Federal Court  Cour fédérale

Date: 20201006

Docket: T-1292-19

Citation: 2020 FC 953

Ottawa, Ontario, October 6, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

FLORENCE BLOIS

Applicant

and

ONION LAKE CREE NATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by Chief and Council of the Onion Lake Cree Nation [OLCN] terminating the appointment of an appeals tribunal. The appeals tribunal was terminated prior to the completion of its consideration and determination of an appeal of the OLCN election held on June 18, 2018 [Election]. The subject appeal was brought by the Applicant, Florence Blois.

Background

[2] In August 2011, the members of OLCN passed the Onion Lake Cree Nation Convention Law [Convention Law] by community referendum. This concerns the governance of OLCN and established the onikaniwak, Chief and Council, who are elected by the members of OLCN. Amongst other things, the Convention Law empowers Chief and Council to establish boards, commissions and committees as necessary for peace, order and good governance (s 4.2) and to pass laws, regulations and codes (s 4.3). The members of OLCN subsequently passed the Onion Lake Election Law [Election Law] which came into effect on July 17, 2017.

[3] On November 21, 2017, the Chief and Council passed the Onion Lake Cree Nation Appeals Regulation [Appeals Regulation], pursuant to section 18.9 of the Election Law. Pursuant to the Election Law, an appeals tribunal is to be appointed at the same time as the electoral officers and election officials (s 18.1). The appointment is made by the Electoral Officer and the Band Administrator, confirmed by motion of Chief and Council (Appeals Regulation, s 5). On April 27, 2018 an appeals tribunal [Appeals Tribunal] was appointed in advance of the upcoming Election.

[4] The Applicant was an incumbent but unsuccessful candidate for councillor in the Election. Following the election, the Applicant sent an email to the Electoral Officer requesting a recount of the ballots. The Electoral Officer replied on June 26, 2018 stating that there is no provision for a recount in the Election Law. However, the Electoral Officer advised the Applicant that she could appeal the councillor ballot count. In that event, the Applicant would submit her appeal to the Chair of the Appeals Tribunal. On or about June 28, 2018, the Applicant submitted an email to the Appeals Tribunal setting out various allegations.

[5] On June 28, 2018, the Appeals Tribunal wrote to the Applicant and another appellant requesting the names of those persons whose election was being appealed and supporting documents. The Appeals Tribunal also advised that it required the Applicant to be more specific in her allegations. The Appeals Tribunal requested that the $500 appeal fee be paid, as required by s 8.1(d) of the Election Law, and that the Applicant submit an updated appeal letter by midnight on July 6, 2018. On July 5, 2018, the Applicant submitted a letter appealing the Election and identifying six matters as the grounds of her appeal. On or after July 6, 2018, the appeal fee was submitted to the Appeals Tribunal.

[6] The Appeals Tribunal met on July 9, 2018 and decided to accept the Applicant's appeal. Notes from a meeting of the Appeals Tribunal held on August 18, 2018 indicate that the Appeals Tribunal was of the view that the Applicant needed to provide proof of her allegations, including a written statement commissioned under oath. On the same day, the Appeals Tribunal sent a letter to the Applicant indicating that her appeal was accepted and advising that the Tribunal would contact the Applicant after it completed its investigation.

[7] On September 22, 2018, the Appeals Tribunal met for the hearing of the appeal. The notes from that meeting indicate that the Applicant wished to call a lawyer and the hearing was adjourned.

[8] By October 2018, there were apparently concerns with the conduct of the appeal. On October 1, 2018, members of the Appeals Tribunal met with the Elders Council during an Elders Council meeting and the appeal was discussed. On October 10, 2018, the Elders Council met

with the Electoral Officer to discuss various matters pertaining to the Appeals Regulation. Concerns with the Applicant's appeal were also discussed, including that her appeal was received on July 5, 2018, in the form of a letter rather than an affidavit and that it raised more issues than just a recount. The meeting minutes indicate that because the Appeals Tribunal could not make a decision based on the content of the Applicant's letter, it decided to conduct a hearing.

[9] On October 23, 2018, legal counsel for Delores Chief, one of the Councillors whose election was challenged by the Applicant, made submissions to the Appeals Tribunal on a preliminary issue, being whether the Applicant's appeal was properly filed. The submission noted that her appeal was filed late and was not accompanied by an affidavit, contrary to the requirements of the Appeals Regulation. On October 31, 2018, the Appeals Tribunal dismissed the preliminary application. On November 3, 2018, the Appeals Tribunal met for a hearing of the appeal. While submissions were received on a number of matters relating to the appeal process and the Election Law, the Appeals Tribunal did not complete the hearing of the appeal.

[10] On December 14, 2018, the Applicant affirmed an affidavit asserting the following appeal grounds:

a) That Darryl Whitstone and Delores Chief be declared as not qualified to be a Candidate;

b) That Darryl Whitstone violated the Election Act and Appeals Regulation in his conduct during the election which affected the results of the election; and

c) That there was a corrupt and fraudulent practice in relation to the election in terms of proxy voting, unsecure ballot boxes and nomination process.

[11] On December 15, 2018, the Appeals Tribunal met again. It appears from the notes of that meeting that the Applicant provided oral evidence, some exhibits and a list of witnesses and that cross-examination took place. However, the hearing was not recorded. The meeting notes do not indicate if the hearing was completed.

[12] On January 14, 2019, the appeal process was discussed at a Chief and Council meeting. The meeting minutes show that the three Councillors who were impacted by the Applicant's appeal removed themselves from the meeting for that discussion.

[13] On January 24, 2019, OLCN Chief Henry Lewis wrote to the Appeals Tribunal terminating the appointment of the Appeals Tribunal and, therefore, the Applicant's in progress appeal.

[14] By email of February 1, 2019, counsel for the Appeals Tribunal advised various parties that the final day of appeal hearing, scheduled for the following day, was cancelled and that once the Appeals Tribunal determined what would happen next this would be rescheduled.

Decision under review

[15] The decision under review is the January 24, 2019 letter from Chief Henry Lewis to the Appeals Tribunal terminating its mandate and the Applicant's appeal. The letter states as follows:

> We have consulted the Elders' Council and have confirmed that it is our responsibility to enact and have oversight on all local laws,

> until such time the Judicial Commission is put in place under OLCN Convention Law.
>
> According to the Election Law, it is required that the Appellant submit their complaint on a certain time after an Election and also that the Appellant was required to submit a sworn Affidavit outlining their concerns. We understand that the Appellant submitted her letter on July 5, 2018 and did not submit the information on a Sworn Affidavit.
>
> Both aspects of the law were not adhered to. Further, it is our understanding that the Appeals Tribunal commenced a hearing where there was a recount of the ballots. The recount confirmed the results where all members of Council were affirmed.
>
> It is the Chief and Council's position that we will not disrespect and bring ill repute to our laws by following different processes. The Elders' Council are also of this view.
>
> Your role is now complete effective immediately.

