Federal Court  Cour fédérale

Date: 20201214

Docket: T-1742-19

Citation: 2020 FC 1144

Ottawa, Ontario, December 14, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

CLARISSE LECOQ

Applicant

and

PETER BALLANTYNE CREE NATION and WARREN MCCALLUM

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review brought by the Applicant, Ms. Clarisse Lecoq [Ms. Lecoq] pursuant to section 18.1(2) of the Federal Courts Act, RSC 1985, c F-7, of an October 2, 2019 decision [Decision] of the Peter Ballantyne Cree Nation Appeal Tribunal [Appeal Tribunal].

[2] The Decision granted the appeal of Mr. Warren McCallum [Mr. McCallum] concerning the election of Ms. Lecoq as the Peter Ballantyne Cree Nation [PBCN] Prince Albert urban councillor [Urban Councillor] in the August 15, 2019 by-election. The Appeal Tribunal found that the behaviour of some election officials "raised the appearance of attempting to influence" the results contrary to the Peter Ballantyne Cree Nation Election Code [Code]. The Appeal Tribunal ordered a by-election within 30 days of the Decision pursuant to section 8(e) of the Code.

[3] Ms. Lecoq requests that the Court quash the Appeal Tribunal's Decision and that she remain in office as the Urban Councillor for PBCN.

[4] For the reasons that follow, the application for judicial review is allowed.

II. Background and Context

A. *Historical Context*

[5] Elections have not always governed leadership selection for First Nations communities throughout Canada. Prior to the imposition of the Indian Act, RSC 1985, c I-5 [Indian Act] on First Nations communities, First Nations had their own governance systems. This included the selection of their leaders according to long established laws, customs, traditions, and practices. First Nations also had their own unique dispute resolution systems to settle disputes within the communities.

[6] The Indian Act unilaterally changed these governance and dispute resolution systems and imposed a delegated form of authority that included elections. There are presently three main ways in which First Nations select their communities' leadership: (1) elections pursuant to the Indian Act; (2) elections pursuant to custom election laws; and (3) elections pursuant to self-government agreements. Additionally, a small number of First Nation select their leadership through hereditary and/or clan system representation, which may include elections in certain circumstances.

[7] PBCN conducts its leadership selection in accordance with a custom election law, the Code.

B. *PBCN*

[8] PBCN is a band within the meaning of the Indian Act and is a Treaty 6 signatory in northern Saskatchewan. It is comprised of seven reserves: Pelican Narrows Reserve, Sandy Bay Reserve, Deschambault Lake Reserve, Amisk Lake (Denare Beach) Reserve, Southend Reserve, Kinoosao Reserve and Sturgeon Landing Reserve.

[9] The Code, created by the membership of PBCN, governs the process for electing the Chief and Councillors. In addition to having elected representatives from the seven reserves, the Code establishes the Urban Councillor position.

C. *The 2018 Election Appeal and Calling of the 2019 By-Election*

[10] Ms. Lecoq and Mr. McCallum were candidates for Urban Councillor in the 2018 general election. While Mr. McCallum won the election, Ms. Lecoq successfully appealed the election result.

[11] Mr. McCallum applied to this Court for judicial review of the Appeal Tribunal's 2018 decision and this Court dismissed the application (McCallum v Peter Ballantyne Cree Nation, 2019 FC 898) [McCallum 2019]. As a result, the by-election proceeded on August 15, 2019 for the Urban Councillor position with Ms. Lecoq, Mr. McCallum and a third PBCN member as candidates.

[12] For the 2019 by-election, PBCN hired an independent third party observer, John Dorion, to observe and provide a report on the by-election. Mr. Dorion's report is included in the record before the Court.

D. *The 2019 Appeal*

[13] On August 30, 2019, Mr. McCallum filed an appeal of the 2019 by-election results. On September 13, 2019, Appeal Tribunal members, Ida Swan [Ms. Swan], Victoria Michelle [Ms. Michelle], Leonard Bear [Mr. Bear], and Helen Bodnar [Ms. Bodnar] met and decided that there was sufficient evidence for an Appeal.

