Federal Court  Cour fédérale

Date: 20170718

Docket: T-1254-16

Citation: 2017 FC 692

Ottawa, Ontario, July 18, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

COWESSESS FIRST NATION NO. 73

Applicant

and

GARY PELLETIER, STAN DELORME, PATRICK REDWOOD, CAROL LAVALLEE, MALCOLM DELORME, CURTIS LERAT AND TERRENCE LAVALLEE

Respondents

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 which challenges a June 27, 2016 decision [the Decision] of the Cowessess First Nation Election Appeal Tribunal [Tribunal].

[2] For the reasons that follow, the judicial review will be granted.

[3] The Decision overturned the results of the April 27, 2016 Cowessess First Nation election [the Election] with respect to three elected councillors.

[4] Specifically, the Tribunal found that successful candidates Carol Lavallee and Malcolm Delorme had been ineligible to run for office because they were not in good standing as a result of the costs awarded in a prior Federal Court of Appeal [FCA] decision. It also found that successful candidate Curtis Lerat had been ineligible to run for office as he had failed to provide a current criminal record check.

[5] As a result of these findings, the Tribunal found that because the grounds of appeal set out in the notice of appeal [Notice] had been proven and had affected the outcome of the Election, the three councillor positions would instead go to the next three eligible candidates by vote count. The Tribunal ordered Cowessess First Nation No. 73 [Cowessess] to effect these changes.

[6] Cowessess comes to this Court seeking an Order overturning the Tribunal's Decision, and confirming the original Election results, so that Carol Lavallee, Malcolm Delorme, and Curtis Lerat can sit on Council. Terrence Lavallee is the only Respondent who opposes this application. All other named Respondents, including those who stand to become councillors if this application is dismissed, have sworn affidavits stating that they either support or do not oppose this application.

[7] In terms of legal arguments, Cowessess challenges the Tribunal's Decision on two grounds, namely that the Tribunal's Decision was flawed in its (a) procedural unfairness to Curtis Lerat, and (b) unreasonable findings with respect to Carol Lavallee and Malcolm Delorme.

[8] In addition to these two substantive issues which lie at the heart of this dispute, Terrence Lavallee [Mr. Lavallee or the Respondent] raised a preliminary procedural argument which, if valid, would put an end to the matter: he argues that Cowessess lacks standing, and therefore the First Nation is not in a position to advance this application before the Court.

II. Analysis

[9] Both parties agree that the applicable standard of review is reasonableness, except for questions of procedural fairness, which are to be assessed on a correctness basis. This is consistent with the case law (*Lavallee v Ferguson*, 2016 FCA 11 at para 19; *Johnny v Adams Lake Indian Band*, 2017 FC 156 at para 23).

III. Analysis

A. *Procedural Issue: Standing of the First Nation*

[10] As the procedural issue that Mr. Lavallee raises — that this application should fail for lack of standing — would be determinative of the judicial review if found in his favour, I will address it first. I conclude that Cowessess indeed has proper standing to bring this application.

[11] Mr. Lavallee submits that, since only a candidate can appeal an election under the *Cowessess First Nation #73 Custom Election Act* [the Act], Cowessess, as a First Nation, does not have standing to bring this application. Mr. Lavallee contends there is no mechanism for Cowessess to properly bring this application for judicial review under the relevant legislation, relying on *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 at para 11 [*Alberta*], which cited T.A. Cromwell (as he then was) in *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 107-108:

> The nature of the regulatory scheme is relevant to standing decisions in at least two ways. First, provisions dealing with who is entitled to notice of proceedings and to be heard may be considered an indication that those persons are "interested" in the proceedings. Second, where the challenged decision is from a body with standing rules of its own, those rules may guide the Court as to who is "interested" in the proceedings.

[12] Looking at the regulatory scheme in this case, Mr. Lavallee notes that subsection 11.05(a) of the Act only permits a candidate in an election (defined as a duly nominated person seeking election under subsection 2.01(e) of the Act) to appeal an election, assuming certain requirements are met.

[13] Mr. Lavallee argues that as a result of the restriction contained in section 11.05, neither an elector (defined as a registered member of Cowessess under subsection 2.01(n) of the Act), nor Cowessess itself as the First Nation government, can bring a judicial review of an election appeal. In other words, the ability to challenge that appeal should not be broader than the originating right of appeal contained in section 11.05 of the Act.

[14] Mr. Lavallee refers specifically to subsection 11.05(n) of the Act, which states that "upon being notified of the decision, the Council shall enforce the decision and put the terms thereof into effect." Accordingly, in Mr. Lavallee's view, providing standing to Cowessess would disregard this section in its entirety. Mr. Lavallee further asserts that Cowessess has neither a direct interest, nor a broader public interest in the proceedings.