Legislative Framework

[16] Below are the most relevant provisions of the Convention Law, Election Law and the Appeals Regulation.

> *Onion Lake Cree Nation Convention Law*
>
> **2. Interpretation**
>
> 2.1 In this legislation,
>
> > b) "**government**" or "onikaniwak" means the okimaw and nikaniwak of the wicekaskosiw sakahikan Cree Nation
> >
> > d) "**nehiyawiyasiwewin mamawinitowin**" means this Convention of the wicelaskosiw sakahikan Cree Nation
> >
> > e) "**okimaw**" means the individual elected as the leader of the wicelaskosiw sakahikan Cree Nation

f) "**onikaniw**" means and individual elected as an Onikaniw of the wicekaskosiw sakahikan Cree Nation;

g) "**onikaniwak**" means the governing body of the wicekaskosiw sakahikan Cree Nation consisting of the okimaw and eight onikaniwak who are also referred to as "the Leaders" or "the Leadership";

3. Purpose and Principles

3.1 The fundamental rights and duties of the onikaniwak of the wicekaskosiw sakahikan Cree Nation shall be guided by this neheyawiyasiwewin mamawinitowin.

…..

4. Organs

4.1 There shall be established as the principle organs of the wicekaskosiw sakahikan Cree Nation:

a) Government, the onikaniwak, which will be made up of okimaw and eight subordinate onikaniwak, who shall be selected and elected by citizens of the wicekaskosiw sakahikan Cree Nation;

b) an Elders Council, which will provide spiritual leadership;

c) Judicial Assembly Commission.

4.2 There shall also be such other Boards, Commissions and Committees as the onikaniwak may determine are necessary for peace, order and good governing of the wicekaskosiw sakahikan Cree Nation. These Boards, Commissions and committees shall have their powers set out in terms of reference by the onikaniwak.

4.3 The onikaniwak shall be entrusted with powers which include the passing of laws, ordinances, statutes, regulations and codes. The onikaniwak shall exercise the following prerogatives:

…

a) to develop and supervise institutions to implement its powers;

> b) to establish Boards, Committees and Commissions to oversee the policies and operations of any institutions under the authority of the wicekaskosiw sakahikan Cree Nation onikaniwak. The Boards, Committees and Commissions established shall have their powers and duties clearly set out in the legislation which created the institution;
>
> g) to make recommendations on any questions or matters, and to execute, enforce or implement decisions and policies on matters within the scope of the neheyawiyasiwewin mamawinitowin [Convention Law].

Onion Lake Election Law

12. Schedule for the election

12.1 No later than sixty days prior to the election date, the Okimaw and Onikaniwak shall by Onikaniwak Resolution:

> a) appoint the Chief Electoral Officer, the Deputy Electoral Officer, and Election Officials including the Appeal Committee
>
> …
>
> e) appoint the Appeals Tribunal Members.

18. Appeals tribunal

18.1 The Appeals Tribunal will be appointed at the same time as the Electoral Officers and Election Officials are appointed.

18.2 The Appeals Tribunal shall consist of two Elders, two Adult citizens from Wicekaskosiw Sakahikanihk and one Indigenous Lawyer. Also, there will be a Youth representative to observe the work of the Tribunal.

18.3 The Appeals Tribunal shall meet within fourteen days from the day of the Notice of Appeal.

18.4 The Appeals Tribunal has the power to compel persons, including Electoral Officers and Election Officials, to appear before them to provide testimony and evidence. Also, the Appeals Tribunal will be able to review all documents related to the election process.

18.5 The Appeals Tribunal will decide to:

a) Uphold the Election; or

b) Nullify the Election of the Candidate(s) who is the subject of the Appeal(s) and order that the candidate(s) with the next highest votes as the elected candidate(s); or

c) Order that a By-Election be held for the office involved.

18.6 Any citizen who appears before the Appeals Tribunal with legal counsel - the citizen must pay for their legal counsel and the legal counsel must operate within the provisions of this law.

18.7 If the candidate is not satisfied and is not in agreement with the Appeals Tribunal decision, the candidate can request an appeal of the last resort for an appeal hearing conducted through a citizens meeting. **18.8** If, after attempting to reach consensus on the call of the Tribunal's appeal decision, and consensus is unattainable, then a by-election shall be held for the position in question.

18.9 The Onikaniwak may make regulations regarding the policies and procedures of the appeal process, but such regulations shall not apply to any case then under appeal for any election held within ninety days of the date of the proclamation of the regulations.

Onion Lake Cree Nation Appeals Regulation

4. Definitions

4.1 The following words and phrases have the following meanings:

c) "Appeals Tribunal" means those individuals appointed by the Chief and Council to form an independent board who will hear Appeals filed pursuant to the Act and the Regulations;

5. Composition of Appeal Tribunal

5.5 The term of office the Appeal Tribunal shall be from its appointment and terminating at the end of the Appeals period or until and Election Appeal is decided, whichever is later. The individuals appointed to the Appeals Tribunal may be reappointed for future Elections.

5.6 The Appeals Tribunal is responsible to conduct, hear, and determine in accordance with the Act [Onion Lake Cree Nation Election Act] and its Regulations [Onion Lake Cree Nation Appeals Regulation] any Appeal from an Election.

6. Timing

6.1 A Candidate may, within fourteen (14) days from the date on which the Election was held, submit an Appeal to the Appeals Tribunal.

7. Grounds for Appeal

7.1 An Appeal submitted must sufficiently outline one or more of the following:

a) that the person declared elected was not qualified to be a Candidate;

b) that there was a violation of the Act and its Regulations in the conduct of the Election that might have affected the result of the Election; or

c) that there was corrupt or fraudulent practice in relation to the Election.

8. Submission

8.1 An Appeal submitted to the Appeals Tribunal must:

a) be in writing and set out in an affidavit sworn before a notary public or duly appointed commissioner for taking oaths the facts substantiating the grounds for the Appeal accompanied by any supporting documentation;

b) be served either personally or by registered mail to the Appeals Tribunal;

c) contain the signature of the person initiating the Appeal; and

d) be accompanied by a non-refundable fee in the amount of five hundred ($500.00) dollars.

9. Procedure

9.1 Upon receipt of an Appeal, the Appeals Tribunal shall:

a) in the case where the appeal is submitted in accordance with this Act and its Regulations, forward a copy together with supporting documents by registered mail to the Respondents from the Election; or

b) in the case where the appeal is not submitted in accordance with the Act and its Regulations, inform the Candidate in writing that the Appeal will not receive further consideration.