[14] On September 18, 2019, Ms. Lecoq wrote to the Chief Electoral Officer [CEO] objecting to Ms. Michelle and Ms. Bodnar sitting on the Appeal Tribunal as their appointment contravened section 7 of the Code. Ms. Lecoq also objected to Ms. Swan hearing the appeal due to a conflict of interest and an apprehension of bias. Further, Ms. Lecoq objected to the validity of Mr. McCallum's appeal based on his filed materials. Ms. Lecoq's counsel followed up with a letter to the CEO that same day inquiring about the start time and location of the appeal hearing and raising the conflict of interest issue.

[15] On September 30, 2019, the Appeal Tribunal held a hearing pursuant to section 8 of the Code. At the start of the hearing, Ms. Lecoq's counsel restated her objections, as expressed in the September 18, 2019 letter. The Appeal Tribunal discussed these concerns with everyone present and decided that the hearing would proceed with the current members. Ms. Swan stated that she would not recuse herself as she had done in 2018 because someone told her that she did not need to do so.

[16] At the start of the hearing, Ms. Swan, as chair of the Appeal Tribunal, advised that they would not swear in, examine or cross-examine anyone.

[17] During the hearing, Ms. Lecoq acknowledged some anomalies with the election but stated that she felt they were not significant enough to warrant a new election. She requested that the Appeal Tribunal dismiss the appeal pursuant to section 8(e) of the Code.

[18] After deliberations, the Appeal Tribunal rendered its Decision granting Mr. McCallum's appeal. The Appeal Tribunal accepted the evidence presented by Mr. McCallum and found that some actions of election officials affected the outcome of the election and that one person turned away at the polling station raised a concern that possibly others were also turned away. The Appeal Tribunal recommended that PBCN take steps to remedy some issues prior to the next general election in 2021. On October 2, 2019, the Appeal Tribunal's counsel provided written reasons.

[19] On November 14, 2019, this Court granted Ms. Lecoq's motion for an injunction to stay the by-election and to have her remain in her position of Urban Councillor until this application was determined. The November 14, 2019 Order also added Mr. McCallum as a Respondent.

[20] On February 4, 2020, this Court ordered the removal of the individually named Appeal Tribunal members from the style of cause pursuant to Rule 303(1) of the Federal Courts Rules, SOR/98-106. PBCN is also a Respondent in this matter.

[21] Ms. Lecoq raises the following grounds for judicial review in her notice of application:

A. The Appeal Tribunal Hearing constituted an abuse of process, a denial of natural justice, and a breach of procedural fairness.

i. The Appeal Tribunal was improperly constituted in accordance with section 7 of the Code as two members were appointed rather than elected. Also, the Chief Electoral Officer, Randy Clarke, failed to disqualify an Appeal Tribunal member due to a conflict of interest and apprehension of bias;

ii. The Chief Electoral Officer, improperly accepted the appeal without the required affidavit pursuant to section 8(a) of the Code;

iii. The Appeal Tribunal failed to give proper weight to the Independent Observer, John Dorion; and

iv. The Appeal Tribunal failed to allow witnesses to be sworn, examined, or cross-examined.

E. *Evidence*

[22] This proceeding raises significant issues, yet there is only the affidavit of Ms. Lecoq for this Court to consider. Her affidavit contains, among other exhibits, the 2018 appeal decision. Ms. Lecoq was not cross-examined on the contents of her affidavit. There is no evidence from any of the Appeal Tribunal members, save for the Decision, and the correspondence from its legal counsel dated November 12, 2019.

[23] Mr. McCallum did not file an affidavit nor did he file submissions in this application for judicial review. Out of an abundance of caution, the Court directed the Registry to contact counsel for Mr. McCallum to confirm service of Ms. Lecoq's and PBCN's submissions. After confirming that service occurred, Mr. McCallum's counsel sought to make their own submissions. The Court denied that request but granted Mr. McCallum's counsel observer status.

[24] PBCN took no position on the merits of the application, except as noted below, but made submissions on costs.

III. Issues and Standard of review

[25] Ms. Lecoq raises numerous concerns with the appeal process:

A. Was the appeal Tribunal properly constituted?

i. Where Helen Bodnar and Victoria Michelle properly part of the Appeal Tribunal?

ii. Should Ida Swan have recused herself?

B. Was the Notice of Appeal of Warren McCallum, without a supporting affidavit, improperly accepted by the Appeal Tribunal for consideration at step one and for a hearing at step two?

C. Was the conduct of the Appeal Hearing unreasonable, a denial of natural justice, and procedurally unfair?

D. Was the Decision of the Appeal Tribunal patently unreasonable?

[26] I will re-frame the issues as follows:

1) Was the conduct of the appeal hearing procedurally unfair?