[15] On the latter point of public interest, Mr. Lavallee argues that it would be odd and offensive for Cowessess to argue that some of its members cannot sit as councillors, when a First Nation, as an entity through its Chief and Council, has no standing to contest an election on the basis of who should be its elected members. By extension Mr. Lavallee contends that Cowessess cannot have standing to challenge the outcome of an appeal of an election when it has not been a party to the appeal proceedings.

[16] For this reason, according to Mr. Lavallee, Bands respond to First Nations election disputes in the Federal Court; they do not bring them as applicants. This would be akin to a federal or provincial government contesting the results of election in which members of legislatures are democratically elected to their positions. In this regard, Mr. Lavallee maintains that Cowessess only has an indirect (rather than a direct) interest in the Election, which is insufficient to imbue it with standing, relying on *Sandy Bay Ojibway First Nation v Canada (Minister of Citizenship and Immigration)*, 2006 FC 903 [*Sandy Bay*].

[17] Cowessess counters all above arguments, arguing that it has standing due to its direct interest in the matter. Cowessess contends that even if it does not fit within a technical reading

of reading ofthe Act, it nonetheless has a direct interest in the Election outcome, as described in *Alberta* at paras 8 and 10–13.

[18] To assist in answering this preliminary issue — namely whether a First Nation can indeed have standing to launch an application for judicial review to challenge the decision of the Tribunal under the *Federal Courts Act* — the jurisprudence establishes that there are two bases upon which standing can be established: (i) direct standing, for those "directly affected", and (ii) public interest standing (*Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 [*Forest Ethics*] at paras 29-36; *League for Human Rights of B'Nai Brith Canada v Odynsky*, 2010 FCA 307 [*B'Nai Brith*] at paras 57-62).

[19] The FCA recently summarized the law in this area: "[t]o have direct standing in a proceeding challenging an administrative decision, a party must show that the decision affects its legal rights, imposes legal obligations upon it, or prejudicially affects it in some way" (*Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala*] at para 83).

[20] Being "directly affected" is specifically outlined in section 18.1(1) of the *Federal Courts Act*:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by <u>anyone directly affected</u> by the matter in respect of which relief is sought. [Emphasis added.]	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par <u>quiconque est directement touché</u> par l'objet de la demande. [Mon soulignement.]

[21] Turning back to the jurisprudential interpretation of this provision, in order for a party to be "directly affected", the decision must have impacted the party in one of three ways, by having (i) affected its legal rights, (ii) imposed "legal obligations" upon it, or (iii) prejudicially affected it in some way (*Gitxaala* at para 83; *Forest Ethics* at para 30; *B'Nai Brith* at para 58). Here, there is no question that the First Nation (Cowessess) is directly affected by the Tribunal's Decision, which imposes legal obligations on it.

[22] In this case, subsection 11.05(n) of the Act states that "upon being notified of the decision, the Council shall enforce the decision and put the terms thereof into effect." In other words the Tribunal's Decision imposes legal obligations on Cowessess, even though it neither appealed the Election nor was a named respondent before the Tribunal. Cowessess is directly affected precisely because it is responsible for enforcing the Tribunal's Decision, which thus imposes legal obligations on Cowessess. I find that the First Nation therefore has direct standing to bring this judicial review.

[23] As to the Respondent's argument that a First Nation cannot bring an application of this nature (judicial review) before the Court to challenge an election matter, a couple of further observations may be instructive as to why I see no reason that Cowesses cannot be the Applicant in the present matter.

[24] First, I disagree with the Respondent in its argument that there is no precedent for a First Nation to bring an application to challenge the composition of its own government, i.e. Chief and Council.

[25] In *Dene Tha' First Nation v Didzena*, 2005 FC 1292 [*Dene*], the First Nation brought an application for a permanent injunction to ban the respondent from calling himself Chief. The respondent had won the election as Chief but later, during his term, questions arose regarding his conduct, and a Band Council resolution [BCR] purportedly terminated him. The respondent took the position that the BCR was not properly passed, and thus that he was never effectively removed from office, and instead continued to be Chief.

[26] Justice Layden-Stevenson agreed and dismissed the application of the First Nation, deeming the BCR to have been a nullity. At no time did Justice Layden-Stevenson question the ability of the First Nation to bring the application against its elected Chief.

