

Federal Court



Cour fédérale

**Date: 20230411**

**Docket: T-106-22**

**Citation: 2023 FC 505**

**Ottawa, Ontario, April 11, 2023**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**OPASKWAYAK CREE NATION**

**Applicant**

**and**

**CLAIRE COOK, JUDY HEAD,  
RHONDA HEAD, DIANE PELLY,  
AND BRADLEY YOUNG**

**Respondents**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] The Applicant, Opaskwayak Cree Nation [OCN or First Nation], seeks to determine the composition of the OCN Election Board after November 9, 2021.

[2] The Applicant seeks an Order of *quo warranto* declaring that Elizabeth “Skippy” Bignell, Raymond N.W. Burns, Lena Cooper, Carleen Fosseneuve, and Clinton Whitehead have been the OCN Election Board members since November 17, 2021; a declaration that the Respondents have lacked lawful authority to act as OCN Election Board members since November 9, 2021, or in the alternative November 17, 2021; and an Order quashing any and all decision made by the Respondents while purporting to act as OCN Election Board members.

[3] The Respondents request that this application be dismissed in its entirety with costs. In the alternative, the Respondents seek an Order remitting the Band Council Resolutions back to Chief and Council with directions that the Council must vote on and decide whether Chief Ballantyne is in a conflict of interest.

[4] The application for judicial review is dismissed. OCN failed to follow the provisions of the Election Code, Ethics Code, and Procedures Policy in passing the Band Council Resolutions appointing new Election Board members.

## II. Background Facts

[5] OCN is a band duly constituted pursuant to the *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

[6] Beginning in 1952, OCN conducted its elections for Chief and Council in accordance with the *Indian Act*. On October 17, 2011, OCN requested an order revoking the application of the election provisions of the *Indian Act*. In its place, OCN developed its own written election

code. The election code came into effect on September 5, 2012, pursuant to Statutory Instrument No. SOR/2012-168.

(1) The OCN Governance System

[7] OCN members have amended the election code on three occasions: March 1, 2016; November 28, 2018 [2018 Election Code]; and March 17, 2021 [Election Code].

[8] The Election Code constitutes one of the highest laws of OCN. It governs the conduct of OCN elections and officials, including Chief and Council, in accordance with the First Nation's customs. Part 14 of the Election Code establishes and governs the operation of the OCN Election Board [Election Board].

[9] To compliment the Election Code, OCN created the OCN Code of Ethics and Conduct [Ethics Code] as well as the OCN Chief and Council Procedures Policy [Procedures Policy]. Both documents were adopted on December 4, 2014.

(2) Events Leading to the Special Meeting

[10] On May 7, 2019, pursuant to the 2018 Election Code, OCN's former Chief and Council appointed seven members to the Election Board: the Chairperson, Jeanette Sayese, and the Respondents.

[11] On March 8, 2021, in preparation for the upcoming general election on September 16, 2021, and pursuant to section 82 of the Election Code, former Chief and Council issued a public call for resumes for new Election Board members [First Call]. Section 82 provides as follows:

**82. Appointment of the OCN Election Board**

(1) The Chief and Council shall appoint the Board six (6) months prior to Election Day in a year in which a General Election is required

(2) At least twenty-eight (28) Days prior to the end of the term of office of the Election Board, the Chief and Council shall post a call for resumes of OCN members who wish to sit as members of the OCN Election Board

(3) The call for resumes shall be for a period of not less than twenty-eight (28) Days

(4) The call for resumes will be:

(a) posted at the Government Services Branch Office and Executive Office, published in the Natotawin, and delivered or mailed to Electors residing outside of the fifty (50) kilometre radius of the OCN 21E Lands;

(b) posted in at least three public (3) places within OCN 21E Lands,

(c) uploaded or posted to the OCN Website and Facebook page, and

(d) emailed to every Elector whose email address is on record.

(5) At the conclusion of the posting period, the Chief and Council shall review all applications and appoint the members of the Election Board.

...

(8) In the event all appointed positions are not filled on the Election Board, the required number of current members will stay on until positions can be filled.

[12] The deadline for applications was March 22, 2021. The former Chief and Council were unable to fill the Election Board positions due to a lack of response.

