Federal Court  Cour fédérale

Date: 20221006

Docket: T-1107-22

Citation: 2022 FC 1382

Ottawa, Ontario, October 6, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

LARSON ANDERSON, EDWARD ALBERT, ANTHONY APETAGON, ORVILLE APETAGON, DEON CLARKE, JOHN L. HENRY

Applicants

and

PAM TAIT-REAUME, ROY FOLSTER, ERIC ROSS SR., SHERRY MENOW, BESSIE FOLSTER, GWEN APETAGON, HILDA ALBERT, STEPHANE CONNORS, HUBERT HART, JERLEEN SULLIVAN, DAVID SWANSON

Respondents

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is a judicial review of a decision made by the Norway House Cree Nation Election Appeal Committee [EAC], dated May 19, 2022 [Decision]. The EAC allowed an appeal from the results of a band election for Chief and Council by members of the Norway House Cree Nation

[NHCN]. The Decision of the EAC set aside the election of both the Chief and all members of Council, and also barred the elected Chief, Larson Anderson, from running for office for a period of 6 years due to a finding of "corrupt practice." The Applicants ask the Court to quash the Decision and restore them to their elected offices.

[2] Judicial review is granted for the following reasons, and the matter will be remanded for redetermination by a differently constituted EAC.

II. Facts

[3] In 1997, the NHCN enacted its own custom *Election Procedures Act* (also referred to as "*EPA*").

[4] While the *EPA* guides the election process, it is not a comprehensive code. For example, while article 6.1 allows any elector to vote by absentee ballot regardless of their residency, the *EPA* does not identify the process or procedure for casting those ballots.

[5] Notably also, the *EPA* does not provide how amendments initiated by the Chief and Council are to be dealt with. An unusual provision of the *EPA* is that the authority rests with the elected Chief and Council to accept or reject proposed amendments put forward by band members, even where the membership at large has voted in favour of the amendment.

[6] The preamble to the *EPA* identifies that the form of election procedures is intended to be "in accordance with current trends and practices of the Norway House Cree Nation."

[7] Electronic voting was used previously by this First Nation and the NHCN electorate. In 2017, before electronic voting was expressly permitted under the ratification process set forth in the *First Nations Land Management Act*, NHCN successfully used the services and platform of One Feather (the company that assisted in the subject 2022 electronic vote) to conduct its secret vote. [Emphasis added]

[8] Moreover, the elections of 2006 and 2009 were appealed. In each of these two most recent appeal processes, the EAC held appeal hearings in a court-like manner. Appeals were heard in public, participants were given the opportunity to challenge the evidence given by others, participants had the right to present their own evidence, and participants had the right to make submissions.

[9] None of these features applied in the process under judicial review.

A. *Process leading to 2022 election of Chief and Council*

[10] By way of background the Chief and Council are responsible for guiding the election process by way of Band Council Resolution [BCR]. The first step is to set an election date and appoint an electoral officer. This was done by BCR on November 3, 2020.

[11] On November 9, 2021 Stephanie Connors, with over 23 years as an electoral officer, was formally retained by NHCN as its independent electoral officer to conduct the upcoming March 7, 2021 NHCN election process.

[12] Importantly, *EPA* article 5.1 gives the electoral officer the authority and discretion to identify the "times, dates and locations" where voting will take place.

[13] The authority and discretion of the electoral officer are reinforced by Article 5.4 which makes clear decisions of the electoral officer are "final and binding."

[14] The 2022 Chief and Councillor election took place during the global COVID-19 pandemic.

[15] The impact of COVID-19 on this First Nation was severe.

[16] In mid to late January, 2022, the First Nation knew the following impacts of COVID-19 on its electorate:

a) Over 500 people in the community (of about 6,500 residents) were in quarantine; and

b) There was no way of knowing whether the COVID-19 situation would get worse.

c) The official numbers identified 567 band members on reserve in isolation and 213 active cases.

[17] On January 5, 2022, the electoral officer recommended to the Chief and Council that due to impacts of the COVID-19 pandemic, including how it was affecting NHCN membership, the election should permit the members to utilize electronic mail in ballots (online voting). The electoral officer was of the view that electronic voting would improve accessibility to voters,

thus enfranchising more people, and is an accurate and efficient means of conducting voting that has distinct advantages over mail in ballots.

[18] The First Nation through its Council agreed with the electoral officer and accepted her recommendation given the ravages of the COVID-19 pandemic on its membership and the importance of voting. It did so by BCR dated January 22, 2022. The BCR permitted electronic voting as per the electoral officer's position.

[19] The Chief at the time, the Applicant Larson Anderson, in accordance with band procedures, did not participate in the vote approving the use of electronic voting.