12. Decision

12.1 The Appeals Tribunal shall render a decision on the appeal within twenty-one (21) days of the hearing or within twenty-one (21) days of the deadline for receipt of written submissions.

12.2 All decisions shall be final and binding on all parties, in accordance to Wicekaskosiw Sakahican Wiyaskonitowin Wiyasiwewin [Election Act].

12.3 After a review of all of the evidence received, the Appeals Tribunal shall rule:

a) that the evidence presented is not sufficiently substantive to determine that:

i. a violation of the Act or the Regulations had taken place that might have affected the results of the Election:

ii. that the person declared elected was not qualified to be a Candidate; or

iii. there was a corrupt practice or fraudulent practice in relation to the Election that might have affected its results.

and dismiss the Appeal; or

a) that all evidence and information gathered allows for the reasonable conclusion that:

> i. a violation of the Act or the Regulations had taken place that might have affected the results of the Election:
>
> ii. that the person declared elected was not qualified to be a Candidate; or
>
> iii. there was a corrupt practice or fraudulent practice in relation to the Election that might have affected its results,
>
> and uphold the Appeal by setting aside the Election of one or more members of Council.
>
> **12.4** The decision of the Appeals Tribunal made pursuant to the Appeals Regulation shall be:
>
> a) published in the community's newspaper or newsletter; and
>
> b) posted in at least [sic] conspicuous place on the Reserve.
>
> **12.5** The decision of the Appeals Panel is final and not subject to appeal, in accordance with the Wicekaskosiw Sakahican Wiyaskonitowin Wiyasiwewin [Election Act].

Issue and standard of review

[17] The Applicant submits that OLCN did not have the jurisdiction or authority to terminate her appeal and that decisions made in the absence of authority are reviewable on the correctness standard as these are matters of procedural fairness. The Applicant relies on *Hamelin v Sturgeon Lake Cree Nation*, 2017 FC 163 [*Hamelin*] (aff'd *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131 [*Hamelin FCA*]) in support of her view.

[18] The Respondent submits that the issue is whether the decision of the OLCN Chief and Council terminating the Applicant's appeal was reasonable. Further, that what is at issue is not

whether Chief and Council had the authority to make the decision to terminate the Appeal Tribunal, but whether they exercised that authority reasonably. That question is to be reviewed on the reasonableness standard in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[19] In my view, for the reasons set out below, the issues are properly framed as follows:

i. Did Chief and Council have the authority to terminate the appointment of the Appeals Tribunal while the Applicant's appeal was being heard and determined?

ii. If so, did Chief and Council breach the duty of procedural fairness owed to the Applicant in the manner in which that decision was effected?

iii. Was the decision reasonable?

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

[21] In my view, the issue of whether the Chief and Council had the jurisdiction or authority to terminate the appointment of the Appeals Tribunal and, therefore, the Applicant's appeal does not fall into any of the circumstances that the Supreme Court identified in *Vavilov* as requiring the application of the correctness standard. Thus, as the presumption has not been rebutted, the reasonableness standard applies.

[22] And while the Applicant submits that this issue is one of pure jurisdiction, the Supreme Court held in *Vavilov* that jurisdictional questions are no longer a distinct category attracting a correctness review (*Vavilov* at para 65). In its analysis underlying that conclusion, the Supreme Court noted, in theory, that any challenge to an administrative decision can be characterized as jurisdictional, in the sense that it calls into question whether the decision maker had the authority to act as it did. However, that review on the reasonableness standard does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them license to enlarge their powers beyond what the legislature intended. "Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority" (*Vavilov* at para 66, 68).

[23] The Applicant also submits that this is not an issue of statutory interpretation. However, I note that to make the challenged decision, the Chief and Council were required to have some source of power authorizing them to take the action that they did. If the decision to terminate the appointment of the Appeals Tribunal is not supported by the Convention Law, Election Law or Appeals Regulation, or some other source of power, it is not acceptable or defensible in law and is unreasonable (*Orr v. Fort McKay First Nation*, 2012 FCA 269 at para 12, 24; *Johnson v Tait*,

2015 FCA 247 at para 28 [*Johnson*]). Accordingly, this Court is required to ascertain the source of Chief and Council's power, if any, to terminate the appointment of the Appeals Tribunal in order to determine if that decision was reasonable. In that regard, I also note that decisions subsequent to *Vavilov* have continued to apply the reasonableness standard of review to First Nations band council decisions regarding their authority or jurisdiction to take challenged actions, for example see *Tourangeau v. Smith's Landing First Nation*, 2020 FC 184 [*Tourangeau*] at paras 20 and 25. Although in this case Chief and Council terminated the appointment of the Appeals Tribunal by a letter that was not supported by a band council resolution, the concept is the same.

[24] Finally, I disagree with the Applicant that, based on *Hamelin,* the authority of the Chief and Council is properly characterized as an issue of procedural fairness, thus attracting the correctness standard of review. First, *Hamelin* pre-dates *Vavilov.* Further, the Federal Court of Appeal in *Hamelin* noted that it had previously held that the reasonableness standard applies to a First Nation's interpretation of its election regulations, but the application judge appeared to have applied the correctness standard. The Federal Court of Appeal ultimately concluded that it was unnecessary to decide whether the application judge had selected the correct standard of review because there was only one reasonable interpretation of the subject election regulations, which was the one the application judge adopted. In my view, *Hamelin* does not assist the Applicant.

[25] In sum, the first and third issues in this matter are to be reviewed on the reasonableness standard which requires the Court to determine whether the decision is transparent, intelligible

and justified in relation to the relevant factual and legal constraints that bear on it (*Vavilov* at para 99).

[26] Issues of procedural fairness are reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canada v Akisq'nuk First Nation*, 2017 FCA 175 at para 19; *Gadwa v Kehewin First Nation*, 2016 FC 597 at para 19, aff'd 2017 FCA 203; *Morin v. Enoch Cree First Nation*, 2020 FC 696 at para 21; *Tourangeau* at para 26). On a correctness review, no deference is owed to the decision maker and the reviewing court determines if the duty of procedural fairness owed to the applicant was breached (*Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31; *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57).

Issue 1: Did Chief and Council have the authority to terminate the appointment of the Appeals Tribunal while the Applicant's appeal was being heard?

Applicant's position

[27] The Applicant submits that Chief and Council were without authority to terminate the Appeals Tribunal and that the termination of the Tribunal, and the Applicant's appeal, was contrary to the appeal procedure stipulated by the Election Law and Appeals Regulation.

