Federal Court  Cour fédérale

Date: 20170426

Docket: T-1073-15

Citation: 2017 FC 407

Ottawa, Ontario, April 26, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAM TWINN AND ISAAC TWINN

Applicants

and

SAWRIDGE FIRST NATION, SAWRIDGE FIRST NATION FORMERLY KNOWN AS THE SAWRIDGE INDIAN BAND, ROLAND TWINN, ACTING ON HIS OWN BEHALF AND IN HIS CAPACITY AS CHIEF OF THE SAWRIDGE FIRST NATION AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of connected decisions taken by the Chief Electoral Officer [CEO], made on or about February 17, 2015 [Decisions] related to the 2015 general election [Election] of Sawridge First Nation [SFN].

II. BACKGROUND

[2] On December 4, 2014, prior to the Election, the CEO sent a mail-out package to SFN's electors that contained: a cover letter; Notice of Election; Notice of the Date for Nominations; a resident electors sub-list; and a non-resident electors sub-list. The cover letter advised recipients to refer to s 18 of the *Sawridge First Nation Elections Act*, *Consolidated with Elections Act Amendment Act* [*Elections Act*] for the provisions that governed the process for submitting changes to the sub-lists and corresponding deadline.

[3] The CEO received 4 requests to correct the sub-lists and provided notice of the changes to SFN's electors on December 23, 2014. The notice also advised that the deadline for submitting a statutory declaration as to why the changes should not be made was 11 days prior to the January 13, 2015 nomination meeting.

[4] On January 13, 2015, Sam and Roland Twinn were nominated for the position of Chief.

[5] The Election took place on February 17, 2015 from 10:00AM to 6:00PM. After the polls closed, the CEO publicly opened the 15 sealed mail-in ballots, including those of Walter Felix Twinn (Walter) and Deana Morton.

[6] Walter's ballot lacked the initials of the CEO, which is a requirement for validity under the *Elections Act*. Ron Rault [Scrutineer], the scrutineer for Sam Twinn, Tracey Poitras-Collins, and Elizabeth Poitras, suggested that Walter's vote be accepted, or that Walter be permitted to cast an in-person vote since he was present at the polls; however, the CEO rejected both suggestions and determined Walter's vote, along with two others, was invalid.

[7] Deana's vote lacked a witness address but was accepted by the CEO.

[8] Roland was declared the winner of the Election for Chief by one vote. According to s 72 of the *Elections Act*, a tie would have required a run-off election.

[9] The Applicants then proceeded to appeal the Election. On March 2, 2015, they filed a Notice of Appeal with the CEO, which was rejected on March 6, 2015. The Applicants then appealed to the Elders Commission, which did not respond within the required time period. Accordingly, the Applicants appealed to the Special General Assembly [SGA] of the SFN on April 13, 2015. The four grounds of all the appeals were: improper rejection of ballots; non-compliance with election rules; inconsistent administration decisions impacting the popular vote; and non-compliance with the rules regarding the creation and notice of voter lists.

[10] On May 30, 2015, the SGA dismissed the Applicants' appeal. The Applicants then commenced this application for judicial review.

III. DECISIONS UNDER REVIEW

[11] According to the Applicants, there are three related decisions that constitute the subject of this judicial review:

(1) Rejection of Walter's Vote

[12] According to the Scrutineer, the CEO set aside Walter's ballot upon opening Walter's mail-in vote because it had been cut and the CEO's initials removed. The CEO later determined Walter's vote to be invalid, overruling the Scrutineer's suggestion that Walter be permitted to cast a new in-person vote in place of his spoiled ballot.

(2) Conduct of the Election

[13] The mail-out packages were dated December 3, 2014 and mailed December 4, 2014, with the Election held on February 17, 2015.

[14] Two of the mail-out packages, addressed to Patrick Twinn and Georgina Ward, were not delivered and returned.

[15] Following corrections, the CEO sent revised lists of electors. The deadline to correct the new list was January 2, 2015. However, Sam Twinn did not receive the notice until January 6, 2015.

[16] On January 12, 2015, the CEO stated in an email to Catherine Twinn, the Membership Registrar, that general membership issues were dealt with by the Membership rather than the CEO. This response was a reply to Catherine's question of whether the CEO had authority to add the names of persons who were entitled to membership to the list of electors, including those whose completed applications had been pending for an unreasonable length of time.

(3) SFN Membership Application Process

[17] In the mail-out package of December 4, 2014, Roy Twinn, the son of Roland Twinn, was listed on the non-resident sub-list. There is no documentation indicating when Roy became a member, but Roy was not on the elector lists for the 2011 election, and others have applied for membership and have not yet received a decision.

IV. ISSUES

[18] The Applicants submit that the following are at issue:

A. Whether the CEO erred in law, including that going to jurisdiction, both in his initial and appeal decisions, in rejecting an election ballot through misinterpretation and misapplication of statutory provisions, compounded by breach of rules of natural justice and procedural fairness?

B. Whether the Respondents failed in their fiduciary duty to establish and confirm that a proper and complete list of electors was prepared, in disregard of constitutional, statutory, and other legal requirements, compounded by corrupt practices, thereby committing errors going to jurisdiction?

C. Whether the CEO erred in law, including that going to jurisdiction, in failing or declining to make adequate inquiry into the composition of the Electors List, compounded by procedural unfairness and disregard for rules of natural justice?

[19] The Respondents submit that the following are at issue:

A. Whether the information and documents in Sam's affidavit, referred to in the Respondent's arguments, are all irrelevant and inadmissible in a judicial review of the CEO's Decisions?

B. Whether the CEO reasonably, indeed correctly, rejected and did not count Walter's mail-in ballot because it did not have "the distinctive mark of the Electoral Officer on the back" as mandated by s 69(1)(b) of the *Elections Act*?

C. Whether the CEO's decision not to give Walter a new, in-person ballot after he had already voted by mail-in ballot and after the polls had closed is neither unfair, discriminatory, nor anti-democratic, but rather a reasonable, indeed correct, interpretation and application of the *Elections Act*?

D. Whether the CEO's decision dismissing the Applicants' March 2, 2015 challenge to the electors sub-lists for non-compliance with statutory procedures and limitation periods is a reasonable, indeed correct, interpretation and application of the *Elections Act*?

E. Whether this judicial review is subject to public policy?

V. STANDARD OF REVIEW

[20] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[21] Although the Applicants raise a wide range of issues in this application, the Court concludes that it is only in a position to review a connected series of decisions (and in particular

the rejection of Walter's vote) made by the CEO during the 2015 Election and the appeal of those decisions to the CEO. This essentially gives rise to issues of procedural fairness and the CEO's interpretation and application of the governing provisions of the *Elections Act*.

[22] Issues of procedural fairness, particularly in regards to the actions of Elections Committees, have been found to be reviewable under a standard of correctness: *Beardy v Beardy*, 2016 FC 383 at para 45 [*Beardy*].

[23] Issues of statutory interpretation and application by the CEO will be reviewed on a standard of reasonableness: *Mercredi v Mikisew Cree First Nation*, 2015 FC 1374 at para 17.

[24] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[25] The following provisions from the *Constitution of the Sawridge First Nation* [*Constitution*] are relevant in this proceeding:

Article 1: Interpretation

1.(1) The definitions in this section apply in this Constitution:

"Law of the First Nation" means a law of the First Nation made in accordance with this Constitution;

[…]

"Member" means a member of the First Nation in accordance with the Membership Code of the First Nation;

[…]

"Membership Rules" are those rules adopted by the Sawridge Band to govern its membership system prior to the establishment of this Constitution;

[…]

Article 3: Membership

Membership Code

3.(3) Until amended in accordance with this Constitution, membership in the First Nation shall be determined by the Membership Rules that were in force immediately before the day on which this Constitution came into force with such modification as are required by the Constitution. The Membership Rules shall thereafter be called "the Membership Code".

[…]

Article 4: Governing Bodies

How Elected

4.(2) The Chief, Councilors [sic] and Elder Commissioners shall each be elected in an election of the First Nation by a plurality of the votes cast by Electors pursuant to the provisions of this Constitution in accordance with all of the Election Procedures set out in laws or Codes of the First Nation.

[…]

Article 9: Appointing Electoral Officer

9.(1) The Council, in consultation with the Elders Commission, shall appoint an Electoral Officer not later than eighty days before the date on which an election is to be held.

[…]

Article 10: Calling of Elections

General Elections

10.(3) The Council shall call a general election of the First Nation for the positions of Chief and Councilors [sic], the Elders Commission, and members of an Audit and Compensation Committee to be held not later than four years from the date on which the last general election was held.

[…]

Article 11: Appealing Election Result

11.(1) Within fourteen days after an election, any candidate in the election or any Elector may lodge a written appeal with the Electoral Officer if the candidate or Elector has reasonable grounds to believe that there was

a) a corrupt practice in connection with the election; or

b) a contravention of this Constitution, or any law of the First Nation that might have affected the result of the election.

(2) The Electoral Officer shall make a decision in respect of any appeal within seven days of receipt.

(3) If any candidate at the election or any Elector is not satisfied with the decision of the Electoral Officer in respect of the appeal, then that person may within 28 days after the decision of the electoral officer is made appeal further to the Elders Commission (if the election was for Council or other office) or the Council (if the election was for the Elders Commission) in writing. The Elders Commission or Council, as the case may be, shall be referred to as "the Appeal Tribunal" and shall make a decision in respect of any appeal within seven days of receipt.

(4) If any candidate at the election or any elector is not satisfied with the resolution by the Appeal Tribunal of any appeal made to them pursuant to subsection (3), then that person may within

fourteen days after the appeal was made, lodge an appeal to a Special or Regular General Assembly which shall be called for that purpose within thirty days from the date the appeal is received.

Sending documents to Electoral Officer

(5) Upon the filing of an appeal, the appellant shall forward a copy of the appeal together with all supporting documents to the Electoral Officer and to each candidate.

Written Answers Required

(6) Any candidate may, and the Electoral Officer shall, within fourteen days of the receipts of a copy of an appeal under subsection (4), forward to the Appeal Tribunal, by registered mail, a written answer to the particulars set out in the appeal, together with any supporting documents relating thereto duly verified by affidavit.

The Record

(7) All particulars and documents filed in accordance with this section form the record.

Relief

(8) The Electoral Officer, Appeal Tribunal, or the General Assembly may provide such relief as it sees fit, when it appears that there was

a) a corrupt practice in connection with the election that might have affected the result of the election; or

b) a contravention of this Constitution, or any law of the First nation that might have affected the result of the election.

[…]

Article 21: Amendment to Constitution

When An Amendment is Effective

21.(1) Subject to subsections (2) and (4), an amendment to the Constitution is effective and in force on the day it is approved by seventy-five percent (75%) of the votes cast in a referendum held for the purpose of amending the Constitution, provided that at least seventy-five percent (75%) of the Electors vote in the referendum, or on such later date as is set out in the amendment.

[26] The following provisions from the *Elections Act*, in force as of October 26, 2013, are relevant in this proceeding:

> *Definitions*
>
> 2. (2) The following terms are defined herewith:
>
> "candidate" means a candidate for election;
>
> "Deputy Electoral Officer" means a person appointed to that position pursuant to this Act;
>
> "election" means a general election for various offices as stipulated in the Constitution or any Law of the First Nation, or a by-election for one or more of these offices;
>
> "election day" means the day fixed for an election by the Council;
>
> "Electors List" means the list of Electors prepared pursuant to this Act, as corrected from time to time;
>
> "in good standing" with reference to debts owed to the First Nation means that no payments due to the First Nation or a First Nation corporation, as defined by regulation, pursuant to the agreement through which the debt was incurred, may be more than 90 days overdue on the date a certificate of good standing is issued for purposes of eligibility for nomination. Where no payment terms are specified in a loan, the loan is due upon demand. A payment on a demand loan is not due until demanded.
>
> "Membership Registrar" is the person named by Council to maintain the Registry of Members pursuant to the Constitution;
>
> "primary residence" means the place which at the time of determination in respect of a person has been for a period of at least six months the principal place of his or her true, fixed and permanent home and place of habitation whereto, when absent or away therefrom, not including absences for normal vacations, temporary work assignments, study or training, always without intention to establish a domicile at some other place, he or she intends to return;
>
> "scrutineer" means a person appointed by a candidate to act pursuant to this Act to observe the election process and to call the attention of the Electoral Officer to any mistake, contravention of this Act and its regulations, or any other matter which might unfairly or unjustly affect the conduct of the election;

"Sawridge entity" means any department, agency, or unit of the Sawridge government.