[20] The Respondent Hubert Hart, who appealed the results of the election, was a Councillor at the time of the BCR, and not only voted in favour of but seconded the motion to approve the BCR approving the use of online voting.

[21] On January 27, 2022, the electoral officer's decision to utilize electronic voting in addition to mail in ballots and in-person voting was communicated to band members by social media and posted in numerous places on the reserve and online.

[22] No one sought judicial review of the decision of the electoral officer to implement electronic voting or to the BCR which permitted online voting.

[23] Indeed, only one person objected to either the BCR authorizing electronic voting or the posted decision of the electoral officer to utilize electronic voting, namely one of the Respondents in this matter , Jerleen Sullivan, who (perhaps notably) did not object until after the election in which she ran (albeit unsuccessfully). Ms. Sullivan made no submissions on this judicial review.

[24] On April 9, 2022 prior to releasing its Decision now subject to judicial review, the EAC observed and decided that due to the COVID-19 exigencies, the Chief and Council were within their authority to amend the *EPA* for the 2022 election to allow for seven members of the EAC.

[25] On that same day, April 9, 2022, in that same meeting, the online ballot issue was discussed by the EAC and like the increase in EAC membership, (and contrary to their ultimate decision) they considered that the BCR permitting online voting was a one-time permissible use of Chief and Council powers during the pandemic. The following quote appears in the April 9, 2022 EAC minutes:

> Chief and Council given the fact that there was a public health emergency order followed with a federal emergency order under Covid-19….. have the authority to overrule the EAC Act just for this election specifically so there was no need to consult the community because this is a one of [*sic*- "off"], a one time exception

[26] On April 19, 2022, Applicant Larson Anderson and Council members became aware that there was an appeal of the election. Chief and Council instructed their lawyer to ask for clarification as to the appeal process that was being followed.

[27] In emails on April 19 and 20, 2022, the lawyer for the EAC, in communication with the lawyer for the Council:

> (1) identified that there was "an appeal" (not two appeals, as was the case);
>
> (2) advised that the election appeal process "follows the NHCN *Election Procedures Act*";
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> (3) when asked on April 20, 2022 for clarification as to the process to be used, and how and if the Chief and Council would be permitted to make submissions, the request was ignored. Counsel for the EAC replied on April 20, 2022, that "you will be notified of an appeal hearing date once it is set"
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> (4) on May 4, 2022, the counsel for the EAC sent an email, without any further details, enclosing a copy of a notice of hearing (dated April 28, 2022). That notice was only in respect of the "Hart" Appeal, and identified that the "Hart" Appeal would be heard on May 9, 2022 at the Veteran's Hall at the NHCN multiplex.

[28] Because Council still did not know the particulars of allegations against them, and given the lack of clarity as to the upcoming appeal process, Applicant Larson Anderson asked a Band employee to find out what role, if any, the Chief and Council could have at the upcoming hearing.

[29] The Chair of the EAC, the Respondent Pam Tait-Reaume, personally confirmed the scheduled appeal hearings were not open to the public, but that the current council members and members of the public would be given an opportunity to speak to the appeal, if at all, after the scheduled hearings took place.

[30] The evidence before me is that these communications with the Chairperson and counsel for the EAC left the Chief and Council with what I find a *bona fide* understanding that the

scheduled hearings were preliminary hearings to decide whether the appeals had any possible chance of success, or whether they could be dismissed summarily. This was the process followed by the EAC in 2018.

[31] As such, Chief and Council did attend the May 9 or 12, 2022, hearings. They waited to see if the appeals would proceed. I note the appeals did not proceed after this process was followed in 2018.

[32] In fact, Chief and Council later discovered the May 9 and 12, 2022, hearings did not take place at the time or location specified in the notices. They later confirmed the hearings conducted by the EAC were only open to the EAC, their lawyer and the complainants.

[33] I find on the record before me that the Applicants were excluded from the EAC's appeal proceedings.

[34] The EAC Decision (dated May 18 or 19) was made public on May 20, 2022, and transmitted electronically by counsel for the EAC to the Applicant Chief Anderson and Councillor David Swanson, and to the members of the EAC.

III. Decision under review

[35] The decision by the EAC was made public on May 20, 2022. The reasons given were that the elected Chief:

1) took part in passing a Band Council Resolution, prior to the election process commencing, by which the band council of the day, in recognition of the COVID-19 pandemic, approved of the use of online voting in addition to in-person and main-in ballots; and

2) took part in the publication, including by the Winnipeg Sun and Toronto Star, of newspaper stories that contained "campaign promises."

[36] The EAC also set aside the election of all the Respondents Councillors, presumably because the voting had taken place online.