Respondent's position

[28] The Respondent submits that the facts are clear and undisputed that the Applicant failed to submit her appeal application within 14 days of the date of the Election as required by s 6.1 of

the Appeals Regulation. Further, when the Applicant submitted her appeal, it was not supported by an affidavit, served or signed in the prescribed manner and was not accompanied by the $500 fee, all contrary to the requirements of s 8.1 of the Appeals Regulation. As s 9.1 of the Appeals Regulation states that where an appeal is not submitted in accordance with the Act and Regulations the Appeals Tribunal "shall" inform the candidate that their appeal will not receive further consideration, the Respondent submits that the Appeals Tribunal had no discretion to accept or consider the Applicant's appeal. Accordingly, its decision to do so was unreasonable and this justified Chief and Council's decision to terminate the appointment of the Appeals Tribunal before it rendered its final decision.

[29] The Respondent submits that, in accordance with their inherent Indigenous laws, Chief and Council have the responsibility and authority to ensure that the OCFN laws are adhered to and that this authority is captured in the Convention Law. Further, that the power to make laws must necessarily include powers to ensure compliance with those laws. The Respondent also submits that this matter is similar to *Perry v Cold Lake First Nations*, 2016 FC 1320 [*Perry*]; aff'd 2018 FCA 73 [*Perry FCA*] and that the framework followed by this Court in its analysis in *Perry* should also be followed in this matter. There, the Court found that nothing turned on the fact that the governing election law or other statute did not expressly empower the Chief and Council in *Perry* to reject the appeal tribunal's decision.

[30] The Respondent asserts that the decision to terminate the Appeals Tribunal was the exercise of a policy or legislative function pursuant to Chief and Council's governance authority and responsibility to ensure compliance with the OLCN Election Law and Appeals Regulation.

Accordingly, no duty of procedural fairness arises in the context of the decision [*Perry* at paras 25-28].

Analysis

[31] By way of the Convention Law, the members of the OLCN chose to codify into writing the rules for establishing, empowering and regulating their institutions of government. OLCN effected a government – or executive – branch, the elected Chief and Council; the Elders Council to provide spiritual guidance; and a Judicial Assembly Commission, although this third organ of government has not yet been established (Convention Law s 4.1).

[32] Chief and Council may effect boards, commissions and committees as they determine necessary for peace, order and good governance. Those boards, commissions and committees shall have their powers set out in terms of reference by Chief and Council (Convention Law s 4.2).

[33] Chief and Council are also entrusted with powers which include the passing of laws, ordinances, statutes, regulations and codes. Chief and Council shall exercise listed prerogatives, which include:

a) develop and supervise institutions to implement its powers;

b) to establish Boards, Committees and Commissions to oversee the policies and operations of any institutions under the authority of the wicekaskosiw sakahikan Cree Nation onikaniwak [Chief and Council]. The Boards, Committees and Commissions established shall have their powers and duties clearly set out in the legislation which created the institution; and

c) to make recommendations on any questions or matters, and to execute, enforce or implement decisions and policies on matters within the scope of the neheyawiyasiwewin mamawinitowin [Convention Law].

[34] Chief and Council, as the OLCN government, is charged with the general direction and administration of the OLCN, including the drafting of legislation, and is collectively and individually responsible and accountable to the citizens of OLCN (Convention Law, s 6.1).

[35] What is significant for the purposes of this judicial review is that nothing in the Convention Law speaks to either establishing or terminating appeals tribunals.

[36] The Election Law provides that, not later than 60 days prior to an election date and by resolution, Chief and Council are to appoint the Chief Electoral Officer, the Deputy Electoral Officer and Elections Officials, including the Appeal Committee (a 12.2(a)) and the Appeals Tribunal members (12.1(e)). Section 18 of the Election Law sets out the role and duties of the Appeals Tribunal. Nothing in the Election Law permits Chief and Council to disband or terminate the appointment of a constituted Appeals Tribunal while it is considering an appeal, or otherwise.

[37] The Appeals Regulation addresses, among other things, the composition of the Appeals Tribunal and how the candidates for an Appeals Tribunal are selected. Specifically, that 60 days before the election, Human Resources in consultation with the Chief and Council and the Elders Council shall prepare a list of eight eligible candidates. From that list, the Chief Electoral Officer and the Band Administrator shall appoint five individuals to be on the Appeals Tribunal and such

appointments will be confirmed by the Chief and Council by a motion (Appeals Regulation, s 5.1-5.4).

[38] Significantly, for purposes of this matter, the Appeals Regulation also stipulates the Appeals Tribunal's term of office and its responsibilities:

> **5.5 The term of office the Appeals Tribunal shall be from its appointment and terminating at the end of the Appeals period or until and Election Appeals is decided, whichever is the later.** The individuals appointed to the Appeals Tribunal may be reappointed for future Elections.
>
> **5.6** The Appeals Tribunal is responsible to conduct, hear, and determine in accordance with the Act [Onion Lake Cree Nation Election Act] and its Regulations [Onion Lake Cree Nation Appeals Regulation] any Appeal from an Election.
>
> (emphasis in bold added)

[39] Nothing in the Appeals Regulation speaks to the termination of the Appeals Tribunal prior to the completion of its term. That is, nothing in the Appeals Regulation provides authority to the Chief and Council, in any circumstance, to intervene in an appeal and dissolve the Appeals Tribunal before the Appeals Tribunal makes a decision in an appeal that is before it. The Appeals Regulation states that all of the Appeals Tribunal's decisions shall be final and binding on all parties in accordance with the Election Law (Appeals Regulation, s 12.2) and that an appeal decision of the Appeals Tribunal is final and not subject to appeal, in accordance with the Election Law (Appeals Regulation s 12.5).

[40] In this matter it is not in dispute that by way of the January 24, 2019 letter from Chief Lewis, the decision that is now under review, the appointment of the Appeals Tribunal was

terminated prior to the completion of the Applicant's appeal hearing and prior to a decision being rendered by the Appeals Tribunal in that regard. The rational for the January 24, 2019 termination decision, as stated in the letter, is that the Applicant had not submitted her appeal within the stipulated period and failed to support it by an affidavit. Chief and Council were of the view that the provisions of the Appeals Regulation governing the commencing of an appeal had not been complied with and, by continuing with the appeal, the Appeals Tribunal was disrespecting and bringing OLCN laws into disrepute.

i. Analytical Framework – *Perry*

[41] As noted above, the Applicant is squarely of the view that the primary issue in this matter is whether Chief and Council had the authority and jurisdiction to intervene in the Applicant's ongoing appeal before the Appeals Tribunal and to terminate the appeal. Conversely, the Respondent submits that Chief and Council had inherent or implicit authority to terminate the Appeals Tribunal's appointment and thus the Applicant's appeal. Further, that the preliminary decision of the Appeals Tribunal that permitted the appeal to proceed despite the assertion of late filing and other irregularities, was clearly in error and was therefore unreasonable. Accordingly, Chief and Council's decision to terminate the Appeals Tribunal was justified and reasonable.

