Federal Court  Cour fédérale

Date: 20190705

Docket: T-1246-18

Citation: 2019 FC 898

Ottawa, Ontario, July 5, 2019

PRESENT: Madam Justice Strickland

BETWEEN:

WARREN SCOTT MCCALLUM

Applicant

And

PETER BALLANTYNE CREE NATION and CLARISSE LECOQ

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of the oral decision of the Appeal Tribunal of the Peter Ballantyne Cree Nation [PBCN] rendered on May 31, 2018, which was followed by written reasons. Pursuant to s 8(e)(iii) of the Peter Ballantyne Cree Nation Election Code of 2014 [PBCN Election Code or Code], the decision upheld an appeal of the April 10, 2018 band councillor election results for the position of councillor in the Prince Albert Urban district and called for a by-election.

Background

[2] PBCN, a named respondent in this matter, is an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5. PBCN's elections are governed by the PBCN Election Code, which was effected in 2014. On April 10, 2018, PBCN held a general election for chief and for the election of councillors in each of its seven electoral districts or communities.

[3] The Applicant, Warren Scott McCallum, is a member of the PBCN and was a candidate for the position of councillor in the Prince Albert Urban district in the election held on April 10, 2018.

[4] The Respondent, Clarisse Lecoq, is a member of PBCN and was also a candidate for the position of councillor in the Prince Albert Urban district in the subject election.

[5] The Applicant obtained the majority of votes cast for the position, with the Respondent placing second, obtaining 26 fewer votes.

[6] On April 12, 2018, the Respondent filed an appeal, pursuant to s 8 of the PBCN Election Code, concerning the election of the Applicant to the position of councillor for the Prince Albert Urban district. The PBCN Appeal Tribunal, composed of three members, allowed an appeal hearing [Appeal Hearing], which was held on May 31, 2018, during which the Respondent (the appellant therein) and the Applicant were both represented by legal counsel, and both called witnesses to give evidence. The Appeal Tribunal rendered its decision orally, immediately after the Appeal Hearing, and provided written reasons on or about June 7, 2018.

Decision Under Review

[7] At the Appeal Hearing, the Respondent called six witnesses: Brian McKay, Debbie Custer, Maxine Ballantyne, Bella Ratt, Raylene Sewap, and Eric Nateweyes, in addition to testifying herself. Nine exhibits were entered during the course of their testimony. The Applicant called Randy Clarke as a witness and also testified himself. During Mr. Clarke's testimony, one exhibit was entered into evidence. Each witness was questioned by counsel for the party tendering that witness, cross-examined by opposing counsel, and re-direct was afforded. The Appeal Tribunal also posed questions that it deemed necessary.

[8] At 9:15 p.m., the Appeal Tribunal advised that it would break to discuss the evidence to see if it could reach a decision that evening. If not, it would reconvene the hearing to advise that it would adjourn and a decision would be rendered at a later date. Upon reconvening that evening, the Appeal Tribunal advised of its decision. In its subsequent written reasons, it stated that the issue of loitering by the Applicant during the election was questionable as he had testified that he had not done so and explained his presence on election day, however, several witnesses stated that they observed him to be present at different times throughout the day. As well, loitering was not defined in the PBCN Election Code. In the result, the Appeal Tribunal found that uncertainty existed as to whether his actions constituted loitering.

[9] The Appeal Tribunal stated that it was concerned with the following issues raised by the testimony of various witnesses:

1. The lack of notice provided to the candidates and members of the community with respect to the change of polling station venue.
2. The publication of the advance polling pursuant to s 5(f)(iv) of the PBCN Election Code was not complied with. Mr. Clarke, who was the appointed Head Electoral Officer, had

testified that he did not think this was necessary. However, the Appeal Tribunal found that when reading that section, it appeared that the publication should have been posted once in newspapers in Saskatoon, Prince Albert, La Ronge, Flin Flon, while other places outside of those locations are at the discretion of the Head Electoral Officer.

3. Not all of the candidates were notified of the change in polling station. One out of the three candidates testified that he had been contacted by Mr. Clarke with respect to the change of location.

4. Sample ballots were posted on the ballot box as an example for individuals who may be voting for the first time. The Appeal Tribunal wondered why the sample ballots were not put face down so that the ballots would at least be identified by colour and not be exposed to the possibility of having an X on the box (sample ballot).

5. The contradictory evidence regarding the number of checks of the ballot boxes and polling stations that were made by the electoral staff throughout the day.

[10] After stating its concerns, the Appeal Tribunal concluded as follows:

> The Appeals Tribunal could not conclude that any of the candidates in the 2018 PBCN Urban Election did anything wrong during the election. The Appeals Tribunal are concerned about the conduct and election procedures of the election staff, before, during and after the Advance Poll and General Election days; their actions or inactions could have materially affected the outcome of the election.
>
> The Appeals Tribunal believes the PBCN Election Code of 2014 is vague and needs much work, particularly the Appeal Tribunal section, in that it is inadequate and does not provide the Appeal Tribunal a remedy to this particular situation. Accordingly, at this point, the only recommendation that they have is to re-run the election, but that is not an option within the Code.
>
> Lastly, to have faith that the election is run fairly and without prejudice or compromise to any of the candidates, a new panel of election staff should be hired to run the Urban election.
>
> The Appeals Tribunal wished to recommend that all employees working the election should confirm that they received a handbook at the beginning of their duties, review it and confirm they understood it. The Head Electoral Officer should meet with all candidates to explain the rules about the code. Any accusations made by an appellant with respect to a candidate should have all of

> the named parties listed. The issue of loitering should be defined within the code.
>
> In general, the Appeals Tribunal found that the lack of adherence to the election procedures set out in the PBCN 2014 Code and the close call and difference of 26 votes between Ms. Lecoq and Mr. McCallum could have affected the outcome of the election and concluded that s 8 e) iii) had [*sic*] was the most appropriate avenue to remedy the issue.

Issues and standard of review

[11] The Applicant submits that the appeal process conducted by the Appeal Tribunal breached procedural fairness and natural justice, and was unreasonable. I would note that the Applicant's written submissions all pertain to breaches of procedural fairness and natural justice that he alleges arise out of the appeal process. In the context of his submission on the standard of review, the Applicant states that issue of whether the Appeal Tribunal has the authority to allow testimony from a candidate who failed to file an appeal, and to accept evidence outside the grounds of appeal raised by the Respondent, attracts the reasonableness standard as the Applicant is requesting the Court to interpret the PBCN Election Code. Beyond this, the Applicant makes no submissions specific to interpretation of the Code or the reasonableness of the decision.

[12] In my view, given the Applicant's submissions, the issue is whether the Appeal Tribunal breached the duty of procedural fairness owed to the Applicant.

[13] Issues of procedural fairness are reviewable on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canada v Akisq'nuk First Nation*, 2017 FCA 175 at para 19 [*Akisq'nuk*]; *Gadwa v Kehewin First Nation*, 2016 FC 597 [*Gadwa*] aff'd 2017 FCA 203). I note that the Federal Court

of Appeal has recently stated that a court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] (*Canadian Pacific Railway Company v Canada*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]) and, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed (*Canadian Pacific Railway* at para 54).

[14] To the extent that the issues raised concern the reasonableness of the decision itself or the interpretation of the PBCN Election Code, they attract a reasonableness standard (*D'Or v St. Germain*, 2014 FCA 28 at para 6 [*D'Or*]; *Gadwa* at para 19; Canada (*Canadian Human Rights Commission*) *v Canada* (*Attorney General*), 2018 SCC 31 at paras 35, 37).

The PBCN Election Code

[15] As noted above, the April 10, 2018 election was governed by the PBCN Election Code. The relevant parts of this Code follow:

[16] Section 2 of the PBCN Election Code defines a corrupt practice as follows:

> "**CORRUPT PRACTICE**" means any act done by a Candidate or an elected official, whether Chief or Councillor, who unlawfully and/or wrongly uses his/her name or position of authority or trust to procure some benefit or favour for him/herself or for another person contrary to his/her official duties and/or the rights of other persons and includes any act or omission that is recognized by law or custom to be a Corrupt Practice, including coercion or vote buying.

[17] Section 5 sets out election and nomination procedures including the following:

(f) The Electoral Officers shall:

i. Post all notices and distribute all election information pursuant to this election Code;

ii. Establish and publicly post a voters list of eligible Electors for each Reserve/Community by the third Friday in January prior to the election.