IV. Issues

[37] The following are the main issues:

a) Preliminary issue – should the affidavit of EAC chair Respondent Pam Tait-Reaume be excluded?

b) Was there a breach of procedural fairness?

c) Was the Decision of the EAC on the "corrupt practice" reasonable?

d) Did the EAC have jurisdiction to hear an appeal of the electoral officer's decision? Is it outside the required deadline and not eligible for appeal?

e) What is the appropriate remedy?

V. Standard of Review

[38] The Applicants allege breaches of procedural fairness and natural justice. As such, they maintain the relevant standard of review is correctness. They also say correctness is required

because the matter involves a conflict in jurisdiction between the Electoral Officer and the EAC as to jurisdiction to determine the appropriateness of online voting.

[39] The Respondents (except Connors, Hart and Sullivan) contend the standard of review is reasonableness.

[40] The Respondent Hart agrees with the Applicants that on matters of procedural fairness and natural justice the standard of review is correctness. This is limited to the first issue posed by the Applicants. He disagrees on the remaining issues, citing the reviewing standard as reasonableness.

[41] Neither the Respondents David Swanson nor Jarleen Sullivan filed submissions on this judicial review.

A. *Reasonableness*

[42] Reasonableness review is both robust and responsive to context: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 67. Applying the *Vavilov* framework in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, Justice Rowe explains what is required for a reasonable decision and what is required of a court reviewing on the reasonableness standard of review:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry

> into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para.100). In this case, that burden lies with the Union.

B. *Correctness*

[43] The presumption of reasonableness established by the Supreme Court of Canada in *Vavilov* does not apply to a review related to a breach of natural justice and/or the duty of procedural fairness. As the Supreme Court put it in *Vavilov*:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[Emphasis added]

[44] Correctness is the appropriate standard of review for issues of procedural fairness and natural justice: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. This was not changed by *Vavilov*. That said, I note that in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 69, the Federal Court of Appeal indicates a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': *Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69.

[45] In *Dunsmuir* at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[46] The leading case on the nature of procedural fairness is the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. There, the Supreme Court of Canada held:

> 21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of

> procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J.
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> 22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

VI. Relevant law

[47] Article 7.1 of the Norway House Cree Nation *EPA* provides:

> 7.1 Within thirty (30) days after the posting of the written statement by the Electoral Office, pursuant to Article 5.15, any candidate or elector who has reasonable grounds to believe: (a) that there was a corrupt practice in connection with the decision, or (b) that these procedures were not complied with, or (c) a person did not qualify to be a candidate or elector as defined herein, may appeal with the Electoral Office setting out the grounds for appeal.

[48] Article 7.3 of the *EPA* provides:

> 7.3 The Appeal Committee shall hear the appeal within thirty (30) days of the filing of the notice of appeal and shall deliver its decision within ten (10) days of the hearing appeal. The Appeal Committee shall not be bound by any rules of evidence. The decision of the Appeal Committee shall be final and binding. Any appeal to a Court of Law Shall be founded in law and not in fact.

[Emphasis added]

[49] Section 97 of the *Federal Courts Rules* states:

Failure to attend or misconduct	**Défaut de comparaître ou inconduite**
97 Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may	**97** Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut:
(a) order the person to attend or re-attend, as the case may be, at his or her own expense;	**a)** ordonner à cette personne de subir l'interrogatoire ou un nouvel interrogatoire oral, selon le cas, à ses frais;
(b) order the person to answer a question that was improperly objected to and any proper question arising from the answer;	**b)** ordonner à cette personne de répondre à toute question à l'égard de laquelle une objection a été jugée injustifiée ainsi qu'à toute question légitime découlant de sa réponse;
(c) strike all or part of the person's evidence, including an affidavit made by the person;	**c)** ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits;
(d) dismiss the proceeding or give judgment by default, as the case may be; or	**d)** ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;
(e) order the person or the party on whose behalf the	**e)** ordonner que la personne ou la partie au

person is being examined to pay the costs of the examination.	nom de laquelle la personne est interrogée paie les frais de l'interrogatoire oral.

[50] Subsection 317(1) of the *Federal Courts Rules* states:

Material from tribunal	**Matériel en la possession de l'office fédéral**
317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	**317 (1)** Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[51] Section 318 of the *Federal Courts Rules* states:

Material to be transmitted	**Documents à transmettre**
318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit	**318 (1)** Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet:
(a) a certified copy of the requested material to the Registry and to the party making the request; or	**a)** au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;
(b) where the material cannot be reproduced, the	b) au greffe les documents qui ne se prêtent pas à la

original material to the Registry.	reproduction et les éléments matériels en cause.