[27] Second, and on a related note, case law has clearly established that First Nations have the capacity to sue and be sued (*Horseman v Horse Lake First Nation*, 2005 ABCA 15; Jack Woodward, *Native Law*, (Toronto: Carswell, 2006) (loose-leaf revision 2017-1), ch 1 at para 490).

[28] More recently, this principle was the subject of Federal Court commentary in *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517 [*Kwicksutaineuk*]. There, the applicant brought an application for judicial review of the Department of Fisheries and Oceans' decision to issue aquaculture (fish farming) licences to two corporate respondents. The First Nation was not a party to the initial decisions being challenged by way of judicial review.

[29] The respondents argued, on the standing issue, that the matter should have been brought to the Federal Court through a representative proceeding under Rule 114 of the *Federal Courts Rules*, SOR98/106 [*Rules*], i.e. brought by a person acting as a representative on behalf of one or more other persons, rather than by the First Nation itself. Justice de Montigny disagreed, deciding that the First Nation indeed had the ability to initiate and bring the application for judicial review. Justice de Montigny wrote at para 88 of *Kwicksutaineuk*:

> I recognize that in many cases involving claimed Aboriginal rights and the duty to consult, the applicant is an individual member of the First Nation or its chief on behalf of the First Nation (see, for example, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 , [2004] 3 SCR 511 [Haida]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763, 315 FTR 178). That does not detract from the fact, however, that Indian Bands are a legal and political entity that can themselves be sued and become the subject of a legal pronouncement (see *Wewayakum Indian Band v Wewayakai Indian Band*, [1991] 3 FC 420 (available on CanLII). While it is true that this case related to a right of occupancy and use of a reserve and did not involve Aboriginal rights, as submitted by the Respondent Attorney General, it does not detract from the fact that the Band itself was the applicant, as opposed to a representative acting on its behalf. Similarly, a number of Indian Bands brought an application for judicial review of a decision of the Minister of Fisheries and Oceans, on the basis that the Minister had failed to uphold the honour of the Crown and to meet his constitutional duty to consult and accommodate; nowhere did the Court object to the standing of these bands because no representative was involved (*Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212, 379 NR 297). [Emphasis added.]

[30] Similar to the scenario in *Kwicksutaineuk*, there is no question that the Applicant in this judicial review was not a party to the proceedings below: Cowessess was neither named nor appeared in the election appeal before the Tribunal.

[31] I will conclude on this first issue of standing by commenting on *Sandy Bay*, which was cited by the Respondent. I disagree that *Sandy Bay* supports his position that Cowessess has no standing in this matter. In *Sandy Bay*, the First Nation had sought the judicial review of decisions of the Minister regarding the immigration status of a purported band member, a Roman Catholic nun from Nigeria. The First Nation's interest was far removed from the personal immigration matters at stake. The Nigerian national had no status under the *Indian Act*, RSC 1985, c I-5. The Court concluded that while the nun was directly affected by the pending deportation order from Canada, the First Nation was only indirectly affected by the matter in respect of which relief was sought.

[32] Here, in contrast with *Sandy Bay*, Cowessess has a direct interest in ensuring that its elections are conducted in accordance with the Act, and that any decision to remove an elected member from the Band Council is made in a fair and proper way.

[33] Before leaving the issue of standing, I would be remiss in failing to make it abundantly clear that standing has been granted to Cowessess in light of the very particular circumstances of this case, due to the following factors and factual backdrop.

[34] First, it is clear from the evidence presented that the effects of the Tribunal ruling and the status quo are impacting the governance of the First Nation as a whole. In other contexts, one might imagine situations where challenging an election outcome appeal, led by the Band and paid with Band funds, would result in a conflict of interest due to personal issues that the Chief and/or members of Council may have.

[35] The evidence here, however, shows that this is not a situation where personal grievances are being addressed through the First Nation funding. Rather, the evidence shows that it is a matter of the Band's interest as a whole to get the matter resolved.

[36] Second, there was evidence of significant consultation that took place before Cowessess decided to pursue this judicial review. That includes the following steps, according to the affidavits of Chief Delorme (Tab 3, Applicant's Record [AR]), Patrick Craig Redwood (Tab 4, AR), Gary Pelletier (Tab 5, AR) and Stanley Delorme (Tab 6, AR):

- On June 29, 2016, an emergency Chief and Council meeting was held where it was decided that Curtis Lerat, Malcolm Delorme and Carol Lavallee would step back while the other members of Council [the Uncontested Members] decided how to proceed in view of the Decision.
- During the following week, the Uncontested Members met with indigenous governance professionals, had a community meeting, met with legal counsel and regularly met to discuss the issue.
- On June 30, 2016, there was a meeting with Stan Delorme, Gary Pelletier and Patrick Redwood where it was explained to them that the Tribunal concluded that they should be members of Council.
- On July 3, 2016, Cowessess held a Band meeting, inviting all members of the First Nation.
- The Uncontested Members then all met two days later, on July 5, 2016, and made a preliminary decision to launch an application for judicial review.
- The Uncontested Members met again on July 6, 2016, and confirmed their intention. They held a unanimous vote on the issue.
- On the afternoon of July 6, 2016, the Uncontested Members announced their decision to the contested members. Stan Delorme was later advised over the phone.

