

IN THE MATTER OF AN APPEAL
PURSUANT TO THE BEAVER LAKE CREE NATION ELECTION LAW
OF THE ELECTION FOR THE BEAVER LAKE CREE NATION ON MARCH 29, 2019, BY:

KURTIS GLADUE

DECISION OF THE ELECTION APPEAL TRIBUNAL – FEBRUARY 24, 2022

Pursuant to the decision of the Federal Court dated September 2, 2021 (cited as 2021 FC 909), and the *Beaver Lake Cree Nation Election Law* (the “**Election Law**”) amended January 25, 2018, and further to the Directions of the Election Appeal Tribunal (the “**Tribunal**”) dated January 21, 2022 and February 3, 2022 (which are attached as appendices to this decision), the Tribunal makes the following decision.

A. SUMMARY

[1] This is an appeal of the Beaver Lake Cree Nation (“**BLCN**”) election for Chief and Council held pursuant to the Election Law on March 29, 2019 (the “**Election**”). Kurtis Gladue (the “**Appellant**”) alleges that certain errors were made in the interpretation or application of the Election Law and that the electoral officer, Mr. Dennis Callihoo (the “**Electoral Officer**”), conducted himself in a manner contrary to his duties and responsibilities under the Election Law, either or both of which materially and directly affected the outcome of the Election. The Appellant requests that the Tribunal overturn the Election.

[2] The appeal is dismissed for the reasons that follow.

B. PROCEDURAL HISTORY

1. The 2019 Election

[3] On or about November 22, 2018, the Electoral Officer was appointed for the Election. On March 29, 2019, BLCN held the Election. The Election was preceded by an advance poll held in Edmonton on March 22, 2019. There were approximately 20 scrutineers for the various candidates present at the advance poll and the Election.

[4] Between the advance poll and the Election, a total of 335 members of BLCN cast their votes. In the Election for Chief, 333 votes cast were held to be valid, and two were rejected. Chief Germaine Anderson was re-elected with a total of 105 votes – 4 more than the runner-up Mr. Gary Dean Lameman and 23 more than the Appellant who placed third. In the Election for Council, 328 votes cast were held to be valid, and seven were rejected. Charlene Cardinal, Shirley Paradis, and Felix Lewis were elected as Councillors. Of the three, Felix Lewis received the fewest votes with 78 – 4 more than the first runner-up, Mr. Claude Landstrom.

2. *The Appeal*

[5] On April 3, 2019, the Appellant appealed the Election results pursuant to section 15.11 of the Election Law. Generally, the Appellant alleged that: (a) there was an error made in the interpretation or application of the Election Law which materially and directly affected the outcome of the Election; and (b) the Electoral Officer conducted himself in a manner contrary to his duties and responsibilities under the Election Law in a manner which materially and directly affected the outcome of the Election. Specifically, the grounds of appeal put forward by the Appellant are as follows:

- a) the Electors' List was posted late in contravention of section 9.10 of the Election Law;
- b) the interpreters appointed to be present at each polling place were related to the candidates and could have easily influenced the vote of electors;
- c) the ballots were not checked by the Electoral Officer or his deputy for the Electoral Officer's initials before being placed in the ballot box, and the electors were allowed to place their ballots directly into the ballot box, contrary to section 11.13 of the Election Law; and
- d) three electors were assisted in voting by a family member and/or interpreter rather than the Electoral Officer or his deputy, and they were present in the voting compartment in contravention of section 11.14 of the Election Law.

[6] By letter dated April 17, 2019, the previously constituted Election Appeal Tribunal, having concluded that the evidence presented was not sufficient to determine that the Election outcome was materially and directly affected by the grounds outlined by the Appellant, rejected the Appellant's appeal.

3. *The decision of the Federal Court dated September 2, 2021(cited as 2021 FC 909)*

[7] Subsequent to his appeal being rejected by the previously constituted Election Appeal Tribunal, the Appellant applied to the Federal Court for judicial review of the previously constituted Election Appeal Tribunal's decision. In allowing the application, Justice Favel concluded that the Election Law Committee which appointed the Election Appeal Tribunal was not functioning and, therefore, the Election Appeal Tribunal was improperly constituted. Having decided the application on this basis, Justice Favel found it unnecessary to consider the merits of the Election Appeal Tribunal's decision.

