

Federal Court



Cour fédérale

**6284Date: 20230419**

**Docket: T-1055-21**

**Citation: 2023 FC 565**

**Ottawa, Ontario, April 19, 2023**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**FRANCIS HIGHWAY**

**Applicant**

**and**

**PETER BALLANTYNE CREE NATION,  
PETER BALLANTYNE APPEAL  
TRIBUNAL, ELIZABETH MICHEL,  
RONALD MICHEL JR.,  
THOMAS LINKLATER JR., SARAH SWAN,  
AND MYRTLE BALLANTYNE**

**Respondents**

**JUDGMENT AND REASONS**

**I. Nature of the Matter**

[1] Francis Highway [Applicant] seeks judicial review of a June 14, 2021 decision of the Peter Ballantyne Cree Nation [PBCN] Appeal Tribunal [Appeal Tribunal] upholding the Applicant's appeal, but allowing the April 13, 2021 general election [Election] to stand on the

ground that the conduct complained of could not have reasonably affected the outcome of the Election [Decision].

[2] The application for judicial review is allowed.

## II. Background

### A. *Preliminary Note*

[3] The record for this matter is lacking. PBCN did not submit the Certified Tribunal Record [CTR] properly. It contains some background related to the Appeal Hearing, such as the Notice of Appeal, the Applicant's affidavit, and counsel's letter to the Appeal Tribunal. These materials were not contained in the Applicant's record. The parties did not raise any objections as to the state of the CTR prior to the hearing. I find these three documents useful as they provide context of what was before the Appeal Tribunal. Further, the Notice of Appeal is reliable because it is directly corroborated by the Decision.

[4] The parties also did not conduct cross-examinations of those who submitted affidavits before this Court, again leaving the record less fulsome.

### B. *Context*

[5] The Applicant is a member of PBCN, a "band" within the meaning of the *Indian Act*, RSC 1985, c I-5. PBCN is divided into seven electoral districts: Pelican Narrows, Deschambault

Lake, Southend, Sandy Bay, Amisk Lake (Denare Beach), Sturgeon Landing, and Prince Albert Urban.

[6] The Election was held in accordance with the PBCN Election Code [Election Code], a custom election law passed in 2014. As set out in further detail below, section 5 of the Election Code allows for advance polls in each of the electoral districts. Section 7 of the Election Code provides for the creation of the Appeal Tribunal.

C. *The 2021 General Election*

[7] On April 13, 2021, PBCN held the Election for Chief and Council for each of the electoral districts. The Election did not unfold smoothly for Pelican Narrows.

[8] In support of the Election, PBCN appointed Burke Ratte as the Head Electoral Officer [HEO]. The HEO selected six Deputy Electoral Officers [DEO]: Serena Ballantyne, Donald Linklater, James Swan, Maureen Linklater, Louise Michelle, and Cheryl Michel.

[9] The Applicant and the individual Respondents, Elizabeth Michel, Ronald Michel Jr., Thomas Linklater Jr., Sarah Swan, and Myrtle Ballantyne [Individual Respondents], ran for the five available Councillor positions in Pelican Narrows. The Individual Respondents were the successful candidates in the Election. The Applicant received 10 votes less than the last elected Councillor.

[10] On April 13, 2021, the HEO posted a notice entitled “Ballot Count Postponement” indicating that election activities in Sturgeon Landing would be postponed due to a COVID-19 outbreak. The notice further explained that “all ballots cast in the [PBCN] General Election...will not be counted until Sturgeon Landing Reserve has completed their election activities.”

[11] On April 14, 2021, the HEO posted a notice entitled “Nullification of ballots cast in Pelican Narrows in Advance Poll and Election Day Poll”. According to the notice, the nullification of the ballots stemmed from one DEO counting the ballots for the Councillor positions in Pelican Narrows on April 13, 2021 and April 14, 2021, contrary to the HEO’s direction. As such, new dates would be scheduled for election activities in Pelican Narrows.

[12] On April 19, 2021, the HEO posted a notice entitled “Polling dates – PBCN” setting out two dates, April 26, 2021 and 27, 2021, for a new election in both Pelican Narrows and Sturgeon Landing.

