

Federal Court



Cour fédérale

Date: 20221031

Docket: T-1751-21

Citation: 2022 FC 1484

Ottawa, Ontario, October 31, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ZACHEUS JOSEPH TROUT

Applicant

and

**WOMEN'S COUNCIL OF PIMISIKAMAK
OKIMAWIN, a.k.a. the Pimicikamak Cree
Nation or Cross Lake First Nation, and
CHRISTIE SCOTT, in her capacity as Chief
Electoral Officer of Pimicikamak Okimawin**

Respondents

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of the Women's Council of the Pimicikamak Cree Nation [Women's Council] to remove Zacheus Trout's [Applicant] name from the list of nominees seeking election to the Executive Council of the Pimicikamak Cree Nation in a by-election, thereby precluding him for running for election to that office.

Background

[2] The Applicant is a member of Pimicikamak Cree Nation, also known as the Cross Lake Band. He sought to run as a candidate for Councillor on the Executive Council in a Pimicikamak Cree Nation by-election scheduled for December 2, 2021 [Election].

[3] Pimicikamak Cree Nation elections are governed by *The Pimicikamak Election Law* [Election Law]. The Election Law sets out the elected Chief and Council's roles and responsibilities (ss 20 to 29) and also provides that, except as amended expressly or by necessary implication, traditional law is continued by the Election Law (s 3). And, for greater certainty, that the Council of Elders may continue to appoint the Traditional Chief, the Women's Council may continue to appoint the Women's Chief and, the Youth Council may continue to appoint the Youth Chief (ss 7 to 9).

[4] The Applicant met the Election Law nomination qualification requirements and, on October 27, 2021, was duly nominated to run for office. However, by letter dated October 28, 2021, members of the Pimicikamak Cree Nation appealed the Applicant's nomination to the Women's Council, pursuant to section 49 of the Election Law. They asserted that the Applicant had "not faithfully observed the fiduciary duties of the code of conduct and was not vigilant in upholding the laws of the nation" as he was in a domestic relationship with two women. The Applicant was not advised of this appeal.

[5] On November 5, 2021, the Chief Electoral Officer [CEO] published a list of persons nominated to run for office in the Election. Although duly nominated, the Applicant's name was not included in that list. The Applicant claims that the CEO did not provide any reason for excluding his name from the list of nominees even after he requested an explanation for the omission.

[6] On November 8, 2021, the Applicant, through his counsel, wrote to the Women's Council to appeal what appeared to him to be a decision by the CEO barring his candidacy in the Election. Having received no response, on November 18, 2021, counsel for the Applicant again wrote to the Women's Council seeking a decision on the Applicant's appeal and advising that if a decision was not provided by November 22, 2022, the Applicant would file an application in this Court seeking a writ of *mandamus* and a stay of the Election until the final determination of the issues raised on the Applicant's appeal.

[7] On November 22, 2021, the Applicant's counsel was notified by a representative of the Women's Council that his name would remain off the ballot, with reasons to follow.

[8] On November 22, 2021, the Applicant filed his Notice of Application for Judicial Review in this matter.

[9] By letter dated November 26, 2021, the Women's Council responded to the Applicant's November 8, 2021 letter. In that letter, the Women's Council disclosed to the Applicant the existence of the October 28, 2021 appeal of the Applicant's nomination. The Women's Council

advised that it had considered the grounds of that appeal and concluded that the Applicant's name should be struck from the list of nominees.

[10] The Applicant seeks judicial review of the November 26, 2021 decision of the Women's Council. By Order dated December 1, 2021, on consent of the parties, the Election was postponed until the final disposition of the Applicant's judicial review of that decision.

Relevant Legislation

The Pimicikamak Election Law, (2 July 1999)

Interpretation

...

4. In this Law, unless a different intention is expressed:

....

“candidate” means a qualified person who is duly nominated for the office of the Chief or of Councillor;

...

“elector” means a citizen who is at least 18 years of age;

...