[42] This markedly different framing of the issues is relevant to the analytical approach to be taken by this Court. The Respondent submits that the Court's analysis should follow the framework found in *Perry*. That framework is a two-step approach whereby the Court would first determine if the preliminary decision of the Appeals Tribunal, which permitted the appeal to proceed, was reasonable. Second, if the decision was not reasonable, then the Court would

determine if Chief and Council's decision to terminate the appointment of the Appeals Tribunal was reasonable. I note that this proposed framework neatly skirts the issue of Chief and Council's authority to intervene and terminate the appointment of the Appeals Tribunal before it had completed its work. And, for the reasons that follow, I am of the view that *Perry* is clearly distinguishable and that the framework employed in *Perry* and proposed here by the Respondent is ill-suited and inapplicable to the factual circumstances of this matter.

[43] In *Perry*, the applicant had run for council and had not been elected. He appealed the election on the basis that he had been improperly removed from the list of candidates on the basis of his residency. The Cold Lake First Nation [CLFN] appeal committee upheld his appeal despite finding no irregularity in the conduct of the subject election. Rather, it concluded that the CLFN election law was deficient in that it excluded certain candidates and voters based on their residency, descendancy and age. Since the election law did not comply with the *Canadian Charter of Rights and Freedoms*, the appeal committee directed the electoral officer to hold a new election. Chief and Council then adopted a band council resolution rejecting the CLFN appeal committee direction to the electoral officer. The band council resolution asserted that the appeals committee acted outside it jurisdiction and without authority in considering appeals outside its mandate under the CLFN election law, specifically, in purporting to strike down residency and other requirements, and effectively amending that law by doing so and by ordering an accelerated election.

[44] The applicant in *Perry* brought an application for judicial review of the band council resolution rejecting the appeal committee's direction. On judicial review, Justice Fothergill found

that the CLFN appeal committee exceeded its jurisdiction by declaring that the CLFN election law contravened the *Charter*, by purporting to amend the CLFN election law and by directing that a new election be held. The band council resolution was therefore reasonable and the application for judicial review was dismissed.

[45] Justice Fothergill found that the CLFN appeals committee did not have the jurisdiction to decide *Charter* questions and grant *Charter* remedies. He relied on *Grandbois v Cold Lake First Nation*, 2013 FC 1039 [*Grandbois*] where the CLFN appeal committee, as in the case before Justice Fothergill, declared the CLFN election law to be unconstitutional. In *Grandbois,* Justice Heneghan found that the application before her involved an examination of the scope of the CLFN appeal committee's decision-making authority and the effect of the decision that it made. The powers of the CLFN appeal committee derived from the CLFN election law which only authorized the CLFN appeal committee to deal with appeals at a public meeting and did not authorize the committee to make a decision. Rather, the CLFN appeal committee was directed to respect and follow CLFN election law, but no specific remedies were identified for implementation after an appeal.

[46] Justice Fothergill agreed with the analysis in *Grandbois* (*Perry* at paras 9-10) and found that the CLFN election law did not confer upon the CLFN appeal committee jurisdiction to decide questions of law. Its mandate was only to "respect and follow the Cold Lake First Nations Election Law". Further, that the *Charter* remedies granted by the appeal committee in that case, declaring the CLFN election law to be unconstitutional and purporting to amend the law, could not be reconciled with the applicable legislative scheme. The CLFN election law itself provided

a mechanism to amend the election law, and required a referendum confirming the approval of 70% of the electors.

[47] I would first note that in *Perry*, the CLFN appeal committee had actually finished its process and made a decision. That is not the circumstance in this matter. Here Chief and Council terminated the appointment of the Appeals Tribunal while the Applicant's appeal was ongoing.

[48] Further, here and unlike in *Perry*, the Election Law clearly affords the Appeals Tribunal decision-making authority. Section 18.5 of the Election Law states that the Appeals Tribunal will decide to: uphold the Election; or nullify the Election of the Candidate(s) who is the subject of the Appeal(s) and order that the candidate(s) with the next highest votes as the elected candidate(s); or order that a By-Election be held for the office involved (also see s 12 of the Appeals Regulation).

[49] Thus, unlike *Perry*, the issue here is not whether the Appeals Tribunal exceeded its authority by making a decision that it had no authority to make and affording a remedy that was outside what was permitted by the governing regulations. Here, the Appeals Tribunal had the authority to make the decisions specified in the Appeals Regulation. However, the Appeals Tribunal was precluded from exercising that authority by the decision of Chief and Council to terminate the Appeals Tribunal's appointment before it decided the Applicant's appeal. Whether or not the Appeals Tribunal's October 31, 2018 preliminary decision to allow the Applicant's appeal to proceed despite alleged procedural defects is reasonable or unreasonable, the

jurisdiction of the Appeals Tribunal *to make* that preliminary decision is not at issue in the matter before me.

[50] Rather, the Respondent simply does not agree with the outcome of the preliminary decision. This is demonstrated by the Respondent's submissions which assert that the facts do not support the Appeals Tribunal's preliminary decision, rendering it unreasonable. In effect, the Respondent takes issue with the Appeals Tribunal's interpretation and application of the Appeals Regulation and the merits of the preliminary decision. It is significant that the Federal Court of Appeal in *Perry* stated that, because the CLFN band council resolution was based on the lack of jurisdiction of the Appeal Committee to decide as it did, "and not on the merits of the Committee's decision per se", the Federal Court had not erred in not addressing whether a provision of the CLFN Election Law was constitutionally valid. Conversely, here Chief and Council's decision was based on the merits of the preliminary decision made by the Appeals Tribunal.

[51] Further, the preliminary decision of the Appeals Tribunal is not the subject of this judicial review. The Respondent did not seek judicial review of the Appeals Tribunal's preliminary decision or, alternatively, to allow the appeal process to run its course and then seek judicial review of the whole decision. Essentially, the Respondent ignores this and seeks to justify the decision that *is* under review – the dismissal of the Appeals Tribunal – on the basis that Chief and Council reasonably found that the Appeals Tribunal's preliminary decision was in error.

