Federal Court  Cour fédérale

Date: 20200207

Docket: T-1687-18

Citation: 2020 FC 220

Ottawa, Ontario, February 7, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

TAYKWA TAGAMOU NATION

Applicant

and

IRENE LINKLATER

Respondent

JUDGMENT AND REASONS

[1] An election review panel ("Review Panel" or "Panel"), effected pursuant to section 19.2 of the Taykwa Tagamou Nation Custom Election Code ("TTN Custom Election Code" or "Code"), decided an appeal brought by Ms. Irene Linklater, the Respondent herein, of the Taykwa Tagamou Nation ("TTN") Chief and Band Council election held on October 12, 2017 ("2017 Election"). The Review Panel concluded that the 2017 election process violated

provisions of the TTN Custom Election Code and it ordered a new election. TTN, the Applicant before this Court, brings this application for judicial review of the Review Panel's decision pursuant to s.18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

Background

[2] The Applicant, TTN, is an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5. TTN's elections are governed by the TTN Custom Election Code, which was effected on March 12, 2011. On October 12, 2017, TTN held an election for the positions of Chief, Deputy Chief, Youth Councillor, and three Councillors.

[3] The Respondent, Irene Linklater, is a member of TTN. She unsuccessfully ran for the position of Chief in the 2017 Election. The majority of votes, being 73 of the 222 valid votes cast for the Chief's position, were cast in support of candidate Daniel Bruce Archibald. The Respondent received 22 votes, placing fifth of the seven qualified candidates who ran for the Chief's position.

[4] The Respondent commenced an appeal of the 2017 Election pursuant to s 19.2 of the TTN Election Custom Code. On appeal, she alleged 17 distinct violations of the Code. The newly elected Chief and Council responded to the appeal, relying on and adopting the facts and submissions of the Electoral Officer, Mr. Vaughn Johnston, being his post-election Final Election Report and a Briefing Note he prepared in response to the appeal. Chief and Council were of the view that the TTN Custom Election Code was followed in the 2017 Election.

[5] Pursuant to section 19.1 of the TTN Custom Election Code, an election review panel is to be comprised of three persons, two of whom are Aboriginal, one of whom is a lawyer, and none of whom are members of TTN. Section 19.3 of the Code sets out the procedure for the selection of the Review Panel, being that the candidate who appealed shall select one Aboriginal member, the electoral officer shall select the lawyer, and members of the newly elected (putative) Band Council shall select the remaining Aboriginal member of the panel. That selection process was followed in the appointing of the Review Panel. The Panel held a hearing on July 19, 2018 and released its written decision on August 21, 2018. This is the judicial review of that decision.

[6] The Chief and Council elected on October 12, 2017 continue to govern TTN.

Decision under review

[7] The Review Panel noted that the matter before it was an appeal of the 2017 Election, which had been conducted under the TTN Custom Election Code. Further, that the applicant therein, Ms. Linklater, alleged that there had been 17 violations of the Code in the 2017 Election and requested that a new election be held because of the severity of the violations. Conversely, the elected Chief and Council of TTN submitted that the 2017 Election was conducted diligently under the Electoral Officer's direction, and relied on and adopted the facts and submissions in the Electoral Officer's Final Election Report and Briefing Note. TTN Chief and Council sought to have the appeal dismissed.

[8] The Review Panel was of the view that the issues in the appeal could be stated as follows:

1. Does Ms. Linklater's allegations of violations of the TTN Election Code have merit?
2. If the allegations have merit, were they minor procedural irregularities dealt with under the TTN Custom Election Code and by the Electoral Officer's authority, discretion and ability?
3. Did the allegations have an impact or change the substance outcome of the 2017 Election?
4. Is it in the best interest of TTN to order a new election?

[9] In its analysis, the Review Panel individually addressed each allegation, TTN Chief and Council's response to that allegation, set out the relevant Code provision, and then stated its finding.

[10] The Review Panel found 14 of the 17 allegations to be without merit. Because the Respondent did not seek judicial review of the Review Panel's decision and because and the Applicant takes issue only with the remaining 3 findings that were found to have merit, it is not necessary in these reasons for me to address the other 14 allegations and the Review Panel's findings pertaining to each of them. For the purposes of these reasons, it is sufficient to say that the allegations that were found to be without merit involved:

- An allegation that section 4.0 of the Code was violated because the Electoral Officer inappropriately delegated election duties to an employee of the Band, the Executive Director, Ms. Sandra Linklater, and that the Executive Director was in a conflict of interest;
- An allegation that section 6.1(d) of the Code was violated because Ms. Bertha Cheena, a candidate running for election in the position of Chief, was inappropriately disqualified;
- An allegation that section 9.2 of the Code was violated because the TTN annual general meeting ("AGM") held on September 28, 2018 was not an all candidates meeting;
- An allegation that section 9.3 of the Code was violated because announcements concerning the election process were not made at the AGM;

- An allegation that section 9.4 of the Code was violated because the Electoral Officer was not present at the AGM;

- An allegation that section 10.1 of the Code was violated because it was uncertain if Mr. Michael Gauthier's withdrawal of his candidacy as a councillor was done in conformity with that provision;

- An allegation that section 11.1 of the Code as violated because one ballot instead of four separate ballots were utilized;

- An allegation that section 11.2 of the Code was violated because Ms. Cheena's name and that of another candidate who had withdrawn from the election were not blocked out on the ballots;

- An allegation that section 11.3 of the Code was violated as off-reserve Band members were not made aware that a candidate had withdrawn;

- An allegation that section 11.4 of the Code was violated because the address for mail-in ballots was incorrect;

- An allegation that section 11.6 of the Code was violated because the procedure for releasing mail in voting packages was not followed;

- An allegation that section 12.9 of the Code was violated because the procedure for candidates' agents was not followed, in that Ms. Sandra Linklater was a scrutineer for and a candidate for a councillor position, Mr. Bruce Archibald, and because Mr. Archibald was present when the ballots were counted;

- An allegation that section 13.3 of the Code was violated because the Electoral Officer did not verify the ballots before they were placed in the ballot box; and

- An allegation that section 16.0 of the Code was violated because the posting of election results was not in conformity with that provision.

[11] This left 3 allegation of violations of the Code which the Review Panel found did have merit – that is, violations of sections 9.6, 12.2 and 12.6.

[12] The first of these allegations was that section 9.6 of the Code was violated because the election was held in a shorter timeframe than was required. That section states:

> 9.6 Elections will be held fifteen (15) days after the AGM. Candidates must cease campaigning 24 hours prior to the commencement of the election.

[13] The Review Panel found that the election was held fourteen, rather than fifteen, days after the AGM.

[14] Having made that finding, the Review Panel then considered whether this was a minor procedural irregularity dealt with under the TTN Custom Election Code and by the Electoral Officer's authority, discretion and ability. The Review Panel noted the position of TTN Chief and Council, being that the election date is set in advance of the AGM and that the AGM is then set. The Panel also noted that the Code does not stipulate how many days the advance polls can be set in relation to the AGM, or the date of the election. The Review Panel noted that no information was provided as to why the AGM date was set only 14 days before the election, rather than the required 15 days, nor why advance polls were set only 12-13 days from the AGM rather than 15 days, or who set the dates. Accordingly, the Panel could not determine whether these were procedural errors in setting the dates or if there were other reasons determining the dates. It stated, however, that it assumed that the dates were set by the former TTN Chief and Council. The Review Panel found that section 9.6 of the TTN Custom Election Code clearly states the AGM is to be held 15 days before the election and that the 15 day time period is repeated in the Code's Election Time Table. Further, that the Code contains no wording allowing the 15 day timeframe to be changed. Therefore, this error could not be dealt with under the Code. Similarly, the Code contained no provision by which the Electoral Officer could rectify an error concerning the setting of the AGM, election or advance polls dates. In the result, the Review

Panel found that the allegation was not dealt with under the Code or the Electoral Officer's authority, discretion and ability.

[15] The Review Panel then considered whether the violation of section 9.6, holding the election 14 rather than 15 days after the AGM, had an impact on or changed the substantive outcome of the 2017 Election. The Review Panel noted that no information was provided to the Panel indicating that candidates must attend and participate in the AGM. And, in that regard, the wording of section 9.2 is permissive, not mandatory. The Review Panel also noted that no information was provided to it indicating that all Band members attend the AGM to hear the candidates' speeches or that the AGM is the only opportunity for Band Members to hear from the candidates. The Review Panel recognized that the AGM appeared to be an important opportunity for candidates in attendance to present their speeches, but found that the AGM was not the only opportunity for candidates to present, or for Band members to hear from the candidates. The Review Panel also noted that TTN members receive notice of the election, and which candidates are running, 45 days before the election as required by the Code. Therefore, the AGM is essentially an opportunity for members who attend to hear from candidates who participate and it is not the process by which members are advised about the election and what candidates are running. Given this, the Review Panel found that holding the AGM one day short of the required timeframe as set out in the Code did not have an impact or change the substantive outcome of the 2017 Election.

