Federal Court Cour fédérale

Date: 20140923

Docket: T-927-13

Citation: 2014 FC 911

Ottawa, Ontario, September 23, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

HENRY J. FELIX SR. and GARRY DANIELS,
GERTRUDE FELIX, GARRY WICHIHIN,
RAMONA FELIX COOK, DAVID BADGER
(THE STURGEON LAKE FIRST NATION
"*WORKING GROUP*")

Applicants

and

THE STURGEON LAKE FIRST NATION,
("*THE BAND*") and THE STURGEON LAKE
FIRST NATION BAND COUNCIL
currently represented by
CHIEF CRAIG BIGHEAD, COUNCILORS
WESLEY BALLANTYNE, MICHA DANIELS,
DONNA KINGFISHER, DANNY
MOOSEHUNTER, ANITA PARENTEAU,
JONAS SANDERSON ("*BAND COUNCIL*") and
GARRY TURNER, DARWIN NAYTOWHOW
("*ELECTION OFFICIALS*") and
CRAIG BIGHEAD, SOLOMON SANDERSON,
KENNETH BARRY KINGFISHER
("*CANDIDATES FOR CHIEF*") and
GABRIEL FELIX, ALLEN JOE FELIX
("*ELECTION APPELLANTS*")

Respondents

JUDGMENT AND REASONS

[1] The applicants seek judicial review of the decision of the Sturgeon Lake First Nation Appeal Tribunal (Appeal Tribunal) made on or around May 2, 2013. The Appeal Tribunal dismissed the applicants' appeal which challenged the disqualification of Mr Felix as a candidate for Chief and the outcome of the Band Council election held on March 27, 2013. For the reasons that follow, the application is allowed.

Background

[2] The current application for judicial review arises in the context of several years of tension within the community regarding the electoral process and the results of the Band Council elections in 2010 and 2013. To provide the necessary context, a detailed chronology of events is set out in Annex A.

[3] Justice Bédard provided a summary of relevant events up to the 2010 election in *Felix Sr v Sturgeon Lake First Nation*, 2011 FC 1139, 398 FTR 88 (*Felix #1*).

[4] The history was also summarised by Justice Snider in *Felix v Sturgeon Lake First Nation*, 2013 FC 310 (*Felix #2*) dismissing the applicant's, Henry Felix Sr's, motion for contempt and ordering costs against him.

[5] At its simplest, the troubled history is as follows. Henry Felix was a candidate for Chief in 2010. This was the first election held under the *Sturgeon Lake First Nations Election Act*,

2009 [*Election Act*]. He lost the election by two votes following a recount. Mr Felix appealed to the Appeal Tribunal. The Appeal Tribunal made a preliminary ruling and dismissed the appeal. In *Felix #1*, Justice Bédard found that the Appeal Tribunal had breached principles of procedural fairness, including by relying on extrinsic evidence, and allowed the application for judicial review. The Appeal Tribunal was directed to recommence the appeal at the hearing stage (which is the second step following a preliminary ruling and permits the parties to be heard) and ensure that the hearing be held in accordance with the *Election Act* and in fairness to all parties. Justice Bédard also cautioned that the Appeal Tribunal should not participate in any decisions that could later be disputed in the context of an appeal.

[6] The Appeal Tribunal recommenced, held three days of hearing, and dismissed the appeal.

[7] Mr Felix did not seek judicial review of the second dismissal of his appeal. However, he brought a motion for contempt against the Band (Sturgeon Lake First Nation) alleging that the re-hearing by the Appeal Tribunal was not held in accordance with the judgment of Justice Bédard in *Felix #1*. The motion was dismissed by Justice Snider in *Felix #2* who noted, among other concerns, that an application for judicial review would have been the appropriate remedy for the applicant to have pursued.

[8] Justice Snider found that the litigation was unnecessary and "was taken through fundamental lack of understanding of the law of contempt" and dismissed the motion, awarding elevated costs against Mr Felix. Justice Snider issued the Order on March 26, 2013.

[9] March 27, 2013 was the date of the second election for Chief and Council members held under the Act. Mr Felix was again a candidate for Chief. The nominations had closed on March 20, 2013 and advance polls had taken place on March 25 and 26.

[10] On the date of the election, a notice was posted by the Chief Electoral Officer ["CEO"] at the polling station around mid-day indicating that Mr Felix owed the Band money arising from the cost order in *Felix #2* and that he was, therefore, disqualified from being a candidate in the election.

[11] Voting continued and when the ballots were counted, Mr Felix had 325 votes placing him in the majority. However, all the ballots cast for Mr Felix were later placed in an envelope and marked as disqualified.

[12] The Appeal Tribunal observed the Nomination meeting, the Advance Polls and the Poll. The Appeal Tribunal was present at the polling place on March 27, 2013 at the time the Band Administrator delivered the notice, referred to as the "Statement of Fact", along with the Order issued by Justice Snider. The CEO then posted the notice indicating that Mr Felix owed money due to Justice Snider's Order which imposed costs against Mr Felix payable to the Band and others and that he was no longer eligible to be a candidate.

[13] Mr Felix and the co-applicants, the Working Group, launched an appeal of the election results alleging that errors were made in the interpretation or application of the *Election Act* and that corrupt practices were engaged in by the Electoral Officers ["EO"] in contravention of the

Act. Mr Felix set out nine grounds for his appeal including that he did not owe money to the Band at the relevant time in accordance with the Act.

[14] The Appeal Tribunal issued a preliminary ruling on April 12, 2013 dismissing the appeals, but, as a "courtesy," held a hearing to permit the appellants to state their position. There is some uncertainty on the record whether the Appeal Tribunal actually considered the appeal by Mr Felix or found him to be without any standing because of his disqualification, and considered only the appeal of the co-appellants Working Group, which raised the same allegations. The hearing was held on April 29 and 30, 2013. The Appeal Tribunal issued its decision on May 2, 2013 and upheld the decision of the EO to disqualify Mr Felix.

[15] The Appeal Tribunal decided to call a by-election for the position of Chief. Mr Felix remained disqualified as a candidate in the by-election because he owed money to the Band as a result of Justice Snider's Order. The by-election was held on May 29, 2013 with advance polls on May 27 and 28. Craig Bighead was elected Chief.

[16] On May 23, 2013 Mr Felix filed this application for Judicial Review of the decision of the Appeal Tribunal which dismissed his appeal.

[17] Mr Felix's application for an injunction to stay the by-election was denied by Justice Roy on May 29, 2013.

[18] Mr Felix's appeal of Justice Snider's decision in *Felix #2*, which dismissed his contempt motion and ordered costs against him, remains pending a hearing in the Federal Court of Appeal.

The Decision under Review

[19] The decision of the Appeal Tribunal is a one page, point form document that sets out the facts very briefly, notes the basis for the appeal pursuant to section 12.1 of the Act and notes its Analysis and Decision.