[8] To ensure that BLCN's jurisdiction was respected, Justice Favel ordered that a new Election Appeal Tribunal be appointed by a fully functioning Election Law Committee to consider the Appellant's appeal afresh. Justice Favel also urged the to-be-appointed Election Appeal Tribunal to develop simple rules of procedure, including quorum requirements and majority decision-making. In his order (which is attached as an appendix to this decision), Justice Favel specified, among other things, that the to-be-appointed Election Appeal Tribunal

"...consider the information before the previously appointed Tribunal and determine the appeal in accordance with the Election Law."

4. *Appointment of the Tribunal and Appeal Community Meeting*

[9] On January 10, 2022, the Tribunal, consisting of Stephen Mussell, Lowa Beebe, and Nicole Hajash, was appointed by a fully functioning Election Law Committee.

[10] The Tribunal issued Directions on January 21, 2022, and February 3, 2022, which outlined that an Appeal Community Meeting would take place on February 10, 2022, included procedures for the manner in which the meeting would take place to review the appeal, and, in accordance with Justice Favel's decision, established the Tribunal's rules of procedure. The Tribunal determined that an Appeal Community Meeting was appropriate for transparency in the process, and in order to:

- a) provide the parties with an opportunity to present their written evidence verbally;
- b) allow the parties to ask each other and the Electoral Officer questions; and
- c) allow for the Appellant to reply to the written responses of the Electoral Officer and Chief and Council to his appeal.

[11] The Appeal Community Meeting took place on February 10, 2022, over Zoom and not in person due to the ongoing impacts of the COVID-19 pandemic and the omicron variant that was circulating at the time. The Appeal Community Meeting was open to BLCN membership to observe.

[12] The following persons participated in the Appeal Community Meeting:

- a) the Tribunal;
- b) Elisa Penn, legal counsel for the Tribunal;
- c) the Appellant and the Appellant's legal counsel, Janet Hutchison;
- d) Robin Gage, legal counsel for the respondent BLCN; and
- e) the Electoral Officer.

The Appeal Community Meeting was also attended by BLCN members. The Appeal Community Meeting was chaired by Tribunal member Lowa Beebe and moderated by the Tribunal's legal counsel, Elisa Penn.

[13] The Tribunal extends its gratitude to all involved for taking time to participate in the Appeal Community Meeting on February 10, 2022, that enabled us to hear directly from various parties, including the Appellant, on this matter of great importance to BLCN.

C. THE ELECTORAL OFFICER'S CONDUCT

[14] Before setting out the Tribunal's reasoning and decision, the Tribunal is compelled to comment on the conduct of the Electoral Officer both with respect to the Election generally and at the Appeal Community Meeting.

[15] In his written response to the Appellant's appeal, the Electoral Officer referenced his "common practice" as justification for failing to adhere to the Election Law, which breaches are detailed below. At the Appeal Community Meeting, the Electoral Officer stated, among other things, that when he is appointed to be the electoral officer of a First Nation's Election, the Election becomes his Election. He appeared to suggest that it is within his power to conduct elections how he sees fit regardless of the election laws put in place by the First Nation. With respect, the Tribunal believes the Electoral Officer's position to be deeply misguided and disrespectful.

[16] Many First Nations, including BLCN, have developed and adopted election laws, codes, and procedures pursuant to their Indigenous laws, in accordance with their methods of governance, and often at great effort and expense to the First Nation. In BLCN's case, and as set out in the preamble to the Election Law, the members of BLCN participated in the discussions and drafting of the Election Law. Further, the Election Law was passed as an aspect of BLCN's commitment "...to living and promoting the values to ensure MIYO-WIYCIHTOWIN and MIYO-WAHKOHTOWIN amongst [BLCN] members and within the community."

