Federal Court  Cour fédérale

Date: 20230925

Docket: T-1015-22

Citation: 2023 FC 1289

Ottawa, Ontario, September 25, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

DAVID MEECHES

Applicant

and

KYRA WILSON, ALLEN DENNIS MYRAN, KEELY ASSINIBOINE, MARVIN DANIELS, and GARNET MEECHES

Respondents

JUDGMENT AND REASONS

[1] This the judicial review of a decision of the Election Appeal Committee of the Long Plain First Nation [LPFN] denying the appeal brought by the Applicant, David Meeches, who unsuccessfully ran for the office of Chief of the LPFN in the election held on April 15, 2022 [Election].

Background

[2] The Applicant is a member of the LPFN.

[3] LPFN elections are governed by the *Long Plain First Nation Custom Election Act*, as ratified by the Tribal Citizens on August 4, 2017 [*Election Act* or *Act*]. The LPFN Tribal Government consists of one Chief and four Councillors elected by the Tribal Citizens. General Elections for these positions are held every four years, on the second Thursday in April (*Election Act* ss 2.1, 2.2, 2.4, 4.1). In 2022, this fell on April 14, 2022.

[4] The *Election Act* includes an election timeline and calendar (for the prior 2018 election and the subject 2022 Election) set out in Schedule F of the *Act* (*Election Act*, s 5). This includes the pre-election process (*Election Act*, s 6), which, among other things, encompasses the giving of unofficial pre-election notices and the selection and appointment of an electoral officer and deputy electoral officer (*Election Act*, ss 6.2 - 6.12).

[5] The electoral officer is responsible for managing and executing pre-electoral, electoral and post-electoral processes and purposes in accordance with the *Election Act*, which responsibilities are set out in s 6.13.

[6] Jacqueline Meeches was selected and appointed to the position of electoral officer for the 2022 Election [Electoral Officer] on March 3, 2022, together with Krystle Fosseneuve as deputy electoral officer [Deputy Electoral Officer].

[7] The *Election Act* also establishes an appeal mechanism for election-related appeals. These are divided into "Appeals of Candidacy" (Part 1) and "Election Appeals" (Part 2). The present application concerns the latter.

[8] Section 13.1 describes the composition of the three-person election appeal committee, while section 13.6 describes its duties:

> 13.6 The Election Appeal Committee is responsible for enforcing this Act in a manner consistent with the *Long Plain First Nation Tribal Constitution*, receiving, investigating and reviewing submitted appeals in a timely and fair manner in accordance with this Act, and conducting public hearings, where necessary, to make final and binding decisions concerning Appeals of candidacy and Election Appeals.

[9] The election appeal committee selected and appointed for the Election was composed of Bill Beauchamp, as chair [Beauchamp or Chair]; Ruth Roulette; and, Preston Assiniboine [together, the Appeal Committee or Committee].

[10] Part 2, Election Appeals, sets out the grounds for an election appeal, the requirements pertaining to appeal submissions and the procedure to be followed by the Appeal Committee in making a decision. It states as follows:

> **PART 2 ELECTION APPEALS**
>
> **Grounds for Election Appeals**
>
> 13.21 Grounds for an Election Appeal pursuant to this Act are restricted to challenges of successful Candidates or election officials only and include:
>
> > a. Material breaches or contraventions of Articles 10.1 and/or 10.2;

b. Voter collusion;

c. Fraud;

d. Material breach or contravention of a rule, process or procedure by election officials;

e. Appeals of Candidacy as set out in Article 13.10; and

f. Any other material breach or contravention of this Act.

Submission

13.22 An Election Appeal submitted to the Election Appeal Committee must:

a. be in writing;

b. set out in writing, being duly signed and witnessed, the reason(s) for the Election Appeal and the facts substantiating the grounds for the appeal;

c. be accompanied by any supporting documentation or evidence; and

d. be accompanied by a non-refundable fee of $100.00 by certified cheque, money order, bank draft or cash to the Long Plain First Nation Finance department and which monies shall be applied toward the costs of the appeal.

If an appeal submission does not comply with the provisions of this Act, the appeal will be immediately dismissed by the Election Appeal Committee.

13.23 The Appellant and the Respondent to an appeal are fully responsible for all costs associated with the Election Appeal. The Long Plain First Nation will not be responsible for any costs, legal or otherwise.

Deadline for Election Appeals

13.24 The deadline for any candidate or Eligible Elector to submit an Election Appeal is by 4:30 p.m. Manitoba local time, within four (4) days after the election.

Procedure

13.25 The Election Appeal Committee shall, upon receipt of an Election Appeal, immediately notify the Electoral Officer and any party named as a Respondent in the appeal in writing.

13.26 Any Respondent to an Election Appeal may submit, within twenty-four (24) hours of the notification, in writing and duly signed and witnessed, their reason(s) outlining why the Election Appeal should be dismissed and the facts substantiating the dismissal of the appeal. The Respondent's submission may be accompanied by any supporting documentation or evidence.

13.27 The Election Appeal Committee shall meet two (2) days after the Election Appeal deadline to determine if there is sufficient evidence to warrant an appeal hearing.

13.28 The Election Appeal hearing, if required, shall be held seven (7) days after the election.

13.29 In a case where the Election Appeal Committee schedules a hearing, the Committee shall immediately send a written notice of the hearing the Electoral Officer and any party named as a Respondent in the appeal and post a notice of the hearing in at least three (3) conspicuous Long Plain entities/businesses and on social media.

13.30 The written notice described in Article 13.29 shall set out:

a. the nature of the hearing and all related particulars;

b. the date, time and location of the hearing; and

c. a statement that the Appellant(s) and Respondent(s), may, at the hearing, make a presentation to the Election Appeal Committee, which may include the presentation of documents, evidence and testimony by witnesses.

13.31 An Election Appeal hearing will take the form of a public hearing consisting of:

a. The Electoral Officer;

b. The Deputy Electoral Officer;

c. The Electoral Ethics Committee;

d. The Appellant;

e. The Respondent;

f. Any Witnesses, if required; and

g. Interested Tribal Citizens as spectators.

13.32 A decision of the Election Appeal Committee shall be irrevocable, binding, and final.

13.33 A decision of the Election Appeal Committee without a hearing shall:

a. be in writing;

b. be provided to the Appellant and Respondent, if any;

c. be posted on the third Thursday of April of the Election year; and

d. be posted at least three (3) conspicuous Long Plain entitles/businesses and social media.

13.34 A decision of the Election Appeal Committee with a hearing shall:

a. be in writing;

b. be provided to the Appellant and Respondent, if any;

c. be posted two (2) days after the date of the hearing; and

d. be posted at least three (3) conspicuous Long Plain entities/businesses and social media.

13.35 After a review of all the evidence received, the Elections Appeal Committee shall:

a. Determine that the grounds put forth in the appeal are either frivolous in nature or are unsubstantiated and dismiss the appeal;

b. Rule that a Respondent is deemed not to have materially breached or contravened the provisions of this Act such that they are ineligible to take office;

c. Rule that a Respondent is deemed to have materially breached or contravened the provisions of this Act such that they are ineligible to take office;

> d. Rule that a procedure, rule or process, in accordance with this Act, has been materially contravened or breached such that it affects the fairness of the results of an election or is unconscionable to uphold the results of the election and may declare the election invalid, in whole or in part.
>
> 13.36 The Election Appeal Committee must not declare an election invalid by reason only of an irregularity or contravention of this Act if it is satisfied that:
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> a. the election was conducted in good faith; and
>
> b. the irregularity or contravention did not materially affect the result of the election.
>
> ……..

[11] As indicated above, in accordance with the *Election Act*, the Election was to have been held on April 14, 2022. However, due to a winter storm, the Electoral Officer made the decision to delay opening of the polls until the following day, April 15, 2022. The Election proceeded on that date, and Kyra Wilson [Wilson] was the successful candidate for the office of Chief, having received 12 votes more than the Applicant (an administrative re-count subsequently held on April 20, 2022, reduced the margin separating the two candidates for Chief to 11 votes). Allen Dennis Myran [Myran], Keely Assiniboine [K. Assiniboine], Marvin Daniels [Daniels] and Garnet Meeches [G. Meeches] were the successful candidates for the four Councillor positions.

[12] On April 19, 2022, sometime between 1:30 and 4:00 pm (i.e., prior to the 4:30 pm deadline), the Applicant filed an appeal of the Election. In his appeal, he asserted that:

a. The previous electoral officer had made statements on her social media account indicating that Tribal Citizens who wished to vote would have to register to vote for all forms of voting – including in person – leading to voter confusion and

discouragement in participation in the Election, as the *Election Act* does not require registration for in-person voting;

b. The Applicant questioned whether the current Electoral Officer received a proper orientation from the previous electoral officer and whether the Electoral Officer had reached out to the previous electoral officer to determine whether notifications required by s 6.2 of the *Election Act* had been sent. The Applicant asserted that if the Unofficial Pre-Election Notices were not sent, which would include a registration form as found in Schedule A of the *Act*, then s 7 of the *Election Act*, absentee and electronic voting, and s 11, Election Process, were contravened;

c. On April 12, 2022, Wilson posted unfounded and false allegations against the Applicant on social media, including that he had removed campaign signs and replaced them with his own, and this post was in breach of ss 10.1(a), (c), (d) and (h) of the *Election Act*;

d. Scrutineers and supporters of Wilson stood outside the (advance) polling station at the Keeshkeemaquah Conference Centre (also known as the Keesh) on April 12, 2022, and harassed electors to reveal whom they intended to vote for and demanded that they vote for Wilson, in breach of ss 10.2(e) and (f) and s 10.3 of the *Act*;

e. The Electoral Officer made an error in judgment in her decision to proceed with the Election on April 15, 2022. That decision was based on major highways reopening after the storm, but it failed to consider that individual lanes (driveways) of Tribal Citizens had not been cleared. This precluded certain Tribal Citizens from exercising

> their right to vote, affected the candidacy of all candidates and breached ss 6.13(a), (b) and (e) of the *Election Act*.