“the Nation” means the Pimicikamak Cree Nation

...

“ordinarily resident” means maintaining a permanent residence, notwithstanding that actual residence may for a temporary reason be elsewhere;

...

“qualified person” means an elector who is ordinarily resident in the traditional territory of the Nation

...

Election of Chief and Council

10. Chief and Council of the Nation shall be elected at such times and by such means as are provided by this Law.

Nominations

...

48. On the next day after the conclusion of the nominating meeting, the Chief Electoral Officer shall publically post the names of persons duly nominated for the offices of Chief and Councillor.

Appeals

49. Any elector may appeal, by notice in writing delivered to the Women's Council within 24 hours after the nominating meeting is closed, the decision of the Chief Electoral Officer to include any name on, or to exclude their own name from the list of persons duly nominated, and the notice shall state the grounds of the appeal.

50. The Women's Council should request and consider the reasons of the Chief Electoral Officer.

51. The written decision of the Women's Council on such appeal, delivered to the Chief Electoral Officer, is final and binding upon all persons.

...

By-elections

111. At any time after the office of a Councillor becomes vacant, the Chief may in writing direct the Chief Electoral Officer to conduct a by-election in accordance with the principles of this Law.

.....

Appeals

115. Except as otherwise provided in this Law, a candidate may deliver an appeal in respect of any decision of the Chief Electoral Officer to the Women's Chief in writing within 24 hours of the matter arising.

116. The Women's Council may, without notice, hear, or not hear, any person upon an appeal under the preceding section, and its decision is final and binding on all persons.

117. A candidate who is aggrieved by the procedure of the Women's Council under authority of the preceding section may petition the Council of Elders.

118. The Council of Elders may provide guidance for future procedure but should not otherwise interfere with the decision of the Women's Council.

Decision Under Review

[11] In its letter dated November 26, 2021, the Women's Council states that the by-election process was conducted in accordance with the Election Law.

[12] It states that on October 28, 2021, it had received an appeal letter from members of the Elder's Council and other community members concerning the Applicant's nomination. The decision letter states that the appeal process for the nomination process is set out in sections 49, 50 and 51 of the Election Law, which provisions were set out. The decision letter states that the appeal letter from members of the Elders Council and other members of the community was received within 24 hours of the nomination meeting closing and set out the belief of those appealing the nomination that the Applicant's "behaviour has breached his duties to, the code of conduct of, and cultural traditions of the Pimicikamak". The decision states that the Women's Council considered the grounds of appeal in the October 28, 2021 letter and concluded that the Applicant's name should be struck from the list of nominees.

[13] The decision letter states that the reasons for its decision were not immediately provided because then legal counsel “declined to assist in the preparation of the letter in any way” and the Women’s Council did not want to provide a letter that had not first been reviewed and vetted by legal counsel.

[14] Further, that:

The decision by the Women’s Council was based on their individual and collective knowledge of the grounds in the Letter as they understand them. They only considered what they had experienced firsthand. They also dismissed Mr. Trout’s position that the relationship he has with his wife, Veronica Trout (“Veronica”), and Patricia Turner (“Patricia”) who is married to another individual, is merely a traditional ceremony practice. The Women’s Council arrived at their decision without prejudice, as evidenced by Mr. Trout’s successfully running in previous elections.

The following list includes, but does not limit, the factors the Women’s Council considered in coming to its decision:

- Mr. Trout held an event which he claimed was a Traditional Ceremony welcoming Patricia into this Clan, but for all intents and purposes was in fact a wedding ceremony between himself, Veronica and Patricia.
- Patricia was a colleague of a Women’s Council Councillor. The Councillor has first-hand knowledge of the relationship Patricia has with Mr. Trout. Patricia has advised the Councillor that Mr. Trout, Patricia and Veronica all sleep in the same bed, with Mr. Trout between them.
- One of Mr. Trout's sons advised the Women's Council he has concerns about the well-being of Patricia and Veronica, having often witnessed their emotional distress.
- During the Covid-19 pandemic, Patricia falsely impersonated a Nurse to be allowed to board a plane to enter Cross Lake when the community was in

Lockdown. Upon discovery, Patricia was escorted out of the Cross Lake community. It is not known to the Women's Council how or what arrangements were made to allow Patricia back into the community and reside with Mr. Trout.