[17] Having participated in and conducted First Nations elections, the Tribunal is sympathetic to the fact that electoral officers will, from time to time, be required to fill in gaps that exist in a First Nation's election law, code, or procedure. Electoral officers may also be forced to make difficult decisions when, for instance, an election law, code, or procedure is ambiguous or internally contradictory. That is not what happened in the Election.

[18] By his own admission, the Electoral Officer deliberately and flagrantly ignored the procedures set out in the Election Law. That is unacceptable. First Nations pass election laws, codes, and procedures and engage electoral officers with the full and reasonable expectation that their laws will be respected and followed to the greatest extent possible. When electoral officers fail to do so, they expose the First Nation to potential liability and throw the election results into doubt. Even where violations of election laws, codes, or procedures do not rise to the level of requiring that an election be overturned, as we have found in this appeal, they undoubtedly create doubt and suspicion in the minds of the First Nation's electors as to the validity of their own elections and the efficacy of their own laws. First Nations and their electors deserve far more.

[19] We urge the Electoral Officer not to take the trust First Nations place in him lightly. First Nations, including BLCN, have developed and adopted election laws, codes, and procedures for a reason. That reason is most certainly not to have their laws, codes, and procedures ignored at the whim of an electoral officer in favour of personal preference or common practice. Indigenous laws are *laws*, and they must be treated as such.

[20] Concerning the conduct of the Electoral Officer at the Appeal Community Meeting, the Tribunal was deeply troubled by the Electoral Officer's disrespectful behaviour towards the Appellant's legal counsel and the Electoral Officer's clear lack of preparation for the Appeal Community Meeting.

[21] As with the Election Law, the Appeal Community Meeting was a process undertaken pursuant to and in accordance with BLCN's Indigenous law. The Tribunal undertook such a process with the express consideration that such a process was wholly consistent with the spirit and intent of the Election Law. Accordingly, the Tribunal fully and, in our opinion, reasonably expected that all involved would take the process seriously and act respectfully. The Electoral Officer did neither of those things.

[22] The Electoral Officer's responses to Appellant counsel's questions were rude and evasive. The Electoral Officer's inability to answer even the simplest questions asked by Appellant counsel and the Tribunal relating to his conduct of the Election was shocking. It is worth reiterating that members of BLCN were invited by the Tribunal to attend the Appeal Community Meeting, and no small number did attend. They witnessed the Electoral Officer's behaviour firsthand. Again, First Nations and their electors deserve far more from those trusted with and engaged in conducting their elections.

[23] As Indigenous people trained in western law, we have obligations grounded not only in western law but also in Indigenous law. It is imperative that we give life and legitimacy to Indigenous law. If we as Indigenous people do not respect and abide by Indigenous law, we cannot advocate in more than rhetorical terms for Indigenous law to be taken seriously as law. In doing so, we undermine our own ability to govern ourselves and our territories as self-determining peoples. It is out of an abundance of love and respect for all Indigenous peoples that we offer the foregoing comments, with no ill feelings or intent.

D. FINDINGS OF FACT

[24] Various facts related to the Appellant's grounds of appeal were admitted and uncontroverted. For convenience, we have set out these facts below, together with those facts that the Tribunal has found, each under the related ground of appeal.

a. The Electors' List was posted late in contravention of section 9.10 of the Election Law.

[25] The Tribunal finds that the Electors' List was posted late in contravention of section 9.10 of the Election Law. The Electoral Officer was required to prepare and post the Electors' List at least four weeks before BLCN's nomination meeting. The nomination meeting was held on February 1, 2019. However, the Electors' List was not posted and made available until on or about March 1, 2019.

b. The interpreters appointed to be present at each polling place were related to the candidates and could have easily influenced the vote of electors.

[26] The Tribunal finds that the interpreters appointed for the advance poll and the Election, Louise (Lewis) Adby and Marilyn Gladue, are closely related to one or more candidates in the Election, and that Louise (Lewis) Adby is the mother of Councillor Felix Lewis.

c. The ballots were not checked by the Electoral Officer or his deputy for the Electoral Officer's initials before being placed in the ballot box, and the electors were allowed to place their ballots directly into the ballot box, contrary to section 11.13 of the Election Law.