[16] The second allegation that the Review Panel found to have merit concerned section 12.2 of the Code. Ms. Linklater alleged that the Code states that two polling stations will be held, one

in TTN and one in Moosonee. However, a third polling station was held in Cochrane in violation of the Code.

[17] The Review Panel noted the position of TTN Chief and Council, being that TTN advised the Electoral Officer that there would be a main poll on the day of the election and two advance polls, one in Moosonee and one in Cochrane. The Panel also noted Chief and Council's position that, while the Code does state that there will be two polls, it could be interpreted such that there can be more than two polling stations. The Review Panel referenced section 12.2, which states:

> 12.2 There will be two (2) polling stations: One on the Taykwa Tagamou Nation Territory (Reserve #69B located in Brower Township) and one in Moosonee, Ontario. The preferred location for the polling station in Moosonee will be at the Friendship Center.

[18] The Panel found that section 12.2 clearly states that there will be two polling stations and does not include any wording that may be interpreted to permit additional polling stations.

[19] Having found that there was merit to the allegation that section 12.2 of the TTN Custom Election Code was violated, the Review Panel next considered whether this was a minor procedural irregularity. The Review Panel noted the position of TTN Chief and Council that it was TTN who advised the Electoral Officer that there would be three polls and stated that the Panel understood this to mean that it was the decision of TTN to have a poll the day of the election and two advance polls and that this was not the decision of the Electoral Officer. The Panel also noted that it was not provided with information as to why TTN made that decision and that Ms. Linklater advised that the 2017 Election was the first time TTN had advance polls and a poll at Cochrane. The Review Panel found that section 12.2 of the TTN Custom Election Code

clearly states that there will be two polling stations, one on TTN and one in Moosonee, and that the Code does not include any wording stating that more than two polling stations or that advance polls can be held. This error, therefore, could not be dealt with under the Code. Further, it was TTN that made the decision to use three polls, and not the Electoral Officer, and the Code does not contain any provision or authority to permit the Electoral Officer to rectify an error concerning polling stations. Based on this, the Review Panel found that the allegation as to a violation of section 12.2 of the Code was not dealt with under the Election Code or the Electoral Officer's authority, discretion and ability.

[20] Having reached that conclusion the Review Panel next asked itself if the violation of section 12.2 had an impact on or changed the substantive outcome of the 2017 Election. The majority of the Panel concluded that holding three polling stations, rather than two, had an impact or changed the substantive outcome of the election. The third Panel member disagreed.

[21] The third allegation that the Review Panel found to have merit was that section 12.6 of the TTN Custom Election Code was violated because advance polling stations were held in Moosonee and Cochrane. The Review Panel noted the position of TTN Chief and Council and that section 12.6 states:

> 12.6 On polling day, all polling stations are open at 8:00 a.m. (local time), and must remain open until 8:00 p.m. of the same day.

[22] The Panel found that the Code did not provide for advance polling stations to be held, and therefore, that there was merit to the allegation of a violation of section 12.6. As to whether this was a minor procedural irregularity, the position of TTN Chief and Council was that the poll

held on October 12, 2017 – election day – was open from 8:00 am to 8:00 pm in accordance with the Code. Further, that the advance polls in Moosonee and Cochrane were held prior to October 12, 2017 and had to have been open 8:00 am to 8:00 pm if they were held on the same day as the polling day of October 12, 2017. The Review Panel noted that it was not provided with any information that the advance polls were not held between 8:00 am and 8:00 pm and it assumed that those polls adhered to that timeframe. However, the allegation was that the Code did not stipulate that advance polls could be held. The Review Panel noted that it had already addressed the issue of advance polls in the context of its section 12.2 findings and reached the same conclusion concerning the section 12.6 violation, being that it was also was not dealt with by the Code or by the Electoral Officer's discretion, authority, and ability.

[23] The Panel then assessed whether the violation had an impact or changed the substantive outcome of the 2017 election. Again, the Panel was divided in its conclusions. The majority of the Panel concluded that holding advance polling stations had an impact or changed the substantive outcome of the election. The third Panel member disagreed.

[24] Finally, having found that the sections 12.2 and 12.6 violations had an impact or changed the substantive outcome of the 2017 Election, the Panel asked itself whether it was in the best interests of TTN to order a new election. Splitting along the same lines, two Panel members found that it was in the best interest of TTN to order a new election. The third Panel member disagreed.

[25] The majority of the Panel found that the 2017 Election was held in violation of the TTN Custom Election Code and ordered that a new election be conducted. The Panel member in the minority would have dismissed the appeal.

TTN Custom Election Code

[26] The introduction to the Code notes that the development of the written electoral code and procedures will help resolve the dilemma of unwritten customary governance practices. The written Code and procedures will serve as a guide and ensure that future misunderstandings can be resolved by referring to written policies. The introduction states that, as was evidenced from the most recent disputes over election matters, there can be many interpretations and variations of the unwritten electoral practices; therefore, having a comprehensive and written electoral code and procedures will result in clear resolution to electoral issues for TTN.

[27] Section 19 deals with the Election Review Panel:

> 19.1 An Election Review Panel shall be comprised of three Persons, at least two of whom are Aboriginal and one of whom is a lawyer, who are not members of TTN.
>
> 19.2 Within thirty (30) days after an election, a candidate may apply (the "Applicant") to have an Election Review Panel created for the disposition of any matter that is alleged to be in violation of this Code.
>
> 19.3 The procedure for that selection of the Election Review Panel is as follows:
>
> a) The candidate who has applied shall select one aboriginal member to the Election Review Panel.
>
> b) The Electoral Officer shall select the lawyer to be appointed to the Election Review Panel.

c) The members of the newly elected (putative) Band Council shall select one aboriginal member to the Election Review Panel.

d) All candidates shall be advised in writing that an application for review has been filed.

19.4 Once an application is submitted to the Electoral Officer, the Election Review Panel shall complete its review within 30 days of receiving a written notice of appeal. It shall give its decision to the applicant and the Electoral Officer and will provide written reasons upon request. The Election Review Panel will allow the Electoral Officer, the newly elected Council, and the Applicant the opportunity to provide written representations. Written representations must be provided 15 days after the notice of appeal is commenced.

19.5 An Election Review Panel shall from time to time determine its own procedures.

19.6 An Election Review Panel has the exclusive jurisdiction to review any matter under this by-law.

19.7 The Election Review Panel may award costs where it appears that the Application was frivolous and without merit. Such costs, if awarded, will be payable to Taykwa Tagamou Nation unless the Panel orders otherwise.

19.8 An appeal of a decision of the Election Review Panel lies by way of application for judicial review to the Federal Court of Canada.

Issues

[28] The Applicant submits that the substantive issue before this Court is whether the Review Panel's decision to order a new election was reasonable based on the evidence before it.

[29] The Respondent submits that the Panel's written decision is unclear, however, the Panel was procedurally and substantively fair to the Applicant and deserves a wide degree of deference to interpret and comprehend matters of which local judicial notice can be taken.

[30] In my view, there is one issue arising in this judicial review, being whether the Panel's decision was reasonable.

Standard of review

[31] Subsequent to the parties filing their written submissions, the Supreme Court of Canada issued its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"), which revisited the standard of review applicable to administrative decisions. As *Vavilov* is relevant to the both the applicable standard of review and to the issue of deference raised by the Respondent, I invited counsel, when appearing before me, to address the decision.

Standard of Review - merits

[32] In their written submissions the parties agreed that the Review Panel's decision on the merits attracted the standard of review of reasonableness as it involves questions of mixed fact and law (*Lavallee v Ferguson*, 2016 FCA 11 at para 19; *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paras 21, 29 ("*Pastion*"); *Lewis v Gitxaala Nation*, 2015 FC 204 at paras 13-15; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51, 53). They also agreed that Indigenous decision makers are entitled to deference when interpreting and applying custom election codes

(*Pastion* at paras 21-27; *Commanda v Algonquins of Pikwakanagan First Nation*, 2018 FC 616 at para 19 ("*Commanda*")).

[33] When appearing before me, the Applicant submitted that *Vavilov* did not change its position that reasonableness is the applicable standard of review. Counsel for the Respondent also accepted that reasonableness remains the appropriate standard of review for the merits of the Review Panel's decision. I agree.