- As stated above, Patricia is married to an individual in Norway House. Patricia and her husband share several children. Patricia's husband and children reside in Norway House, while Patricia resides in Cross Lake with Mr. Trout.

- Mr. Trout has invoiced Pimicikamak Okimawin, under the name White Buffalo Clan, for traditional services that were not commissioned by Pimicikamak Okimawin.

The above factors, and Mr. Trout successfully running for office in the past, illustrates that the Women's Council did not act in haste, prejudice or without due consideration when deciding it would not be appropriate for Mr. Trout to have the privilege of running to be a Community Leader due to his long running pattern of behaviour, in particular the wedding ceremony which took place this summer. The Women's Council exercised their Authority with Care, reasonableness, and deliberation according to Election Law.

.....

Our position is brought forth from the perspective of upholding Traditional Law (written and unwritten), Election Law and the First Written Law of Pimicikamak. In addition, the Women's Council has exclusive jurisdiction over Pimicikamak elections. As such, the Women's Council has a fiduciary duty to protect the community from individuals who espouse a pattern of behaviour as described above. Indeed, the Women's Council protects the community not only from individuals with inappropriate patterns of behaviour, but from individuals with character that actually breaks from traditional laws and morals. The fiduciary duty of the Women's Council to the community prevents them from allowing individuals like Mr. Trout to run for office as it could put them into a position where they would be an example of a community and moral leader.

.....

Issues and Standard of Review

[15] In my view, the primary issues arising in this application for judicial review are:

- i. Was the decision made in breach of a duty of procedural fairness, and
- ii. Was the decision reasonable?

[16] Issues of procedural fairness are to be reviewed on a correctness standard (see: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). That said, in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR], the Federal Court of Appeal held that although the required reviewing exercise may be best – albeit imperfectly – reflected in the correctness standard, issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the Court is to determine whether the proceedings were fair in all of the circumstances. That is, “the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond” (CPR at paras 54-56; see also *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[17] Subsequently, the Federal Court of Appeal in *Ahousaht First Nation v Canada (Indian Affairs and Northern Development)*, 2021 FCA 135 [Ahousaht] restated this as follows:

[31] The standard of review on issues of procedural fairness is essentially correctness: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 79. As stated in *Vidéotron Ltée v. Canada (Shared Services)*, 2019 FCA 307, 313 A.C.W.S. (3d) 299 at para. 12:

Issues of procedural fairness are to be reviewed on a correctness standard. While it may be that “no standard of review is being applied” when a court

considers issues of procedural fairness because the question is “whether the procedure was fair having regard to all the circumstances,” this Court’s review is “best reflected in the correctness standard” for such issues (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2018] F.C.J. No. 382 at para. 54).

[18] Accordingly, I understand the standard of review for issues of procedural fairness to be correctness, or at least, essentially correctness.

[19] In assessing the merits of an administrative decision, such as that of the Women’s Council, the standard of review of reasonableness will presumptively apply (*Canada (MCI) v Vavilov*, 2019 SCC 65 at paras 23, 25, 31 48-49 [*Vavilov*]; see also *Thomson v Attorney General*, 2021 FC 606 at para 32; *Taykwa Tagamou Nation v Linklater*, 2020 FC 220 at paras 34-36). When applying the standard of reasonableness, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

Preliminary Matter

[20] In its written submission, the Respondents indicate that section 117 of the Election Law states that “the abused person” can “appeal” to the Council of Elders but that the Applicant did not do so. The Respondents submit that the Applicant has not complied with the requirements of customary law and the Election Law and proceeded to judicial review without having taken the necessary preliminary steps.