[…]

Preparation of Electors List

16. (1) Within seven days after the Council has called an election pursuant to the Constitution, the Membership Registrar shall provide the Electoral Officer named by the Council pursuant to the Constitution with an alphabetical list of all Electors, containing the birth date and last-known address of each Elector. The list shall be in two forms:

(i) one, the Master List, containing the name, date of birth, and address of each Elector and

(ii) the other, the Public List, containing only the names of the Electors.

Creating and Posting of Resident and Non-Resident Voters Lists

(1) From the Public List, the Electoral Officer shall create a Resident Electors Sub-List and a Non-Resident Electors Sub-List. Not less than 70 days prior to the Election Day, the Electoral Officer shall post the sub-lists in all Principal Offices. Each Elector's name shall be on either the Resident Electors Sub-List or the Non- Resident Electors Sub-List, but no name shall appear on both sub-lists. These sub-lists shall not contain addresses or dates of birth.

(2) On the request of any person, the Electoral Officer shall confirm whether the person's name is on the Public List, and if so, which sub-list it is entered on.

(3) Any Elector is entitled to confirm with the Electoral Officer the information regarding the Elector which is shown on the Master List.

Correcting the Sub-Lists

(2) If any elector wishes to show cause as to why the change should not be made, they may at any time prior to 11 days prior to the date set for the nomination meeting provide the Electoral Officer with a statutory declaration containing evidence and the Electoral Officer shall consider the evidence and make a determination as to which list the elector's name shall appear on and notify all Electors.

[…]

Appeal of Electoral Officer's decision

18.2 If any elector wishes to appeal the decision of the Electoral Officer, the matter shall be referred to the Elders Commission no less than 4 days prior to the date set for the nomination meeting which shall decide whether it wishes to hear the appeal, and if not, the Electoral Officer's decision is final. If the Elders Commission decides to hear the appeal, it shall hear the evidence of the electors who have filed statutory declarations, the elector in question, and the Electoral Officer as to the reasons for his or her decision, and after which, shall decide on which list the name of the Elector in question shall appear. The decision of the Elders Commission must be provided to the Electoral Officer prior to the date set for the nomination meeting.

18.3 After the commencement of the nomination meeting the names which appear on the Electoral List may not be changed and the names which appear on a Sub-List may not be removed from that Sub-List and placed on the other Sub-List.

No Delay in Nomination Meeting or Election

19. Notwithstanding any other section of this Act, no question with respect to the names on the Electoral List or a Sub-List shall cause a delay in the date set for either the Nomination Meeting or the Election or the holding of the Nomination Meeting or the Election.

Correcting the Electors Lists

20. (1) The Electoral Officer shall revise the Electors Lists where it is demonstrated to the Electoral Officer's satisfaction prior to the commencement of the Nomination Meeting that

(a) the name of an Elector has been omitted from the Electors List;

(b) the name or birth date of an elector is incorrectly set out in the Electors List;

(c) the name of a person who is not qualified to vote is included in the Electors List.

(2) For any change made, the Electoral Officer shall give written notice of the correction to any affected person and to any person who provided information which led to the correction.

[…]

Request for Reconsideration of Electoral Officer's decision

21. (1) If an Elector who requested that the Electoral Officer make a correction in the Electors' List or any Elector affected by a decision of the Electoral Officer to correct the Electors' List is not satisfied with the Electoral Officer's decision, such Electors may at any time before the polls close request the Electoral Officer to reconsider his/her decision on one or more of the following grounds, and only on these grounds, namely, that:

(a) the person is eligible to be on the Electors List;

(b) the person's name is on the Membership Registry and he/she will be 18 years of age or over on election day;

(c) the person's name was mistakenly omitted from the Electors List;

(d) the person is not disqualified from being on the Electors List;

(f) [*sic*] the person is ineligible to be on the Electors List.

Responsibility of Each Elector To Keep His/Her Address Current

23. Each Elector is responsible for

(1) keeping the Membership Registrar informed of his/her current address and for notifying the Membership Registrar of any change of address;

(2) checking that his/her address is shown correctly on the Electors' List and notifying the Electoral Officer of any correction to be made;

(3) providing the Membership Registrar with a Declaration of his or her Primary Residence within 120 days of the enactment of this provision or within 120 days of becoming an Elector thereafter, and thereafter within 60 days of any change of his or her Primary Residence.

[…]

Voting Stations

47. (6) Voting stations shall be kept open from 10 a.m., local time, until 6 p.m., local time, on the day of the election unless regulations establish variations in these hours.

[…]

Cancelled ballots

61. (1) If an Elector makes a mistake on a ballot or inadvertently spoils his/her ballot paper in marking it prior to depositing it in the Ballot Box, then the Elector is entitled to another ballot to be issued by the Electoral Officer upon return of the spoiled ballot to the Electoral Officer.

(2) The Electoral Officer shall write the word "Cancelled" on the spoiled ballot and without examining the ballot, store it separately.

(3) An Elector who receives a soiled or improperly printed ballot paper upon returning the ballot paper to the Electoral Officer is entitled to another ballot paper. The Electoral Officer shall write the word "Cancelled" on the spoiled ballot and store it separately.

PART VI

COUNTING OF VOTES

66. As soon as is practicable after the close of the polls, the Electoral Officer shall, in the presence of the Deputy Electoral Officer and any Electors who are present, open each outer envelope without opening the inner envelope containing a mail-in ballot that was received before the close of the polls and, without unfolding the ballot,

(a) set aside the ballot if

  (i) it was not accompanied by a Voter Declaration Form, or the Voter Declaration Form is not signed or witnessed,

  (ii) the name of the Elector set out in the Voter Declaration Form is not on the Electors' List, or

  (iii) the Electors List shows that the Elector has already voted, or if the ballot is not set aside,

(b) open the inner envelope and without unfolding the ballot deposit the ballot in the ballot box and place a mark on the Electors List opposite the name of the Elector set out in the Voter Declaration Form and deposit the ballot in a ballot box.

Counting duties of Electoral Officer

69. (1) As soon as is practicable after the mail-in ballots have been deposited under section 66(b), the Electoral Officer shall, in the presence of the Deputy Electoral Officer, any Electors and any other persons permitted by this Act or its Regulations, open all ballot boxes and shall examine each ballot cast and reject ballots that:

(a) were not issued, mailed out or handed out by the Electoral Officer,

(b) does not have the distinctive mark of the Electoral Officer on the back;

(c) are marked "spoiled" "cancelled" or "declined",

(d) contain a mark that identifies or may identify an Elector.

[27] The following provisions from the *Sawridge First Nation Elections Act*, in force as of January 9, 2010, are relevant in this proceeding:

Application to correct the Electors Lists

19. Any person whose name is not on the Electoral List and believes he/she is eligible to be on the Electoral List, or whose name is on Electoral List but believes his/her name is on the wrong Sub-List, may request the Electoral Officer to correct one or both Lists by giving to the Electoral Officer

(a) written confirmation from the Membership Registrar that the person is a member and is or will be 18 years of age or older on the day of the election, where the person's name is not on the Electoral List; and

(b) a statutory declaration of the right to be on the Electors List and setting out the basis of eligibility for entry onto one or the other the Sub-List.

Correcting the Electors Lists

20. (1) The Electoral Officer shall revise the Electors Lists where it is demonstrated to the Electoral Officer's satisfaction that

> (a) the name of an Elector has been omitted from the Electors List;
>
> (b) the name or birth date of an elector is incorrectly set out in the Electors List;
>
> (c) the name of a person who is not qualified to vote is included in the Electors List; or
>
> (d) the name of an Elector was included in the Resident Elector Sub-List or the Non-Resident Elector Sub-List when it should have been included in the other sub-list.
>
> (2) For any change made, the Electoral Officer shall give written notice of the correction to any affected person and to any person who provided information which led to the correction.
>
> (3) The Electoral Officer may ask the Elders Commission any question with regard to a dispute as to whether a correction, omission, or addition should be made with respect to the Electoral Lists, and shall consider the counsel, opinion, or recommendation of the Elders Commission before making a decision.

[28] The following provisions from the *Sawridge Membership Rules* are relevant in this proceeding:

> 3. Each of the following persons shall have a right to his or her name entered in the Band List; [**PASSED JULY 4, 1985]**
>
> (a) Any person who, but for the establishment of these rules, would be entitled pursuant to subsection 11(1) of the Act to have his or her name entered in the Band list required to be maintained in the Department and who, at any time after these rules come into force, either
>
> (i) is lawfully resident on the reserve; or
>
> (ii) has applied for membership in the band and, in the judgment of the Band Council, has a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band;

(b) a natural child of parents both of whose names are entered on the Band List;

(c) with the consent of the Band Council, any person who

(i) has applied for membership in the Band;

(ii) is entitled to be registered in the Indian Register pursuant to the Act;

(iii) is the spouse of a member of the Band, and

(iv) is not a member of another band;

(d) with the consent of the Band Council, any person who

(i) has applied for membership in the Band,

(ii) was born after the date these rules come into force, and

(iii) is the natural child of a member of the Band, and

(e) any member of another band admitted into membership of the Band with the consent of the council or both bands and who thereupon ceases to be a member of the other band.

[…]

15. No person shall have a right to have his or her name entered in the Band List except as provided in section 3 of these Rules **[PASSED JULY 5, 1985]** and, for greater certainty, no person shall be entitled to have his or her name included in the Band List unless that person has, at some time after July 4, 1985, had a right to have his or her name entered in the Band List pursuant to these Rules. **[PASSED JUNE 24, 1987]**

16. In the event that any of the foregoing provisions of these Rules is held by a court of competent jurisdiction to be invalid in whole or in part on the ground that it is not within the power of the Band to exclude any particular person or persons from membership in the Band, these Rules shall be construed and shall have effect as if they contained a specific provision conferring upon such person a right to have his or her name entered in the Band List, but for greater certainty, no other person shall have a right to have his or her name entered or included in the Band List by virtue of the provisions of this Section and, in particular, no person referred to in Subsection 11(2) of the Act shall be entitled to membership in

> the Band otherwise than pursuant to Section 3 of these Rules. **[PASSED JUNE 24, 1987]**
>
> 17. In the event that any provision, or any part of any provision, of these Rules is held to be invalid or of no binding force or effect by an court of competent jurisdiction, these Rules shall be construed and applied as if such provision or part thereof did not apply to or in the circumstances giving rise to such invalidity and the effect of the remaining provisions, or parts thereof, of these Rules shall not be affected thereby. **[PASSED JUNE 24, 1987]**

VII. ARGUMENT

A. *Applicants*

(1) Rejection of Walter's Vote

(a) *Applicable Jurisprudence*

[29] The Applicants argue that the CEO erred in law, in both his initial and appeal decisions, by rejecting Walter's election ballot through the misinterpretation and misapplication of the relevant statutory provisions, an error which was compounded by a breach of the rules of natural justice and procedural fairness.

[30] This Court has jurisdiction to hear appeals of federal boards, commissions, or other tribunals under s 18.1 of the Act. SFN meets this definition as it is a band recognized under federal statute and holds elections under the SFN *Elections Act*. In *Roseau River Anishinabe First Nation Custom Council v Roseau River Anishinabe First Nation,* 2009 FC 655, at para 27, Justice Phelan determined that this Court has jurisdiction over native band councils regardless of whether their election is pursuant to custom or the *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

[31] The Applicants contend that the Court should review the rejection of Walter's vote under the standard of correctness, as it is part of a band election process and custom cannot ignore or trump natural justice and procedural fairness: *Beardy*, above, at paras 44-45, 126. The right to vote is at the heart of any democratic process; as such, irregularities that affect an election result undermine the integrity of the whole process and are grounds for overturning an election. Moreover, a fair election requires the CEO to be an independent, neutral steward of the integrity of the electoral process: *Longley v Canada (Attorney General)*, 2007 ONCA 852 at para 74*; Stevens v Conservative Party of Canada*, 2005 FCA 383 at paras 19-21. The Court must carefully review the CEO's exercise of discretion and ensure it is fair and consistent with statutory safeguards.