[20] The Analysis part states:

> 1. *5.1(b)(VII) Owing money to Sturgeon Lake First Nation by Federal Court Order*
>
> 2. *12.1(a) We do not believe Error or Violation of the Election Act was made in the interpretation or application of the Act*
>
> 3. *12.1(b) Yes we do believe the Candidate Henry Felix who ran in the Election was ineligible to do so pursuant to the Sturgeon Lake Election Act 2009.*

[21] The Decision states:

> *Uphold Chief Electoral Officer decision to disqualify Henry Felix as pursuant to Madam Justice Snider Federal Court Ruling that states Henry Felix owes money to Sturgeon Lake First Nation and as per Sturgeon Lake Election Act, Section 12.8(c) "There shall be no new or additional nominations beyond the slate that ran in the Election or By-election that is the subject of Appeal but no candidates shall be required to let his or her name stand in the new Election or By-election" for the position of Chief on the following dates:* […]

[22] The decision then goes on to indicate that advance polls would take place on May 27 and 28 and the election on May 29, 2013.

[23] *The Appeal Tribunal's Preliminary Ruling* on April 12, 2013 stated:

- With respect to the appeal by Henry Felix:

  Set aside due to disqualification as per Federal Court Order and Election Act.

- With respect to the appeals by the WG:

  Response: We believe that the CEO conducted his duties in accordance with the Sturgeon Lake Election Act. We deem that these appeals were not against a specific person or corrupt practice but rather complaints against the Sturgeon Lake Act. A person cannot appeal the act there is a process to amend the act Sec. 16. No one can change the act in the middle of an election.

[24] And at the end states:

> *Though we made a preliminary ruling to dismiss these appeals the coappellants were given the courtesy to come and voice their complaints at the April 29th & 30th, 2013 Appeal Hearing.*

[25] *The Notice Posted at the Election Polling Place* on March 27, 2013 (referred to as the Statement of Fact) states:

> *TAKE NOTICE:*
>
> *IN THE MATTER OF*
>
> *HENRY J FELIX SR. vs THE STURGEON LAKE FIRST NATION*
>
> *Pursuant to a Federal Court Order issued March 26, 2013 by the Honourable Madam Justice J. Snider:*
>
> *HENRY J FELIX, SR. owes the Sturgeon Lake First Nation costs for his contempt motion against the Appeal Tribunal, members of*

> *the Band Council and the three lawyers who acted as legal advisors.*
>
> *AS A CONSEQUENCE, HENRY J FELIX, SR. IS NO LONGER ELIGIBLE TO BE A CANDIDATE IN THE 2013 ELECTION.*
>
> *Copies of the Judgment will be available at the Band Office next week.*

The legislation

The Sturgeon Lake First Nation Election Act, 2009

[26] The *Sturgeon Lake First Nation Election Act, 2009* governs the process of the election from the time of choosing the Electoral Officers to the completion of any appeal period. It sets out, among other things, the criteria for candidates, the role and responsibilities of the Electoral Officers, the composition of the Appeal Tribunal and the process for an appeal.

The Executive Act

[27] The *Executive Act* sets out the roles, responsibilities and authority of the Chief and Council. It also provides for the Elders Executive Advisory Council ("Elders EAC") which may carry out duties assigned to it by the Chief and Council, including providing guidance when its advice is sought (Section 8.3(a)).

[28] Section 9 sets out a Code of Ethics governing what the Chief and Council may or may not do during their terms of office. These guidelines aim to help officials be good leaders, maintain their integrity and the dignity of their office, engage in discussion and avoid conflicts of interest. The Code also outlines other ethical principles. Section 10 provides specific conflict of

interest provisions. Section 11 addresses discipline. The Elders EAC can call upon the Appeal Tribunal when they have reason to believe the Chief or a Councillor has breached the code of ethics or conflict of interest guidelines, or has engaged in other illegal or immoral conduct.

[29] Section 12 provides for motions of non-confidence for a serious breach of the duties set out in the Act.

[30] Section 13 governs when an elected office is vacated; this includes conviction for an indictable offence or an offence related to trafficking of a prohibited or controlled substance, resignation, death, mental incompetence, failure to uphold the oath of office, failure to observe the band by laws, and where a person "is determined to be ineligible to hold office by virtue of this Act or any amendments thereto" (s 13.1(j)).

Overall Position of the Applicants

[31] The applicants submit that the Appeal Tribunal breached its duty of procedural fairness by participating in the decision to disqualify Mr Felix on the date of the election and later determining the appeal of that same decision. The *Election Act* codified customary practices but says nothing about the role of the Appeal Tribunal to oversee elections. This is the role of the Chief and Deputy Electoral Officers ["DEO"]. Even if the custom is for the Appeal Tribunal to attend the election, custom cannot trump procedural fairness. The appellants submit that the Appeal Tribunal ignored the direction provided by Justice Bédard in *Felix #1*.

[32] The applicants ask that the Court quash the decision and substitute its own decision restoring the results of the votes in favour of Mr Felix in the 2013 election. The applicants argue that remitting the decision for reconsideration by the same Appeal Tribunal will not result in a just process or determination, given that the Appeal Tribunal ignored the direction provided by Justice Bédard in *Felix #1* and that the same members would again be determining the appeal of the decision they took part in and, effectively, had predetermined. Alternatively, the applicants ask that if the decision is remitted to the Appeal Tribunal for re-determination, that clear directions be provided to them.

Overall Position of the Respondents

[33] The respondents submit that the Appeal Tribunal followed the *Election Act* and the custom, which is that the Appeal Tribunal attend and oversee the election. The respondents argue that the Appeal Tribunal did not participate in the decision to disqualify Mr Felix on Election Day and that Mr Felix was disqualified by operation of the *Election Act* due to his own unsuccessful litigation which resulted in a cost order against him and owed to the Band. The respondents submit that Mr Felix brought this situation on himself. The respondents argue that the Appeal Tribunal's attendance at the election and their later determination of the appeal does not create a reasonable apprehension of bias. The respondents highlight the importance of self-government and the efforts of the Band to reflect their custom in the *Election Act*, and ask the Court not to usurp the role of the Appeal Tribunal which is best placed to address this issue.

Jurisdiction and Standard of Review

[34] It is well established that this Court has jurisdiction to determine this application for judicial review. The Sturgeon Lake First Nation Appeal Tribunal is a "federal board, commission or other tribunal" for the purpose of the *Federal Courts Act*, RSC 1985, c F-7, section 2.

[35] The application raises questions of law and of jurisdiction of the Appeal Tribunal and raises important issues of procedural fairness, all of which are reviewable on a standard of correctness.

[36] Issues of mixed fact and law are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 ["*Dunsmuir*"]).

The Issues

[37] The issues boil down to: whether the Appeal Tribunal breached its duty of procedural fairness by its customary practice of observing and overseeing the election and its specific conduct on March 27, 2013; whether the decision of the Appeal Tribunal to uphold the decision of the CEO to disqualify Mr Felix as a candidate was reasonable; and, if the decision is set aside, what is the appropriate remedy.

[38] I have therefore regrouped the several specific issues raised by the applicants as follows:

- Did the Appeal Tribunal Breach its duty of procedural fairness?