[21] To the extent that the Respondents are suggesting the Applicant has not exhausted all available appeal avenues, and therefore his application for judicial review is premature, I disagree.

[22] The decision that is the subject of this judicial review is the decision of the Women's Council made in response to the October 28, 2021 appeal by some members of the Elder's Council and other community members. As the decision states, an appeal of a nomination is governed by sections 49 to 51 of the Election Law. That is, any elector may appeal, by notice in writing delivered to the Women's Council within 24 hours of the nomination meeting closing, a decision of the CEO to include any name on or to exclude their own name from the list of persons duly nominated, which notice shall state the grounds of appeal. The decision is in respect to the October 28, 2021 appeal and the application for judicial review is concerned with that decision. Thus, sections 49 to 51 apply. Section 51 states that the written decision of the Women's Council is final and binding upon all persons.

[23] Accordingly, there is no further right of appeal available to the Applicant; his application for judicial review is therefore not premature.

[24] The Respondents do not refer to the nomination appeal provisions found in sections 49 to 51. Instead, they rely on sections 115 to 118 of the Election Law. However, those provisions are concerned with appeals made in the context of a by-election *by a candidate* of any decision of a CEO. While the Applicant did file an appeal by letter of November 8, 2021, that appeal was based on his understanding, at that time, that the CEO had made a decision to bar his candidacy

in the Election by removing his name from the nomination list. He had not been provided with the October 28, 2021 appeal or informed that it was the Women's Council that had made the decision to strike his name from the nomination list, not the CEO. There is no evidence in the record before me of any decision of the Women's Council responding to the Applicant's appeal.

[25] Further, in any event, and contrary to the Applicant's submission, section 117 of the Election Law does not state that there is a right of appeal to the Council of Elders. Section 117 states that a candidate who is aggrieved by the procedure of the Women's Council under the authority of section 116 may petition the Council of Elders. However, section 118 states that the Council of Elders may provide guidance for future procedure but should not otherwise interfere with the decision of the Women's Council. In other words, not only does section 117 have no application to the factual situation in this matter, even if it did, petitioning the Council of Elders is not an adequate alternative remedy.

Procedural Fairness

[26] The Applicant submits that the Women's Council breached the duty of procedural fairness owed to him as it failed to inform him of the October 28, 2021 appeal and failed to provide him with a meaningful opportunity to be heard, or for that matter, any opportunity to be heard at all. He was not advised of the existence of the October 28, 2021 appeal against his nomination until the decision was rendered in response to his application for judicial review. Accordingly, he could not know the case against him and, in any event, was not afforded any opportunity to respond to the allegations against him.

[27] Upon a very generous reading of the Respondents' submissions, it could be understood that they dispute that the decision was made in breach of procedural fairness. In fact, the Respondents do not address this issue directly but refer only to *Clifford Ray Cardinal v Bigstone Cree Nation*, 2018 FC 522 at paragraph 40 quoting the sentence that "[p]rocedural fairness does not always require a person be afforded an oral hearing" and *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 7 that "council is chosen according to the custom of the band" and then asserting that the Women's Council acted pursuant to its rule in customary law. The Respondents also rely on section 116 of the Election Law which states that "[t]he Women's Council may, without notice, hear or not hear, any person upon an appeal under the preceding section, and its decision is final and binding on all persons".

Analysis

[28] It is not disputed that the Applicant met the requirements of the Election Law thereby qualifying him to be nominated to run for office as a Councillor of Pimicikamak Cree Nation. The Election Law defines a "candidate" as a qualified person who is duly nominated for the office of Chief or Councillor (s 4). A "qualified person" is defined as an elector who is ordinarily resident in the traditional territory of the Pimicikamak Cree Nation (Election Law, s 4). The term "ordinarily resident" means maintaining a permanent residence, notwithstanding that actual residence may for a temporary reason be elsewhere, and "elector" is defined as a citizen who is at least 18 years of age (Election Law, s 4). It is also not disputed that the Applicant was duly nominated in accordance with the requirements of sections 37 to 48 of the Election Law.