[32] At the heart of this case is the confidence of SFN in its electoral process. If people who are qualified or entitled to vote are not permitted to do so, this erodes the foundations of democracy. This view is reflected in *Harper v Canada (Attorney General)*, [2004] 1 SCR 827 at para 103.

[33] The Applicants argue that the aforementioned jurisprudence is applicable to the current matter because statutes have never declared that the common law principles associated with elections are not applicable to band elections, and courts have the authority to declare an election void under the common law despite the fact that it could have been voided under the statute: *Cameron v McDonnell*, (1874) Russel R (NS) 42-60; *Howley v Campbell*, [1939] 1 DLR 431.

(b) *Application to Walter's Vote*

[34] The Applicants contend that the application of the common law to Walter's vote demonstrates the CEO's decisions were unreasonable and reflect serious errors of law and lack of procedural fairness.

[35] The rejection of Walter's vote directly affected the outcome of the Election for Chief, as the result differed by one vote.

[36] The CEO had the responsibility of ensuring a fair and proper election in accordance with s 12 of the *Elections Act*, which does not specify particulars concerning the vote-counting process, including fair counting, determining the validity of ballots, and processing mail-in ballots. The CEO used his own discretion in his decisions. This was an error, as the *Elections Act* does contain specific rules that govern the cancellation of ballots. In particular: s 47(7) permits an elector inside the voting station to vote; s 61(1) entitles an elector who inadvertently spoils his ballot to be issued another ballot; and s 61(2) requires the CEO to write "Cancelled" on a spoiled ballot without examining the contents.

[37] In rejecting Walter's ballot and refusing him another ballot, the CEO committed an error of law going to jurisdiction. His decisions were based on the fact that the CEO's initials were missing from Walter's ballot, despite there being no issue as to identity, double voting, or that Walter had been present while the polls were open and afterwards. The CEO allowed technicality to govern over substance, which is not the correct approach. Moreover, the CEO

permitted Deana's vote despite apparent deficiencies. Deana's vote lacked a witness address, which means it should have been set aside pursuant to s 66(a) of the *Elections Act*; yet it was accepted.

[38] The CEO justified his rejection of Walter's vote by stating that the CEO's initials were necessary to ensure identification. However, there was no issue as to identification with Walter. The CEO believed that a ballot could not be replaced after 6 p.m., even though a replacement was not necessary and Walter was entitled to vote under ss 47 and 61 of the *Elections Act*.

[39] The CEO then committed a further error in his handling of the appeal decision by refusing to consider the circumstances regarding Walter's vote on the basis that Walter had not appealed and the Applicants were not elders. The *Elections Act* does not identify either factor as a requirement for an issue to be subject to appeal. The CEO effectively rejected the Applicants' appeal on an irrelevant ground and improperly declined jurisdiction to inquire and investigate.

[40] Additionally, the Applicants submit that the CEO refused to hear Walter's representations. In their Notice of Appeal, the Applicants requested the right to attend and adduce evidence, including hearing from Walter. Yet the CEO rendered the appeal decision without any regard for that request. Appeal committees must address the issue put to them: *Meeches v Meeches*, 2013 FC 196 at para 14. While this Court has found that the right to an oral hearing may be waived, the Applicants submit that this did not occur in the present case, which distinguishes it from *Gadwa v Kehewin First Nation*, 2016 FC 597 [*Gadwa*].

[41] The Applicants argue that the CEO failed to conduct the Election and the appeal process in accordance with the highest standards of correctness and procedural fairness, which is sufficient justification to set aside the result.

(2) SFN Membership Application Process

[42] The Applicants submit that the Respondents have failed in their fiduciary duty to establish and confirm that a proper and complete Voter List was prepared, which is in disregard of constitutional, statutory, and other legal requirements. This failure was compounded by corrupt practices, thereby culminating in an error going to jurisdiction.

[43] The SFN has a legal history of attempting to assert complete control over its membership. In *L'Hirondelle v Canada*, 2003 FCT 347, affirmed 2004 FCA 16 [*L'Hirondelle*], this Court held that SFN could not continue to ignore the legal requirements regarding membership imposed by the *Indian Act* and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 [*Charter*] and the clear directions of the courts. In *L'Hirondelle*, the Federal Court of Appeal upheld an injunction mandating compliance, stating "For those persons entitled to membership, a simple request to be included in the band's membership is all that is required. The fact that the individuals in question did not complete a Sawridge Band membership application is irrelevant." Yet in 2008, SFN attempted to have the *Indian Act* provisions declared unconstitutional, an application that was dismissed: *Sawridge Band v Canada*, 2008 FC 322. Furthermore, the Court held in *Poitras v Twinn*, 2013 FC 910 that *L'Hirondelle* is not a legal barrier to an applicant's membership status.

However, SFN continues to refuse to implement *L'Hirondelle* and, by doing so, corrupts its election process. By not adding entitled persons to the band list, there cannot be a fair election.

[44] The corruption in the membership process is worsened by the queue jumping permitted to Roland's children, who were added to the list while others, such as Ms. Donald, are forced to wait until the law is enforced. The evidence demonstrates that it is possible for an individual to be left hanging for years in a SFN membership process that is shrouded in secrecy. The SFN has adopted a stance and process that is the polar opposite of the enfranchisement purpose of the *Indian Act* and any truly fair and democratic electoral process.

(3) Pre-Election and Appeal Conduct

[45] The Applicants also submit that the CEO erred in law, including that going to jurisdiction, in failing or declining to make adequate inquiry into the composition of the Voters List, which is compounded by procedural unfairness and a disregard for the rules of natural justice.

[46] According to s 17 of the *Elections Act*, the CEO must send the election packages out not less than 75 days prior to the date of the election. However, SFN did not comply with this in several ways. First, the number of days between December 4, 2014 and February 17, 2015 is 74 days, not 75. Second, electors either received the notice late, as was the case for Sam on December 12, 2014, or not at all, as was admitted by the CEO in an email to Catherine. Third, notice of corrections to the sub-lists was not given until after the deadline for disputing the sub-lists, thereby rendering it impossible to challenge the lists.

[47] Additionally, the CEO erred when he determined that he had no authority to enquire about the issue of outstanding applications for membership. He stated that the issue was one for "membership" in an email on January 12, 2015, and his appeal decision of March 6, 2015 does not even mention the issue, despite its inclusion in the Notice of Appeal. The CEO failed to consider this issue, which is a clear decline of jurisdiction and a deprivation of the fair opportunity to be heard.

[48] The Applicants submit that the CEO should have considered this matter as it is within his power to do so under s 11(8) of the *Constitution*, which says that the CEO, Appeal Tribunal, or SGA may provide such relief as it sees fit when there is a corrupt practice in connection with the election that might affect the result of the election, or a contravention of the *Constitution* that might affect the result of the election. Section 20 of the *Elections Act* requires the CEO to revise the list of electors where it is demonstrated to the CEO's satisfaction prior to the nomination meeting that the name of an elector has been omitted from the Electors List. A comparison to an older version of the *Elections Act*, in force prior to October 26, 2013, demonstrates that additions to the list used to require confirmation from the Membership Registrar. The removal of such a requirement in the *Elections Act* currently in force indicates that the CEO has the authority to add electors to the lists.

[49] Yet the CEO created the sub-lists from the names provided by SFN and declared that any other names were a matter for "membership," despite the decision in *L'Hirondelle*, above, clearly stating that whether a person has applied for membership or not is irrelevant. The CEO had the responsibility to correct the lists and his failure to do so deprived persons of the

opportunity to challenge the lists, which is a complete abdication of jurisdiction and responsibility.

[50] The CEO's errors continued at the appeal stage when he refused to hear from individuals who asserted entitlement to membership by applying irrelevant considerations such as whether a membership application had been processed and accepted. He also breached procedural fairness by depriving the Applicants and others of a fair hearing and by abdicating his jurisdiction under s 20 of the *Elections Act*.

[51] The Applicants submit that the CEO's interpretation of s 20 of the *Elections Act* compounds the corrupt practices of SFN. The CEO had the jurisdiction to add to the list, yet refused to do so and referred the matter to "membership." Such an abdication of authority must be resolved by the Court, as the refusal to enquire about unreasonably delayed applications that entitle persons to be electors undermines the integrity of the electoral process.

(4) Order Sought

[52] The Applicants seek the following relief:

A. An Order setting aside the results of the February 17, 2015 Election for the position of Chief and/or declaring the Election of Chief on February 17, 2015 to be null and void, and declaring a new election for Chief of SFN be undertaken;

B. A order requiring a CEO, approved by the Applicants and the Court, to investigate and establish a fair, proper, and complete Electors List;

C. An Order setting out such directions as the Court deems fit for the conduct of a new and fair Election;

D. Enhanced costs of this application and prior motions;

E. Such further and other Orders as this Honourable Court shall deem just and convenient in the circumstances.

B. *Respondents*

(1) Relevance of Affidavit

[53] The Respondents take issue with the information and documents in Sam Twinn's affidavit. They submit that it is irrelevant and inadmissible in a judicial review of the CEO's decision because the information was not before the CEO when he made the decisions that are the subject of judicial review, and it does not provide necessary background information to assist the Court in assessing the reasonableness or correctness of the CEO's decisions. Further, it is inadmissible under Rule 81 because most of it is personal opinion or argument. Accordingly, no weight or consideration should be accorded to Sam's affidavit.

[54] The CEO had no power under Sawridge Law to inquire as to why or when an individual's name came to be on the Electors List, as this is compiled from the Membership Register under s 16(1) of the *Elections Act*. The CEO's powers are restricted to dividing the list provided by the Membership Registrar into sub-lists of resident and non-resident electors. Once this division is made, any elector can request that an individual be moved from one sub-list to another, but the CEO can only accede to the request on certain grounds, which are enumerated in ss 20 and 21 of the *Elections Act*. Such a decision can also be appealed under ss 18.1 and 18.2 of the *Elections Act*.

[55] The Respondents also contend that the Applicants' submissions in paragraphs 70-82 of their memorandum of argument are irrelevant because this judicial review does not review decisions made by SFN under the *Membership Code* between 1984 and 2014. Any interpretation or application of the *Membership Code* is not related or connected to the CEO's decisions and, as such, any submissions regarding this matter should be disregarded by the Court: Rule 302 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*].

(2) Rejection of Walter's Vote

[56] The Respondents submit that the CEO reasonably, indeed correctly, rejected and did not count Walter's mail-in ballot in accordance with s 69(1)(b) of the *Elections Act*.

[57] The *Elections Act* allows electors to vote either by mail-in ballot or in-person at the polls; however, electors cannot vote both ways in the same election. Mail-in ballots contain the CEO's "distinctive mark" and an elector can either mail the ballot or deliver it to the CEO prior to the close of the polls at 6 p.m. on the date of the election: ss 45(1)(f) and s 47(6) of the *Elections Act*. Alternatively, on the day of the election, an elector can exchange an unmarked mail-in ballot for a ballot to be marked and deposited at the voting station, or obtain a ballot and vote in-person at the voting station, if they swear they have not voted in the election by mail or in-person: ss 45(5) and 55(3)(b)) of the *Elections Act*. Once the polls have closed, the CEO opens the mail-in ballot envelopes, checks for a signed and witnessed Voter Declaration Form, and deposits the ballot in the ballot box without unfolding the ballot: s 66 of the *Elections Act*. Following the deposit of the mail-in ballots, the ballot box is then opened and the CEO must examine and reject ballots that: were not issued by the CEO; do not contain the distinctive mark of the CEO; are marked

"spoiled," "cancelled," or "declined," or contain a mark that identifies or may identify an elector: s 69(1) of the *Elections Act*.