[13] The Appeal Committee met that evening and on the following morning, April 20, 2022, to review the Applicant's appeal (as well as a second appeal that is not the subject of this application for judicial review).

[14] At 11:26 am on April 20, 2022, Bill Beauchamp, as Chair of the Appeal Committee, sent an email to the Electoral Officer attaching copies of the appeals. The email states that "[i]n accordance with Article 13.26 of the *Long Plain First Nation Custom Election Act*, we ask that you provide a written response to both appeals, in writing, within 24 hours of receiving this email." Further, that the response should be signed and witnessed, set out the Electoral Officer's position in response to the specific allegations raised in the appeals and include as an attachment any supporting documentation or evidence. It concluded, "[t]o be clear, we require your written response, signed and witnessed, by no later than Thursday April 21, 2022, at 11:25 am."

[15] The evidence of the Chair of the Appeal Committee is that, in the meantime, the Appeal Committee continued its review and, at about 1:00 pm, decided that it would dismiss the Applicant's appeal. This decision was not communicated at that time.

[16] On the evening of April 20, 2022, at 9:56 pm, the Electoral Officer sent a responding text message to the Chair indicating that she had been engaged in conducting a re-recording of the ballots and had not gotten home until 6:30 pm, when she began her review. She requested an

extension of time for her response to the two appeals. The Chair responded, “with the tight deadlines we have I am not sure who allows the extension. I will check into it.” He said he would get back to her. On the morning of April 21, 2022, at 8:36 am, the Chair sent a text to the Electoral Officer stating, “the extension you are requesting would be at your call bc you are the electoral officer.” The Electoral Officer responded that she was almost done and that the Appeal Committee would receive her response before the end of the day. At 2:56 pm, the Chair sent a text to the Electoral Officer asking how much more time she would need. The Electoral Officer responded that she was just printing the supporting documents, she would perhaps be done at 4:00 pm, and she could deliver the original. The Chair acknowledged this and asked that the Electoral Officer let him know when she was there.

[17] The Electoral Officer hand-delivered the original of her response to the appeal [Response] to the Chair at about 4:30 pm.

[18] At 5:47 pm, the Appeal Committee sent its decision to the Applicant. The Applicant called the Chair at 5:57 pm. The Applicant’s evidence is that he was told that the appeal was dismissed due to a lack of substantiating evidence and that the Electoral Officer’s Response was not considered because it was not received within the 24-hour *Election Act* deadline.

[19] The Electoral Officer was sent the decision at 6:37 pm and called the Chair at 6:47 pm. Her evidence is that she asked if the Appeal Committee had considered her Response before its decision was rendered. She was informed by the Chair that it was not considered because it was not included with the Applicant’s appeal.

[20] It is not apparent from the record before me when or if the Appeal Committee made its decision public, by posting, as required by s 13.33 of the *Election Act*.

[21] On May 18, 2022, the Applicant filed his application for judicial review of the Appeal Committee's decision. The Notice of Application named Jacqueline Meeches (the Electoral Officer), Krystle Fosseneuve (the Deputy Electoral Officer), Bill Beauchamp, Ruth Roulette, and Preston Assiniboine (the Appeal Committee members) and Kyra Wilson as the Respondents. On October 7, 2022, the Applicant wholly discontinued his application against the Electoral Officer, Deputy Electoral Officer and Appeal Committee members and simultaneously filed an amended Notice of Application which added four new respondents – the four councillors elected in the contested Election – Allen Dennis Myran, Keely Assiniboine, Marvin Daniels and Garnet Meeches. Kyra Wilson is the one remaining original Respondent.

[22] On November 28, 2022, Associate Judge Aalto ordered the Appeal Committee to file a certified tribunal record [CTR] by December 1st. It was received by the Registry on December 6th, 2022, and consists only of the *Election Act* and a copy of the appeal submitted by the Applicant.

[23] In this application, Kyra Wilson and Allen Dennis Myran [Wilson & Myran Respondents] are represented by Duboff Edwards Schachter Law Corporation and oppose the application.

[24] The Respondent K. Assiniboine is self represented (but was represented by counsel when cross-examined on her affidavit) and opposes the application.

[25] The Respondents Marvin Daniels and Garnet Meeches [Daniels & G. Meeches Respondents] are represented by Chornopyski Law and, unusually, as they are respondents, support the Applicant's application, agreeing with the Applicant that the Appeal Committee decision should not stand.

Decision Under Review

[26] The Appeal Committee stated that the Applicant's appeal raised the following four grounds:

1. The previous electoral officer made misleading comments on social media which, in the opinion of the Appellant, "led to voter confusion and ultimately voter discouragement in participation in the General Election."

2. The Appellant was accused of removing the campaign sign of Kyra Wilson and placing his own campaign sign on the property of an individual, without permission. Candidate Kyra Wilson, and others, made this false allegation on social media, and the Appellant alleges that this had a "negative impact" on his candidacy.

3. Scrutineers and supporters of Kyra Wilson stood outside of the polling station on April 12, 2022, and were harassing electors and anyone in general.

4. The election date was moved from April 14 to April 15, 2022, but the Electoral Officer should have delayed the vote until the Public Works Department had the opportunity to clear all lanes.

[27] The Appeal Committee then found as follows:

> The Appeal Committee has determined that a hearing is not required and that the matters raised in the Appeal can be determined without an appeal hearing. More specifically, and for the reasons set out below, it is the determination of the Appeal Committee that the Appeal fails to establish a *prima facie* breach of the Act, such that the Appeal is dismissed.
>
> **1st Ground of Appeal**
>
> A social media post issued by a former electoral officer, even if misleading, does not violate the Act because the former electoral officer had no authority, and was not an election official, as it relates to the general election that occurred on April 15, 2022 (the "General Election"). Article 13.21(d) of the Act requires that a material breach or contravention of a rule, process or procedure be by an "*election official*". As it relates to the General Election, the Act makes clear that a new electoral officer would be appointed on the first Thursday in March, 2022. Therefore, for the purposes of the General Election and Article 13.21(d) of the Act, the former electoral officer was not engaged as an election official.
>
> Further, and in any event, the Appeal does not provide any information or evidence, at all, to support that any citizen was *actually* misled, or that this issue had any impact on the fairness of the General Election or the election outcome.
>
> For the reasons stated above, the Appeal Committee has determined that the 1st ground of appeal, on its face, is unsubstantiated.
>
> **2nd Ground of Appeal**
>
> The Appeal does not contain sufficient information to establish a *prima facie* breach of the Act. Specifically, the Appeal does not provide any details of the social media posts complained of and so there is no basis to conclude that those posts breached Article 10.01 of the Act. Further, there is no factual information contained

in the Appeal upon which to determine that the social media posts had a negative impact on the Appellant's candidacy, or on the voting results.

For the reasons stated above, the Appeal Committee has determined that the 2nd ground of appeal, on its face, is unsubstantiated.

3rd Ground of Appeal

Article 10.1 and 10.2 of the Act places restrictions on the actions of "Candidates". Article 10.3 of the Act makes clear that Candidates shall not "knowingly or willfully, directly or indirectly through their supporters/advocates" breach any of the campaign rules as set out in Articles 10.1 and 10.2. In order to establish that a Candidate knowingly or willfully breached the obligations owed under Articles 10.1 and 10.2, the evidence must establish that the Candidate knowingly breached the campaign rules directly, or that the Candidate indirectly breached these obligations (knowingly or willfully) through a supporter/advocate. This would require evidence that the Candidate directed or authorized the breach or contravention to occur, so as to be able to draw an inference that the actions of the supporter/advocate are attributable to the Candidate.

The Appeal does not provide any evidence or information to support that the actions complained of were authorized by, or even known to, Kyra Wilson. Candidates are not strictly liable for the actions of their supporters and the Appeal filed by the Appellant fails to provide any information upon which it could be concluded that Kyra Wilson knowingly or willfully allowed these alleged breaches to occur.

For the reasons stated above, the Appeal Committee has determined that the 3rd ground of appeal, on its face, is unsubstantiated.

4th Ground of Appeal

Of significance, the Appellant accepts and agrees that the election originally scheduled for April 14, 2022 had to be adjourned because of the unforeseen snow storm. The Appellant does not take issue with the authority of the Electoral Officer to delay the in-person election voting date. Rather, the Appellant alleges that the vote should have been delayed for a longer period of time.

> We accept that the Electoral Officer had the power to adjourn the originally scheduled election voting date from April 14 to April 15, 2022. It is not for this Appeal Committee to scrutinize the correctness of this decision with the benefit of hindsight. Rather, the issue is whether the decision of the Electoral Officer was reasonable in all of the circumstances, and consistent with the Electoral Officer's obligations under the Act. The Act states that the General Election must happen on the second Thursday of April, and so it is understandable that any required delays in the holding of the election would be as short as possible.
>
> While we have carefully reviewed and considered the information and allegations advanced by the Appellant, we find that the decision was reasonable and consistent with the Act.
>
> **In summary and for the reasons stated above, the Appeal is denied.**

Issues and Standard of Review

[28] The issues arising in this application for judicial review are:

i. Preliminary Evidentiary Issues;

ii. Did the Appeal Committee breach the duty of procedural fairness owed to the Applicant?

iii. Was the Appeal Committee's decision reasonable?

[29] The parties submit that issues of procedural fairness are to be reviewed on a correctness standard. I agree (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*], the Federal Court of Appeal held that the required reviewing exercise is best – albeit imperfectly – reflected in the correctness standard.

The Court is to determine whether the proceedings were fair in all of the circumstances (*CPR* at paras 54-56; see also *Watson v Canadian Union of Public Employees*, 2023 FCA 48 at para 17).

[30] The parties also agree, as do I, that reasonableness is the standard of review applicable to the merits of the Election Committee's decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25 [*Vavilov*]). "A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, 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 Evidentiary Issues

[31] Extensive evidence has been filed in this matter, with some duplication of materials between the parties' records.