VII. Analysis

A. *Preliminary Issue – Should the affidavit of Respondent Pam Tait-Reaume, Chair of the EAC, be excluded?*

[52] The Applicants submit and I agree that several offers to conduct the cross-examination of the Chair of the EAC, Pam Tait-Reaume were ignored. I accept that counsel for the members of the EAC, including Pam Tait-Reaume, agreed to attend for cross-examination but on the appointed days, failed to do so.

[53] On June 20, 2022, Case Management Judge Coughlan issued an Order, with the consent of the Respondents, that any cross examinations were to take place during the week of July 11 to 15, 2022. The Applicants proposed, and counsel for the Respondents agreed by email on July 11, 2022 that counsel for the Respondents would be cross-examining the Applicants' affiants on July 12 and 13, 2022, and also agreed the Respondents' affiants of her affiants would be cross examined July 14 and 15, 2022.

[54] The Applicants' affiants attended at the time scheduled for their cross-examination. However, counsel for the Respondents failed to attend. The day before the scheduled cross-examination said counsel emailed claiming that she did not consent to the date and time, but providing no explanation as to why her client had suddenly become "unavailable." In my view such attendance had been consented to by the parties.

[55] Counsel for the Applicants identified the existence of the consent Order and explained that they were not available on or after July 19, 2022. Counsel for the Applicants offered alternate times for cross-examination to permit the cross exams to take place within the time ordered by the Court. The offer was ignored.

[56] Certificates of non-attendance were secured by the Applicants for failure to attend the cross-examinations.

[57] In *Marvel Characters Inc. v. Randy River Inc.* 2003 FC 986, at para 8, Prothonotary Lafrenière (as he then was, now Justice Lafrenière) observed: "… given the scarcity of judicial resources, parties should be encouraged to agree, as they typically do, upon the time and place of examinations between themselves. Once an agreement is reached, the parties should be expected to honour that agreement, or face consequences provided by Rule 97." I fully agree.

[58] Prothonotary Lafrenière noted a change in venue had not been agreed to and that after agreement has been reached in that case, the options open to the party seeking to resile from the agreed timetable are limited, and they were to proceed with the examination as agreed, or seek directions from the Court. He continued:

> 11 The Plaintiffs did neither. It is no answer to say that a Direction to Attend was not served, or that conduct monies were not paid by the Defendant, since the parties' agreement waived such formalities. As a result, I conclude that the Plaintiffs failed to attend a scheduled examination, and are in breach of the Court-ordered deadline for completing the first round of discoveries by July 21, 2003.
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> 12 Such conduct by the Plaintiffs should be discouraged by invoking the sanction provisions under Rule 97. Failure to do so would simply undermine the purpose of Rule 97 and leave parties,

> like the Plaintiffs, free to ignore agreements regarding the time and place of examinations….."

[59] I agree with the Applicants that the proper consequence in accordance with Rule 97 on the facts of this case, are that all parts of the affidavit of EAC Chair Pam Tait-Reaume affirmed July 8, 2022, that do not consist of admissions are struck. I am not persuaded they should simply be given little weight in these circumstances given what I consider the seriousness of the failure to attend and the lack of justification for it. Not only was there a breach of agreement, arguably in the nature of an undertaking, but the Respondents' behaviour in this regard was contrary to the Order of Case Management Judge Coughlan who set timelines for these very cross-examinations.

B. *Was there a breach of procedural fairness?*

[60] In my respectful view, judicial review must be granted because the Decision is the result of a flawed and procedurally unfair process. Contrary to *Baker*, the Respondents were deprived of an opportunity "to put forward their views and evidence fully and have them considered by the decision-maker." I also find the Decision unreasonable because it is not justified on the record and law before the EAC.

[61] I will deal with reasonableness in the next following portion of these Reasons.

[62] Reverting to the issue of procedural fairness, and given my finding that procedural unfairness attracts correctness as its standard of review, it is not necessary to deal with the Applicants' submissions regarding "competing tribunals", nor with their submissions in favour

of correctness based on Article 7.3 of the *EPA's* requirement that EAC decisions are "final and binding" with appeals allowed only "in law and not in fact."

[63] The Applicant submits the following breaches of procedural fairness:

i. The EAC did not advise the Chief of details of the appeal allegations made by Hart.

ii. The EAC provided no details of the hearing process, including date and time the appeals would be heard.

iii. Then-Chief Larson Anderson and Council members were not permitted to attend the hearing, as it was considered "private."

iv. The location of the hearing was changed at the last moment and was in a private forum.

[64] In my view and as it pertains to these points, the *EPA* is largely silent on methods of appeal. However it is clear the EAC did not provide a proper opportunity for the former Chief and Council members to address and respond to the appeal allegations before it.

[65] The Respondents excluding Hart, Sullivan and Connors provided little by way of substantive submissions on the issue of procedural fairness in their Memorandum. In oral submissions, Counsel's remarks were limited to the assertion that the hearings were made public and anyone was welcome to come.

