Federal Court  Cour fédérale

Date: 20210617

Docket: T-1440-20

Citation: 2021 FC 618

Ottawa, Ontario, June 17, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**ALEXANDER FIRST NATION,
ALEXANDER FIRST NATION COUNCIL,
GEORGE ARCAND JR., KEVIN ARCAND,
CHRIS ARCAND, MARTY ARCAND,
HEATHER JENNINGS, AUDRA ARCAND,
AND SCOTT BURNSTICK**

Applicants

and

**KURT BURNSTICK, IVY BRUNO,
ERIC ARCAND, KAREN KOOTENAY,
JACOB THOMPSON, MICHEAL CALLIHOO,
TAMMIE BRUNO, KAILEY AMOR,
KYLA BRUNO, RILEY HARRISON,
LEO KEITH, YVONNE AMOR, AND LYNN ARCAND**

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of the November 1, 2020 decision of an Appeal Board, appointed pursuant to the *Alexander First Nation Band Custom Election Regulations*

[Election Regulations], with respect to the September 25, 2020 Alexander First Nation [AFN] election for Chief and Council [Election]. The Appeal Board found that the candidates for Chief and Council had not been elected into office in accordance with Election Regulations, therefore a new election was required.

Background

[2] The AFN is a band within the meaning of the *Indian Act*, 1985 RSC c I-5. Its elections are governed by the Election Regulations, which were effected by the AFN in 1987.

[3] The Applicants are the AFN, the AFN Council, and the individual Chief and Councillors elected on September 25, 2020. The named Respondents are the appellants in the Election appeals. However, only three of the Respondents – Kurt Burnstick, Ivy Bruno, and Eric Arcand – participated in the judicial review.

[4] Pursuant to the Election Regulations, Chief and Council is composed of one Chief and six Councillors who hold office for three years. They are required to call an election at least thirty days before an election would ordinarily be held (i.e. the end of their term of office). At that time, the Chief and Council are also required to appoint an electoral officer and members of the election appeal board. The appeal board is to be composed of individuals who are not members of the AFN.

[5] On August 25, 2020, the former AFN Chief and Council appointed Loretta Pete Lambert as electoral officer [Electoral Officer] and three Appeal Board members.

[6] The Election was scheduled during the Covid-19 pandemic. In advance of the Election, the Electoral Officer posted the Covid-19 precautions that would be in place during voting. She also made several adjustments to the voting process. Most significantly for the purposes of this judicial review, the Electoral Officer decided to use an electronic voting tabulation machine to count ballots for Councillors to minimize contact with ballots and reduce the need for people to gather for an extended period to count ballots. This meant that although the Election Regulations state that each ballot must be marked by an "x" placed beside the name of the candidates for whom the elector intends to vote, electors were instead instructed to indicate their choice by filling in an oval by the names of their chosen candidates.

[7] The Election Regulations also define "electors", that is, those persons who are eligible to vote. This includes that an elector must be 21 years old, a member of the AFN, and be ordinarily resident or have resided on AFN reserve land for at least one month. Any person who disputes the name of an elector included on a voter's list or who believes their name should be included on the voter's list may apply to the electoral officer for a determination of the matter at any time up to 8:00 p.m. on the date of the election. The Election Regulations also state that the electoral officer shall not be bound by any rules of evidence and their decision shall be final and binding.

[8] Voting was conducted on September 25, 2020 at the AFN Community Centre. Sixty-three potential electors who presented themselves at the Community Centre, but who were not on the voter's list, were permitted to make statutory declarations attesting to their residence. These statutory declarations were declared before AFN's in-house counsel, Mr. Brooks Arcand-Paul, a commissioner of oaths.

[9] When voting was concluded, the ballots for Chief were counted by hand while the ballots for Councillors were tabulated by machine. The Electoral Officer prepared a Statement of Election Results, dated September 25, 2020. Of the 533 ballots cast, three ballots for Chief and two ballots for Councillors were rejected. Mr. George Arcand was elected Chief with 308 votes, the Respondent Kurt Burnstick received 208 votes and, a third candidate received 37 votes. Kevin Arcand (249 votes), Chris Arcand (218 votes), Marty Arcand (167 votes), Heather Jennings (165 votes), Audra Arcand (164 votes), and Scott Burnstick (158 votes) were elected as Councillors. The Respondents Eric Arcand and Ivy Bruno received 86 and 73 votes respectively. The Statement of Results also states that the election is "Effective immediately for a three year term ending September 25, 2023".

[10] Following the Election, thirteen appeals were filed with the Appeal Board. On October 23, 2020, the Appeal Board sent letters to each appellant, advising them that the Appeal Board had scheduled an "Appeal Hearing Date" for October 28, 2020 at a specified time. The letters indicated the hearing location and gave appellants the opportunity to appear in person or via Zoom. There is little other evidence in the Certified Tribunal Record [CTR] about the Appeal Board's process. There are no notes, recordings or transcripts of any hearings or proceedings conducted on October 28, 2020 or otherwise.

[11] The Affidavit of Mr. Arcand-Paul affirmed on May 5, 2021 [Arcand-Paul Affidavit] attaches as Exhibit I notes from an October 22, 2020 telephone call he had with the then Appeal Board Chair, Ms. Sherri Turner (who later resigned and was replaced by Ms. Kellie Wuttunee). These notes indicate that the Chair advised Mr. Arcand-Paul that thirteen appeals had been filed,

they were scheduled to be heard on October 28, 2020, and that the Electoral Officer would be interviewed. The notes record that Mr. Arcand-Paul asked about the content of the appeals, and the Chair's response with respect to sharing the nature or issue of the appeals was "Not going to do that at this time. Legal counsel advised against it". As to sharing of appeal information with the community, the notes record "No to sharing information with the community. Appeal board would like to respect the impartiality. Invites to the hearings for the relevant parties will be out tomorrow …". And, as to whether AFN was able to submit written submissions, the recorded response is "No, not appropriate".

[12] On October 23, 2020, the Chief and Council distributed an "Election Appeal Update". The update contains much of the same information as in the Arcand-Paul notes from the telephone call the day before with the Appeal Board Chair:

> ELECTION APPEAL UPDATE
>
> October 23, 2020
>
> The Chief and Council have received an update regarding the election appeal. Below is a summary of the information provided:
>
> 1) There are **13 appeals** before the Electoral Appeal Board.
>
> 2) The hearings are tentatively scheduled for October 28, 2020, subject to scheduling conflicts.
>
> 3) Hearing details will be sent to relevant parties by Friday, October 23, 2020.
>
> 4) The Appeal Board will provide their final decision by November 2, 2020, subject to scheduling conflicts.
>
> 5) The Appeal Board has been advised by their independent legal counsel not to release any information related to the issues or nature of the appeals to the Nation.

> 6) The Appeal Board has also stated that submissions will only be received from a party relevant to an [*sic*] appeal.
>
> …….

[13] On November 1, 2020, the Appeal Board sent the AFN and the appellants its decision. The Appeal Board allowed the appeal on three grounds, as set out below. The Appeal Board made no reference to any further reasons that were to follow.

[14] On November 4, 2020, the newly elected AFN Chief and Council convened a members meeting at which the Appeal Board's decision was discussed. The Applicants' evidence is that the clear majority of those members in attendance supported a legal challenge of the decision, confirmed support for the newly elected Chief and Council and opposed holding a new election.

[15] Chief and Council passed a band council resolution [BCR] to this effect on November 13, 2020. The BCR includes a statement that Chief and Council had received legal advice that the Appeal Board's decision is incorrect, unlawful, procedurally unfair and unreasonable and, on that basis, had made the decision to seek judicial review of the decision. The BCR resolves to instruct legal counsel accordingly and to seek a stay of the Appeal Board decision pending the determination of the judicial review; that no election will be held; and, that Chief and Council elected on September 25, 2020 would continue in that capacity pending the determination of the judicial review.

[16] On November 16, 2020, after Chief and Council had decided to seek judicial review of the Appeal Board's decision, the Appeal Board released a "Final Report" which provides

summaries of the evidence presented at the appeals and the Appeal Board's analysis underlying its decision.

[17] This application for judicial review was filed on November 26, 2020. The Chief and Council elected on September 25, 2020 has continued to govern and a new election (pursuant to the Appeal Board's Decision) has not been held.

Decision under review

[18] The November 1, 2020 decision of the Appeal Board is reproduced in full below:

> VIA Email
>
> Attention: Alexander First Nation Chief and Council
>
> Dear Sirs/Madam
>
> Re: Alexander First Nation Election Appeal Decision
>
> The Appeal Board for Alexander First Nation Election September 2020 ("Board") is appointed by the Alexander First Nation Chief and Council pursuant to the Alexander First Nation Band Custom Election Regulations ("Regulations").
>
> The Board finds the candidates for Chief and Council have not been elected to office in accordance with the Regulations and the Electoral Officer shall hold a nomination meeting and election for the vacant office or offices in accordance with the Regulations.
>
> The Board finds the following Regulations have not been applied in this Election:
>
> Pursuant to section twenty-two (22) a person presenting himself for the purpose of voting shall, upon being confirmed by the Electoral Officer or his assistant as an elector, be given one (1) ballot upon which to register his vote. The Electoral Officer or his assistant shall initial each ballot as it is given to the elector. The Board finds the use of sixty-three (63) statutory declarations did not effectively provide evidence to the Electoral Officer to confirm

that an individual was living on-reserve at least one month prior to the Elections, as a Commissioner of Oaths is not required to review any proof of residency before signing. Therefore, Regulation twenty-two (22) is breached.