…..

iv. By the third Friday in January prior to the Election, post notices at the Peter Ballantyne Cree Nation offices, and once in newspapers published Saskatoon, Prince Albert, La Ronge, Flin Flon, and such other places as the Head Electoral Officer decides are necessary, to notify the eligible Electors of the Nomination Meetings and Election dates which will include the place and time for each;

v. Arrange facilities to conduct a Nomination Meeting, advance polls, and the General Election; ensure the facilities have internet connection & computers available for all polling stations.

…..

viii. Count the ballots in the presence of the Members and designated Scrutineers and announce and post the official Election results;

….

(l) Procedures on ELECTION DAY shall be as follows:

i. The ballots, metal ballot boxes, polling station and all facilities required for election purposes shall be the responsibility of the Head Electoral Officer, Assistant to the Head Electoral Officer and/or Deputy Electoral Officers including the full supervision, security, and proper conduct of Members at all polling stations(s);

…..

vi. Following the closure of the polling station, the Electoral Officers shall, in the presence of the Members, present, examine and tabulate the ballots. Following the

> initial count before the Members, the Electoral Officers, shall release the official results of the Election.
>
> ….
>
> xi. Any Councillor Candidate has a right to a re-count for that community only if the number of votes between candidates is less than twenty (20) for the elected Councillor. This request must be made in writing within forty-eight (48) hours after the closing of the polls.
>
> xii. The Head, Deputy and other Electoral Officers shall ensure that there is no loitering in the vicinity of the polling stations and they are hereby empowered to control or evict loiterers if deemed necessary. Loitering includes actions by Candidates or representatives. For the purposes described in this Election Code, loitering within fifty (50) m of the polling station shall not be tolerated.
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> …..
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> (o) There shall be advance polls in each of the identified Peter Ballantyne Cree Nation reserves and communities for one day from 11:00 a.m. to 8:00 p.m., to be held at least 5 days before the General Election. Saskatoon and La Ronge urban (for Prince Albert Urban Councillor position only) and Kinoosao (for Southend Councillor positions only) will have advance polls only. All who cast their vote in advance polls will be entered into a computer for monitoring purposes for Election Staff so no Member will be able to double vote in any community.

[18] Section 7 addresses the Appeal Tribunal:

> The Appeal Tribunal shall consist of one eligible Member from one of the seven (7) communities: Pelican Narrows, Deschambault Lake, Southend, Sandy Bay, Denare Beach, Sturgeon Landing, and Prince Albert Urban. Appeal Tribunal members shall be 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. Each member must have a working knowledge of the policies and procedures of the current Administration for the purposes of understanding their role and responsibilities as it pertains to their appointment to the Appeal Tribunal.

(a) An Appeal Hearing will take the form of a formal meeting consisting of the Appeal Tribunal, Appeal Tribunal independent legal counsel, the Appellant and his/her legal counsel, and any affected Candidates and their legal counsel.

…..

[19] Section 8 sets out the election appeal procedures:

8. The 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.

(b) An appeal is restricted to the following grounds:

i. Conduct that contravenes this Election Code which may reasonably have affected the outcome of the Election;

ii. A Corrupt Practice related to the Election which may reasonably have affected the outcome of the Election;

(c) The Appeal Tribunal shall be entitled to retain independent legal counsel that is not a PBCN Band lawyer and will rule on whether to allow or disallow an Appeal Hearing within two (2) weeks after expiration of the twenty (20) day appeal period.

(d) If there is sufficient evidence to warrant an Appeal Hearing, the Appeal Tribunal will order a hearing within ten (10) days. The Appeal Tribunal shall notify the Appellant and any affected Candidates of the date, time, and place of the Appeal Hearing.

(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:

i. Deny the Appeal

ii. Uphold the Appeal but allow the Election to stand on the grounds that the conduct complained of could not reasonably have affected the outcome of the Election;

> iii. Uphold the Appeal and call for a By-Election within thirty (30) days of the upholding of an appeal decision;
>
> (f) The decision of the Appeal Tribunal is final and binding on all parties.

Preliminary Matters

[20] When the Applicant filed his Notice of Application on June 25, 2018, it named PBCN and the three individual members of the Appeal Tribunal as the respondents. By an Order of this Court dated February 12, 2019, the individual members of the Appeal Tribunal were removed as respondents as they had been so named in contravention of Rule 303(1)(a) of the *Federal Court Rules*, SOR/98-106. And, while Clarisse Lecoq has been involved in this matter, at no time was she ever formally added as a respondent or as an intervenor to this application for judicial review. When this was raised with counsel at the commencement of the hearing before me, it was agreed that she would be added as a named respondent and the style of cause would be amended accordingly.

[21] Second, while much of the Applicant's appeal, and the evidence of witnesses at the Appeal Hearing, concerned allegations of acts of election impropriety or corruption, the Appeal Tribunal specifically found than none of the candidates did anything wrong in the course of the Prince Albert Urban district election. Unsurprisingly, the Applicant has not taken issue with that finding. Accordingly, that aspect of the decision and evidence related to it will not be addressed in these reasons.

Positions of the Parties

i) PBCN's Position

[22] In this application for judicial review, PBCN has filed a Memorandum of Fact and Law in which it states that it takes no position and makes no submissions in response to the issues raised by the Applicant. PBCN does, however, make submissions on costs, which will be addressed below.

ii) Applicant's Position

[23] The Applicant submits that it is not disputed that the Appeal Tribunal's decision triggers the duty of procedural fairness (*Gadwa* referencing *Baker* at p 836 and *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at p 653; *Mavi v Canada (Attorney General)*, 2011 SCC 30 at para 38 [*Mavi*]). Rather, the question is the content of that duty. In that regard, the Applicant makes reference to the *Baker* factors, and submits that the content of the duty must be assessed contextually.

[24] He also submits that the Appeal Tribunal failed to follow the procedure set out in the provisions of the PBCN Election Code and breached its duty of procedural fairness by:

i. Breaching s 8(a) of the Code by accepting deposed and oral evidence, in addition to the affidavit of the Respondent, as a candidate;

ii. Breaching s 8(e) of the Code by allowing chief and cross-examinations consisting of individuals who were not candidates within the general election;

iii. Breaching s 8 of the Code by allowing the oral testimony of Eric Nateweyes, which alleged conduct outside the grounds of the appeal relied upon by the Respondent;

iv. Failing to give the Applicant notice with respect to the nature of Eric Nateweyes' allegations made at the Appeal Hearing.

[25] The Applicant references my analysis in *Gadwa*, quoting paras 48–59, but submits that he is owed a higher duty of procedural fairness given the decision-making powers of the Appeal Tribunal. Further, because the calling of a by-election of a duly elected official and the departing from the enacted procedure of an appeal in a First Nation general election is not a trivial matter.

[26] The Applicant submits that he objected to the oral testimony of Eric Nateweyes and the raising of allegations or the leading of evidence outside the grounds listed in the Respondent's appeal. Further, he did not receive fair nor any notice of the Applicant's intention to lead evidence from Mr. Nateweyes or the nature of his anticipated testimony, upon which, the Applicant asserts, the Appeal Tribunal placed substantial weight. Nor was his counsel afforded the opportunity to make closing arguments with respect to the admissibility of Mr. Nateweyes' testimony.

[27] According to the Applicant, the PBCN Election Code requires a candidate to file grounds for appeal within 20 days from the election, and limits the submission of material supporting an appeal to an affidavit of the affected candidate. However, the Appeal Tribunal allowed considerable material in addition to that of an affected candidate. Further, Eric Nateweyes' failure to file an appeal within the required 20 days prohibits him from submitting grounds for appeal outside those raised by the Respondent.

[28] The Applicant also submits that the Appeal Tribunal commented on the shortcomings of the PBCN Election Code and suggested that calling a by-election for elected positions, in addition to the Prince Albert Urban councillor position, would have been most equitable. But, failing to have the jurisdiction to do so, it called only the by-election for the Prince Albert Urban position. In failing to have sufficient jurisdiction to direct precise procedural fairness or just

treatment of the election, any quasi-remedy should also fail. Further, the reason raised by the Appeal Tribunal to justify the departure from the clear wording of the appeal procedures in s 8 of the PBCN Election Code is unacceptable given the consequences to the Applicant (*Prince v Sucker Creek First Nation #150A*, 2008 FC 1268 at paras 48–49).