[29] On December 13, 2021, the Respondents filed what is described on its face by Ms. Betty Lou Halcrow, Chief of the Women's Council of Pimicikamak Cree Nation, as true and complete copies of: the by-election Certificate for Nominee as Member of Executive Council for the Applicant; the October 28, 2021 appeal; and, the November 26, 2021 decision. In response to the application for judicial review, the Respondents filed two affidavits of Betty Lou Halcrow, the first sworn on January 13, 2022 [Halcrow Affidavit #1] and the second sworn on February 4, 2022 [Halcrow Affidavit #2]. Ms. Halcrow was also cross-examined on her affidavits, the transcript of which cross-examination is found in the Applicant's Record.

[30] When cross-examined, Ms. Halcrow confirmed that the by-election Certificate for Nominee, the October 28, 2021 appeal and, the November 26, 2021 decision were the only documents relied on by the Women's Council in making the decision. I note that it is difficult to see how the Women's Council could rely on its own decision to make that decision. In any event, the record contains no other documentary or other record of information relied upon by the Women's Council in making its decision. No formal certified tribunal record was filed.

[31] Halcrow Affidavit #1 includes the statement that the CEO did not decide to remove the Applicant's name from the ballot (presumably meaning the nomination list), rather his name was removed by the CEO at the request of the Women's Council. Further, that "the only decision the CEO made was to include Mr. Trout's name on the list of nominees as he had completed all of the requirements necessary to be on the list". The affidavit states that the Women's Council decided to remove his name "in response to, but not limited to, a written appeal from members of the Pimicikamak community". The affidavit also states that the Applicant was verbally advised

of the reasons why he was disqualified from the Election but it provides no specifics of when this verbal notification was provided, by whom, or the specifics of the notification. The affidavit, referring and responding to the Notice of Application for Judicial Review, states that “the Women’s Council generally do not ‘hold court’ as part of their appeal consideration”.

[32] The affidavit also states:

17. The Women’s Council carefully considered the appeal by members of the Pimicikamak Okimawin community to Mr. Trout’s nomination.

18. The Women’s Council found that Mr. Trout’s behaviour was not acceptable or becoming of an individual who could potentially become an elected leader and influence their community and decided to uphold the appeal.

19. The Women’s Council considered, but were not limited to, the following factors when making their decision:

- a) Mr. Trout’s practice of polygamy;
- b) Mr. Trout’s son expressing concern over the well being of the women living with Mr. Trout;
- c) One of the women living with Mr. Trout was removed from the Cross Lake community for impersonating a nurse during a pandemic related lockdown, only to return to reside with Mr. Trout under uncertain arrangements;
- d) One of the women living with Mr. Trout is married and has children with an individual in another community; and
- e) While serving in office in the community, Mr. Trout invoiced Pimicikamak Okimawin, under the name White Buffalo Clan, for traditional services that were not commissioned by Pimicikamak Okimawin.

[33] For the reasons that follow, I agree with the Applicant that the Women's Council breached the duty of procedural fairness owed to him in making the decision.

[34] With respect to the content of the duty of procedural fairness owed to the Applicant, as stated by the Supreme Court of Canada in *Vavilov*:

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

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

representations (see, for example, *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 39; *Peguis First Nation v Bear*, 2017 FC 179 at para 62; *Morin v Enoch Cree First Nation*, 2020 FC 696 at para 34 [*Morin*]; *Carry the Kettle First Nation v Kennedy*, 2021 FC 462 at para 68)).

[36] In *Bruno v Samson Indian Band*, 2006 FCA 249 at paras 21-22 [*Samson*], the Federal Court of Appeal applied the *Baker* factors (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at p 836 [*Baker*]) when determining the content of the duty of fairness owed in the context of an appeal from an First Nation's election held pursuant to a custom election code. The Court of Appeal determined that basic procedural safeguards were required and that the appeal board had failed to provide an opportunity for the respondent in the appeal to make submissions. The Court also noted that the opportunity to respond did not require an oral hearing, however, by failing to allow *any* response, the board made its decision on an incomplete factual record.