[32] The Applicant has filed:

i. Affidavit of David Meeches sworn on October 17, 2022 [Applicant's Affidavit];

ii. Affidavit of Jacqueline Meeches sworn on October 20, 2022 [Electoral Officer's Affidavit];

iii. Affidavit of Krystle Fosseneuve affirmed on October 18, 2022 [Deputy Electoral Officer's Affidavit];

iv. Affidavit of Chris Yellowquill affirmed on October 17, 2022 [Yellowquill Affidavit];

v. Supplemental Affidavit of Jacqueline Meeches sworn on December 22, 2022 [Electoral Officer's Supplemental Affidavit];

vi. Transcript of the Cross-Examination of Kelly Assiniboine conducted on March 2, 2023 [K. Assiniboine Cross Examination];

vii. Transcript of the Cross-Examination of William Beauchamp conducted on March 3, 2023 [Beauchamp Cross Examination];

viii. Transcript of the Cross-Examination of Kyra Wilson conducted on March 3, 2023 [Wilson Cross Examination];

ix. Transcript of the Cross-Examination of Allen Dennis Myran conducted on March 3, 2023 [Myran Cross Examination];

x. Certified Tribunal Record dated December 1, 2022 [CTR].

[33] The Wilson & Myran Respondents filed:

i. Affidavit of Kyra Wilson affirmed on January 27, 2023 [Wilson Affidavit];

ii. Affidavit of Allen Dennis Myran affirmed on January 27, 2023 [Myran Affidavit];

iii. Affidavit of Bill Beauchamp affirmed on January 30, 2023 [Beauchamp Affidavit];

iv. Transcript of Cross-Examination of David Meeches conducted on March 1, 2023 [Applicant Cross Examination];

v. Transcript of Cross-Examination of Jacqueline Meeches conducted on March 2, 2023 [Electoral Officer Cross Examination];

vi. Transcript of Cross-Examination of Krystle Fosseneuve conducted on March 2, 2023 [Deputy Electoral Officer Cross Examination];

vii. Transcript of Cross-Examination of Marvin Daniels conducted on March 1, 2023 [Daniels Cross Examination];

viii. Transcript of Cross-Examination of Garnet Meeches conducted on March 1, 2023 [G. Meeches Cross Examination]; and

ix. Transcript of Cross-Examination of Christopher Yellowquill conducted on March 1, 2023 [Yellowquill Cross Cross-Examination];

[34] The Daniels & Meeches Respondents filed:

i. Affidavit of Garnet Meeches sworn on December 29, 2022 [G. Meeches Affidavit];

ii. Affidavit of Marvin Daniels sworn on December 29, 2022 [Daniels Affidavit];

iii. K. Assiniboine Cross Examination;

iv. Beauchamp Cross Examination;

v. Wilson Cross Examination;

vi. Myran Cross Examination; and

vii. CTR.

[35] The Respondent K. Assiniboine filed:

i. Affidavit of Keely Assiniboine affirmed on February 22, 2023 [K. Assiniboine Affidavit].

[36] The Applicant initially served and filed his Affidavit, the Electoral Officer's Affidavit, the Deputy Electoral Officer's Affidavit, the Yellowquill Affidavit as well as affidavits of Myrna Assiniboine and Dale Myran. The Wilson & Myran Respondents raised concerns regarding these latter two affidavits at a case management conference held in December 2022. A partial agreement followed which resulted in Associate Judge Coughlan issuing an Order on December 19, 2022, that the Applicant would withdraw the affidavits of Myrna Assiniboine and Dale Myran and serve a supplemental affidavit of the Electoral Officer, and that the hearing of a motion to strike by the Wilson & Myran Respondents would be deferred to the hearing.

i. Wilson & Myran Respondents' motion to strike

[37] The Wilson & Myran Respondents' motion is now before me. Therein, those respondents seek to strike out the following evidence:

Affidavit Evidence

a. Applicant's Affidavit at paras 14 in part, 15 in part and Exhibits E, F and G in their entirety;

b. Electoral Officer's Affidavit at paras 5, 14, 16, 17, 19 in part, 20 in part, 21, 22, 24, 25, 27, 28 and Exhibits D, E and G in their entirety;

c. Electoral Officer's Supplemental Affidavit at para 6 in part and Exhibit D in its entirety;

d. Deputy Electoral Officer's Affidavit at para 9 and Exhibit B in its entirety; and

e. Yellowquill Affidavit at paras 3, 6 in part, 7 and Exhibit A in its entirety.

Cross-Examination Evidence

a. Applicant's Cross Examination at page 33 line 4 to page 42 line 13 and page 19 line 23 to page 20 line 4;

b. Electoral Officer's Cross Examination at page 27 lines 5-6 in part, page 32 lines 24-25 in part and page 49 line 16 to page 61 line 7;

c. Deputy Electoral Officer's Cross Examination at page 15 line 10 to page 28 line 15;

d. Yellowquill Cross Examination at page 3 line 10 to page 4 line 3, page 4 lines 4-25 and page 5 line 4 to page 10 line 25; and

e. Beauchamp Cross Examination at page 33 lines 8-14, page 36 line 3 to page 38 line 9 and page 40 line 14 to page 42 line 8.

Wilson & Myran Respondents' Position

[38] The Wilson & Myran Respondents assert that their motion raises two issues. First, whether evidence that was not submitted to the Appeal Committee, or considered by it, should be struck from the record. Second, whether hearsay and opinion evidence should be struck from the

record. They submit that it is uncontested that the Appeal Committee made its decision without reviewing the Electoral Officer's Response and that what is at issue is whether the Applicant can, without motion, rely on "fresh evidence" that was not before the Appeal Committee to challenge the merits of the decision.

[39] The Wilson & Myran Respondents refer to *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-20 [*Access Copyright*]; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42 [*Delios*]; *Chowdhury v Canada*, 2022 FC 1449 at para 25; *David Suzuki Foundation v Canada (Health)*, 2018 FC 379 at para 36; *Re Keeprite Workers' Independent Union et al and Keeprite Products Ltd*, 1980 CanLII 1877 (ON CA), 29 OR (2d) 513 at para 12 for the general rule that the evidentiary record before the Court on judicial review is restricted to the evidentiary record that was before the administrative decision-maker, with certain limited exceptions. They submit that the Applicant's evidence that was not before the Appeal Committee does not fall within any of the exceptions and should be struck out.

[40] The Wilson & Myran Respondents particularly take issue with the Electoral Officer's Response, which was submitted to, but not considered by, the Appeal Committee and assert that the Applicant seeks to rely on the Response to introduce new evidence of inappropriate conduct, harassing behaviour, security issues and ballot tampering. They also assert that the Response was "improper and inadmissible" before the Appeal Committee, as the *Election Act* limits the evidence of respondents to an appeal to why the appeal should be denied, not why it should be allowed. Further, that judicial review is not an opportunity to correct a deficient appeal (citing

Kelley Estate v Canada (Attorney General), 2011 FC 1335 at para 13; *Chopra v Canada (Treasury Board)*, 168 FTR 273, 1999 CanLII 8044 (FC) at para 9).

[41] As to hearsay, the Wilson & Myran Respondents refer to Rule 81(1) of the *Federal Courts Rules*, SOR/98-106 [Rules]. They also submit that the hearsay at issue goes to controversial issues like alleged ballot tampering, harassment of voters and the validity of the Election. The witnesses to these alleged events are not affiants or parties to this application, and there was no opportunity to cross-examine or test their evidence. The Wilson & Myran Respondents submit that they will suffer prejudice if this evidence is admitted (citing *Rainy River First Nations v Bombay*, 2022 FC 1434 at paras 35 and 40 [*Rainy River*]).

[42] Further, they submit that the Electoral Officer, Myran and Yellowquill evidence may also be struck out on the basis that it contains opinion evidence.

Applicant's Position

[43] The Applicant is prepared to withdraw paragraph 15 of his Affidavit, in part, and specifically Exhibit F, being the Electoral Officer's Response, because this is more properly contained in the Electoral Officer's Supplemental Affidavit, where it is attached as Exhibit D. The Applicant is also prepared to withdraw page 33 line 4 to page 42 line 13 of the Applicant Cross Examination.

[44] Beyond this, the Applicant submits that the challenged evidence falls within the exceptions to the general rule that the evidentiary record before the Court on judicial review is

restricted to the record that was before the decision-maker. Specifically, that it provides context and background information necessary for understanding the issues and to bring attention to the procedural defects that cannot be found in the CTR. The Applicant submits that the Electoral Officer's Affidavit and Supplemental Affidavit provide background information relating to the allegations set out in his appeal. The Electoral Officer's Response, according to the Applicant's submissions, provides background information and will "fix a procedural defect," as the Response was improperly not included in the CTR, rendering it incomplete. The Response also includes the Facebook post made by Wilson referred to in the Applicant's appeal and based on which the Applicant asserted that an unfounded allegation against him was posted on social media in violation of the *Election Act*. The Applicant submits that this evidence is necessary to provide general background information to illustrate the content of the social media post, which the Applicant did not have access to when filing his appeal.

[45] Further, the Applicant submits that Exhibit F of the Electoral Officer's Affidavit, a social media post entitled "Official Announcement" advising the opening of polls on April 14, 2022, was postponed due to the winter storm, and the Yellowquill Affidavit provide general background information about the storm and that his appeal provided significant information about the impact of the storm. Similarly, the Deputy Electoral Officer's Affidavit at paragraph 9 and Exhibit B, which address five messages from Tribal Citizens who were unable to vote due to the storm, is general background information and is not new in substance.

Other Respondents' Positions

[46] Neither the Daniels and G. Meeches Respondents nor the K. Assiniboine Respondent made submissions in response to the motion to strike.