[58] According to the Scrutineer's report, Walter's ballot was deemed spoiled under s 69(1) of the *Elections Act* because it lacked the distinctive mark of the CEO on the back. Accordingly, both the Scrutineer and the CEO understood that Walter's vote had to be rejected pursuant to the *Elections Act*. The fact that Walter's ballot should have been deposited unfolded into the ballot boxes without having first been examined by the CEO does not affect the result of the election because as soon as the boxes were opened, the CEO would have had to reject it under s 69(1)(b). Thus, the CEO's decision to reject the ballot was both reasonable and correct and this judicial review should be dismissed.

[59] Similarly, the Respondents take the position that the CEO's subsequent decision to refuse Walter a new, in-person ballot after the polls had closed is neither unfair, discriminatory, or anti-democratic.

[60] Subsection 61(1) of the *Elections Act* clearly allows an in-person voter who errs in voting to return his ballot and receive a new ballot before voting; but this entitlement is not applicable to electors who have chosen to vote by mail. The latter electors can only vote in-person before the polls have closed on the condition that they exchange their unmarked mail-in ballots for in-person ballots, or if they satisfy the CEO that they have not already voted: ss 45(4) and 45(5) of the *Elections Act*.

[61] By the time Walter's vote was discovered as spoiled, the polls had closed and it was too late for him to receive an in-person ballot under s 45 of the *Elections Act*. Thus, the CEO's decision was reasonable and this judicial review should be dismissed.

[62] The Respondents oppose the Applicants' unsubstantiated suggestion that the CEO used his discretion to reject Walter's vote. In addition to Walter's vote, the CEO applied s 69(1) to reject two additional ballots that had marks that identified or potentially identified an elector: s 69(1)(d). Deana's vote, on the other hand, was accepted because it was signed and witnessed, thereby ensuring her identification, as required by s 66(a)(i) of the *Elections Act*. Walter was not denied the right to vote; he voted incorrectly and, consequently, his vote was invalid. The rejection of his vote is neither unfair, discriminatory, or undemocratic; it was mandatory under the rules of the *Elections Act*.

[63] Provisions such as s 69(1) of the *Elections Act* are not unique. Election laws across Canada require voters to cast ballots in a basic and prescribed form, lest they be rejected. Some election laws do provide electoral officials with discretion to accept non-conforming ballots but some do not, such as s 86(1)(a) of the *Alberta Local Authorities Election Act*, RSA 2000, c L-21. Yet these provisions are not undemocratic.

[64] Further, the CEO did not breach procedural fairness by deciding the Applicants' election appeals in writing without an oral hearing. The duty of procedural fairness is flexible. In *Gadwa*, above, the election officer was only required to provide a response within 7 days of a notice of appeal and did so without an oral hearing, as is the case here. The CEO rendered a decision

within the 7 day time allotment. Additionally, the CEO had all the information required to make a decision because Article 11(1) of the *Constitution* ensures the CEO had a detailed written notice of appeal. Further, the issues to be decided in the appeal required the interpretation and application of the *Elections Act* to undisputed facts, which indicates there could not have been a breach of procedural fairness in not having a hearing between March 2 and 6, 2015. The duty of procedural fairness is limited in this instance because the appeal can be further appealed to the Elders Commission as well as the SGA under Articles 11(3) and 11(4) of the *Constitution*. Thus, the Respondents submit that the Applicants were not denied procedural fairness and this judicial review should be dismissed.

(3) Dismissal of Challenge to the Electors List and Sub-Lists

[65] The Respondents submit that the CEO's decision to dismiss the Applicants' challenge to the lists of electors for non-compliance with the limitation periods in the *Elections Act* was reasonable and correct.

[66] As stated previously, the CEO has no power to inquire into how or why an individual's name is on the list of members entitled to vote that is produced by the Membership Registrar. The CEO's powers are expressly restricted by ss 17-20 of the *Elections Act*, which permits the division of the provided list into sub-lists.

[67] The evidence also demonstrates that the Applicants did not challenge the sub-lists until March 2, 2015, when they filed their Notices of Appeal. This was well past the time fixed for

challenging the Electors List, as set out in ss 18-20 of the *Elections Act*. The CEO's decision to apply the statutory limitations was correct and required by law.

(4) Judicial Review Contrary to Public Policy

[68] Even if the Applicants are successful in their arguments that the CEO's decisions were unreasonable, the Respondents submit that this Court should use its overriding discretion under s 18.1(3) of the Act and refuse relief.

[69] The Applicants had several chances before the Election to challenge the list of electors as well as the right to appeal in a three-tiered process. The Applicants did not avail themselves of their rights before the Election, but they did exercise their constitutional rights to appeal the results of the Election. However, the doctrine of exhaustion requires that parties exhaust all adequate remedial courses in the administrative process prior to court proceedings: *Re Wilson and Atomic Energy of Canada Ltd*, 2015 FCA 17 at paras 28-33; *President of the Canada Border Services Agency et al v CB Powell Limited*, 2010 FCA 61 at paras 30-32.

[70] While Justice Zinn did not find that the doctrine of exhaustion precluded the Applicants from judicial review, his Order does not remove the Applicants' onus of proving entitlement to some relief in their judicial review of the CEO's decisions; nor does it remove this Court's inherent discretionary power to refuse any relief even if such an entitlement is proven. In *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paras 37-45, the Supreme Court of Canada found that the Court may exercise its discretion and refuse judicial relief if applicants have an alternative administrative remedy, which is clearly the case in the present matter.

[71] The Respondents submit that to grant the Applicants relief would ignore: the Applicants' failure to challenge the sub-lists under the *Elections Act*; the Applicants' first appeal of the Election results on March 6, 2015; the Applicants' second appeal of the Election results on May 30, 2015; and the failure to challenge the SGA's decision to dismiss their final constitutional election appeal. If relief were to be granted in this case, the Court would ignore the principles of administrative law and public law values underlying the doctrine of exhaustion. This Court should not undermine the three-tiered election appeal system established by the *Constitution* or allow the Applicants to circumvent and ignore the unchallenged decision of the SGA.

[72] The Respondents therefore submit that the Applicants be denied any relief that might have been available to them in a judicial review under s 18 of the Act, even if they are successful in demonstrating the CEO's decisions were unreasonable.

(5) Relief Sought

[73] The Respondents seek dismissal of this application with costs.

VIII. ANALYSIS

The Decisions

[74] Bearing in mind the wide-ranging arguments regarding corrupt practices at SFN brought by the Applicants, it should be kept in mind that the decisions under review in this application

are set out in the Notice of Application as confirmed by Justice Zinn in his Order and Reasons of March 30, 2016:

> [3] The applicants' Notice of Application states the following regarding the decision sought to be reviewed:
>
> > This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985 c. 41 (1st Supp.) (the "Act") as amended, of Dennis Callihoo (being the Chief Electoral Officer ("CEO")) decisions made on or about February 17, 2015 (the "Decision") concerning Sawridge First Nation's (the "Nation") 2015 general election which decision was appealed by Sam Twinn and Isaac Twinn (the "Applicants") on April 13, 2015 to the Sawridge first Nation Special General Assembly which in turn dismissed the appeal on May 30, 2015.

[75] As can be seen in the Applicants' written representations, it is not at all clear what this application is intended to encompass. The application refers to "decisions" made on or about February 17, 2015. Those decisions were the subject of appeals to the CEO and, eventually, to the SFN SGA. The Applicants have made it clear that they are not appealing the decision of the SGA, but seek to review certain decisions of the CEO made during the 2015 Election. However, the Amended Notice of Application dated June 26, 2015 seeks broad and extensive relief that goes well beyond the decisions of the CEO and includes, for example, a request for a declaration that certain provisions of the *Elections Act* are invalid and of no force and effect. As becomes clear when the written representations of the Applicants are reviewed, the Applicants have failed to comply with Rule 302 of the *Federal Courts Rules* and are asking the Court to review in one application a variety of matters that do not constitute a "continuous course of conduct" as defined by the governing jurisprudence. It seems to me that this judicial review is confined to the

decisions of the CEO made during the Election, which the Applicants raised in their appeal to the CEO, and which the CEO addressed in his decision of March 6, 2015:

> **SAWRIDGE FIRST NATION ELECTION APPEAL OF SAMUEL TWINN and ISAAC TWINN DECISION OF ELECTORAL OFFICER**
>
> **PURSUANT TO SECTION 11(2) OF THE CONSTITUTION OF THE SAWRIDGE FIRST NATION 9 (the "Constitution") DATED, MARCH 6, 2015**
>
> 1. An Appeal to the Sawridge First Nation February 17, 2015 Election was received by the Electoral Officer on March 2, 2015. Appeals were filed by Samuel Twinn and Isaac Twinn (referred to as the "Appellants"), both of which appeared to be duplicates. Accordingly, they will be dealt with together.
>
> 2. The Appellants stated four grounds of Appeal as follows:
>
> i. Improper rejection of ballots contrary to Section 61 of the Sawridge First Nation Elections Act (the "Act") and infringements of the Sawridge Constitution.
>
> ii. Non-Compliance with Section 44, 45(4), (7), Section 61 of the Act and Section 2(1)(f) of the Constitution.
>
> iii. Inconsistent Administrative Decision Impacting the Popular Vote.
>
> iv. Non Compliance with Rules regarding the creation and Notice of Voters Lists.
>
> 3. As the first two grounds of Appeal are duplicitous and overlapping, I would propose and will deal with them together.
>
> 4. The Appellants allege and state that an Elector should have been allowed another ballot after the Electoral Officer found the ballot spoiled during the opening of the mail-in ballots. The ballot was found to be spoiled as set out under S. 69(1)(b) of the Act as the ballot did not have the distinctive mark of the Electoral Officer on the back.
>
> 5. Section 61 of the Act is within Part VI and deals with voting. If an Elector makes a mistake, they can return their ballot and receive another ballot However, this is for in-person voting and does not apply for mail-in voting. Section 61(1) states in part:

> "If an Elector makes a mistake on a ballot.....**prior to depositing it in the ballot box.**.."

6. Section 45(4) and (5) of the Act also allow mail in voters to change their ballots upon signing a written affirmation.

7. Section 47(6) of the Act states that "voting stations shall be kept open from 10:00 a.m., local time, **until 6:00 p.m**., local time..". I find this applies to both in person voters and mail in voters.

8. There is no provision in the Act for the allowance of voting after the close of the polls at 6:00 p.m. on the election day. The allegations of the Appellants took place after 6:00 p.m. when the polls had closed. Accordingly, this portion of the Appeal is dismissed.

9. It was also alleged that the Electoral Officer allowed a ballot in favour of Roland Twinn despite the irregularity that the Declaration Form did not have an address for the witness. This was not possible as the ballots remained unopened and placed in the ballot box. The assertion of the Appellants of identifying the ballot as in favour of one candidate is based solely on speculation.

10. The purpose of the Declaration Form is to ensure identification of the Elector of which I was satisfied with as the Declaration Form was signed and the Elector identified. This portion of the appeal is dismissed.

11. Further in paragraph 5 of Section II of the Appeal, it is alleged the Electoral Officer should have viewed the in person ballots and correct mistakes before allowing ballots in the ballot box.

12. Section 55(6)(c) of the Act requires the ballot to be folded to conceal printing and any mark placed thereon by the Elector but exposes the distinctive mark of the Electoral Officer. There is no provision to allow the Electoral Officer to view ballots before being placed in the ballot box. This portion of the appeal is dismissed.

13. The Appellants also alleged that an Elector's Rights under S.2 (l)(f) and G) of the Constitution were infringed. This was based in part on the Elector's age as an Elder. I would note the Appellants are not Elders themselves.