[13] The Applicant wrote to the HEO requesting a recount around this time. In a letter dated April 26, 2021, the Applicant explained that he was “requesting a recount for Councillor ballots, which were counted at the Pelican Narrows Band Hall on the evening of April 13, 2021.” He acknowledged that the recount request must be made in writing “within forty-eight (48) hours after the closing of the polls” pursuant to subparagraph 5(1)(xi) of the Election Code. The Applicant further wrote, “I believe the last poll is closing today, on April 21, 2021 at Sturgeon

Landing, for the whole Peter Ballantyne Election, therefore I am ahead of schedule in asking for this recount” (emphasis added). The Applicant asserts that the request was subsequently denied.

[14] On April 25, 2021, Justice Grammond issued an interlocutory injunction prohibiting PBCN from holding a new election for the five Councillor positions in Pelican Narrows unless the Appeal Tribunal made an order to that effect under section 8 of the Election Code. In the Order, Justice Grammond noted that the Election Code does not empower the HEO to nullify an election once it has occurred.

[15] That same day, the HEO posted a notice advising that all ballots cast during the Election in Pelican Narrows for the position of Chief would be counted on April 27, 2021. Accordingly, the ballot count for Councillor positions in Pelican Narrows, as conducted by the DEO on April 13, 2021 and April 14, 2021, stood. All election activities at Sturgeon Landing proceeded as scheduled.

[16] On April 28, 2021, the HEO issued a report confirming the elected Chief and Council.

D. *The 2021 Appeal*

[17] On April 30, 2021, pursuant to subparagraph 8(b)(i) of the Election Code, the Applicant appealed the Election results to the Appeal Tribunal. The Applicant asserted in both his affidavit and through his counsel’s submissions various procedural irregularities that may have reasonably affected the outcome of the Election.

[18] On June 2, 2021, the Appeal Tribunal wrote to the Applicant allowing a hearing to proceed on June 10, 2021 [Appeal Hearing]. Appeal Tribunal members Alton Michel (Chair), Dwayne Seib, Beverly Morin, and Candice Michel presided over the hearing. The Southend community did not select an Appeal Tribunal member due to its objections to the selection process.

[19] The Applicant advanced four main procedural irregularities in support of his appeal. First, Maureen Linklater was not eligible to act as a DEO as she was employed by the PBCN school, contrary to paragraph 5(e) of the Election Code.

[20] Second, several of the DEOs are immediate family members to candidates in the Election, contrary to paragraphs 5(h)(xi) and 2(p) of the Election Code. Specifically, James Swan, Maureen Linklater, Louise Michelle, and Cheryl Michelle are the immediate family of Sarah Swan. Further, Serena Ballantyne and Donald Linklater are married spouses and the immediate family of Thomas Linklater Jr. and Myrtle Ballantyne.

[21] Third, cardboard boxes with zip ties were used to secure both Chief and Council votes, rather than a locked metal ballot box as required under subparagraphs 5(f)(vii), 5(l)(ii), and paragraph 5(m) of the Election Code. Further, contrary to subparagraph 5(l)(iii), the ballots were initialled by the HEO, not a DEO.

[22] Lastly, Myrtle Ballantyne was loitering within 50 meters of the polling station, contrary to subparagraph 5(l)(xii) of the Election Code.

[23] It is worth noting that the Applicant's Notice of Appeal did not advance issues surrounding the HEO's treatment of the ballot recount request.

### III. The Decision

[24] Seven witnesses appeared before the Appeal Tribunal: Serena Ballantyne, Myrtle Ballantyne, Ronald Michelle Jr., Eileen Linklater, Glenda Merasty, Graham Linklater, and the Applicant.

[25] On June 14, 2021, the Appeal Tribunal, pursuant to section 8 of the Election Code, upheld the Applicant's appeal but allowed the Election to stand on the ground that the conduct complained of could not have reasonably affected the outcome of the Election.

[26] The Appeal Tribunal accepted that there were irregularities with the Election process and contraventions to the Election Code. However, the Appeal Tribunal concluded that, as a whole, they "were not so severe as to affect the outcome of the Election."

[27] The Decision referred to each issue raised in the Applicant's Notice of Appeal. The Appeal Tribunal first found that there was no evidence to support the Applicant's contention that PBCN employees acting as DEOs influenced the outcome of the Election, especially given the difficulty in securing DEOs for elections.