Analysis

[47] In *Access Copyright*, Justice Stratas pointed out that in determining the admissibility of an affidavit in support of an application for judicial review, the differing roles played by the Court and the administrative decision-maker must be kept in mind (at para 14). Parliament gave the administrative decision-maker, and not the Court, jurisdiction to determine certain matters on their merits. Because of this demarcation of roles, the Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before a reviewing Court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible (*Access Copyright* at paras 14-19).

[48] The recognized exceptions are an affidavit that: provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, but does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker; brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker so that the Court can fulfill its role of reviewing for procedural unfairness; or

highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding (*Access Copyright* at para 20; see also *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-25 [*Bernard*]; and *Delios* at para 45).

[49] In *Delios*, Justice Stratas stated, with respect to the general background exception:

> [44] Under this exception, a party can file an affidavit providing "general background in circumstances where that information might assist [the reviewing court to understand] the issues relevant to the judicial review": *Access Copyright*, above at paragraph 20(a).
>
> [45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.
>
> [46] But "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20(a).

a) Electoral Officer's Response and related evidence.

[50] In this matter, the most contentious piece of evidence is the Electoral Officer's Response. I pause here to note that the Response is found in the Applicant's Affidavit paragraph 15, Exhibit F; the Electoral Officer's Supplemental Affidavit paragraph 6, Exhibit D; and the Beauchamp

Affidavit paragraph 19, Exhibit E. After the hearing, it came to my attention that, although all three versions contain the 12-page (including covering letter) written response, there is a difference in the documents attached to the written response. The version attached to the Applicant's and the Electoral Officer's version contains 19 pages of attachments, while the version attached to the Beauchamp Affidavit contains 58 pages of attachments. Given the references to attached material in the written portion of the Response, it seemed likely that the Beauchamp Affidavit attaches a complete copy of the attachments to the written portion of the Response. By direction dated September 15, 2023 I requested the parties to confirm, by September 15, 2023, that the Beauchamp Affidavit attaches a complete copy of the attachments to the Response. A letter dated September 20, 2023, sent with the consent of all parties, confirmed this to be the case.

[51] The fact that the Appeal Committee requested that the Electoral Officer provide a response to the Applicant's appeal, that she did so, and that the Appeal Committee received the Response before it communicated its decision to the Applicant and the Electoral Officer is not in dispute. Indeed, the Beauchamp Cross Examination evidence (the admissibility of portions of which is open to question, as discussed below) is that the decision had been made by the Appeal Committee at about 1:00 pm on April 20, 2022 – before Beauchamp sent his texts to the Electoral Officer pertaining to her request for an extension of time to submit her response. Further, although the Response was received at about 4:30 pm on April 21, 2022, the Appeal Committee did not review it prior to communicating the previously made decision to the Applicant (at 5:47) and the Electoral Officer (at 6:37 pm).

[52] Rule 317 of the Federal Court Rules addresses materials in the possession of a tribunal:

> 317(1) Material from a Tribunal – A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing written request, identifying the material requested.

[53] As indicated above, on November 28, 2022, the Appeal Committee was ordered by this Court to file its record.

[54] On December 1, 2022, Bill Beauchamp, as Chair of the Appeal Committee, provided the CTR. He states that he certifies "that the documents attached to this certificate are true copies of the relevant material that was in the possession **and considered by** the Election Appeal Committee in issuing its decision on April 21, 2022, which is the subject of this application for judicial review" (emphasis added). The only documentation contained in the CTR is the Applicant's appeal and a copy of the *Election Act.* There are no meeting notes, records of deliberations or any communications of any kind.

[55] It is significant to note that Rule 317(1) does not limit the material to be provided in the CTR to relevant material "considered by" the tribunal. Were it so, tribunals could simply decline to consider relevant evidence and then decline to include it in the CTR. This would be highly prejudicial to applicants and would defeat the purpose of the Rule. Rather, under Rule 318, where a tribunal objects to a request made under Rule 317, it is to inform the parties and the Court Administrator, in writing, of the reason for the objection. The Court may then give directions as to a procedure for making submissions with respect to such an objection and, after hearing those submissions, make an order accordingly.

[56] As stated by Justice Stratas in *Canadian Copyright Licensing Agency v Alberta*, 2015 FCA 268 [*Canadian Copyright*], in the context of a challenge to the reasonableness of a challenged decision:

> [13] Rule 317 reflects the reality today that the permissible grounds for judicial review are broader than they once were. It entitles the requesting party to receive everything that was before the decision-maker at the time it made its decision and that the applicant does not have in its possession: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 at paragraph 7. This allows parties "to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective" and "have the reviewing court [that is engaged in reasonableness review] consider the evidence presented to the tribunal in question": *Hartwig v. Saskatchewan (Commission of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at paragraph 24 (commenting on a rule similar to Rule 317).

[57] Here, the Appeal Committee did not disclose the existence of the Response, which was in its possession, and then object to providing it on the basis of relevance or otherwise. It simply did not provide the Response in the CTR. That said, the Applicant's Affidavit states that, in response to a letter he sent to the Electoral Officer on April 21, 2022, after he received the appeal decision, the Electoral Officer provided him with a copy of her Response. Thus, the Response was in the possession of the Applicant and, on that basis, it was not strictly required to also be provided in the CTR.

[58] However, the Wilson & Myran Respondents assert that the Response was irrelevant, as it was not reviewed by the Appeal Committee and therefore does not form a part of the record. I do not agree. Material before an administrative decision-maker cannot be deemed to be irrelevant – and therefore not included in the record – simply on the basis that the decision-maker did not

consider it. Were it so, then this would mean, for example, that material that was inadvertently overlooked could then be deemed irrelevant.

[59] Whether materials are relevant (for the purposes of Rule 317) has been found to be defined by the grounds of review in the notice of application, which are to be read holistically and practically (*Tsleil-Waututh Nation v Canada (Attorney General),* 2017 FCA 128 at paras 109-110 [*Tsleil-Waututh*]). Here, the grounds of the application as set out in the amended Notice of Application identify that the Appeal Committee failed to consider the Response, and its decision was unreasonable. This Court has also held that "… in determining the relevance of a document under Rule 317, the issue is not whether the decision-maker did not consider evidence, but rather whether the evidence was or should have been before the decision maker" (*Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities,* 2006 FC 720 at para 83). In this case, given that the record clearly establishes, and the Wilson & Myran Respondents acknowledge, that the Electoral Officer's Response was sought and was received by the Appeal Committee, in my view it is, on its face, relevant.

[60] As indicated above, the decision itself makes no reference to the fact that the Response was requested and received. It is entirely silent as to the existence of the Response. Nor was the Response included in the CTR, which is also bereft of any materials that might explain why the Response was not considered. Thus, whatever the Appeal Committee's reasoning may have been for making the decision in advance of receipt of the Response and then not considering the Response when it was received before communicating the decision, this reasoning is not apparent from the reasons or the record. These do not demonstrate that the Appeal Committee

declined to consider the Response because it was not relevant, or for any other reason. I acknowledge that the Beauchamp Affidavit and Beauchamp Cross Examination evidence offers explanations for why the Response was not considered. However, as will be discussed below, in my view, the post-decision reasoning of the decision-maker is to be afforded no weight.

[61] To the extent that the Wilson & Myran Respondents assert that the Response was not before the Appeal Committee when it made its decision, I first point out that there is nothing in the CTR that demonstrates when the decision was actually made. In any event, the Appeal Committee requested the Response, followed up with the Electoral Officer to determine when it would be received, had it in its possession before it communicated the decision to the Applicant but chose not to review it. In my view, even if a decision had already been made, there was nothing preventing the Appeal Committee from considering the Response when it was received and – if necessary – reconsidering or revising its decision prior to its communication. Or, if the Appeal Committee was declining to consider the Response, there was similarly nothing to prevent it from acknowledging the submission of the Response and explaining in its decision why it did not consider it. Accordingly, in my view, in these circumstances, the Response can be considered to be relevant and to have been "before" the Appeal Committee when it made, or at least before it communicated, its decision.

[62] Accordingly, this is not a situation where the Applicant seeks to submit evidence that was not before the decision-maker and, to do so, must demonstrate that it falls within the limited exceptions to the general rule that only evidence that was before the administrative decision-maker can be considered by the Court.

[63] Rather, given that the Response was in the possession of the Applicant, as the Electoral Officer provided him with a copy, this is a situation more like *Canadian Copyright*. There, material that a party had in its possession, and that was before the administrative decision-maker at the time it made the decision in issue and was potentially relevant to the judicial review, was not produced by the decision-maker in response to a Rule 317 request (para 19). In *Canadian Copyright*, Justice Stratas indicated that material that a party has in its possession and that was before the decision-maker but was not produced under Rule 317 is properly introduced by means of an affidavit (para 21).

[64] Here, unlike *Canadian Copyright* where the applicant simply included the evidence in its application record material (although it was ultimately found to be admissible), the Applicant introduced the Response as Exhibit F of his Affidavit, together with the covering letter submitted by the Electoral Officer to the Appeal Committee with the Response. Thus, the Applicant established that the Response was before the decision-maker and properly submitted the Response as an exhibit to his Affidavit. Accordingly, it is properly in the record by way of the Applicant's Affidavit.

[65] The Response is therefore not "new evidence" as the Wilson & Myran Respondents submit, and the Applicant was not required to bring a motion to admit it as such.

[66] As to the Wilson & Myran Respondents' submission that the Response was "improper and inadmissible" before the Appeal Committee because the *Election Act* limits the evidence of respondents to an appeal to why the appeal should be denied, not why it should be allowed, again

the CTR and the decision are silent on this point. The decision and the record do not express this reasoning. In any event, as will be discussed below in the context of the reasonableness of the decision, I do not accept the premise of this argument.

[67] For the reasons above, I decline to strike or disregard paragraph 15 of the Applicant's Affidavit and Exhibits F and G. Relatedly, I also decline to strike or disregard paragraph 14 of the Applicant's Affidavit introducing Exhibit E. This is a letter dated April 21, 2022, from the Applicant to the Electoral Officer. The letter describes the telephone calls the Applicant made to Beauchamp after the appeal decision was released and relates that Beauchamp indicated the Response had not been considered by the Appeal Committee. The letter also requests that the Applicant be provided with a copy of the Response as well as any communications between the Electoral Officer and the Election Committee and related notes.