[66] Respectfully, I am not satisfied this was the case. I find insufficient notice was given to the Applicants, and that they were deprived of the right to be heard. While the existence of the EAC hearings was announced publicly, the evidence before me is that members of the public and

more importantly, the Respondents as relevant parties were not informed of the process the EAC would follow nor were they allowed to participate.

[67] I refer back to the factors from *Baker*, which are:

- The nature of the decision;
    - this requires an assessment of (1) the function of the tribunal; (2) nature of the decision-making body; (3) process used and (4) matters to be determined
    - In essence, the more judicial processes imported into a decision, the more likely it is that "procedural protections closer to the trial mode will be required by the duty of fairness."
- The statutory scheme
    - The surrounding indications in the statute will assist in determining the duty of fairness
    - Greater procedural safeguards will likely be required where no appeal mechanism is provided within the governing statute, and
- The important of the decision to the individual or individuals affected
    - Essentially, the more important the decision is to the individuals involved, "the more stringent the procedural protections that will be mandated."
- The legitimate expectations of the person challenging the decision
    - Though this does not create a substantive right, if a claimant has a "legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness."

- The choice of procedure made by the agency
    - As per the Supreme Court's wording, "important weight must be given to the choice of procedures made by the agency itself and its institutional constraints."

[68] On its face, what happened in this case was a clear unwarranted departure from the standards required for procedural fairness on multiples factors in the *Baker* analysis.

[69] Notably, two similar appeals were heard pertaining to elections results in 2006 and 2009. The Applicants note that in those proceedings, unlike those in the subject appeal:

> […] the EAC held the hearings in public, and an almost court like process followed. Participants were given the opportunity to challenge the evidence given by others and to present their own evidence and to make fulsome representations.

[70] This was not the case in the EAC process outlined before me.

[71] Read in combination with the *EPA's* preamble, which states that election procedures are "in accordance with current trends and practices of the Norway House Cree Nation", I agree custom is to be given significant weight. In my view, the appeals in this case were procedurally unfair when measured against past practices.

[72] It is also my view the failure of the EAC to give the Applicants fair notice of where and when the appeals would be heard, and its failure to give them an opportunity to attend and participate, offend core principles of natural justice and procedural fairness.

[73] On these bases, judicial review will be granted.

C. *Was the Decision of the Election Appeals Committee on the "corrupt practice" reasonable?*

[74] In my view, the *EPA* is a relatively comprehensive code, but not one with a rigidity sufficient to disenfranchise a large portion of this First Nation membership during the 2022 election for Chief and Council given the severe impact of the COVID-19 pandemic.

[75] It is not disputed the 2022 election was required to be held in the middle of the global COVID-19 pandemic.

[76] COVID-19 and the related health emergency in effect in this First Nation impacted a very large percentage of its members. To recall, at the time electronic voting was recommended by the electoral officer and permitted by BCR, the facts were:

a) Over 500 people in the community (of about 6,500 residents) were in quarantine;

b) There was no way of knowing whether the COVID-19 situation would get worse; and

c) The official numbers being kept at the time identified that there were 567 band members on reserve in isolation and 213 active cases.

[77] The Respondents excluding Hart, Sullivan and Connors submit Chief Anderson engaged in a corrupt practice in supporting online voting, and violated the terms of the "election period" by making campaign promises to members of the Nation that could be construed as influencing the election. The Respondent's on the EAC took issue with a "deal" taking place and being

advertised for the first time allegedly during an election "black out" period, thereby engaging in corrupt practices.

[78] I cannot agree with these submissions. I am not persuaded the record reasonably supports the finding by the EAC of corrupt practices. I defer to my learned colleague's decision in *Wilson* for the guidelines in making this finding.

[79] The Respondent Stephanie Connors did not make submissions on this point.

[80] Reviewing the EPA contextually and holistically, I find the decision to proceed with electronic voting during this health emergency was reasonable. To begin with, the *EPA* does not define precisely what the election "procedures" are, which as a starting point provides some latitude to the electoral officer. Considerable further latitude is given to the electoral officer because the *EPA* mandates in article 5.1, that it is the electoral officer who has the authority and discretion to identify the "time, dates and locations" where voting will take place. That, and with respect, could entail allowing members to vote from home by the internet.