[13] On March 31, 2021, former Chief and Council initiated a second call for resumes [Second Call]. The call remained open until positions were filled. Chief and Council only received one application, but that individual was not appointed to the Election Board.

[14] On September 16, 2021, the electorate of OCN elected Chief Ballantyne and Council members.

[15] Following the election, on or about September 29, 2021, the Respondents assert that they received an election appeal against Chief Ballantyne. Similarly, on or about October 3, 2021, the Election Board received a second election appeal from Gina against Chief Ballantyne.

[16] On October 12, 2021, the current Chief and Council published a third call for resumes for various OCN board entities, including the Election Board [Third Call]. The deadline for applications was November 2, 2021. Chief and Council were unable to fill the Election Board positions.

[17] On or about October 21, 2021, the Respondents heard both election appeals [Appeal Hearings]. At the Appeal Hearings, the appellants decided to withdraw their appeals and instead submit complaints against Chief Ballantyne pursuant to section 100 of the Election Code.

[18] The Respondents assert that Ms. Guiboche submitted her complaint on or about November 2, 2021. The Respondents explain that the complaint hearing was originally scheduled for November 3, 2021, on the consent of both parties, but was adjourned shortly thereafter in order to provide Chief Ballantyne time to prepare. Both complaint hearings were subsequently rescheduled for November 20, 2021 [Complaint Hearings].

[19] On or about November 9, 2021, the current Chief and Council issued a fourth call for resumes for the various OCN board entities, including the Election Board [Fourth Call]. The deadline for applications was November 24, 2021.

[20] That same day, the current Chief and Council passed a band council resolution [Band Council Resolution] to appoint new Election Board members at a regular Chief and Council meeting. During the meeting, Council members raised concerns surrounding the Chief's conflict of interest in relation to the matter. The resolution passed with four votes for, four votes against, and Chief Ballantyne breaking the tie by voting in favour.

[21] Following the regular meeting, OCN Chief Executive Officer Rhonda Ross shared the Band Council Resolution with the Respondents, explaining that their term on the Election Board was terminated effective immediately.

[22] In response, on November 16, 2021, and November 17, 2021, Respondent Rhonda Head [Respondent Head] wrote to Ms. Ross explaining that the resolution was invalid because (1) section 82 of the Election Code only provides for the appointment of a new Election Board six

months prior to a general election; and (2) Chief Ballantyne, who is the subject of two complaints, did not comply with the Election Code or the Ethics Code. Respondent Head advised that the Election Board would proceed with the Complaint Hearings and continue to fulfill its duties under the Election Code.

(3) The Special Meeting

[23] On November 17, 2021, the current Chief and Council held a special meeting. During the special meeting, Chief and Council passed a band council resolution to appoint five new members to the Election Board “for a term effective November 17, 2021, and ending on March 21, 2023, or six months prior to the next General Election, whichever is sooner” [collectively, the Band Council Resolutions]. The new Election Board members were Lena Cooper, Elizabeth “Skippy” Bignell, Carleen Fosseneuve, Clinton Whitehead and Raymond N.W. Burns. The Band Council Resolution passed with four votes for, four votes against, and Chief Ballantyne breaking the tie by voting in favour.

(4) Events following the Special Meeting

[24] On or about December 1, 2021, Ms. Ross explained that she received a letter from Respondent Head. The letter is dated November 17, 2021; however, its contents suggest that this date is an error. In the letter, Respondent Head explained that the Complaint Hearings proceeded as scheduled on November 20, 2021. Further, the Election Board would hold future hearings in response to a third complaint and petition. It is unclear who these matters concern.

[25] On December 12, 2021, a public notice to all OCN members was issued on Election Board letterhead stating that Ms. Sayese and the Respondents continue to hold the office of the Election Board.

[26] On December 20, 2021, Ms. Sayese wrote to Ms. Ross advising that she has not been an active Election Board member since November 10, 2021, and that she officially informed the other Election Board members of her resignation on December 13, 2021.

### III. Issues

[27] After reviewing the submissions of the parties, the issues are best characterized as:

1. Does the Federal Court have jurisdiction to judicially review the conduct of the Election Board?
2. Do the new Election Board members have lawful authority?
3. What are the appropriate remedies?