[34] *Vavilov* established a presumption that reasonableness is the applicable standard of review whenever a Court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That presumption can be rebutted in two types of situations. The first being where the legislature explicitly prescribes the applicable standard of review or where it has provided a statutory appeal mechanism from an administrative decision to a court thereby signalling the legislature's intent that the appellate standards apply when a court reviews the decision. The second being when the rule of law requires that the standard of correctness be applied. This will be the case in certain categories of questions, namely, constitutional questions, general questions of law of central importance to the legal system as a whole, questions regarding jurisdictional boundaries between administrative bodies, or any other category that may subsequently be recognized as exceptional and also requiring review on the correctness standard (*Vavilov* at paras 17, 69).

[35] The majority in *Vavilov* held that, "it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review" (*Vavilov* at para 30, emphasis original).

[36] Here, the Review Panel was not delegated its decision making authority from a federal or other statute. However, this Court has previously recognized that a First Nation's capacity to make laws concerning matters of leadership and governance are not derived from the *Indian Act* or other statutory power: "[r]ather it is the result of the exercise of the First Nation's aboriginal right to make its own laws concerning governance." (*Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 34). In my view, TTN, as a matter of self-governance, effected the TTN Custom Election Code. By way of the Code, TTN delegated authority to election review panels to address appeals of elections that allege violations of the Code and make determinations in that regard. Accordingly, the presumptive reasonableness standard applies because the TTN Custom Election Code has delegated authority to election panels to determine election appeals and because none of the circumstances exist which might rebut that presumption.

[37] Council for the Applicant noted that section 19.8 of the Code states that, "[a]n appeal of a decision of the Election Review Panel lies by way of application for judicial review to the Federal Court of Canada." She submits, and I agree, that this is not a circumstance amounting to a statutory appeal mechanism of review panel decisions to a court, as identified in *Vavilov*. While the wording does reference an "appeal", the wording is also clear that this relief is by way of judicial review to this Court.

[38] The Applicant is also of the view that significant deference is still owed to Aboriginal administrative decision makers, such as the Review Panel, based on their experience and expertise, as previously found in cases such as *Pastion* (at para 22) and *Commanda* (at para 19).

However, that this Court need make no determination in that regard because, on the facts of this case, no amount of deference could save the fatally flawed Review Panel decision as it lacked justification, intelligibility and transparency.

[39] I agree that it is not necessary for this Court to delve into a comparative analysis of the deference owed, previously based on the acknowledged expertise of administrative decision makers as an aspect of the determination of the appropriate standard of review, with the requirements of *Vavilov* that a reviewing court consider the decisions of an administrative decision maker in their own particular contextual constraints, review its reasons in light of the record and with due sensitivity to the administration setting within which the reasons were given, and with respectful attention to a decision maker's demonstrated experience and expertise (*Vavilov* at paras 31, 88-98).

[40] This is because, at the end of the day, regardless of any level of deference owed as related expertise, "[w]here a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility" (*Vavilov* at para 98). For the reasons that follow, that is the circumstance in this case.

Standard of review - procedural fairness

[41] In *Mission Institution v Khela*, 2014 SCC 24 (at para 79) and in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 (at para 43) the Supreme Court found that that questions of procedural fairness are reviewed on a correctness standard. In *Vavilov*, the Court does not

explicitly state whether questions of procedural fairness will continue to be reviewed on a correctness standard. However, in establishing reasonableness as the presumptive standard of review for most questions on judicial review, the Supreme Court's framework was concerned with circumstances where the merits of an administrative decision are challenged (*Vavilov* at para 16). And, at paragraph 23, the Supreme Court indicated that a challenge on the merits is not one that relates to natural justice or procedural fairness:

> 23 Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[42] On this basis, in my view, prior jurisprudence that establishes correctness as the standard of review for questions related to procedural fairness is still authoritative.

[43] That said, I disagree with the Respondent's submission that the Court must consider "procedural issues" on the correctness standard, including questions of standing. Standing was not an issue before the Review Panel and the Panel made no determinations in that regard. Accordingly, the Court is not reviewing the decision of the Review Panel with respect to standing. Rather, standing is a procedural issue raised by the Respondent in this Court. Nor does *Cowessess First Nation no 73 v Pelletier*, 2017 FC 692 ("*Cowessess*"), referenced by the Applicant, support her submission that issues of standing attract a correctness standard of review. *Cowessess* merely stated that the standard of the review in that case was agreed to be reasonableness, except for questions of procedural fairness (at para 9). The Court then dealt with

the preliminary standing issue as a procedural issue – not an as an issue of procedural fairness – and it did not apply a standard of review to that procedural issue.

[44] Finally, I note that the Supreme Court in *Vavilov* also addressed how a reasonableness review is to be conducted by a reviewing court (at paras 73-145). In that regard, it held that "[i]n order to fulfill *Dunsmuir's* promise to protect 'the legality, the reasonableness and the fairness of the administrative process and its outcomes', reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28." (*Vavilov* at para 12). The reviewing court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified (*Vavilov* at para 15).

Preliminary Issue - Standing

[45] The Respondent makes two submissions which she frames as matters of standing. The first of these is that the impugned Chief and Council do not have standing to bring the judicial review application on behalf of TTN without a prejudicial conflict of interest. The second concerns the standing of the Respondent herself.

i. Standing of TTN

[46] The Respondent's written submissions accept that TTN has a direct interest in the outcome of this application and that an appeal of the Review Panel's decision is permitted by way of an application for judicial review to this Court pursuant to section 19.8 of the TTN

Election Code. She also concedes that TTN has standing. However, she submits that it is less clear that the impugned Chief and Council have standing on behalf of TTN. The Respondent submits that this is because there was an unreasonable, self-serving delay in having the Review Panel constituted to hear the appeal; the TTN Custom Election Code is silent as to what occurs before the appeal process is concluded and as to who pays for the Panel; and, because past practice and a reasonable expectation are that the previous Council would remain in place until a pending appeal is resolved.

[47] In this regard, the Respondent references sections 17.2, 19.2 and 19.4 of the Code and asserts that the 8-month delay between the election and the hearing of the appeal is an unacceptable delay by the impugned Chief and Council, and that prejudice to her should be inferred. Further, that ignoring the Review Panel's decision and failing to seek a stay of its decision is the equivalent of the impugned Chief and Council being in contempt of the decision. Accordingly, "this bears consequences on the equity of considering the relief requested" by the impugned Chief and Council on behalf of TTN (citing *Ledoux v Gambler First Nation*, 2019 FC 380 ("*Ledoux*")). The Respondent also submits that "challenging an election outcome appeal, led by the Band and paid with Band funds, results in a conflict of interest due to the personal interests of the impugned Chief and Council to remain in power." She contends that there is no incentive for a band member to bring a legitimate appeal if the impugned Chief and Council could delay the appeal and fund their own application at the Federal Court; she submits that cannot be the intended outcome of the TTN Custom Election Code.

[48] In my view, the issues of delay in constituting the Review Panel, alleged prejudice and cost implications of the application are not issues of the standing of the impugned TTN Chief and Council before this Court.

Delay

[49] While the Code does state that that an appeal must be brought within 30 days of an election (section 19.2) and that once an application is submitted to the Electoral Officer that the Review Panel shall complete its review within 30 days of receiving a written notice of appeal, it is otherwise silent as to the timing of the appeal process. The Respondent refers to section 17.1 of the Code, which states that ballots are to be retained for a 30 day period and, if there are no successful appeals, will be destroyed after 30 days. The Respondent suggests that it can be inferred from this and section 19.4 that review panels are to be convened within 30 days or as quickly as practical. Here, there was a delay of 8 months.

[50] Be that as it may, any delay in bringing the appeal does, not in and of itself, touch on standing before this Court.

[51] Standing is dealt with in Rule 303(1)(a) of the *Federal Courts Rules*, SOR/98-106 (also see s 18.1(1) of the *Federal Courts Act*). Rule 303(1)(a) states that an applicant shall name as a respondent every person who is directly affected by the order sought in the application, other than the tribunal in respect of which the application is brought.

[52] In *Forest Ethics Advocacy Assn v Canada (National Energy Board)*, 2013 FCA 236 ("*Forest Ethics*") Justice Stratas held that when considering Rule 303(1)(a), the question is whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some way (*Forest Ethics* at para 21). If so, the party should be added as a respondent. If that party was not added as a respondent when the notice of application was issued, then, upon motion under Rule 104(1)(b), it should be added as a respondent (*Forest Ethics* at para 21; also see *Gitxaala Nation v Canada*, 2016 FCA 187 at para 83 as to parties with direct standing).

[53] Thus, whether there was a delay in constituting the Review Panel is not an issue of standing.