[37] Finally, six of the named Respondents, including all three affected negatively by the Decision (Curtis Lerat, Carol Lavallee and Malcolm Delorme), either supported or took no position in the judicial review. This provides further evidence that this was truly a community decision rather than anything motivated by personal gain.

B. *Was the Decision Procedurally Unfair to Mr. Lerat?*

[38] Cowessess challenges the Tribunal's Decision on the basis of procedural unfairness to Mr. Lerat. The Tribunal stated that it reviewed each candidate's eligibility documents related to criminal record checks, as provided by the Chief Electoral Officer [CEO], who had deemed Mr. Lerat eligible. The Tribunal noted that Mr. Lerat's criminal record check was dated February 2015, which was not "current" as required by the eligibility criteria pursuant to subsection 7.04(d) of the Act. As a result, the Tribunal found that Mr. Lerat failed to meet the eligibility requirements for nomination, and thus was ineligible for candidacy as a councillor.

[39] Cowessess makes two arguments with respect to Mr. Lerat. The first is that the Tribunal only has jurisdiction to consider the grounds of appeal stated in Mr. Lavallee's Notice, which did not raise the issue of Mr. Lerat's criminal record check.

[40] Related to this first issue is the second—whether the Tribunal breached its duty of procedural fairness because Mr. Lerat did not have the opportunity to properly respond to the criminal record check issue.

[41] When the Tribunal gave notice that it would hear the appeal and set down a date for a hearing, Mr. Lerat was not listed as one of the designated respondents, was not provided with a copy of the Notice, and was not given the opportunity to address the issue of his criminal record check.

[42] Cowessess contends that, if provided with a fair opportunity to address the Tribunal's concerns, first by way of notice, and then at the hearing, Mr. Lerat could have presented evidence to the Tribunal which would have affected its Decision. In particular, Cowessess claims that Mr. Lerat's criminal record check was obtained from the RCMP on February 11, 2016, but due to a clerical error the report was erroneously dated February 11, 2015. That error went unnoticed, and could have been easily corrected with fair warning.

[43] Mr. Lavallee denies the assertion that the Tribunal violated Mr. Lerat's right to procedural fairness in that he was given the opportunity to be heard before the Tribunal, which cured any defect with respect to notice. Furthermore, Mr. Lavallee asserts that if Mr. Lerat had concerns about the Notice and its fairness, he should have raised his objections at the hearing; issues of procedural fairness must be raised at the earliest opportunity (*Kamara v Canada (Citizenship and Immigration)*, 2007 FC 448).

[44] Mr. Lavallee further takes issue with Cowessess' argument that the Tribunal erred in considering the criminal record check because it was not a ground of appeal. Mr. Lavallee says it is inaccurate because the Notice states: "candidates that are not in good standing […] have taken votes away from the candidates that are in good standing."

[45] Mr. Lavallee elaborates that while the criminal record check was not specifically named, the wording of the Notice and the Act allowed the Tribunal to consider matters beyond those specifically listed in the Notice. Mr. Lavallee points in this regard to *Meeches v Assiniboine*, 2016 FC 427 [*Meeches*], aff'd in part 2017 FCA 123. *Meeches* concluded that candidate

eligibility falls within the concept of "election practices" as contemplated by an election act that Mr. Lavallee contends was very similar to Cowessess' Act. Given these observations, Mr. Lavallee concludes that the criminal record check being more than a year old, it was entirely reasonable for the Tribunal to conclude that it was not current.