[27] The Tribunal finds that the electors' ballots were not checked by the Electoral Officer or his deputy for the Electoral Officer's initials before being placed in the ballot box, and the electors were allowed to place their ballots directly into the ballot box, contrary to section 11.13 of the Election Law. However, the Tribunal accepts the Electoral Officer's evidence that all ballots were accounted for which were issued and deposited in the ballot box and that all such ballots had the initials of the Electoral Officer or his deputy on them when counted.

d. Three electors were assisted in voting by a family member and/or interpreter rather than the Electoral Officer or his deputy. They were present in the voting compartment in contravention of section 11.14 of the Election Law.

[28] The Tribunal finds that three electors were assisted in voting by a family member and/or interpreter rather than the Electoral officer or his deputy and were present in the voting compartment in contravention of section 11.14 of the Election Law.

E. APPLICABLE STANDARD FOR THE TRIBUNAL'S REVIEW AND EVIDENCE REVIEWED

1. Applicable Standards

[29] The role of the Tribunal is to decide whether the evidence submitted by the Appellant is, as set out in section 15.8 of the Election Law, sufficient for the Tribunal to determine that the error or conduct alleged by the Appellant "materially and directly affected the outcome of the Election". This standard is the standard referred to and accepted by all parties. We note that a different standard, unreferenced by any party, is set out in section 15.15 of the Election Law: "that might have affected the outcome of the election". Despite this, regardless of which standard is applied, the Tribunal's decision in this appeal would not change. The Appellant must prove the appeal on a "balance of probabilities," which means that it is "more likely than not" the ground of appeal is proven and that it materially and directly affected the outcome of the Election. It is not sufficient for the Appellant to simply prove that a breach or breaches of the Election Law occurred; such breach or breaches must be shown by the Appellant to have, on a balance of probabilities, materially and directly affected the outcome of the Election.

2. Evidence and Materials Reviewed

[30] In preparing this decision, the Tribunal has thoroughly reviewed the following:

- a) the decision of the Federal Court dated September 2, 2021(cited as 2021 FC 909);
- b) the Certified Tribunal Record containing:
 - i. the Election Law,
 - ii. the Appellant’s appeal submission,
 - iii. the Electoral Officer’s response to the Appellant’s appeal submission,
 - iv. BLCN’s response to the Appellant’s appeal submission,
 - v. email exchange between the BLCN Membership Clerk and members of the previously constituted Election Appeal Tribunal, and
 - vi. the previously constituted Election Appeal Tribunal’s decision;
- c) documents provided by the Electoral Officer, including:
 - i. Statement of Votes for the Election of Chief,
 - ii. Statement of Votes for the Election of Councillors,
 - iii. Statement of Votes for the elected candidates,
 - iv. Notice of Elections,
 - v. Notice of Nomination Meeting,
 - vi. Verified Nominee List for the position of Chief, and
 - vii. Verified Nominee List for the position of Councillor; and
- d) Summary for the Tribunal prepared by counsel for the Appellant.

3. *Evidentiary Requests of the Appellant*

[31] In advance of and at the Appeal Community Meeting, counsel for the Appellant requested that the Tribunal accept additional evidence that was not before the previously constituted Election Appeal Tribunal. The Tribunal denied this request as the Tribunal determined that it was appropriate, fair, consistent with the Election Law, and in line with the order of Justice Favel to only consider materials that were before the previously appointed Election Appeal Tribunal.

[32] Counsel for the Appellant further requested that the Tribunal obtain and review the Electoral Officer’s file, including the Electors’ List used on the date of the advance poll and Election and all ballots cast. Ms. Hutchison suggested to the Tribunal that if the Tribunal obtained the Electoral Officer’s file, it should properly be provided to the Appellant. This request was denied on the basis that: (a) while the Election Law provides that the Tribunal may review the Electoral Officer’s file should it deem it necessary to do so, the Tribunal is not required by the Election Law to review the Electoral Officer’s file; and (b) it was deemed immaterial by the Tribunal to the disposition of the appeal for the reasons set out in this decision.