[28] Second, the Appeal Tribunal accepted Serena Ballantyne's testimony that none of her immediate family members were candidates in the Election.

[29] Third, the Appeal Tribunal acknowledged the DEOs' responsibility to use locked metal ballot boxes, but accepted Serena Ballantyne's testimony that the cardboard boxes were potentially a more secure system, having been signed by the DEOs and sealed with a layer of packing tape. Should there be a tear in the tape, the DEOs would have known it was tampered with.

[30] Lastly, the Appeal Tribunal considered the evidence related to Myrtle Ballantyne's loitering. The Appeal Tribunal noted that Myrtle Ballantyne lives directly across the road from the polling station, the location of which was selected to address COVID-19 precautions. As such, it would be unreasonable to impose constraints on the occupation of her property so as to be in compliance with the distance provisions. The Appeal Tribunal found that this conduct did not amount to a contravention or a corrupt practice.

[31] The ballot recount issue was not specifically referenced in the Decision.

#### IV. Issues and Standard of Review

[32] After considering the parties' submissions, the issues are as follows:

1. Was the conduct of the Appeal Hearing procedurally fair?
2. Was the Decision reasonable?

[33] The Applicant submits that the appropriate standard of review is reasonableness, which encompasses procedural unfairness and a denial of natural justice. The Individual Respondents agree with the Applicant. PBCN made no submissions on the standard of review.



[34] In my view, issues of procedural fairness are subject to a correctness standard of review (*Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at paras 49-56; *Mission Institution v Khela*, 2014 SCC 24 at para 79). On a correctness review, no deference is owed to the decision maker (*Bois v Onion Lake Cree Nation*, 2020 FC 953 at para 26). However, as noted in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], “the duty of procedural fairness in administrative law is ‘eminently variable’, inherently flexible and context-specific” (at para 77). In the context of Indigenous laws, the content of the duty of fairness must be “tailored to the particular circumstances and context of the [appeal body]. This context can and should include judicial respect for relevant custom” (*Bruno v Samson Cree Nation*, 2006 FCA 249 at para 20; *Labelle v Chiniki First Nation*, 2022 FC 456 at paras 91-92).

[35] The merits of the Decision, on the other hand, are subject to a reasonableness review. The presumption of reasonableness is not rebutted in the case at hand (*Vavilov* at paras 16-17). To determine whether a decision is reasonable, a reviewing court must consider both the outcome and underlying rationale of the decision to assess whether the decision, as a whole, bears the hallmarks of reasonableness – justification, transparency, and intelligibility (*Vavilov* at paras 15, 99). Reasonableness review is not a line-by-line treasure hunt for error, and a reviewing court must refrain from reweighing and reassessing the evidence (*Vavilov* at paras 102, 125). A decision will be reasonable where the reasons of the decision-maker allow the Court to understand why the decision was made and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86). Conversely, a decision will be unreasonable where there are shortcomings in the decision that are

sufficiently central or significant (*Vavilov* at para 100). The party challenging the decision bears the burden of showing that the decision is unreasonable (*Vavilov* at para 100).

V. The Election Code

[36] Section 2 of the Election Code defines immediate family members as:

(p) “**IMMEDIATE FAMILY**” means father, mother, sister, brother, grandfather, grandmother, uncle, aunt, son, daughter, either common-law or married spouse, and including in-laws.

[37] Section 5 of the Election Code sets out election and nomination procedures, including the powers and responsibilities of the HEO and DEOs:

(e) No person employed by the [PBCN] or its entities shall be eligible to be an Electoral Officer, nor shall any employee of the [PBCN] take time off, holiday, temporary leave, or resign their position to serve in any [EO] position.

(f) The Electoral Officers shall:

...

(vii) Make all arrangements for professionally pre-printed ballots and metal ballot boxes;

...

(h) Conduct of the **NOMINATION MEETING** shall be as follows:

...

(xi) Deputy Electoral Officers, Polling Clerks, Computer Clerks and Security will be selected at the end of the nomination meetings in member communities or reserves. Deputy Electoral Officers selected for these positions should not have any Immediate Family as a Candidate in the Election.