[29] Finally, the Applicant submits that, regardless of the duty of fairness owed to him, the aforementioned flaws in the appeal process are unreasonable, incorrect and unfair.

iii) Respondent's Position

[30] The Respondent alleges that in addition to the allegations of procedural unfairness raised in the Applicant's Memorandum of Fact and Law, the Applicant indicated, when cross-examined on his affidavit filed in support of this application for judicial review, that it was procedurally unfair for the Appeal Tribunal to dismiss the election appeals at Pelican Narrows and Sandy Bay, but not the appeal at Prince Albert. The Respondent states that this argument is without foundation.

[31] The Respondent submits that the PBCN Election Code sets out a two-step procedure. At the first stage, the submitted grounds of appeal and supporting candidate affidavit are assessed to determine whether it is sufficient to warrant an Appeal Hearing. If so, at the second stage a hearing is held.

[32] The Respondent submits that the Applicant's argument that it was procedurally unfair for the Appeal Tribunal to accept deposed and oral evidence in addition to the affidavit submitted by the Respondent as a candidate with her appeal, confuses the two-stage process employed by the PBCN Election Code.

[33] As to the allowing of chief and cross-examination of individuals who were not candidates within the general election, while the Code is silent as to the manner in which evidence will be taken and who can testify, it is clear that any witness who was called was allowed to be cross-examined by the other side. Further, at no time did the Applicant object to evidence being led of a witness who was not a candidate. In fact, the Applicant himself called as a witness Randy Clarke, the Head Electoral Officer, who was not a candidate.

[34] As to the calling of Eric Nateweyes as witness and the Applicant's allegation that the Appeal Tribunal allowed testimony that alleged conduct outside the grounds of appeal raised by the Respondent, the Applicant submits that Eric Nateweyes was in fact a candidate in the election, but he did not file an appeal. Further, his testimony was encompassed by the overall grounds of appeal that the Respondent raised, which included "breaking of policies and procedures and rules of the election". In fact, it was Randy Clarke's testimony, the Applicant's witness, that established the irregularities for which the election for Prince Albert Urban councillor was set aside. His evidence was the best evidence of the irregularities. Had Mr. Nateweyes' testimony been the only evidence of procedural irregularities, then perhaps some consideration could be given to the Applicant's argument, however, his testimony became redundant once Randy Clarke testified. The Appeal Tribunal did not rely of the testimony of Mr. Nateweyes.

[35] Concerning the Applicant's argument that he was not given notice of the nature of Eric Nateweyes' allegations made at the hearing, the Respondent points out that the PBCN Election Code does not provide that disclosure must be made concerning the evidence an appellant may wish to lead. Nor does it state that the only admissible evidence is that raised in the candidate

affidavits. Advance disclosure is only relevant in criminal proceedings. It would be procedurally unfair and an injustice if the Appeal Tribunal was to ignore evidence of irregularities or misconduct.

[36] Here the Appeal Tribunal correctly followed the two-stage procedure and conducted an Appeal Hearing with all parties having a right to call witnesses and conduct cross-examination. The evidence of Randy Clarke showed procedural irregularities, which the Appeal Tribunal correctly concluded could have affected the outcome of the election. The Appeal Hearing was conducted fairly; it heard all the witnesses, allowed cross-examination, accepted exhibits, and gave a detailed and well-reasoned decision. Accordingly, there was neither a breach of procedural fairness or natural justice.

[37] The Respondent also submits, on the basis of the treatment of a certified question in *Baker*, that once the Appeal Tribunal accepted the appeal for hearing in accordance with s 8(d) of the PBCN Election Code, it was open to the Appeal Tribunal to consider all aspects of the appeal lying within its jurisdiction.

[38] Further, in applying the principles in *Baker*, it is clear that there was no procedural unfairness since the Applicant had full opportunity to examine and cross-examine witnesses and to present his own testimony. The mere fact that the Applicant's witness supported the Respondent's contention that the Code was not followed does not amount to procedural unfairness. An example of what constitutes procedural unfairness is found in *Okemow v Lucky Man Cree Nation*, 2017 FC 46 [*Okemow*].

Analysis

[39] I agree with the Respondent that reading s 8(a) to (e) of the PBCN Election Code together establishes a two-stage appeal procedure. Similar provisions were considered in *Bill v Pelican Lake Band*, 2006 FC 679 at paras 46, 47 and *Linklater v Peter Ballantyne Cree Nation Election Appeal Committee*, 2011 FC 1353 at para 5, where the two-step process was confirmed.

[40] Any Candidate (defined in s 2(e) as an eligible PBCN member seeking the office of either Councillor or Chief) may appeal the results of an election by delivering a notice of appeal setting out the grounds of appeal and supported by an Affidavit of the Candidate (s 2(d) defines "Affidavit" as a written sworn statement of the fact(s) voluntarily made by a Candidate under oath or affirmation administered by a person authorized to do so by law). At the first stage, the Appeal Tribunal decides, within two weeks of the expiry of the twenty-day appeal period, whether or not to allow an Appeal Hearing (which is not a defined term). Section 8(d) states that if there is sufficient evidence to warrant an Appeal Hearing, the Appeal Tribunal will order a hearing within ten days. Thus, at this first or threshold stage, the evidence before the Appeal Tribunal would, at a minimum, be the Candidate's Affidavit and the notice of appeal. Section 8(e) pertains to the second stage of the appeal process, the conduct of the Appeal Hearing.

iv) Section 8(a)

[41] The Applicant takes the view that because s 8(a) of the PBCN Election Code permits the commencement of an appeal by a Candidate by delivering a notice of appeal setting out the grounds of appeal, supported by a Candidate's Affidavit, this must be read to exclude the

submission of any other evidence other than the Candidate's Affidavit. Therefore, the Appeal Tribunal erred in considering such evidence.

[42] The Applicant offers no statutory interpretation analysis with respect to s 8 of the Code or any authorities in support of his view.

[43] In my view, because a plain reading of s 8(a) to (d) does not exclude the submission of other evidence at the first stage of the appeal process, there would be nothing inherently procedurally unfair or unreasonable about the Appeal Tribunal accepting for consideration evidence from other sources. It may be, for example, that an appellant would not have personal knowledge of certain facts or events and that such information would be necessary to assess the appellant's allegation. The Appeal Tribunal could accept such evidence and, together with the other evidence before it, assess whether it was relevant, reliable and material so as to be sufficient to meet the threshold requirement, thereby warranting an Appeal Hearing.

[44] This view finds support in *Wolfe v Ermineskin*, 2001 FCA 199 [*Wolfe*], referenced in *Strawberry v O'Chinese First Nation*, 2017 FC 869 at para 39, which is relied upon by the Respondent. In *Wolfe*, the Federal Court of Appeal had to determine whether the right to appeal to the Election Appeal Board as provided for by the Ermineskin Tribal Election Regulations was an adequate alternative remedy to judicial review. Those regulations provided that within 14 days after the holding of an election, a candidate (which the appellant in that case was not) could appeal to the board on certain specified grounds. The Federal Court of Appeal concluded that it was reasonably open to the trial judge to conclude that the right to appeal was an adequate alternative remedy, and, as to the submission of evidence by persons other than candidates, the Court stated:

> While the right of appeal to the Board is limited to candidates in the election, there is no evidence that the appellant had taken any steps to see whether a candidate was willing to take his concern to the Board. Further, we are not persuaded by counsel's argument that the right of appeal is not an adequate remedy because the procedures of the Board for examining a complaint that are prescribed in Regulations 28 and 29 are unsatisfactory. In our view, the Regulations do not preclude the Board from properly investigating a complaint in a fair manner, including, where appropriate, by providing an opportunity for a person who was not a candidate in the election to put before the Board evidence in support of the complaint.

[45] Further, Courts will defer to any reasonable interpretation adopted by an administrative decision-maker, even if other reasonable interpretations may exist (*McLean v British Columbia (Securities Commission),* 2013 SCC 67 at para 40).

