this Court has developed an expertise in adjudicating First Nation governance disputes. It also offers mediation services or other processes that allow for the expression of a broader set of Indigenous laws and principles in the settlement of such disputes (see *Henry* at paras 18-37).

B. *Standard of Review*

[16] This brings me to the principles guiding this Court when it exercises its supervisory jurisdiction over Indigenous decision-making bodies.

[17] Mr. Pastion argues that this Court should review the Board's decision on a standard of correctness, as the issues involved are questions of law. In other words, I would have to substitute my opinion for that of the Board. I am unable to accept that submission. The standard of review is reasonableness, not correctness.

[18] For the last forty years or so, the Supreme Court of Canada has directed courts to show deference towards administrative decision-makers when reviewing their decisions (*CUPE v NB Liquor Corporation*, [1979] 2 SCR 227). In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Court decided that this means that in most cases, reviewing courts must not set aside an administrative decision unless it is shown to be unreasonable. In particular, "a court must presume, in reviewing a decision in which a specialized administrative tribunal has interpreted and applied its enabling statute or a statute with a close connection to its function,

that the reasonableness standard applies" (*Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at para 15, [2017] 2 SCR 488). This is often known as the "home statute" presumption.

[19] Briefly stated, the main rationale for deference is to give effect to the legislature's intent that certain issues would be decided by administrative bodies. If courts, on judicial review, were to substitute their own decisions, the legislature's intent would be thwarted (*Dunsmuir* at para 30). Expertise is another rationale frequently mentioned. If the legislature conferred jurisdiction over a specific issue to an administrative body, it is often because that body is composed of persons who have an in-depth knowledge of the issue or are expected to develop such knowledge as they repeatedly adjudicate the issue (*Dunsmuir* at paras 49, 54, 55).

[20] These rationales apply with equal, if not more, force when courts are called upon to review decisions made by Indigenous bodies. Indeed, since *Dunsmuir*, the Federal Court of Appeal has repeatedly held that decisions of First Nation election appeal bodies must be reviewed on a standard of reasonableness, including when they are interpreting the provisions of an election code: *Orr v Fort McKay First Nation*, 2012 FCA 269 at paras 8-12; *D'Or v St. Germain*, 2014 FCA 28 at paras 5-7; *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 at para 24.

[21] It may be useful to examine more closely the reasons that mandate deference towards Indigenous decision-makers tasked with applying Indigenous laws.

[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.
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> (*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.

[24] Indigenous laws often entrust Elders with certain decision-making powers. In this case, the Election Regulations provide that the nomination of candidates must be approved by a Senate of Elders. Elders may also be invited to be members of an Election Appeal Board. Indeed, the Board convened to address Mr. Pastion's appeal was composed of three Elders.

[25] In its Report, the Royal Commission on Aboriginal Peoples had this to say about Elders:

> Elders are generally, although not exclusively, older members of the community. They have lived long and seen the seasons change many times. In many Aboriginal cultures, old age is seen as conferring characteristics not present in earlier years, including insight, wisdom and authority. Traditionally, those who reached old age were the counsellors, guides and resources for the ones still finding their way along life's path.
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> (*Report of the Royal Commission on Aboriginal Peoples*, vol 4, *Perspectives and Realities* (Ottawa, 1996) at 103)

[26] When the power to make a decision is entrusted to Elders, this is an additional factor militating in favour of the standard of reasonableness. Indeed, deference is a manifestation of the respect due to Elders in most Indigenous societies.

[27] I wish to make clear that these justifications for deference apply with equal force when the question at issue involves the interpretation of written Indigenous law. In several recent cases, the Supreme Court of Canada has established a presumption that reasonableness is the standard of review where a decision-maker is interpreting his or her "home statute" (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 21, [2013] 3 SCR 895). In this case, the Election Regulations are the Board's "home statute." The presumption in favour of reasonableness is rebutted only in exceptional circumstances. No such circumstances exist in this case. It cannot be said that the interpretation of the Election Regulations is a question of importance for the Canadian legal system as a whole.