[46] I agree with Cowessess on the issue of procedural fairness for the following reasons. The Tribunal's jurisdiction, pursuant to section 11.05 of the Act, does not extend to grounds outside the appeal notice:

> 11.05 (l) upon conclusion of the appeal hearing, the Election Appeal Tribunal shall endeavour to reach a decision on the appeal as soon as practical and in its decision shall:
>
> (i) determine whether the appellant(s) have proven the grounds for appeal set out in the notice of appeal;
>
> (ii) determine whether the evidence as presented may reasonably have affected the outcome of the Election or By-Election appealed from;

[47] The appellant has the burden of proving the grounds raised in the Notice. The Tribunal is not thereafter at liberty to seize itself of new matters. I do not agree with Mr. Lavallee that Mr. Lerat's criminal record check was raised by implication in the Notice. Grounds raised in originating documents, whether a statement of claim, application for judicial review, or appeal thereof, need to be clear and not leave the responding party to have to guess. Without knowing the case, the responding party cannot mount a proper defence. The onus is on the moving party to clearly articulate the claim or ground of review.

[48] The wording of the Act is also clear. It states that the Tribunal's job is to determine whether the appellant has proven the grounds of appeal set out in the notice of appeal. The Act does not say that the respondent has to prove he or she satisfied every eligibility criterion. That would, of course, be impractical, beyond running counter to a common sense or efficient approach to an appellate process.

[49] Here, the Tribunal should not have considered eligibility relating to the criminal record check because it was not raised as a ground of appeal. Procedural fairness requires an adequate opportunity to respond to allegations, which was not provided in this case. This fairness principle has been upheld in *Sparvier v Cowessess Indian Band No 73*, 1993 CarswellNat 808 (WL Can) (FCTD) [*Sparvier*], a case which should be familiar to some of the parties involved, since that 1993 judicial review also involved some of them. In *Sparvier* at paras 55–57, Justice Rothstein held:

> Respondents' counsel takes the position that because the procedure of the Appeal Tribunal was in accordance with Band custom, the degree of natural justice or procedural fairness owed to the applicant is minimal. To hold otherwise, it was said, would render nugatory the procedures followed by all other bands in Canada who elect their officials according to their own custom, because the Court would simply be imposing its rules of procedure in place of customary band procedures.
>
> No authority was cited by counsel for the respondents to the effect that the principles of natural justice or procedural fairness are not to be applied in situations where band custom dictates procedures to be followed by band tribunals.
>
> While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in

> procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied. [Emphasis added.]

[50] In coming to this conclusion, Justice Rothstein considered leading Supreme Court jurisprudence on the contents of procedural fairness, including *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165, *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311, and *Martineau v Matsqui Institution Disciplinary Board*, [1980] 1 SCR 602. Justice Rothstein concluded that the basic requirements of procedural fairness are applicable to the Election Appeal Tribunal of Cowessess — namely those of notice, an unbiased tribunal, and the opportunity to make representations. Specifically on the notice component of procedural fairness, Justice Rothstein found as follows at paras 82-83 of *Sparvier*:

> The *Cowessess Indian Reserve Elections Ac*t is silent on the issue of notice, nor do the authorities set out, in terms of hours or days, guidelines as to what does or does not constitute adequate notice. What is adequate notice must be determined on the circumstances of each case. Clearly, a notice period of less than twelve hours is very short. Such a short notice period raises a number of concerns: (a) relevant persons may not be available; (b) there is practically no time to investigate the facts relating to the subject matter of the appeal; (c) it is unreasonable to expect the participants to adequately organize and prepare their representations. No evidence was led to indicate any compelling reason for the Tribunal commencing its proceedings upon such short notice.
>
> It is true that the applicant had actual notice and attended the Appeal Tribunal proceedings. However, his attendance does not detract from the disadvantageous conditions of having to proceed without an adequate opportunity to investigate the matter and prepare representations. I think it is reasonable for me to infer that the applicant's participation did not represent genuine consent to the proceedings of the Appeal Tribunal and that he did not waive his right to adequate notice.

[51] Here, Mr. Lerat did not know the case he had to meet for his criminal record check, and could not properly respond to the allegations since there was no mention of the issue in the Notice.

[52] Furthermore, in his affidavit, Mr. Lerat attests that the issue of his criminal record check was never addressed at the hearing. Rather, he states that he first learned of the clerical mistake when he received the Tribunal's Decision. Thus, he could not have waived his right to notice as he still was not aware of the issue during the hearing.

[53] In *Sparvier*, Justice Rothstein concluded that the mere fact of the applicant's participation in the hearing did not constitute consent to the proceedings, nor waiver of his right to adequate notice. On the present facts, the same reasoning applies even more forcefully: even if Mr. Lerat had been notified at the hearing, notice would have been clearly insufficient to meet the Tribunal's duty of fairness. Just as 12-hour notice was inadequate in *Sparvier* due to an inadequate opportunity to prepare, so too was the complete lack of notice in this instance. A fundamental tenet of fairness is that one must know the case to be met, and the duty to provide such notice cannot be evaded through vague or unclear notification: the notice must be clear on its face.