[46] Based on the foregoing, I do not agree with the Applicant that the Appeal Tribunal breached s 8(a) of the PBCN Code by accepting evidence in addition to the Applicant's Candidate Affidavit. That said, it is also entirely unclear what evidence was before the Appeal Tribunal when it determined that an Appeal Hearing was warranted.

[47] Although not addressed in the Applicant's written submissions, in his June 27, 2018 affidavit made in support of this application for judicial review, the Applicant states that the 12 documents attached as exhibits to his affidavit "were filed and accepted by the Appeal Tribunal in the Urban Appeal Hearing". Further, that of the authors of those documents, only the Respondent (for the Prince Albert Urban area) and Eileen Linklater (for Pelican Narrows area) were Candidates who filed an appeal. Despite this, the Appeal Tribunal accepted for filing all of the material contained in the exhibits in direct contravention of s 8(e) of the Code. He also states that this was filed in connection with the Appeal Hearing.

[48] I would first note that s 8(e) is concerned with the second stage of the appeal process, the Appeal Hearing, and that these exhibits, other than the Respondent's appeal letter and Candidate's Affidavit, do not form part of the Certified Tribunal Record [CTR]. If, in fact, this material was accepted by the Appeal Tribunal as part of the Respondent's appeal, then this would suggest that it was accepted at the first stage of the appeal process in determining if an Appeal Hearing was warranted. This is supported by the fact that the Appeal Tribunal decision clearly sets out the evidence that was submitted during the hearing, which it identifies as exhibits to the hearing. The CTR also verifies that the Appeal Tribunal produced any and all relevant and material documents in the Appeal Tribunal's possession, custody and control, and that they were all considered by the Appeal Tribunal in making its decision.

[49] Based on the record before me, it is not possible to determine what, if any, "deposed and oral evidence" was submitted in support of the first stage of the appeal process, other than the Respondent's notice of appeal and Candidate's Affidavit. Nor is it possible to reconcile the Applicant's submission pertaining to s 8(e) with the CTR, and, in that regard, I prefer the evidentiary record as provided in the latter.

[50] In any event, I have found above that s 8(a) does not exclude the admission of evidence other than the notice of appeal and Candidate's affidavit at the first stage of the appeal process and it was, therefore, not a breach of procedural fairness if the Appeal Tribunal chose to do so.

v) Section 8(e)

[51] I also do not agree with the Applicant's second submission that the Appeal Tribunal breached s 8(e) by allowing direct and cross-examination of witnesses other than Candidates.

[52] Once a decision has been made to hold an Appeal Hearing, the only procedural requirements found in the PBCN Election Code are that the Appeal Tribunal will order a hearing within ten days and shall notify the appellant and any affected Candidates of the date, time and place of the Appeal Hearing, pursuant to s 8(d), and that the hearing is to 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, pursuant to s 8(e). The PBCN Election Code is otherwise silent as to the manner in which the Appeal Hearing will proceed, including how evidence will be taken and who can testify. In the face of such silence, there is nothing to preclude the Appeal Tribunal from determining its own procedure, provided it is not otherwise inconsistent with the PBCN Election Code and procedural fairness (*Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at p 569; *Cardinal v Bigstone Cree Nation*, 2018 FC 822 at paras 27–28).

[53] As a preliminary observation, I note that while the Applicant asserts that the Appeal Tribunal's decision was procedurally unfair because it failed to comply with the appeal process set out in s 8 of the PBCN Election Code with respect to the calling of witnesses, it does not appear that the Applicant challenged the Appeal Tribunal's interpretation and application of the Code at the Appeal Hearing. The Appeal Tribunal's reasons note that there were no preliminary issues or applications raised by either party's legal counsel. Both sides called witnesses – candidates and others – who were examined in chief, cross-examined, and the opportunity to re-direct was offered. No objection to this procedure is indicated. The reasons do indicate that counsel for the Applicant made three objections, but each of these pertained to the admissibility of hearsay evidence. Given that the Applicant and Respondent both arrived at the hearing with

their witnesses and counsel, it would follow that they were aware of and prepared for the intended process.

[54] To the extent that the Applicant is now challenging the procedure adopted by the Appeal Tribunal of allowing witnesses to be called, there is no evidence that the Applicant raised this issue with the Appeal Tribunal. As this Court noted in *Muskego v Norway House Cree Nation*, 2011 FC 732 at para 42:

> 42 It is a well-established principle that a party must raise an issue of procedural fairness at the first opportunity. The failure to do so will amount to an implied waiver: see, for example, the decision of this Court in *Kamara v. Canada (Minister of Citizenship & Immigration)*, 2007 FC 448 (F.C.):
>
> > [26] ...The jurisprudence of the Court is clear; such issues dealing with procedural fairness must be raised at the earliest opportunity. Here, no complaint was ever made. Her failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. See *Restrepo Benitez et al v MCI*, 2006 FC 461 (CanLII), 2006 FC 461 at paras 220-221, 232 & 236, and *Shimokawa v MCI*, 2006 FC 445 (CanLII), 2006 FC 445 at paras 31-32 citing *Geza v MCI*, 2006 FCA 124 (CanLII), 2006 FCA 124 at para. 66.

(Also see *Uppal v Canada (Minister of Citizenship & Immigration)*, 2006 FC 338 at paras 51–52).

[55] That said, based on his submissions, it appears that the Applicant's primary concern is not that the evidence took the form of direct and cross-examination, but rather that evidence was led from individuals who were not Candidates. His submission is not clear on this point, but it appears to be based on the fact that s 8(e) lists certain individuals whose presence is explicitly

required at an Appeal Hearing. However, this provision would appear to be directed at ensuring that the party bringing the appeal – the appellant – as well as other Candidates affected by it, and their legal counsel, will participate in the Appeal Hearing. Nothing in s 8(e) restricts witnesses to persons who are Candidates or precludes Candidates from calling other witnesses to give evidence. Doing so is, therefore, not in breach of that provision and is not an inherent breach of procedural fairness. Further, interpreting this requirement in a way that excludes the presence of others for the purpose of giving evidence could have the result of preventing the Appeal Tribunal from effectively carrying out its function. Evidence of an appeal ground may not be within the personal knowledge of an applicant (see *Gadwa* at para 61). And, where a ground of appeal turns on credibility, hearing oral testimony may be the most effective way for an Appeal Tribunal to perform its fact-finding function.

[56] In sum, the appeal Tribunal did not breach its duty of procedural fairness by permitting oral testimony by Candidates and other witnesses.

vi) Oral Testimony of Eric Nateweyes

[57] Eric Nateweyes was a Candidate in the election. Therefore, as I understand the Appellant's submissions, he does not suggest that a breach of procedural fairness arises from Mr. Nateweyes being permitted to give testimony, as such, at the Appeal Hearing. Rather, the Applicant submits that the Appeal Tribunal breached s 8 of the PBCN Election Code by allowing Eric Nateweyes to give testimony that alleged conduct outside of the grounds of appeal relied upon by the Respondent. The Applicant submits that he objected to this. Further, that he had no notice of the nature of Mr. Nateweyes' anticipated testimony, upon which the Appeal Tribunal

placed substantial weight. Nor was his counsel afforded an opportunity to make closing arguments with respect to the admissibility of Mr. Nateweyes' testimony.

vii) Objection to testimony

[58] In the Applicant's affidavit filed in support of this application for judicial review, he states that Eric Nateweyes, who was also a Candidate in the Prince Albert Urban district, raised issues outside the Respondent's grounds of appeal, and gave evidence in support of "his appeal". The latter reference may be related to the Applicant's allegation, contained in his Notice of Application, that the Appeal Tribunal breached the duty of procedural fairness owed to the Applicant "by allowing an appeal of an unsuccessful candidate, Eric Nateweyes, who did not file an appeal, in contravention" of s 8(a) of the Code. If so, this is of no merit. Mr. Nateweyes was not purporting to launch an appeal by way of testifying at the Appeal Hearing convened as a result of the Respondent's complaint.

[59] The Applicant also submits that he instructed his counsel to object to Mr. Nateweyes' testimony. He states that although the Appeal Tribunal allowed Mr. Nateweyes to continue, his counsel submitted that the procedural breach and the resulting reasoning as to why the Appeal Tribunal should disregard Mr. Nateweyes' submissions was more appropriately addressed in closing argument, which the Appeal Tribunal refused to allow his counsel to make.