...

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

...

(ii) Voting shall take place on Election Day from 9:00 a.m. to 8:00 p.m. and by secret ballot, at the polling station provided. All ballots shall be placed in a locked metal ballot box;

(iii) Electors shall proceed immediately to the compartment provided for marking ballots and shall mark the ballot paper by placing an "X", a checkmark "✓" or a cross "+" opposite the name of the Candidate(s) of their choosing. The Electors shall then fold the ballot paper so as to expose the initials of the Electoral Officer and upon leaving the voting compartment shall immediately deliver the ballot paper to the Electoral Officer. The Electoral Officer shall, without refolding the ballot, verify his/her initials and immediately deposit the ballot paper in the metal ballot box in the presence of the Elector and all other person(s) entitled to be present at the polling station. Any Elector who has received a ballot and leaves the polling area after receiving the same shall forfeit his/her right to vote;

...

(xi) Any Councillor Candidate has a right to a recount for that community only in the number of votes between candidates is less than twenty (20) for the elected Councillor. This request must be made in writing within forty-eight (48) hours after the closing of the polls.

(xii) The Head, Deputy, and other Electoral Officers shall ensure that there is no loitering in the vicinity of the polling stations and they are hereby empowered to control or evict loiterers if deemed necessary. Loitering includes actions by Candidates or representatives. For the purposes described in this Election Code, loitering within fifty (50) m of the polling station shall not be tolerated.

(m) All ballot boxes shall be initially empty, sealed with a numbered and initialized seal, have a locking device with key only

by the Electoral Officer, and are scrutinized throughout the entire period of voting.

...

(o) There shall be advance polls in each of the identified [PBCN] reserves and communities for one day from 11:00 a.m., to 8:00 p.m., to be held at least 5 days before the General Election. Saskatoon and La Ronge urban (for Prince Albert Urban Councillor position only) and Kinoosao (for Southend Councillor positions only) will have advance polls only. All who cast their vote in advance polls will be entered into a computer for monitoring purposes for Election Staff so no Member will be able to double vote in any community.

[38] Section 7 addresses the Appeal Tribunal:

7. The Appeal Tribunal shall consist of one eligible Member from one of the seven (7) communities: Pelican Narrows, Deschambault Lake, Southend, Sandy Bay, Denare Beach, Sturgeon Landing, and Prince Albert Urban. Appeal Tribunal members shall be elected by a simple majority of Electors at the nomination meeting in each community. For further clarification, each community selects one Appeal Tribunal member only. Each member must have a working knowledge of the policies and procedures of the current Administration for the purposes of understanding their role and responsibilities as it pertains to their appointment to the Appeal Tribunal.

...

(b) No Appeal Tribunal member shall be eligible to participate if the Appellant is an Immediate Family member.

[39] Lastly, section 8 sets out the election appeal procedures:

(a) Any Candidate may appeal the results of an Election within twenty (20) days from the date of the Election by delivering a notice of an appeal, setting forth the grounds of the appeal and supported by an Affidavit of the Candidate to the Head Electoral Officer or a Deputy Electoral Officer.

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

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

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

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

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

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

i. Deny the Appeal

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

iii. Uphold the Appeal and call for a By-Election within thirty (30) days of the upholding of an appeal decision;

(f) The decision of the Appeal Tribunal is final and binding on all parties.

[40] There are no provisions in the Election Code that provide for the modification or cancellation of election procedures by any individual, including the HEO.

## VI. Preliminary Issue

[41] The Individual Respondents submit that the Applicant is estopped from bringing this application judicial review because he and other candidates for the position of Councillor agreed not to appeal the Election results. On April 13, 2021, the Applicant and other candidates signed an agreement that “[w]e the undersigned Councillor candidates will not hold any responsibility to the hired election committee for any outcomes of tonight’s ballot count and there will be no Appeals.” Recall that the HEO had purported to pause the counting of the ballots at Pelican Narrows.

[42] The Individual Respondents’ submissions must fail. They have not provided any authority for their position. In any event, the record does not establish circumstances giving rise to the doctrine of promissory estoppel (*Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 45, citing *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50 at 57, 80 DLR (4th) 652). Absent any submissions or evidence beyond a broad assertion, the Individual Respondents’ argument must fail.