Pursuant to section twenty-three (23) each ballot must be marked with an ‘x’ being placed beside the name of the candidate or candidates from whom the elector intends to vote and such instruction shall be clearly posted at the place of voting by the Electoral Officer. The Board finds the electronic tabulator used during the election did not allow the use of an ‘x’ for the candidates for Council, as the equipment required an oval bubble to be filled, to count the results of each ballot. If the oval bubble was not filled the ballot was rejected, therefore placing an ‘x’ within the bubble would not have resulted in a counted ballot and subsequently Regulation twenty-three (23) is breached.

Pursuant to section thirty-five (35), the Regulations may only be amended by fifty-one percent (51%) of the electors of Alexander First Nation who endorse their signatures on a petition. A meeting shall be called for the purpose of discussing the amendments. The Board finds the ballots for the candidates for Chief were counted by hand and an ‘x’ should have been placed beside the candidates name, however the ballot provided was identical to that of the Council and included clear instructions to fill in an oval bubble. Therefore, Regulation thirty-five (35) has been breached.

Nonetheless, an amendment was not made to the Regulations, as a result of fifty-one percent (51%) of the electors signing a petition, to approve the use of an electronic tabulator.

The Board is fully aware of the risks due to the Global Pandemic and financial expense of a new election for Alexander First Nation. However, the concerns of the Appellants were valid and upholding the Law of Alexander First Nation is essential. As a Board, we have a responsibility to make a finding and deliver a decision within five (5) days of the Appeal Hearings pursuant to the Regulations.

The Board reminds the Electoral Officer that they shall hold a nomination meeting and election for the vacant office or offices in accordance with the Regulations, where the Board finds the candidates were not chosen in accordance with the Regulations.

The Board has enclosed several recommendations to Chief and Council as well as the Electoral Officer, prior to the new Elections, for their consideration.

Regards,

Kellie Wuttunee
Election Appeal Board Chairperson

Recommendations

1. The Board recommends the Electoral Officer utilize voting by way of an ‘x’ until any changes are made to the Regulations by fifty-one percent (51%) of the electors.

2. The Board recommends the Electoral Officer utilizes an Affidavit for verification of those electors on-reserve, as statutory declarations cannot effectively verify whether an individual lives on reserve.

3. The Board recommends Alexander First Nation set a specified time limit within which an election is to be held after an Appeal Board finds a new election is required. Currently there is no specified time listed for a new election within the Regulations. The Board recommends that an election take place within thirty (30) days.

4. The Board recommends Alexander First Nation select an alternative Electoral Officer if a second election is to take place after a successful appeal, as this would assure the electors that the new election would be run in accordance with the Regulations.

Legislative Scheme

[19] The most relevant portions of the Election Regulations are reproduced in Annex A of these reasons.

Issues

[20] In my view, the issues arising in this application can be framed as follows:

Preliminary issue: are portions of the affidavit evidence inadmissible as hearsay, opinion or argument?

1. Was the Appeal Board's process procedurally fair?
2. Was the Appeal Board's decision reasonable?
3. If the process was unfair or the decision unreasonable, what remedy should follow?

Standard of Review

Applicants' position

[21] The Applicants point to the wording of s 30 of the Election Regulations in support of their submission that the AFN's legislative choice to provide for an appeal suggests that the correctness standard of review applies, referencing the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The Applicants also submit that the appellate standard of review applies and this Court is "free to replace the opinion of the [Appeal Board] with is own" (citing *Housen v Nikolaisen*, 2002 SCC 33 at para 8). Alternatively, the Applicants submit that the reasonableness standard of review applies.

[22] The Applicants submit that the correctness standard of review applies to questions of procedural fairness.

Respondents' position

[23] The Respondents submit that the reasonableness standard of review applies to the substantive issues and the correctness standard applies to procedural fairness issues. And, contrary to the Applicants' position, this is not a statutory appeal. In that regard, the Respondents

note that the Applicants state in their Notice of Application that this is an application for judicial review. The Respondents characterize s 30 of the Election Regulations as a privative clause, not as a statutory appeal provision and submit that the only relief available to the Applicants is through an application for judicial review. And, even if this was a statutory appeal, it could only be based on questions of law and not fact. Therefore, the substantive issues raised by the Applicants would not be available on a statutory appeal.

Analysis

[24] The Supreme Court of Canada in *Vavilov* held that the standard of reasonableness presumptively applies whenever a Court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That presumption may be rebutted in two circumstances. The first is where the legislature has prescribed the standard of review or where it has provided a statutory appeal mechanism thereby signalling the legislature's intent that appellate standards should apply (*Vavilov* at paras 17, 33). The second circumstance is where the rule of law requires the application of the correctness standard. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at paras 17, 53).

[25] Section 30 of the Elections Regulations states as follows:

> 30. The appeal board shall hear the appeal with thirty (30) days of filing of the notice of appeal and shall deliver its decision with five (5) days of the hearing of the appeal. The appeal board shall not be bound by any rules of evidence. The decision of the appeal

> board shall be final and binding. Any appeal to a Court of Law shall be founded in law and not in fact.

[26] Arguably, this could be viewed as the AFN's legislative intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision (*Vavilov* at para 36). And, therefore, that a court hearing such an appeal should apply appellate standards of review to the Appeal Board's decision (*Vavilov* at paras 37, 44-45).

[27] However, when addressing how the presence of a statutory appeal mechanism should inform the choice of the standard of review analysis, the Supreme Court in *Vavilov* also stated:

> [52] Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. **However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions**, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal.
>
> (emphasis added)

[28] Further, in *Yellowdirt v Alexander First Nation*, 2013 FC 26 [*Yellowdirt*] this Court considered the AFN Election Regulations and stated that appeal board decisions "can be appealed or reviewed" (at para 35).

[29] Here, in their Notice of Application, the Applicants specifically bring an application for judicial review pursuant ss 18, 18.1 and 28 of the *Federal Courts Act*, RSC 1985 c F-7, as opposed to an appeal pursuant to certain section of the statute, which in this case would be s 30 of the Election Regulations. And, the Applicants are seeking declaratory relief, including that the Appeal Board breached the requirements of procedural fairness and that its decision was incorrect and unreasonable. The Applicants also seek an order quashing the decision and "directing the Appeal Board, pursuant to s 18.1(3)(b) of the *Federal Courts Act* to dismiss the appeals and uphold the Election", and alternatively, to direct a new panel to re-determine the appeals.

[30] In my view, it is abundantly clear that the Applicants have elected to challenge the Appeal Board decision by way of judicial review, not by statutory appeal. Accordingly, the standard of review for the substantive issue is reasonableness.

[31] When applying the reasonableness standard, a reviewing court "asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 15, 99). When a decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker, it is reasonable and is to be afforded deference by a reviewing court (*Vavilov* at para 85).

[32] The standard of review for issues of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. And, as I previously stated in *Morin v. Enoch Cree First Nation*, 2020 FC 696 [*Morin*]:

> [21] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) ("*Baker*"), and with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed (*Canadian Pacific Railway Company v Canada*, 2018 FCA 69 at para 54 ("*Canadian Pacific*")).
>
> [22] No deference is owed to the administrative decision maker under the correctness standard. And, it is for the reviewing Court to determine if an applicant's procedural fairness rights were violated (*Canada Pacific* at paras 33-56; *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31; *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57).

Preliminary issue: are portions of the affidavit evidence inadmissible as hearsay opinion or argument?

Applicants' position

[33] The Applicants do not address this as a discrete issue in their written submissions. However, they do submit within their argument that portions of the responding Affidavit of Kurt Burnstick, sworn on May 10, 2021 [Burnstick Affidavit] are hearsay, specifically Mr. Burnstick's evidence asserting historical and cultural significance to the marking ballots with an "x". The Applicants submit that this evidence is unattributed, it is hearsay and therefore it is inadmissible for the truth of its contents. The Applicants also note that this historical evidence is

being submitted for the first time on judicial review and is an impermissible attempt to bolster the record.

Respondents' position

[34] The Respondents assert that the Applicants, through their affidavit evidence, are also attempting to bolster the record. The Respondents submit that almost all of the Applicants' submissions on the reasonableness of the decision rely on evidence in the Applicants' affidavits and not on the record that was before the Appeal Board. The Respondents submit that the Applicants' evidence about the merits of the decision should either be disregarded or struck.

[35] The Respondents also submit that the Applicants mischaracterize Mr. Burnstick's affidavit evidence. This evidence is a summary of the submissions he made to the Appeal Board. Even if it is hearsay, it is admissible as it demonstrates what evidence was before the Appeal Board, rather than the truth of its contents. Moreover, Mr. Burnstick's evidence is that he testified before the Appeal Board that he was present when the Election Regulations were adopted. Therefore, his affidavit evidence speaking to the intent of the AFN is his personal knowledge, not hearsay.

Analysis

[36] As a general rule, the evidentiary record before a Court on judicial review is restricted to the evidentiary record that was before the decision maker. Evidence that was not before the decision maker and that goes to the merits of the matter is, with certain limited exceptions, not

admissible (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22; *Bernard v Canada Revenue Agency*, 2015 FCA 263 at para 35).

[37] The first exception is an affidavit that provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, but care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision maker. The second exception is evidence that brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision maker so that the Court can fulfill its role of reviewing for procedural unfairness. The third exception is evidence that highlights the complete absence of evidence before the administrative decision maker when it made a particular finding.

[38] Pursuant to Rule 81(1) of the *Federal Courts Rules*, SOR/ 98-106, affidavit evidence is restricted to facts within the deponent's personal knowledge. Moreover, the purpose of an affidavit is to adduce facts relevant to the dispute "without gloss or explanation" including opinion or argument (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18).

