

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20230626**

**Docket: A-80-22**

**Citation: 2023 FCA 149**

**CORAM: LOCKE J.A.  
LEBLANC J.A.  
ROUSSEL J.A.**

**BETWEEN:**

**DARRYL W. WHITSTONE and  
DELORES CHIEF**

**Appellants**

**and**

**ONION LAKE CREE NATION, and  
FLORENCE BLOIS**

**Respondents**

Heard at Edmonton, Alberta, on April 19, 2023.

Judgment delivered at Ottawa, Ontario, on June 26, 2023.

**REASONS FOR JUDGMENT BY:**

**LOCKE J.A.**

**CONCURRED IN BY:**

**LEBLANC J.A.  
ROUSSEL J.A.**

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**REASONS FOR JUDGMENT**

**LOCKE J.A.**

[1] The appellants, Darryl W. Whitstone and Delores Chief, appeal a decision of the Federal Court (2022 FC 399, *per* Justice Henry S. Brown), which dismissed their application for judicial review of a decision of the Onion Lake Cree Nation Appeals Tribunal (the Tribunal). On August 12, 2021, the Tribunal had granted (in part) an appeal by the respondent Florence Blois,

and nullified the June 18, 2018 elections of Mr. Whitstone and Ms. Chief to four-year terms as Onikaniwak (Councillors) of the Onion Lake Cree Nation (OLCN), the other respondent.

[2] In its decision, the Tribunal found that Ms. Chief was not qualified as a candidate because of monetary obligations that contravened subsection 10.6(c) of the Wicekaskosiw Sakahikan Wiyaskonitowin Wiyasiwewin Onion Lake Election Law (OLCN Election Law). The Tribunal also found that Mr. Whitstone had violated subsection 5.1(e) of the OLCN Election Law, which requires that candidates campaign “ethically, focusing on political issues and candidate platforms, instead of engaging in libel and slander.” The Tribunal cited Mr. Whitstone’s discussion of a particular news article, and found (i) that the only plausible reason to have done so “would be to attempt to libel or slander the incumbent council,” and (ii) that such discussion might have affected the outcome of the election.

[3] Before this Court, the appellants argue that the Federal Court erred in finding no error in the following aspects of the Tribunal’s decision:

1. Allowing Ms. Blois’s appeal to proceed despite failures to comply with certain requirements of the OLCN Appeals Regulation.
2. Finding that Mr. Whitstone had engaged in libel and slander in contravention of subsection 5.1(e) of the OLCN Election Law.

3. Finding that Mr. Whitstone's alleged contravention of the OLCN Election Law might have affected the outcome of the election.

[4] The OLCN supports the appellants' position on the first argument concerning failures to comply with the OLCN Appeals Regulation. The OLCN takes no position on the other two issues raised by the appellants. Further, the OLCN opposes the appellants' request that this Court declare that they were duly elected and entitled to all benefits and entitlements as OLCN Councillors retroactive to their date of removal from office. For her part, Ms. Blois opposes the appellants on all of the issues they raise.

[5] Interestingly, none of the parties' memoranda of fact and law addresses the question of mootness in view of the June 2022 election of a new Onikaniwak (OLCN Council). Prior to the hearing of this appeal, the parties were directed as follows: "At the hearing of the appeal on April 19, 2023, the parties should be prepared to address the question of whether the appeal is moot and, if so, whether this Court should decide the appeal despite its mootness."

[6] At the hearing of the appeal, all of the parties addressed the issue of mootness, but none argued that the appeal is not moot: even the appellants limited their arguments to requesting that the Court exercise its discretion to hear the appeal if it was found to be moot. The appellants mainly focus on the benefit that this Court's decision could bring to their reputation. They also note that they seek salary and benefits lost in the period from October 2021, when their salary was stopped, to June 2022, when the new Council was elected. The OLCN has no strong view on

whether the Court should exercise its discretion to hear this appeal, but Ms. Blois argues that the Court should not.

[7] In my view, the present appeal is indeed moot. The June 2022 OLCN election resulted in a new Council, meaning that the Councillor positions from which the appellants were removed can no longer be restored. Therefore, there is no longer a live controversy between the parties as contemplated in *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 (*Borowski*). Even if we were to agree with the appellants on the issues they raise and allow the appeal, we would go no further than remitting the matter to the Tribunal for a new determination on Ms. Blois's appeal. It is not this Court's role to decide the Tribunal's appeal on its merits or to award remedies in relation thereto. The appellants' arguments do not justify any exception to the general rule that unreasonable tribunal decisions are to be remitted to the tribunal for reconsideration: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paragraph 141.

[8] In any case, since the four-year term for which the appellants were elected has now expired, a new determination by the Tribunal could not have any effect that is contemplated in the OLCN Appeals Regulations. The Tribunal's task on a new determination would be (i) to decide whether Ms. Blois's appeal should be considered, and (ii) if so, to hear the appeal and determine whether the evidence and information gathered supports the appeal such that the election of either or both of the appellants should be set aside. Setting aside those elections after the end of their term would have no direct effect. The Tribunal might decide either not to consider the appeal or that the evidence did not justify setting aside the 2018 elections in issue.

Alternatively, the Tribunal might consider the appeal and decide that it merited setting aside the 2018 elections. Either way, the appellants' positions as councillors would not be restored.

[9] I would also not exercise this Court's discretion to hear this appeal despite its mootness, for the reasons set out below.