[43] I also note that the record makes no mention of the Individual Respondents’ estoppel argument before the Appeal Tribunal, and the Decision itself fails to reference the aforementioned agreement. The Individual Respondents should have raised this issue before the Appeal Tribunal. Further, the Election Code does not provide for opting out of the election appeal provisions. These are additional bases to find the Individual Respondents’ assertion lacking.

## VII. Analysis

[44] PBCN only advanced submissions on costs. Accordingly, the analysis that follows is limited to the submissions of the Applicant and the Individual Respondents.

A. *Was the conduct of the Appeal Hearing procedurally fair?*

(1) Applicant's position

(a) *Conduct of the Appeal Hearing*

[45] The Decision was patently unreasonable in light of sections 7 and 8 of the Election Code. This renders the appeal process unreasonable.

(b) *Apprehension of Bias*

[46] Appeal Tribunal members Alton Michel and Dwayne Seib lacked partiality and demonstrated a reasonable apprehension of bias (*Johnny v Adams Lake Indian Band*, 2017 FCA 146; *Committee for Justice and Liberty Tribunal et al v National Energy Board et al*, [1978] 1 SCR 369, 68 DLR (3d) 716). Alton Michel's family members were involved in the Election and he nominated an unsuccessful candidate for Chief. Dwayne Sieb posted on Facebook on multiple occasions prior to the Election voicing both his support for Serena Ballantyne and his disdain surrounding the conduct of the Election.

(2) Individual Respondents' Position

(a) *Conduct of the Appeal Hearing*

[47] The Appeal Tribunal's conduct was procedurally fair. The Appeal Tribunal correctly followed the two-stage procedure set out in section 8 of the Election Code and, after determining there was sufficient evidence to proceed to a hearing, the Appeal Tribunal heard all witnesses, allowed cross-examinations, accepted exhibits, and provided a detailed and well-reasoned Decision (*Lecoq v Peter Ballantyne Cree Nation*, 2020 FC 1144 at paras 42-51 [*Lecoq*]).

[48] The Appeal Tribunal also considered the evidence related to the irregularities with the Election process and contraventions to the Election Code, yet nevertheless concluded that they were not so significant as to affect the outcome of the Election.

[49] Lastly, the irregularities and contraventions constituted administrative errors (*Opitz v Wrzensewsky*, 2012 SCC 55 at para 2 [*Opitz*]). Section 8 of the Election Code specifically anticipates the occurrence of such errors during an election. However, to upset an election, these errors must affect its outcome. This did not occur here.

(b) *Apprehension of Bias*

[50] The Applicant is precluded from raising the issue of bias as he did not raise it at the Appeal Hearing. There are no circumstances, including prior recusals or mutual employment, that exist within the Appeal Tribunal composition that give rise to an apprehension of bias (*Lecoq* at para 57).

(3) Conclusion

(a) *Conduct of the Appeal Hearing*



[51] I find that the conduct of the Appeal Hearing was procedurally fair, having regard to all the circumstances (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 837-41).

[52] In *Lecoq*, I found that the Appeal Tribunal's process involved a judicial component, necessitating a higher level of procedural fairness (at para 46). I also found that the Appeal Tribunal should ensure that there is a level of consistency in its processes in order to create confidence within the community and develop a body of precedential decisions that can be relied on for future proceedings (at para 50).

[53] In the present matter, the Appeal Tribunal correctly followed the two-stage appeal procedure in conducting the Appeal Hearing (*McCallum v Peter Ballantyne Cree Nation*, 2019 FC 898 at para 39 [*McCallum*]). The Decision sets out the process it followed. First, the Appeal Tribunal found that there were sufficient grounds to warrant an appeal hearing. Second, at the Appeal Hearing, the Appeal Tribunal heard from seven witnesses including the Applicant, allowed for cross-examinations, and accepted exhibits. The Court acknowledges that there is no set requirement for formality. Rather, "what is required is an ability to test the evidence of the people providing testimony" (*Lecoq* at para 48). There is nothing to indicate that any procedural unfairness arose during the Appeal Hearing itself.