14. S. 2(2) of the Constitution states "**when a person believes he or she has been treated unfairly, discriminated against or**

> **treated in a manner not in accord with accepted standards of administrative fairness**[.]"
>
> 15. In these circumstances, the Elector alleged to have had his rights infringed based on age or other grounds has not made a complaint or appeal, but the Appellants. I find the Appellants do not have standing to bring a complaint under S. 2(2) of the Constitution as their Rights and Freedoms were not affected, but those of another Elector.
>
> 16. This ground of the appeal is dismissed.
>
> 17. The third ground of appeal also deals with complaints based on another Electors alleged infringement of other Rights under Article 2 of the Constitution.
>
> 18. Similarly, the Appellants third grounds of Appeal are dismissed for the same reasons as above in paragraph 15.
>
> 19. The Appellants in their fourth grounds of Appeal allege non-compliance with the Voters Lists. There is a process including appeals both to the Electoral Officer and the Elders Commission in "Part III, The Electoral List" of the Act. It is both comprehensive and final. This is necessary to allow the Nomination process and the Voting process to proceed.
>
> 20. The timelines for appeals within Part III of the Act have expired and are concluded. I find the appeals provision in Section 11(2) of the Constitution under which this appeal has been filed does not allow a second opportunity to revisit expired timelines in the Electoral List process under Part III of the Act. The law in Part III of the Act was followed and concluded.
>
> 21. The Appeal is hereby dismissed.
>
> [emphasis in original]

[76] The CEO's reasons as set out above are important because they provide the rationale for the decisions he made in the pre-Election period under review and which are referred to by the parties in their submissions.

Membership Issues

[77] In their written submissions, the Applicants say that the CEO erred in law – including jurisdiction – in failing or declining to make adequate inquiry into the composition of the Electors List that was used by the CEO to administer the Election. They say this error was further compounded by the CEO's procedural unfairness and disregard for the rules of natural justice in his handling of the appeals.

[78] For the obligation to ensure the completeness and integrity of the Electors List, the Applicants rely primarily on s 20(1) of the *Elections Act* which reads as follows:

> *Correcting the Electors Lists*
>
> 20. (1) The Electoral Officer shall revise the Electors Lists where it is demonstrated to the Electoral Officer's satisfaction prior to the commencement of the Nomination Meeting that
>
> (a) the name of an Elector has been omitted from the Electors List;
>
> (b) the name or birth date of an elector is incorrectly set out in the Electors List;
>
> (c) the name of a person who is not qualified to vote is included in the Electors List.
>
> […]

[79] The Applicants say that these provisions place the responsibility upon the CEO to go behind the Electors List provided by SFN to ascertain the names of all persons who the Courts have said are rightfully members of SFN, and not just those individuals who SFN has decided to admit to membership in accordance with its own Membership Code. They say the CEO's

decision to leave the status of membership to SFN simply compounds the corrupt practices and procedures regarding membership that the Courts have found to prevail at SFN. In other words, the argument is that membership for the purposes of the Electors List is not simply a matter of accepting the list provided by SFN's Membership Registrar; it is a matter of the CEO ascertaining and assembling a full membership list in accordance with the Court's directions on membership entitlement at SFN.

[80] While I think that current membership practices at SFN could give rise to corrupt electoral practices (which I will address later), I don't think the CEO can be faulted for taking the position that he cannot be expected to resolve such broad and complex issues of membership in his electoral role. And I think that the governing legislation supports that position.

[81] Under the *Elections Act*, the definition of "Electors List" means "the list of Electors prepared pursuant to this Act" and the preparation of the list is governed by Part III of the *Elections Act*.

[82] Under Part III, it is the "Membership Registrar" who must "provide the Electoral Officer named by the Council pursuant to the Constitution with an alphabetical list of all members who will be Electors on the day of the Election…." What the CEO can and should do with this list is set out fully in the other provisions of Part III. These provisions deal mainly with corrections, omissions and additions to the Electors List provided by the Membership Registrar. And this must all be done before the nomination meeting because s 18.3 of the *Elections Act* makes it clear that:

> 18.3 After the commencement of the nomination meeting the names which appear on the Electoral List may not be changed and the names which appear on a Sub-List may not be removed from that Sub-List and placed on the other Sub-List.

[83] What is more, s 19 of the *Elections Act* provides as follows:

> *No Delay in Nomination Meeting or Election*
>
> 19. Notwithstanding any other section of this Act, no question with respect to the names on the Electoral List or a Sub-List shall cause a delay in the date set for either the Nomination Meeting or the Election or the holding of the Nomination Meeting or the Election.

[84] Section 20 of the *Elections Act*, relied upon by the Applicants, allows the CEO to revise the Electors List provided by the Membership Registrar "prior to the nomination meeting" because any application to correct is governed by s 18:

> 18.1 (1) If the Electoral Officer decides that the information provided in the statutory declaration is sufficient evidence, if unrefuted, that the elector's name should be moved from one list to another, the Electoral Officer shall make reasonable efforts to notify all electors that based on the information received, he or she is considering changing the list on which that elector's name appears and offer all electors the opportunity to show cause as to why that elector's name should not be moved from one list to the other.
>
> (2) If any elector wishes to show cause as to why the change should not be made, they may at any time prior to 11 days prior to the date set for the nomination meeting provide the Electoral Officer with a statutory declaration containing evidence and the Electoral Officer shall consider the evidence and make a determination as to which list the elector's name shall appear on and notify all Electors.
>
> (3) The Electoral Officer may ask the Elders Commission any question with regard to a dispute as to whether a correction, omission, or addition should be made with respect to the Electoral Lists, and shall consider the counsel, opinion, or recommendation of the Elders Commission before making a decision.

(4) When considering a request to move an Elector's name from one Sub-- List to another Sub-List in a situation where the Elector has more than one Residence, the Electoral Officer and the Elders' Commission may consider the following in relation to each residence:

i. An Elector may have only one Primary Residence at any point in time;

ii. The location around which the Elector's life is focussed;

iii. The location of the Elector's usual place of employment or education;

iv. The location where the Elector spends the most time;

v. The location which the Elector represents to be the Elector's Residence;

vi. Whether people other than the immediate family of the Elector reside in the residence;

vii. Whether other members of the Elector's immediate family reside in the residence;

viii. Whether the residence is owned or rented, and if rented or leased, the duration of the lease (daily, weekly, monthly, or annual) and the term of the lease (whether it is fixed or indefinite);

ix. The Elector's social, religious, business, and financial connections to the location of the residence;

x. The location where the majority of the Elector's clothes and personal belongings are located; xi. Regularity and length of stays in a Residence; and

xii. The center of the Electors's vital interests; (5) The Electoral Officer shall make a decision with respect to any appeal received no less than 7 days prior to the date set for the nomination meeting.

18.2 If any elector wishes to appeal the decision of the Electoral Officer, the matter shall be referred to the Elders Commission no less than 4 days prior to the date set for the nomination meeting which shall decide whether it wishes to hear the appeal, and if not, the Electoral Officer's decision is final. If the Elders Commission decides to hear the appeal, it shall hear the evidence of the electors who have filed statutory declarations, the elector in question, and the Electoral Officer as to the reasons for his or her decision, and

> after which, shall decide on which list the name of the Elector in question shall appear. The decision of the Elders Commission must be provided to the Electoral Officer prior to the date set for the nomination meeting.
>
> 18.3 After the commencement of the nomination meeting the names which appear on the Electoral List may not be changed and the names which appear on a Sub-List may not be removed from that Sub-List and placed on the other Sub-List.

[85] It is questionable whether s 20 gives the CEO any authority to go beyond s 18 but, even if it did, there would have to be a request to amend "prior to the commencement of the Nomination Meeting," which did not occur in this case.

[86] It seems clear from Part III that the CEO is neither empowered or obliged to make changes to the Electors List, or to reject or supplement the Electors List provided by the Membership Registrar, without a request from a member that he do so. On the facts before me, no such request was made. I see nothing in the *Elections Act* that would allow the CEO to reject the Electors List provided by the Membership Registrar and, on his own initiative, compile an alternative Electors List based upon what the Courts have said about entitlement to membership at SFN. It would make no sense for SFN to put in place an *Elections Act* that did not reflect and conform to its own position on membership. This is not to say, of course, that SFN's position on membership is legal, or that it is not simply defiant of what the Courts have ruled on the issue of membership. But I don't think that those Court rulings give the CEO any power to go beyond the present *Elections Act*. And the Court has not been asked to review the legality of the *Elections Act* in this application.

[87] This means that I have to reject the Applicants' argument for reviewable error by the CEO for failing or declining to make inquiry into the composition of the Electors List that was provided to him by the Membership Registrar, after his finding that the "timelines for appeals within Part III of the Act have expired and are concluded." There was no requirement for the CEO to implement some kind of general inquiry into the creation of the Voters List.

[88] It appears to me that the Applicants accepted this position at the oral hearing before me in Edmonton and agreed, at least, that it would be "impractical" to expect the CEO to deal with membership issues in this broad sense.

Failure of Respondents to Establish and Confirm a Proper and Complete Voters List

[89] The Applicants say that the Respondents failed in their fiduciary duty to establish and confirm that a proper and complete Voters List was prepared. They say further that this was done in disregard of constitutional, statutory and other legal requirements, and was compounded by corrupt practices and errors of jurisdiction.

[90] In written representations, the Applicants summarize the situation as follows:

> 81. In *Holland v. Saskatchewan*, [2008] SCC 42, the SCC dealt with the situation where a court issues a binding order which is then not complied with. The court ruled that although some aspect of negligence might be a viable action, the traditional and proper remedy is judicial review for invalidity [para 9]. That is precisely what the Applicants seek. So long as the SFN continues to throw down the gauntlet to the courts by refusing to implement the clear language of this Court in *L'Hirondelle*, *supra*, it continues to irretrievably corrupt the election process. So long as entitled persons are not added to the Band list, despite the clear

> determination of entitlement, the concept of a truly fair election is illusory.
>
> 82. It is made even worse by the queue jumping which has Roland's scions added to the list whilst others must wait for someone to enforce the law. It is possible, as the evidence indicates, for someone to be left hanging for years, in a SFN process that is shrouded in secrecy. The SFN adopts a stance and process that is the polar opposite of the enfranchisement purpose of the *Indian Act* and a truly fair and democratic electoral process.
>
> [footnotes omitted]

[91] The Respondents take the position that these issues are beyond the scope of review in this application. They say that this application is not a challenge to any and all of the decisions made by the Chief and Councillors applying SFN's Membership Code, nor is it a challenge to the confidentiality of SFN's membership list under First Nations Law. In other words, the Respondents say that this issue is entirely irrelevant because it was not before the CEO when he made the pre-Election decisions that are the subject of this judicial review application.

[92] It seems to me that the Applicants are again attempting to use this judicial review of decisions made by the CEO in the 2015 Election to attack the SFN's Membership Code and the way that membership is dealt with at SFN.

[93] Bearing in mind that this application, as confirmed by Justice Zinn, deals with decisions of the CEO during the 2015 Election, I think that Rule 302 excludes this kind of extensive general inquiry into membership issues at SFN. As the Court has made clear on numerous occasions, where review of multiple decisions is sought, Rule 302 requires an application for each decision to be filed, unless the Court orders otherwise, or the applicant can show that the

decisions at issue form part of a continuous course of conduct. However, where two or more decisions are made at different times and involve a different focus, they cannot be said to form part of a continuing course of conduct. See, for example, *Servier Canada Inc v Canada (Minister of Health)*, 2007 FC 196.

[94] In the present case, I do not think that the Respondents' implementation of a Membership Code and the general process for granting membership at SFN can be said to be part of a continuing course of conduct that includes the decisions made by the CEO at the 2015 Election, except perhaps in one respect. There is an allegation of queue jumping in membership applications that the Applicants say was facilitated by Chief Roland Twinn in the 6 month period prior to the 2015 Election to ensure that his own son was granted membership, while other applicants for membership have been kept waiting for years. The inference is that this was done so that Roland's son could vote for his father in the 2015 Election. In a First Nation such as SFN with a total membership of only 44, of which only 41 are qualified to vote, I can see why this might be a concern. In the notice of appeal dated March 2, 2015, the Applicants stated as a ground under IV. Non Compliance with the Rules Regarding the Creation and Notice of Voter Lists:

> 3. The failure to comply with the creation and notice of Voter's Lists was compounded by a process that unfairly added persons and excluded others. In particular, notwithstanding applications for inclusion which had been outstanding for years, only the son of the successful candidate for Chief was added to the List."