[39] In this matter, the Appeal Board did file a CTR pursuant to Rule 318. However, the CTR contains virtually no evidence that was before the Appeal Board when it rendered its decision. Other than the notices of appeal, and two partial text messages from Kurt Burnstick to Casey Auigbelle which were submitted by Kurt Burnstick, the record is comprised only of communications between the Appeal Board, the appellants, and others, concerning hearing times

and dates and that the appeals are not to be made public. There are no hearing notes nor any record of the submissions made at the appeal hearings. Faced with this void, to a certain extent both parties attempt to bolster the record through their affidavit evidence or to explain the Appeal Board's decision. While understandable, the affidavit evidence cannot be used for those purposes.

[40] As to the Burnstick Affidavit, because there is no transcript or recording of the Appeal Board's proceeding, there is no way to confirm that the "summary of the information [he] gave to the Appeal Board" (Burnstick Affidavit at para 22) accurately portrays what he submitted to the Appeal Board. More significantly, Mr. Burnstick's explanation of the asserted historical significance of the requirement that ballots be marked with an "x" is not particularly relevant to the determination of this judicial review. This is because the Appeal Board's Decision makes no reference to this submission and there is no reason to believe that its finding was based on the point. Rather, the Appeal Board stated that "If the oval bubble was not filled in the ballot was rejected, therefore placing an 'x' within the bubble would not have resulted in a counted ballot and subsequently Regulation twenty-three (23) is breached". Putting aside the potential factual error in this finding, discussed below, this conclusion does not support that the Appeal Board based its finding on the alleged historical significance of making ballots with an "x".

[41] Further, in the Final Report, issued after the decision, the Appeal Board referenced Mr. Burnstick's apparent submission that as a young man he had been present at a meeting of those writing the Election Regulations and that the intention of the use of an "x" was significant and was the will of the Elders. However, the Appeal Board concluded that, in the absence of any

written documentation as to the interpretation of the Election Regulations and the use of an “x”, Mr. Burnstick’s reference to the purpose of the “x” “could not be considered with any level of weight”. To the extent that the Burnstick Affidavit evidence challenges the merits of the Appeal Board’s decision on this point, it is not the Court’s role to reweigh the evidence.

[42] Read in whole, the Burnstick Affidavit contains other information that is not relevant to this judicial review or is opinion evidence. Accordingly, I afford those portions of the affidavit little weight. I note that in addition to the Burnstick Affidavit, the Respondents have filed affidavits of Eric Arcand, Ivy Bruno, Marcel Paul, Cheryl Savoie, Sheldon Arcand and Anita Arcand.

[43] The Applicants filed affidavits of Loretta Pete-Lambert, Chief George Arcand Jr, Chris Arcand, Kevin Arcand, Brooks Arcand-Paul, Audra Arcand, Heather Jennings, Marty Arcand and Scott Burnstick. The affidavits of the Electoral Officer and Mr. Arcand-Paul include their respective views on the proper interpretation of the Election Regulations. This amounts to legal argument and/or opinion. Further, some of the Applicants’ affiants provide evidence that goes to the merits of the decision but is not found in the record. For example, the Electoral Officer’s attestation that ballots marked with an “x” were still counted. This evidence is given little weight.

[44] However, to the extent that the Applicants’ affidavit evidence highlights procedural defects that cannot be found in the record or a lack of evidence before the decision maker, this evidence is admissible because it speaks to procedural unfairness.

Issue 1: Was the Appeal Board's process procedurally fair?

Applicants' position

[45] The Applicants submit that the Appeal Board breached procedural fairness because it failed to provide notice of the appeals to AFN or the new Chief and Council and because the Appeal Board did not allow AFN, Chief and Council or the community to participate in the appeals, to know the nature of the appeals, the evidence and arguments, or to make submissions.

[46] The Applicants note that at a minimum procedural fairness requires meaningful notice so that a person whose interests are at stake is aware of the allegations made and has a reasonable opportunity to respond and to be heard by the decision maker before the decision is made. Further, that custom cannot override the requirements of procedural fairness. Procedural fairness applies notwithstanding that the Election Regulations are silent as to the precise procedural safeguards to be afforded to a person whose interests are at stake. The Applicants submit that because they are required to leave their employment upon being elected their interests are engaged and they are entitled to procedural fairness.

[47] The Applicants also submit that the Appeal Board violated foundational procedural fairness rights by: not providing notice of the appeals to Chief and Council despite the fact that their newly elected positions were apparently placed in jeopardy by the appeals; rejecting the AFN's request to be granted standing, even though an interpretation and application of its laws and electoral practices was at issue; expressing resistance to AFN making submissions; and, conducting the appeal process behind closed doors and hearing only from the appellants. The

Applicants submit that these breaches void the entire proceeding and, therefore, the decision should be quashed.

Respondents' position

[48] The Respondents submit that the Appeal Board's process was fair. They submit that the AFN did participate in the appeal. The Final Report indicates that the Appeal Board spoke to the Electoral Officer and the AFN's administrator. Therefore, "the AFN's representatives gave extensive evidence and had the opportunity to respond to all issues raised by the appeals".

[49] The Respondents submit that the individual Applicants were aware of the appeals as demonstrated by the fact that Chief and Council distributed the Community Update about the status of the appeals. Because the Applicants had actual notice of the appeals, no formal notice or invitation to participate was required. The Respondents also submit that because the individual Applicants did not object to their lack of involvement at the time, they waived their ability to claim a breach of procedural fairness in this application.

[50] Finally, the Respondents submit that the Applicants cannot simultaneously claim that they were not afforded a procedurally fair process and that the record is sufficiently complete such that the Court need not remit the matter back to the decision maker. The Respondents submit that the Applicants must demonstrate that the breach of procedural fairness was material and would have affected the result.

Analysis

[51] In my view, it is beyond dispute that the Applicants – as Chief and Council and as newly elected individual members of Chief and Council – were owed a duty of procedural fairness.

[52] The Applicants submit that they are affected for employment reasons, specifically that the Election Regulations required them to leave their prior employment immediately upon election. To my mind, this is an underlying or secondary aspect of the fact that the duty is owed because the Appeal Board's decision could, and did, cause the Applicants' positions as newly elected Chief and Council to be vacated. As this Court recently stated in *Halcrow v. Kapawe'no First Nation*, 2021 FC 219 [*Halcrow*], a case considering procedural fairness in a similar context:

> [57] The Applicants, having been elected, had the highest personal interest of any member of the KFN, in any reconsideration of the election results by the Appeal Committee. This fact alone elevates, and by a significant degree, the procedural fairness owed to them. The Applicants had the right to have adequate notice of the case against their successful elections, and they should have been provided with sufficient opportunity to make representations before a decision adverse to their interests was made.

(see also *Ledoux v Gambler First Nation*, 2019 FC 1465 at para 25 [*Ledoux II*].)

[53] Regarding the content of the duty of procedural fairness, as I previously stated in *Morin*:

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

> the choice of procedure of the decision maker (*Baker* at paras 23-27).
>
> [33] I would also note that, more generally, *Baker* at para 28 states:
>
> > The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.
>
> [34] Significantly, notice and an opportunity to make representations have been characterized as the most basic requirements of the duty of fairness (*Orr v Fort McKay First Nation*, 2011 FC 37 at para 12 ("*Orr*"); *Gadwa* at paras 48-53). Further, the Federal Court of Appeal has stated that, "No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific* at para 56).

[54] As stated by Justice Kane in *Weekusk v Thunderchild First Nation Band Council*, 2014 FC 845 [*Thunderchild*]:

> [78] The minimum requirements of procedural fairness require meaningful notice so that the person whose rights or interests are at stake is aware of the specific allegations made and has a reasonable opportunity to respond to those allegations and to be heard by the decision-maker before a final decision is made.

[55] In my view, this Court's previous decision in *Yellowdirt* is also significant as it addressed the procedural fairness of an appeal convened under these Election Regulations. There, the applicant sought judicial review of the appeal board's decision rejecting his election appeal. The

applicant had appealed the election results on a number of grounds, including that the respondents had engaged in vote buying, and that the residence requirement violated the *Charter*.