[68] For the same reason, I decline to strike or disregard paragraph 6 and Exhibit D (Response and covering letter to Appeal Committee) of the Supplemental Electoral Officer Affidavit and paragraph 14 and Exhibit D of the Electoral Officer's Affidavit. The Electoral Officer's Cross Examination evidence given in response to questions asked about the Response is also admissible.

b) Remaining Impugned Evidence

[69] As both parties correctly submit, on judicial review, evidence that was not before the decision-maker and that goes to the merits of the matter is, within certain limited exceptions, not

admissible. Thus, the issue here is whether the Applicant's remaining impugned evidence falls under one or more of the recognized limited exceptions.

[70] In my view, the Applicant's reliance on the general background exception described in *Access Copyright* and *Bernard* is misplaced. As set out above, the general background exception refers to circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, but does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker (*Bernard* at para 22). It is not new information going to the merits. Rather, it is a summary of the evidence relevant to the merits that was before the administrative decision-maker (*Bernard* at para 20).

[71] With respect to Exhibit D of the Electoral Officer's Affidavit, a Facebook post by Wilson, the Applicant submits that this is background information relating to the ground of his appeal that asserts there was an unfounded allegation made against him on Facebook pertaining to the removal of election campaign signs of another candidate. I note that the subject post is included in the Response and therefore is admissible as it is not new evidence that was not before the Appeal Committee.

[72] Exhibit E of the Electoral Officer's Affidavit is a letter from a community scrutineer describing information she received from a third party indicating that two individuals at an advance poll were informing electors who to vote for. This evidence was included in the Response. The written portion of the Response describes how it came about and states that the statement of the community scrutineer dated April 19, 2022, is attached. Thus, the letter from the

community scrutineer was “before” the Appeal Committee because it formed part of the Response. However, the letter is also hearsay and thus contrary to the requirements of Rule 81. Indeed, when appearing before me, counsel for the Applicant acknowledged that the letter is inadmissible hearsay. I agree.

[73] The photographs referenced in paragraph 6 and attached as Exhibit A to the Yellowquill Affidavit, which the Applicant submits are intended to demonstrate that laneways were not cleared on April 15, 2022, that were not included as attachments to the Response are inadmissible new evidence. Relatedly, Exhibit G to the Electoral Officer’s Affidavit, a screenshot of a text message received by the Electoral Officer from Chris Yellowquill regarding the state of driveways, was included in the Response and thus is admissible as evidence that was before the Appeal Committee.

[74] The same cannot be said of paragraph 9 and Exhibit B of the Fosseneuve Affidavit concerning five text or social media messages about the storm and individuals’ inability to get out to vote. These were not included in the Response and thus were not before the Appeal Committee. Thus, they are new evidence and are not admissible.

[75] Generally speaking, discretion to strike an affidavit or part of it should be exercised sparingly, and only in exceptional circumstances (*Canada (Board of Internal Economy) v Canada (Attorney General),* 2017 FCA 43 at para 29). This is especially so in judicial review applications (*Rainy River* at para 36, citing *Gravel v Telus Communications Inc,* 2011 FCA 14 at para 5). An applications judge can instead choose to draw an adverse inference or give the

impugned affidavit (or portions thereof) little or no weight (*Rainy River* at para 36, citing *O'Grady v Canada (Attorney General)*, 2016 FCA 221 at para 11. See also *Alexander First Nation v Burnstick*, 2021 FC 618 at para 42 [*Alexander First Nation*]). In this matter, evidence that was not before the Appeal Committee and related cross examination evidence, as well as opinion and hearsay evidence, will be afforded no weight.

[76] The motion to strike is denied.

c) Beauchamp Evidence

[77] By direction dated August 28, 2023, I requested that the parties be prepared, at the hearing of the application for judicial review, to speak to cases such as *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 (see paras 40-42) [*Stemijon*] and *Halcrow v Kapawe'no First Nation*, 2021 FC 219 (see paras 37-39) [*Halcrow*] in view of the affidavit and cross-examination evidence of Bill Beauchamp, Chair of the Appeal Committee.

[78] My concern was that the Wilson & Myran Respondents, in their submissions to the Court, were relying on portions of the Beauchamp Affidavit and Cross Examination evidence to justify why the Response had not been considered by the Appeal Committee – yet neither the reasons for the decision nor the materials in the CTR addressed that issue.

[79] As held by the Federal Court of Appeal in *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255, the jurisprudence of this Court holds that a decision-maker cannot improve upon the reasons given to the applicant by means of the affidavit filed in

the judicial review proceedings, "[a]s any other approach to this issue allows tribunals to remedy a defect in their decision by filing further and better reasons in the form of an affidavit. In those circumstances, an applicant for judicial review is being asked to hit a moving target" (at paras 46-48; see also *Beeswax v Chippewas of the Thames First Nation*, 2023 FC 767 at para 23).

[80] The Federal Court of Appeal restated this, with great clarity, in *Stemijon.* There, during argument of the appeal, the respondent referred the Court to an affidavit that had been filed with the Federal Court. The affidavit was from the delegate of the Minister who made the decision that was subject to judicial review. In that affidavit, and also in cross-examination on that affidavit, the delegate testified that he relied on other matters when he made his decision. The Federal Court of Appeal stated*:*

> [41] The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd.* (1980), 1980 CanLII 1877 (ON CA), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was *functus*: *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848. After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *United Brotherhood of Carpenters and Joiners of America v. Bransen Construction Ltd.*, 2002 NBCA 27 at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267.
>
> [42] In this case, the Minister was obligated to disclose the full and true bases for his decision at the time of decision. The decision letter, viewed alongside the proper record of the case, is where the bases for decision must be found. In this case, the proper record sheds no light on the bases for the Minister's decision, and so the

> bases set out in the Minister's decision letter must speak for themselves.

[81] In *Halcrow*, the parties objected to the Court considering the affidavit of a member of the election appeal committee of the Kapawe'no First Nation on the basis that it was improper for a member of the appeal committee to file an affidavit on a judicial review of the decision of that committee. Justice MacDonald agreed:

> [37] With respect to these objections, as a starting point it is useful to reiterate the general rule that on judicial review the Court only considers the evidence that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19; see also *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 13-18; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42, *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 41).
>
> [38] The exceptions to this general rule include circumstances where additional evidence is necessary to highlight or summarize background information; or evidence is necessary to explain the absence of evidence on a certain subject matter; or where such evidence is necessary to explain an improper purpose or fraud (Bernard at paras 19-25).
>
> [39] The Affidavit of Anita Cunningham, a member of the Appeal Committee, is particularly concerning. A decision-maker cannot attempt to justify the decision, after-the-fact, when the justification for the decision cannot be ascertained by reference to the information on record (*Stemijon* at paras 41-42). The statements contained in the Affidavit of Anita Cunningham are an attempt to justify and explain the reasons for the Appeal Committee decision and to respond to the apprehension of bias allegation. Therefore, Anita Cunningham's Affidavit will not be considered on this judicial review. For the same reasons, paragraph 73 of the Affidavit of Lydia Cunningham is hereby struck.

[82] When appearing before me, counsel for the Wilson & Myran Respondents submitted that *Halcrow* is distinguishable because in that case no substantive reasons were given for the decision

of the appeal committee. In my view, this does not assist those Respondents. The principle against bootstrapping is not concerned with the depth of the reasons of the decision-maker, but with the supplementing of those reasons. Any additional reasoning may be bootstrapping when the reasons are sparse, but supplementing in-depth reasons is still bootstrapping. In this matter, the Appeal Committee gave no reasons why the Response was not considered, and no reasons are discernible from the CTR materials. Beauchamp was the Chair of the Appeal Committee and, as such, by way of his affidavit and cross examination evidence, attempts to supplement the Committee's reasons by providing explanations as to why the Response was not considered (as well as by explaining the Appeal Committee's reasoning in reaching its decision). This is not permissible.

[83] Counsel for the Wilson & Myran Respondents also directed the Court to the Supreme Court of Canada's decision in *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 [*Ontario Power*]. There, the Supreme Court considered the appropriate role of the Ontario Energy Board in the appeal before it. The Supreme Court discussed the participation of administrative decision-makers in the appeal or review of their own decisions, specifically, tribunal standing. There, the relevant legislation expressly provided that the Board was entitled to be heard, by counsel, on the argument of an appeal to the Divisional Court. The Supreme Court noted that the subject provision neither expressly granted the Board standing to argue the merits of the decision on appeal nor did it expressly limit the Board to jurisdictional or standard of review arguments. It found that the Board's participation in the subject appeal was not improper and then considered whether the Board's arguments were appropriate.

[84] The Supreme Court discussed "bootstrapping" which, in the context of tribunal standing, occurs where the tribunal seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. The Wilson & Myran Respondents rely on paragraph 68 of *Ontario Power,* which states:

> [68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

[85] In this matter the Appeal Committee has no legislative standing, and it is not participating in an appeal of its own decision. It is not seeking to raise a new argument as a participant in such an appeal.

[86] And, while administrative decision-makers do, on occasion, file affidavits in judicial reviews, the content of such affidavits tends to be admissible under the general background rule, as they speak generally to the policies, procedures or practices normally followed by the tribunal. They do not go further and provide supplementing reasons for the decision under review.

[87] In my view, the Beauchamp Affidavit and Cross Examination testimony seeking to explain why the Response was not considered, and how the Appeal Committee reached its conclusions, is a clear attempt to bootstrap the Appeal Committee's reasons. The Appeal Committee's reasons as found in the decision and the CTR materials must be the basis for the decision that is considered by this Court. Neither of these offer any insight as to why the Appeal Committee did not consider the Response. I will disregard and afford no weight to the explanations offered after the fact by the Beauchamp evidence or its rationale justifying the making of the decision.