### IV. Preliminary Issue

A. *Does the Federal Court have jurisdiction to judicially review the conduct of the Election Board?*

[28] The Applicant asserts that, pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], this Court has jurisdiction to judicially review the Election Board's conduct after November 17, 2021 (*Ojibway Nation of Saugeen v Derose*, 2022 FC 531 [*Saugeen*]; *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 [*David Suzuki*];



*Da'naxda'xw First Nation v Peters*, 2021 FC 360 [*Peters*]). The Election Board is an integral part of OCN's governance structure that reviews election appeals and complaints, thereby providing the Election Board with jurisdiction over Chief and Council. Accordingly, the Election Board is a both body under the *Indian Act* and a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Courts Act*.

[29] The Respondents made no submissions in respect of this preliminary issue.

[30] I agree that this Court has jurisdiction over this matter, which concerns the Respondents' conduct in exercising the office of the Election Board. Intimately tied to the electoral process, the role of the Election Board is to "review and make decisions concerning Election Appeals and Complaints, oversee the Election Code Amendment process, and carry out [other] duties as assigned under the OCN Election Code" (Election Code, s 4(1); see generally *Thomas v One Arrow First Nation*, 2019 FC 1663 at para 14). In exercising these functions, I am of the view that the Election Board similarly constitutes a "federal board, commission or other tribunal" for the purpose of section 18 of the *Federal Courts Act*. Indeed, this Court has previously found that bodies, including appeal tribunals and election committees, that originate and derive their power from a custom election code effected under the provisions of the *Indian Act* constitute a "federal board, commission or tribunal" (*Sparvier v Cowessess Indian Band No 73*, [1993] 3 FC 142 at 156; *Beardy v Beardy*, 2016 FC 383 at paras 38-39). This applies regardless of whether the body has lawful authority to act (*Peters* at para 158; *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 at para 12).

V. Standard of Review

[31] The Applicant, citing *Saugeen*, submits that the standard of review is “difficult to speak of” when deciding cases seeking writs of *quo warranto* and declaratory judgements as to who holds lawful authority (at para 26). Such remedies involve a course of conduct that cannot be narrowed down to a discrete decision. It follows that, where there exists no independent mechanism to settle the dispute, this Court is called upon to clarify the legal rules concerning leadership selection and apply them to the matter at hand.

[32] The Respondents do not provide any submissions on the standard of review.

[33] I agree with the Applicant. There exists no independent decision-maker established by OCN to which the Court should defer to settle this dispute, which pertains to a course of conduct that cannot be narrowed down to a discrete decision (*Saugeen* at para 28). Accordingly, similarly to *Saugeen*, this Court must clarify the legal framework concerning the appointment of Election Board members as set out in the Election Code, Ethics Code, and Procedures Policy and apply them to the present circumstances (*Saugeen* at para 29).

VI. Parties’ Positions

A. *Do the new Election Board members have lawful authority?*

(1) Applicant’s Position

[34] The normal term of an Election Board member commences six months prior to a general election and ends six months prior to the next general election (Election Code, s 82(1)). Where a vacancy occurs, an Election Board member may continue in their role after the normal term on an interim basis until they are replaced (in other words, they are not appointed for another full two-year term). In the event that it is not possible to fill the vacancy, the interim Election Board member may not serve longer than the end of the normal term. Chief and Council are required to replace interim members as soon as possible through the normal application process set out in section 82 of the Election Code.

[35] The former and current Chief and Council cumulatively published four calls for resumes for new Election Board members, despite only being required to make one call. The current Chief and Council was only able to fill the Election Board vacancies on November 17, 2021.

[36] The Court should reject the Respondents' argument that the Band Council Resolutions were invalidated by Chief Ballantyne's participation in the votes for several reasons. First, applicants for judicial review must exhaust all other remedies. Here, the Election Code provides that the Election Board is to investigate and rule on complaints against Chief and Council. Admittedly, this presents as a difficulty in the present matter. Had a complaint not been possible or appropriate, the Respondents could have applied to this Court for judicial review of the votes passing the Band Council Resolutions. The Respondents neglected to do so, and are now outside the 30-day limitation period set out in subsection 18.1(2) of the *Federal Courts Act*.

[37] Second, Chief Ballantyne acted in accordance with the Election Code and was not in a conflict of interest in voting to appoint new members to the Election Board. The Respondents have failed to provide evidence as to how Chief Ballantyne was in a conflict of interest. Rather, they suggest that Chief Ballantyne's tie-breaking vote for anyone would have resulted in a conflict of interest since the Election Board has jurisdiction over Chief and Council.