2) Was the Appeal Tribunal properly constituted?

3) Was Mr. McCallum's appeal properly accepted?

4) Was the Decision reasonable?

[27] Issues of procedural fairness typically attract a correctness standard of review (Canadian Pacific Railway Company v Canada (Attorney General), 2018 FCA 69 at paras 49-56; Khela v Mission Institution, [2014] 1 SCR 502 at para 79). However, “the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected” (Baker v Canada (Minister of Citizenship and Immigration), 1999 SCC 699 at para 22 [Baker]).

[28] As my colleague Justice Strickland recently noted in Blois v Onion Lake Cree Nation 2020 FC 953 [Blois]:

> [26] Issues of procedural fairness are reviewed on the correctness standard (Mission Institution v. Khela, 2014 SCC 24 (S.C.C) at para 79; Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12 (S.C.C) at para 43; Canada v. Akisq’nuk First Nation, 2017 FCA 175 (F.C.A) at para 19; Gadwa v. Kehewin First Nation, 2016 FC 597 (F.C) at para 19, aff’d 2017 FCA 203 (F.C.A); Morin v. Enoch Cree First Nation, 2020 FC 696 (F.C) 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 (F.C.A) at para 31; Connolly v. Canada (National Revenue), 2019 FCA 161 (F.C.A) at para 57).

[29] As such, the first issue, including the consideration of bias, is reviewable on the correctness standard.

[30] The second and third issues involve an interpretation of the Code and therefore will be reviewed under the reasonableness standard (Blois at para 24; Sturgeon Lake Cree Nation v Hamelin, 2018 FCA 131).

[31] The standard of review for the Decision will be viewed on the reasonableness standard as identified in Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 [Vavilov]. A reviewing Court "must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the required degree of justification, intelligibility, and transparency" (Vavilov at para 100). If the Decision is found to be internally coherent, includes a rational chain of analysis, and is justified based on the facts and law it will be found to be reasonable (Vavilov at para 85).

[32] In addressing whether the Decision was reasonable, the Court is unable to reweigh or re-assess the evidence (Canada (Human Rights Commission) v Canada (Attorney General), 2018 SCC 31 at para 55).

IV. Parties' Submissions

A. *PBCN*

[33] PBCN takes no position on the merits of the matter and makes submissions on costs only. However, PBCN submits that if the Court were to set aside the Decision, it "will result in a disregard of the arguably valid concerns expressed by the Tribunal that came to light by virtue of the appeal process that Ms. Lecoq is objecting to." They state that this may result in concerns with the Code being unaddressed.

B. *Ms. Lecoq*

[34] Ms. Lecoq submits that the CEO accepted and presented an improperly constituted appeal of Mr. McCallum, in contravention of section 8(a) of the Code. In failing to deliver an affidavit with his notice of appeal, Ms. Lecoq states that Mr. McCallum's appeal should not have been heard and the Appeal Tribunal therefore lacked jurisdiction to consider the appeal.

[35] Ms. Lecoq submits that the membership of the Appeal Tribunal contravenes section 7 of the Code because the CEO appointed members Ms. Bodnar and Ms. Michelle rather than these members being selected by the community.

[36] Ms. Lecoq also submits that the CEO failed to disqualify Ms. Swan, due to a conflict of interest and apprehension of bias. The apprehension arose because Ms. Swan had previously recused herself from the 2018 appeal hearing involving the same parties. Additionally, Ms. Swan is the secretary-treasurer on a corporate board of which Mr. McCallum is president. Ms. Lecoq states that Ms. Swan provided no valid reason why she should not recuse herself.

[37] Further, Ms. Lecoq takes issue with the appeal hearing process in that witnesses were not sworn, examined or cross-examined, and no exhibits were accepted.

[38] Ms. Lecoq submits that the Decision is patently unreasonable in finding that the turning away of one eligible member at the polling station prior to voting could have affected the election especially when she won the by-election by 110 votes. Ms. Lecoq submits that there was

no evidence that any election worker attempted to influence the election results or that any incident affected the election results on the by-election day.

[39] Ms. Lecoq also submits that the Decision was procedurally unfair as sufficient reasons were not provided nor was there a summary of the facts provided showing what the Appeal Tribunal considered in coming to its Decision.