[56] The Court noted that the AFN Election Regulations are silent on the powers and the procedures of the appeal board, including notice and the hearing process. However, in that case, the chair of the appeal board considered that the applicant had the onus to bring compelling evidence to prove his allegations on a balance of probabilities and had explained that the individuals affected by the evidence may wish to attend and give evidence contrary to the applicant's evidence (para 34). This Court held that:

> [35] The Appeal Board has the basic attributes of a judicial decision maker. It makes final factual determinations which include credibility findings and questions of law. Ultimately, its decisions, which can be appealed or reviewed, can bring about the cancellation of elections. Furthermore, the Chair of the Appeal Board understood that the onus was on the Applicant in bringing forward *viva voce* testimony and that he had the right to cross-examine witnesses. This is what a judicial tribunal is all about.
>
> [36] Therefore, **the basic principles of natural justice apply in order to ensure that a fair process exist and that guarantees that all the evidence presented to the Board, which may directly or indirectly impact on the decision to be made, is heard by all.**
>
> [37] In the case at bar, the Chair breached procedural fairness by communicating privately with two important witnesses against whom serious allegations of electoral corrupt practice consisting of facilitating the issuance of a $1300 cheque by the Band Administration in return for votes, which are revealed by the testimony of Mr. Bruno. During the conversations, issues of substance were addressed: “[t]he allegations were discussed, the testimony of Mr. Bruno was also dealt with, and both Respondents Paul and Burnstick denied the allegations and refused to appear and testify.” This is vital evidence communicated directly to the Chair but not directly to the other two panel members, the Applicant and the public. The Chair did report the conversations to the Applicant and the other panel members but this is not a remedy to the breach committed. This crucial information could not be

> dealt with in public like it should have been and the Applicant had no opportunity to test the version given by the two individuals through cross-examination. If the Chair of the Appeal Board wanted to be fair to the Respondents Paul and Burnstick by communicating the testimony of Mr. Bruno to them, he was unfair to the Applicant. The means by which the contradictory evidence should have been dealt with is a public hearing, which must be accessible to all. There is in no way to know what impact these conversations had on the Appeal Board members but any neutral observer, in such a situation, would have serious concerns about the objectivity of the decision-making process followed.
>
> [38] The breach is so fundamental that the argument to the effect that because the Applicant did not object to the Chair's private communications with Respondents Paul and Burnstick and that he even requested the Chair of the Appeal Board to contact the Respondents cannot be accepted by this Court as the Chair's actions that followed are simply not acceptable. Moreover, it is to be noted that there is contradictory evidence with regard to both of these matters. A Chair of a tribunal communicating privately with witnesses, does not assume his role properly and is not acting in the interests of justice.
>
> [39] **The fundamental objective of the judicial process is to ensure that all evidence is presented publicly, in order that it be heard by all interested parties who can test the evidence through proper procedure thereby guaranteeing the integrity of the judicial process. For the Chief, the Band Council and the members of the Band, it is of utmost importance that justice be administered in a non-arbitrary way, in accordance with the rule of law**. Fair and honest elections preserve the democracy of the Alexander First Nation Band. The tribunal set up to ensure democratic vitality must be open and fair in order to guarantee the sanctity of the electoral results. It did not assume this responsibility in this case.
>
> (emphasis added)

[57] In contrast to the process adopted by the Appeal Board in this matter, in *Yellowdirt* the appointed appeal board indicated that all those affected could attend and participate in the appeal hearings. The process as described in *Yellowdirt* also does not support the Respondents' submission that prior AFN election appeals have been conducted without the participation of the

chief and councillors whose positions were potentially subject to vacation. And, in any event, any prior failures of procedural fairness do not justify a failure to meet those requirements in this case.

[58] And, even though the Election Regulations are silent on the process for conducting an election appeal, such as the notices to be given and the hearing process, this did not free the Appeal Board from its obligation to meet its duty of procedural fairness. As stated in *Thunderchild*:

> [75] Although the *Election Act* does not address the need for notice or the participation of the person named in a complaint or whose interests are at stake, basic rights of procedural fairness cannot be trumped by the silence of the governing statute.

[59] Further, the Appeal Board in this case opted to hear evidence from the appellants. In *Ledoux II,* this Court spoke to the procedural fairness requirements flowing from such a decision:

> [26] The GFN submits that the Election Committee fulfilled its duty of fairness to the Applicants in making its decision. I disagree. As the Supreme Court noted in *Baker* at paragraph 22:
>
> > […] the purpose of participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> [27] Counsel for the GFN submits that neither the *Election Law*, nor any applicable statute or the common law, require that there be an oral hearing of an appeal. While that may be, the Election Committee decided to hear evidence. By opting to do so, the Election Committee recognized that additional evidence was required in order to make a determination. By depriving the

> Applicants an opportunity to challenge Albert Tanner's evidence and to adduce evidence in rebuttal, the Election Committee breached fundamental rules of procedural fairness – the right to know the case to be met and the right to be heard. In the circumstances, the Election Committee's decision as it relates to the bribery charge must be quashed.

[60] *Morin, Yellowdirt, Thunderchild* and *Ledoux II*, as well as much other jurisprudence, all support the proposition that at a minimum, notice and an opportunity to make submissions in a public forum were required in this context.

[61] Here, the affidavit evidence of the Applicants is that the Appeal Board did not provide them with notices of the appeals and they were not provided with the particulars of the appeals or permitted to participate in the appeal process in any way.

[62] The record also contains nothing to demonstrate that the Applicants were given notice of the hearings, that they knew the case to be met or that they were provided an opportunity to make representations.

[63] The Appeal Board sent letters to each of the appellants advising of their individual appeal hearing date and time, inviting them to bring all of their original materials and any relevant evidence referenced in their appeal materials, and that the hearing could be held in person at the Yellowhead Tribal College or via Zoom. These letters were not copied to the Applicants. There is also no indication in the record that the Applicants were advised of the exact time of each appeal hearing, the place of the hearing or that the Applicants were provided with the Zoom link

for the hearings. The hearings appear to have been individualized interviews and there is no evidence they were open to the community, AFN administration or Chief and Council.

[64] As to the Applicants' knowledge of the appeals, as indicated above, there is no evidence that the Appeal Board gave the Applicants notice of the appeals. There is also no record in the CTR of the October 22, 2020 telephone conversation between Mr. Arcand-Paul and the then Chair of the Appeal Board. However, according to the Mr. Arcand-Paul's notes, the Appeal Board had been advised by its legal counsel not to share the nature of the issues in the appeals. The notes also state that information will not be shared with the community in order to "respect impartiality" and that the Appeal Board was of the view that it would not be appropriate for the AFN to participate. The Community Update issued the next day by Chief and Council, which was presumably based on the telephone conversation with the Appeal Board Chair, also states that the Appeal Board had been advised by their independent legal counsel not to release any information related to the issues or nature of the appeals to the Nation and that the Appeal Board had stated that hearing details would be sent to "relevant parties" and that submissions would only be received from "a party relevant to an appeal".

[65] What little information is contained in the CTR also confirms that the Appeal Board's view was that appeals were to be held in private and without participation by those who may be affected by the Appeal Board's decision. This includes an October 27, 2020 email from Candace Willier (administrative assistant to the Appeal Board) to the Chair, Kellie Wuttunee, indicating that Ivy Bruno asked that her interview be held *in camera*. Ms. Willier asked Ms. Wuttunee if

she should reply saying “that this will not be an issue”. I note that the record does not contain Ms. Wuttunee’s reply or any indication as to why any appeals would be conducted *in camera*.

[66] There is also an October 13, 2020 email from Sherri Turner to Jenna Broomfield indicating that Brooks Arcand-Paul had asked that six appeals be forwarded to him so he could update Chief and Council and possibly prepare written submissions. The email states that Ms. Turner was not comfortable with this but that Ms. Willier had already provided Mr. Arcand-Paul with three of the appeals. “So I have cc’d you on my emailed responses to Brooks and Candace advising that we will not be forwarding these documents to anyone directly”. I note that the CTR does not contain the referenced emails.

[67] On November 3, 2020, after the decision was issued, Ms. Wuttunee sent a formal letter to Chief and Council stating that the Appeal Board was aware that its decision and recommendations had been posted to the Alexander Chief and Council Facebook page. The Appeal Board Chair stated “Please note that the Board provided the letter in strict confidence to Chief and Council and did not intend for this information, which includes the names of the Appellants to be posted in any public fora”. The letter goes on to state that although the post may have been made with the intention of transparency, “there may be concerns posed to Chief and Council regarding the anonymity of the names, given that they were not redacted from the document which was posted publicly”. The Chair then suggested that Chief and Council might want to discuss this with in house legal counsel.

[68] The Chair also emailed Candace Willier and others on November 3, 2020 stating that she had noticed that the Appeal Board's decision was posted on Facebook and stating "We cc'd the appellants in the letter. We only sent it to the appropriate parties. The names of the appellants should be redacted form the Facebook post on Alexander First Nation Chief and Council page as this information is not necessarily appropriate to share with the community/public. We the board provided information to the appropriate parties and did not post this information on a public forum". Ms. Wuttunee requested that the names be redacted and that she be advised promptly that this had been done.

[69] In my view, the Appeal Board's approach was, at best, misguided. Rather than affording the individual Applicants, who had been elected as Chief and Council, the opportunity to know when the appeals of their election would be heard, informing them of the substance of those appeals and affording them the opportunity to respond, the Appeal Board held entirely private hearings and even balked at the identity of the appellants or its decision being disclosed.

[70] The process adopted by the Appeal Board excluded the Applicants and heard only from one side, the appellants. There was no way for the Applicants to test, or even be aware of, the evidence presented. The process was procedurally unfair.

[71] The Respondents assert that the Applicants had actual notice of the appeals as demonstrated by the Community Update and, therefore, they did not require "formal notice". This misses the point. To be sufficient, notice must be meaningful. It must provide the particulars of the appeal including the allegations at issue (*Thunderchild* at para 76).

[72] Further, even if Chief and Council were aware of the date of the hearings, as the Respondents assert, the Appeal Board appears to have determined that they were not a "party relevant to an appeal". Accordingly, the Applicants were not provided with the hearing details. The Appeal Board also appears to have made a deliberate choice not to share the nature of the appeals or to permit submissions from anyone other than appellants or those individuals who the Appeal Board chose to privately interview, such as the Elections Officer. In the result, the Applicants did not have adequate notice of the appeals, did not know the case against them and were not afforded an opportunity to participate and respond to the appeals. To highlight this, I note that the Appeal Board has jurisdiction to hear appeals regarding election misconduct or a violation of the Election Regulations. In this instance, Chief and Council would not even have known on which grounds the Election was being challenged.

[73] The Respondents' assertion that the AFN participated in the appeals is also without merit. In support of this assertion, the Respondents rely on the fact that the Appeal Board "interviewed" the Electoral Officer, Ms. Pete-Lambert, and the AFN's Administrator, Al Arcand.