[38] Lastly, the Election Board had not heard the Complaint Hearings until after the new Election Board members were appointed. Therefore, it would have been appropriate for the new Election Board members to hear the complaints *de novo*.

(2) Respondents' Position

[39] First, the Band Council Resolutions violated the conflict of interest rules, as set out in the Election Code, Ethics Code, and Procedures Policy. During the November 9, 2021 meeting, current Councillors raised concerns regarding Chief Ballantyne's conflict of interest in voting to dismiss the Election Board. Chief Ballantyne himself acknowledged these concerns. Despite this, Chief Ballantyne cast two tie-breaking votes dismissing the Respondents and appointing the new Election Board members.

[40] Pursuant to paragraph 11(2)(a) of the Ethics Code, a person must disclose a conflict of interest, as defined in paragraph 2(1)(f) of the Ethics Code, at the first meeting that the matter arises. Following this, Chief and Council must determine by vote whether a conflict exists. The person subject to the purported conflict may not participate in the vote (Ethics Code, s 13(1)). More broadly, Chief and Council are bound to serve the public interest by upholding both the

letter and the spirit of OCN laws and policies (Ethics Code, s 6(1)(h)). This principle is reaffirmed in the Applicant's evidence under cross-examination, subsection 5(5) of the Election Code, and this Court's jurisprudence (*Annapolis Valley First Nations Band v Lawrence Toney*, 2004 FC 1728 at paras 28-29 [*Toney*]). These actions were lacking in the present matter.

[41] Second, the new Election Board members purportedly installed on November 17, 2021 are not qualified under the Election Code, as the Applicant did not follow the OCN laws, codes, and policies. Subsections 82(2)-(4) of the Election Code establishes specific procedures that Chief and Council must follow for each call for resumes to appoint Election Board members.

[42] In the present matter, the Applicant submits that both former and current Chief and Council published four calls for resumes for Election Board members, the most recent being on November 9, 2021. Subsequently, on November 17, 2021, Chief and Council passed the second Band Council Resolution appointing five new Election Board members. This resolution violated subsection 82(2) of the Election Code, as it condensed the call for resumes to eight days in length. In doing so, the Applicants denied OCN members their right to respond to the call.

[43] To the extent that the Applicant relies on the Second Call for resumes, which provides that "applications are open until positions are filled", it is submitted that this call was issued under the former Chief and Council. Accordingly, the Second Call concluded on the same date as the Third Call, being November 2, 2021.

[44] Regarding the remaining procedures, the Applicants failed to advance evidence that the calls were posted at the required locations, delivered or mailed to electors residing more than 50 kilometers outside OCN lands, or emailed to every elector whose email address is on record. Similarly, the Applicant provided no evidence that the calls were ever responded to, including the receipt of resumes, nor did they submit evidence that the applicants met the criteria under subsection 84(1) to sit as Election Board members. There is also no evidence to demonstrate that Chief and Council reviewed the applications pursuant to subsection 82(5) of the Election Code.

[45] The Election Board's term of office is unique, in that it begins and ends six months prior to a general election (Election Code, s 85(1)). The Respondents held the office of the Election Board during the former Chief and Council's term; however, the former Chief and Council did not replace their appointments at the end of their term. As the Election Code does not provide for interim appointments of Election Board members, the Respondents began a new term six months prior to the September 16, 2021 general election.

[46] The new Chief and Council was aware of the Respondents' intention to hear the Complaint Hearings on November 20, 2021. Depending on the outcome of the Complaint Hearings, Chief Ballantyne stood to be potentially removed from his position (Election Code, s 104(1)(b)). Based on the timing of the special meeting, being three days prior to the Complaint Hearings, it is reasonable to draw an adverse inference that the new Election Board members were selected for their perceived support of Chief Ballantyne.