[40] Lastly, Ms. Lecoq submits that the Appeal Tribunal failed to give weight or consideration to the evidence of the independent observer, Mr. Dorion, on the basis that he was not a PBCN member.

V. Analysis

A. *Was the conduct of the appeal hearing procedurally fair?*

[41] The Supreme Court in Vavilov stated the following:

> [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.

(1) Conduct of the Appeal Hearing

[42] Ms. Lecoq submits that the Appeal Tribunal hearing was unreasonable as there were no witnesses sworn, no cross-examination, and no accepted exhibits. Ms. Lecoq also provided evidence of objections that were raised with the Appeal Tribunal both prior to the appeal hearing and at the appeal hearing. She also compares the conduct of the 2019 appeal hearing with the 2018 appeal hearing and notes the stark contrast in the proceedings.

[43] The closer the administrative process is to a judicial process the more likely the procedural protections afforded will be similar to those owed in a formal trial (Knight v Indian Head School Division No 19, [1990] 1 SCR 653 at p 683). Section 8(e) of the Code states that "An Appeal Hearing will take the form of a formal meeting consisting of the Appeal Tribunal, independent legal counsel, the Appellant and his/her legal counsel, and any affected Candidates and their legal counsel".

[44] The greater the importance and impact of a decision, the more procedural protections are owed. For example, a high standard is required where the right to continue ones' profession or employment is at stake. This is because negative decisions can have severe and permanent impacts on ones' career (Baker at para 25).

[45] In considering the Baker factors, I find that there was a breach of procedural fairness.

[46] There is no right of appeal of the Appeal Tribunal's Decision provided for in the Code, which establishes the need for a higher level of procedural fairness. There are also significant ramifications of an appeal outcome to both the governance of PBCN and to Ms. Lecoq and Mr. McCallum. In light of these factors, I find that the appeal process has a judicial component to it and, based on the requirements of the Code, there is some level of formality and testing of the evidence required in the hearing process.

[47] In 2018, the Appeal Tribunal heard the appeal of Ms. Lecoq. There were seven witnesses called during the hearing and ten exhibits entered. Each witness was sworn, examined, cross-examined, and there was an opportunity for redirect. The Appeal Tribunal also posed questions to the parties. Subsequent to the hearing, the Appeal Tribunal provided written reasons consisting of 15 pages and 101 paragraphs of facts, submissions, and analysis. This created a legitimate expectation by Ms. Lecoq that she would be afforded the same level of procedural fairness and transparency in the appeal process.

[48] The only evidence of appeal processes provided to the Court on how the Appeal Tribunal conducts appeals was the process followed in the 2018 appeal. While the 2018 appeal process was very formalistic and generated a fulsome decision, that level of formality may not always be required. However, what is required is an ability to test the evidence of the people providing testimony.

[49] I am mindful that a litigant raising issues of procedural fairness must do so before the body they are appearing in front of (McCallum 2019 at para 54) and he or she must do so at the earliest opportunity. Ms. Lecoq raised objections, as stated above, though not about whether the 2019 appeal hearing would follow the 2018 appeal hearing. Nevertheless, based on Ms. Lecoq's evidence, Ms. Swan stated at the outset of the 2019 appeal hearing that the hearing was not going to be like the last one, so it can be inferred that a comparison with the 2018 appeal process was on peoples' minds.

[50] A tribunal should ensure that there is a level of consistency in its processes in order to create confidence within the community. Appeal bodies perform an important function as part of the exercise of a First Nation's jurisdiction and there is an opportunity to develop a body of precedential decisions with each matter addressed. To do so, certain procedural safeguards need to be implemented and followed, such as an ability to properly test the evidence in a consistent manner. They were not in this case.

[51] Accordingly, I find that the Appeal Tribunal breached its duty of procedural fairness to Ms. Lecoq in the 2019 appeal hearing when compared with the 2018 appeal hearing.

(2) Was there an apprehension of bias?

[52] Respecting the allegation of bias, this part of the analysis will concern only Ms. Swan, as Ms. Lecoq's submissions do not allege any bias on the part of the remaining Appeal Tribunal members. The Code is silent on conflicts of interest involving Appeal Tribunal members; however, section 14 of the Code refers to conflicts of interest respecting Chiefs, Councillors or Elders.