[37] Given the clear jurisprudence, I conclude that while procedural fairness may not always demand that an oral hearing be conducted, in the circumstances of the October 28, 2021 appeal of his nomination, the Applicant was entitled to notice, an opportunity to make submissions and a full and fair consideration of those submissions (see *Gadwa v Kehewin First Nation*, 2016 FC 597 at paras 53 -54 [*Gadwa*]; *Okemow v Lucky Man Cree Nation*, 2017 FC 46 at para 30; *Shirt v Saddle Lake First Nation*, 2022 FC 321 at para 78; *Labelle v Chiniki First Nation*, 2022 FC 456 at para 96).

[38] This did not occur. In that regard, the Applicant filed an affidavit in support of his application for judicial review, affirmed on January 10, 2022. The accuracy of the content of which has not been substantively challenged.

[39] It is not disputed that the Women's Council received the appeal on October 28, 2021. It is not disputed and there is also no evidence before me that the Women's Council informed the Applicant that an appeal had been filed or that the October 28, 2021 appeal was provided to the Applicant prior to the Women's Council making the decision. In fact, when the Applicant filed his Notice of Application for Judicial Review, he was still under the impression that it was the CEO who had made the decision to remove his name from the list of nominees. It was only in response to the application for judicial review that the Women's Council disclosed the October 28, 2021 appeal. Further, the Women's Council did not provide its written reasons until November 26, 2021 – again after the Applicant had brought his application for judicial review. The Applicant's affidavit states that on November 22, 2021, George Musswagon, acting as a representative of the Women's Council, informed counsel for the Applicant that the Applicant's name would remain off the ballot, with reasons to follow. On November 26, 2021 the Women's Council provided its decision giving its reasons for removing the Applicant's name from the nominee list.

[40] In my view, in these circumstances it is clear that the Applicant was not given notice of the appeal, therefore, he was unable to know that there was a case against him, and he was denied any opportunity make representations in response.

[41] The Respondents' written submissions state that it is important to look at the affidavit of the Applicant in which he stated that the decision appeared to be driven by an allegation that he had married a second woman, Patricia Turner, and that this allegation was false. However, that when cross-examined on his affidavit, his counsel advised him not to answer questions about the allegation that the Applicant has a polygamous relationship with Ms. Turner. I note in passing here that while the Respondents purport to quote from the cross-examination of the Applicant, a copy of the transcript has not been provided. Regardless, according to the Respondents, the only inference that can be drawn from the Applicant's refusal to answer is that he was living in a polygamous relationship as found by the Women's Council in responding to the October 28 appeal.

[42] I note that this argument comprises most of the Respondents' written and oral submissions. However, to my mind it entirely misses the mark. The point is that the Women's Council did not even advise the Applicant of the appeal. Regardless of whether or not it was entitled to rely on information apparently gleaned from its internal discussion with its own members – which seem to reflect interactions those members may have had with other community members, although the particulars of these interactions are unspecified – the Women's Council did not give the Applicant notice of the appeal, it did not advise him of the Women's Council's concerns and the basis for same, and it did not afford him any opportunity to respond to those concerns. Had the Women's Council done so, and had the Applicant then refused to address the allegation of polygamy, then it may be that the Women's Council could have made an inference to the effect it now proposes. However, the Women's Council could not make an inference of polygamy to support its decision based on a cross-examination of an

affidavit that did not even exist when it made its decision, as it now appears to suggest. I also reject the submission of counsel for the Respondents that the cross-examination afforded the Applicant the opportunity to respond to the appeal. The cross-examination was conducted after the decision was made and cannot cure the breach of procedural fairness.