[28] One particular aspect of deference must be emphasized. When deciding whether Indigenous decision-makers have made an unreasonable decision, reviewing courts should read their reasons generously, supplementing any apparent omission by looking to the record (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). Judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*., 2013 SCC 34 at para 54, [2013] 2 SCR 458).

[29] For those reasons, I conclude that the Board's decision must be reviewed according to a standard of reasonableness.

III. Analysis of the Board's Decision

[30] With those principles in mind, I now turn to the decision made by the Board to reject Mr. Pastion's appeal. I find this decision to be reasonable. When one reads that decision carefully, it becomes clear that the Board's main ground for rejecting the appeal was that it was too late to challenge Mr. Didzena's eligibility. That is a reasonable interpretation of the Election Regulations.

A. *What Did the Board Decide?*

[31] The parties do not agree about what the Board actually decided. Mr. Pastion says that the Board considered that Mr. Didzena was ineligible, but then came to the conclusion that the presence of Mr. Didzena's name on the ballot did not significantly affect the result of the election. The Nation, in contrast, says that the Board merely noted that Mr. Didzena's eligibility had not been challenged according to the procedure set forth in the Election Regulations. The Board's reasoning with respect to whether the result was significantly affected was, therefore, simply an alternative argument that justified the Board's dismissal of Mr. Pastion's appeal.

[32] In my view, the Nation correctly describes the reasoning of the Board. Indeed, this is a case where the teachings of the *Newfoundland Nurses* case are particularly relevant.

[33] To understand the Board's decision, it is useful to refer at the outset to two provisions of the Election Regulations. Section 1(6) provides that the Electoral Officer shall post a notice of the elections, a notice of nomination and a list of electors. According to the definitions found in

the Election Regulations, an elector or a candidate must be ordinarily resident on one of the Nation's reserves. Section 1(6) then goes on:

> […] Determination will be made by the Council as to the residence of the electors and the candidates prior to the election and the decisions of the Council will be final. This determination will take the form of the Council's approval of the eligible electors list. […]

[34] In addition, section 1(8) sets forth a procedure for challenging decisions made at nomination meetings:

> Anyone wishing to appeal the procedures affecting the outcome of the nomination process shall do so in writing to the electoral officer. Such an appeal will be considered if received immediately after the nomination meeting date and responded to prior to the ensuing scheduled election.

[35] Bearing these provisions in mind, we may now turn to the relevant portion of the Board's decision concerning Mr. Didzena's eligibility, which reads as follows:

> The Applicant stated in his Affidavit an Elector questioned Mr. Didzena on his place of residence on October 12, Chateh's Chief Candidates Forum of his residency and was not eligible to be a candidate for the position of Chief. The Applicant and others present heard the Elector's concerns yet omitted to do anything about it, nor did any other Candidate or Nation Member take steps to address this concern.

[36] The Board then quoted section 1(8) of the Election Regulations and concluded: "The Appeal Board agreed the ineligibility of Mr. Didzena was made public at all three community forums."

[37] It is obvious that the gist of the Board's decision is that any challenge to Mr. Didzena's compliance with the residency requirement should have been the subject of an immediate nomination appeal, pursuant to section 1(8) of the Election Regulations. In this context, the Board's emphasis on the fact that the allegations regarding Mr. Didzena's residence were widely publicized shows that the Board was of the view that by not objecting immediately, members of the Nation consented to Mr. Didzena's nomination or waived any possibility of challenging it.

[38] The Board's decision is relatively brief and is perhaps not couched in the clearest of terms. In this regard, the phrase "the ineligibility of Mr. Didzena" must be understood as a reference to "allegations regarding the ineligibility of Mr. Didzena."

[39] Thus, the main reason behind the decision of the Board is that any challenge to Mr. Didzena's eligibility had to be brought under section 1(8). This not having been done, such a challenge is now foreclosed.

B. *No Infraction*

[40] This brings me to the crucial issue: is the Board's conclusion that there was "no infraction" to the Elections Regulations reasonable?

[41] I must not approach that issue by setting out my own answer to the question and measuring the Board's decision by that standard. Rather, I must look at the Board's decision in a generous spirit and ask myself whether that decision is justifiable.