[74] There is no evidence that Mr. Arcand and Ms. Pete-Lambert were advised that they were being interviewed as the representatives of AFN and its interests for the purposes of the hearing and determination of the appeals, or that they had the authority to act in that capacity. The Final Report's one paragraph reference to Mr. Arcand identifies him as the AFN Administrator and summarizes a question the Appeal Board asked him as to the use of the electronic tabulator. The Final Report's references to Ms. Pete-Lambert pertain to her role as Electoral Officer and her responses to specific questions put to her by the Appeal Board. There is also no indication that

either Mr. Arcand or Ms. Pete-Lambert were provided with copies of the appeals, were able to consult with the AFN about the appeals, or were permitted to hear and respond to the evidence of the appellants or make other submissions. Ms. Pete-Lambert's affidavit evidence is that she was "informally questioned by the Appeal Board over the phone on the grounds to appeals". Further, given Ms. Pete-Lambert's role as the Electoral Officer, it is difficult to see how she could possibly have represented the AFN and its interests during the appeals. To conclude on this point, even if the Appeal Board's process had been procedurally fair – and it was not – these two interviews do not demonstrate that AFN, or Chief and Council, participated in that process.

[75] Nor can the Respondents' assertions of waiver succeed. To succeed on the ground of waiver the Respondents must establish that the Applicants were fully informed of the facts and that the waiver was truly voluntary (*Attorney General of Canada v Clegg*, 2008 FCA 189 at para 59). The Applicants were not advised of the actual hearing times or provided with the appeals so that they would know the case to be met. Absent such information, the Applicants cannot be taken to have waived their participatory rights. Moreover, the breach of procedural fairness is so fundamental that the waiver submission cannot succeed (*Yellowdirt* at para 38). Further, the procedural irregularities here stem from the Appeal Board's choice to design a process that ignored the requirements of procedural fairness. The Applicants should not be penalized for this choice of process.

[76] Finally, the Respondents submit that to obtain relief from the Court for a breach of procedural fairness they must demonstrate that that breach was material and would have affected the result. The Respondents rely on *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore*

Petroleum Board, [1994] 1 SCR 202 [*Mobil Oil*] in support of this view. However, I do not understand *Mobil Oil* to stand for that proposition.

[77] In the normal course, even if a decision is otherwise reasonable, it will still not stand if the process upon which it was reached was unfair. As stated in *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643 at p. 661 [*Cardinal*] "the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision". The Supreme Court in *Mobil Oil*, referencing *Cardinal*, stated that in the ordinary case a breach of procedural fairness will afford an applicant a responsive remedy, even if the remedy is apparently futile. There, however, the circumstances were exceptional in that they involved a particular type of legal question – one that had an inevitable answer (*Mobil Oil* at paras 52-55).

[78] The exception is summarized by the Federal Court of Appeal in *Canada (Attorney General) v. McBain*, 2017 FCA 204 [*McBain*]:

> [9] Breaches of procedural fairness will ordinarily render a decision invalid, and the usual remedy is to order a new hearing (*Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, [1985] S.C.J. No. 78 (QL)).
>
> [10] Exceptions to this rule exist where the outcome is legally inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202 at pp. 227-228; 1994 CarswellNfld 211 at paras. 51-54) [*Mobil Oil*] or where the breach of procedural fairness has been cured in the appellate proceeding (*Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, [2010] B.C.J. No. 316 (QL) at para. 38 [*Taiga Works*]).

[79] In conclusion, the Applicants were denied procedural fairness because they were not given notice of the appeal or of the case to meet or an opportunity to make submissions. The Appeal Board's process was essentially a private, one-sided process that was not open to the AFN community, Chief and Council or the AFN administration.

[80] This is sufficient to dispose of the application. I will, however, briefly address the substantive submissions of the parties because, in my view, the decision is also unreasonable.

Issue 2: Was the Appeal Board's decision reasonable?

Applicants' position

[81] Regarding the Appeal Board's first finding, the insufficiency of a statutory declaration, the Applicants submit that the text of the Election Regulations is silent on how voter eligibility is to be verified and, pursuant to s 22, the Electoral Officer has discretion to choose an appropriate method of confirming elector eligibility. The Electoral Officer reasonably deemed verification of residency by way of statutory declaration to be sufficient evidence of residency. In finding that a statutory declaration was insufficient, the Appeal Board unreasonably added a requirement to the Election Regulations. The Applicants also submit that the finding is arbitrary as a statutory declaration is a statement presided over by a commissioner of oaths, and is therefore not materially or legally different than the swearing of an affidavit as to residency. Further, the Appeal Board's insistence on the use of an affidavit places a disenfranchising burden on would-be voters.

[82] As to the Appeal Board's second finding, that filling in an oval on the ballot instead of marking it with an "x" violated s 23 of the Election Regulations, the Applicants submit that the Appeal Board erroneously chose a technical interpretation over a purposive one. The clear intent and purpose of s 23 is to ensure that the voter communicates their vote through a written mark. The Applicants note that the choice of an electronic tabulation machine was a deliberate and reasonable response to holding an election during the pandemic – particularly as Indigenous communities were more vulnerable and at heightened risk – and that no one objected to this before or during the election. Further, that using a machine is authorized pursuant to s 20 of the Election Regulations, which permits the Electoral Officer to secure the necessary equipment to ensure the secrecy of voting. The Applicants also submit that Election Regulations should be interpreted in an enfranchising manner.

[83] The Applicants submit that it was error for the Appeal Board to conclude that if a ballot was not marked by filling in an oval, the ballot would be rejected. The Applicants submit that the Electoral Officer's affidavit evidence is clear that both ballots marked with a filled in oval and those marked with an "x" were counted, and that no ballot was rejected because it was marked with an "x". Therefore, the Appeal Board's conclusion that filling the oval in with an "x" meant the ballot would have been rejected is based on conjecture, not fact founded in evidence.

[84] Finally, the Applicants submit that Appeal Board did not consider whether the electoral irregularities would have impacted the outcome, and that elections should only be set aside if the results are affected by the irregularities.

Respondents' position

[85] The Respondents submit that the Appeal Board's decision was reasonable.

[86] Regarding its finding on the statutory declarations, the Respondents submit that the issue was about fairness and consistency, not the form of proof of residency. According to the Respondents, typically, proof of residency is required and the statutory declaration does not require such proof. Given concerns raised in a prior election, to ensure fairness, it was incumbent upon the AFN's administration and the Electoral Officer to provide advance notice of what would be required to establish residency.

[87] Regarding marking the ballot with an "x", the Respondents submit that this requirement is not merely technical but has historical and cultural significance. Further, that the Applicants' purposive interpretation goes too far and tries to use purpose to replace the clear words in the text of s 23 of the Election Regulations.

[88] Finally, the Respondents submit that the Applicants' submission that the improperly marked ballots did not effect the result ignores the text of the Election Regulations, which state that an improperly marked ballot should be rejected.

Analysis

[89] In this case, a significant portion of the submissions made by both parties are based not on the decision made or the reasons provided, but rather attempt to explain or justify the Appeal

Board's decision. However, reasonableness review is concerned with whether the decision "is justified in relation to the relevant factual and legal constraints that bear on the decision". Further, the focus of reasonableness review is on the decision actually made, the starting point being the reasons provided for the decision (*Vavilov* at paras 83 – 84). It is not the Court's role to conduct a *de novo* analysis or to ask what decision it would have made in place of the decision maker (*Vavilov* at para 83).

Statutory Declarations

[90] In my view, the Appeal Board's analysis concerning the use of statutory declarations is unreasonable.

[91] In its decision, the Appeal Board refers to s 22 of the Election Regulations which states that a person presenting themselves for the purpose of voting shall, "upon being confirmed by the Electoral Officer or his assistant as an elector" be given one ballot. The Appeal Board then concludes that the use of the sixty-three statutory declarations did not effectively provide evidence to the Electoral Officer to confirm that an individual was living on reserve at least one month prior to the Election. The Appeal Board's conclusion is based on its finding that a Commissioner of Oaths is not required to review any proof of residency. On this basis, the Appeal Board found that s 22 was breached. In its recommendations, the Appeal Board recommended that the Electoral Officer utilize an affidavit for verification "as statutory declarations cannot effectively verify whether an individual lives on reserve".

[92] In my view, this reasoning is unintelligible. Nor is it justified. The Election Regulations do not require the use of an affidavit. Further, while a copy of the Statutory Declaration is not found in the CTR, it is attached as Exhibit C of the Electoral Officer's affidavit. The statutory declaration requires that the person completing the form solemnly declare that they meet the four listed eligibility requirements including that the person is ordinarily resident or has resided on the AFN reserve for a period of not less than 1 month. The declaration also states that it is made in support of an application to be included on the 2020 voter's list. Finally, the declarant attests that "I make this declaration believing it to be true and knowing that it is of same force and effect as if I make an oath and by virtue of 'The Canadian Evidence Act'". The declaration is to be made before a commissioner of oaths in and for the province of Alberta.

[93] Given that the AFN's in-house counsel, who is a commissioner of oaths, administered the sixty-three declarations, it is unclear to me how, in law, this declared information would differ – and be acceptable to the Appeal Board – simply because it would instead provided by a sworn affidavit. Indeed, the Appeal Board recommends that affidavits be utilized "for verification of those electors on-reserve, as statutory declarations cannot effectively verify whether an individual lives on reserve". How an affidavit swearing to residency would be more effective than a statutory declaration to that effect is not apparent from the record.