This was not addressed by the CEO in the appeal decision. However, the CEO did reply, in an email to the Membership Registrar regarding the Election and his authority to "add the names of persons entitled to membership to the electoral list including those whose completed applications

have been pending for an unreasonable time" that "a general membership issue would be dealt with by Membership." In other words, the CEO felt that he could not deal with this complaint because, as previously mentioned, his authority to deal with membership issues is restricted by ss 18 and 20 of the *Elections Act*. It seems to me that this position is neither unreasonable or incorrect.

Errors by CEO

[95] The true focus of this application must be the allegations that the CEO, Mr. Callihoo, erred in law (including jurisdiction) in rejecting Walter's election ballot through misinterpretation and misapplication of the governing statutory provisions, and that this error was compounded by a breach of the rules of natural justice and procedural fairness.

[96] It is noteworthy that the error identified is the rejection of "an election ballot," and this would appear to be a reference to the ballot of Walter Felix Twinn.

[97] The Applicants explain the problems associated with the rejection of Walter's ballot as follows, and I think it would be helpful to set out the arguments of both sides on this central point in detail:

> 16. Walter Felix Twin ("Walter") is an elderly resident member of the SFN. He asked Sam in 2012 to run for the position of Chief which Sam, in Sept., 2014, decided to do. Walter was about 80 years old, has health issues and may have difficulty reading and comprehending English, Cree being his first language. On election day Sam was present in the polling station before 6 p.m., as were Walter and his wife.
>
> 17. Mail in ballots were mailed to electors. Before the poll opened at 10 a.m.; the CEO showed Sam's Scrutineer, Ron Rault

("Scrutineer") all the Mail In Ballots, 15 in total, all unopened. The 15 mail in ballots showed the name of the elector on the return envelope and these 15 names were recorded. One of these names was life time resident elector Walter. A non-resident elector, Wesley Twinn, completed his mail in ballot and asked the CEO if he could drop it off but was refused. Therefore, on Feb. 12, 2015 he express posted the ballot. However, Wesley was not one of the 15 names recorded at the polling station. Wesley Twin had to vote in person. Some electors arrived with mail in ballots but without Voter Declarations as required but were permitted to vote in person.

18. After 6 p.m., the CEO opened the 15 mail in ballots, including Walter's, who was still at the polling station. His ballot was set aside as the portion that had the CEO's initials had been cut off to fit the paper into the return envelope. Discussion ensued between the scrutineer, the CEO and his deputy, in the presence of other electors. The scrutineer's position was that the ballot should be counted as there was no issue as to the elector's intent, identity, nor any suggestion that Walter had voted more than once. Of the 41 electors all were accounted for except for Georgina Ward. Nevertheless, the CEO rejected Walter's ballot. Another mail in ballot (Deanna Morton) was set aside as the Voter Registration had a witness signature but no witness address as required. The CEO ruled that ballot was valid. In total, the CEO disqualified three of four ballots (all mail-in ballots). He set aside two cast in favour of Sam, one cast in favour of Roland. Thereafter, Sam and his Scrutineer sought to inspect the spoiled ballots, and these requests ignored and/or denied.

19. The Scrutineer suggested that as Walter was present he should be permitted to cast an in person vote. Others waded into the discussion. Irene Twinn, sister of Roland, objected to Walter casting and in person vote. Roland stated that mail in ballots are a problem. The CEO rejected the request. This result was Roland won by one vote rather than a tie vote which would have necessitated a runoff election. In any event, three runoff elections were required as a result of voting for council members and Elders.

20. The Applicants appealed on March 2, 2015, setting out their Grounds of Appeal and expressly indicating their desire to attend and intention to call oral evidence of named individuals, and others. Without notice or otherwise communicating the CEO rejected the appeal on March 6, 2015. In his written decision the CEO makes no mention of the request to attend or call evidence. The decision was, therefore, rendered without hearing evidence or submissions. His stated reason for rejecting the appeal was his

interpretation that a spoiled ballot cannot be replaced after 6 p.m., whether the elector is voting in person or by mail in ballot. The purpose of the CEO's initials was to ensure identification. He rejected any element of unfairness or discrimination because Walter was not the appellant and because the Applicants were not elders.

…

58. In this case, the plurality separating Roland Twin and Sam Twinn was one vote. The rejection of Walter Twin's vote directly affected the outcome.

59. The CEO has direct responsibility for ensuring a fair and proper election. Any discretion must necessarily be confined by the law in relation to the purpose of the legislation, and rules of procedural fairness. The Election Act, s. 12, states:

> 12.(1) The Electoral Officer shall be responsible for the fair, efficient and proper conduct of an election held in accordance with this Act and the regulations.
>
> (2) The Electoral Officer may take all reasonable means to encourage, in an impartial manner, all Electors to engage in and to vote at an election.
>
> (3) As such, the Electoral Officer may make such decisions and rules, that are not inconsistent with the provisions of the Constitution, this Act or any regulation made pursuant to this Act, to fulfill his/her responsibilities and to deal with any matter that circumstances require so as to protect the integrity of the election within generally accepted standards for the conduct of elections.

60. The SFN has authority to pass regulations concerning the vote counting process, means for fair counting, processes to ensure that all valid votes are counted, when ballots are to be discarded, verification of votes, the counting of mail in ballots, the process of verifying ballots, the process of determining what is a proper mail in ballot and how such ballots are to be identified. The CEO did not refer to any such regulations either in his original decision or appeal decision. The simple reason is that regulations do not exist and the CEO is left to make up his or her own rules.

61. However, the Election Act does contain some specific rules which were not referred to by the CEO at either decision level. Ss. 47 and 61 of the *Election Act* states:

> S. 47 (7): *An elector who is inside a voting station at the time that the voting station is to close is entitled to vote.*
>
> *61(1) if and elector makes a mistake on a ballot or inadvertently spoils his/her ballot paper in marking it prior to depositing it in the Ballot Box, then the Elector is entitled to another ballot to be issued by the Electoral Officer upon return of the spoiled ballot to the Elector Officer.*
>
> *(2) The Electoral Officer shall write the word "Cancelled" on the spoiled ballot and without examining the ballot, store it separately.*

62. The CEO did not specify any statutory basis for rejecting Walter's ballot, or refusing another ballot. In doing so he declined to do that which he was directed to do, thereby committing error of law going to jurisdiction.

63. Both his initial and appeal decisions simply state that because his [the CEO's] initials were not on the ballot it would not be counted, notwithstanding that there was no issue as to identity, or double voting, or that Walter was present before and after the 6 p.m. closing, or that there was a clearly discernible voter intention. Technicality governed substance which is the converse of the correct approach.

64. In contrast, the CEO permitted other votes in which the asserted deficiency was at least as serious. The Election Act, s. 66 (a) states that any mail in ballot shall be set aside if not accompanied by a Voter Declaration Form if that form is not signed or witnessed. S. 70 then specifies that any such ballot is void and must not be counted. A mail in ballot by Deana Morton had no witness address but was nevertheless counted. No explanation for the differential standard has been forthcoming.

65. In his appeal decision the CEO stated that the purpose of the initials was to ensure identification of the standard which was the standard he applied to the vote cast in favour of Roland. There was no issue as to identification with Walter and, even if such was somehow conceivable, Walter was present to confirm. However, the CEO was of the view that a ballot could not be replaced after 6

p.m.. There are two problems with that: (a) replacement was not necessary and (b) even if it was, the plain words of ss. 47 and 61 of the *Election Act* govern. His decision can only be reached by reading in further words which would be contrary to the correct statutory interpretation standard, as set out in the law above.

66. The errors in his decision were compounded by further error. First, he refused to consider any of the circumstances in relation to Walter because Walter had not appealed and neither of the appellants were elders. The governing statute contains no such requirement just as, on a recount vote a returning officer does not require the individual whose vote is challenged or has been rejected to be the applicant for a recount. As previously indicated direct evidence is not required. What matters is that the appeal body is given notice of an issue triggering a right and duty to investigate. By requiring that the Applicant be elderly he effectively rejected the appeal on an irrelevant ground and improperly declined jurisdiction to inquire and investigate.

67. The second problem, which goes directly to the heart of procedural fairness, is that in the appeal process the CEO must be taken to have refused to hear from Walter. The Appeal Notice specifically requested a right to attend and adduce evidence, and specifically put forward a request to hear from Walter who would attend. The Appeal decision was rendered without any regard for that request.

68. As stated in the *Meeches* not only does an appeal committee have power to investigate alleged breaches but must address the issue put to it. The appeal process, as conducted by the CEO, is the mirror opposite of that found in *Gadwa v. Kehewin First Nation* [2016] FC 597. At issue was the counting of certain disputed votes. Because Gadwa failed to raise with the Election Officer his concerns as to the need for an oral hearing, he had waived procedural fairness rights. Further, the Elections Officer had received informal information and indicated that she would take action, provided that affidavits were sworn. That suggestion was declined. In the circumstances the court was satisfied that Gadwa had been given a "meaningful opportunity to put forward his position and evidence in support of that position". Such is the opposite of what occurred here.

69. The Applicants, and indeed all those entitled to vote in a SFN election, have a legitimate and paramount expectation that the voting process - the fundamental cornerstone of democracy - will be conducted to the highest standards of correctness and procedural fairness. The continuing failure of the CEO to meet

> those standards is sufficient justification to set aside the election result. Not only were the CEO's decisions unreasonable but reflect serious error of law and lack of procedural fairness.
>
> [footnotes omitted]

[98] The Respondents' position is that the CEO had no choice but to reject Walter's ballot because he was bound to do so in accordance with the governing provisions of the *Elections Act*:

> 58. An Elector voting by mail-in ballot receives, under section 40(l)(b), a ballot in the mail bearing the Electoral Officer's "distinctive mark" on it. That Elector can either, choose to mark that mail-in ballot and mail or deliver it to the Electoral Officer "before the time at which the polls close on the day of the Election" under section 45(1)(f). Or, that Elector can, under section 45(4) and section 55(3)(a), choose to "exchange his/her **ummarked** [*sic*] mail-in ballot with the Electoral Officer for a ballot to be marked and deposited in a ballot box at the voting station" or the Elector can, under section 45(5) and section 55(3(b), "obtain a ballot and vote in person at a voting station" by swearing that he or she "has not voted in the Election by mail or in person". All mail- in ballots received by the Electoral Officer before the polls close remain, under section 66, unopened until after the polls close. Under section 47(6) the polls close at 6:00 pm.
>
> 59. An Elector who chooses to vote in person goes to the poll between 10 am and 6 pm and receives a ballot bearing the Electoral Officer's "distinctive mark" if he or she has not already voted in the election either by mail-in ballot or in person: see sections 55(1)(b) and (c) and (e). The Elector then marks the in-person ballot in secret, folds it and deposits it **folded** in the ballot box; section 55(l)(d) and (g).
>
> 60. Only after the polls close at 6:00 pm does the Electoral Officer open up the mail-in ballot envelopes he or she received. He or she checks to see whether the Elector has enclosed his or her "signed and witnessed" Voter Declaration Form and, if that form is present, the Electoral Officer shall:
>
> > "... **without unfolding** the ballot deposit the ballot in the ballot box…"
>
> 61. Only after all of the mail-in ballots that were accompanied by "signed and witnessed" Voter Declaration Forms are deposited

in the ballot box, is the ballot box then opened. Once the ballot box is opened, section 69(1) mandates that the Electoral Officer

"**shall** examine each ballot **and reject** ballots that:

"(a) were not issued, mailed out or handed out by the Electoral Officer,

"(b) **does [sic] not have the distinctive mark of the Electoral Officer**:

"(c) are marked "spoiled", "cancelled" or "declined'',

"(d) **contain a mark that identifies or may identify an Elector**."

Section 69 gives the Electoral Officer no discretion, he or she must reject such ballots.

62. As Sam Twinn's Scrutineer noted in his written report, after the polls closed on February 17, 2015:

> "Every ballot - Mail In or In-Person - had to have the initials of either the Electoral Officer or the Deputy Electoral Officer clearly marked and visible on the back of the ballot before it could be deposited in the ballot box. Both [of Walter Felix Twinn's mail-in] ballots, one for Chief and the other for Resident Council and Resident Elder, had been cut, removing the initials of the Electoral Officer. After thoroughly examining the Ballot for Chief, the Chief Electoral Officer set it aside; discussion occurred between us, in the presence of electors. Later the Chief Electoral Officer declared the ballot spoiled."