  - Did the Appeal Tribunal's attendance at the Polling Station result in bias or a reasonable apprehension of bias in their determination of the applicants' appeal which challenged the election process and the disqualification of Mr Felix?
  - Can customary practices override or "trump" provisions of the *Election Act* or principles of natural justice and procedural fairness?

- Is the decision of the Appeal Tribunal reasonable?
  - Did the Appeal Tribunal err in finding that a candidate can be disqualified after being accepted by the Electoral Officer and having his or her name placed on the ballot? (In other words, at what point can a candidate be disqualified? If the *Election Act* refers to the date of nomination, what process governs disqualification after that date or after the election has been held?)
  - Did the Appeal Tribunal err in concluding that the Electoral Officers acted within their authority and jurisdiction under the *Election Act* by disqualifying Mr Felix and rejecting the ballots cast in his favour?

- What is the appropriate remedy?
  - Does the Court have jurisdiction and is it appropriate in the circumstances for the Court to substitute its judgment for that of the Appeal Tribunal which upheld the CEO's decision and, in turn, for that of the CEO who disqualified Mr Felix as a candidate?

Did the Appeal Tribunal Breach its duty of procedural fairness?

[39] The applicants submit that the customary law whereby the Appeal Tribunal observes the election is not the critical issue. The issue is the participation of the Appeal Tribunal in the very decision that they later considered on appeal. It is this participation that creates bias or the reasonable apprehension of bias.

[40] The applicants note that in *Felix #1* Justice Bédard cautioned the Appeal Tribunal regarding its custom of observation of elections and in that case the conduct of determining the place of the advance polls and assisting elderly voters was of a less serious nature. The applicants argue that the Appeal Tribunal has not heeded the direction of Justice Bédard.

[41] The applicants point to *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142, [1994] 1 CNLR 182 42 [*Sparvier*] where Justice Rothstein highlighted that custom cannot be at the expense of natural justice.

[42] The *Election Act* was ratified in 2009 and codified the Band Custom as it relates to elections. The practice of the Appeal Tribunal to attend and oversee the election is not consistent with the Act which gives the responsibility for carriage of the election to the CEO and his designate (s 4 and 5). The *Election Act* provides only that the Appeal Tribunal consider appeals arising from the election.

[43] The applicants submit that if the custom is for the Appeal Tribunal to attend and observe or oversee the elections, this should be specifically included in the *Election Act* which is intended to be a codification of such long-standing customs.

[44] The applicants argue that not only did the very presence of the Appeal tribunal at the polling station prevent the CEO from carrying out his mandate, but the Tribunal went much farther by directing the CEO regarding the disqualification of Mr Felix.

[45] The Tribunal's attendance and participation created a reasonable apprehension of bias and in fact predetermined the appeal by participating in the original decision.

[46] The applicants question the propriety of Appeal Tribunal members giving evidence in this judicial review regarding their own conduct.

[47] The applicants argue that if the decision is returned to the Appeal Tribunal, it cannot be trusted to make an unbiased decision.

[48] The applicants further submit that the Appeal Tribunal process which dismissed Mr Felix's appeal at stage 1 denied him an appeal completely; his appeal was "set aside due to disqualification as per Federal Court Order and Election Act", suggesting that the Tribunal did not address it at all.

[49] The respondents note that the 2009 *Election Act* followed from extensive consultations and codified custom that had evolved over 42 years and had acquired the force of law.

[50] The *Election Act* provides for the selection of the EO and the members of the Appeal Tribunal at the same time. The Appeal Tribunal members take an oath with respect to carrying out their duties. The Band custom is that the Tribunal will be present at all proceedings to observe the CEO and EO conduct of the proceedings. The respondents submit that there is collective acceptance of this practice.

[51] The respondents point to Justice Snider's observation that Justice Bédard did not find that custom was precluded provided the *Election Act* is followed. The respondents now submit that where the *Election Act* is silent, custom can fill the void.

[52] The respondents acknowledge that in 2010 the Tribunal overstepped its role. The words of Justice Bédard were then carefully considered in the 2013 election and it did not participate in any decisions. The Tribunal did not publicly comment about the announcement that Mr Felix was disqualified. It did review the decision of Justice Snider and it did see the notice (Statement of Fact) that was prepared to advise voters and posted in the polling place.

[53] The respondents reiterate what had transpired on Election Day, noting that the CEO counted the ballots in plain view while the Tribunal observed. The CEO announced the results and also that Felix was disqualified. The election report was prepared. The ballots for Felix were

put in one envelope with the notation that Felix was disqualified. The ballots were then sealed in the box.

[54] The respondents contend that there can be no reasonable apprehension of bias in the custom of attending and overseeing the role of the CEO and EO provided they do not participate in decisions that could later be disputed.

[55] The respondents also note the challenges of small communities where many are related and all are known to each other, and that bias must be considered with this in mind.

The Appeal Tribunal did not meet its duty of procedural fairness

[56] The *Election Act* sets out the role of the Appeal Tribunal and it does not refer to observing or overseeing the election. It provides in section 11 that an Appeal Tribunal shall be appointed at the time the Election is called and sets out the role of the Tribunal and also the process for appeals. The following sections are specifically noted:

> *11.2 No one sitting on the Appeal Tribunal may participate in the Election or By-election whether as a Candidate, Nominator, Seconder or Voter.*
>
> 11.3 The Appeal Tribunal ***shall*** supervise and administer all **Election** and **By-election** Appeals in accordance with this ***Election Act***. The Appeal Tribunal may be-reconvened to deal with any disciplinary matters that arise during an **Elected Official's** term of office pursuant to the terms of the *Sturgeon Lake First Nation Executive Act, 2009*.
>
> 11.4 It ***shall*** be the duty of the Appeal Tribunal to certify the **Election** or **By-election** results of the **First Nation** Council if there is an Appeal after an **Election** of **By-election**.
>
> [Emphasis in original]

[57] I find that the Appeal Tribunal did usurp its role according to the *Election Act* and it also usurped its role according to the custom to observe and oversee the election. The Tribunal did participate in the decision to disqualify Mr Felix as a candidate in the election. The evidence does not support the respondent's position that the Appeal Tribunal merely attended and observed. The affidavits of the Appeal Tribunal Members do not indicate what the involvement of the Tribunal was in the posting of the notice of disqualification or the later rejection of ballots cast for Mr Felix, but their cross-examinations are more candid.

[58] Mr McLeod, an Appeal Tribunal Member, stated that Band custom is that the Appeal Tribunal oversee and observe the election. Irene Ermine, an Appeal Tribunal member, also indicated at Q 350 that it has always been the practice for the Appeal Tribunal to "go with the election to -- to -- observe".

[59] When asked what "oversee" meant, Mr McLeod responded at Q 57 that it was to ensure "it runs right". In response to what he would do if it were not running right, he gave the example of directing the polling clerk to assist a handicapped person.

[60] At Q 64-93, he responded to questions about what transpired when the Band administrator delivered the Statement of Fact. He indicated that he made inquiries to the CEO about what the document was. The CEO and EO read the documents and closed the doors to the poll for about five minutes while a quick meeting was held. At Q 90 he indicated that he was at that meeting along with other members of the Appeal Tribunal and the CEO and other EO and "I was listening to the evidence --".