[52] The Respondent attempts to turn *Perry* on its head. There the appeals committee failed to make a decision on the merits of the appeal before it and exceeded its jurisdiction by finding the underlying legislation to be unconstitutional, effectively amending the legislation and affording a remedy it did not have authority to grant. Because the appeals committee exceeded its jurisdiction, Justice Fothergill found its decision to be unreasonable and therefore the band council resolution that refused to allow the decision to be effected was reasonable. Here, the question is not about the jurisdiction of the Appeals Tribunal to make appeal decisions, it is whether Chief and Council acted without authority, or exceeded their jurisdiction, by dismissing the appointment of the Appeals Tribunal before it completed the Applicant's appeal hearing and rendered a final decision on the merits of her appeal. The Respondent attempts to justify that action on the basis of Chief and Council's view that the Appeals Tribunal preliminary decision was in error and unreasonable. But, unless Chief and Council had the authority to review the Appeals Tribunal decision on the merits, Chief and Council will have acted without authority and their decision will therefore be unreasonable – just as the decision of the CLFN appeal committee in *Perry* was unreasonable for exceeding that committee's authority.

[53] Accordingly, the analytical framework followed in *Perry* and proposed by the Respondent is not appropriate to the circumstances of this case. The first question to be determined must be whether Chief and Council had the authority to dismiss the Appeals Tribunal.

ii. Authority of Chief and Council

[54] I am not persuaded that the Chief and Council had the authority to terminate the Appeals Tribunal before it completed its term and made its decision in the Applicant's appeal.

[55] The Convention Law preamble states that the rules for establishing, empowering, and regulating the OLCN institutions of government must be written to better regulate the OLCN member's lives. By passing the Convention Law and the Election Law, OLCN members decided to codify their customary laws. Nothing in the Convention Law, Election Law or the Appeals Regulation permits Chief and Council to terminate the appointment of an appeals tribunal.

[56] If anything, the legislative scheme suggests that if Chief and Council had the authority to disband the Appeals Tribunal before the expiry of its specified term, for any reason, and instead substitute its own finding, then this authority would have been clearly stated. This is demonstrated by the fact that the conduct of OLCN election appeals is exhaustively covered by the Election Law and Appeals Regulation.

[57] Further, jurisprudence from the Federal Court of Appeal and this Court suggests that there must be clear legislative authority to remove appeal committee or council members. For example, in *Johnson* the band council for the Lax Kw'alaams Indian Band met and passed three resolutions, the first removing the three existing appeal board members, the second naming five new members to the appeal board and the third suspending the mayor. Regarding the band council's authority to remove the members of the appeal board, the Federal Court of Appeal stated:

> [29] In applying the reasonableness standard as so-defined to the Band Council's implicit interpretation of the Election Regulations

> made in this case, I would find such interpretation unreasonable but for different reasons than those of the application judge.
>
> [30] Unlike the application judge, I do not see any basis for implying into the Election Regulations a provision that permits the removal of the three previous Appeal Board members in this case, even if they had been given ample notice and an opportunity to speak to the Band Council prior to their removal.
>
> [31] The provisions in Part 14 of the Election Regulations, providing for Appeal Board appointments well in advance of elections and for a four year term for appointees, indicate that the Appeal Board is meant to be a stable body that, to the maximum extent possible, is shielded from involvement in the disputes it might be called upon to decide. It is consistent with this role that its appointees not be subject to removal by the Band Council during the heat of a dispute where one side to the dispute picks the members of a new Appeal Board. Thus, the absence of a provision in the Election Regulations for removal of Appeal Board members must be seen as being deliberate.
>
> …
>
> [33] It thus follows that I would find that the Band Council's decision to remove the three previous Appeal Board members was unreasonable as the Election Regulations did not provide the Band Council with the authority to remove the three Appeal Board members in this case….

[58] Here, s 12.1(e) of the Election Law requires that not less than 60 days prior to the election date the appeals tribunal members will be appointed by Chief and Council resolution. Section s 5.3 of the Appeals Regulation also addresses the appointment of the Appeals Tribunal members, stating that the Chief Electoral Officer and the Band Administrator will appoint members, and the members' appointment will then be confirmed by motion of Chief and Council. Section 5.5 of the Appeals Regulation sets the term of office of the Appeals Tribunal from its appointment "and terminating at the end of the Appeals period or until an Election Appeal is decided, whichever is the later". Section 5.6 states that the Appeals Tribunal is

responsible to conduct, hear and determine any appeal from an election in accordance with the Election Act and the Appeals Regulation. Section 12.2 and 12.5 state that decisions of the Appeals Tribunal are final. Further, and significantly, s 4.1(c) defines the Appeals Tribunal as those individuals appointed by Chief and Council "to form and independent board who will hear Appeals" filed pursuant to the Election Act and the Appeals Regulation.

[59] Thus it is clear that the Appeals Tribunal, as an independent body, holds a discreet and exclusive role in the conduct of election appeals, and the term of the appointment of that body is explicitly stated to start at appointment and not to terminate until an election appeal is decided. In my view, like *Johnson*, the absence of a legislative provision permitting the Chief and Council to terminate the Appeals Tribunal's appointment while an appeal is ongoing must be viewed as deliberate and intended to preclude interference by Chief and Council in the making of appeal decisions.

[60] Similarly, in *Angus v Chipewyan Prairie First Nation*, 2008 FC 932 [*Angus*], the First Nation band council passed a resolution dismissing a properly appointed electoral officer. This Court held that any power of the band council to remove the electoral officer had to be found in the Chipewyan Prairie First Nation election code or under some general principle of elections law that had been incorporated into that Code. The Court rejected the band council's argument that this authority arose from the provision of the election code stating that "the Chief and Council may approve such regulations and forms as is necessary to give effect to this Indian Band Custom election code". The Court found that this general provision could not be used by the band council to pass resolutions that would allow it to thwart the appeals process. The Court noted that the

electoral officer must remain independent and free to operate within the confines of the Election Code without interference from individuals or groups who may have a personal interest in undermining the obvious intent of the appeals process under the Election Code – in that case a newly elected band council whose election had been disputed. The Court concluded:

> [77] The Applicants are correct that there exists an established appeal procedure set out in the Elections Code and that the Band Council was required to follow this procedure. In this regard, I find that by issuing the June 11, 2007 Resolution, the Band Council attempted to circumvent the procedure set out in the Elections Code and denied the right of an appeal to the persons who filed Notices of Appeal under the Election Code. In making such a Decision the Band Council, in my view, acted beyond its jurisdiction. The Band Council cannot, simply by its own resolution, decide that the Election Code can be disregarded and that an appeal will not take place. Also, the Band Council cannot, by its own resolution, and without due process and procedural fairness simply remove an Electoral Officer who, under the Election Code, is fixed with the duty of overseeing the appeals process and who, in effect, answers to the eligible voters of CPFN. In the present case, the Band Council has not conducted itself with due process or in accordance with established rules of natural justice and procedural fairness. The Band Council has provided the Court with no authority or principle that would authorize or justify its conduct so far in this matter. The cross-examinations of Chief Vern Janvier and councilor Stuart Janvier do not suggest a Band Council that is cognizant of its obligations under the Election Code or under rules of procedural fairness. The Band Council has, in effect, prevented the people of CPFN from making decisions that the Election Code says are their's to make.