And, as explained in the Electoral Officer's March 2, 2015 Decision:

> "4. . . . The ballot was found to be **spoiled as set out under S. 69(1)** of the Act as the ballot did not have the distinctive mark of the Electoral Officer on the back."

63. It was clear, both on February 17, 2015 and on March 2, 2015, that the Electoral Officer rejected Walter Felix Twinn's ballots under section 69(1)(b) because the *Consolidated Elections Act* expressly says that they shall be rejected. They cannot be counted. That reasoning was known and

understood on February 17, 2015 by Sam Twinn's Scrutineer. And, as it is an undisputed fact that those ballots did not have "distinctive mark of the Electoral Officer" on them, given the unambiguous meaning of the mandatory wording of section 69(1)(b), the Electoral Officer's decision was reasonable, within the range of possible acceptable outcomes, and indeed correct.

64. Even if Walter Felix Twinn's mail-in ballots should have deposited unfolded into the ballot boxes without having been first examined to see if they had the "distinctive mark of the Electoral Officer on the back", the Electoral Officer's decision not to do so did not affect the result of the election because, as soon as the ballot boxes were opened on February 17, 2015, the Electoral Officer would have then had to summarily reject it under section 69(1)(b). He had no discretion. He could not count it. Indeed, as everyone had already learned from Walter Felix Twinn before the ballot box was opened that he had cut the "distinctive mark of the Electoral Officer" off his ballots, had his Chief ballot been deposited in the ballot box before the ballot box was opened, the Electoral Officer would have also had to reject it under section 69(1)(d). The Electoral Officer's decision not to count Walter Felix Twinn's ballot was reasonable, indeed correct, and this judicial review should be dismissed.

The Electoral Officer's decision not to give Walter Felix Twinn a new, in-person ballot after the polls had closed is neither unfair nor discriminatory nor anti-democratic. It is a reasonable, indeed correct, interpretation and application of the Consolidated Elections Act.

65. As explained by the Electoral Officer in paragraphs 5 - 8 of his March 2, 2015 Decision, while section 61(1) of the *Consolidated Elections Act* allows an **in-person** voter who makes a mistake in the polling booth to return his or her ballot and get a new ballot before actually voting, that section **does not** apply to Electors who have already chosen to vote by mail. Those Electors can only vote in-person before the polls close under sections 45(4) or 45(5); that is, only if they exchange their **unmarked** mail-in ballots for in-person ballots or if they satisfy the Electoral Officer that they have not already voted in the election either in person or by mail-in ballot.

66. By the time it was discovered that Walter Felix Twinn had spoiled his ballot by cutting off "the distinctive mark of the Electoral Officer", it was too late for him to get an in- person ballot under section 45(4) or section 45(5). He had already marked his mail-in ballot, he had already mailed or delivered it to the Electoral

Officer, who had received it before the polls closed and only opened it after the polls had closed. The Electoral Officer's decision was reasonable. It was transparent, intelligible and within the range of possible acceptable outcomes, given the election regime established by the *Consolidated Elections Act*. This judicial review of the Electoral Officer's decision should be dismissed.

67. The Applicants' unsubstantiated suggestion that the Electoral Officer's reasonable and correct interpretation and application of the Consolidated Elections Act was inconsistent, unfair, discriminatory or undemocratic must be rejected. The Applicants' unsubstantiated suggestion that the Electoral Officer was left to make up his "own rules" must also be rejected. There is absolutely no evidence to support either of these suggestions.

68. On the contrary, the evidence is clear that the Electoral Officer did not apply his "own rules". He consistently applied the rules established by the *Consolidated Elections Act*, specifically:

a) he applied the mandatory provisions of section 69(1) to reject not only Walter Felix Twinn' s mail-in ballots but also two in-person ballots that, when the ballot box was opened, were found to have "a mark that identifies or may identify an Elector" contrary to section 69(1)(d); and

b) he accepted the Voter Declaration Form received with Deana Morton's mail-in ballots because it was indeed "signed and witnessed", as required by section 66(a)(i), thus ensuring Elector Morton's identification.

69. Contrary to the Applicants' suggestion, Walter Felix Twinn was not denied his right to vote. He voted. He marked his mail-in ballot and he mailed or delivered it to the Electoral Officer before the polls closed. He voted "by mail". However, because he did it wrong, just as Electors Morton and Potskin did it wrong, his vote was not counted because it had to be rejected under section 69(1) of the *Consolidated Elections Act*. Section 69(1) was applied consistently by the Electoral Officer to all of the ballots he received. Neither the Consolidated Elections Act nor the Electoral Officer's interpretation and application of them are "unfair", "discriminatory" or "undemocratic".

[emphasis in original, footnotes omitted]

[99] As the Respondents point out, s 69(1) of the *Elections Act* is mandatory ("shall examine each ballot and reject ballots that … (b) does [*sic*] not have the distinctive mark of the Electoral Officer"). The Respondents also point out that Walter's ballot could and should also have been rejected under s 69(1)(d) because everyone involved had already learned from Walter himself before the ballot box was opened that he had cut the distinctive mark of the CEO off his ballot.

[100] The Applicants attempt to circumvent the mandatory impact of s 69(1) in several ways. First of all, they refer the Court to s 12 of the *Elections Act*:

> 12. (1) The Electoral Officer shall be responsible for the fair, efficient and proper conduct of an election held in accordance with this Act and the regulations.
>
> (2) The Electoral Officer may take all reasonable means to encourage, in an impartial manner, all Electors to engage in and to vote at an election.
>
> (3) As such, the Electoral Officer may make such decisions and rules, that are not inconsistent with the provisions of the Constitution, this Act or any regulation made pursuant to this Act, to fulfill his/her responsibilities and to deal with any matter that circumstances require so as to protect the integrity of the election within generally accepted standards for the conduct of elections.

[101] It is true that s 12(2) imposes a positive duty on the CEO to encourage electors to engage in the election, but this does not mean they can vote in a way disallowed by the *Elections Act*, so that it does not override s 69(1). And the discretion given to the CEO under s 69(2) can only be exercised in ways "that are not inconsistent with the provisions of the Constitution, this Act or any regulations made pursuant to this Act…." Subsection 69(1) is a provision of the *Elections Act* and it says that mail-in ballots cannot be accepted if they do not have the distinctive mark of the CEO, or if they contain a mark that identifies or may identify an elector.

[102] The Applicants also point to ss 47(7) and 61(1) and (2) of the *Elections Act*:

> *Voting Stations*
>
> 47. (6) Voting stations shall be kept open from 10 a.m., local time, until 6 p.m., local time, on the day of the election unless regulations establish variations in these hours.
>
> […]
>
> *Cancelled ballots*
>
> 61. (1) If an Elector makes a mistake on a ballot or inadvertently spoils his/her ballot paper in marking it prior to depositing it in the Ballot Box, then the Elector is entitled to another ballot to be issued by the Electoral Officer upon return of the spoiled ballot to the Electoral Officer.
>
> (2) The Electoral Officer shall write the word "Cancelled" on the spoiled ballot and without examining the ballot, store it separately.
>
> […]

[103] It seems to me that the Respondents are right to point out that these provisions do not assist the Applicants. Walter chose to vote, and did vote, by way of mail-in ballot. He could have chosen to vote in person before the polls closed under ss 45(4) and 45(5) of the *Elections Act*. But this could only have occurred if he had exchanged his unmarked mail-in ballot for an in-person ballot, or if he had satisfied the CEO that he had not already voted in the Election either in person or by mail-in ballot. Walter did not do this. He marked his mail-in ballot and delivered it to the CEO before the polls closed, and it was opened after the polls closed. This means, as I read the *Elections Act*, that Walter voted by way of mail-in ballot that was spoiled for reasons later given by the CEO in his March 2, 2015 Decision, *i.e.*:

> The ballot was found to be spoiled as set out under s 69(1) of the Act as the ballot did not have the distinctive mark of the Electoral Officer in the back.

[104] The Applicants' final argument is based upon common sense and fair play. In essence, it is that Walter attended to vote before the polls closed, he had only cut off the CEO's distinctive mark to fit his mail-in ballot in the envelope, everyone knew who he was, he could easily have been given an in-person ballot and allowed to vote in a way that would not identify him. No harm would have been done to the electoral process in a context (41 electors) where every vote is highly significant. The Applicants say that the CEO placed form ahead of substance.

[105] This seems to me to be an argument alleging the unreasonable exercise of a discretionary power. But the CEO only had the powers granted to him by the *Elections Act*. The Applicants' arguments make sense to me, but they cannot be reconciled with the process chosen by SFN under the *Elections Act*, and I am not here reviewing that *Elections Act*. If form has been placed before substance, then it is SFN who has done this, not the CEO. The way to deal with this kind of problem is to seek an amendment to the *Elections Act* that would give the CEO the scope to deal with the kind of problems that arose in this case over Walter's vote. Given the current wording of the *Elections Act*, I cannot say that the CEO was either incorrect or unreasonable in rejecting Walter's ballot.

Queue Jumping

[106] The Applicants complain that the election process is corrupted at SFN by the way that the Membership Committee allocates membership to applicants and controls the Membership Register and hence, the Electors List.

[107] There is no Membership Code decision before the Court in this application, but the Applicants' specific complaint appears to be that Chief Roland Twinn's son was granted membership in the 6-month period prior to the Election – thus effectively ensuring a vote for his father - while other applications for membership have been left hanging for years. The Applicants point out that the whole membership process is shrouded in secrecy and this undermines the democratic process, and did in this case because Chief Roland Twinn's son was granted membership in a way that was not transparent. It is also not disputed that Chief Roland Twinn chaired the SFN Membership Committee which controls applications and provides recommendations on membership to Chief and Council. It seems obvious, then, that Chief Roland Twinn could find himself in a conflict of interest when it comes to deciding any application for membership, and particularly when his own children are involved. Even if he abstains, that does not mean that his influence and his wishes will be disregarded.

[108] Because there is no application to review the decision to grant Membership to Chief Roland Twinn's son before me, the Court is not in a position to assess whether that decision was erroneous or unlawful, either in terms of SFN's own constitution or the significant jurisprudence that has dealt with the vexed issue of membership at SFN. The Applicants are simply asking the Court to draw an inference that Chief Roland Twinn, and those he is able to influence, have, in this instance, used their control over membership to secure an advantage in the Election. Based upon the record before me, I do not think that such an influence can be drawn. In any event, however, the Court is reviewing the decision of the CEO during the Election and the Applicants' appeal of the Election.

[109] The grounds of the appeal were:

> **SAWRIDGE FIRST NATION ELECTION APPEAL**
>
> **FEBRUARY 17, 2015**
>
> We provide Notice pursuant to the Constitution of this Nation of our intent to Appeal the results of the General Election of the First Nation for the position of Chief, the position of Councillor and the position for the Elders Commission. I have reasonable grounds to believe that there has been a contravention of the Constitution and contraventions of the laws of the First Nation that have affected the results of the Election. In the final analysis, the announced results do not reflect the popular vote and the Nation is best served by the relief requested and calling for a new Election in order to properly reflect the popular vote.
>
> **GROUNDS OF APPEAL**
>
> **I. Improper Rejection of Ballots, Contrary to s.61 of the Sawridge Election Act and the Sawridge Constitution which Guarantees the Right Not to be Discriminated Against and, the Right to Equal Protection, Treatment and Benefit under the Laws of the First Nation**
>
> **During the Ballot Opening and Count Process of the February 17, 2015 Election:**
>
> 1. The Chief Electoral Officer (CEO) discounted the clear intention of voter Elder Walter Felix Twin who cut his Mail In Ballots to fold and fit the envelope. The CEO, in searching for his own initials, thoroughly examined the Ballots which had been in the sealed envelope. At this point in time, the CEO embraced the now discredited strict procedural approach and determined there was an Irregularity. A ballot in every sense complete, with the exception of the Electoral Officer's identifying initials, was held to be an invalid expression of the Voter's intent. The CEO deemed the ballot cast by Walter Felix Twin "spoiled" or otherwise rejected;
>
> 2. On the contrary, the modern electoral guidelines embrace a substantive approach emphasizing the right of the elector to express his free political opinion. There can be no question that all of the usual safeguards were in place, protecting the sanctity of the ballots. With the exception of the CEO's initials, all other safeguards were in place and the unfettered will of the voter clearly expressed. While other voters subsequently enjoyed corrective

measures, this specific mail in voter who was present February 17, 2015, did not receive any assistance and was therefore deprived of his right to participate.