[94] Further, the Final Report indicates that the Appeal Board interviewed Mr. Auigbelle, the AFN Membership Clerk and assistant to the Electoral Officer. The Appeal Board asked Mr. Auigbelle if he accepted the statutory declarations "at face value" and he confirmed that he did. When asked if he understood how statutory declarations worked he advised that he understood

that declarants are liable for falsifying information if they swear that they live on reserve and it is discovered that they do not. The Appeal Board then asked Mr. Auigbelle if he felt it was within his "responsibility of due diligence" to confirm residence and whether there was "a higher duty placed on him" given his position as assistant to the Electoral Officer and his experience as membership clerk. They also asked whether he had access to certain information at the band office which might provide him the necessary information to confirm a member's address.

[95] In its Final Report, the Appeal Board stated that it took Mr. Auigbelle's position and his experience "into account" and "Therefore, the expectation for either the Electoral Officer or the Assistant could be set at a higher standard to ascertain whether someone was residing on reserve". Further, that there was a "clear disconnection" with s 1(c)(iii) of the Election Regulations (the residence requirement) and s 22. According to the Appeal Board, this is because s 22 permits the Electoral Officer to confirm a voter without prescribing a means by which this is to be achieved "in direct conflict with Regulation 1(c)(ii) which requires an eligible voter to be on reserve one-month-prior". The Appeal Board further stated that "while statutory declarations satisfy the Election Regulations", it is not an effective method of verifying a member's address and creates the opportunity for someone off-reserve to say that they were on the reserve since one month prior.

[96] What the Final Report analysis establishes is that the Appeal Board knew and accepted that the use of statutory declarations met the requirements of the Election Regulations. This alone renders unreasonable its finding in its decision that s 22 was breached. Further, the Appeal Board does not appear to grasp that because the Election Regulations are silent about how the

Electoral Officer is to verify residency, she has discretion as to how this is to be confirmed. In my view, a statutory declaration is a reasonable means of doing so. As to the Appeal Board's view that the there is somehow a higher standard that "could" be placed on the assistant to the electoral officer based on his or her position and experience, nothing in the Election Regulations supports this. In effect, the Appeal Board is suggesting that to ensure that AFN members did not falsify their residency information provided in the statutory declaration, Mr. Auigbelle or Ms. Pete-Lambert were somehow obliged to look behind the declaration by consulting AFN's records. Again, nothing in the Election Regulations supports this. While it was open to the Electoral Officer to require that voters provide documentary proof of residence, she was not required to do so and the statutory declaration placed the onus on the declarant to provide truthful information in that regard.

[97] I also note that the Appeal Board did not consider what impact, if any, s 17 of the Election Regulations has on verifying eligibility through a statutory declaration. Section 17 provides that any person who believes his or her name should be on the voter's list may apply to Electoral Officer to be added to the list by 8 pm the day of the election, and the Electoral Officer is not bound by any rules of evidence. This section may have bearing on evaluating the use of the statutory declaration, but it is simply not considered. Nor is there any indication that the Appeal Board considered the prior use of statutory declarations in AFN elections. Finally, and in any event, I note that the Appeal Board did not find that any ineligible voters cast votes.

[98] In my view, for the above reasons, the Appeal Board's decision that s 22 of the Election Regulations was breached by use of the statutory declarations is unreasonable.

Marking of ballots

[99] The Appeal Board correctly states that s 23 of the Election Regulations provides that each ballot must be marked with an "x" being placed beside the name of the candidate or candidates for whom the elector intends to vote and such instructions shall be clearly posted at the place of voting by the Electoral Officer. With respect to the election of Councillors, it found that the electronic tabulator did not allow the use of an "x", because placing an "x" in the oval would not have resulted in a counted ballot, thereby breaching s 23. In its Final Report the Appeal Board states that it assumed that a ballot marked with an "x" would be spoiled, effectively preventing members from using an "x" to mark their ballot, in direct contradiction of s 23. The Appeal Board did not find that the ballots cast by filling in an oval, rather than marking an "x", were not valid votes and should have been rejected by the Electoral Officer. Rather, that if an elector used an "x" to mark a ballot then it must be accepted and the ballot counted.

[100] With respect to the election for the office of Chief, the Appeal Board noted that the ballots were counted by hand. It found that an "x" should have been placed by the selected candidates name but, instead, the ballot provided instructions to fill in an oval. The Appeal Board did not state that this was a breach of s 23, but found that s 35 of the Election Regulations was breached as the Electoral Officer had made an unauthorized amendment to the Election Regulations by allowing the ballots to be marked by the filling in of an oval rather than the use of an "x".

[101] In my view, the issue that the Appeal Board should have squarely addressed was essentially one of statutory interpretation. Specifically, whether s 23 required that ballots can only be marked by an "x". It is arguable that the Appeal Board indirectly adopted a plain, or literal interpretation, when it found that an "x" should have been placed by the names of the selected candidate of Chief, rather than filling in an oval. However, this gives rise to a potential internal inconsistency, as it is not clear that the Appeal Board reached the same conclusion in its treatment of the votes for Councillors.

[102] I also acknowledge that a formalistic statutory interpretation is not always required of administrative decision makers (*Vavilov* at para 119). However, here the Chair of the Appeal Board is a lawyer and the record indicates that the Appeal Board had the support of independent counsel. Further, the effect of the finding is, at least with respect to the election for Chief, that virtually every vote cast was deemed to be invalid by the Appeal Board, in a circumstance where there was a difference of 100 votes between the successful candidate and the next runner up and only three ballots were spoiled. In my view, clear and consistent reasons were required to justify overturning that result.

[103] Both parties submit, and I agree, that the Election Regulations should be interpreted purposively, in a manner consistent with its object of allowing eligible voters the right to vote. In this regard, the Applicants cite *Wrzesnewskyj v. Canada (Attorney General)*, 2012 SCC 55 [*Opitz*] and the Respondents rely on *Boucher v. Fitzpatrick*, 2012 FCA 212 at para 27 [*Boucher*]. As stated in *Boucher*, election legislation "should be construed in a manner consistent with its object of providing all eligible voters with an opportunity to exercise their basic democratic right

– the right to vote". *Opitz* states that "enfranchising statutes have been interpreted with the aim and object of providing citizens with the opportunity of exercising this basic democratic right. Conversely, restrictions on that right should be narrowly interpreted and strictly limited" (at para 37). To my mind, one would have to consider whether insisting that the marking of a ballot with an "x", as opposed to filling in an oval (accompanied by appropriate instruction), achieves that objective. For example, does that approach rely on form over substance, rather than taking a substantive approach that "focuses on the underlying right to vote, not merely on the procedures used to facilitate and protect that right" (*Opitz* at paras 54-57). The problem here is that the Appeal Board did not engage with the interpretation of s 23.

[104] In any event, based on the record, I am unable to determine the evidentiary basis for the Appeal Board's finding that "If the oval bubble was not filled the ballot was rejected, therefore placing an 'x' within the bubble would not have resulted in a counted ballot and subsequently Regulation twenty-three (23) is breached". In the Final Report, when addressing the Electoral Officer's evidence the Appeal Board states that:

> The Electoral Officer further noted in her interview that there was nothing preventing a person from using an "X" in the Ballot, however the Board notes that the instructions included on the Ballots which were provided by the Electoral Officer explained the bubble was to be shaded/filled in. The Board inquired what would happen if the "X" was outside the oval bubble and she responded "it would not be counted if it was outside the oval. A rejected ballot is one outside of the ballot box".

[105] However, in the analysis portion of the Final Report the Appeal Board states that the "Electoral Officer stated that if an 'X' had lines outside the small bubble it would ruin that ballot". The Appeal Board then concluded that: "Unless evidence to the contrary is provided to

the Board that an ‘X’ would effectively be counted by the electronic tabulator, the Board will assume that a ballot marked with an ‘X’ would be spoiled, and effectively prevents members from using an ‘X’ to mark their ballot, in direct contradiction with Regulation 23”.

[106] It is difficult to reconcile this assumption with the Appeal Board’s prior statement that the Electoral Officer had indicated that there was nothing preventing a person from using an “x” and only an “x” outside the oval would not be counted, or with the Appeal Board’s decision which indicates that utilizing an “x” would cause the ballot not to be counted.

[107] Moreover, the Appeal Board could easily have ascertained during its interview of the Electoral Officer – or by viewing the five rejected ballots – if they had been marked by using an “x” and if this was why they were rejected. Further, and while the affidavit evidence of the Electoral Officer filed in this application for judicial review was not before the Appeal Board, it is significant as it highlights evidence that could have been obtained by the Appeal Board or by the Applicants if they had been afforded the opportunity to participate in the appeals. Specifically, the Electoral Officer deposes that despite the fact that the ballots instructed voters to fill in an oval, “if in fact a voter marked an ‘x’ on the oval beside their candidate of choice, the electronic tabulation machine would still read it and tabulate it correctly. No ballots were rejected by reason of having been marked with an ‘x’ next to a candidate’s name rather than filled in an oval as instructed, or visa versa”. The Electoral Officer went on to say that of the 533 ballots cast for each position, only 3 ballots for Chief and 2 ballots for Councillor were rejected and that in no case was this the result of an elector having marked them with an “x”, rather than by filling in an oval, or vice versa.

[108] The Appeal Board's statement in the Final Report that unless evidence to the contrary was provided to the Appeal Board that an "x" would effectively be counted by the electronic tabulator, the Appeal Board would "assume" that a ballot marked with an "x" would be spoiled, also demonstrates the impact of the procedural irregularities on the Appeal Board's decision. Putting aside what appears to have been the Electoral Officer's statement to the Appeal Board to the contrary, other evidence to the contrary – the absence of which the Appeal Board cited as the basis for its assumption – was unlikely to be available given that the Applicants were not given an opportunity to participate in the appeals. Had they done so, they could have obtained the Electoral Officer's evidence on the point.