Did the Appeal Committee breach the duty of procedural fairness owed to the Applicant and/or was its decision unreasonable?

[88] The bulk of the Applicant's submission is framed in terms of his assertion that the Appeal Committee breached his right to procedural fairness. However, when appearing before me he submitted that his procedural fairness and reasonableness submissions overlap and are intertwined, although many of his arguments in fact may turn on the reasonableness of the decision. I agree that matters such as the Appeal Committee's failure to consider the Response could potentially be framed as a failure to fairly follow the process set out in the *Election Act* and/or as a question of reasonableness in failing to consider evidence that was before it. My analysis will therefore consider both issues together.

Submissions on Procedural Fairness

Applicant's Position

[89] With respect to procedural fairness, the Applicant first submits that the Appeal Committee breached s 13.25 of the *Election Act* by failing to "immediately notify" the Electoral Officer that his appeal had been received. Rather, the Committee waited until 11:26 am the following day to notify her. Further, that the Committee erred in failing to provide the appeal to "any of the respondents named in the appeal," including Wilson. He submits that, at a minimum, all individuals named within his appeal should have been notified and provided with an opportunity to respond before the Appeal Committee made its decision, given that the provision of notice and an opportunity to make representations in response have been characterized as the most basic requirements of the duty of fairness (citing *Alexander First Nation* at paras 51-54).

[90] The Applicant also submits that the Appeal Committee determined internally, just after noon on April 20, 2022, that they would dismiss the Applicant's appeal, which is roughly an hour and a half after they had asked the Electoral Officer to submit a response within 24 hours and before her Response was received the following day. The Applicant highlights that Beauchamp, as Chair of the Appeal Committee, advised the Electoral Officer that she had the authority to grant herself an extension for her response, and even followed up with her as to when her response would be filed, without ever advising her that a decision had actually already been made. And, despite not considering or reviewing the Response, the Appeal Committee waited until two hours after it had been received to communicate its decision. The Applicant submits that the Response should have been reviewed in advance of any decision being communicated (and should also have been included in the CTR).

[91] Finally, the Applicant submits that, pursuant to s 13.6 of the *Election Act*, the Appeal Committee was required to investigate and review appeals in a timely and fair manner, but that the Committee failed to act fairly in its review of the appeal and failed to investigate the appeal, in breach of the *Election Act*. The Applicant notes Beauchamp in cross-examination expressed surprise at the content of the Electoral Officer's Response, noting it was not what they were expecting. The Applicant submits that there is a clear lack of procedural fairness when the Appeal Committee forecasts the response from the Electoral Officer, a key individual in the investigation, rather than obtaining information from them as part of their review on the merits of the appeal. In essence, the Applicant submits that the Appeal Committee breached procedural fairness, as it did not properly investigate the appeal and did not conduct a public hearing. It also ignored evidence in the appeal such as the signatures of 47 Tribal Citizens who were unable to vote in the aftermath of the winter storm, 32 of whom stated that they intended to vote for the Applicant – which figure exceeds the 12-vote margin between the Applicant and the successful candidate for Chief, Wilson. The Appeal Committee also failed to consider the Response, in which the Electoral Officer indicated that she made a mistake in keeping the polls open on April 15, 2022, as it was obvious that the community remained snowed in. The Applicant refers to other evidence (that was not before the Appeal Committee) that he states illustrates the impact of the winter storm and submits that the Appeal Committee failed to investigate "the specifics of the Appeal relating to the winter storm and failed to require a hearing into the circumstances."

[92] The Applicant addresses the Appeal Committee's reasons with respect to each of the four grounds of the appeal and submits that the Committee neglected to investigate the assertions contained in his appeal, referencing affidavit and other evidence filed in the application for

judicial review (most of which was not before the Appeal Committee) as supporting this assertion. Based on this, he submits that the Appeal Committee failed to ensure that the "proper procedures and protocols were applied" and breached the "process of procedural fairness as they failed to properly investigate and review the Appeal in accordance with their duty and the provisions of the Election Act."

Wilson & Myran Respondents' Position

[93] The Wilson & Myran position, overall, is that, in an effort to overturn the decision of the Appeal Committee, the Applicant seeks to use the judicial review process to improperly supplement his appeal with new evidence that was not before the Appeal Committee, to expand the obligation of the Committee by claiming that it had a duty to investigate his appeal, and to show that there was a breach of procedural fairness owed to others.

[94] Specifically, in the context of procedural fairness, the Wilson & Myran Respondents submit that the Applicant had an opportunity to present his case but failed to present a *prima facie* case on any ground alleged. Further, they submit that the Committee fulfilled its obligation to provide the Applicant with a fair and impartial process but determined that there was not sufficient evidence to warrant an appeal hearing.

[95] The Wilson & Myran Respondents submit that the Applicant is improperly attempting to claim a breach of procedural fairness on behalf of a third party, the Electoral Officer. They submit that the Applicant is attempting to have the Court overturn the Committee's decision on the basis that it owed a duty of procedural fairness to the Electoral Officer, and that this "novel

position" is unsupported by case law. And, even if the Electoral Officer were entitled to a duty of fairness to submit a response, she was only denied the opportunity to provide an explanation as to "why the appeal should be dismissed" and not why it should be allowed. In any event, a third party has no standing to challenge a failure suffered during the Election process.

[96] In the alternative, if what the Wilson & Myran Respondents assert is "fresh evidence" is admissible, then these Respondents make submissions as to the procedural fairness and reasonableness of the decision, referencing the content of the affidavit and cross-examination evidence.

Daniels & G. Meeches Respondents' Position

[97] The Daniels & G. Meeches Respondents do not explicitly invoke a breach of procedural fairness in their written submissions. However, they frame the issue as whether the Appeal Committee breached the *Election Act*, specifically s 13.6, by failing to appropriately investigate and review the Applicant's appeal in a timely and fair manner and/or at all. In particular, they take issue with the Appeal Committee's failure to take into account the Electoral Officer's Response. When appearing before me, counsel for the Daniels & G. Meeches Respondents added that this failure was a breach of the duty owed to the Applicant pursuant to s 13.6 as well as pursuant to s 13.35.The Daniels & G. Meeches Respondents submit that the Appeal Committee breached the process set out in the *Act* when it failed to follow it.

[98] They add that they were elected as Councillors in the Election and, in supporting the Applicant, they risk losing those positions if there is a new election. That is, they have nothing to gain by supporting him but instead are taking a principled position.

Respondent K. Assiniboine's Position

[99] The Respondent K. Assiniboine is self-represented at this judicial review and submitted a record consisting solely of her Affidavit. It does not address the issue of procedural fairness.

Submissions on reasonableness

Applicant's Position

[100] The Applicant frames his reasonableness arguments in the alternative to his procedural fairness arguments. The Applicant identifies, with little elaboration, three main reasons why the Appeal Committee's decision was unreasonable.

[101] First, the Committee failed to consider the Electoral Officer's Response despite having it in its possession prior to communicating the decision. Second, the Appeal Committee erred by dismissing the appeal in full without requiring a hearing. Third, the Appeal Committee failed to consider information within the appeal itself. The Applicant submits that the Appeal Committee's failure to consider the Response, to obtain information from any respondents, to require a hearing and to consider and investigate the actual information contained within the appeal demonstrates that the decision was unreasonable.

Wilson & Myran Respondents' Position

[102] The Wilson & Myran Respondents submit that the decision confirms that the Appeal Committee reviewed the evidence carefully, considered the applicable test under the *Election Act* and reasonably came to the conclusion that there was not sufficient evidence to proceed to a hearing. They also note that appeals are restricted to challenges of the successful candidates or to the conduct of election officials in performing their duties under the *Act* (*Election Act*, 13.21).

[103] They submit that the Appeal Committee is owed deference in its interpretation of the *Election Act* as to who constituted a "respondent" for the purposes of the appeal. And, although the Applicant in his appeal made allegations against the former electoral officer, the former electoral officer was not a proper party to the appeal (as she was not an election official in the subject Election). While Wilson may have properly been a respondent, insufficient evidence was included in the appeal to support the allegations against her. Accordingly, the Committee did not consider her to be a responding party and did not notify her of the appeal. Further, neither the former electoral officer nor Wilson has challenged the Appeal Committee's decision to exclude them. The Court should, according to the Wilson & Myran Respondents, therefore defer to the Committee and not intervene.

[104] Second, the Wilson & Myran Respondents argue the Appeal Committee had no duty to investigate the Appeal. They submit that, while the Applicant (and the Daniels & G. Meeches Respondents) relies on s 13.6 to submit that the Committee had a duty to investigate and erred by failing to do so, such a reading of that provision is inconsistent with the deadlines and procedures

set out in the *Act* and the (unspecified) principles of interpretation governing it. They submit that the *Election Act* does not confer the same powers of investigation on the Appeal Committee for election appeals (s 13.26) as it does for appeals of candidacy (s 13.16). Specifically, they note the power to "conduct such further investigation into the matter as the Committee deems necessary" is found only in s 13.16 relating to appeals of candidacy and is not found in the section governing election appeals (s 13.26). The Wilson & Myran Respondents submit that while the Appeal Committee "undoubtedly investigates the appeal in the sense of considering whether it has any merit, the Act does not confer the same powers of investigation nor does it impose the same duty as found in 13.16 to Election Appeals." They submit that the Appeal Committee's decision not to investigate beyond considering the Applicant's evidence was reasonable.

[105] Third, regarding whether there was sufficient evidence to warrant a hearing, the Wilson & Myran Respondents submit that the narrow question before the Appeal Committee was whether the appeal met the threshold to proceed to a hearing and that this question is the decision under review in this matter. They submit that the Committee reasonably decided that no hearing was required. Further, on election appeals, the onus is on the applicant to establish that a material breach or contravention of the governing election act occurred (citing *Flett v Pine Creek First Nation*, 2022 FC 805 at para 17 and s 13.21 of the *Act*). Here, there were no material breaches or contraventions established based on the evidence provided in the appeal.