[43] In that regard, I would also note that the Women's Council had obviously made its decision by November 5, 2021, the date when the CEO published a list of persons nominated for to run for office in the Election – which list did not include the Applicant's name. The affidavit evidence of Ms. Halcrow is that the Women's Council instructed the CEO not to include the Applicant's name on that list. Thus, it is somewhat disingenuous for the Women's Council to now assert that its written reasons were delayed because its then legal counsel declined to assist in any way with the preparation of the letter and that, "in an effort to be as reasonable and judicious as possible", it did not want to provide a letter that had not been first reviewed and vetted by other legal counsel. The Women's Council had already made its decision and did so without providing the Applicant with notice of the appeal, an opportunity to know the case against him and a reasonable opportunity to respond.

[44] The Respondents also submit that it is critically important to refer to sections 115 to 117 of the Election Law because, pursuant to section 116, the Women's Council may or may not hear any person upon an appeal under those provisions. Again, as I have noted above, and as explicitly acknowledged by the Women's Council in the decision, the appeal of the removal of the Applicant's name was governed by the appeal provisions found in sections 49 to 51 the Election Act, not sections 115 to 117.

[45] Finally, while it is true that sections 49 to 51, concerning nomination appeals, do not compel the Women Council to “hold court” or otherwise conduct an oral hearing when assessing an appeal, the basic tenants tenets of procedural fairness still apply. This means that the Applicant had to be informed of the case against him and afforded a reasonable and meaningful opportunity to respond. That may, or may not, have required an oral hearing. Written responding submissions may have sufficed had the Women’s Council disclosed the appeal and its own internal discussions and knowledge – described in the decision as its “individual and collective knowledge” – upon which it intended to rely upon in making its decision. However, the Women’s Council failed to observe these basic tenets of procedural fairness, thereby denying the Applicant procedural fairness and the opportunity to run for elected office. For that reason, its decision cannot stand.

Reasonableness

[46] Given my conclusion that the Women’s Council breached the duty of procedural fairness owed to the Applicant, I need not address the Applicant’s submissions as to the reasonableness of the decision, which include the authority or jurisdiction of the Women’s Council. I note in passing that the Respondents did not directly address the reasonableness of the decision.

[47] I appreciate that the Applicant chose to focus his submissions on the reasonableness of the decision and, in his view, that the heart of the case is that it is the electors who must make a decision as to the suitability of a candidate, not the Women’s Council acting as “morality police”. When appearing before me, the reason for this focus was stated as being that if the Court were to agree with the Applicant’s arguments on the unreasonableness of the decision, which are

based primarily based on a lack of jurisdiction, then this would support the Applicant's argument that the matter should not be remitted back to the Women's Council. Rather, that the Court should direct that the CEO place the Applicant's name back on the nominee list. For the reasons set out below in the remedy section of this decision, I am not persuaded by that argument. Further, the clear lack of procedural fairness is determinative.

Remedy

[48] Given that it is now known that it was the Women's Council who made the decision and as it has now provided its reasons for the decision, albeit after the judicial review was commenced, the remedies sought by the Applicant pertaining to *mandamus*, compelling the CEO to make a decision, and the quashing of the CEO's decision, are no longer relevant. The remaining relief sought in the Notice of Application for Judicial Review is a writ of *certiorari* quashing the Women's Council decision.

[49] In his written submissions, the Applicant submits that the Court should also direct the CEO to include the Applicant's name on the ballot for the Election, or alternatively, direct the Women's Council to reconsider the decision. The Applicant submits that the Court has discretion to not remit an issue back to a decision maker if the decision maker could only come to one decision in that case (citing *Vavilov* at paras 142, 195-196). As such, he submits that if the Court agrees with the Applicant's submissions, then the only reasonable decision would be to allow the Applicant's name to be placed on the ballot by directing the CEO to do so.

[50] The Respondents did not make any submissions on this point in their written submissions. When appearing before me, the suggestion was that if the Court found in favour of the Applicant, then the matter should be sent back to the Women's Council for redetermination.