[42] In performing that analysis, I must bear in mind that the Board has first-hand knowledge of the way in which the Nation has conducted elections. I must also recognize that it is common for First Nations election laws to provide for a formal nomination meeting.

[43] Thus, it was reasonable for the Board to decide that a challenge to the nomination process had to be brought immediately after the nomination meeting and not after the election. This is precisely what is contemplated by section 1(8) of the Election Regulations.

[44] This makes even more sense in cases where the challenge is based on the residency requirement. As we saw above, the definitions section of the Election Regulations provides that determinations regarding the residency requirement are made by the Nation's Council and that those determinations are final. No one has alleged that Mr. Didzena's name was not on the list of electors approved by Council and was therefore not eligible to run. I note, in this regard, that Mr. Pastion was Chief, and thus a member of Council, when the Council was supposed to approve the list of electors.

[45] One could object that section 8(5)(b) of the Election Regulations expressly provides that the fact that "a candidate who ran in the election was ineligible" is a ground for appealing the results. One could argue that the Board's interpretation of the Election Regulations deprives section 8(5)(b) of any effect, which is contrary to the canons of interpretation. However, that does not make the Board's decision unreasonable. Where two interpretations of a written law are possible, choosing one over the other is not unreasonable.

[46] I would also add that such an argument assumes a degree of coherence and internal logic that is, regrettably, not always present in First Nations election laws. Nevertheless, this Court should be mindful that reasonableness remains the standard of review and resist the temptation of imposing its own interpretation of the Election Regulations. When there is an apparent inconsistency, an Indigenous decision-maker such as the Board is in a better position than this Court to understand the purpose and logic of the Indigenous law in question and to select an interpretation that will be found legitimate by the members of the community involved.

C. *Magic Number*

[47] Given the foregoing conclusion, it is not strictly necessary for me to decide whether the Board's alternative ground for dismissing Mr. Pastion's appeal was reasonable. Nevertheless, both counsel suggested that some guidance from the Court would be useful. I therefore propose to describe the opposing theses and to provide my assessment of the Board's reasons in this regard. For the purposes of this discussion, I will assume what I have just rejected, namely, that Mr. Didzena was ineligible and that votes cast in his favour constituted an irregularity.

[48] Mr. Pastion's argument is that the Board erred in not applying what is known in Canadian election law as the "magic number" test. This means that when a court has to determine whether irregularities have affected the result of an election, it must focus on the difference between the number of votes in favour of the winner and those of the runner up – this is the "magic number." If the number of votes invalidly rejected or allowed exceeds the "magic number," there is a possibility that the result is affected and the court should normally annul the election. The "magic number" test has been applied by this Court and other courts tasked with reviewing the

results of elections in Indigenous communities (see, for example, *Lewis v Gitxaala Nation*, 2015 FC 204; *Omoth v Ghostkeeper*, 2005 ABQB 671; *McNabb v Cyr*, 2017 SKCA 27).

[49] In *Opitz v Wrzesnewskyj*, 2012 SCC 55, [2012] 3 SCR 76 [*Opitz*], however, the majority of the Supreme Court of Canada cast doubt on the validity of the "magic number" test:

> [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.

[50] The Court in *Opitz* also remarked that the annulment of an election is an extraordinary remedy that disenfranchises, in a sense, the whole population entitled to vote (at para 48). It also said that the system should not be designed so as to encourage post-election litigation (at para 49), which, if too frequent, could erode the public's confidence in the electoral system (at para 2). These comments, made in the context of a federal election, are equally valid in the context of First Nation elections.

[51] American courts have sometimes applied an alternative to the "magic number" test. It is called "proportional deduction." When a number of votes have been illegally cast, votes are deducted from each candidate in proportion to the overall number of votes received by each candidate in the relevant polling section. Thus, rather than assuming that all invalid votes would have been in favour of the winner, proportional deduction assumes that the distribution of those votes would mirror the actual, observable distribution. Yet, proportional deduction has also been criticized, precisely because its underlying assumption may prove to be invalid in the circumstances of a specific case (Ilana Ludwin, "Electoral Errors in Etobicoke: Issues & Implications" (2013) 7 JPPL 339 at 355-356; Steven F. Huefner, "Remedying Election Wrongs" (2007) 44 Harv J on Legis 266 at 282; but see Kevin J. Hickey, "Accuracy Counts: Illegal Votes in Contested Elections and the Case for Complete Proportionate Deduction" (2008) 83 NYUL Rev 167).