[61] When questioned about the Appeal Tribunal's preliminary ruling, at Q 201 he agreed that Mr Felix's appeal was not considered at all, it was set aside, "due to disqualification". Mr McLeod indicated that the other appeals were considered and also dismissed.

[62] Mr Gary Turner, the CEO, was asked what he did about the Statement of Fact that was delivered and responded at Q 58, that "we" had a group discussion about the ruling and that this group included the DEO and the Tribunal members.

[63] When asked what the Tribunal members did, he indicated at Q 81, "Well, I -- well, I -- I -- I read that statement of fact to them and I asked them, and their decision was that -- to go ahead with the -- with the polls but that to let the people know that Henry was ineligible for a -- as a candidate." At Q 83, he indicated that Tribunal member Jeff McLeod made the decision/statement.

[64] At Q 122 he acknowledged that he posted the Statement of Fact in the polling station, but that he read the decision of Justice Snider later.

[65] When asked about why Mr Felix was not a candidate for the by-election, he indicated at Q 255 that he was removed as a candidate by the Appeal Tribunal.

[66] At Q 338-340 he indicated that based on information he received from the Band administrator, the Appeal Tribunal told him that Felix was ineligible.

[67] This testimony establishes that the Appeal Tribunal played a more active role in the disqualification of Mr Felix than simply observing or overseeing the role of the Chief Electoral Officer. It appears that the Tribunal read the decision of Justice Snider and the notice prepared by the Band Administrator, met and discussed the notice with the CEO and EO, and collaborated in the decision to post the notice, let the election continue and later disqualify all ballots cast for Mr Felix.

[68] This participation clearly overstepped the customary role of the Tribunal described as observing and overseeing the elections. The respondent was not able to answer what "overseeing" generally entails. I would suggest that if the accepted custom is that the Appeal Tribunal has any role in overseeing an election, they will put themselves in the same "delicate" situation noted by Justice Bédard, as they could be called upon later to determine an appeal on a wide range of election irregularities that they oversaw.

[69] Even the silence of the Appeal Tribunal – if the facts supported that the Tribunal had been silent – could be construed as participation in a decision where the Tribunal stands by and does not prevent a breach of the *Election Act* or breach of procedural fairness from occurring.

[70] In this case, the Appeal Tribunal considered the appeal of the very decision it had participated in to disqualify Mr Felix. There is no doubt that this created real or a reasonable apprehension of bias.

[71] The oft cited test for bias was stated in the *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, at page 394:

> As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and rightminded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through --conclude". […]

[72] In this case, the informed person could reach no other conclusion than that there was a reasonable apprehension of bias.

[73] As the respondents note, in small communities, everyone knows or is related to each other, including decision makers, and it may be a challenge to avoid an apprehension of bias. However, we are not dealing with kinship and familiarity but with conduct that could be avoided by observing basic rules of procedural fairness.

[74] Justice Bédard was clear in stating her concerns about the practice of the Appeal Tribunal in *Felix #1*, at paras 46 to 49:

> [46] At the hearing, counsel for the applicant raised other concerns about the role that the Appeal Tribunal members played in the electoral process. Notably, he raised the fact that the Appeal Tribunal members were present at the polls and witnessed facts that they later adjudicated. The Court has similar concerns.
>
> [47] In its submission, the respondent admitted that the Appeal Tribunal members were involved in different stages of the electoral process. For example, evidence shows that the Appeal Tribunal members participated in the decision regarding the location of the advance poll in Saskatoon. The evidence also showed that the Appeal Tribunal members were present when voters were assisted by Elder/Interpreter Margaret Ermine. Both the matter of locating

> the advance poll in Saskatoon and the matter of Elder Margaret Ermine's assistance were at issue in the appeal. The Appeal Tribunal members placed themselves in a very delicate situation. One cannot act as judge, witness and party. The Appeal Tribunal's members must keep a safe distance from the electoral process in order to remain neutral and maintain the appearance of neutrality expected from them.
>
> […]
>
> [49] I am also of the view that the involvement of the Appeal Tribunal members in the electoral process should be reviewed to ensure that they do not participate in making decisions that can later be disputed in the context of an appeal.

[75] Although the respondents submit that the Appeal Tribunal heeded the advice or direction of Justice Bédard, it clearly did not do so and did not appear to understand that its role in attending and observing placed it directly into the situation of participating in decisions it would later be called upon to determine on appeal. These situations cannot be anticipated and it would be wise to not observe or oversee at all, or alternatively to prescribe what that role actually is and to confine itself to it without usurping the role of the CEO.

[76] I agree with the applicants that the critical issue is not the role that custom plays in the community but the need to ensure that the custom complies with natural justice and procedural fairness. The law is well established that custom can not ignore or trump principles of natural justice or procedural fairness. In *Sparvier*, Justice Rothstein noted at para 47:

> 47 While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this

> Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

[77] With respect to the applicants' suggestion that Mr Felix's appeal was shut down at the preliminary ruling because of his disqualification, the record is not clear that this occurred. The brief ruling does not clarify if this was a proper stage 1 ruling to dismiss the appeal due to insufficient evidence or if it was a predetermination of the issue with the subsequent hearing simply as a "courtesy" or afterthought and not a proper appeal. Given that the decision is quashed, it is not necessary to decide this, but only to caution that the preliminary ruling must be in accordance with the criteria set out in the *Election Act*. A preliminary ruling dismissing an appeal due to the disqualification of the appellant when it is the validity of that disqualification that is being appealed would completely deny the appellant any opportunity to appeal.

Is the decision of the Appeal Tribunal reasonable?

[78] The applicants submit generally that the *Election Act* should be respected and followed and that there were several irregularities which demonstrate that the sanctity of the ballot box was compromised and that general principles essential for a democratic process were not observed.

[79] The applicants argue that 325 votes were cast for Mr Felix and the disqualification of these votes by the CEO after the count, and not in accordance with the procedure for marking ballots disqualified, disenfranchised 325 voters and denied Mr Felix his position as Chief. Mr Felix was qualified at the nomination meeting. The Act does not provide for reopening issues dealt with at the nomination meeting.

[80] The applicants submit that the award for costs against Mr Felix does not affect his eligibility as a candidate as that was determined on the day of his nomination. The applicants note that Mr Felix was accepted as a candidate at the date of nomination. The *Election Act* provides that any debt owing to the Band should be verified in accordance with the auditor's financial statements. Those statements confirm that Mr Felix did not owe a debt to the Band at the relevant time. He argues that even if money is later owed to the Band, the ballot should still continue. There are other processes to deal with conduct of elected officials during their term of office.

[81] The applicants argue that the CEO and EO exceeded their authority and that the Appeal Tribunal erred in deciding that the CEO and EO acted within their authority and jurisdiction under the *Election Act* in rejecting the votes cast for him. The applicants submit that the Tribunal failed to consider the *Election Act* and the sanctity of the ballot box; the ballots were not rejected individually by the CEO but as a group after polls closed and the vote count clearly favoured Mr Felix.