B. *What are the appropriate remedies?*

(1) Applicant's Position

[47] This Court may issue a writ of *quo warranto* where it is satisfied that the individuals against whom the writ is issued have no legal basis for holding the position in question (*Gagnon v Bell*, 2016 FC 1222 [*Bell*]; *Bone v Sioux Valley Indian Band No 290*, [1996] FCJ No 150, 61 ACWS (3d) 214; *Peters* at para 194; *Saugeen* at para 91; *Marie v Wanderingspirit*, 2003 FCA 385 at para 20; *Marcel Colomb First Nation v Colomb*, 2016 FC 1270 at para 195). The test for determining whether this Court should grant the remedy of *quo warranto* is set out in *Jock v R*, [1991] 2 FC 355 at para 49, 26 ACWS (3d) 1. The present matter satisfies this test.

[48] Further, this Court should issue a writ of *certiorari* as incidental to the remedy of *quo warranto* in the event that it finds that the Respondents made any decisions that are *ultra vires* while wrongfully retaining the office of the Election Board (*Peters*).

(2) Respondents' Position

[49] The Respondents concede that they have not brought their own independent application. Accordingly, the application should be dismissed. In the alternative, this Court could exercise its discretion under the *Federal Courts Rules*, SOR/98-106 to provide advice and directions.

VII. Analysis

A. *Do the new Election Board members have lawful authority?*

[50] I will first address the Applicant’s assertion that this Court should reject the Respondents’ argument that the Band Council Resolutions are invalid because they were discrete events that should have been brought as an application for judicial review, but are now outside the 30-day limitation period set out in subsection 18.1(2) of the *Federal Courts Act*. Rather, the Applicant asserts that the focus of this application should be the Respondents’ course of conduct after November 17, 2021.

[51] Subsection 18.1(2) requires an applicant to bring an application for judicial review within 30 days after the decision is first communicated. In *David Suzuki*, the Court summarized the relevant jurisprudence governing subsection 18.1(2) (at para 173):

- The 30-day limitation period in subsection 18.1(2) does not apply where the applicant is seeking to review a matter, which is not a decision or order.
- A matter includes a policy or a course of conduct.
- A course of conduct includes a “general decision, the implementation steps, or a combination of the two, where they combine to result in unlawful government action”.
- In the context of government decisions and actions, the focus is on whether there is a “closely connected course of allegedly unlawful government action”.
- A course of conduct may also include an ongoing practice.
- Both the Rule 302 and subsection 18.1(2) jurisprudence tend to use the term “course of conduct”, and both consider whether there are closely connected decisions.
- More than one decision may be reviewed in a single application — as an exception to Rule 302 — where it is a continuing act or, a continuing course of conduct. The factors to consider in determining whether there is a continuing act or course of conduct include:



whether the decisions are closely connected; whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the decision and decision-making bodies; whether it is difficult to pinpoint a single decision; and, based on the similarities and differences, whether separate reviews would be a waste of time and effort.

[52] While the Respondents concede that they have not brought their own independent application in regard to the appropriate remedies, they do not take a specific position on the limitation issue.

[53] In *Saugeen*, this Court sought to determine the lawful Chief and Headmen for the Ojibway Nation of Saugeen. Justice Grammond found that the two applications, including the applicable resolutions, pertained to a course of conduct that could not be narrowed down to a discrete decision. Rather, the issue was whether the two resolutions validly removed and replaced the Chief and Headmen (at para 25). Similarly, in *Dakota Plains First Nation v Smoke*, 2022 FC 911 [*Smoke*], Justice Ahmed concluded that subsection 18.1(2) of the *Federal Courts Act* did not apply to a governance dispute involving two band council resolutions, as it constituted a continuing course of conduct (at para 20).

[54] The question this Court must consider, therefore, is “one of characterization as to whether there was a closely connected series of events, or separate discrete events”. As in *Saugeen* and *Smoke*, I am of the view that the answer is the former. While I acknowledge that the Band Council Resolutions were passed outside the 30-day limitation period, the “matter” in question

stems directly from their implementation and execution, namely the Respondents' subsequent conduct in maintaining their positions in office. I am unable to agree with the Applicant. The Band Council Resolutions were discrete events that can be entirely divorced from the Respondents' conduct after November 17, 2021. Accordingly, the consideration of the matter must necessarily extend to the validity the Band Council Resolutions (*Saugeen* at para 30).

[55] I also disagree with the Applicant that the Respondents ought to have sought recourse before the Election Board prior to bringing an application for judicial review. OCN itself acknowledged in both its submissions surrounding the standard of review and the appropriate remedies that there exists no independent decision-making body established by OCN to which the Court should defer to settle this dispute. The Applicant cannot employ this argument as a double-edged sword to suit their arguments as they see fit.