3. This error on the face of the record effectively added one vote in favour of the Incumbent and reduced by one the number of votes for the Challenger contesting the position of Chief, resulting in a reversal of the elected representative. At best, the error resulted in a tie, giving rise to a new Election. Subject to the evidence of the Chief Electoral Officer and the Scrutineer, the elections for the position of Councillor and the Election for the position of Resident Elder to the Elders Commission, have been similarly impacted.

II. Non Compliance with Election Rules - s. 44, s.45(4), (7), s.61 and s.2(1)(f) of the Sawridge Constitution which Guarantees the Right to Vote to all Electors

1. The CEO closed the Polls and started opening the Mail In Ballots thereby depriving any elector present, in particular, 80 year old Elector Walter Felix Twin, the opportunity to correct their Mail In Ballot or vote in person as provided for by the Elections Act as amended. We have a custom which shows great deference to age, life, experience, education, health, ability to appreciate and understand the written word and, we make every effort to accommodate these issues. The strict procedural approach by the CEO is contrary to our custom, culture and prevailing law.

2. The CEO refused to allow the 80 year Elector, Walter Felix Twin, present, to cast a new Ballot, despite being asked by Scrutineer Ron Rault. The incorrect interpretation of the procedural rules coupled with the small size of the return envelope, and difficulty appreciating written instructions required the voter to cut down the size of the ballot to fit the envelope with a predictable result. Cutting the Ballot is one of a list of available responses some of which are more reasonable than others. With every other safeguard in place to protect the sanctity of the Ballot itself, this voter response was not so unreasonable as to deprive the voter of the opportunity to participate. On the contrary, participation is to be encouraged and indeed commended.

3. Alternatively if the Rules do not provide an opportunity to substitute a Ballot, such provisions improperly discriminate as between types of electors.

4. In contrast the CEO set aside then allowed a Mail In Ballot in favor of Roland Twinn despite the irregularities in the Voter’s

Declaration Form which form did not identify the address of the witness to the Elector's Declaration. The form is specific, directive and clear that the address of the Witness must be included.

5. The CEO failed to show the Scrutineer the two Ballots that allegedly identified the Elector. He then deemed these Ballots "spoiled". The CEO and DEO failed to check the Ballots before being deposited into the Ballot Box and enable a correction so each vote would count. The CEO upon request from Sam Twinn confirmed that one of the Ballots was cast in favor of Sam Twinn for Chief.

III. Inconsistent Administrative Decision Impacting the Popular Vote

1. The differential approach by the CEO followed upon the determination of who the votes were cast for, in at least one case. ln fact the CEO confirmed his knowledge who the Elector voted for as Chief.

2. Despite Walter Felix Twin's presence to the knowledge of the CEO, no steps were taken to identify any difficulties with the Ballots and allow Walter Felix Twin to exercise his full voting rights under the Election Act as amended and to consider his Mail In Ballot spoiled and offer him the opportunity to vote, as he was entitled to do. Administrative fairness as provided under the Sawridge Dispute Resolution Act requires Notice and an opportunity to express concerns provided it would not cause unreasonable delay. Walter Felix Twin was present and no delay would have occurred.

IV. Non Compliance with the Rules Regarding the Creation and Notice of Voter Lists

1. The Election Act as amended requires that Elector Sub Lists be mailed to each Elector not less than 75 days prior to the Election. This was not complied with.

2. The failure to comply deprives persons who had not been Included in the List the opportunity to present information to the CEO to ensure their proper inclusion as provided by the Election Act as amended.

3. The failure to comply with the creation and notice of Voter's Lists was compounded by a process that unfairly added persons and excluded others. In particular, notwithstanding applications for inclusion which had been outstanding for years,

> only the son of the successful candidate for Chief was added to the List.
>
> **EVIDENCE**
>
> I. We intend to call the evidence of Samuel Twinn, Isaac Twinn, Felix Twinn and others as they become known to us, together with the evidence of the Scrutineer, Ron Rault. The Scrutineer's Report is attached for your information and review.

[110] The CEO's decision rejecting this appeal is set out at paragraph 75 above.

[111] As can be seen from the above, this ground of appeal was rejected on the basis of "timeliness" and non-compliance with Part III of the *Elections Act*.

[112] The Applicants have not addressed this aspect of the decision before me.

Procedural Fairness

[113] The Applicants raise the following procedural fairness issues:

> 66. The errors in his decision were compounded by further error. First, he refused to consider any of the circumstances in relation to Walter because Walter had not appealed and neither of the appellants were elders. The governing statute contains no such requirement just as, on a recount vote a returning officer does not require the individual whose vote is challenged or has been rejected to be the applicant for a recount. As previously indicated direct evidence is not required. What matters is that the appeal body is given notice of an issue triggering a right and duty to investigate. By requiring that the Applicant be elderly he effectively rejected the appeal on an irrelevant ground and improperly declined jurisdiction to inquire and investigate.
>
> 67. The second problem, which goes directly to the heart of procedural fairness, is that in the appeal process the CEO must be taken to have refused to hear from Walter. The Appeal Notice

> specifically requested a right to attend and adduce evidence, and specifically put forward a request to hear from Walter who would attend. The Appeal decision was rendered without any regard for that request.

[114] In their grounds of appeal, the Applicants alleged, *inter alia*, non-compliance with s 2(1)(f) of the *Constitution* which protects the rights and freedoms of members against "unreasonable search or seizure."

[115] In his decision, the CEO says that the "Appellants also allege that an Electors Rights under s 2(1)(f) and (j) of the Constitution were infringed."

[116] The CEO appears to have raised s 2(1)(j) himself because of the mention of Walter's age in the appeal. Subsection 2(1)(f) includes the right not to be discriminated against on the basis of "age."

[117] The Court does not understand the relevance of s 2(1)(f) to the facts and issues at play in this case which have nothing to do with unreasonable search and seizure. And as the Applicants didn't raise s 2(1)(j), it is hard to see how they can now say that the appeal was unfairly handled or dismissed based upon this issue.

[118] However, the grounds of appeal do make some mention of age:

> **II. Non Compliance with Election Rules - s. 44, s.45(4), (7), s.61 and s.2(1)(f) of the Sawridge Constitution which Guarantees the Right to Vote to all Electors**
>
> 1. The CEO closed the Polls and started opening the Mail In Ballots thereby depriving any elector present, in particular, 80 year

> old Elector Walter Felix Twin, the opportunity to correct their Mail In Ballot or vote in person as provided for by the Elections Act as amended. We have a custom which shows great deference to age, life, experience, education, health, ability to appreciate and understand the written word and, we make every effort to accommodate these issues. The strict procedural approach by the CEO is contrary to our custom, culture and prevailing law.
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> 2. The CEO refused to allow the 80 year Elector, Walter Felix Twin, present, to cast a new Ballot, despite being asked by Scrutineer Ron Rault. The incorrect interpretation of the procedural rules coupled with the small size of the return envelope, and difficulty appreciating written instructions required the voter to cut down the size of the ballot to fit the envelope with a predictable result. Cutting the Ballot is one of a list of available responses some of which are more reasonable than others. With every other safeguard in place to protect the sanctity of the Ballot itself, this voter response was not so unreasonable as to deprive the voter of the opportunity to participate. On the contrary, participation is to be encouraged and indeed commended.

[119] It seems to me that although Walter's age is mentioned here, as is the custom to deference for age, it is not really explained how Walter's age and status as an elder affected his ability to vote or required that the normal voting rules needed to be modified in his case.

[120] I think this is what the CEO means by citing Walter's constitutional rights under s 2 of the *Constitution* and pointing out that the Applicants are not elders themselves. The point is that the Applicants did not establish that they themselves had had any s 2 rights that were infringed.

[121] I agree with the Applicants that they did not need s 2 standing to bring an appeal under Article II of the *Constitution* which provides that "any Elector may lodge a written appeal… if the … Elector had reasonable aground to believe that there was":

> (a) a corrupt practice in connection with the election; or

> (b) a contravention of this Constitution, or any law of the First Nation that might have affected the result of the election.

[122] The grounds of appeal focus upon the way that Walter's ballot was dealt with and the CEO's refusal to allow him to vote in person. The CEO gave reasons for this aspect of the appeal and I cannot say that, given the governing provisions of the *Elections Act,* his decision was incorrect or wrong. It is indeed unfortunate that Walter, an elder, was not able to vote, but I don't see any provisions in the *Election Act* or the *Constitution* that say that an elder is not bound by the same election rules as everyone else at SFN, or that special dispensation must be made by the CEO when dealing with an elder. The *Constitution* and the *Elections Act* in their totality don't suggest that an elder's vote is any more valuable than is the vote of other members who qualify as electors.

[123] The balance of the grounds of appeal refer to non-compliance with the rules governing mailing of elector sub-lists "not less than 75 days prior to the Election" which was compounded by the queue-jumping issues I have already referred to.

[124] These voter list issues are dealt with in paragraphs 19 and 20 of the Decision and I can find no reviewable error in the CEO's reasons.

[125] The appeal was not rejected on the irrelevant ground that the Applicants had to be elderly. The substance of the appeal was rejected on the basis that Walter's ballot had been handled in accordance with Part III of the *Elections Act* which is "comprehensive and final." I see no error here.

[126] I see nothing in the "Appeal Notice" or in the record before me to show that the Applicants "specifically put forward a request to hear from Walter who would attend."

[127] In any event, Article II of the *Constitution* requires all appeals to be made in writing and that the "Electoral Officer shall make a decision in respect of any appeal within seven days of receipt." Appeals have to be made within 14 days after the election.

[128] For obvious reasons, SFN has decided that any appeals need to be dealt with quickly and in writing. Long, drawn-out appeals can give rise to significant uncertainty and difficult legitimacy issues for which the whole First Nation can suffer.

[129] The Court has not been asked to review the Article II appeal process in any general way and, on the facts of this case, it has not been established that the Applicants suffered any procedural unfairness for having to make their appeal in accordance with Article II. Given the issues raised, Article II provided a reasonable process whereby applying the *Elections Act* to undisputed facts, the Applicants were able to state their case. It is true that the Applicants wanted the CEO to take general soundings with regards to membership at SFN, but that was not within the CEO's competence or jurisdiction. The material matters of concern that the CEO could deal with – the handling of Walter's ballot and the Voters List issues – were reasonably and fairly dealt with on the basis of written submissions.

Conclusions

[130] The Applicants have not convinced me that a reviewable error has occurred in this application.

Costs

[131] The Respondents have asked for their costs in this case, but I feel this is an appropriate case to require that both sides meet their own costs. As the jurisprudence shows, there is significant concern and confusion regarding membership and, thus, voting entitlement at SFN. As Justice Zinn pointed out, this application raises "serious matters that will affect the electoral process undertaken in 2015 and future elections." These are serious, public issues that affect all members of SFN and I do not think that individual members should be discouraged from coming before the Court on those occasions when their concerns have some justification. SFN is unique in being such a small and self-contained First Nation. It has also faced numerous disputes on the membership issue. Membership is a requirement which is tightly controlled and the process for granting and withholding membership is opaque and secretive. Hence, there is scope for abuse and the lack of transparency is bound to give rise to future disputes. This application is a function of the system in place at SFN. Although I cannot find for the Applicants on the facts of this case, it seems to me that this application is, to some extent at least, a response to a public need at SFN that will persist until membership issues are resolved.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The parties will bear their own costs.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1073-15
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PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	MARCH 14, 2017
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DATED:	APRIL 26, 2017

APPEARANCES:

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