[82] The 325 votes cast were legitimate ballots. There is no record of each ballot having been rejected as required. By March 29, the ballots had collectively been marked as rejected.

[83] The applicants point to the recent decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*, 2012 SCC 55, [2012] 3 SCR 76 [*Opitz*] and argue that election officials should favour the inclusion, not the exclusion, of voters and candidates.

[84] The respondents submit that the *Election Act* together with the *Executive Act* provide the authority for disqualification even after the nomination is accepted. The respondents argue that the power to disqualify a candidate rests with the CEO up to date of swearing in. Thereafter the *Executive Act* applies and a breach of the Oath of Office can result in removal. The Executive Elders Advisory Council has the authority to discipline elected officials and address their removal for violations of the Act.

[85] The respondents argue that Mr Felix brought this situation on himself as his unsuccessful litigation frustrated his candidacy. The respondents further submit that he could have cleared his debt before the by-election but did not do so.

[86] The respondents submit that the CEO and EO made the decision based on the current information available to them on Election Day, i.e., that Mr Felix owed money to the Band.

[87] The respondents further submit that it was the intention of the community members who participated in the election reform process that the qualifications of candidates would be ongoing requirements and notes, for example, the conflict of interest and corrupt practices provisions of the *Executive Act* section 13(3). The respondents argue that a candidate could disqualify himself because any substantial change in the candidate's circumstances might result in their disqualification at any stage of the proceedings up to their swearing-in and that this is what occurred in Mr Felix's case.

The Appeal Tribunal must reconsider whether the CEO erred in disqualifying Mr Felix

[88] As noted above, the Appeal Tribunal violated procedural fairness and the decision is quashed on that basis. In most cases where a decision is quashed for a breach of procedural fairness, there is no need for the Court to go on to consider the reasonableness of the decision. In this case, because the same Appeal Tribunal will be tasked with re-determination of the appeal, some further guidance regarding the issues raised concerning the reasonableness of the decision is warranted.

[89] Reasonableness, as the Supreme Court of Canada stated at para 47 of *Dunsmuir*, refers to "both to the process of articulating the reasons and to outcomes." According to the Court, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[90] It appears that no one took the responsibility for the decision to disqualify Mr Felix and that there was a great deal of confusion about who should determine the issue and how. The CEO is responsible for determining the qualifications of candidates in accordance with the *Election Act*. As found above, the Appeal Tribunal played a role in that decision and overstepped their authority in doing so.

[91] Some appear to think it was an automatic disqualification due to the *Election Act*, but that is not the case and it appears that no one carefully read the *Election Act* or the decision of Justice Snider before posting the notice.

[92] The testimony of the CEO and Appeal Tribunal members demonstrates this confusion.

[93] Gary Turner, the CEO, acknowledged that he posted the Statement of Fact in the polling station, but that he read the decision of Justice Snider later. He also indicated that it was Jeff McLeod who made the decision to disqualify Mr Felix.

[94] When Mr Turner was questioned about who in fact disqualified Mr Felix at Q 321-336, he responded that Mr McLeod said that the Band disqualified Mr Felix because the Band made the *Election Act* and the *Election Act* speaks for the Band. In response to further questioning he indicated, "So it's the band that disqualified Henry, not me, not you, not anybody, the band."

[95] When asked who informed him as CEO, at Q 336 Mr Turner indicated that "They didn't tell me. They showed me."

[96] At Q 338-340 Mr Turner indicates that based on information he received from the Band administrator, the Appeal Tribunal told him that Mr Felix was ineligible.

[97] However, at Q 112 of Mr McLeod's cross-examination, Mr. McLeod agrees that the money owed by Mr Felix does not reflect the provisions of the *Election Act* which requires the money owed to be "as evidenced by the most recent audited financial statement --".

[98] Irene Ermine, another Appeal Tribunal member, was also questioned about the disqualification of Mr Felix. In response to Q 79 she indicated that Mr Felix was disqualified by the "Statement of Fact". She appeared to believe that the Order of Justice Snider had indicated that Mr Felix was not eligible to be a candidate because he owed money to the Band. When questioned further, she could not point to anything in the Order of Justice Snider that indicated that Mr Felix was disqualified.

[99] At Q 365 she indicated that the Appeal Tribunal "didn't disqualify him. It was the – the Court order – the statement of fact that we received that disqualified him."

[100] Although the Tribunal Members and the CEO take the view that the *Election Act* disqualified Mr Felix, their duty is to properly interpret and apply the provisions of the *Election Act*. Despite Mr Turner's opinion, the decision is attributed to him as CEO, albeit with input from the Appeal Tribunal.

[101] I do not agree with the respondents that *all* the requirements of candidacy are ongoing because this was the intention of the Band. If that were the intention, it should be clearly reflected in the Acts. The *Election Act* sets out eligibility and with respect to money owed, refers specifically to the evidence required – the audited financial statements. The provisions of the

Executive Act referred to by the respondent are related to conflicts and ethical duties during the term of office.

[102] A debt may only be a temporary situation. It would be impossible and impractical to remove an elected official for a debt owed to the band one day that may be paid back the next day or the next month, whatever the reasonable time to pay would be.

[103] I also do not agree with the respondents that the Elders EAC could resolve the conflict. The role of the Elders EAC appears to be based on a specific request from the Appeal Tribunal. The Council has no role in addressing *Election Act* appeals or related disputes.

[104] The respondents submit that Mr Felix made no arrangements to pay the costs ordered by Justice Snider. However, there is no such evidence. Moreover, the Order imposed by Justice Snider on March 26 asked both parties for submissions regarding the costs initially within 30 days with an additional 25 days for replies. Mr Felix would not be aware of the specific amount he would be required to pay until that Order was finalised.

[105] The Band Administrator was very quick to post the notice of Mr Felix's debt and his ineligibility. It appears that little attempt was made to fully understand the Order made by Justice Snider. As indicated by Mr Turner, the notice was posted first, and the decision was read later.

[106] Notably, the advance polls had taken place before the decision to disqualify Mr Felix was made and several votes had likely been cast for Mr Felix before the notice was posted, and likely others cast after the notice.

[107] If Justice Snider had issued the Order three days later, after the election results had determined that Mr Felix was the candidate with the most votes, would the *Election Act* or the *Executive Act* provide for his removal? The provisions of these Acts do not appear to address this situation.

[108] The provisions referred to by the respondents in the *Executive Act* regarding removal from office do not refer to money owing to the band but to matters such as breach of the oath of office, corruption and conflict of interest, which are indeed ongoing requirements.

[109] As for the *Election Act*, it clearly states in Section 2:

> "Candidate" means an individual who meets all of the following criteria:
>
> […]
>
> e) a person who does not owe any money to the Band <u>as evidenced by the most recent audited financial statement</u> (this prohibition excludes funds advanced for emergency or post-secondary purposes);
>
> [My emphasis]

[110] Section 5. 1 states:

> The Chief Electoral Officer shall ensure that the following conditions are met:
>
> […]

> (b) Only members of the Sturgeon Lake First Nation who:
>
> […]
>
> (vii) who do not owe any money to the Band;
>
> […]
>
> may be nominated as a Candidate pursuant to sub-section 2.5 of this Act.