[60] However, in the Respondent's September 4, 2018 affidavit filed in support of this application for judicial review, she contests this allegation. She states no objection to the testimony of Mr. Nateweyes was made to the Appeal Tribunal. Further, that she has read the decision of the Appeal Tribunal, and that it was diligent in recording the evidence, including the

objections of the lawyers. The only objections were recorded at paragraphs 47 and 49. At no time, while she was present, was the Appeal Tribunal told that there was an issue with Mr. Nateweyes' testimony.

[61] While there is no recording or transcript of the hearing, the Appeal Tribunal did provide detailed reasons. These reflect that Applicant's counsel made three objections, two of which were during Mr. Nateweyes' testimony. Specifically, the first objection occurred after Mr. Nateweyes had testified about the change in advance polling station in Saskatoon on the day of the advance polls without the requisite notice requirements being met and that he had not personally been notified of same. After this testimony, the Appeal Tribunal stated that "Mr. Nateweyes was wanting to provide testimony with respect to conversations he had with other individuals who would not provided [sic] copy of documentation to him however Ms. Stonechild objected to his conversations with individuals who were not present to testify that date [sic]". Second, after Exhibit 9A was introduced, being Mr. Nateweyes' notes of his conversation with Mr. Carter, the reasons record that "Ms. Stonechild objected to Mr. Nateweyes discussing his conversation he had with Mr. Carter, but did not object to the notes being made as exhibits."

[62] The Appeal Tribunal's decision does not indicate that the Applicant objected to the content of Mr. Nateweyes' evidence on the basis that it exceeded the grounds of the Respondent's appeal, or suggest that this was ever put in issue. The objections concerned inadmissible hearsay. Nor does the decision indicate that Applicant's counsel sought to address this in closing arguments or objected, on the basis of procedural fairness or otherwise, to the loss of the opportunity to do so.

[63] I prefer the evidence of the Respondent as it is consistent with the Appeal Tribunal's approach to recording objections, and I am not persuaded that an objection was made to Mr. Nateweyes giving evidence at the Appeal Hearing or to the content of his testimony. I also note that it was open to counsel for the Applicant, if she believed that there had been a breach of procedural fairness arising from the alleged objection and lack of opportunity to make closing arguments concerning the admissibility of Mr. Nateweyes' testimony, to file an affidavit in support of this submission and have alternate counsel represent the Applicant at the judicial review. This approach was not taken.

[64] In sum, I am not persuaded that at the Appeal Hearing the Applicant objected to either Mr. Nateweyes giving testimony or to the content of that testimony, other than the hearsay objections. Regardless, I will also consider whether a breach of procedural fairness arises on the basis of an alleged lack of notice and opportunity to respond to his testimony.

viii) Notice and an opportunity to respond

[65] The Respondent's notice of appeal (appeal letter) and Candidate's Affidavit were primarily concerned with alleged loitering and vote buying by the Applicant. As noted above, the Appeal Tribunal rejected these arguments. The Respondent's notice of appeal did raise some procedural violations, specifically regarding security on nomination night (relating to s 5(h)(xi) of the Code), that, upon the closure of the polling station, members were required to leave the station before the votes were tabulated which was required to be done in the presence of the band members (relating to s 5(l)(vi) of the Code), and whether there should have been an advance polling station at Prince Albert (relating to s 5(o) of the Code). However, these were not the procedural violations that ultimately grounded the Appeal Tribunal's decision to order a

by-election. More generally, the Respondent's appeal letter references s 8(b)(i) of the Code, and her Candidate's Affidavit states that policies, procedures and rules of the election were broken.

[66] Under s 8(b), there are only two possible grounds of appeal: conduct that contravenes the Election Code which may reasonably have affected the outcome (s 8(b)(i)), and corrupt practices which may reasonably have affected the outcome (s 8(b)(ii)). As noted above, the Respondent's appeal letter and Candidate's Affidavit raise both of these general grounds but do not specify the procedural defects that were ultimately identified and relied upon by the Appeal Tribunal in its decision. This leads to the question of whether the Appeal Tribunal, in allowing Mr. Nateweyes' testimony, breached procedural fairness by failing to provide the Applicant with notice of the case against him and an opportunity to respond to it.

[67] In that regard, it is important to recall that, while the Applicant only takes issue with Eric Nateweyes' testimony, the Appeal Tribunal stated that it was concerned with the election process issues that it identified which were "raised by the testimony of various witnesses". Notably, in my view, this included the Applicant's own witness, Randy Clarke, the Head Electoral Officer.

[68] A summary of the most relevant witnesses' evidence follows.

a) Bella Ratt

[69] The first witness was Bella Ratt. Her direct evidence addressed a defaced ballot on a ballot box. She testified that while she was waiting to vote she saw a sample sheet/ballot taped on the top of the ballot box which was visible to all. She also saw the Applicant's name on the ballot with an "X" beside it. This was at about 3:30–4:00 on election day. She advised the Deputy Returning Officer of this and asked her to remove the ballot. The Deputy Returning

Officer instead scribbled out the “X”. On cross-examination by counsel for the Applicant, Ms. Ratt confirmed that she saw the Deputy Returning Office cross out the “X” but that it was still visible. In answer to questions by the Appeal Tribunal, Ms. Ratt stated that she did not know how long the sample ballot was on the ballot box and who put the “X” on the box.

b) Raylene Sewap

[70] Raylene Sewap, the Deputy Electoral Officer, testified that she saw Ms. Ratt vote and that Ms. Ratt then came to speak to her about a blank ballot on the ballot box that had a mark on it. All of the ballot boxes had the names of those running in the election taped to the top of the appropriate box. Ms. Ratt had complained about an “X” beside the name of the Applicant on the ballot on top of the box for council members. Ms. Sewap testified that she did not put the “X” there. She confirmed that she first crossed out the boxes beside the candidates’ names but this was insufficient so she removed the defaced ballot, crumpled it up and put it in the ballot box so it would be accounted for and would not be a missing ballot. This was at about 3:30–3:45 pm. She also testified that she had observed Randy Clarke tape the sample ballots to the boxes and thought the ballots were on the boxes for about 4 hours. The “X” on the box beside the Applicant’s name was on top of the tape used to affix the ballot to the box. Ms. Sewap was cross-examined by counsel for the Applicant during which she reconfirmed that she observed an “X” by the Applicant’s name on a sample ballot. She did not think any other sample ballots were written on but she removed and crumpled up all of the sample ballots putting them in the ballot boxes. She was also asked questions by the Appeal Tribunal.

c) Eric Nateweyes

[71] In his testimony, Mr. Nateweyes affirmed that he was a Candidate in the council election. He was shown Exhibit 4A, a February 2018 advertisement for the election published in the Prince Albert Grand Council Tribune, which, amongst other things, identified the Prince Albert advance poll location as Cottage 1 and the Saskatoon advance poll location as the Indian and Metis Friendship Centre. He was also shown Exhibit 5A, which is a March 2018 advertisement for the election in the Prince Albert Grand Council Tribune which indicates the same. Mr. Nateweyes confirmed that the exhibits stated that the Saskatoon advance polls station was White Buffalo friendship centre and the Prince Albert advance poll station was Cottage 1. However, he was aware that the polling station in Saskatoon was changed on the day of the advance poll. He testified that he only became aware of the change in the polling station venue through reading Mr. Clarke's Facebook posting. He had been campaigning in Saskatoon for three days and during that time had told everyone to vote at White Buffalo. He confirmed that he received notice that 131 voters attended in Saskatoon at the advance polling station by reading the Facebook post of Mr. Clarke. He testified that on March 28, 2018, there was a Chief's Forum during which no notification of any change in advance polling stations was raised. Nor was he contacted in any manner about the change in polling stations for Prince Albert or Saskatoon.