F. THE TRIBUNAL'S DECISION

[33] Having reviewed and heard all written and oral evidence and submissions, the Tribunal makes the following decisions with respect to the grounds of appeal put forward by the Appellant.

a. The Electors' List was posted late in contravention of section 9.10 of the Election Law.

[34] The Appellant challenges the validity of the Election based on the Electors' List being posted late. Section 9.10 of the Election Law provides that the Electors' List be posted "...at least four (4) weeks before the nomination meeting". As above, The Tribunal finds that the Electors' List was posted late in contravention of section 9.10 of the Election Law. However, no evidence was led by the Appellant that such failure materially and directly impacted the Election results.

[35] In her oral presentation, counsel for the Appellant asserted that the Electoral Officer's failure to post the Electors' List on time resulted in (a) the BLCN community losing the opportunity to scrutinize the list at the early stages of the electoral process; and (b) the candidates seeking a new position on Council being denied access to the Electors' List to assist them in their campaigning for the majority of the pre-election period. This may be so. However, the Appellant provided no evidence that the Electoral Officer's failure to post the Electors' List on time resulted in a single vote being cast by an ineligible elector or that any electors would have voted differently should the Electors' List have been posted on time.

[36] The standard set by the Election Law is that the failure of the Electoral Officer to post the Electors' List on time must be shown to have materially and directly impacted the Election results. Beyond speculative impacts, the Tribunal has no evidence that this occurred. Accordingly, on a balance of probabilities, this ground must fail.

b. The interpreters appointed to be present at each polling place were related to the candidates and could have easily influenced the vote of electors.

[37] The second ground of appeal is the Appellant's allegation of an apprehension of bias of the interpreters due to both being related to candidates. Section 11.6 of the Election Law requires that the Electoral Officer appoint interpreters to be present at the polling place(s). As above, the Tribunal finds that the interpreters appointed for the advance poll and the Election, Louise (Lewis) Adby and Marilyn Gladue, are closely related to one or more candidates in the Election and Louise (Lewis) Adby is the mother of Councillor Felix Lewis.

[38] Despite the foregoing, the Election Law does not provide any guidelines about the appointment of interpreters. Specifically, the Election Law does not provide that an interpreter may not be related to candidates or be a BLCN member, nor does it provide any requirement for the names of the interpreters to be disclosed to the electors in advance of an election. Further, no evidence was led by the Appellant that the interpreters being closely related to one or more candidates materially and directly impacted the results of the Election.

[39] In his appeal, the Appellant asserts that the interpreters "...could have easily influenced the electors on who to elect." Again, this may be so, and could be true of any interpreter who has some stronger relationship with one candidate over another. However, the Appellant provided no evidence that suggests that any electors' votes *were* influenced by the interpreters. Beyond speculation, the Tribunal has no evidence that this occurred. Accordingly, on a balance of probabilities, this ground must fail. The Tribunal also notes that First Nations communities, even larger First Nations communities, are small in the sense that many within the community are related. Therefore, it is not unexpected that certain individuals involved in the electoral process will be related in some way to the candidates.

c. The ballots were not checked by the Electoral Officer or his deputy for the Electoral Officer's initials before being placed in the ballot box, and the electors were allowed to place their ballots directly into the ballot box, contrary to section 11.13 of the Election Law.

[40] Thirdly, the Appellant challenges the Election on the ground that the ballots were not checked by the Electoral Officer or his deputy for the Electoral Officer's initials before being placed in the ballot box, and the electors were allowed to place their ballots directly into the ballot box in contravention of section 11.13.

[41] The Appellant provided abundant evidence that, on multiple instances, electors were allowed to place their ballots directly into the ballot box and that the Electoral Officer or his deputy did not check for the Electoral Officer's initials before the electors placed their ballots in the ballot box. As stated above, the Tribunal finds that the electors' ballots were not checked by the Electoral Officer or his deputy for the Electoral Officer's initials before being placed in the ballot box, and the electors were allowed to place their ballots directly into the ballot box, contrary to section 11.13 of the Election Law. However, the Tribunal also accepts the Electoral Officer's evidence that all ballots were accounted for which were issued and deposited in the ballot box. All such ballots had the initials of the Electoral Officer or his deputy on them when counted.