[111] In re-determining the appeal by Mr Felix, the Appeal Tribunal must consider the applicable provisions of the *Election Act, 2009* and whether the *Election Act* authorises the disqualification of a candidate for a debt that arises after the individual is accepted as a candidate and where the audited financial statements disclose no debt on the relevant date. The Tribunal must also consider whether a reasonable time for payment would be permitted where such debts arise. Similarly, the Tribunal should consider what would have occurred if the debt arose after the election.

[112] As the decision of the Appeal Tribunal could again be challenged on judicial review, the Tribunal should aim to ensure that the decision is reasonable; i.e., that it "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para 47) and that it is justified, transparent and intelligible (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59).

What is the appropriate remedy?

[113] The applicants initially submitted that the Court could liberally interpret Rules 3 and 4 of the *Federal Courts Rules*, SOR/98-106 to craft an appropriate remedy and substitute its decision

for that of the Appeal Tribunal and CEO. They also rely on the result reached by Justice Zinn in *Bellegarde v Poitras*, 2009 FC 968, 352 FTR 290 [*Bellegarde*], which reinstated the elected Chief as authority for his submission that the Court could substitute Mr Felix as Chief.

[114] The applicants submit that the respondents' request to let the Band consider the issues in its own way is clearly not an option. The Court should not remit the decision to the Appeal Tribunal as those same members would again be reviewing their own decision and there is more than a reasonable apprehension of bias.

[115] The applicants submit that the Court should consider a remedy that will give some guidance. The only real or effective remedy is for the Court to substitute its decision for that of the Appeal Tribunal and to find that the electoral officials lacked jurisdiction to disqualify Mr Felix and to give effect to the results of the 2013 election in accordance with the *Election Act*. The decision to disqualify the candidacy of Mr Felix was participated in or made by the Appeal Tribunal and endorsed by CEO and DEO or, alternatively, made by the CEO and DEO and endorsed by the Appeal Tribunal – and this is the very decision that Mr Felix and the WG sought to appeal. Returning the decision to the same Appeal Tribunal will delay justice – or prevent it. The Appeal Tribunal has limited experience interpreting the Act and they believe that custom supersedes the Act. Moreover, the Appeal Tribunal is not inclined to follow the guidance of the Court. It cannot therefore be entrusted with re-determining this appeal.

[116] The respondents submit that the Court should not substitute its decision and emphasizes that aboriginal self-government must be meaningful and respected. Leadership selection is an

inherent right and it is for the electors in the Band to determine. The respondents further submit that the Court should not the usurp role of the Appeal Tribunal to decide if the election results should be set aside or that a new election is warranted.

[117] The respondents point out that there is no provision in the *Election Act* to permit a reconstituted Appeal Tribunal to re-determine the appeal. The same three members would sit on the Appeal Tribunal until the next election is called.

[118] The respondents advise the Court that no attempts have been made to resolve this dispute in the community, but that amendments to the *Election Act* are currently under discussion. The respondents submit that if the applicants' concerns about due process and fairness are related to the *Election Act*, they should propose amendments to that Act.

[119] The respondents acknowledge that mistakes have been made and that meaningful direction from the Court would permit development in a culturally appropriate way. The respondents note, as an example, that in *Jackson v Piikani Nation Election Appeals Board*, 2008 FC 130, 323 FTR 188 at para 37-38, Justice Phelan ordered the Band to make specific amendments to their *Election Act* within a fixed time.

The Appeal Tribunal Must Re-determine the Appeal

[120] The decision is quashed but the remedies available to the Court are limited.

[121] As noted by Justice Bédard in *Felix #1*, Rules 3 and 4 do not permit the Court to order the substantive relief the applicants seek. At para 56:

> [56] The Court does not have jurisdiction to set aside the election results and order a new election. Rules 3 and 4 of the Rules do not allow the Court to go as far as creating a substantive relief that is not provided for in the Election Act. Rule 3 is an interpretation rule and Rule 4, often called the "Gap Rule", is procedural in nature and does not allow the Court to invent relief not contemplated in the applicable legislation. The responsibility of deciding whether the election results should be set aside and if a new election is warranted rests with the Appeal Tribunal and the Court must not usurp that role.

[122] The applicants also suggest that *Bellegarde* provides sufficient authority for the Court to declare that the votes cast for Mr Felix are not disqualified and to declare him as the elected Chief. I do not agree.

[123] In *Bellegarde* the applicant was removed as Chief by a decision of the Council of Elders. Justice Zinn found that the Council breached its duty of procedural fairness and quashed that decision. By quashing the removal of the Chief, the situation that existed before the decision was made was restored, i.e., the applicant was restored to her position as Chief.

[124] In that case, Justice Zinn indicated "As a result of paragraph 2 of this Judgment, the Court declares that Beverly Bellegarde is the Chief of the Peepeekisis First Nation and she is entitled to receive forthwith all wages and compensation that were not paid as a consequence of the decision made on June 10, 2009 to cease her compensation". Paragraph 2 quashed the decision which removed Ms Bellegarde. The result restored the situation that existed before the decision was made.

[125] In the present case, the Appeal Tribunal upheld the decision of the CEO (if indeed it was his decision as no one claims to have made the decision – but the decision is attributed to the CEO). By setting aside the Appeal Tribunal's dismissal of the appeal, the decision of the CEO to disqualify Mr Felix as a candidate and to reject all the votes cast for him still remains.

[126] This leaves the remedy of remitting the decision to the decision maker to be re-determined. The *Election Act* does not provide for a different, i.e., a re-constituted Appeal Tribunal, to determine the issue afresh. I agree with the comments of Justice Noel in *Bill v Thomas*, 2007 FC 1152, 319 FTR 182 (Eng) [*Thomas*], that this is not a good option. Unfortunately, it is the only option.

[127] In *Thomas*, at para 32-34, Justice Noel commented on the fact that the *Election Act* failed to provide for the Appeal Tribunal to be reconstituted to re-determine a decision where the Court allowed judicial review. He then called on the Band to amend its Act to provide for clear and fair procedures:

> [32] I also add that the Court's finding of apparent bias makes it impossible to return the matter to the Appeal Board as it was constituted after the March 2007 election. What can a Court do in such a situation?
>
> [33] This exceptional situation calls for exceptional measures. To put an end to this vicious cycle and allow the democratic will of Band members to run its course, this Court therefore allows the appeal. In obiter therefore, the Court is of the studied opinion that the applicants should take all means possible to correct the present situation. The Pelican Lake Band Council, under the direction of the applicants, Chief Peter Bill and Councillors Romeo Thomas, Frederick Whitehead, David Thomas, Gilbert Chamakese, Sidney Bill and Jimmy Bill, elected for a three year term on March 9, 2007, are encouraged to take the decision of the electoral process back to the people according to Band custom, and decide how best

> the Band will be governed pursuant to the amendments deemed to be in the best interests of the Band and its people.
>
> [34] In so doing, the Court would encourage the Band Council to turn its mind to the people within six (6) months of these reasons, and using the amending formula provided under section 16 of the *Election Act* put in place clear, fair and just procedures to assure that the democratic will of the Band members is respected and allowed to run its course and effectively stop the revolving door of judicial proceedings.