[72] Mr. Nateweyes testified he was not happy with how the election was run and that the location was changed at the last minute with poor notification to the community. He referenced section 5(f)(ii) and (iv) of the PBCN Election Code saying that he believed there was an issue in that the posted voters list was not publicly posted for each community as required and that, with reference to section 5(f)(iv), the publications in the Prince Albert Daily Herald and Saskatoon

Star Phoenix were not as set out in the Code. He stated that the only notices published were in the Grand Council Tribune and MBC Radio and no local newspapers. Mr. Nateweyes testified that after the election he further inquired as to election announcements. He stated that he was told by Randy Clarke that the posters referenced in Exhibits 4A and 5A were made in January 2019. He was shown Exhibit 8A, a letter from the Saskatoon Indian and Metis Friendship Centre dated April 11, 2018 stating that Mr. Clarke had not confirmed a booking for the election and had only made an inquiry, despite having the publications in the Tribune printed confirming that the polling station was at the White Buffalo friendship centre. Mr. Nateweyes testified that March 16, 2018 was when Randy Clarke booked the advance polls and Mr. Clarke did not make an announcement of the changes at the Chief's Forum. It was at this point that Mr. Nateweyes wanted to testify about conversations he had with other people who were not present to testify to which counsel for the Applicant objected.

[73] Mr. Nateweyes was then cross-examined by counsel for the Respondent who asked him if he was aware of how many eligible voters were in the Saskatoon area, to which he replied approximately 300. In response to a question posed by the Appeal Tribunal, counsel for the Applicant raised her objection to Mr. Nateweyes discussing his conversation with Mr. Carter, but did not object to Mr. Nateweyes notes of that conversation being entered into evidence (Exhibit 9A).

d) Clarisse Lecoq

[74] The Respondent then testified. When Exhibits 4A and 5A were put before her, she testified she was never informed of any changes in the polling stations. She had received some phone calls from individuals who were going to vote indicating that there were no advance polls

at the Friendship Centre in Saskatoon and there were no signs posted at the polling station that was advertised in the Tribune. Further, no notices of change in the Prince Albert polling station were posted at Cottage 1. Nor did the ad from the Tribune mention advance polls in Prince Albert.

[75] She stated she did not see a voters list posted on the reserve in Prince Albert. Also, on April 10, 2018, at 8:00 p.m., the doors to the polling station were shut, and it took approximately 30 minutes after the polls were closed to commence counting ballots.

[76] Further, that she had filed an appeal to the election because she was a runner up and was only 26 votes behind the Applicant, who was the successful Candidate. She felt that the "X" on the ballot box beside the Applicant's name was an attempt to influence voters and the election outcome. She was also concerned with the short notice in the change of the polling stations and lack of posting of eligible voter lists. On cross-examination by counsel for the Applicant, she stated that approximately 10 people contacted her about the advance poll in Saskatoon and no polling station being at the advertised location. When asked about the sample ballot, how many urban voters there were, and if anyone had called her to say they wanted to vote for her but did not because the polling station had been moved, she responded that she did not recall. In response to questions from the Appeal Tribunal, she stated that she found out about the poll changes from a fellow Candidate who contacted her around 11:00 a.m. on the day of the advance polls. She was not informed of the change in polls by Randy Clarke, the Electoral Officer. She also stated she did not see ballots that were tampered with on top of the ballot boxes and nor did she receive a voters list directed to her or posted at the band office.

e) Randy Clarke

[77] The Applicant then called Randy Clarke as a witness. Mr. Clarke confirmed that he was the Chief Election Officer for the election. He also confirmed that he was the person who marked 'void' on the ballots and taped them to the top of the boxes. He stated he did it in Pelican Narrows and Deschambeault Lake to make it easier for people to vote. He told his staff to check the boxes three times a day to see that no one had defaced the ballots. He testified that he did not place an "X" beside the Applicant's name on the sample ballot. He believed the defaced sample ballot was still in the ballot box. He also confirmed that he did not keep the advance polls separate from the ballots received on election day and stated that he was not responsible for this.

[78] Mr. Clarke testified he had made posters, posted them in places and did the Tribune advertisements. He did not go to the Saskatoon or the Prince Albert paper as no one really reads them anymore, which is why he published the change in polls on Facebook and on his webpage. When questioned about how he made sure the membership was aware of the polling locations, Mr. Clarke replied that he could not recall. He said he told people and put up posters at the Friendship Centre to indicate the change of location to the Ramada. When questioned how he notified the Candidates of the change, Mr. Clarke stated he told everyone it was being changed and called the Candidates.

[79] Mr. Clarke stated he brought the ballot boxes for the urban voting. He directed his staff to check the back of the polling booths every two hours to make sure that nobody was writing on any stuff.

[80] When cross-examined by counsel for the Respondent, Mr. Clarke stated that he put the sample ballots at the advance polls outside of the boxes with the help of Ms. Sewap. He put the ballots face up because he did not think it would be a problem. He testified it was the Deputy Returning Officer who was responsible for removing marked up things. He thought the Deputy Returning Officer would probably replace the ballot with another one if she had to take it down because of markings.

[81] Mr. Clarke testified that he provided Exhibits 3A and 4A (likely meaning 4A and 5A) for publishing and stated he did not have to publish it as it was his opinion that he did not find it necessary. Counsel for the Respondent asked if Mr. Clarke had followed the act (Code) and he replied that he had not. When Exhibit 8A was put to him, he stated that he had spoken to a few other people at the Friendship Centre but not to the man named in the letter. He stated he posted it (likely meaning the change in the polls) on his site and phoned everybody. He thought he phoned the Candidates for the polling station locations. He could not recall how he contacted the Respondent or the other Candidates. He stated that he was pretty sure he phoned the Applicant about the change in polling stations. He posted a list of voters at the band office, but it was actually a band list of names.

[82] When he was questioned on why the location of the advance poll was changed, Mr. Clarke advised there was not enough room for people to go in and out. He acknowledged he did not publish changes anywhere in Prince Albert and Saskatoon with respect to the advance polling stations. When questioned about the Facebook notification on April 2, 2018, for the April 3, 2018 polling station, Mr. Clarke testified that he thought someone called him with respect to the same.

[83] On redirect by counsel for the Applicant, he was asked whether loitering is defined in the Code, and he stated that it is not. He also agreed with counsel's statement that people tend to write on polling booths. The Appeal Tribunal asked whether or not Mr. Clarke had made an announcement at the Chief's Forum to which he replied that he thought he did.

f) Warren Scott McCallum

[84] The Applicant then testified. Much of his evidence dealt with the allegations of loitering and alleged vote buying. When questioned about how he became aware of the notice of location of the urban voting, he replied that he did not have Facebook but was told it was moved. Mr. Clarke called him and gave him dates of when the polling stations were in Saskatoon.

[85] This concludes the summary of the relevant witness testimony.

[86] In this application for judicial review, the Applicant challenges only the lack of notice of the intent to lead evidence from Mr. Nateweyes and the nature of his evidence. As seen from the above summaries, Mr. Nateweyes' evidence was primarily concerned with the last minute change to the advance poll locations and the fact that notice of this change was not adequately provided to Candidates and members of the community. This issue was reflected in three of the Appeal Tribunal's concerns. However, it was not only addressed by Mr. Nateweyes' testimony; it was also addressed by the testimony of the Respondent. And, significantly, the issue had been squarely raised before Mr. Clarke was called as a witness for the Applicant. Counsel for the Applicant addressed with Mr. Clarke the placement of the sample ballots, responsibility for checking the ballot boxes, advertisement of the advance polls and changes to the location for them, the Friendship Centre letter, contacting of Candidates when the location changed and other

matters. On cross-examination, Mr. Clarke made admissions as to non-compliance with the requirements of the Code and that, other than on his Facebook page and webpage, he did not publish the change in location for the advance polls. Counsel for the Applicant was afforded and took advantage of the opportunity of redirect examination. The Applicant himself then testified.

[87] In these circumstances, it may be that the Applicant did not have advance notice of the issue of the change in location of the advance polls, but he did have the opportunity to respond to it as his counsel was able to and did cross-examine Mr. Nateweyes, and the Applicant himself subsequently testified and could have addressed the matter. That the Applicant's own witness, Mr. Clarke, gave unfavourable evidence on the poll change and other matters concerning the conduct of the election was, of course, unhelpful to the Applicant's view that the appeal should be dismissed.

[88] Further, and significantly, the Applicant does not challenge the veracity of any of the testimony pertaining to any of the concerns listed by the Appeal Tribunal. He does not suggest that the evidence is flawed in any way or that if he had been given advance notice of Mr. Nateweyes' evidence on the advance poll issue, then he would have called other witnesses who would have contradicted that evidence. Indeed, the Applicant called Mr. Clarke, the Head Electoral Officer, as a witness, and it is difficult to see how his evidence on that issue could be challenged by the testimony of others.