[54] Indeed, the Respondent's submission on this point are not concerned with standing, but suggest that prejudice should be inferred and the relief sought by the Applicant before this Court should be mitigated, in an unspecified way, by the alleged prejudice to the Respondent caused by the delay. She also asserts that the delay was deliberate and self-serving. However, the Respondent's affidavit, affirmed on May 21, 2019 and filed in response to the application for judicial review, merely states that she objected to the amount of time it took for the Review Panel to be appointed but that her objections did not lead anywhere. She offers no evidence as to the reason for the delay, to establish that it was self-serving or how it prejudiced her. Nor is the suggestion that the relief sought by the Applicant should be impacted by the delay in effecting the Review Panel further developed in the Respondent's submissions.

Contempt

[55] The Respondent also asserts that failing to seek a stay of the Review Panel's decision is the equivalent of the Chief and Council being in contempt of that decision. Again, this is not an issue that affects the Applicant's standing before this Court.

[56] It is true that the Review Panel decision, dated August 21, 2018, was that a new election was to be held and that, to date, the impugned Chief and Council have not sought a stay of that decision pending the outcome of this application for judicial review. Nor have they scheduled a new election while this application for judicial review is pending. However, it is important to consider this in the context of the procedural history of this matter.

[57] TTN filed its application for judicial review on September 20, 2018, being within 30 days of the Review Panel decision. By Order of the same date and pursuant to Rule 384 of the Federal Courts Rules, in accordance with Section A (Dispute Resolution thought Dialogue) of Part III of the Practice Guidelines for Aboriginal Law Proceedings (April 2016), the matter was immediately continued as a specially managed proceeding. Justice Mandamin was assigned as the Case Management Judge. By letter of October 4, 2018, counsel for TTN wrote to the Court advising that the decision calling for a new election had created uncertainty and confusion for members of TTN. As such, counsel requested a case management conference be convened as soon as possible to discuss a motion to stay the order for a new election or, in the alterative, to schedule an expedited hearing date. A case management conference call was held in October 2018 during which the Applicant proposed that the judicial review take place early in January.

Justice Mandamin directed that a date would be scheduled and that, in the meantime, that the Applicant, in consultation with the Respondent, produce a timeline. The Applicant prepared a timeline that Justice Mandamin accepted. However, the Respondent advised in January 2019 that she was still self represented, and that it was unfair that she had to bear that cost as well as various other matters such as adding the Electoral Officer as a party to the application. She requested an extension of time to file her affidavit in response and a case management conference to discuss this request.

[58] A case management conference call was held in February 2019. The Respondent was permitted to serve and file her affidavit on or before March 31, 2019. The Applicant was directed to prepare a schedule, with the consent of the Respondent, for further steps in the proceeding on an expedited basis. The parties were unable to come to an agreement until April 29, 2019 when counsel for the Applicant advised the Court that the Respondent had retained counsel and that agreement had been reached on the form and content of a draft order, which was provided for the Court's consideration. Justice Mandamin issued his Order on May 10, 2019 with the agreed timeline and ordered that the hearing was to take place on an expedited basis if the Court was able to accommodate this. Counsel jointly proposed hearing dates in August or September of 2019. By Order dated July 23, 2019, the hearing of the judicial review was set down to be heard on September 3, 2019. The Respondent sought a further extension of the time to serve and file her Respondent's record and, by direction of Prothontary Furlanetto and with the consent of the Applicant, the extension was granted to August 8, 2019.

[59] The matter was convened for hearing on September 3, 2019, but was adjourned pending confirmation from the Review Panel as to what materials they considered in making their decision or the filing of its record in that regard. Once this was done the parties were to seek a hearing date as soon as possible. By letter of October 16, 2019, counsel for the Applicant confirmed compliance with that Order and asked that the hearing date be scheduled on an expedited basis. The application for judicial review was set down to be heard on January 8, 2020.

[60] The above procedural history is significant as it demonstrates that the Applicant has, since bringing its application for judicial review, been alert to the need to have the matter dealt with as expeditiously as possible and has attempted to do so. Further, the Applicant raised the possibility of seeking a stay of the Review Panel decision in the event that this could not be achieved. The Court's file does not indicate that the Respondent or her counsel at anytime took issue with the time taken to have the matter heard at judicial review or that they were of the view that the Applicant should seek a stay of the Review Panel's decision while the application for judicial review was pending. Given that the matter was in case management, it was open to the Respondent to raise this as a concern, as she raised other matters. Further, in my view, the setting down of a new election while the application for judicial review was pending would have served only to further complicate and add even greater uncertainty to the situation.

[61] The Respondent references *Ledoux* in support of her argument that the Chief and Council are, in effect, in contempt of the Review Panel's decision and that this should have an unspecified negative impact on the relief sought by the Applicant before this Court. In my view, *Ledoux* is factually dissimilar. There, the applicants brought an interlocutory motion seeking

injunctive relief. The applicants had won an election, but lost the appeal before an elections committee. The applicants then launched an application for judicial review to overturn the elections committee's decision. They did not bring an application to stay the decision of the election committee, or to seek to delay or stop the second election, and a second election was held. The applicants then disregarded the new election results and instead continued to act as the elected Chief and Council, remaining in control of the day-to-day operations of the First Nation, as well as its bank account. Those same parties then brought an interlocutory motion seeking an order declaring that they should have control over the administration, governance and finances of the First Nation even in the face of the second election results (*Ledoux* at paras 17, 21-22). Justice Pentney found that the applicants came before the Court seeking equitable relief "effectively to cement their raw assertion of power pending the determination of their judicial review" (*Ledoux* at para 20). He refused to grant the relief sought and found that the applicants did not come before the Court with clean hands. Justice Pentney also noted that despite the efforts of the case management judge, the parties were not inclined to expedite the hearing of the main dispute prior to the hearing of the motions brought before him which had the effect of prolonging the litigation and thereby delaying a resolution for the community (*Ledoux* at para 7).

[62] Here, the application for judicial review has been in case management since it was filed and the parties have been in dialogue, through case management, as to the timing of the application. Unlike *Ledoux*, a second election has not been held and disregarded, and injunctive relief is not sought in an effort to cement an unlawful act. And, as acknowledged by the Respondent, the TTN Custom Election Code is silent about the timeframe within which a new election must be held following a successful appeal. Nor does the Respondent offer any evidence

to suggest that she was not in agreement with the timing of the application for judicial review arising from the case management.

[63] To the extent that the Respondent is indirectly suggesting, based on her contempt and standing submissions, that the Applicants come to this Court with unclean hands, I am unpersuaded.

Custom

[64] The Respondent also submits the Applicant lacks standing because past practice and reasonable expectation are that the previous Council remains in place pending an appeal's resolution. Presumably, the suggestion is that only the former Chief and Council would have standing. However, even if that were so, the impugned Chief and Council would still have a direct interest in the relief sought.

[65] In any event, to the extent that the Respondent is suggesting that TTN custom is that the previous council is to remain in place while an election is appealed or a decision of a review panel is subject to judicial review, she provides little to substantiate this. The TTN Custom Election Code serves to codify previously unwritten TTN governance customs and to effect other practices and procedures agreed to by the Band. Nothing in the Code suggests that when an appeal is filed the impugned Chief and Council must step aside or that the prior Chief and Council will resume governance until a new election is held. The absence of a provision requiring the prior council to remain in place during an appeal of an election does not support that this is a custom of TTN.

[66] The Respondent's affidavit, filed in response to the Applicant's application for judicial review, does not speak to this issue. It does attach, marked as Appendix F but not referenced in or referred to as an exhibit to her affidavit, a copy of what appears to be an email or posting by RoseAnne Archibald which states, "[s]eriously though, I have a feeling this election will be appealed, which means that the current Council stays in position until the appeal is ruled on, which as we've seen in the past can take a very very long time." This is hearsay and is insufficient to establish that it is a custom of TTN for the past Council and Chief to continue to hold those positions pending the resolution of an election appeal. To establish that the prior council remaining in power while an election is appealed is a TTN custom, the Respondent would have to establish, with convincing evidence, that such a practice was firmly established and followed consistently by the community (see, for example, my decision in *Beardy v Beardy*, 2016 FC 383 at paras 90-97 ("*Beardy*"); *Shotclose v Stoney First Nation*, 2011 FC 750 at para 69). She submitted no evidence in that regard and her submission as to standing based on an alleged custom cannot succeed.

Conflict of interest

[67] The Respondent's submission that the application for judicial review results in a conflict of interest as the application is paid for by Band funds and because it is in the personal interest of the impugned Chief and Council to remain in power is also not an issue of standing.