[53] Ms. Lecoq references Johnny v Adams Lake Indian Band, 2017 FCA 146 para 50 [Johnny], where the Court found a reasonable apprehension of bias. The Court in Johnny states that an actual conflict of interest is required for a finding of an apprehension of bias. However, if a reasonable and informed person would conclude that the member would be unable to decide the issues fairly, they should not participate (Johnny at para 42).

[54] In Committee for Justice & Liberty v Canada (National Energy Board) (1976), [1978] 1 SCR 369 at page 394 the Court stated:

> ...[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [That] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

[55] This Court in Sparvier v Cowessess Indian Band No 73, 1993 3 FC 142 at para 75 states that a rigorous test for a reasonable apprehension of bias is not appropriate for the following reason:

> [75]... it does not appear to me to be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation, to be completely without social, family or business contacts with a candidate in an election. …
>
> […]
>
> If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.

[56] On its face, there is no familial relationship or financial benefit at issue between Ms. Swan and Mr. McCallum and therefore no conflict of interest or issue of bias. Ms. Lecoq states that Ms. Swan recused herself in the 2018 appeal hearing. The record does indicate that Ms. Swan and Mr. McCallum sit on a corporate board together. According to Ms. Lecoq, at the appeal hearing, Ms. Swan advised that she was not recusing herself because someone told her that she was not in a conflict.

[57] However, when one considers the 2018 appeal, also concerning Ms. Lecoq and Mr. McCallum, Ms. Swan recused herself. This fact, along with the fact that Ms. Swan and Mr.

McCallum sit together on a corporate board created a reasonable apprehension of bias or at least a perception of bias.

B. *Was the Appeal Tribunal properly constituted?*

[58] Ms. Lecoq does not take issue with the Appeal Tribunal being comprised of only four members, however, she objects to the manner of selection of Ms. Bodnar and Ms. Michelle.

[59] Section 7 of the Code provides that the Appeal Tribunal shall consist of one eligible member from one of the seven (7) electoral communities "elected by a simple majority of Electors at the nomination meeting in each community. For further clarification, each community selects one Appeal Tribunal member only".

[60] The Code does not set out what happens in the event of a vacancy. There is no evidence as to what steps were taken to notify the affected communities of the vacancy caused by the member who represented the two communities other than the November 12, 2019 letter from the Appeal Tribunal's counsel which states, in part:

> The Appeal Tribunal concedes that Helen Bodnar and Victoria Michelle were not nominated or elected as Appeal Committee Members, pursuant to section 7 of the Peter Ballantyne Election Code of 2014. Rather, both women were elected on short notice by way of Band Custom in response to the death of an Appeal representative who previously represented both Denare Beach and Sturgeon Landing just prior to the August 15, 2019 election. In both of these Peter Ballantyne Cree Nation communities a meeting was called publically and held on short notice. No more than a few community members showed up to either of these meetings. One representative from each community was desired for each community so that the Appeal Tribunal was comprise of a maximum number of members in the event of an election dispute.

> Community members present at these meetings elected Ms. Bodnar and Ms. Michelle as their Appeal Tribunal representatives. Neither Ms. Bodnar nor Ms. Michelle were selected personally by Randy Clark. Neither have any relation or connection to Mr. Warren McCallum.

[61] The timing of the Appeal Tribunal members' selections is important to ensure fairness and impartiality for any electors who seek to challenge an election and for those electors whose election to Chief or Councillor positions are the subject of an appeal. All parties' consented to the November 12, 2019 letter forming part of the record.

[62] There is no evidence that Appeal Tribunal members from the other reserves were unavailable or that a requisite quorum of Appeal Tribunal members could not be attained. In light of my finding on the first issue, I decline to make a finding on this particular issue since it is not determinative of this application. However, I do note that employing a band custom to replace a deceased Appeal Tribunal member would seem to be a reasonable approach under the circumstances since the nomination date had passed and since there is no provision in the Code for the replacement of Appeal Tribunal members in the event of death or resignation. That said, such a replacement process should still be transparent to ensure fairness and confidence in the overall appeal process.

C. *Was Mr. McCallum's appeal properly accepted?*

[63] Section 8 of the Code provides:

> 8. Election Appeal Procedures shall be as follows:
>
> a) Any Candidate may appeal the results of an Election within

> twenty (20) days from the date of the Election by delivering a notice of an appeal, setting forth the grounds of the appeal and supported by an Affidavit of the Candidate to the Head Electoral Officer or a Deputy Electoral Officer.