[109] In my view, the Appeal Board's finding that the placing an "x" within the oval would not have resulted in a counted ballot was unreasonable as it appears to be internally inconsistent with what the Appeal Board states it was told by the Electoral Officer. It was also unreasonable to make an unfounded assumption that a ballot marked with an "x" would be spoiled – particularly as definitive evidence on this point could have been elicited. And, if the Appeal Board was of the view that the use of an "x" was prohibited by s 23, the relevance of these findings is unclear.

Issue 3: If the process was unfair or the decision unreasonable, what remedy should follow?

Applicants' position

[110] The Applicants submit that the decision should be quashed and the Appeal Board directed to uphold the Election results certified by the Electoral Officer. Given the appeals advanced and the evidence adduced, there is no other reasonable outcome. Even if the alleged

irregularities were well founded, they had no material impact on the outcome of the Election. Therefore, there is no utility in returning the matter to the Appeal Board. In the alternative, the Applicants submit that the matter should be remitted back to a newly constituted Appeal Board to re-determine the appeals, taking this Court's reasons into consideration.

Respondents' position

[111] The Respondents submit that remedies on judicial review are discretionary and that the Applicants' conduct since the Appeal Board's decision should disentitle them to the relief they seek. They submit that the Applicants blatantly ignored the Appeal Board's decision, continued to govern and delayed in seeking a stay of the decision – filing this application in November of 2020 and not filing a stay motion until April 2021. The Respondents also submit that the time and cost of re-determining the Appeal Board's decision weighs against the Court exercising its discretion in granting relief in favour of the Applicants. They submit that the Appeal Board's decision should be upheld and a new election should be scheduled.

Analysis

[112] While it is correct that granting relief on a judicial review is discretionary, I am not persuaded by the Respondents arguments that this is a circumstance in which the Court should decline to grant a remedy.

[113] In support of their position, the Respondents rely heavily on the fact that there was a delay of about five months in bringing a stay application. However, in their written submissions

and when appearing before me, the Applicants explained in detail the circumstances leading up to the hearing of this application. Much of this this explanation is also reflected in the Court's file.

[114] The Appeal Board's decision was issued on November 1, 2020 (and the Final Report on November 16, 2020). The Applicant's Notice of Application was issued on November 26, 2020. The Applicants encountered difficulty in effecting service of the underlying application for judicial review on nine of the thirteen named Respondents. The Case Management Judge directed, on January 18, 2021, that the Applicants were to submit their motion for substituted service by February 1, 2021 and the timeline for the Applicants' preliminary motion (injunction) would be discussed at a case management conference once service had been resolved. On February 1, 2021, the Applicants brought a motion, pursuant to Rule 147, for validation of service, which was granted in part on by the Case Management Judge by Order dated February 18, 2021. That Order also required the Applicants to make further efforts at personal service respecting two of the Respondents. Service on all Respondents was effected by March 10, 2021. On March 24, 2021, the Applicants requested a case management conference to set a timeline for a stay motion. On April 9, 2021, the Applicants served the Respondents with a notice of motion for a stay of the Appeal Board's decision. However, at an April 13, 2021 case management conference the Case Management Judge proposed that the parties consider foregoing the stay and proceeding directly to the application. This was agreed to and on April 15, 2021, the application for judicial review was set down to be heard on June 7, 2021.

[115] Further, and significantly, the Amended Certified Tribunal Record, requested in the Applicants' Notice of Application filed on November 26, 2020, was not filed by the Chair of the Appeal Board until April 22, 2021.

[116] In my view, these factual circumstances do not justify this Court refusing to issue a remedy based on delay.

[117] I agree that the Applicants have not complied with the Appeal Board's decision in that they have continued to govern rather than vacating their offices and calling a new election. However, as discussed above, a motion for a stay (overtaken by this application) of the Appeal Board decision was not inordinately and unreasonably delayed. And, if the newly elected Chief and Council had vacated office, this would not have meant that the prior Chief and Council would somehow have been reinstated. Their term in office had expired. On a practical level, this means that there would be no governing body in place, leaving the AFN administrative staff to manage the affairs of the AFN, to the extent that they had the authority to do so, until the resolution of the underlying application for judicial review. It also would have made no sense to hold another election while the outcome of the September 25, 2020 Election was still at issue.

[118] In *Ledoux v Gambler First Nation*, 2019 FC 380 [*Ledoux I*], on July 14, 2019, an election committee ordered that a new election be held. An application for judicial review seeking to quash the election committee's decision was filed on August 13, 2018. Interlocutory motions were brought by both parties, the applicants seeking a declaration that they had the right to

control the affairs of the First Nation pending the resolution of the application for judicial review, essentially seeking injunctive relief. Both motions were dismissed by Justice Pentney.

[119] With respect to the motion for injunctive relief, Justice Pentney noted that the applicants had won the election but lost the appeal before the election committee. The applicants did not, however, bring a motion seeking to stay the decision of the election committee or to delay or stop the second election. Rather they ignored those events and continued to act as *de facto* Chief and Council. They had then sought equitable relief, by way of the injunction, to "cement their raw assertion of power pending the determination of their application for judicial review" (para 20). The injunctive relief was denied by Justice Pentney as the applicants had not come before the Court with clean hands.

[120] Although the Respondents rely on Justice Pentney's decision in *Ledoux 1*, it was concerned only with injunctive relief. Further, in this case, a stay was contemplated and a second election was not held and ignored.

[121] Further, when the application for judicial review on the merits was heard, in *Ledoux II*, Justice Lafrenière noted the matter's procedural history but also pointed out that Justice Pentney had recognized that there may be merit to the underlying application when Justice Pentney found:

> [7] On the limited record before me, it appears that one faction may have ignored the basic precepts of the rule of law, and now seeks to solidify its control through an order of the Court. On the other hand, serious questions have been raised about the electoral appeals process and the way the second election was conducted.

[122] Justice Lafrenière stated that it appeared that the applicants had continued to remain in control of the day-to-day operations of the First Nation, as well as its bank accounts, notwithstanding the dismissal of their injunction motion and the strong rebuke by Justice Pentney. However, Justice Lafrenière held:

> [22] While the Court does not condone the actions of the Applicants in taking the law into their own hands, it remains the interests in this case go beyond those of the parties, as stated by Mr. Justice Donald Rennie in *Poker v Mushuau Innu First Nation* 2012 FC 1 at paragraph 30:
>
> > […] regardless of which individual or individuals may have cause or contributed to the shortcomings in the process, the paramount consideration in considering whether to grant or withhold relief is the Band membership's confidence in the electoral process itself. There is an overarching public interest in ensuring that Band confidence in Band elections is merited, as it strengthens Band governance. In consequence, given the importance of the electoral process, relief will not be withheld.
>
> [23] The will of the members of the GFN in electing its leaders is at the heart of this proceeding, and not the personal interests of the Applicants. The Court should therefore be reluctant to decline relief where serious questions have been raised about the electoral appeal process, such as in this case.

[123] Justice Lafrenière concluded that the election committee's decision was fundamentally flawed and unreasonable and should accordingly be set aside. He stated that while the normal practice is to refer the matter back for redetermination, in some cases, this Court has refrained from doing so. In the particular circumstances of the case before him, he concluded that it would not serve the interests of justice to remit the matter back to the election committee. This was because the evidence submitted by one of the respondents to the election committee was vastly insufficient to support his allegations of corrupt practice or violations of the election law. And,

even if there were violations of the election law, there was no evidence before the election committee that those violations might have affected the election results. Moreover, a rehearing of the appeal would only result in further delay and uncertainty for the community. The contested election had taken place almost a year and a half before and the community was entitled was to finality.

[124] I agree that the Court should be reluctant to decline relief where serious questions have been raised about the electoral appeal process, which is the circumstance in this matter. Here the Applicants have established that the Appeal Board's decision was procedurally unfair and unreasonable. The application for judicial review overtook the stay motion, and it was not unreasonably delayed. Unlike *Ledoux*, a new election was not held. That said, I also agree that in this type of situation, a stay should be pursued as quickly as possible to avoid the circumstance where an appeal board's order is not being followed and resultant questions as to the authority to govern arise. However, the Applicant's conduct in this matter does not warrant a refusal to grant the relief sought.

[125] I also do not agree with the Respondents' submission that the time and cost of re-determining the Appeal Board's decision weighs against the Court exercising its discretion in granting relief in favour of the Applicants. It is common practice when a judicial review is granted that the matter is remitted back to a different administrative decision maker for redetermination. The cost of that process is surely outweighed by the public interest in ensuring that a fair and reasonable decision is rendered. Nor should a successful applicant be effectively

penalized – by depriving them of relief – for reviewable errors made by the decision maker and the resultant cost of redetermination. Here, the cost factor is not an exceptional consideration.

[126] In short, I am not persuaded that the factual circumstances of this matter warrant the exercising of my discretion to decline to grant the relief sought.

[127] This leaves the question of what relief should be granted.

[128] As stated in *Vavilov*:

> [140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.
>
> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.
>
> [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paras. 18-19 (CanLII). An intention that the administrative decision maker

> decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, at paras. 54 and 88 (CanLII). Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

[129] I agree with the Respondents that this is not a merry-go-round situation where there have been multiple judicial reviews and reconsideration. Therefore, in my view, the only real question is whether a particular outcome is inevitable.