[68] I would also note that, upon election, the current Chief and Council became the representatives of TTN and were responsible for governance of that First Nation. I am not persuaded a conflict of interest exists merely because of a decision by the current Chief and

Council to seek judicial review of the Review Panel decision. That is a question of Band governance and was a decision, and related expense, that was open to them. This is particularly so as the Review Panel's decision turns on the question of whether the allegations of violations of the Code had an impact on or changed the substantive outcome of the 2017 Election and whether it was in the best interest of TTN to order a new election. That is to say, the appeal was not concerned with individual election results but pertained to the overall conduct of the election.

ii Standing of the Respondent

[69] The second issue that the Respondent raises as a question of standing appears to concern her own standing. More accurately, she seems to question whether she is a properly named respondent.

[70] Ms. Linklater submits that the Review Panel handed her no authority and that the resolution of the appeal is a public democratic process in the interests of the entire TTN. She submits that it is unfair that she had to bear the cost of "her representative" on the Panel as well as responding to the application for judicial review before this Court. She submits that her civic duty to TTN ended when the Panel completed hearing her submissions and that the Panel's authority is on behalf of the TTN, not the Respondent. Despite this submission, the Respondent also argues that the impugned Chief and Council should be bringing the judicial review against TTN, a directly affected party because it enacted the Code, and naming herself and the Electoral Officer as respondents. Naming only her as a respondent creates an inherent power imbalance in favour of the impugned Chief and Council rather than the public interest to TTN in having a fair and culturally appropriate election process and appeal.

[71] As to the Respondent's apparent suggestion that she should not be a named respondent, I do not agree.

[72] Section 19.2 of the TTN Custom Election Code permits a candidate to apply to have an Election Review Panel constituted for the disposition of any matter that is alleged to be in violation of the Code. The Respondent was an unsuccessful candidate for the position of Chief and sought such an appeal. As submitted by the Applicant, because the Respondent commenced the successful appeal, she is directly affected by the remedy that the Applicant seeks on judicial review, being an order quashing the decision of the Review Panel.

[73] While I acknowledge that the Respondent frames her appeal as one of civic duty, the appeal also has a direct impact on her personally. The result of the successful appeal that she brought was that the Review Panel found that the election in which she unsuccessfully ran as a candidate was in violation of the Code and therefore ordered a new election. This presented her with the opportunity to run again. However, if the Applicant is successful on judicial review, then the Review Panel's decision will be quashed. In that event, the impugned Chief and Council will remain in place and the Respondent will not have an opportunity to run in the new election. In my view, because she was the applicant in the appeal and because the decision of this Court will directly affect her, she is a properly named respondent pursuant to Rule 303(1) of the *Federal Courts Rules*.

[74] As for the Respondent's submission that Vaughn Johnston, the Electoral Officer, should also be named as a Respondent, it is difficult to see why he would be so named. He was not a

candidate, and he could not and did not appeal the 2017 Election. He is not directly affected by the order sought. Moreover, as demonstrated by his submissions before the Review Panel during the Respondent's appeal, the Electoral Officer does not believe that the 2017 Election violated the Code. It is therefore reasonable to infer that the Electoral Officer would not oppose the Applicant's application for judicial review. Indeed, the Applicant adopted the Electoral Officer's submissions when appearing before the Review Panel. Accordingly, I see no merit to this submission.

[75] The remainder of the Respondent's submissions concern her view that, having brought the appeal in the public interest, it is unfair that she is forced to bear the costs of the appeal and also her costs in responding to the application for judicial review. Additionally and relatedly, because only she is named as a respondent, a power imbalance results.

[76] The Respondent did not bring any motions seeking to be removed as a respondent, seeking to add or remove others as applicants or respondents, and nor does she now bring such motions. Nor is the Respondent actually challenging standing. Rather, her submissions amount to a complaint about the costs of the appeal process. Specifically, that the Code does not provide for costs to those individuals like her who elect to appeal an election result, or who respond to the judicial review of such an appeal. In essence, she challenges the fairness of the appeal process from a cost perspective and asserts a power imbalance because TTN's expenses in bringing this application for judicial review are Band expenses, but her expenses as an individual responding to the application are not. However, the Respondent does not appear to have challenged the Code

on this basis in her appeal and, accordingly, this application for judicial review is not concerned with that issue. It is concerned with the reasonableness of the Review Panel's decision.

[77] The Respondent's concern as to a power imbalance is, in reality, a concern as to the costs of the application and would have been more properly addressed as such.

[78] Before moving onto a consideration of the reasonableness of the Review Panel's decision, I note in passing that, in its written submissions, the Applicant addressed several matters raised in the affidavit of the Respondent submitted by her in response to the application for judicial review. In paragraph 7, 19 and 20 of her affidavit, the Respondent states that she was hindered in finding work and responding to the application for judicial review because her Record of Employment has not been issued by the Band office, that she felt pressured to submit to the authority of the impugned Chief and Council and that the employment by TTN of two members of the Respondent's family was terminated in unusual circumstances. Also, that her cell phone was cut off without notice after the election (the Respondent was a Councillor on the former Band Council). She also states that she has warned the current Chief and Council that the application for judicial review is unfair and prejudicial to her, that she has experienced stress and expenses as a result, and that the application for judicial review should not have been brought against her individually.

[79] It is sufficient for the purposes of this decision to simply say that I have read the Respondent's affidavit and the transcript of cross-examination of the Respondent on her affidavit. The allegations as to the withholding of her Record of Employment, termination of

employment of her relatives and of the cellphone were addressed during the cross-examination and, in my view, these matters are not relevant to, or pursued by, the Respondent in the context of the reasonableness or procedural fairness of the Review Panel appeal. The Respondent's submissions on the unfairness of being named a respondent and in incurring the costs of the judicial review process are pursued in her submissions in the context of her arguments on standing, which I have addressed above.

Issue: Was the Review Panel's decision reasonable?

Applicant's Position

[80] The Applicant submits that there are four reasons why the Review Panel's decision was unreasonable. First, the Panel majority based their decision that the TTN Election Code violations affected the election's outcome on their own experience conducting elections elsewhere, rather than on information relating to the 2017 election. Second, the Panel majority ordered a new election on the basis of their own anecdotal experience conducting elections elsewhere, rather than on information relating to the 2017 election, and further found that TTN had been harmed by the negligence and unprofessional work ethics of the Electoral Officer, which conduct was not outlined or considered anywhere in the decision. Third, the Panel majority failed to consider the evidence before them that the successful candidates had achieved their positions by a substantial margin of victory, such that the procedural violations identified by the Panel would not have had a substantial effect on the 2017 election. And, fourth, the Panel majority failed to consider the harm to TTN that would be caused by ordering a new election after the Chief and Council had been in place for, at that time, ten months.

[81] The Applicant also submits that only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election. If elections can be easily annulled on the basis of administrative errors then public confidence in the finality and legitimacy of the elections results will be eroded and voters disenfranchised. Accordingly, this Court has exercised its discretion to uphold elections based on public interest considerations (citing *Opitz*). In *Ominayak v Returning Officer for the Lubicon Lake Indian Nation Election*, 2003 FCT 596 ("*Ominayak*"), this Court refused to void election results because it could impugn the validity of decisions made by the council and chief in the intervening four years since the election (at paras 55-56). A similar decision was reached in *Clifton v Benton*, 2005 FC 1030 at para 60 ("*Clifton*"). Relying on *Ominayak* and *Clifton*, the Applicant submits that quashing the Panel majority's decision would be in the best interest of TTN members because the Chief and Council have been in their roles for almost two years now and it would be damaging to the First Nation to call into question the many decisions that have been made over that period.

Respondent's Position

[82] The Respondent does not directly address the issues raised by the Applicant. She submits that the Review Panel decision offers very little by way of explanation as to how it reached its findings. However, that it is significant that the reasons stated that:

> Those Panel members with experience conducting elections report that the two advanced polls changed the number of ballots cast…
>
> (Respondent's emphasis)

[83] According to the Respondent, the lawyer Panel member, who she states is not Indigenous, wrote the decision and failed to provide any detail as to how the majority of the Panel arrived at its decision "other than to leave it blatantly wide open for appeal through the language chosen." The use of the word "report", according to the Respondent, means that the lawyer Panel member wrote the decision indicating disagreement with the Indigenous non-lawyer Panel members who have experience conducting elections. The Respondent submits that by bringing the application for judicial review the Applicant "seeks to disavow the expertise of its Indigenous panel members, and uplift the opinion of the Electrical Officer's appointed lawyer to determine the appropriate outcome of the appeal." Further, that there is a reasonable apprehension of bias inherent in the selection process and appointment of the Review Panel "where the lawyer is concerned" (citing *Taylor v Kwanlin Dun First Nation By-Election Appeals Board*, 1998 CanLII 8795 at para 5 (FCTD)). The Respondent submits that the Indigenous non-lawyer Panel members were best placed to take judicial notice of aspects unique to First Nations law and election practices with which they had experience, and that where the decision does not reflect this, the decision should be interpreted generously "having regard to the lack of independent articulation of the positions and findings of the Indigenous non-lawyer panel members."