[10] The parties appear to agree that the criteria for consideration in the exercise of discretion to hear a moot case are as set out in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at para. 18 (*Doucet-Boudreau*), citing *Borowski* at 358-363:

- (1) the presence of an adversarial context;
- (2) the concern for judicial economy; and
- (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

[11] I will address each of these criteria in turn.

[12] I accept that there is an adversarial context in this case. All sides have made their arguments with vigour. No party disputes that this first criterion is satisfied.

[13] The second criterion, the concern for judicial economy, requires consideration of the following factors:

- (i) whether the court's decision will have some practical effect on the rights of the parties,
- (ii) whether the issues in dispute are of a recurring nature but brief duration, which may be evasive of review, and

(iii) the public importance of resolving the debate between the parties.

(*Borowski* at 360-362)

[14] As alluded to above, the “practical effects” cited by the appellants concern the hope of repairing their respective reputations and recovering lost salary and benefits. However, the repair that this Court could make to the appellants’ respective reputations is notional at best. As indicated above, it is not this Court’s role to reweigh the merits of Ms. Blois’s appeal, and we would do no more than remit the matter to the Tribunal for a new determination. Further, if this Court were to allow the present appeal on the basis that Ms. Blois’s appeal should not have been considered in the first place, it is unlikely that this Court would consider the Tribunal’s findings that have reputational effects on the appellants (the allegations of monetary obligations and libel/slander). Moreover, given the passage of time, it is difficult to imagine that either the OLCN (as the funding source) or the Tribunal would want to devote resources to an appeal that could have no direct effect on the governance of the OLCN. Accordingly, regardless of the merits of the present appeal, it is unlikely that the Tribunal’s findings that concern the appellants would be replaced.

[15] It is also unlikely that the appellants could recover lost salary and benefits. As the *Federal Courts Act*, R.S.C. 1985, c. F-7, does not contemplate relief of this nature in judicial review, it is not within this Court’s jurisdiction to order such recovery: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at para. 52. Moreover, as discussed in the previous paragraph, the Tribunal is unlikely to deal with the matter.

[16] Though I acknowledge that there remains a possibility that a decision by this Court in the present appeal could have marginal positive reputational or financial effects for the appellants, I find that those effects are outweighed by the consideration of whether the issues in dispute are of a recurring nature but brief duration, which may be evasive of review. The term of the elections in issue was four years, and hence not of brief duration. Several events contributed to the delays that resulted in Ms. Blois's appeal taking over three years to decide, and the present appeal being held after the next OLCN Council election had taken place. Key among these events were (i) the effort by the OLCN Chief and Council in January 2019 (later reversed: see *Blois v. Onion Lake Cree Nation*, 2020 FC 953) to stop the process, which delayed the matter for over 20 months until October 2020, and (ii) the COVID-19 pandemic, which significantly constrained many activities from March 2020 onward. These two events explain most of the delay in the Tribunal's work and are unlikely to recur. The issues the appellants seek to raise in this appeal are not evasive of review.

[17] The last of the judicial economy considerations identified above is the public importance of resolving the debate between the parties. I accept that the legal issues the parties address in the present appeal, which relate to governance, are of public importance. That said, I am mindful that the OLCN Election Law and the OLCN Appeals Regulation intend that these issues be decided within the OLCN community and not by this Court. This Court serves merely a supervisory role. This fact is particularly important in this case, which concerns indigenous self-government: see *Pastion v. Dene Tha' First Nation*, 2018 FC 648, [2018] 4 F.C. 467 at paras. 22-23, cited in *Porter v. Boucher-Chicago*, 2021 FCA 102 at para. 27. This consideration does not assist the argument for hearing this moot appeal.



[18] I come now to the third of the criteria identified in *Doucet-Boudreau* for consideration in the exercise of discretion to hear a moot case: the need for the Court to be sensitive to its role as the adjudicative branch in our political framework. I accept that hearing the present appeal would not necessarily take this Court outside of its adjudicative role. However, as discussed in the previous paragraph, I believe that this Court should hesitate before becoming involved in a matter of indigenous self-government where the intent of the governing legislation is that the dispute should be dealt with by the Tribunal. It is the Tribunal's role to interpret and apply the applicable provisions of the OLCN Election Law and the OLCN Appeals Regulation. This Court's role should be deferential and limited to determining whether such interpretation and application was fair and reasonable.

[19] I conclude that the applicable criteria weigh against the exercise of discretion to hear the present appeal despite its mootness. I would dismiss the appeal on that basis.

[20] I would not award costs in the present appeal. I am mindful that I have reached no conclusion on the substantive issues argued by the parties, and I would decide this appeal on a basis that was not argued in the parties' memoranda of fact and law, and was discussed at the hearing only at the request of the Court.

"George R. Locke"

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J.A.

"I agree.  
René LeBlanc J.A."

"I agree.  
Sylvie E. Roussel J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-80-22

**STYLE OF CAUSE:** DARRYL W. WHITSTONE and  
DELORES CHIEF v. ONION  
LAKE CREE NATION, and  
FLORENCE BLOIS

**PLACE OF HEARING:** EDMONTON, ALBERTA

**DATE OF HEARING:** APRIL 19, 2023

**REASONS FOR JUDGMENT BY:** LOCKE J.A.

**CONCURRED IN BY:** LEBLANC J.A.  
ROUSSEL J.A.

**DATED:** JUNE 26, 2023

**APPEARANCES:**

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