[130] Here, the margin of votes in the election for the office of Chief between the successful candidate and the next runner up was 100. The ballots were counted by hand and only three were spoiled. However, the Appeal Board found that an "x" should have been placed by the selected candidate's name. Instead, the ballot provided instruction to fill in an oval. Therefore, s 35 of the Election Regulations was breached as the Electoral Officer had made an unauthorized amendment to the Election Regulations. What the Appeal Board was required to do was to

determine whether or not the ballots were valid, even if marked with an “x”, which required interpreting s 23 of the Election Regulations. If the use of an “x” was not a breach of s 23, then the Appeal Board should have considered whether the irregularity affected the result of the election for the office of Chief and warranted setting aside the election results (see *Opitz* at paras 55-57, 71-73; *Meeches v Meeches*, 2013 FCA 177 at para 63-64). However, if it was a breach, then presumably none of the ballots would be valid and a new election would be required. Similarly, in the election of Councillors the vote differential between the sixth, elected, candidate and the next runner up was four votes. There were two spoiled ballots. Again, if the use of an “x” is not a breach of s 23, the outcome of the election of the Councillors will not change on the basis of that irregularity. If it was, a new election is required. Accordingly, the outcome is not legally inevitable.

[131] Further, the breach of procedural fairness meant that the Applicants were not able to participate in the appeals, including putting forward relevant evidence. This could also potentially impact the outcome. Given this, the appropriate remedy is to remit the matter back to a different appeal board for re-determination taking these reasons into consideration. I am mindful of the fact that it is very much in the interest of the AFN to have the appeals resolved as quickly as possible. Accordingly, I will order that the new appeal board be constituted within 21 days of the date of these reasons. Further, of the thirteen appellants, only three actually participated in this application for judicial review. Thus, those appellants/Respondents who elected not to participate have not raised as an issue that any grounds of appeal they submitted were not addressed by, or did not form the basis of, the Appeal Board’s decision. Accordingly, the re-determination will be limited to the appeals of Kurt Burnstick, Ivy Bruno and Eric Arcand.

I also emphasize that the new appeal panel must consider whether the alleged irregularities impacted the outcome of the Election.

Costs

[132] At the hearing of this matter I asked if the parties had reached an agreement as to costs and, if not, if they were prepared to make submissions in that regard, per the April 30, 2010 *Notice to the Parties and the Profession, Costs in the Federal Court*. The parties advised that they had not reached an agreement nor were they in a position to speak to costs but that they would address the matter between themselves and advise the Court of agreement could be achieved. At the time of issuance of these reasons no communication had been received by the Court from the parties concerning costs.

[133] Pursuant to Rule 400 of the *Federal Courts Rules*, the Court has full discretionary power over the awarding of costs. In that regard, the Court may take into account the factors set out in Rule 400(3). I have done so and have also considered that there is a financial resources imbalance between the AFN – Chief and Council having brought this application pursuant to an authorizing BCR – and the individuals who are responding to the application; that the application for judicial review perhaps provided clarity on procedural aspects of decision making going forward; as well as the fact that the Applicants have been successful in this application in that the decision of the Appeal Board will be quashed and remitted back for redetermination (see *Whalen v Fort McMurray No. 468 First* Nation, 2019 FC 1119; *Tourangeau v Smith's Landing First Nations*, 2020 FC 184 at paras 69-70). As a result, I am awarding costs in the all inclusive lump sum amount of $1000 to be paid by the participating Respondents (Kurt Burnstick, Ivy Bruno

and Eric Arcand) to the Applicants. The remaining named Respondents did not participate in this hearing and there shall be no order of costs against them (*Morin* at para 57).

JUDGMENT IN T-1440-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The November 1, 2020 decision of the Appeal Board overturning the September 25, 2020 election of the Alexander First Nation Chief and Council is quashed;

2. The matter will be remitted back to a differently constituted election appeal board, to be constituted within 21 days of the date of this decision, for reconsideration and taking into consideration these reasons. The re-determination will be limited to the appeals of Kurt Burnstick, Ivy Bruno and Eric Arcand, the Respondents who participated in the judicial review; and

3. The Applicants shall have their costs of this application in the all inclusive lump sum amount of $1000 which shall be paid by the participating Respondents, Kurt Burnstick, Ivy Bruno and Eric Arcand, to the Applicants. The remaining named Respondents did not participate in this hearing, there is no order of costs against them.

"Cecily Y. Strickland"
Judge

Annex A – Election Regulations

DEFINITIONS

1. In these regulations:

(a) "Appeal Board" means a board consisting of such impartial person or persons who:

(i) are not members of the Alexander Tribe, and

(ii) are appointed by the Alexander Tribal Chief and Council.

(c) "Elector" means a person who:

(i) is the full age of twenty-one (21) years, and

(ii) is a member of the Alexander Tribe, and
(iii) is ordinarily resident or has resided on the Alexander Reserve for a period of not less than one (1) month, and
(iv) is not the Elector Officer or his appointed assistant.

(d) "Electoral Officer" means a person appointed to the office by the Alexander Tribal Chief and Council from time to time for the purpose of carrying out the duties set out in these regulations.

COMPOSITION OF COUNCIL

2. The Alexander Tribal Council shall consist of one (1) Chief and six (6) Councillors who shall be elected in accordance with these Regulations.

TENURE OF COUNCIL

3. (a) The Chief and Councillors shall hold officer for three (3) years.

(b) The Chief and Council shall call an election at least thirty (30) days before the date when another election would ordinarily be held and at that same time shall appoint an Electoral Officer and the member or members of the appeal board. A written statement setting out the name of the Electoral Officer and the member or members of the appeal board shall be posted in the Alexander Tribal government Office from the time of the appointments until such time to file an appeal has expired.

ELECTIONS

17. Any person who:

(i) disputes the name of an elector included on the voter's list, or

(ii) believes his name should be included on the voter's list

may apply to the Electoral Officer for determination of the matter at any time up to 8:00 p.m. on the date of the election. The Electoral Officer shall not be bound by any rules of evidence. The decision of the Electoral Officer shall be final and binding. Any appeal to the Court of Law shall be founded in law and not in fact.

18. The Electoral Officer may appoint such person or persons to assist in the polling as he deems necessary.

19. The Electoral Officer shall keep the polling station open from 9:00 a.m. to 8:00 p.m. on the day of the election.

20. The Electoral Officer shall secure such equipment as is necessary to ensure the secrecy of voting.

22. A person presenting himself for the purpose of voting shall, upon being confirmed by the Electoral Officer or his assistant as an elector, be given one (1) ballot upon which to register his vote. The Electoral Officer or his assistant shall initial each ballot as it is given to the elector.

23. Each ballot must be marked with an 'x' being placed beside the name of the candidate or candidates from whom the elector intends to vote and such instruction shall be clearly posted at the place of voting by the Electoral Officer.

27. Within twenty-four (24) hours of the public declaration of the candidates elected for office, the Electoral Officer shall:

(a) Provide to each candidate and shall post in the Alexander Tribal Government Administration Office, Education Office, Day Care Centre, Tribal Farm and such other places on the Alexander Reserve as he deems necessary, a notice setting out:

(i) the candidates elected, and

(ii) the number of votes cast for each candidate, and

(iii) the number of ballots rejected.

APPEALS

29. Within fifteen (15) days after the posting of the written statement by the Electoral Officer pursuant to Section 27, any elector who has reasonable grounds to believe:

(a) that there was corrupt practice in connection with the election, or

(b) that these Regulations were not complied with.

may appeal the election of a candidate or candidates by filing a written notice of appeal with the Electoral Officer which sets out the grounds of the appeal.

30. The appeal board shall hear the appeal with thirty (30) days of filing of the notice of appeal and shall deliver its decision with five (5) days of the hearing of the appeal. The appeal board shall not be bound by any rules of evidence. The decision of the appeal board shall be final and binding. Any appeal to a Court of Law shall be founded in law and not in fact.

31. Where the appeal board finds that a candidate or candidates have not been elected to office in accordance with these Regulations, the Electoral Officer shall hold a nomination

meeting and election for the vacant office or offices in accordance with these Regulations.

35. The Regulations may only be amended by fifty-one percent (51%) of all of the electors of the Alexander Tribe who endorse their signatures on a petition. A meeting shall be called for the purpose of discussing the amendments

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1440-20
STYLE OF CAUSE:	ALEXANDER FIRST NATION, ALEXANDER FIRST NATION COUNCIL, GEORGE ARCAND JR., KEVIN ARCAND, CHRIS ARCAND, MARTY ARCAND, HEATHER JENNINGS, AUDRA ARCAND, AND, SCOTT BURNSTICK v KURT BURNSTICK, IVY BRUNO, ERIC ARCAND, KAREN KOOTENAY, JACOB THOMPSON, MICHEAL CALLIHOO, TAMMIE BRUNO, KAILEY AMOR, KYLA BRUNO, RILEY HARRISON, LEO KEITH, YVONNE AMOR, AND, LYNN ARCAND
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	JUNE 7, 2021
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JUNE 17, 2021

APPEARANCES:

Maxime Faille Aaron Christoff	FOR THE APPLICANTS
Evan C. Duffy Matthew Cressatti	FOR THE RESPONDENTS (KURT BURNSTRICK, IVY BRUNO, AND ERIC ARCAND)

SOLICITORS OF RECORD:

Gowling WLG (Canada) LLP Barristers & Solicitors Vancouver, British Columbia	FOR THE APPLICANTS
Parlee McLaws LLP Edmonton, Alberta	FOR THE RESPONDENTS (KURT BURNSTRICK, IVY BRUNO, AND ERIC ARCAND)