[54] There is also nothing in the record to suggest that the Applicant challenged the procedure adopted by the Appeal Tribunal at the Appeal Hearing. The Applicant's bald assertion that the appeal process was unreasonable because the Decision is patently unreasonable in light of

sections 7 and 8 of the Election Code, without more, is insufficient to set the Decision aside on this ground.

[55] I will address the Individual Respondents' remaining submissions concerning the administrative nature of the irregularities with the Election process and contraventions to the Election Code under the reasonableness of the Decision.

(b) *Apprehension of Bias*

[56] It is unnecessary to delve into the test for establishing a reasonable apprehension of bias as the Applicant did not raise this argument before the Appeal Tribunal. The jurisprudence is clear that allegations of bias and procedural unfairness must be made at the earliest possible opportunity; otherwise, an applicant is precluded from raising the issue on judicial review (*Muskego v Norway House Cree Nation Appeal Committee*, 2011 FC 732 at para 42 [*Muskego*]; *Hennessey v Canada*, 2016 FCA 180 at para 20 [*Hennessey*], citing *Re Human Rights Tribunal and Atomic Energy of Canada Ltd*, [1986] 1 FC 103 at 113 (CA) [*Atomic Energy*]; *McCallum* at para 54). As this Court explained in *Muskego*:

[42] It is a well-established principle that a party must raise an issue of procedural fairness at the first opportunity. The failure to do so will amount to an implied waiver: see, for example, the decision of this Court in *Kamara v Canada (Minister of Citizenship and Immigration)*, 2007 FC 448:

[26] ...The jurisprudence of the Court is clear; such issues dealing with procedural fairness must be raised at the earliest opportunity. Here, no complaint was ever made. Her failure to object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred. See *Restrepo Benitez et al v MCI*, 2006 FC 461 (CanLII), 2006

FC 461 at paras 220-221, 232 & 236, and *Shimokawa v MCI*, 2006 FC 445 (CanLII), 2006 FC 445 at paras 31-32 citing *Geza v MCI*, 2006 FCA 124 (CanLII), 2006 FCA 124 at para. 66.

[57] The earliest possible opportunity arises “when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection” (*Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at para 220, aff’d 2007 FCA 199).

[58] The reason underlying this timeframe is that a first-instance decision-maker, such as the Appeal Tribunal, ought to be afforded “a chance to address the matter before any harm is done, to try to repair any harm, or to explain itself” (*Hennessey* at para 21). A party “cannot withhold a disqualifying procedural ground in reserve, stay still in the weeds and later brandish it on judicial review when it happens to be unsatisfied with the first-instance decision” (*Sharma v Canada (Citizenship and Immigration)*, 2020 FC 381 at para 31; *Hennessey* at para 21).

[59] In the present matter, the Appeal Tribunal acknowledged the Applicant’s concerns regarding Donald Linklater’s participation in the Appeal Hearing due to his spousal relationship with DEO Serena Ballantyne. Donald Linklater recused himself without protest prior to the commencement of the Appeal Hearing.

[60] The Decision, however, shows no objection to any bias arguments that the Applicant now raises on judicial review. The Applicant ought to have raised his concerns surrounding the participation of Alton Michel and Dwayne Seib when discussing his concerns about Donald Linklater (*Ahousaht First Nation v Canada*, 2021 FCA 135 at para 39). The Applicant’s entire

course of conduct before the Appeal Tribunal – including calling witnesses and making submissions – constituted an implied waiver of any assertion of bias on the part of the presiding Appeal Tribunal members (*Atomic Energy* at para 5).

B. *Was the Decision reasonable?*

(1) Applicant's Position

[61] The irregularities and contraventions acknowledged by the Appeal Tribunal could have affected the outcome of the Election.

[62] Further, the Appeal Tribunal disregarded the evidence surrounding the HEO's breach of subparagraph 5(1)(xi) of the Election Code in denying the Applicant's recount request. The closing of the polls occurred on or around April 26, 2021 at Surgeon Landing for the entirety of the Election. Accordingly, the recount request, made on April 26, 2021, was within the 48-hour time limit set out in the Election Code.

(2) Individual Respondents' Position

[63] The Applicant's contentions are not supported by any evidence. The Appeal Tribunal considered all of the evidence before it in rendering its Decision (*Lecoq* at paras 68-72).