[52] In the current state of the law, it is difficult to state propositions of general application. The most that can be said is that, in the wake of *Opitz*, the "magic number" test is no longer mandatory. The real question is whether, in the circumstances of the case, the result of the election was significantly affected. In future cases, expert evidence could be adduced to show, on the basis of reasonable assumptions, the statistical probability of a different outcome.

[53] A number of features of this case render it somewhat atypical, making my task somewhat easier. First, this is not a case, like *Opitz*, where it is alleged that votes were illegally cast. In those cases, given the secrecy of the ballot, we do not know for which candidate these illegal votes were cast. In this case, in contrast, we know that the problematic votes were in favour of

Mr. Didzena. Instead of deducting these votes from the winner, the Court is invited to allocate them to the runner-up. Second, most election cases, and the debate between the "magic number" test and proportional deduction, appear to be based on the assumption that the overwhelming majority of votes are concentrated on two, or perhaps three main candidates. In this case, there were eight candidates who received a number of votes within the same order of magnitude. Obviously, the probability that the result is affected is much smaller when votes are spread over a larger number of candidates. Lastly, contrary to cases such as *Opitz*, this Court is sitting in judicial review and not on appeal. Deference is due to the Board.

[54] I can now turn to the Board's reasons, which read, in their relevant part:

> In addition, the votes received by Fred Didzena were 44 in total, but after careful review the Appeal Board cannot determine with certainty on how and where these votes would have been allocated by the other candidates and such would not have played a significant role as to the outcome of the election.

[55] These reasons must be assessed globally, bearing in mind the reasons for deference towards Indigenous decision-makers. The Board was composed of three Elders of the Dene Tha' First Nation. They must have intimate knowledge of the political situation of the Nation. They must know the candidates, their programs and the sources of their support among the Nation. For the result of the election to be affected, Mr. Pastion must have been the second choice of at least 30 of the 44 electors who voted for Mr. Didzena. The three Elders who composed the Board are in an infinitely better position that this Court to determine if there was any likelihood of this happening. Their decision should be respected.

[56] The Board's statement that it "cannot determine with certainty" who was the second choice of the electors who voted for Mr. Didzena may, if taken in isolation, suggest that the Board applied the wrong test, because an applicant need not bring conclusive evidence that electors would have voted in his or her favour. However, this would be precisely the kind of line-by-line scrutiny proscribed by *Newfoundland Nurses*. Reading the reasons as a whole, I am convinced that the Board understood what it had to decide, namely, in its own words, whether the incident "played a significant role as to the outcome of the election."

[57] The Board did not explain why it made that decision, apart from saying that it was reached after "careful review." Nevertheless, even in the absence of statistical evidence, the facts of the case are such that the conclusion of the Board is "within a range of possible, acceptable outcomes" (*Dunsmuir* at para 47). There were eight candidates who received between 27 and 158 votes, with a total of 693 votes cast. Mr. Pastion received 19% of the votes. To change the result of the election, at least 30 of the 44 electors who voted for Mr. Didzena needed to vote for Mr. Pastion, which would represent 68% of those electors. It is highly unlikely that those who voted for Mr. Didzena would have concentrated their votes so strongly on Mr. Pastion. Hence, the Board's decision was within the range of reasonable outcomes.

IV. Conclusion

[58] The Board's decision, when read globally and fairly, was that it was too late to challenge Mr. Didzena's eligibility. It also provided an alternative reason for rejecting the appeal, which is that even if there was an infraction, it did not significantly affect the results of the election. That decision was reasonable. Hence, the application for judicial review will be dismissed.

JUDGMENT IN T-1808-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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