[84] The Respondent submits that a high degree of deference is to be accorded to a First Nation's election appeal board, within the range of reasonable outcomes. However, that the lawyer member of the Panel should not be given greater deference simply because they are legally trained. According to the Respondent, because the minority panel member, the lawyer, drafted the decision, the "voices of the Indigenous non-lawyer panel members are not clear

enough in the written decision to counteract the erroneous assumption that the lawyer is best placed to assess the evidence."

[85] The Respondent also submits that it is in the best interests of TTN to dismiss this application for judicial review. This is because the there is a severe loss in the integrity of the impugned Chief and Council in continuing to hold office in light of the circumstances of the election, the delayed appeal, the contempt of the Panel's decision, and the "continued positions taken against a single band member, without any funding."

Analysis

[86] The Review Panel's decision is consistent in approach. For each alleged violation, it sets out Ms. Linklater's position, TTN Chief and Council's position, the relevant Code provision and the Review Panel's finding. The Respondent accurately indicates that little analysis is provided. In fact, most of the assessments of each allegation merely accept the position of one party or the other, with little if any analysis. The Review Panel unanimously agreed that only 3 of the 17 alleged violations were of merit.

[87] The Panel divided when considering whether violations of section 12.2 and 12.6 of the Code had an impact on or changed the substantive outcome of the 2017 Election as well as on the question of whether it was in TTN's best interest to require a new election. The totality of those reasons were as follows:

> 121. Two Panel members find that the holding three polling stations rather than two polling stations had an impact or changed the substantive outcome of the 2017 Election. Those Panel

> members with experience conducting elections report that the two advanced polls changed the number of ballots cast by said voters at this particular polling station, that this change in the Election Code while during a current election process impacted the entire outcome of the 2017 election.
>
> 122. One Panel member disagrees and finds that holding three polling stations rather than two polling stations did not have an impact or change the substantive outcome of the 2017 Election. That Panel member accepts TTN Chief and Council's submissions that the holding of three polling stations did not affect the fairness of the elections. That Panel member finds that Ms. Linklater did not provide information to demonstrate that holding three polling stations instead of only two polling stations impacted or changed the outcome through the number of votes cast, the locations of where the voters voted, or other reasons.

As to the section 12.6 violation, the reasons state:

> 124. Two Panel members find that the holding advanced polling stations rather had an impact or changed the substantive outcome of the 2017 Election. Those Panel members with experience conducting elections report that the two advanced polls changed the number of ballots cast by said voters at this particular polling station, that this change in the Election Code while during a current election process impacted the entire outcome of the 2017 election.
>
> 125. One Panel member disagrees and finds that holding advanced polling stations did not have an impact or change the substantive outcome of the 2017 Election. That Panel member accepts TTN Chief and Council's submissions that the holding of advanced polling stations did not affect the fairness of the elections. That Penal [*sic*] member finds that Ms. Linklater did not provide information to demonstrate that the advance polling stations either decreased or increased the number of voters who voted based on when they were held or their location, or the overall fact that advanced polling stations were held.

Finally, as to whether it is in the best interest of TTN for the Panel to order a new election, the reasons were:

> 126. Two Panel members find that it is in the best interest of Taykwa Tagamou Nation to order a new election. Those Panel members with experience conducting elections report that the Taykwa Tagamou Nation is in harm as the 2017 Election was in violation of the Election Code due to the negligence and

> unprofessional work ethics carried out and tremendous lack of respect of the Election Code by the contractor whom Taykwa Tagamou Nation sought and hired.
>
> 127. One Panel member disagrees and finds that it is not in the best interest of Taykwa Tagamou Nation to order a new election. That Panel member is of the opinion that more harm may be done to Taykwa Tagamou Nation if a new election is ordered as the present Taykwa Tagamou Nation Chief and Council have been in office now for almost 10 months; a new election will burden the First Nation by interrupting the governance of the First Nation; and there is no guarantee that running a new election will be free form additional problems under the existing wording of the Election Code.

[88] As a preliminary observation, I note that the Respondent's attack on the lawyer Panel member is misplaced and without merit.

[89] In that regard, the Respondent asserts that by the use of the word "report" in the reasons, "the lawyer member of the Panel is writing the decision in a manner clearly indicating disagreement with the Indigenous non-lawyer Panel members who have experience conducting elections. The author does not provide any detail as to how the majority panel member arrived at their decision, other than to leave it blatantly wide open for appeal through the language chosen."

[90] There is no evidence before me as to which Panel member wrote the decision. The Respondent assumes that it was the lawyer member and it may well have been, but there is nothing in the record to indicate that this is the case. Further, the dissenting Panel member clearly indicated her disagreement with the majority. Thus, the use of the word "report" is of no significance in that regard. Moreover, Panel members are not required to agree with one another. It is entirely appropriate for a panel member to dissent if he or she holds a differing opinion.

Further, the level of detail provided in support of the majority and minority Panel member's reasons is not disproportionate.

[91] And, significantly, each of the Panel members signed the decision which signifies their satisfaction with it. There is nothing to support the Respondent's bald assertion that the reasons did not accurately and appropriately describe the opinion of the majority Panel members or to substantiate her submission that the voices of the Indigenous non-lawyer Panel members were not clear enough in the written decision to "counteract the erroneous assumption that the lawyer was the best placed to assess the evidence." Indeed, this would suggest that the lawyer Panel member, who may or may not be Indigenous and who may or may not have election experience, made this assumption and that the two experienced Indigenous Panel members, one of whom the Respondent selected, simply went along with this.

[92] When appearing before me counsel for the Respondent pursued this line of reasoning and suggested that it was not the role of the majority Panel members to write the reasons, they just "sign off", and that the lack of reasons was the fault of the minority Panel member who failed adequately convey the reasons of the majority. This is abject speculation. All Panel members are responsible for making the decision and all signed the decision. The Respondent seeks to look behind the decision-making process of the Panel members and suggested evidence could have been led in that regard. However, no such evidence was provided and I fail to see how it could have been.

[93] When appearing before me, counsel for the Respondent also suggested that the best evidence was not before the Court. However, nothing in the written submissions or the Respondent's affidavit addressed this. I would also note that, as a general rule, the evidentiary record before a 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 (*Association of Universities and Colleges of Canada v Canadian Copyrights Licensing Agency*, 2012 FCA 22 at paras 19-20).

[94] The Respondent also asserts that there was "a reasonable apprehension of bias inherent in the selection process and appointment of the ERP [Review Panel], where the lawyer is concerned."

[95] As noted above, section 19.3 of the Code provides for the selection of the Review Panel, being that the candidate who brought the appeal, Ms. Linklater in this circumstance, and the members of the newly elected (putative) Band council shall each select one Aboriginal member to the Review Panel and the Electoral Officer shall select the lawyer to be appointed to the panel. This process was followed in the 2017 Election and the Respondent does not explain how the selection process was biased in relation to the lawyer Panel member. The totality of her assertion is that given the wording of the introduction of the Code referring to the inherent law of the First Nation, "it appears as a bizarre twist that the Nation now seeks to disavows the expertise of it Indigenous panel members, and uplift the opinion of the Electoral officer's appointed lawyer to determine the appropriate outcome of the appeal."

[96] To the extent that this is intended to infer that the lawyer Panel member is not Indigenous and this, or the fact that she is a lawyer, somehow results in bias, I note that there is no evidence to support either of these highly questionable inferences. It also ignores that at least two of the three Panel members were Indigenous and that they formed the majority, which held that the Respondent's appeal should succeed. The test for an apprehension of bias is what would an informed person, viewing the matter realistically and practically, and having thought the matter through, have concluded (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716; *Sparvier v Cowessess Indian Band No 73*, [1993] 3 FC 142, 1993 CarswellNat 808 at para 65 (FCTD); *Johnny v Adams Lake Indian Band*, 2017 FCA 146 at para 43). The test is not met based on the foregoing inferences.

[97] And, to the extent that the Applicant is challenging the validity of section 19.3 of the Code based on inherent procedural bias, that is not the issue before me on judicial review. In my view, the Respondent simply disagrees with the dissenting opinion.

[98] As to the Review Panel's decision, for the reasons that follow I find it to be unreasonable.