[56] Turning now to the validity of the Band Council Resolutions, I agree with the Respondents that the Band Council Resolutions failed to comply with the Election Code, Ethics Code, and Procedures Policy due to Chief Ballantyne's participation in the tie-breaking vote.

[57] The "hierarchy of law" dictates that legislation, including customary codes enacted by Indigenous lawmakers, "takes precedence over subordinate legislation and the common law" (*Sturgeon Lake Cree Nation v Hamelin*, 2018 FCA 131 at para 54). This principle is further enforced by subsection 5(6) of the Election Code, which provides that the Election Code is to be interpreted in accordance with the laws, codes, and policies adopted by OCN, followed by the

appropriate federal and provincial laws. Accordingly, one must first consider the conflicts of interest provisions as set out in the Election Code, Ethics Code, and Procedures Policy.

[58] Sections 11 and 13 of the Ethics Code outline the procedure for disclosing and determining conflicts of interest, as defined in subsection 4(1) of the Election Code and section 2 of the Ethics Code. First, pursuant to subsections 11(1) and (2) of the Ethics Code, a person must disclose a conflict of interest at the first meeting that the matter arises. Drawing from the Chief and Council meeting held on November 9, 2021, Chief Ballantyne acknowledged, prior to the passing of the Band Council Resolution dismissing the Respondents, that the Election Board was currently investigating two complaints and in the process of ruling on an appeal, all of which were against him.

[59] While I accept that the Applicant complied with section 11 of the Ethics Code, Chief and Council subsequently violated subsection 13(1) of the Ethics Code. Specifically, Council members did not determine by vote whether the matters before the Election Board gave rise to an actual conflict of interest. Had the Council determined that a conflict did not exist, Chief Ballantyne would have been permitted to cast the tie-breaking vote in dismissing the Election Board members and subsequently appoint new Election Board members. However, had the Council determined that a conflict did exist, Chief Ballantyne would be precluded from voting entirely (Ethics Code, s 13(2)). Instead, the Deputy Chief or another member would assume the role as chairperson in voting on the matter (Ethics Code, s 14; Procedures Policy, s 20).

[60] As an aside, it should be noted that the Ethics Code does not specifically provide for the duration of a conflict of interest. Although paragraph 11(2)(a) provides for the timing of the initial disclosure of a conflict of interest, being the first meeting at which the matter arises, it does not set out whether the conflict is maintained in subsequent meetings, or how it may be lifted. Presumably, it would be maintained in all meetings in which the matter arises, only to conclude once the matter or conflict is resolved.

[61] In light of this conclusion, I disagree with the Applicant's argument that the Respondents assert that every appointment to office of the Election Board would give rise to a conflict of interest because the Election Board has jurisdiction over Chief and Council. Rather, had the Councillors voted on the existence of Chief Ballantyne's conflict in accordance with the Ethics Code, regardless of the outcome of the vote, the November 9, 2021 Band Council Resolution would have been valid. In deviating from the required procedure, Chief and Council failed to act in OCN members' best interests and in a manner inconsistent with their Oath to Office (Election Code, s 11; Ethics Code, s 3; *Toney* at paras 30-31; *Basil v Lower Nicola Indian Band*, 2009 FC 741 at paras 95-98; *Louie v Louie*, 2018 FC 550 at para 34).

[62] Turning now to the Respondents' second argument, namely that the new Election Board members are not properly qualified under the Election Code. I agree with the Applicant that, on its face, subsection 82(2) of the Election Code only required Chief and Council to make one call for resumes for new Election Board members. This is subject to subsection 82(7) of the Election Code, which mandates Chief and Council to post a second call for resumes where there are

insufficient applicants to avoid appointing more than one “immediate relative” to another member. There is nothing in the record to indicate this was the case here.

[63] In my view, where Chief and Council decide to post subsequent calls for resumes in order to fill the positions of the Election Board, those subsequent calls must conform to the Election Code provisions. To do otherwise would defeat the spirit and intent of the Election Code: to attract and inform OCN members of the Election Board positions (Election Code, s 5(5); *Landry v Savard*, 2011 FC 720 at paras 42-43, citing *Rizzo & Rizzo Shoes Ltd, Re*, [1998] 1 SCR 27 at paras 21-23, 154 DLR (4th) 193; *Carry The Kettle First Nation v Kennedy*, 2021 FC 462 at para 61).