[81] I should also note the Supreme Court of Canada adopted the proposition that activities on the internet involving two entities, take place at the locations of both, which in this case would be the First Nation member's home and the polling office. It accepted the "both here and there" concept in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45 at paras 58 and 59:

> 58 Helpful guidance on the jurisdictional point is offered by La Forest J. in *Libman v. The Queen*, 1985 CanLII 51 (SCC),

[1985] 2 S.C.R. 178. That case involved a fraudulent stock scheme. U.S. purchasers were solicited by telephone from Toronto, and their investment monies (which the Toronto accused caused to be routed through Central America) wound up in Canada. The accused contended that the crime, if any, had occurred in the United States, but La Forest J. took the view that "[t]his kind of thinking has, perhaps not altogether fairly, given rise to the reproach that a lawyer is a person who can look at a thing connected with another as not being so connected. For everyone knows that the transaction in the present case is both here and there" (p. 208 (emphasis added by the Court)). Speaking for the Court, he stated the relevant territorial principle as follows (at pp. 212-13):

> I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country . . . [Emphasis added]

59 So also, in my view, a telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, "is both here and there". Receipt may be no less "significant" a connecting factor than the point of origin (not to mention the physical location of the host server, which may be in a third country). To the same effect, see *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, at para. 52; *Kitakufe v. Oloya*, [1998] O.J. No. 2537 (QL) (Gen. Div.). In the factual situation at issue in *Citron v. Zundel*, *supra*, for example, the fact that the host server was located in California was scarcely conclusive in a situation where both the content provider (*Zundel*) and a major part of his target audience were located in Canada. The *Zundel* case was decided on grounds related to the provisions of the *Canadian Human Rights Act*, but for present purposes the object lesson of those facts is nevertheless instructive.

[Emphasis added]

[82] It seems to me therefore that just as telecommunications from one country to another occur both here and there, so too online voting takes place both at the terminals of the voter and the electoral officer's chosen One Feather online voting provider, i.e., here and there. This further confirms the reasonableness of the electoral officer's acceptance of online voting in these circumstances.

[83] Also reasonably in support of the decision of the electoral officer and First Nation Council, the preamble of the *EPA* indicates NHCN practice is intended to be "in accordance with current trends and practices of the Norway House Cree Nation." In this connection, it is important to recall this First Nation used online voting as recently as 2017 when, before electronic voting was expressly permitted under the ratification process set forth in the *First Nations Land Management Act,* this First Nation successfully used the services and platform of One Feather (the company that assisted in the subject 2022 electronic vote) to conduct a secret vote of the membership. [Emphasis added]

[84] It is also noteworthy that the electoral officer sought and obtained the approval of online voting from the Council, which was particularly prudent and responsible considering the Council had declared health emergency in force at that time.

[85] I note as well the electoral officer is empowered to appoint such persons as he or she deems necessary to assist in the polling (article 5.5). The electoral officer also has the discretion to secure such equipment as is necessary to ensure the secrecy of the vote (article 5.7), which and

with respect reasonably encompasses engaging the online voting assistance of One Feather company and its electronic equipment, to assist with polling.

[86] All of the foregoing in my view support the reasonableness of the electoral officer's decision to allow online voting in the midst of the COVID-19 pandemic.

[87] As I understand it, the position of the EAC is simply that online voting is not expressly and categorically set out in the EPA and therefore is forbidden such that, among other things, this entire election must be set aside, and additionally Chief Anderson should be found guilty of corrupt practice and banned from NHCN office for six years.

[88] I agree the EAP is silent on online voting, however, for the reasons above, its use in this case was reasonable.

[89] Given these findings, neither the Chief nor Councillors may reasonably be criticized because online voting was supported and or used during the 2022 election.

[90] Also in my view, the Chief may not be faulted in any way because he did not in fact vote for the BCR; instead the record shows he followed NHCN practice and abstained. That he may then be banned from First Nations office for six years let alone found to have committed corrupt practice is not reasonable.

[91] These findings are sufficient to conclude the Decision of the EAC must be set aside for unreasonableness to the extent it relates to online voting.

[92] That said, I am also of the view the EAC acted unreasonably in determining Chief Anderson engaged in a corrupt practice. I note the *EPA* contains no definition of what a corrupt practice is. What amounts to is a corrupt practice has been held to be a question of law to which no deference is owed to the election appeal committee by this Court in *Wilson v. Norway House Cree Nation Election Appeal Committee*, 2008 FC 1173, at paras 24-28 [*Wilson*] per Dawson, J, as she then was.