[99] While the Respondent acknowledges that the reasons provided in the decision are "unclear", she submits that the majority Panel decision is to be afforded significant deference and references Justice Grammond's decision in *Pastion* in that regard:

> [22] Many forms of knowledge may be grouped under the heading of "expertise." Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue. They are also sensitive to Indigenous experience generally and to the conditions

> of the particular nation or community involved in the decision. They may be able to take judicial notice of facts that are obvious and indisputable to the members of that particular community or nation, which this Court may be unaware of. Indeed, for many Indigenous peoples, a person is best placed to make a decision if that person has close knowledge of the situation at issue (see Lorne Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012) 45 UBC L Rev 595 at 605-607). This Court has recognized that certain of those reasons militate in favour of greater deference towards Indigenous decision-makers (*Giroux v Swan River First Nation*, 2006 FC 285 at paras 54-55; *Shotclose v Stoney First Nation*, 2011 FC 750 at para 58; *Beardy v Beardy*, 2016 FC 383 at para 43). For example, in a very recent case, Justice Phelan noted that:
>
> > Given that the decisions engage the Appeal Board's knowledge and expertise of the community norms and experiences and is an internal decision of a community's electoral laws, as part of the respect owed to aboriginal peoples in the governance of their internal affairs, the Board's decision should be accorded a high degree of deference within the reasonableness range of outcomes.
> >
> > (*Commanda v Algonquins of Pikwakanagan First Nation*, 2018 FC 616 at para 19)
> >
> > …
>
> [28] One particular aspect of deference must be emphasized. When deciding whether Indigenous decision-makers have made an unreasonable decision, reviewing courts should read their reasons generously, supplementing any apparent omission by looking to the record (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). Judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para 54, [2013] 2 SCR 458).

[100] I agree that the jurisprudence preceding *Vavilov* held that Indigenous decision-makers are entitled to considerable deference, and that this Court should generously read the reasons given (*Pastion* at para 28; *Beardy* at para 43). However, the jurisprudence also held that if upon review

of the record it becomes apparent that the record does not provide information that permits the Court to understand the reasons contained in the decision under review, then the decision will be found to be unreasonable. As stated by the Federal Court of Appeal in *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227:

> [121] If the reasons for decision are non-existent, opaque or otherwise indiscernible, and if the record before the administrative decision-maker does not shed light on the reasons why the administrative decision-maker decided or could have decided in the way it did, the requirement that administrative decisions be transparent and intelligible is not met…[references omitted]
>
> [122] Any reviewing court upholding a decision whose bases cannot be discerned would blindly accept the decision, abdicating its responsibility to ensure that it is consistent with the rule of law.

[101] In *Vavilov*, the Supreme Court revised the role of expertise:

> [31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

[102] Instead, the Court found that reasonableness is a single standard that accounts for context:

> [90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

[103] Throughout its decision the Supreme Court in *Vavilov* emphasised the need for justification in administrative decision-making, stating that reasons shed light on the rational for a decision and that the purpose of reasons is to demonstrate justification, transparency and intelligibility (at paras 2, 14, 74). Where reasons are provided, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable (*Vavilov* at para 81). A reviewing Court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision-maker to arrive at its conclusions (*Vavilov* at para 84). Significantly, "[w]here reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (*Vavilov* at para 86, emphasis original).

[104] Reasons are also be read in light of the record and with due sensitivity to the administrative setting in which they were given. They are not to be assessed against a standard of perfection (*Vavilov* at para 91). Further,

> [92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.
>
> [93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be

> attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[105] The Supreme Court held that "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision" (*Vavilov* at para 85). A reviewing court is to ask "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). To be reasonable, a decision must be based on reasoning that is both rational and logical (*Vavilov* at para 102). A decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis, where the conclusion reached cannot follow from the analysis undertaken, or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (*Vavilov* at para 103)

[106] For the reasons that follow, the Review Panel's decision cannot withstand this scrutiny.

[107] In this matter, the expertise and experience of the Indigenous Panel members' in conducting First Nations elections is not at issue. The problem is that the decision offers no

explanation as to how that experience and expertise informed or justified the majority's findings. More specifically, the reasons do not explain what experiences assisted the Panel majority in determining that having advance polling stations and an additional polling station in Cochrane changed the outcome of the election. Nor did the Panel majority explain how their experiences with conducting other elections for other First Nations led them to the conclusion that TTN was harmed by the 2017 Election because of the Electoral Officer's unprofessional work ethics or negligence. Here, the majority Panel has not demonstrated through their reasons that the decision was made by bringing their expertise and experience to bear on the specific circumstances before them. The existence of such expertise cannot alone, in this circumstance, provide an explanation for the lack of reasons that justify the decision.

[108] Looking to the record, which in this case is comprised of the affidavit of Sandra Linklater, executive director of TTN, affirmed on November 20, 2018, attaching exhibits "A" through "J" which documents were before the Review Panel when it made its decision, I find nothing to assist with filling the gaps in the majority's reasons.

[109] With respect to the section 12.2 Code violation, the majority simply does not explain how, based on its experience or otherwise, it reached the conclusion that the holding of three polling stations, rather than two polling stations, changed the number of ballots cast at the additional advance polling station and how this change impacted the outcome of the whole of the 2017 Election. Clearly, if the additional polling station had not been set up, then no Band members would have voted there. However, this does not necessarily mean that they would not have voted at the polls set up on election day or that more or fewer voters would have significantly changed or impacted the results. The majority Panel members would have been

alert to this issue because, and as pointed out by the Applicant, the dissenting Panel member was of the view that Ms. Linklater had not provided anything in her appeal submissions to demonstrate that by holding three polling stations instead of two this impacted or changed the outcome through the number of votes cast, the location of where the voters voted or other reasons.

[110] Similarly, with respect to the section 12.6 violation of holding advance polls in Moosonee and Cochrane, the majority appears to rely exclusively on its experience in conducting other First Nations elections to find that the holding of advance polls had an impact on the substantive outcome of the 2017 Election because this "changed the number of ballots cast by said voters at this particular polling station." Again, it is true that if the advance polls had not been set up then no Band members would have voted there and so, on its face, this changed the number of ballots cast there. However, this does not necessarily speak to the substantive outcome of the election. This is pointed out by the dissenting Panel member's reasons, which again point out that Ms. Linklater did not provide information to demonstrate that the advance polling stations either decreased or increased the number of voters based on when or where the advance polls were held or the existence of the advance polls. The majority does not address this concern in its reasons and the record does not provide any information that would supplement or explain how the past experience and expertise of majority allowed it to arrive at its conclusion.

[111] In my view, given a lack of evidence from the Respondent, the apparent exclusive reliance of the majority on its member's past experience in conducting other First Nation elections, and its awareness of the concerns as illustrated by the reasons of the dissenting Panel

member, it was incumbent upon the majority to explain how the past experience and expertise of those Panel members justified its conclusion, or how it otherwise reached its conclusion.

[112] Of even greater concern is the Review Panel's final consideration of whether it is in the best interest of TTN to order a new election. Clearly, this is a question in which the Indigenous majority panel members could potentially have reasonably relied on their past experience and expertise and would have been owed deference in that regard had they explained how that experience justified their conclusion. Instead, the majority stated that TTN was in harm as the 2017 Election was in violation of the Election Code "due to the negligence and unprofessional work ethics carried out by and tremendous lack of respect of the Election Code by the contractor whom Taykwa Tagamou Nation sought and hired."

[113] There is absolutely nothing in the reasons or the record that justifies this finding.

[114] The Panel unanimously found that 14 of the 17 allegations of violations of the Code were without merit. Given this finding, it is impossible to see how the majority could also find that TTN was harmed because of those violations of the Code. Nor do the reasons indicate that the Electoral Officer was negligent, unprofessional or lacked respect for the Code with respect to the 14 allegations which the Review Panel found to be without merit. For example, with respect to the allegation that section 4 of the Election Code was violated, the Panel found that the allegation was without merit and accepted that the Electoral Officer delegated the responsibilities of a Deputy Electoral Officer position to Ms. Sandra Linklater "and that it was essential and practical to do so." The Review Panel found that the delegation did not contravene the Code and Ms.

Linklater was not in a conflict of interest as the Respondent had alleged. Similarly, with respect to the allegation of a violation of section 9.2 of the Code, the Panel found that the Code does not require the Electoral Officer to attend at the AGM, the Electoral Officer did not know about the AGM and that the election date was set before the AGM, again concluding that the allegation was without merit. With respect to the alleged section 9.3 violation, the Review Panel found that the Election Code does not require the Electoral Officer to oversee the candidate speeches at the AGM and that there was no merit to the alleged violation. As to the alleged section 11.4 violation, the Review Panel found that the address for the Electoral Office was correct and that the Electoral Officer took immediate steps to address the error made by Canada Post when it came to his attention and to afford the members the opportunity to vote within the election framework and that the allegation was without merit. Nothing in the Review Panel's reasons concerning these 14 allegations even remotely suggests negligence on the part of the Electoral Officer.