[42] Despite the foregoing breach, no evidence was led by the Appellant that such failure materially and directly impacted the Election results. No evidence was led, for example, that an elector cast more than one vote or that an ineligible elector cast a vote, or that a scrutineer expressed any concerns with the ballots counted. Rather, the Appellant has invited the Tribunal to speculate and conclude that, on a balance of probabilities, the Electoral Officer's breach resulted in electors casting more than one vote. We have been presented with no evidence that this occurred. Accordingly, on a balance of probabilities, this ground must fail.

d. Three electors were assisted in voting by a family member and/or interpreter rather than the Electoral Officer or his deputy. They were present in the voting compartment in contravention of section 11.14 of the Election Law.

[43] The fourth ground of appeal is the Appellant's allegation that, on three occasions, a family member and/or interpreter was permitted in the voting compartment with an elector contrary to section 11.14 of the Election Law. Section 11.14 of the Election Law provides, among other things, that no person is allowed in the voting compartment other than the elector

who is voting. As above, The Tribunal finds that three electors were assisted in voting by a family member and/or interpreter rather than the Electoral officer or his deputy and were present in the voting compartment in contravention of section 11.14 of the Election Law.

[44] As outlined above, the difference in votes between Chief Germaine Anderson and the first runner-up for Chief was four votes. The vote difference between the elected Councillor who received the fewest votes, Felix Lewis, and the first runner-up for Councillor was four votes. Even if the Tribunal were to accept that all three electors who were assisted by a family member and/or interpreter had their votes influenced or changed, which we do not, the Tribunal has still not been presented with sufficient evidence on which to determine, on a balance of probabilities, that the breach materially and directly impacted the results of the Election.

[45] In oral submissions, counsel for the Appellant suggested that, should the Tribunal choose to review the Electoral Officer's file, we would find that the Electoral Officer failed to track who received assistance voting as required by section 11.15 of the Election Law. We have already commented on our response to the suggestion that we should review the Electoral Officer's file. However, even if we had reviewed the Electoral Officer's file and found that Appellant counsel's comments are accurate, we would still be left without any evidence that a family member and/or interpreter who was present in the voting compartment with an elector influenced or changed that Electors' vote. Absent such evidence, we are forced to speculate. We can not overturn an election based on speculation about what *may* have happened – especially when the Election Law requires that we determine, on a balance of probabilities, that the breach materially and directly impacted the results of the Election. We must make a decision based on the evidence presented and available to us. Accordingly, on a balance of probabilities, this ground must also fail.

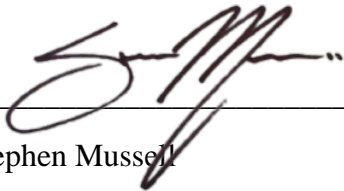
G. CONCLUSION

[46] For the reasons set out in this decision, the Tribunal finds that there is no basis for overturning the results of the Election. This result is no doubt disappointing to the Appellant, and the Tribunal wishes to acknowledge the immense personal and financial sacrifice made by the Appellant in pursuing his appeal and in standing up for BLCN's law. It is our hope that our comments in this decision will ensure that BLCN's Election Law is followed, respected, and treated as law.


[47] The appeal is dismissed.

[48] As a closing note, the Tribunal strongly recommends that the Election Law be legally reviewed, updated, and amended to address the lack of guidelines around interpreters, the apparent inconsistency between the two standards of review set out in sections 15.8 and 15.15 of the Election Law, and to address any gaps or ambiguities to ensure that future electoral officers follow the Election Law, regardless of what their preferred practices are.

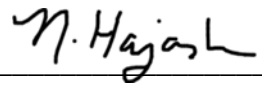
PER THE ELECTION APPEAL TRIBUNAL:



Stephen Mussell



Lova Beebe



Nicole Hajash