[54] Mr. Lavallee argues that the Notice, in referring to "good standing" and "election practices", refers to the eligibility of all the candidates.

[55] I disagree: the simple mention of "good standing" in the Notice is not sufficiently clear to refer to a challenge to the validity of evidence brought with respect to criminality—which is simply one of the criteria underlying eligibility. For instance, "good standing" in the Act refers to repaying a debt owed to Cowessess (subsection 2.01(o)). It cannot reasonably be construed as requiring all the candidates listed in the Notice to prove, for a second time (the first being to the Chief Electoral Officer at the time of the Election), that they met all eligibility criteria to run in the Election, absent a specific challenge.

[56] While Mr. Lavallee is correct that in *Meeches* Justice McDonald found that "election practices" encompassed candidate eligibility, *Meeches'* context was entirely different: there, the context was the jurisdiction of the Appeal Committee, rather than procedural fairness, as in this matter. While a broad interpretation of election practices makes sense in *Meeches*, I do not find that in our situation, the mere mention of election practices would put all the candidates on notice that they may be required to provide proof that they meet every single criterion for eligibility under the Act. The issues of jurisdiction and of proper notification to parties are distinct.

[57] In short, impugned candidates must be given sufficient notice to understand the basis on which their erstwhile successful election is being challenged, to provide them with the opportunity to mount a full and informed response. Here, that didn't occur for Mr. Lerat, and, for the reasons explained above, I find his rights to procedural fairness were violated.

C. *Was the Decision Unreasonable in Relation to Ms. Lavallee and Mr. Delorme's Ineligibility on Account of "Debts"?*

[58] The Tribunal held that Ms. Lavallee and Mr. Delorme were ineligible due to debts that were found to have accrued as a result of a FCA cost award against them as part of the unsuccessful party in another case. Specifically, the Tribunal held that since the First Nation had funded the legal costs of the FCA litigation, Cowessess had the authority to issue a BCR establishing (1) that Carol Lavallee and Malcolm Delorme, as two of the respondents in that FCA litigation, were jointly and severally indebted to Cowessess in the amount of $27,010.66 calculated pursuant to column III of the table to Tariff B of the *Federal Courts Rules*; (2) a repayment plan from Ms. Lavallee and Mr. Delorme to Cowessess; and (3) that until that plan was complied with, Ms. Lavallee and Mr. Delorme would not be in "good standing."

[59] Cowessess argues that the Tribunal made unreasonable errors in its finding that this award constituted a "debt" owed by each of Ms. Lavallee and Mr. Delorme, because:

a. The Tribunal obtained letters of the two candidates' "good standing" from Cowessess' senior accountant and opinion letters from their legal counsel confirming that costs awarded had yet to be assessed, and were thus not yet determined by the FCA, and anyway only the Court could assess costs - not the winning party or the Applicant (Cowessess). Thus, Ms. Lavallee and Mr. Delorme did not owe any outstanding debts to Cowessess. Cowessess claims that these letters were errantly overlooked or disregarded, because the unassessed costs had not crystallized as debts;

b. Cowessess itself was not a party to the FCA decision and the Tribunal overlooked evidence that the Applicant had been improperly assigned the cost award by the members of Chief and Council who voted on that BCR.

[60] Mr. Lavallee responds that the Tribunal was aware of the evidence in question and adequately addressed it. With respect to the accountant's opinion, Mr. Lavallee notes that the Tribunal addressed it. Furthermore, he argues that the letters from legal counsel were only opinions: the Tribunal was free not to address them; there is no obligation on the Tribunal to address every piece of evidence and it wrote a comprehensive decision citing the key evidence. As counsel for Mr. Lavallee stated during the hearing, referring to the legal opinions: "They're not evidence. They're not case law. They're not even from a textbook. They're not something that should be considered by a Court, nor should they be considered by a tribunal."

[61] I find, however, that these legal opinions were important documents before the Tribunal that merited comment, even if that was a brief explanation as to why they were being disregarded or given little weight. Indeed, the Tribunal wrote at the outset of its Decision that it "must consider all evidence put forth which in its opinion is reliable and relevant to the determination of an Order with respect to this appeal."

[62] These opinions formed a central part of Ms. Lavallee's and Mr. Delorme's submissions. If they were not reliable or relevant, the Tribunal needed to state so, and at a minimum briefly explain why that was the case. Failing to do so rendered the Decision unreasonable due to a lack of transparency, intelligibility and justification on this particular issue.