[106] Finally, the Wilson & Myran Respondents address the Appeal Committee's having declined to review the Electoral Officer's Response. They argue the Electoral Officer's Response failed to comply with the *Act* because the Electoral Officer delivered the Response five hours

and five minutes late (i.e., not within the required 24 hours), although it is uncontested that she did so because "Mr. Beauchamp erroneously told her she could extend her own deadline"; however, the Wilson & Myran Respondents assert that this was "an inconsequential error" because the appeal lacked sufficient evidence to warrant a hearing and because the Response by the Electoral Officer, as a respondent, is limited by the *Election Act* to providing reasons why the appeal should be dismissed.

Daniels & G. Meeches Respondents

[107] The Daniels & G. Meeches Respondents' submissions support the Applicant and are as set out above.

Respondent K. Assiniboine

[108] The Respondent K. Assiniboine did not make submissions addressing the reasonableness of the decision.

[109] Indeed, her affidavit evidence is largely irrelevant and attempts to provide new evidence as to what she did and observed on election day. It also improperly and somewhat incomprehensibly makes the submission that if there was an issue with the *Election Act* or how elections are run, then the Applicant should have addressed this by putting forward an amendment to the *Election Act* (it is unclear what this amendment might concern) and concludes by stating the affiant's opinion that LPFN "elections and decisions should be kept within the community to uphold the election act and its proposes."

[110] I afford no weight to the K. Assiniboine Affidavit.

Analysis

[111] The Wilson & Myran Respondents correctly point out that election appeals are restricted to the grounds set out in s 13.21 of the *Election Act*, which include material breaches or contraventions of the *Act* as well as material breaches or contraventions of a rule, process or procedure by election officials.

[112] The *Election Act* also sets out, in sections 13.25 to 13.38, the procedure to be followed when the Appeal Committee receives an election appeal. This procedure requires that the Appeal Committee "shall, upon receipt of an Election appeal, immediately notify the Electoral Officer and any party named as a Respondent in the appeal in writing" (s 13.25). Any respondent to an appeal may, within 24 hours of receipt of the appeal, submit their reasons outlining why the appeal should be dismissed and the facts and any supporting documentation in support of this (s 13.26). The Committee must meet two days after the appeal was received to determine if there is sufficient evidence to warrant an appeal hearing (s 13.27). Whether or not a hearing is held, the Committee is ultimately required "after a review of all of the evidence received" to make one of the four determinations set out in s 13.25. One of these determinations is that the grounds put forth in the appeal are either frivolous in nature or are unsubstantiated and, therefore, that the appeal should be dismissed (s 13.35(a)).

[113] In this matter, the Applicant's Affidavit evidence is that he submitted his appeal document before the 4:30 pm deadline on April 19, 2022. The Electoral Officer's Supplemental

Affidavit states that the Chair of the Appeal Committee emailed her copies of the appeals at 11:26 am on the following day, April 20, 2022, and that the Chair requested a written response within 24 hours.

[114] Thus, it is apparent that the Appeal Committee did not follow the *Election Act* process to the extent that it did not "immediately" notify the Electoral Officer of the appeal, even though the Beauchamp Cross Examination evidence is that the Committee met on the evening of April 19, 2022, and reviewed the appeals. There is no explanation for this delay discernible from the CTR materials, which do not even contain the emails between the Chair and the Electoral Officer. However, in these circumstances, the delay, in and of itself, does not constitute a breach of procedural fairness or render the decision unreasonable. Nothing really turns on it.

[115] I also see no error in the Election Committee's finding that the social media post of the former electoral officer, even if misleading, did not constitute a breach of s 13.21(d) of the *Election Act*, as she was not an election official or engaged as such with respect to the Election. It is undisputed that, in accordance with the appointment schedule of the *Act*, the Electoral Officer was appointed on or about March 3, 2022. Indeed, the Applicant acknowledges this in the appeal. Given this, the Appeal Committee was not obliged to provide the former electoral officer with notice of the appeal, as, given her lack of capacity as an election official, she could not be a respondent thereto.

[116] According to the Wilson & Myran Respondents, although Wilson may have been properly considered a respondent to the appeal, there was insufficient evidence included in the

appeal to support the allegations against her. Because of this, the Appeal Committee did not consider her a responding party and did not notify her of the appeal.

[117] However, as indicated above, the process set out in the *Election Act* clearly contemplates that any named respondent must be notified immediately of the appeal (s 13.26) and be given 24 hours to respond. Within 48 hours of the appeal being filed (s 13.25), the Appeal Committee is to determine if there is sufficient evidence to warrant a hearing (s 13.27). And, significantly, whether or not a hearing is held, the Committee is ultimately required, after a review of all of the evidence received, to make one of the four determinations set out in s 13.25. Accordingly, I do not agree with the Wilson & Myran Respondents' submission that it was open to the Appeal Committee to make a pre-emptive determination that Wilson was not a respondent and, accordingly, not provide her with notice of the appeal.

[118] That said, Wilson has not raised any concerns about the lack of notice and opportunity to respond (i.e., a lack of procedural fairness accorded to her). I agree with the Wilson & Myran Respondents that it is not open to the Applicant to challenge the decision based on an alleged breach of procedural fairness that Wilson has not asserted.

[119] Far more problematic is the Appeal Committee's failure to consider the Electoral Officer's Response.

[120] Section 13.6 of the *Election Act* clearly sets out the duties of the Appeal Committee, which include "receiving, investigating and reviewing submitted appeals in a timely and fair

manner in accordance with this Act, and conducting public hearings, where necessary." This is an overarching responsibility that is found in the *Act* ahead of Part 1, Appeals for Candidacy, and Part 2, Election Appeals.

[121] The Wilson & Myran Respondents correctly submit that there is a difference in the wording of s 13.16 and s 13.26. However, in view of the overarching requirement of s 13.6, I am not persuaded that this demonstrates that the difference precludes or relieves the Appeal Committee from considering submissions, in this case the Response. Section 13.35 states that **after a review of all of the evidence received** the Appeal Committee shall make one of the four listed determinations.

[122] Thus, while I agree that the Appeal Committee is not, as the Applicant suggests, obliged to convene a public hearing, rather that it need only do so if it deems this to be necessary (s 13.28), this does not relieve the Appeal Committee of the requirement to consider all of the evidence before it makes a disposition of the appeal pursuant to s 13.35. Accordingly, I do not agree with the submission of the Wilson & Myran Respondents that the Appeal Committee's decision "not to investigate beyond considering the Applicant's evidence" was appropriate and reasonable.

[123] And, while the parties focus on the term "investigate" and debate what is or is not encompassed and required by it, to my mind this emphasis is somewhat misplaced. It is clear that the Appeal Committee had a duty to receive, investigate and review submitted appeals as prescribed by the *Act* (s 13.6), which included reviewing all of the evidence received before it

made a decision (s 13.35). Had the Appeal Committee reviewed and considered the Electoral Officer's Response, it may well have ultimately reached the same conclusion without needing to conduct a hearing (and regardless of whatever investigative powers it may or may not have). However, its failure to do so was in contravention of the process required by the *Act* and was unreasonable.

[124] More specifically, the Appeal Committee asked the Election Officer to provide a response to the appeal. At no time did it advise her that the response was no longer required. It followed up with her as to the progress of her response, and it did not release its decision until after the Response came into its possession – yet it failed to consider the Response. And, as discussed above, neither the decision nor the CTR materials offer any explanation for why the Response was not considered. In their written submissions, the Wilson & Myran Respondents submit that where an administrative decision-maker has provided written reasons, those reasons are how the decision-maker communicates the rationale for its decision, and a principled approach puts those reasons first (citing *Vavilov* at paras 83-84). This is true, and the problem with the Appeal Committee's reasons is that they make no reference to the Response and do not explain why it was not considered. Nor can an explanation be discerned from the CTR materials or implicitly based on the reasons and the record.

[125] It may well be that, having considered the Response, the Appeal Committee could have concluded that the Response did not alter its original view of the appeal and its disposition. But having failed to consider it, the Committee had no way of knowing whether the Response contained information that would be relevant to its disposition. For example, the Facebook post

referenced by, but not included in, the appeal was included in the Response. The Appeal Committee may, or may not, have found that this supported the appeal and warranted further inquiry by way of a hearing. The point is, by not considering the Response, no determination was made in that regard. Similarly, in her Response, the Electoral Officer identifies errors she made in the conduct of the Election, including in keeping the polls open on April 15, 2022, which also pertains to one of the Applicant's grounds of appeal. Whether or not those purported errors would amount to material breaches or contraventions of a rule, process or procedure by the Electoral Officer as an election official and as described in s 13.21(d) of the *Election Act* is unknown, as the Appeal Committee did not consider the Response.

[126] I also do not agree with the Wilson & Myran Respondents' position that the failure to consider the Response was an inconsequential error because the appeal lacked sufficient evidence to warrant a hearing and because, as a respondent, the Electoral Officer's response was limited to providing reasons why the appeal should be dismissed.

[127] As already discussed, s 13.35 required the Appeal Committee to consider all of the evidence before it made a decision as to the disposition of the appeal. In that regard, it is also of note that the Appeal Committee requested, if not required, the Electoral Officer to provide a response. The Chair's email communication to the Electoral Officer suggests that the Appeal Committee may have considered her to be a respondent, as it states that it is making its request in accordance with s 13.26 of the *Election Act*. Yet, in response to her request for an extension, the Chair responded that the extension would be the Electoral Officer's "call" because she was the Electoral Officer. This suggests that her response was being provided in that capacity. While the

Wilson & Myran Respondents submit that this discrepancy exists because the Appeal Committee, in error, considered the Electoral Officer to be a respondent and later changed its mind, this line of thought cannot be discerned from the reasons or the record, and I have declined to give any weight to the evidence of the Chair of the Appeal Committee that attempts to provide supplementary reasons for the decision – including explaining the Committee's thought process in making the decision and declining to consider the Response. The fact remains that, for whatever reasons, the Appeal Committee sought a submission from the Electoral Officer but failed to consider the submitted Response.