[128] Given that the same Appeal Tribunal must determine the appeal of the decision which they have taken part in, it will be essential that the Appeal Tribunal meets its duty of procedural fairness, seeks submissions from counsel for the parties on the proper interpretation of the *Election Act*, particularly regarding the qualifications of candidates, the role of the CEO and the role of the Appeal Tribunal, and should make every effort to approach the appeal with an open mind to avoid the inherent apprehension of bias.

[129] With respect to the respondents' suggestion that Mr Felix should engage in the process to amend the *Election Act*, any amendments to the Act, as necessary as these may be, would only be prospective and would not resolve the errors in the 2013 election.

[130] That said, I would encourage the Band to enact amendments to the Act as soon as possible, and before the next election, to clarify the role of the Appeal Tribunal in observing elections and to ensure it does not usurp the role of the CEO. As noted above, the reliance on custom, even if codified, cannot trump the basic requirements of procedural fairness. In particular, if this custom is codified, the Act should also provide that the Appeal Tribunal shall not engage in any conduct or decisions which it will later be called upon to consider as an

Appeal Tribunal. As noted above, it is impossible to anticipate all such situations so the role of the Tribunal should be very limited.

[131] The Band should also consider enacting amendments before the next election to provide that the membership of the Appeal Tribunal could be changed in the event that decisions are remitted to the Tribunal for re-determination. This is essential to avoid a continuous cycle of allegations of real or apprehended bias. This could be accomplished in several ways, for example, by choosing six members of the Tribunal (two panels of three to ensure that the same panel does not re-determine its own decisions).

[132] The Band should also consider amendments to clarify how debts owed to the Band that arise after the candidate is nominated affect the eligibility of the candidate.

[133] Given the lack of clarity regarding the preliminary ruling which may have denied Mr Felix an appeal altogether, the Appeal Tribunal should ensure that its preliminary rulings are based on insufficiency of evidence, as stated in the Act, and are not pre-determinations of issues which require a full hearing.

[134] I am mindful that the Sturgeon First Nation has enacted its *Election Act* after many years of consultation and the process of amendment continues. The guidance offered above is not intended to usurp the role of the people of Sturgeon Lake in managing their elections and their government, rather it is intended to avoid the need to return to the Court.

[135] This Court has addressed similar issues and I have considered the jurisprudence which emphasizes that the Court should not be too quick to craft remedies for the community. I note, in particular, the words of Justice Barnes in *Sweetgrass First Nation v Gollan*, 2006 FC 778, 294 FTR 119 at para 53:

> 53 **There is much to be said for the Court adopting the least intrusive path into the affairs and decisions of Sweetgrass in fashioning a remedy for the electoral impasse which has arisen**. Like most other democratic institutions, the electors and elected representatives of Sweetgrass are fully capable of conducting their business without outside involvement and, except in a limited way, this case is no exception.
>
> [Emphasis in original]

[136] In this case, the people of Sturgeon Lake First Nation, with the guidance of this decision and the guidance of Justice Bedard in *Felix #1*, are equally capable of resolving election appeals.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is remitted to the Appeal Tribunal for re-determination in accordance with the directions provided.

3. The applicants shall have reasonable costs of the motion. The parties have 15 days to make submissions regarding their costs and each shall have an additional 15 days in reply.

"Catherine M. Kane"

Judge

Annex A

Chronology

- October 2008-May 2009 – The Sturgeon Lake First Nation engages in consultation process to update its initial custom election act. This process results in the enactment of the *Sturgeon Lake First Nations Election Act, 2009* in May 2009.

- March 26, 2010 – Mr Felix runs as candidate for Chief in first election held under the *Election Act, 2009*. He places second by a margin of three votes.

- March 30, 2010 – A re-count of the election ballots takes place, reducing the margin of Mr Felix's loss to two votes.

- April 7, 2010 – Mr Felix appeals the election to the Sturgeon Lake First Nation Appeal Tribunal.

- April 12, 2010 – The Sturgeon Lake First Nation Appeal Tribunal meets and makes a Preliminary Ruling dismissing Mr Felix's appeal.

- April 29, 2010 – Mr Felix applies for judicial review of the Sturgeon Lake First Nation Appeal Tribunal's decision to the Federal Court.

- October 16, 2011 – In *Felix #1*, Justice Bédard sets aside the Sturgeon Lake First Nation Appeal Tribunal's decision, directing that the process be restarted at the appeal hearing stage and be conducted in accordance with the *Election Act* and in fairness to all parties.

- November 1, 2011 – Pursuant to Justice Bédard's judgment, the Sturgeon Lake First Nation Appeal Tribunal reconvenes and the rehearing takes place. The Appeal Tribunal adjourns a second hearing to November 21, 2011.

- November 9, 2011 – The respondent Band appeals Justice Bédard's judgment to the Federal Court of Appeal. On December 19, 2011, the Federal Court of Appeal denies a motion by the respondent to stay the judgment pending the appeal. The appeal is later abandoned.

- November 21, 2011 –The hearing resumes and preliminary rulings are provided to the Mr Felix

- December 20, 2011 – The hearing resumes for its third day. Mr Felix expresses his concerns before the Appeal Board that the hearing is not being conducted in accordance with Justice Bédard's decision to proceed under the *Election Act* and leaves the hearing before giving evidence. The Appeal Tribunal dismisses his appeal.

- May 4, 2012 – Mr Felix applies under Rule 467(3)(2) for an Order for contempt.

- December 2012 – A Band meeting takes place to select Chief and Deputy Electoral Officers and an Appeal Tribunal for the 2013 Election.

- Early 2013 – The Electoral Officers meet to set dates for the 2013 elections.

- March 6, 2013 –Mr Felix and other candidates submit declarations of their intent to run for Chief to the Electoral Officers.

- March 13, 2013 – The Federal Court hears Mr Felix's motion pursuant to Rule 467(3)(2) for an Order for contempt.

- March 20, 2013 – The nomination meeting for Elections for Chief and Councillors takes place at the Sturgeon Lake Community Hall. The Chief Financial Officer certifies at this date that Mr Felix does not owe money to the First Nation.

- March 25 and 26, 2013 – Advance polls for the election take place.

- March 26, 2013 – Justice Snider issues Reasons for Order and Order dismissing the motion for contempt and awards costs against Mr Felix.

- March 27, 2013
  - The Sturgeon Lake First Nation poll for the March 27, 2013 election takes place.
  - The Electoral Officers circulate and post an unsigned, undated document (referred to as the "Statement of Fact") at the Sturgeon Lake First Nation poll. This document states that Mr Felix owes money to the Sturgeon Lake First Nation pursuant to Justice Snider's Order and, as such, is ineligible to run for Chief.
  - Immediately upon close of the Sturgeon Lake poll, the Electoral Officers supervise the ballot count for Chief. Mr Felix receives 325 ballots in his favour.
  - Chief Electoral Officer, Gary Turner, declares that Mr Felix is disqualified.