[89] A lack of advance notice of the specifics of an appeal may not, in every case, result in a finding of a breach of procedural fairness. As stated in *Giroux v Swan River First Nation*, 2006 FC 285, rev'd on other grounds 2007 FCA 109:

[38] As Madam Justice Heneghan observed in *Sound*, ideally before the hearing Mr. Giroux should have received notice of the specific allegations made against him. To provide such particulars at the hearing runs the risk that, after hearing the allegations of those opposing the election, procedural fairness would require the hearing to be adjourned in order for a reasonable amount of time to be provided to the elected person in order to allow that person a fair opportunity to prepare a response. Here, however, the Committee chose to follow the procedure whereby particulars were provided at the appeal hearing.

[39] On the particular facts of this case, I conclude that such choice of procedure by the Committee did not violate the requirements of procedural fairness. I reach that conclusion because the minutes of the hearing before the Committee show that Mr. Giroux was able to respond to the allegations by referring to the *Sound* decision, and another decision, as they related to the validity of the 2002 amendments to the Regulations. He was able to provide copies of the letter of legal advice to the Band with respect to the failure to post the list of approved applications for membership and the Band Counsel Resolutions with respect to the acceptance of the membership applications of the three new members of the Giroux family. Mr. Giroux did not seek any adjournment after hearing the allegations against him and he adduced no evidence before this Court of facts, evidence or argument that he was unable to adduce or advance because he did not receive particulars of the allegations against him in advance of the hearing. On this evidence Mr. Giroux has not satisfied me that he did not have enough information to allow him to respond intelligently to the case against him.

[40] I find, therefore, that Mr. Giroux's participatory right to put forward his evidence and argument fully was not violated by the failure of the Committee to see that particulars were provided before the hearing. I caution, however, that the same conclusion might not be reached in another case on different evidence. I echo Madam Justice Heneghan's comments that ideally particulars should be provided in advance of any hearing before the Committee. This could easily be accomplished, for example, by requiring detailed notices of appeal which would be provided to the person who is subject to the appeal before the hearing.

[90] In the particular circumstances of this case, I am not persuaded that the lack of advance notice of the nature of Mr. Nateweyes' testimony precluded the Applicant from fully responding to the issue and, therefore, amounted to a breach of procedural fairness.

[91] I reach this conclusion because, although in this application for judicial review the Applicant claims he was not afforded notice and an opportunity to respond to the testimony given by Mr. Netaweyes, which primarily concerned the last minute change of location of the advanced polls, this issue was also addressed in the testimony of the Respondent and of Mr. Clarke, which the Applicant has not challenged on the basis of notice, an opportunity to respond, or otherwise. Further, the Applicant had the opportunity to cross-examine and examine witnesses directly, and the right to re-direct questions to Mr. Clarke and to give evidence himself, the latter after the Respondent, Mr. Nateweyes and Mr. Clarke had given their testimony. Further, the Appeal Tribunal states in its decision that it was concerned with the issues it identified which were raised by the testimony of various witnesses. To the extent that the Appeal Tribunal relied on the evidence of Mr. Nateweyes, similar or relevant evidence was also given by the Respondent and Mr. Clarke. The Applicant also does not contest the veracity of the evidence of Mr. Nateweyes or suggest what evidence or submissions the Applicant would have made to contest it if he had been afforded the opportunity to do so. Nor does he explain how he was prejudiced by Mr. Nateweyes' evidence, given that similar evidence was also given by other witnesses.

[92] Further, there is no evidence that the Applicant sought an adjournment to permit him an opportunity to respond to Mr. Nateweyes' evidence. It may be that his counsel was not afforded an anticipated opportunity to make closing submissions, and that, even though no objection was

made to Mr. Nateweyes' evidence at the Appeal Hearing based on a lack of notice or content of his testimony (other than the hearsay objections), those closing submissions might have addressed the admissibility of the advance poll evidence tendered by Mr. Nateweyes. However, nothing in the Applicant's submissions made in support of this application for judicial review explains how such closing arguments would have demonstrated prejudice arising out of a lack of notice or adequate opportunity to respond. Given the above, in my view, a lack of opportunity to make closing submissions is not sufficient to establish a breach of procedural fairness in these circumstances.

ix) Appeal Tribunal Findings

[93] The remaining question is, was the Appeal Tribunal, based on all of the testimony, entitled to uphold the appeal on the basis of conduct that was not the specific subject of the appeal, but which nevertheless concerned contraventions of the Code that could reasonably have affected the outcome of the election?

[94] The Respondent submits, relying on *Baker*, that once the Appeal Tribunal accepted the appeal for a hearing in accordance with s 8(d) of the PBCN Election Code, it was open to it to consider all aspects of the appeal lying within its jurisdiction.

[95] When the parties appeared before me, I questioned the applicability of *Baker* to this situation. *Baker* was an immigration matter. Pursuant to what is now the equivalent of s 74(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], an appeal to the Federal Court of Appeal from a decision of this Court arising from a judicial review of an immigration matter may only be made if, in rendering judgment, a judge of this Court certifies that a serious

question of general importance is involved, and states the question. It is true that if the Federal Court of Appeal accepts the certified question as valid, based on the applicable legal test, and hears the appeal, then it can consider any aspect of the appeal, and not just the certified question (see for example: *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 37 [*Lewis*]). However, this case is not an immigration matter, and the IRPA legislative regime has no application. Nor did the Respondent provide any authority in support of the premise that once an Appeal Hearing is convened, the Appeal Tribunal is entitled to consider and make a decision based on the testimony it hears – even if the issues raised by that testimony fall outside the specific (as opposed to general) grounds of appeal identified in an appellant's notice of appeal. The Applicant did not address this issue in his submissions. Accordingly, the Court requested that counsel for each of these parties submit a brief two-page written submission on this point.

[96] The Applicant's submission argues that although the Appeal Tribunal may have desired to do the right thing, it was not open to it to allow evidence outside the grounds for which he was provided notice. The Applicant notes the lack of jurisprudence on the precise issue raised by the Court, being whether defects in the election process raised by the testimony given at the Appeal Hearing may serve to ground the Appeal Tribunal's decision even if the issues raised are only generally, and not specifically, referenced in the Notice of Appeal. However, the Applicant references *Cowessess First Nation no 73 v Pelletier*, 2017 FC 692 [*Cowessess*], in support of its view, in which Justice Diner stated:

> [72] Second, it is clear that the jurisdiction of the Tribunal is limited to grounds raised in the Notice, and the appellant has the burden of proving those grounds. The Tribunal cannot seize itself of new matters. As the issue of Mr. Lerat's criminal record check

> was not raised in the Notice, the tribunal improperly considered it and acted outside its jurisdiction in doing so.

[97] The Respondent continues to rely on *Baker* in support of her view that it was open to the Appeal Tribunal to consider all aspects of the appeal lying within its jurisdiction. Specifically, she argues that *Baker* envisages a two-step process in which a certified question is posed to Court arising from the issues raised at the trial (in fact, the judicial review). This triggers the second stage, where the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction. She submits that parallel circumstances should apply to the two-step appeal process of the PBCN Election Code. She also submits that neither legislation nor jurisprudence suggests or holds that there are limits on what kind of evidence the Appeal Tribunal can allow, or limits on the basis upon which it can make its decision once the second phase has been triggered. Here the test for procedural fairness applies, being whether or not the Applicant had an opportunity to respond to the allegations made, which he did.

[98] The Applicant submitted a follow-up letter asking the Court to disregard the Respondent's six-page submission in full because it was in breach of the Court's direction restricting submissions to two pages. It is clear that the Respondent disregarded the Court's direction. However, as the submission is primarily a restatement of her prior position, I will not disregard it in whole as the Applicant requests.

[99] In my view, *Baker* is of little assistance in this matter. In the circumstance of an appeal arising from a certified question, the object of the appeal is the judgment itself, not the certified question (*Baker* at para 12; *Lewis* at para 37; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at para 19; and *Canada (Citizenship and Immigration) v Zazai*, 2004 FCA 89 at

para 10). This is unlike the two-stage appeal process contained in the PBCN Election Code. There, the first stage is an evidentiary threshold requirement. At the second stage, actual testimony is heard and assessed.