[93] In *Wilson* Justice Dawson provided a definition of corrupt practice in the context of NHCN election appeals at paras 23 and 32-33 where she wrote that:

> 23 ….What is relevant is the motive or intent behind the impugned conduct. Is the conduct directed to improperly affecting the result of an election?
>
> …
>
> 32 Further, the Appeal Committee was obliged to consider the cumulative nature of the conduct of the three successful candidates.
>
> 33 It was also required to consider their intent. It was incumbent on the Appeal Committee to consider, for example, for what purpose the three successful candidates acted as they did, and whether they were attempting to improperly influence the outcome of the election. While an election does not suspend council activity, councillors must carry out those duties in a scrupulously fair and honest fashion. Benefits must be distributed on the basis of merit. When a benefit is conferred not based on merit, but rather based upon an intent to influence an elector, a corrupt practice occurs….
>
> [Emphasis added]

[94] I agree with the Applicants Justice Dawson focussed on motive (intent or *mens rea*) to "improperly" influence the vote, coupled with conduct (an *actus*) that was wrongful - such as distributing benefits within the control of the Chief and Council not based on merit, but for the purpose of improperly buying votes.

[95] The situation here is not at all analogous to *Wilson*. What occurred here was the issuance of a press release by the First Nation and a nickel mining company, which noted benefits potentially accruing to the First Nation and its members. With respect, this is not comparable to the *Wilson* situation which was described in in *Muskego v. Norway House Cree Nation*, 2011 FC 732 at para 6: "The *Wilson* Appeal was based on allegations that these individuals had illegitimately made decisions about approving some allocations of housing, trailers, and special needs funding…"

[96] Moreover, the evidence before the Court is that Chief Anderson was in fact not involved in issuing the press release. I find the press release was drafted and issued by a third party consultant who was not aware an election process had begun in January, 2022, and whose uncontradicted and sworn evidence was that the election timing had no bearing on his decision to write and issue the press release. Thus I am not satisfied Chief Anderson wrote the press release; rather the record is that it was both written and released by the consultant. I am unable to justify the EAC's findings on this constraining record.

[97] Therefore, and with respect, the conclusions of the EAC are unstainable given there was no evidence of any intention to improperly influence the vote, no act of anyone distributing

benefits to band members, much less distributing benefits other than on merit, and that to the contrary Chief Anderson neither voted for nor wrote nor had a hand in the timing of the press release. I also note the press release makes no reference to money, jobs and homes to be received by anyone. In addition, I accept the Applicants' evidence the press release was issued in the normal course, and had nothing to do with the election process.

[98] I also agree there was no "blackout period" during which announcements such as the press release, could not be made, certainly not in the *EPA*. While Council did determine that in the 10 days prior to the election, attendance at the First Nation office by elected officials and staff members running for office was not permitted, it also appears the press release was issued before that period began.

[99] Given these findings, the EAC's Decisions with respect to the Applicants must be set aside not only for procedural unfairness, but also because it is unreasonable as not justified by the constraining the record.

D. *Did the EAC have jurisdiction to hear an appeal of the electoral officer's decision? Is it outside the required deadline and not eligible for appeal?*

[100] While perhaps not necessary at this point, I wish to add two points.

[101] First, the time to litigate the electoral officer and/or the First Nation's decision to proceed with online voting, started to run January 22, 2022 when the electoral officer posted her decision and communicated it to the NHCN members. The proper procedure to follow for persons

wishing to object would have been to file an application for judicial review within 30 days under section 18.1 and subsection 18.1(2) of the *Federal Courts Act*. This was not done.

[102] Also on the issue of timing, as the Applicants' correctly note, the Article 7.3 of the *EPA* requires any election appeals be heard within 30 days of the filing of the Notice of Appeal. However, the "Sullivan" and "Hart" appeals were heard outside this time limit at 41 and 34 days respectively. This is not disputed.

E. *What is the appropriate remedy?*

[103] Judicial review will be granted. The Applicants asks that the Decision be set aside, with no Order requiring the matter to be reconsidered as would be required in the usual Order granting judicial review. I am not persuaded an exception should be made. The Applicants' concerns includes bias, but the usual reconsideration order also requires a fresh decision by a differently constituted decision maker, as will be the case in my Judgment in this case.

[104] Therefore, I will make the usual judgment requiring reconsideration by a differently constituted *EAC* appointed in the manner established by the *EPA*.

VIII. Conclusion

[105] The Decision is both procedurally unfair and unreasonable as set above. Therefore judicial review will be granted.

IX. Costs

[106] The Applicants asked for the following cost awards:

a) a partial indemnity lump sum all-inclusive cost award of $100,000.00 against the Respondents (excluding Hart, Sullivan and Swanson) i.e., jointly against Pam Tait-Reaume, Roy Folster, Sherry Menow, Bessie Folster, Gwen Apetagon and Hilda Albert;

b) a lump sum all-inclusive costs of $1,000.00 against the Respondent Hubert Hart.

[107] The Applicants did not seek costs against the Respondents Sullivan and Swanson who did not participate, nor against Ross Jr.

[108] The electoral officer Connors requested the same partial indemnity lump sum all-inclusive cost award of $100,000.00 without reference to Hart, Sullivan or Swanson, but did not seek costs against Ross Sr.