[64] In this regard, subsections 82(3) and (4) of the Election Code establish specific procedures that Chief and Council must follow in appointing Election Board members. Specifically, each call for resumes must be:

1. Posted for at least 28 days;
2. Posted at the Government Services Branch Office and Executive Office, published in the Natotawin, and delivered or mailed to Electors residing outside of the fifty (50) kilometer radius of the OCN 21E Lands;
3. Posted in at least three public (3) places within OCN 21E Lands,
4. Uploaded or posted to the OCN Website and Facebook page, and
5. Emailed to every Elector whose email address is on record.

[65] Applying these requirements to the present matter, it is evident that the First, Third, and Fourth Call all violated subsection 82(3) of the Election Code. I will only address the Fourth Call, however, as I believe it to be the most determinative of the issue. To recall, the Fourth Call was posted on or about November 9, 2021, with a deadline of November 24, 2021. Even absent the special meeting held in between these dates, this time period is less than the 28-day requirement. The November 17, 2021 special meeting appointing the new Election Board members further limited this time period to only eight days. In doing so, Chief and Council's conduct was in further contravention of the Election Code.

[66] In light of this violation, I do not find it necessary to address the Respondents' remaining arguments surrounding the Applicant's compliance with subsection 82(4) of the Election Code.

[67] For the sake of completeness, I will consider both parties' interpretation of the Election Code as it applies to Election Board members' term of office. Subsections 82(1) and 85(1)-(2) provide that the Election Boards' term of office begins six months prior to a general election and terminates six months prior to the next general election. Once the Election Board members' terms have expired, the office becomes vacant (Election Code, s 89(1)). However, where appointed positions are not filled by Chief and Council, the required number of current members will stay on until positions are filled (Election Code, s 82(8)).

[68] I do not read this to mean that the Election Board members are re-appointed for another full two-year term as the Respondents suggest. Rather, the Election Board members continue until such time that they are replaced by Chief and Council through the normal application

process, to a maximum term of six months prior to the next general election (Election Code, s 85(1) and (2)). Indeed, subsection 85(3) of the Election Code, which pertains to the Election Board members' term of office, specifically provides for the re-appointment of members "for another term." This re-appointment is subject to the Election Board's determination of members' eligibility and the discretion of Chief and Council. In contrast, the language included in subsection 82(8) expressly limits the use of the same language. Rather, it suggests that, in the event of a vacancy, the Election Board members continue on an interim basis. In my view, this legislative silence was deliberate (*Lukács v Canada (Transportation Agency)*, 2014 FCA 76 at para 43). Applying these provisions to the present matter, the Respondents continued in their position on an interim basis, despite being past their term in office, until Chief and Council purported to fill their positions on November 17, 2021.

B. *What are the appropriate remedies?*

[69] Section 18(1)(a) of the *Federal Courts Act* permits this Court to issue a writ of *quo warranto* against any federal board, commission, or other tribunal where the authority by which a public office is held is successfully challenged (*Peters* at para 174; *Bell* at para 58). However, given my conclusion that processes surrounding passing the Band Council Resolutions violated the Election Code, this remedy is not available to the Applicants. I decline to issue a writ of *quo warranto*.

VIII. Conclusion

[70] For the foregoing reasons, the Applicant's application for judicial review is dismissed. The Applicant violated the Election Code, Ethics Code, and Procedures Policy in passing the Band Council Resolutions appointing new Election Board members.

[71] Neither the Applicant nor the Respondents made fulsome submissions on costs. Generally, the Applicant does not request costs, while the Respondents seek costs. The Court requires further submissions from the parties on costs.



**JUDGMENT in T-106-22**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. The parties will provide submissions on costs, not exceeding 10 pages in length, within 30 days of this Judgment.

"Paul Favel"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-106-22

**STYLE OF CAUSE:** OPASKWAYAK CREE NATION v CLAIRE COOK,  
JUDY HEAD, RHONDA HEAD, DIANE PELLY, AND  
BRADLEY YOUNG

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** OCTOBER 6, 2022

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** APRIL 11, 2023

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