[63] In *Square v David*, 2012 FC 624 at para 23, Justice Rennie held:

> In addition, the substance of the applicant's concerns were set forth, in detail, in a February 26, 2003, letter from their counsel. Neither this letter, nor the substance of the arguments contained in the letter, are considered in the Minister's decision. The decision fails to consider the relevant factual and legal submissions in issue, and thus violates the principle that the reasons must address the key factual legal issues: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*), [1998] FCJ No 1425. [Emphasis added.]

[64] I find the same principles apply to this Decision. The submissions were important, amongst other reasons, because they addressed the notion of costs and debt within the context of a Court order and in relation to the Act. These were central issues to candidate eligibility, forming the basis on which the Tribunal overturned the CEO's prior finding that the candidates were indeed eligible. If those opinions were neither reliable nor relevant, the Tribunal owed an explanation why. From all appearances, the letters (contained at Tabs 3K, M, N, 7A and 8A of the Applicant's Record) merited some comment because they addressed the crystallization of Court costs, and whether they were properly considered "debts."

[65] There is jurisprudence which holds that costs can only be deemed to be a debt once quantified by the Court. In *Condominium Plan No 7510189 v Jones*, 1997 CarswellAlta 66 (WL Can) (CA), the Alberta Court of Appeal held at para 36:

> [t] he object of taxation is to ensure that an account for the costs of legal services is reasonable. Until that determination is made, the amount of the payment to be made by the Appellants is not known with certainty. It cannot therefore be said to be a 'debt' because a debt is 'a sum payable in respect of a liquidated money demand, recoverable by action'." [Emphasis added.]

[66] Indeed, until the amount of costs has been fixed, there is no ability to make a payment. No party can unilaterally determine and set the figure. Rather, the payment of costs is an area over which the Court has full discretionary power (*Armada Lines Ltd v Chaleur Fertilizers Ltd*, [1997] 2 SCR 617 at para 18). As Justice Mosley of this Court later held in *Shotclose v Stoney First Nation*, 2011 FC 1051 at para 8:

> The Court may fix costs in a lump sum or leave costs to be assessed: Rules 400 (4) (5); *Dimplex North America Ltd. v. CFM Corp* 2006 FC 1403 aff'd 2007 FCA 278. While the Court has full discretion over the amount of costs to be awarded, the relevant factors in the non-exhaustive list delineated in Rule 400(3) must be considered in deciding, not only the quantum of costs, but also their allocation and the determination of by whom such costs should be paid: *Francosteel Can. Inc. v. "African Cape" (The),* [2003] 4 FC 284, 301 NR 313, 2003 FCA 119 at para 20.

[67] Certainly, any party may propose costs for any proceeding, or both parties may consent to them, and the Court may agree to those costs. However, if such a cost quantum is not proposed and agreed to or otherwise ordered by the Court, then costs must be taxed considering an accounting of their various components - usually provided in a bill of costs. A full regime for the awarding and assessment of costs is set out in Part 11 of the *Rules*. As succinctly stated by this Court in *Bégin v Séguin*, 2008 FC 948 at para 3, "only the Court has the power to award costs."

[68] Therefore, turning back to the facts at hand, while costs have been awarded by the FCA, they have not been assessed, and that function clearly falls within the domain of the Court, not the parties (Rule 405).

D. *The Issue of the Band Council Resolution*

[69] Finally, Mr. Lavallee maintains that in coming to its decision on Ms. Lavallee's and Mr. Delorme's eligibility, the Tribunal had no jurisdiction to consider the BCR. There is no need for me to address the issue of the BCR's validity, given my conclusion on the evidentiary point above.

IV. Conclusion

[70] First, as a procedural matter, Cowessess has standing to bring this application pursuant to subsection 18.1(1) of the *Federal Courts Act*, being directly affected by the proceedings below.

[71] Second, it is clear that the jurisdiction of the Tribunal is limited to grounds raised in the Notice, and the appellant has the burden of proving those grounds. The Tribunal cannot seize itself of new matters. As the issue of Mr. Lerat's criminal record check was not raised in the Notice, the Tribunal improperly considered it and acted outside its jurisdiction in doing so.

[72] Third, significant submissions with respect to the FCA decision were placed before the Tribunal—namely legal opinions with respect to the purported debt and resulting ineligibility of Ms. Lavallee and Mr. Delorme. The Tribunal itself set out that it had to consider all evidence put forth, which in its opinion was reliable and relevant to the determination of an Order with respect to the appeal. If these legal submissions were not reliable or relevant, the Tribunal needed to state so, and explain (even briefly) why that was the case. Failing to do so rendered the Decision unreasonable due to a lack of transparency, intelligibility and justification.