[109] The Respondent Pam Tait-Reaume for herself as Chair and the remaining members of the EAC, requested costs on a lump sum basis of $50,000.00 being their approximate solicitor client costs. Their counsel, who as I understand it is also counsel to the First Nation (which was not a party to this proceeding), advised the Court the First Nation’s practice is to pay costs.

[110] Bills of Costs were filed.

[111] Given there are no reasons why costs should not follow the event, given the complete vindication and success of the Applicants, given the very serious nature of the EAC finding against the Chief and Councillors (including a potentially devastating 6 - year ban on holding First Nation office against Chief Anderson), given the EAC's finding the entire election outcome including the election of Chief and all Councillors fell "outside the confines of the *Election Procedures Act*" which it did not, given the irregularities already noted in these Reasons, given the complexity of this litigation, and given the lump sum claimed is less than half the Applicants' solicitor and own client cost, and given there was no opposition to the quantum claimed by the Applicants, I find the cost submissions of the Applicants reasonable and will therefore award such costs.

[112] For essentially the same reasons I find the cost submissions of the electoral officer Connors reasonable and will so order, although not against Sullivan or Hart.

[113] I have not made the cost award in favour of the Applicants or Connors "jointly" payable.

[114] I decline to deal with the cost submissions by parties who were not successful, and leave matters of indemnity and or compensation of unsuccessful parties to be dealt with by the First Nation and parties. That said and while I need not make any ruling on the practice(s) of the First Nation in terms of compensation or indemnity for costs, because the practice of this First Nation was raised at the hearing, I would make the non-binding suggestion that in fairness past practice guide the First Nation's payment of legal bills.

JUDGMENT in T-1107-22

THIS COURT'S JUDGMENT is that:

1. Judicial review is granted.
2. The Decision of the Electoral Appeals Committee is quashed.
3. The appeals against the elections of the Applicants are remanded for redetermination by a differently constituted Electoral Appeals Committee to be appointed pursuant to the *Electoral Procedures Act*.
4. The Respondents, excluding Hart, Sullivan, Ross Jr., Swanson and Connors, shall pay to the Applicants their lump sum all-inclusive costs of $100,000.00.
5. The Respondent Hart shall pay to the Applicants the lump sum all-inclusive costs of $1,000.00.
6. The Respondents, excluding Hart, Sullivan, Swanson, Ross Sr., and Connors, shall pay to the Respondent Connors the lump sum all-inclusive costs of $100,000.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1107-22
STYLE OF CAUSE:	LARSON ANDERSON, EDWARD ALBERT, ANTHONY APETAGON, ORVILLE APETAGON, DEON CLARKE, JOHN L. HENRY v PAM TAIT-REAUME, ROY FOLSTER, ERIC ROSS SR., SHERRY MENOW, BESSIE FOLSTER, GWEN APETAGON, HILDA ALBERT, STEPHANIE CONNORS, HUBERT HART, JERLEEN SULLIVAN, DAVID SWANSON
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 23, 2022
JUDGMENT AND REASONS:	BROWN J.
DATED:	OCTOBER 6, 2022

APPEARANCES:

Harley I. Schachter	FOR THE APPLICANTS
Leah Ballantyne	FOR THE RESPONDENTS (PAM TAIT-RHEAUME, ROY FOLSTER, SHERRY MENOW, BESSIE FOLSTER, GWEN APETAGON, HILDA ALBERT)
Sarah D. McNamara	FOR THE RESPONDENT (ERIC ROSS SR.)
John B. Harvie	FOR THE RESPONDENT (STEPHANIE CONNERS)
Peter Mueller	FOR THE RESPONDENT (HUBERT HART)
Jerleen Sullivan	FOR THE RESPONDENT (SELF REPRESENTED)

David Swanson	FOR THE RESPONDENT (SELF REPRESENTED)

SOLICITORS OF RECORD:

Duboff Edwards Schachter Law Corporation Barristers and Solicitors Winnipeg, Manitoba	FOR THE APPLICANTS
Leah Ballantyne Law Corporation Chilliwack, British Columbia	FOR THE RESPONDENTS (PAM TAIT-RHEAUME, ROY FOLSTER, SHERRY MENOW, BESSIE FOLSTER, GWEN APETAGON, HILDA ALBERT)
McNicol Bourcier Barristers and Solicitors Winnipeg, Manitoba	FOR THE RESPONDENT (ERIC ROSS SR)
Myers LLP Barristers and Solicitors Winnipeg, Manitoba	FOR THE RESPONDENT (STEPHANIE CONNERS)
Taylor McCaffery LLP Barristers and Solicitors Winnipeg, Manitoba	FOR THE RESPONDENT (HUBERT HART)