[64] The closing of the polls in Pelican Narrows occurred on April 13, 2021 and the ballot count was completed on April 14, 2021. The Applicant agreed with the other candidates to proceed with the original ballot count on April 13, 2021. Pursuant to subparagraph 5(1)(xi) of the

Election Code, the Applicant's demand for a recount should have been made on or before April 16, 2021.

(3) Conclusion

[65] Decision-maker's reasons are not to be judged on a standard of perfection. The fact that a decision-maker does not refer to all arguments or details that the reviewing judge would have preferred is insufficient to set a decision aside (*Vavilov* at para 91).

[66] Further, the review of a decision cannot be divorced from the institutional context in which it was made (*Vavilov* at para 91). It follows from this that in assessing the reasonableness of the Decision, deference should apply towards Indigenous decision-makers, being better positioned to understand First Nations legal traditions (*Lecoq* at para 69; *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 22).

[67] I acknowledge that courts should not overturn First Nation elections solely due to administrative errors. As explained by the Supreme Court of Canada in *Opitz*, "[i]f elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election" (at para 2).

[68] I agree with the Individual Respondents that, based on the reasons of the Decision and in light of the history and context of the proceedings, the Appeal Tribunal considered all the

evidence pertaining to the irregularities with the Election process and contraventions to paragraphs 5(e), (f), (h), (l), and (m) of the Election Code. While some provisions are incorrectly referenced, the Decision clearly illustrates that the Appeal Tribunal relied on, and assessed, the parties' submissions and witness testimony in arriving at conclusions for each of the Applicant's asserted procedural irregularities.

[69] Having engaged with the evidence, the Appeal Tribunal concluded that, pursuant to subparagraph 8(e)(ii) of the Election Code, the contraventions and irregularities could not have reasonably affected the outcome of the Election. It was entirely open to the Appeal Tribunal to arrive at this conclusion. Accordingly, I take no issue with the Appeal Tribunal's reasoning process.

[70] Turning to the Applicant's argument surrounding his recount request, I note that the Individual Respondents did not object to submissions on this issue. I take that to mean that there must have been some discussion at the Appeal Hearing on this issue despite the Appeal Tribunal's lack of reference to it in the Decision.

[71] In my view, and under typical circumstances, the wording of subparagraph 5(l)(xi) of the Election Code likely contemplated that the "closing of the polls" occurred on the same day at each of the seven electoral districts. That would have been April 13, 2021. However, as discussed earlier, the Election did not unfold as anticipated. The ballots at Pelican Narrows should have been counted on April 13, 2021 and April 14, 2021, and they were. The Election Code did not empower the HEO to alter the process set out in the Election Code when he issued

the April 13, 2021 notice postponing the ballot count, the April 14, 2021 notice nullifying the ballot count, or the April 19, 2021 notice setting out new election dates in both Pelican Narrows and Sturgeon Landing. It is understandable that these notices caused confusion. More confusion followed with the April 25, 2021 notice from the HEO stating that, as a result of Justice Grammond's Order, only the ballots for the position of Chief would be counted on April 27, 2021 with the closing of the polls in Sturgeon Landing. However, the ballot count for Councillor positions in Pelican Narrows on April 13, 2021 and April 14, 2021 stood.

[72] The Applicant's recount request for the ballots counted on April 13, 2021 is dated April 26, 2021. However, the Applicant's letter also references his belief that the polls in Sturgeon Landing closed "today, April 21, 2021", thereby making his ballot recount request early. At the hearing, counsel stated that the proper date of the letter was April 26, 2021. However, as noted above, there are inconsistencies in the record that the Court is unable to decipher due to the state of the record.

[73] Had the Appeal Tribunal considered these facts in conjunction with Justice Grammond's Order, the Appeal Tribunal may have very well concluded that it was logical for the Applicant to wait until April 26, 2021 to request a recount for the Councillor ballots in Pelican Narrows, and accordingly, that a recount should have been conducted. However, because Justice Grammond's Order prevented a new election for the five Councillor positions in Pelican Narrows from proceeding, the Appeal Tribunal may have also concluded that the Applicant's ballot recount request should have been made by April 16, 2021 in accordance with subparagraph 5(1)(xi) of the

Election Code. The Court does not know what the Appeal Tribunal considered because there is nothing in the Decision indicating its position.