[128] I also have considerable difficulty with the Wilson & Myran Respondents' submission that because the *Election Act* limits respondents to providing reasons why the appeal should be dismissed, election officers are therefore precluded from responding in support of an appeal. This submission is made in the context of these Respondents' argument that the Response was improper and inadmissible before the Appeal Committee.

[129] In my view, this interpretation is highly problematic when viewed in light of the duties of the Electoral Officer set out in the *Act.* The Electoral Officer has specific responsibilities (s 6.13) that a respondent does not. Electoral Officers must uphold the processes and procedures established by the *Act*; fulfill their duties and responsibilities; carry out their duties faithfully, honestly and impartially; and always act in the best interests of the Community. These duties could potentially require providing an appeal committee with important information regarding issues with an election, and this information may or may not be reasons why an appeal should be dismissed. The discrete role of an electoral officer, as opposed to a respondent, is also reflected

in the fact that in the event that a hearing is convened by an appeal committee, the electoral officer is one of the listed persons who will be heard from along with other officials, the appellant, the respondent and any witnesses (s 13.31). It seems reasonable that the electoral officer would be expected to provide all relevant evidence, even if it did not support the election.

[130] I acknowledge that it is highly probable that in almost all situations an electoral officer would submit that they conducted the election diligently and in accordance with the applicable election legislation, and they would therefore make submissions as to why the appeal should be dismissed. However, the possibility that evidence of material irregularity or non-compliance might come to an electoral officer's attention after the election cannot be ruled out. It would be unreasonable and procedurally unfair, indeed perverse, to preclude an electoral officer from providing submissions to that effect on the basis that the *Act* limits the submission of respondents to explaining why the appeal should be dismissed. It would certainly not be in the best interests of the community.

[131] When appearing before me, counsel for the Wilson & Myran Respondents submitted that in the event that an electoral officer subsequently became aware of a significant concern with respect to the conduct of an election, the officer would be required to bring it to the attention of someone, possibly the ethics officer, who would address it by some unspecified process. But this argument ignores that when the concern comes to light in the context of an appeal from an election, the appeal must be dealt with by an appeal committee in accordance with the *Act*. I am not persuaded that, in such a circumstance, an appeal committee could reasonably refuse to accept such information from an electoral officer on the premise that respondents (which the

electoral officer may or may not be) can only make submissions as to why the appeal should be dismissed.

[132] In any event, I need not resolve that issue. Here, the Appeal Committee invited but did not review the Response. Therefore, when it made its decision it could not have known that the Response did not support the election process. Accordingly, it could not have rejected it on the basis that it contained submissions that did not support the dismissal of the appeal. Put otherwise, the Wilson & Myran Respondents' submissions on this point cannot reflect the reasoning of the Appeal Committee. Nor do I accept that there is an implied interpretation of the *Act* within the reasons that would serve to explain the failure to consider the response.

[133] Not to put too fine a point on it, but here the Electoral Officer, in the Response, stated that she had "made errors in judgement & decision making as [her] role as the Electoral Officer" and that "[t]he issues within David Meeches' appeal are validated." This should have been reviewed and assessed by the Appeal Committee.

[134] In my view, this application for judicial review must succeed on the basis that the Appeal Committee failed to follow the process set out in the *Election Act* in that it made its decision that the appeal was unsubstantiated without reviewing all of the evidence before it, specifically, the Response. This was both procedurally unfair and unreasonable.

[135] The Wilson & Myran Respondents argue strongly that pursuant to s 13.36 of the *Election Act*, the Appeal Committee was precluded from declaring the Election invalid by reason only of

an irregularity or contravention of the *Act* if it was satisfied that the Election was conducted in good faith and the irregularity or contravention did not materially affect the result of the Election. In essence, they invite me to find that the breaches asserted in the appeal are not material and to deny the application on that basis.

[136] It may be that even if the Response had been considered by the Appeal Committee, it may have still determined that a hearing was unnecessary and that the appeal was to be dismissed because it was unsubstantiated and/or because the Response did not establish that a rule, procedure or process has been materially contravened or breached. However, it is not the role of this Court on judicial review to make the assessments of the evidence that the Appeal Committee should have done. Similarly, while the Wilson & Myran Respondents invite the Court to assess and determine if any irregularities or contraventions materially affected the result of the Election, such fact finding on the merits is the role of the Appeal Committee, not the Court on judicial review. Indeed, the Appeal Committee in this case made no findings in that regard, as it dismissed the appeal as unsubstantiated.

[137] As a final comment, I agree with the Wilson & Myran Respondents that in some instances the Applicant improperly relies on the Response (and other evidence filed in this application for judicial review) to supplement the grounds of his appeal. The Appeal Committee, however, was only obliged to consider the appeal grounds and the evidence that was before it. While I have found that this included the Response, it did not include matters arising from much of the affidavit and cross examination evidence generated in this proceeding.

Remedy

[138] The Applicant proposes a multitude of alternative remedies as follows:

1. An order setting aside the result of the Election and ordering a new election immediately for Chief and Council.

2. In the alternative to number 1 above, an order remitting the matter back to the Appeal Committee with directions that the office of the Chief has become vacated as a result of breaches to the *Act*, and requiring a by-election for the position of Chief to be called.

3. In the alternative to numbers 1 and 2 above, an order remitting the matter back to the Appeal Committee with directions that the offices of the Chief and Councillors have become vacated as a result of breaches of the *Act*, and requiring a new general election to be called for all positions.

4. In the alternative to numbers 1, 2 and 3 above, an order remitting the matter back to a new election appeal committee for redetermination, including to hold an appeal hearing before the new election appeal committee and consider the evidence of Jacqueline Meeches and other respondents.

5. In the alternative to numbers 1, 2, 3 and 4 above, an order remitting the matter back to the Appeal Committee for redetermination, including to hold an appeal hearing before the Appeal Committee and to consider the evidence of Jacqueline Meeches and other respondents.

6. Costs on a solicitor and his own client basis in favour of the Applicant.

[139] In my view, these are not appropriate remedies in these circumstances. Nor do I agree with the Wilson & Myran Respondents that even if the decision is procedurally unfair, the outcome is legally inevitable such that the decision should be upheld (referencing *Alexander First Nation* at paras 75-78).

[140] I will remit the matter back for reconsideration by a different election appeal committee. I recognize that pursuant to s 13.5 of the *Election Act*, the current Appeal Committee was appointed to serve a four-year term. However, the *Act* also requires that a list of three alternate members be kept, and, in the event that an Appeal Committee member excuses themselves from a particular appeal, the remaining members will select an alternate member from the list of alternates (s 13.4). In this circumstance, all three members of the Appeal Committee shall excuse themselves from the redetermination of the Applicant's appeal and shall be replaced by the three alternate members. If any of the alternate members are not available or must excuse themselves pursuant to s 13.3 of the *Act*, then the interview committee shall select new alternate members who will conduct the redetermination. In that event, and if necessary, a new interview committee will be appointed and selected, in accordance with s 6.4-6.7 of the *Act*.

[141] The selection and appointment of the election appeal committee constituted for the purpose of the redetermination will occur within one month of the date of this decision. The new election appeal committee shall, within two weeks of its appointment, conduct the redetermination, taking into consideration only the original appeal submitted by the Applicant and the Electoral Officer's Response. Having done so, the new election appeal committee will

determine, at its discretion, whether or not a hearing is required and the appropriate determination to be made under s 13.35 of the *Election Act*.

Costs

[142] At the conclusion of the hearing, the parties agreed to discuss costs and endeavour to provide the Court with a joint submission in that regard. By letter dated September 1, 2023, counsel for the Wilson & Myran Respondents advised that they and the Applicant had agreed to each bear their own costs of the motion to strike and the judicial review hearing. The letter also advised that the Daniels & G. Meeches Respondents and the K. Assiniboine Respondent took "no position." On September 11, 2023, the Court directed that, by September 15, 2023, the Daniels & G. Meeches Respondents confirm that they too will bear their own costs, if that is their intent. And that as K. Assiniboine did not participate in the motion or the hearing, the Court would assume, unless she advises otherwise, that she is not seeking costs. By letter dated September 20, 2023, counsel, on with the consent of all parties, confirmed that the Daniels & G. Meeches Respondents shall also bear their own costs and advised that the K. Assiniboine Respondent has not incurred any costs.

JUDGMENT IN T-1015-22

THIS COURT'S JUDGMENT is that

1. The motion to strike brought by the Wilson & Myran Respondents is dismissed;

2. The application for judicial review is granted;

3. The Applicant's appeal, as submitted to the Appeal Committee, shall be redetermined by a different election appeal committee, which shall be appointed from the existing list of alternates. If any of the current alternate members on that list are not available or must excuse themselves pursuant to s 13.3 of the *Act*, then the interview committee shall select new alternate members who will conduct the redetermination. In that event, and if necessary, a new interview committee will be appointed and selected, in accordance with s 6.4-6.7 of the *Act*.

4. The selection and appointment of the election appeal committee constituted for the purpose of the redetermination will occur within one month of the date of this decision. The new election appeal committee shall, within two weeks of its appointment, conduct the redetermination, taking into consideration only the original appeal submitted by the Applicant and the Electoral Officer's Response. Having done so, the new election appeal committee will determine, at its discretion, whether or not a hearing is required and the appropriate determination to be made under s 13.35 of the *Election Act*.

5. Each party shall bear its own costs with respect to the motion to strike and the judicial review.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1015-22
STYLE OF CAUSE:	DAVID MEECHES v KYRA WILSON, ALLEN DENNIS MYRAN, KEELY ASSINIBOINE, MARVIN DANIELS, and GARNET MEECHES
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	AUGUST 29, 2023, AUGUST 30, 2023
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	SEPTEMBER 25, 2023

APPEARANCES:

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