- March 29, 2013 –The Electoral Officers issue an Election Report and record the 325 ballots cast for Mr Felix as "rejected." The Report indicates that Mr Felix was

disqualified because of the money owing to the Band pursuant to Justice Snider's March 26, 2013 Order.

- April 6, 2013 – Mr Felix files an appeal with the Sturgeon Lake First Nation Appeal Tribunal.

- April 11, 2013 –Working Group Members, Garry Daniels, Gertrude Felix, Garry Wichihin, Ramona Felix Cook and David Badger file appeals with the Sturgeon Lake First Nation Appeal Tribunal.

- April 12, 2013 (on or about) – The Sturgeon Lake First Nation Appeal Tribunal issues a Preliminary Ruling dismissing the appeals, but also decides to hold a hearing.

- April 29 & April 30, 2013 – The Sturgeon Lake First Nation Appeal Tribunal holds a hearing.

- May 3, 2013 – Mr Felix launches an appeal of *Felix #2* (Justice Snider's Order) to the Federal Court of Appeal. This appeal has not yet been heard.

- May 6, 2013 – The Sturgeon Lake Appeal Tribunal issues its decision to set aside the appeals of "the petitioners"

- May 9, 2013 – The Working Group receives notice of the Sturgeon Lake Appeal Tribunal's decision.

- May 21, 2013–Mr Felix writes to Duane Storey of the Sturgeon Lake First Nation requesting proof of his indebtedness. According to his Affidavit, as of June 14, 2013, no response was received.

Annex B

The Sturgeon Lake First Nation Election Act, 2009

The relevant provisions are set out below:

Section 2.5 – "Candidate" means an individual who meets all of the following criteria:

[…]

e) a person who does not owe any money to the Band as evidenced by the most recent audited financial statement [this prohibition excludes funds advanced for emergency or post secondary purposes];

Section 5. 1 The Chief Electoral Officer shall ensure that the following conditions are met:

[…]

(b) Only members of the Sturgeon Lake First nation who:

[…]

(vii) do not owe any money to the Band;

may be nominated as a Candidate pursuant to sub-section 2.5 of this Act.

Section 8.18 No person shall on Polling Day:

(a) while in a Polling Place display on his or her person or

(b) post or display in or within one hundred and fifty metres (150 m) of a Polling Place or in or on the window or door of a Polling Place or on the walls or any part of the building in which a Polling Place is situated

any campaign literature, emblem, ensign, badge, label, banner, card or device that could be taken as an indication of support for a particular Candidate.

Section 11- An Appeal Tribunal shall be appointed at the time the Election is called.

[…]

11. 2 *No one sitting on the Appeal Tribunal may participate in the Election or By-election whether as a Candidate, Nominator, Seconder or Voter.*

11.3 The Appeal Tribunal ***shall*** supervise and administer all **Election** and **By-election** Appeals in accordance with this ***Election Act***. The Appeal Tribunal may be-reconvened to deal with any disciplinary matters that arise during an **Elected Official's** term of office pursuant to the terms of the *Sturgeon Lake First Nation Executive Act, 2009*.

11.4 It ***shall*** be the duty of the Appeal Tribunal to certify the **Election** or **By-election** results of the **First Nation** Council if there is an Appeal after an **Election** of **By-election**.

Section 12 – The Appeal Procedure shall be as follows:

[…]

12.3 The Appeal Tribunal ***shall***, within seven (7) days of receiving the complaint, rule on whether to allow or disallow an Appeal Hearing based on the sufficiency of the evidence presented in the complaint.

[…]

12.5 If the Appeal Tribunal decides to proceed with an Appeal Hearing, the Hearing *shall* be held within fourteen (14) days of receiving the complaint. All proper parties [the Appellant(s) and Respondent(s)] *shall* be given notice of the date, time and place of the Appeal Hearing and the grounds for appeal by registered mail.

12.6 At the Appeal Hearing, the Appellant(s) *shall* present his, her or their case. All proper Respondents are entitled to make full answer and defence. The Appellant(s) *shall* then have an opportunity for rebuttal. Any of the parties [Appellants, Respondents] may be represented by legal or other counsel each at their own expense. The Appeal Tribunal may have legal counsel whose professional fees shall be paid by the Band.

12.7 The Appeal Tribunal *shall* hear any and all relevant evidence brought forth by the Appellants and/or Respondents.

12.8 The Appeal Tribunal *shall* within seven (7) days of holding an Appeal Hearing, make one of the following decisions:

(a) deny the Appeal on the grounds that the evidence presented did not indicate an infraction of the Act, there was no evidence (or insufficient evidence) of corrupt practice and/or the Candidate was not disqualified from running and so advise the Band and the Complainant;

(b) uphold the Appeal but allow the Election to stand, on the grounds that the infraction could not reasonably be seen to have affected the results of the Election; or

(c) uphold the Appeal and call for a new Election [all election results are suspect] or By-election [only some election results are suspect] within twenty-one (21) days of the determination of the Appeal for all or some of the positions which were contested, giving clear instruction to the Election Officials such that the reason for the original Appeal [error or omission] is corrected.

There *shall* be no new or additional nominations beyond the slate that ran in the Election or By-election that is the subject of Appeal but no Candidate *shall* be required to let his or her name stand in the new Election or By-election.

12. 9 Where an appeal is received by the Appeal Tribunal pursuant to sub-section 12.1 the Appeal Tribunal *shall*:

(a) within seven (7 days) of the receipt of the Appeal forward a copy of the Appeal together with the supporting documents to each of the parties named in sub-section 12.4;

(b) as soon as is practicable forward a copy of their Preliminary Ruling by Registered Mail to each of the aforementioned parties;

(c) advise each of the aforementioned parties in person or by regular, electronic and/or fax mail of the date, time and place of the Appeal Hearing, if there is to be one, and the grounds of the Appeal;

(d) advise each of the aforementioned parties by Registered Mail of the decision of the Appeal Tribunal.

12. 10 The decision of the Appeal Tribunal *shall* be final.

[…]

Section 15 Vacancies *shall* occur in the event of the following:

15.1 The offices of Chief and Councillor *shall* immediately become vacant when the person holding that office

[…]

(g) fails to uphold the Oath of Office, Band by-laws or other duly enacted Band legislation including this Act and the *Executive Act*;

[…]

(i) is determined to be ineligible to hold office by virtue of this Act or any amendments thereto.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-927-13
STYLE OF CAUSE:	HENRY J. FELIX SR. ET AL v THE STURGEON LAKE FIRST NATION, (“*THE BAND*”) ET AL
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	AUGUST 21, 2014
JUDGMENT AND REASONS:	KANE J.
DATED:	SEPTEMBER 23, 2014

APPEARANCES:

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Victoria Elliott-Erickson	FOR THE RESPONDENTS

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