[74] Paragraph 8(e) of the Election Code specifically provides that the Appeal Tribunal's authority to reach conclusions must be based on "the conduct complained of" (*McCallum* at para 101). In *McCallum*, Justice Strickland explained that the language included in paragraph 8(e) of the Election Code applies to both the grounds raised in the applicant's notice of appeal and the testimony provided at the appeal hearing (at para 101). As noted above, there appears to be some acknowledgement on both sides that the ballot recount request was discussed along with the Applicant's other grounds of appeal. This conduct fell within the general appeal ground under subparagraph 8(b)(i) of the Election Code, which is within the Appeal Tribunal's decision-making mandate set out in paragraph 8(e) of the Election Code.

[75] Overall, the Appeal Tribunal failed to provide any thought or weight to the Applicant's submissions on this point or explain why they were disregarded. Accordingly, the Decision is not justifiable, transparent, or intelligible; nor is it justified in relation to the facts and the law constraining it (*Vavilov* at para 99).

### VIII. Conclusion and Remedies

[76] For all the above reasons, the application for judicial review is allowed. While the Appeal Tribunal did not breach the Applicant's right to procedural fairness, it rendered an unreasonable Decision in failing to consider the Applicant's recount request. In light of this conclusion, I will now turn to the issue of remedies.



[77] It is trite law that remedies on judicial review are discretionary. The paramount consideration on whether to grant or withhold relief is PBCN membership's confidence in the electoral process (*Poker v Mushuau Innu First Nation*, 2012 FC 1 at para 30; *Ledoux v Gambler First Nation*, 2019 FC 1465 at para 23). In my view, this consideration is particularly relevant in an election dispute involving a close vote, as occurred here.

[78] While the record does not contain any information about whether any ballots were spoiled or rejected during the initial count, it is presumed that a recount would require even closer scrutiny of the ballots, which may reveal errors in the initial count. I am not suggesting that such errors occurred in this matter, but this possibility was not considered by the Appeal Tribunal, or at least was not reflected in the Decision.

[79] Remitting the matter to the Appeal Tribunal will allow the recount issue to be fully canvassed. There is no indication on the record before me that the Appeal Tribunal would not consider this issue with an open mind. Allowing the Appeal Tribunal to consider this matter more comprehensively will, in my view, help instill confidence in the electoral system for the PBCN membership.

[80] Only the Respondents have made fulsome submissions on costs. Respondent PBCN submits that regardless of whether the Applicant is successful, costs should not be awarded in his favour. In the alternative, Respondent PBCN seeks an Order requiring each party to bear their own costs. In the further alternative, any award of costs against the Respondents should be limited to the sum of \$2,500.00 and not borne entirely by PBCN.

[81] The Individual Respondents seek lump costs. Alternatively, the Individual Respondents seek an Order to have their costs reimbursed by Respondent PBCN (*Knebush v Maygard*, 2014 FC 1247 at paras 57-61).

[82] The Applicant has not made fulsome submissions on costs.

[83] Under the circumstances, I will allow the Applicant to make fulsome submissions on costs. The Respondents can then provide supplementary submissions after reviewing the Applicant's submissions.

**JUDGMENT in T-1055-21**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed. The Decision is unreasonable for failing to address the Applicant's recount request.
2. The matter is remitted to the Appeal Tribunal for re-determination.
3. The Applicant will provide submissions on costs within 21 days of this Order. The Respondents may then provide supplementary submissions in response to the Applicant's submissions within 14 days after receiving the Applicant's submissions.

"Paul Favel"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1055-21

**STYLE OF CAUSE:** FRANCIS HIGHWAY v PETER BALLANTYNE CREE NATION, PETER BALLANTYNE APPEAL TRIBUNAL, ELIZABETH MICHEL, RONALD MICHEL JR., THOMAS LINKLATER JR., SARAH SWAN, AND MYRTLE BALLANTYNE

**PLACE OF HEARING:** SASKATOON, SASKATCHEWAN

**DATE OF HEARING:** SEPTEMBER 29, 2022

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** APRIL 19, 2023

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