[61] I would note that in this case, unlike in *Angus*, the January 14, 2019 meeting notes of Chief and Council indicate that the three councillors whose election was under appeal by the Applicant left the meeting when the decision to terminate the appointment of the Appeals Tribunal was discussed. Be this as it may, the effect of the decision is that a newly elected Chief and Council terminated the legislated appeal process through which the Applicant sought to contest the election. Regardless of whether the interference was intended to defeat that process,

and therefore the will of OLCN members, it had that effect. In my view, this cannot have been the intent of the legislative scheme and, in the absence of an explicit provision permitting Chief and Council to intervene in the appeal process by terminating the appointment of the Appeals Tribunal, the decision to do so was made without authority. (Although factually dissimilar, see also *Peguis First Nation v Bear*, 2017 FC 179 at paras 81-82, 88 and *Alexander v Roseau River Anishinabe First Nation Custom Council*, 2019 FC 124 for the general proposition that chief and council cannot override existing band governance legislation and/or terminate independent governance entities by way of band council resolutions.)

[62] To the extent that the Respondent asserts that Chief and Council were empowered to terminate the appointment of the Appeals Tribunal based on inherent or natural law, I note that the Respondent's submission on this point was that "in accordance with inherent Indigenous laws, sometimes described as 'natural law', onikaniwak (Chief and Council) have the responsibility and authority to ensure the Nation's laws are adhered to. This authority is captured in the Convention Law." This would seem to be an acknowledgement of OLCN members' decision to codify their customary laws by way of the Convention Law. The Respondent points to no other prevailing and applicable source of inherent authority for the termination of the appointment of the Appeals Tribunal. Nor does the Respondent assert that any custom law exists outside the codified law that would provide such a source of authority.

[63] I am also not persuaded that such authority arises by way of the Chief and Council's prerogative power to "supervise institutions" pursuant to s 4.3 (d) of the Convention Law as the Respondent submits. As noted above, the appointment of Appeals Tribunal is authorized by the

Election Law and the Appeals Tribunal's term and the appeal process is set out in the Appeals Regulation, which also state that the Appeals Tribunal's decisions are final. Given this, even if the Appeals Tribunal is an "institution" over which the Chief and Council have supervisory authority, which I think highly unlikely but need not determine, in my view the terminating of the Appeals Tribunal while it is assessing an appeal goes far beyond "supervision". Here, Chief and Council essentially usurped the authority and role of the Appeals Tribunal and substituted their own finding and conclusion. In effect, Chief and Council overruled the Appeal Tribunal's preliminary decision.

[64] Nor am I persuaded that s 4.3(g) of the Convention Law assists Chief and Council as suggested by the Respondent. This section permits Chief and Council the prerogative "to make recommendations on any questions or matters, and to execute, enforce or implement decisions and policies on matters within the scope of" the Convention Law. As discussed above, nothing within the Convention Law permits Chief and Council to make a decision concerning the conduct of an appeal. Thus, the decision to terminate the Appeals Tribunal while an appeal was before it and to effectively substitute Chief and Council's own decision does not fall within the "scope" of Chief and Council's decision implementation authority under the Convention Law.

[65] The Respondent also submits that the decision was "the exercise of a policy or legislative function pursuant to its [Chief and Council] governance authority and to ensure compliance with" the Election Law and Appeals Regulation. Again, the legislative scheme requires an Appeals Tribunal, not Chief and Council, to conduct and decide election appeals. As to enforcement, whether framed as policy decision or otherwise, this characterisation simply

ignores that Chief and Council are not "enforcing" compliance by the Appeals Tribunal with the Appeals Regulation. Chief and Council simply disagree with the application by the Appeals Tribunal of the Appeals Regulation to the facts of the Applicant's appeal in a preliminary ruling. Even if the Appeals Tribunal assessment is unreasonable, the intervention of Chief and Council to terminate the Appeals Tribunal and substitute their own decision for the preliminary decision of the Appeals Tribunal is not an action of enforcement or regulatory compliance. It is a decision made because Chief and Council disagreed on the merits of the preliminary decision. Further, by terminating the Appeals Tribunal's term of appointment before the Tribunal had completed its determination of the Applicant's appeal, Chief and Council were effectively amending s 5.5 of the Appeals Regulation. Such amendment did not follow the amendment procedure set out in s 15 or the requirement in s 18.9 of the Election Law that any amendment to the Appeals Regulation does not apply to an ongoing appeal.

[66] For the reasons set out above I conclude that the Chief and Council did not have the authority to terminate the appointment of the Appeals Tribunal and, thereby, the Applicant's appeal. Accordingly, that decision was unreasonable. The Respondent's attempt to justify Chief and Council's decision on the basis that Chief and Council reasonably found that the Appeals Tribunal erred on the merits when making the preliminary decision cannot succeed. That approach would mean that rather than challenging the reasonableness of the decision ultimately made by the Appeals Tribunal, Chief and Council could simply terminate the Appeals Tribunal and substitute its own decision whenever they disagree with an Appeals Tribunal's assessment of the facts or evidence before it, or with the application of any provision of the Appeals Regulation. Such termination, in my view, is not permitted under the legislative scheme

described above, either explicitly or implicitly. Nor is it permitted under the guise of policy or legislative function or enforcement of compliance with the Election Law or Appeals Regulation.

Issue 2: If so, did the Chief and Council breach the duty of procedural fairness owed to the Applicant in the manner in which that decision was effected?

[67] Having found that Chief and Council did not have the authority to terminate the Appeals Tribunal before its term was ended and before the Appeals Tribunal had decided the Applicant's appeal, I need not address this issue.

[68] However, in the event that I am wrong and Chief and Council did have that authority, I will address whether Chief and Council owed and breached a duty of procedural fairness. The Respondent relies on *Perry* in support of their view that the decision was an exercise of Chief and Council's policy or legislative function to ensure compliance with the Election Law and Appeals Regulation and, therefore, that no duty of procedural fairness was owed.