[100] As to *Cowessess,* there this Court held that a candidate's eligibility relating to a criminal record check was not raised as a ground of appeal and should not have been considered by the tribunal as this was outside its jurisdiction. Further, that the procedural fairness requirements of notice and an opportunity to respond were not met.

[101] In my view, although the reasons in *Cowessess* speak to both jurisdiction and procedural fairness, the decision demonstrates that an appeal tribunal's ability to ground its decision on concerns not raised in a notice of appeal is a function of the wording in the applicable election code. Put otherwise, it is a question of interpretation. In that case, the code required the tribunal in making it decision to "determine whether the appellant(s) have proven the grounds for appeal set out in the notice of appeal". The PBCN Election Code does not contain an equivalent provision. Section 8(b) restricts an appeal to two grounds, one of which s 8(b)(i), being conduct that contravenes the Code and which may reasonably have affected the outcome of the election. Section 8(e) permits the Appeal Tribunal to deny the appeal (s 8(e)(i)), uphold the appeal but allow the election to stand on the grounds that the conduct complained of could not have reasonably affected the outcome of the election (s 8(e)(ii)), or uphold the appeal and call a by-election within 30 days (s 8(e)(iii)). The only wording in s. 8(e) which could be viewed as limiting the Appeal Tribunal's authority to reach the conclusions that it did in this case is the phrase "conduct complained of" in s. 8(e)(ii). However, like other aspects of the PBCN Code, this is somewhat ambiguous as, interpreted broadly, it could encompass conduct complained of

at the Appeal Hearing. Given this, it was reasonably open to the Appeal Tribunal to base its decision to uphold the appeal on findings of fact as to conduct that contravened the Code, and, which may reasonably have affected the outcome of the election, but which facts arose from the testimony given at the Appeal Hearing. Moreover, that conduct fell within the general appeal ground identified in s 8(b)(i), which section was referenced in the Respondent's notice of appeal, and within the Appeal Tribunal's decision-making mandate set out in s 8(e).

[102] In any event, in my view, both *Cowessess* and the Applicant's submission in this application for judicial review ultimately turn on the question of a lack of notice resulting in a breach of procedural fairness. In this case, the lack of notice of the content of Mr. Nateweyes' testimony and resultant lack of an opportunity to fully respond to that evidence. For the reasons set out above, I have found that this did not amount to a breach of procedural fairness. It is also significant to note that the Applicant has not asserted a lack of notice with respect to the issue of the defaced ballot boxes, which was not addressed by Mr. Nateweyes' evidence, but which was the basis for the remaining two concerns identified by the Appeal Tribunal. Further, *Cowesses* is distinguishable on its facts. There the applicant submitted affidavit evidence stating that the issue of his criminal record check was never addressed at the hearing. He also deposed that the criminal record check contained a clerical error as to its date, which, prior to the tribunal review, had gone unnoticed and could have been addressed had the issue been raised by the notice of appeal or at the hearing. Unlike *Cowessess*, here the testimony at the Appeal Hearing raised the issues of the lack of notice of the change in the location of the advance polls and, of the defacing of ballots and other procedural defects in the running of the election. And, also unlike *Cowessess*, here the Applicant has provided no evidence as to how he would have rebutted the evidence of procedural defects in the election process arising from the testimony given at the

Appeal Hearing concerning the lack of notice of the change of location of the advance polls, or the evidence of Bella Ratt, Raylene Sewap and Randy Clarke concerning the ballot defacement.

[103] In conclusion, considering the *Baker* factors, and taking a contextual approach to the question of the content of the duty of procedural fairness owed to the Applicant, I am satisfied that in this matter the procedure was fair having regard to all of the circumstances.

[104] That said, I agree with the Appeal Tribunal's comments that the PBCN Election Code lacks precision. If the Code contained provisions indicating that only appeal grounds which are particularized in the notice of appeal may be pursued at an Appeal Hearing, or clarifying that, if testimony at an appeal hearing reveals facts that identify and confirm other relevant contraventions of the Code, then that these may be taken into consideration in the decision making process, then this would avoid situations such as this one. This clarification would also avoid the prospect of appellants launching fishing expeditions for helpful testimony at the appeal hearing and/or eliminate the risk that contraventions established by testimony at the hearing would go unaddressed, putting the community's faith in the election process at risk. Clear requirements as to the content of the notice of an appeal hearing would also be beneficial. However, this is a matter to be dealt with by the Peter Ballantine Cree Nation if it feels that it is appropriate to do so.

[105] In the same vein, I note that it is apparent from the Appeal Tribunal's reasons that, given the procedural defects in the election process that it identified, it was of the view that the whole election should be re-run. However, it correctly found that did not have the authority under the Code to make that ruling. It therefore confined itself to the appeal before it, and, on the basis of the procedural defects and the narrow margin of votes between the Respondent and the

Applicant, determined that a by-election for the Prince Albert Urban district was warranted. While the Applicant asserts that faced with a lack of jurisdiction "to direct precise procedural fairness or just treatment of the election", then that "any quasi-remedy should also fail", I see no merit to that position. While a more equitable outcome may have been to re-run the whole election, the fact that the Code did not provide that option to the Appeal Tribunal does not invalidate its decision made on the appeal that was before it.

Costs

[106] The Applicant, in his Notice of Application, seeks party and party costs in accordance with Tariff B. The PBCN has made lengthy submissions on costs which I have reviewed and considered. It ultimately submits that costs should not be awarded in favour of the Applicant, regardless of his success in the within application. Alternatively, that each party should bear its own costs and, in the further alternative, that any award of costs against the Respondents should be limited to the cost of the judicial review hearing and not be born entirely by the PBCN. The Respondent, Clarisse Lecoq, seeks to have her costs fixed in the amount of $10,000.

[107] Rule 400(1) of the *Federal Courts Rules*, SOR/98-16, states that this Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. Rule 400(2) sets out factors that the Court may consider in exercising that discretion.

[108] Here the Applicant was not successful. PBCN did not take a position or participate in the judicial review, other than making its submissions as to costs.

[109] PBCN, fairly, in my view, points out that it is arguable that the resolution of the issues contained in the application for judicial review will be in the interest of PBCN as a whole, which lends support to the argument that PBCN would be liable for costs, regardless of whether the Applicant was successful or not. PBCN also submits that interrelated with the importance of the public interest is that, to engage it, the matter must raise an issue that is new and extends beyond the immediate parties. PBCN submits that the issues raised by the Applicant are not solely in the public interest and do not extend beyond his own immediate interests (*Cowessess First Nation No. 73 v Pelletier*, 2017 FC 859 paras 16, 23–24 [*Pelletier*]; *Raymond Willier v Sucker Lake Indian Band #150A*, 2002 FCT 192 at paras 13, 18, 22).

[110] I note that the Applicant asserted a lack of jurisdiction (which, in my view, is a question of the interpretation of the Code) and breaches of procedural fairness arising out of the provisions and application of the PBCN Elections Code. In its decision, the Appeal Tribunal specifically found that the Code is vague and needs much work, especially the Appeal Tribunal section, in that it is inadequate and did not provide the Appeal Tribunal with a remedy for the situation before it. Considering this, and my observations above as to the lack of clarity in the appeal provisions of the Code, I am satisfied that although the Applicant was not successful it is appropriate that there shall be no award of costs against him. Further, that it is appropriate for PBCN to pay the Respondent's costs, in the all-inclusive lump sum amount of $2,500. There shall be no further order as to costs.

JUDGMENT in T-1246-18

THIS COURT'S JUDGMENT is that:

1. Clarisse Lecoq is added as a Respondent in this matter and the style of cause is hereby amended accordingly.

2. The application for judicial review is dismissed.

3. There shall be no award of costs against the Applicant. PBCN shall pay the costs of the Respondent in the all-inclusive lump sum amount of $2,500. There shall be no further order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1246-18
STYLE OF CAUSE:	WARREN SCOTT MCCALLUM v PETER BALLANTYNE CREE NATION
PLACE OF HEARING:	PRINCE ALBERT, SASKATCHEWAN
DATE OF HEARING:	MAY 7, 2019
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JULY 5, 2019

APPEARANCES:

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Anil K. Pandila	FOR THE RESPONDENT PETER BALLANTYNE CREE NATION
Peter V. Abrametz	FOR THE RESPONDENT CLARISSE LECOQ

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