[115] As to the remaining 3 allegations that were found to have merit, the Panel found that with respect to section 9.6, the election being held 14 rather than 15 days after the AGM, no information was provided as to who set the dates. The Review Panel could not, therefore, determine if this was a procedural error made in calculating the dates, or otherwise. Similarly, it could make no determination as to why the advance polls were set only 12 and 13 days from the AGM rather than 15 days. The Panel stated that it assumed that the dates were set by the former TTN Chief and Council. Further, that the Election Code did not include any provision or authority whereby the Electoral Officer could remedy an error concerning the setting to the AGM, election or advance poll dates. Given that the Review Panel appears to conclude that the

errors were not those of the Electoral Officer and its finding that the Electoral Officer had no authority to rectify the errors, it is impossible to see how this could have contributed to the majority Panel finding that the 2017 Election was harmed as it was in violation of the Code due to the negligence, unprofessional work ethic and lack of respect for the Code by the Electoral Officer.

[116] As to the violation of section 12.2 of the Code, the Panel states that it was TTN Chief and Council's position that TTN advised the Electoral Officer that there would be a main poll on the day of the election and two advanced polls in Moosonee and Cochrane. The Panel stated that it understood this to mean that it was the decision of TTN to have a poll the day of the election and two advanced polls, and that "it was not the decision of the Electoral Officer." Further, "[t]he decision to hold a poll the day of the election and to hold two advanced polls was made by the Taykwa Tagamou Nation and not by the Electoral Officer. The Panel finds that the Election Code does not include a section or any authority to the Electoral Officer to rectify an error concerning polling stations." Again, nothing in this finding supports the majority Panel's subsequent finding that the 2017 Election was harmed by Code violations attributable to the Electoral Officer's negligence in running that election. This is also the case with respect to the majority Panel's finding concerning the section 12.6 violation.

[117] When appearing before me, counsel for the Respondent stated that the Respondent challenges the Panel's finding that the decisions concerning the holding of advance polls and the location of a third poll at Cochrane were those of the former Chief and Council. In that regard I note that the Respondent also made this assertion when cross examined on her affidavit which

was prepared after the Review Panel made its decision. However, this was not addressed in the Respondent's written submissions, and the record before the Review Panel included the Electoral Officer's Briefing Note, which states that he was advised by TTN that there would be a main poll on election day and two advance polls, one in Moosenee and one in Cochrane. The Review Panel decision finds as a fact that the decision to hold a poll on the day of the election two advance polls was made by TTN and was not made by the electoral Officer. Without further evidence to substantiate the Respondent's position at judicial review that the Review Panel erred in its factual finding that TTN, and not the Electoral Officer, determined the location and number of polls, and given that the record before the Review Panel supported that finding and that there is no evidence in that record to suggest otherwise, I am unable to conclude that the Review Panel made an error of fact in this regard. In effect, the Respondent asks that this Court reweigh the evidence, which is not its role (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61).

[118] Further, if the majority Panel members intended to imply that they reached this finding based on their past experience, it is impossible to determine what that past experience may have been and how it was related to and was utilized to assess the impact of actual events of the 2017 Election. More specifically, it is difficult to see how past experience in conducting other elections for other First Nations could inform the majority Panel's finding that the Electoral Officer was negligent, had an unprofessional work ethic and showed a lack of respect for the TTN Custom Code when he was conducting the 2017 Election.

[119] A review of the record also sheds no light on this finding and provides no justification for it. To the contrary, it contains the Electoral Officer's Report, which is comprehensive, as well as the Electoral Officer's CV, which lists his prior election experience, and his Briefing Note provided to the Panel in the appeal.

[120] Given that the majority Panel members provide no reasons to explain their finding that the 2017 Election was harmed as a result of violations of the TTN Custom Election Code caused by the Electoral Officer's negligence, unprofessional work ethic and tremendous lack of respect for the Code, the finding is not justified. Further, no justification for this finding can be found in the record. Accordingly, the decision is unreasonable.

[121] As I have found the Review Panel decision to be unreasonable, I need not substantively address the Applicant's further submission that the majority Panel members failed to consider its submissions concerning the margin of victory evidence. More specifically, the Applicant submits that with respect to the Chief's position, a total of 223 votes were cast, of which 222 were valid. The successful candidate received 73 of the 222 valid votes (32.9%). The next candidate received 43 of the 222 votes cast (19.4%). Thus, the Chief was elected by a wide margin of votes, which was significant when viewed in the context of the relatively small population of voting TTN members and the number of candidates for chief. Similar submissions were made with respect to the Deputy Chief position. In my view, as these submissions concerned the question that the Review Panel put to itself in deciding the appeal, being whether the violations had an impact on or changed the substantive outcome of the 2017 Election, I agree that the Review Panel should have addressed them. As indicated in *Vavilov*, a decision maker's failure to

grapple with key issues or central arguments raised by the parties can call into question whether the decision maker was alert and sensitive to the matter before it (at para 128). That is the circumstance before me.

[122] The Applicant also submits that the majority Panel members failed to consider the Applicant's submissions that a new election should not be held because of the harm that an interruption of governance would cause to TTN. Again, as I have already found that the majority Panel's reasons given pertaining to harm were unreasonable, I need not address this further submission. Again, however, I agree that the submission should have been addressed. Although the Panel identified the question of whether it is in the best interests of TTN for the Panel to order a new election, the majority Panel members did not engage with that issue.

Conclusion

[123] In conclusion, in the post-*Vavilov* world, Indigenous decision makers with demonstrated expertise and experience will continue to be afforded deference when making decisions such as determining appeals of elections based on custom election codes. Such decisions will also continue to be reviewed for reasonableness. In this matter, the majority Review Panel's decision is not based on an internally coherent and rational chain of analysis that is justified in relation to the facts and the law that constrained the Review Panel. Nor can the conclusion reached follow from the analysis conducted. Accordingly, the decision is not reasonable and cannot be saved on the basis of deference (*Vavilov* at paras 85, 102, 103).

[124] The Review Panel's decision must be quashed because it lacks justification, transparency and intelligibility and is not is justified in relation to the relevant factual and legal constraints that bear on the decision.

Costs

[125] When appearing before me the parties agreed that if they could not reach mutual agreement as to costs then they would make written submissions with their respective positions.

[126] Accordingly, if necessary, within one week of the date of this decision the Applicant shall submit brief written submissions, not to exceed three pages in total, as to costs. The Respondent shall, within two weeks of this date of this decision, make her submissions on costs, which shall not exceed three pages in total.

Relief

[127] The Applicant sought to have the decision of the Review Panel quashed and that relief will be granted.

[128] The Applicant also sought an order in the nature of *quo warranto*. However, when appearing before me, counsel for the Applicant advised that this request was stated in error and that in fact the relief sought is an order declaring that the sitting Chief and Council are confirmed as holding those positions per the 2017 Election results. Counsel for the Applicant also submitted that this was a circumstance where the matter should not be remitted back to a review panel for

reconsideration. Further, as indicated in *Vavilov*, that it may be appropriate for the Court to decline to remit a matter back to the decision maker where it becomes evident to the Court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose (*Vavilov* at para 142).

[129] I am not persuaded that this is such a case. It may be that on reconsideration by a different review panel reasons might be provided that justify, having taken into consideration the Applicant's submissions as to the margin of victory and the impact that holding a new election would have on the community given the interruption of governance that would result, among other factors, that a new election is warranted. Or that it is not. In other words, based on the record and submissions before me, I cannot conclude that the only possible decision of a new panel is that a new election is not required.

[130] That said, when counsel for the Respondent was canvassed on this point, she indicated that the Respondent was of the view that, if this Court quashed the Review Panel's decision, then a new election should not be held and that the current Chief and Council should be declared as being the valid office holders. That is, the appeal should not again be determined by another review panel. This was based on the view the TTN First Nation would be less prejudiced by a declaration that the current Chief and Council are confirmed in those positions than it would by the holding of a new appeal hearing with attendant uncertainties.

[131] If the Respondent is, in effect, abandoning her appeal then when the Review Panel's decision is set aside there will be no challenge to the 2017 Election. In that event, its results will stand.

JUDGMENT in T-1687-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;

2. Unless the Respondent confirms that she is abandoning her appeal, the matter will be remitted back to a different review panel, to be constituted within 30 days of the date of this decision, for reconsideration;

3. If the parties cannot reach agreement on costs, they shall provide the Court with brief written submissions, not to exceed three pages in total, as to their respective positions on costs. Within one week of the date of this decision, the Applicant shall provide its submissions on costs and, within two weeks of this date of this decision, the Respondent shall provide her submissions on costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	TAYKWA TAGAMOU NATION v IRENE LINKLATER
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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