[69] Generally speaking there is no duty of procedural fairness for "legislative and general" decisions, while there is a duty of procedural fairness for administrative decisions. Legislative decisions are broad and general policy decisions. Conversely, administrative decisions are specific and impact an individual's rights and interests (*Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 [*Knight*] at p. 670; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.) at para. 61; *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paras 425-429). Whether a duty of procedural fairness exists in a given case depends on a number of factors, including the nature of the decision being made, the relationship between the

decision-making body and the individual affected, and the effect of the decision on the individual's rights (*Knight* at p. 669).

[70] In my view, in this case the decision made and action taken by Chief and Council was not legislative in nature, for example, affecting the general appeals process or structure. Rather, the decision was specific to the Appeals Tribunal that was appointed with respect to the Election and which was considering the appeal filed by the Applicant. The rational for terminating the appointment of the Appeals Committee was that Chief and Council were of the view that the Appeals Tribunal had not properly interpreted and applied the Appeals Regulation based on Chief and Council's understanding of the facts underlying the Applicant's appeal. In my view, this was an administrative decision. Further, the termination of the Appeals Tribunal before it completed its process and made a decision with respect to the Applicant's appeal had the effect of denying her individual right to an appeal.

[71] In *Perry*, because the passing of the subject band council resolution cancelled a new election that had been ordered by an appeal committee without the authority to do so, the band council resolution was found to be an exercise of the council's policy or legislative function. Therefore no duty of procedural fairness was owed to the applicant, who was also not personally affected by the decision of the band council (see *Perry* at paras 25-28). Thus, in *Perry*, it was the appeals committee's lack of authority to act as it did that engaged the policy or legislative function of the band council. That is not the circumstance in this matter as the Appeals Tribunal had the authority to make appeal decisions. Chief and Council did not agree with the preliminary

decision and terminated the appointment of the Appeals Tribunal before it could make its final decision.

[72] As to the content of the duty of procedural fairness owed to the Applicant, as stated by the Supreme Court in *Vavilov*:

> [77] It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74-75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

[73] In my view, it is not necessary to engage in an in depth analysis of the content of the duty of procedural fairness owed in this case because, even where only minimal procedural rights are required, those rights include notice and an opportunity make representations (see, for example,

Minde v. Ermineskin Cree Nation, 2006 FC 1311, at para 44; *Tsetta Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 39; *Peguis First Nation v. Bear*, 2017 FC 179 at para 62).

[74] When appearing before me the Respondent acknowledged that the Applicant was not given notice of the meeting where Chief and Council decided to terminate the appointment of the Appeals Tribunal and, hence, her election appeal. There is also no evidence in the record before me that the Applicant was told why the Chief and Council intended to terminate the Appeals Tribunal before it completed the Applicant's appeal hearing or afforded her the opportunity to respond. Accordingly, in my view, Chief and Council breached the duty of procedural fairness owed to the Applicant.

Issue 3: Was the decision reasonable?

[75] As Chief and Council lacked the authority to make the decision and, in any event, breached the duty of procedural fairness owed to the Applicant, I need not decide this issue.

Remedies

[76] Although the Applicant seeks the remedy of *mandamus* to compel OLCN to hold a by-election for the positions held by Councillors Chief, Pahtayken and Whitstone, I agree with the Respondent that this relief is not available to her.

[77] The test, as set out in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 [FCA] at p. 19 is that there must be a public legal duty to act, that duty must be owed to the applicant, and there must be a clear right to performance of that duty. That test cannot be met because the OLCN is under no public duty to order a by-election in the absence of a decision by the Appeals Tribunal concerning the Applicant's appeal. It cannot be presumed that the Appeals Tribunal would have granted the appeal. Further, pursuant to s 18.7 – 18.8, if the Applicant was not satisfied with the Appeals Tribunal decision she could request an appeal of last resort through a citizenship meeting. If consensus was not reached in that forum, then a by-election would be held. Again, it is not a certainty that consensus would not be reached and, therefore, that a by-election would be called. There is no duty owed to the Applicant to hold a by-election, or clear right to a by-election, in these circumstances.

[78] In my view, the appropriate remedy is to quash the January 24, 2019 decision of the Chief and Council terminating the appointment of the Appeals Committee and to direct that the Appeals Tribunal be reconstituted and permitted to complete the hearing of the Applicant's appeal and make a decision in that regard.

Costs

[79] The Applicant submits that she should be awarded costs on a solicitor-client basis as this application serves the public interest by preventing future interventions in appeals by Chief and Council. Further, that the laws of OLCN were ignored by Chief and Council. This was what required her to bring this application, which should not have been necessary (*Roseau River Anishinabe First Nation v Nelson*, 2013 FC 180 at paras 61-71).

[80] The Respondent submits that the awarding of costs is at the discretion of the Court and that solicitor-client costs should not be granted in these circumstances. Only public interest cases with widespread societal impact attract solicitor-client costs (*Carter v Canada (Attorney General)* 2015 SCC 5 at para 140). The fact that the judicial review engages questions of OLCN governance and laws does not meet this criteria (*Whalen v Fort McMurray First Nation No. 468*, 2019 FC 1119 at paras 27 and 18).

[81] While the intervention by Chief and Council in the appeal process was inappropriate, ill-conceived and without authority, there is no evidence before me to suggest that it was intended to insulate those councillor positions the Applicant challenged on appeal and the potential removal of those councillors if the appeal succeeded. Rather, Chief and Council appear to have formed the view that the preliminary decision to allow the appeal to proceed was in error and that the appeal process had gone on too long and needed to be shut down. I would also observe that, based on the record before me, the Appeals Tribunal preliminary decision to permit the appeal to proceed in the face of procedural defects may well have been open to question. However, as discussed above, the appropriate response was not the termination of the appointment of the Appeals Tribunal.

[82] Having considered all of the circumstances in this matter, I am not persuaded that solicitor-client costs are warranted. I am exercising my discretion pursuant to Rule 400(3) of the *Federal Court Rules* SOR/ 98-106 to award costs in the all inclusive, lump sum amount of $3500.00 to be paid by OLCN to the Applicant.

JUDGMENT IN T-1292-19

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted;

2. The January 24, 2019 decision of Onion Lake Cree Nation Chief and Council terminating the appointment of the Appeals Tribunal is quashed;

3. The Appeals Tribunal shall, within 30 days of this decision, be reconstituted and shall complete the hearing of the Applicant's appeal and make a decision on that appeal, all in accordance with the Election law and the Appeals Regulation; and

4. The Onion Lake First Nation shall pay the Applicant's costs in the all inclusive, lump sum amount of $3500.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1292-19
STYLE OF CAUSE:	FLORENCE BLOIS v ONION LAKE CREE NATION
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JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	OCTOBER 6, 2020

APPEARANCES:

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