[73] Accordingly, the judicial review is granted. Although this outcome is not that sought by Mr. Lavallee, I commend his counsel, Ms. Troup, for her very able oral and written presentations to the Court.

A. *Remedy*

[74] Cowessess requests that this Court

a) quash the aspects of the Decision which concluded that Carol Lavallee, Malcolm Delorme, and Curtis Lerat were ineligible to run for the office of Resident Councillor;

b) set aside the Appeal Tribunal's direction to remove Carol Lavallee, Malcolm Delorme, and Curtis Lerat from elected office and to award Gary Pelletier, Stan Delorme, and Patrick Redwood positions on the Band Council of the First Nation; and

c) reinstate and affirm the results of the April 27, 2016 Election as originally declared by the Chief Electoral Officer.

[75] I disagree that these are appropriate remedies in this case. The role of this Court in a typical judicial review is to assess the Tribunal's Decision, and if it erred, point out those errors and have the Tribunal decide anew, rather than to step into the Tribunal's shoes and make the decision for it (even though this Court has the jurisdiction to quash the Decision pursuant to section 18 of the *Federal Courts Act*).

[76] Mr. Lavallee, on the other hand, suggests that the appropriate remedy in this matter is for the Court to order a new election for the councillor seats.

[77] I do not find this to be an appropriate remedy either. The Tribunal has limited powers in the event that it grants an appeal. It can only do one of the following:

> 11.05 (l) upon conclusion of the appeal hearing, the Election Appeal Tribunal shall endeavour to reach a decision on the appeal as soon as practical and in its decision shall:
>
> (i) determine whether the appellant(s) have proven the grounds for appeal set out in the notice of appeal;
>
> (ii) determine whether the evidence as presented may reasonably have affected the outcome of the Election or By-Election appealed from;
>
> (iii) order, in the case the position under appeal is that of Chief's position, a By-Election where the Election Appeal Tribunal is satisfied that the grounds for appeal have been proven and such grounds may reasonably have effected [sic] the outcome of the Election or By-Election appealed from, or, uphold the Election or By-Election where the grounds of appeal have not been proven or, if proven, could not reasonably have effected [sic] the outcome of the Election or By-Election appealed from; or
>
> (iv) order, in the case the position under appeal is that of a Resident Councillor or Non-Resident Councillor, that the individual receiving the next number of highest votes in the Election or By-Election under appeal be awarded the Councillor position where the Election Appeal Tribunal is satisfied that the grounds of appeal have been proven and such grounds may reasonably have effected [*sic*] the outcome of the Election or By-Election appealed from, or, uphold the Election or By-Election, where the grounds of appeal have not been proven or, if proven, could not reasonably have effected [*sic*] the outcome of the Election or By-Election appealed from; [emphasis added.]

[78] As the Tribunal itself cannot order a new election in the case of councillors' positions, this Court cannot do so in its place. In *Felix Sr v Sturgeon Lake First Nation*, 2011 FC 1139, Justice Bédard stated:

> [56] The Court does not have jurisdiction to set aside the election results and order a new election. Rules 3 and 4 of the Rules do not allow the Court to go as far as creating a substantive relief that is not provided for in the Election Act. Rule 3 is an interpretation rule and Rule 4, often called the "Gap Rule", is procedural in nature and does not allow the Court to invent relief not contemplated in the applicable legislation. The responsibility of deciding whether the election results should be set aside and if a new election is warranted rests with the Appeal Tribunal and the Court must not usurp that role.
>
> (See also *Felix v Sturgeon Lake First Nation*, 2014 FC 911 at paras 120-128).

[79] As calling a new election is not relief that is contemplated by the applicable legislation, this Court is not in a position to grant it.

[80] I will instead ask that the Tribunal redetermine the issues addressed in this judicial review in accordance with these Reasons.

[81] Costs will be ordered in favour of Cowessess.

JUDGMENT in T-1254-16

THIS COURT'S JUDGMENT is that this judicial review is granted. The matter is to be reconsidered by the Tribunal in accordance with these Reasons. Costs are awarded to Cowessess.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1254-16
STYLE OF CAUSE:	COWESSESS FIRST NATION NO. 73 v GARY PELLETIER, STAN DELORME, PATRICK REDWOOD, CAROL LAVALLEE, MALCOLM DELORME, CURTIS LERAT AND TERRENCE LAVALLEE
PLACE OF HEARING:	REGINA, SASKATCHEWAN
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JUDGMENT AND REASONS :	DINER J.
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APPEARANCES:

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