[51] In my view, this is not a circumstance where the Court should exercise its discretion to not remit the decision back to the Women's Council. As the Applicant submits, the Supreme Court of Canada in *Vavilov* held that declining to remit a matter back to the decision maker may be appropriate where it becomes evident to the Court, in the course of its review, that a particular outcome is inevitable and that remitting the case back would therefore serve no useful purpose (para 142). However, this matter is not a merry-go-round situation where there have been multiple judicial reviews and reconsiderations. Nor is it apparent to me that it is inevitable that the Applicant's name must be placed back on the nominee list and, therefore, the Election ballot.

[52] The Women's Council had explicit authority under the Election Law to make nomination appeal decisions, which decisions are stated to be final and binding (ss 50 and 51). While it is true that the Applicant meets all of the Election Law requirements for nomination, the Election Law does not prescribe the scope of an appeal of a CEO's decision. That is, it does not limit the grounds of appeal to whether a nominee meets the qualification requirements, as the Applicant submits. Sections 49 to 51, which pertain to the appeal, are silent as to the grounds upon which an appeal of the decision of the CEO to include any name on the list of persons nominated (or to exclude the elector's own name) can be made, as well as with respect to the factors that the Women's Council may consider when assessing the asserted appeal grounds.

[53] I acknowledge the Applicant's submission that such limits on the appeal grounds should be seen as implicit when the Election Law is viewed through the lens of democracy and in harmony with Charter values and rights. However, I am not persuaded by the Applicant's argument that the Women's Council necessarily acted outside the scope of its powers by considering factors beyond whether the Applicant was qualified, duly nominated or subject to permanent incapacity, which the Applicant submits are the only applicable considerations or grounds of appeal.

[54] That said, if the Women's Council is relying on customary law to support its assessment of such external factors with respect to the appeal – as it appears to suggest in the decision – such custom must demonstrably exist. The Women's Council is also required to reasonably assess all of the evidence before it. In the context of its redetermination of this matter, this will include any evidence submitted by the Applicant when he has been afforded the opportunity to do so. Further, any other evidence relied upon by Women's Council must form part of its record and be provided to the Applicant to enable him to respond to the appeal. And, ultimately, the re-determination must be reasonable.

Costs

[55] Neither party made submissions as to the quantum of costs.

[56] As the successful party, the Applicant shall have his costs as against the Women's Council which shall be based Column III of Tariff B (*Federal Court Rules*, SOR/98-106, Rule 400(1), (3) and (4)).

JUDGMENT IN T-1751-21

THIS COURT'S JUDGMENT is that

1. This application for judicial review is granted;
2. The November 26, 2021 decision of Pimicikamak Cree Nation Women's Council removing the Applicant's name from the list of duly nominated candidates to run for election is quashed;
3. The Women's Council shall, within 30 days of this decision, provide the Applicant with all of the factors upon which it intends to rely in assessing the October 28 appeal, including the source of the information upon which it intends to rely and the particulars of same, and shall afford the Applicant a meaningful opportunity to respond; and
4. The Pimicikamak Cree Nation shall pay the Applicant's costs to be based Column III of Tariff B (*Federal Court Rules*, SOR/98-106, Rule 400(4)).

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1751-21

STYLE OF CAUSE: ZACHEUS JOSEPH TROUT v WOMEN'S COUNCIL OF PIMISIKAMAK OKIMAWIN, A.K.A. THE PIMISIKAMAK CREE NATION OR CROSS LAKE FIRST NATION, AND CHRISTIE SCOTT, IN HER CAPACITY AS CHIEF ELECTORAL OFFICER OF PIMISIKAMAK OKIMAWIN

PLACE OF HEARING: BY VIDEOCONFERENCE USING ZOOM

DATE OF HEARING: OCTOBER 26, 2022

JUDGMENT AND REASONS: STRICKLAND J.

DATED: OCTOBER 31, 2022

APPEARANCES:

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