[64] The Code defines affidavit under section 2(d) as "a written sworn statement of fact(s) voluntarily made by a Candidate under an oath or affirmation administered by a person authorized to do so by law."

[65] The Court must assess whether the Appeal Tribunal's interpretation and application of section 8 was reasonable (McCallum 2019 at para 45 citing McLean v British Columbia (Securities Commission), 2013 SCC 67 at para 40).

[66] Mr. McCallum submitted, in one letter; notice that he was appealing the election results along with a statement of sworn facts stamped by a notary public. Mr. McCallum submitted his appeal and related evidence within the period required by the Code and this is enough for the Appeal Tribunal to consider his appeal based on its processes and a consideration of evidence. Importantly, accepting appeal materials does not necessarily mean that an appeal will be successful. The Appeal Tribunal is still required to assess other evidence that comes before it.

[67] I find that there is no error on the part of the Appeal Tribunal in accepting Mr. McCallum's appeal. There must be a balance struck between abiding by wording and formalities of the Code and access to justice for those wishing to challenge an outcome. A notarized copy of an appeal letter or document can suffice in commencing an appeal, but the evidence contained in

such a document will still need to be tested, as described earlier. The work of the Appeal Tribunal does not end simply by accepting documents commencing an appeal.

D. *Was the Decision reasonable?*

[68] For the sake of completeness and, if I am in error as to the breach of procedural fairness, I have determined that the Decision is unreasonable due to a lack of consideration of all the evidence.

[69] In considering this issue, the Court acknowledges that First Nation decision-makers are better positioned to understand First Nations legal traditions and deference should apply towards these decision-makers. There was no evidence in the record regarding a custom or tradition in limiting testimony or evidence to only PBCN members.

[70] I am cognizant of PBCN's submission that the Court should not interfere too much in the "arguably valid concerns expressed by the Appeal Tribunal". Bearing this in mind, I nevertheless find that the Decision does not indicate any analysis indicating why the Appeal Tribunal preferred one set of information against another set of information that was before it. The Appeal Tribunal took into consideration the evidence of Mr. McCallum and an Elder and referenced that evidence in concluding there were irregularities in the conduct of the election but the Appeal Tribunal made no mention of Mr. Dorion's report or his evidence given at the appeal hearing.

[71] The November 12, 2019 letter from the Appeal Tribunal's legal counsel states the following:

> The Appeal Tribunal indicated that they chose not to take Mr. John Dorion's testimony into consideration in the course of making their decision dated October 2, 2019 because Mr. Dorion is not a Peter Ballantyne Cree Nation member.

[72] Given the role that Mr. Dorion was hired to observe matters on election day, his testimony would have been relevant. It was also contradictory to the other material the Appeal Tribunal had before it. The Appeal tribunal needed to weigh it and illustrate why it was disregarded. The refusal to assess this evidence led to an unreasonable Decision.

VI. Remedy

[73] Having found that the Appeal Tribunal breached procedural fairness and made an unreasonable Decision, I would have remitted the matter to the Appeal Tribunal to reconsider the matter afresh in accordance with these reasons. However, recognizing the discretionary nature of remedies available on judicial review, I do not feel that would be appropriate for the following reasons.

[74] Pursuant to section 5(a) of the Code, the next general election will fall on April 13, 2021. In addition, section 5(b) of the Code provides for the nomination and appointment of independent electoral officials "on the second Friday of December in the year preceding an Election year…". A nomination meeting will also occur on March 16, 2021 pursuant to section 5(h)(i) of the Code and signing and decision-making authority of the current Chief and Counsellors will cease on March 15, 2021 based on section 15(a) of the Code. Further, section 8(e)(iii) states:

> ELECTION APPEAL PROCEDURES
>
> 8. Election Appeal procedures shall be as follows:
>
> (e) An Appeal Hearing will take the form of a formal meeting consisting of the Appeal Tribunal, independent legal counsel, the Appellant and his/her legal counsel, and any affected Candidates and their legal counsel. The Appeal Tribunal may:
>
> […]
>
> iii. Uphold the Appeal and call for a By-Election within **thirty (30) days** of upholding of an appeal decision;
>
> [Emphasis added.]

[75] Based on section 8, if the Court remitted the matter to the Appeal Tribunal, and that panel once again upheld Mr. McCallum's appeal and called a by-election, the earliest that a by-election could occur would be 30 days after the Appeal Tribunal decision. On the other hand, if this matter was remitted and the Appeal Tribunal dismissed Mr. McCallum's appeal, there would be much effort and, possibly expense, in undergoing such a process when the next general election is looming. The timelines are simply too tight and it is not practical to remit the matter back to the Appeal Tribunal.

[76] As my colleague Justice Grammond stated in Thomas v One Arrow First Nation, 2019 FC 1663 at paras 38-43 [Thomas], it would be a significant waste of resources to hold two elections for the same position within a period of less than three months. While the Code before me does not have the same provision that was before Justice Grammond, I nevertheless find that the limited time available for a new appeal hearing so close to the commencement of the general election would similarly amount to a significant waste of PBCN's resources regardless of the outcome of the Appeal Tribunal's deliberations.

[77] Accordingly, I am quashing the Decision and declining to remit the matter to the Appeal Tribunal (Standinghorn v Atcheynum, 2007 FC 1137 at para 55). This essentially results in Ms. Lecoq maintaining her position as Urban Councillor until the end of the term in April 2021 pending the general election.

VII. Costs

[78] Ms. Lecoq notes that in McCallum 2019 the Court awarded costs against PBCN in the sum of $2,500.00. Ms. Lecoq seeks lump sum costs in the sum of $10,000.00 submitting that this is the second time the CEO failed to follow the Code.

[79] PBCN, after citing law and Rule 400 factors, submits that regardless of Ms. Lecoq's success, no costs should be awarded, each party should bear its own costs or that costs be limited to the sum of $2,500.00 and they not be borne entirely by PBCN.

[80] In Whalen v Fort McMurray No 468 First Nation, 2019 FC 1119 [Whalen], Justice Grammond, after summarizing the various categories of costs, outlined the applicable principles for the granting of costs as follows:

> [27] In First Nations governance cases, as in other cases, an award of costs is in the trial judge's discretion, which must be exercised after taking all relevant factors into consideration;
>
> The imbalance between the financial resources of an applicant and those of the [First Nation], or a party whose legal fees are paid by the First Nation, is a relevant factor;
>
> Taken in isolation, however, the resource imbalance is not a sufficient factor to justify an award of costs on a solicitor-client basis;

> The fact that an application contributed to clarify the interpretation of a First Nation's laws or governance framework may be taken into account when making a costs award; but not every application falls in that category.

[81] The Applicant had success in this application. In light of the remedy granted, I note that this judgment and reasons may have provided clarity on procedural aspects of decision making for PBCN going forward. I am mindful that PBCN did not complicate this application and that Mr. McCallum did not participate. In light of these factors and considering the principles discussed in Whalen, I am exercising my discretion pursuant to Rule 400(3) to award nominal lump sum costs to Ms. Lecoq in the sum of $3,000.00 to be borne equally by PBCN and Mr. McCallum.

JUDGMENT in T-1742-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The Appeal Tribunal's Decision is quashed.
2. The Court exercises its discretion not to remit the matter to the Appeal Tribunal for the reasons set forth above. Ms. Lecoq will remain as Urban Councillor in accordance with the Code until the calling of the next general election.
3. Ms. Lecoq is awarded costs in the sum of $3,000.00 to be borne equally by PBCN and Mr. McCallum. Costs are to be paid within ninety (90) days of the issuance of this judgment and reasons.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1742-19
STYLE OF CAUSE:	CLARISSE LECOQ v PETER BALLANTYNE CREE NATION, WARREN MCCALLUM
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND WINNIPEG, MANITOBA
DATE OF HEARING:	SEPTEMBER 9, 2020
JUDGMENT AND REASONS:	FAVEL J.
DATED:	DECEMBER 14, 2020

APPEARANCES:

Peter Abrametz	FOR THE APPLICANT
Anil Pandila	FOR THE RESPONDENTS (PETER BALLANTYNE CREE NATION)
Kellie Wuttunee	FOR THE RESPONDENT (WARREN MCCALLUM)

SOLICITORS OF RECORD:

Abrametz & Eggum Barristers and Solicitors Prince Albert, Saskatchewan	FOR THE APPLICANT
Pandila & Co. Barrister and Solicitor Prince Albert, Saskatchewan	FOR THE RESPONDENTS (PETER BALLANTYNE CREE NATION)
Kellie Wuttunee Barrister and Solicitor Prince Albert, Saskatchewan	FOR THE RESPONDENT (WARREN MCCALLUM)