# *IN THE APPEAL OF THE SPLATSIN CUSTOM ELECTION HELD JANUARY 10, 2022*

***Brought by Trina Antoine pursuant to paragraph 216 of the Splatsin Custom Election Code***

# DECISION

*Reasons of Board Member Stevenson:*

## A. INTRODUCTION

1. On January 10, 2022, the Splatsin First Nation ("SFN") held a general election to elect Kukpi7 and Tkwamipla7 (Chief and Council) for SFN for the 2022 to 2026 term.

2. The SFN Custom Election Code (the "Code") governs the procedures for the election.

3. On February 9, 2022, the Splatsin Complaints and Appeal Board (the "Board") received a formal written appeal of the election by a candidate in the election, Trina Antoine (the "Appellant").

4. The Appellant states in her appeal that the "sole issue in this appeal is whether the Electoral Officer ("EO") of the SFN had the legal authority to determined (*sic*) that the custom of the SFN permits him to admit thirteen votes via telephone and to do so without scrutiny be members that are not present at the SFN polling station." The Appellant's position is that the EO did not have such authority to admit thirteen votes by telephone without scrutiny of members.

5. The EO contests the allegation that he attempted to change the custom of SFN or that that he committed a violation that invalidates the election results. He maintains that he adopted a procedure that resulted from the unusual circumstances of this election (during the Covid 19 pandemic, in which election procedures and mail delivery were not usual) and to ensure that validly cast votes were counted.

6. For the reasons set out below, the Board dismisses the appeal.

## B. BACKGROUND FACTS

### 1. 2022 Election

7. As noted, the Code that governs the election at issue in this appeal is called the Splatsin Custom Election Code and is described on the front page as approved on February 16, 2016. SFN is not subject to the *Indian Act* election provisions, but rather conducts their elections by custom, as set out in the Code (see Section 3 of the Code for the definition of custom election).

8. An election for Chief and Council was called for January 10, 2022; and, as per the Code, SFN Chief and Council appointed an Electoral Officer (the "EO"). The person appointed has overseen several previous SFN elections.

9. The Code requires the EO to publish a notice of election with specific information at least 45 days before the date of the election. On November 17, 2022, the EO published a "Polling Notice for the Splatsin General Election" notifying the electors that the election of one Chief and five Councillors would be held at the Splatsin Community Centre in Enderby on January 10, 2022. The notice states that counting of the ballots by the EO would occur "immediately after the close of the poll", at 8 p.m. on January 10, 2022.

10. The election took place on January 10, 2022. As set out in the polling notice, the polling station was at the Splatsin Community Centre. The EO conducted the election and the counting of ballots occurred following the close of the poll at 8 p.m. on election night. A number of candidates and scrutineers were present for the counting of ballots at the polling station.

### 2. Counting of Mail-in Ballots delivered January 10, 2022

11. The Appellant alleges that on election night, thirteen mail-in ballots were read out over the phone by a security guard from another location, and, that those thirteen ballots were wrongfully counted.

12. The Code sets out a specific procedure for counting mail-in ballots. Paragraph 175 provides that, on the close of polls on election day, the EO or Deputy Electoral Officer (the "DEO") shall open mail-in ballot envelopes in the presence of any candidate present, and, without opening the ballot, shall either reject the ballot for failing to comply with voter

identification requirements set out in paragraph 175(a), or accept the ballot and deposit it into the ballot box (paragraph 175(b)).

13. In his response to the appeal, the EO admits that there were thirteen mail-in ballots that were counted over the phone. The counting was done pursuant to his instructions and by a duly appointed DEO. The EO recognizes that this process was not exactly as the Code provides, but maintains that the procedure was necessary, and, that he followed a procedure that was otherwise rigorous and that was put in place to ensure that the legitimate votes of thirteen electors were counted. Details of the reasons for and procedure are set out further under "EO's Position" below.

14. In short form, the DEO opened each ballot and read the votes over the phone to the EO, and the EO relayed the votes to those present at the polling station.

15. The Appellant agrees that the votes were read over the phone, and, that there were candidates and scrutineers present at the polling station. Her concern is that the process was not that set out in the Code, and, that it deprived those present at the polling station to see or scrutinize those ballots.

16. The thirteen mail-in ballots included 6 votes for Theresa William and 2 for the Appellant.

**3. Election Results**

17. According to the "Official Results of Election" sheet signed by the EO and DEO, 223 ballots were cast. Of those, one ballot was rejected for Chief and three were rejected for Councillor.

18. Douglas Thomas was elected as Chief.

19. The candidates elected to positions of Councillor received 137 votes (Loretta Eustache), 111 votes (Sabrina Vergata), 110 votes (Leonard Edwards), 103 votes (Beverly Thomas) and 92 votes (Theresa William). The Appellant, who was running for a Councillor position, received 88 votes.

20. The Appellant specifically challenges the election result in relation to Theresa William ("Ms. William"). The Appellant focuses her appeal in this way because, she submits, the thirteen mail-in ballots affected the result only of Ms. William. The thirteen ballots would not change the result for any other Councillor position.

## C. ADMINISTRATIVE PROCEDURE FOLLOWED BY THE BOARD

21. The Board is constituted under and receives its mandate under the Code. The Code sets out procedure for addressing an election appeal.

22. Upon receipt of the Appellant's appeal, the Board first determined that the appeal was admissible pursuant to paragraph 218 of the Code.

23. The Board asked for proof that the Appellant's appeal (the "Appeal Document") was witnessed by a commissioner of oaths. The Board was satisfied by the proof that was provided, and otherwise confirmed conformity with paragraph 217 and 218.

24. Having determined admissibility, the Board then provided the Appeal Document to the persons identified in paragraphs 219 of the Code and invited the EO and candidates in the election to provide responses to the appeal allegations (as per paragraphs 220-222).

25. A response was received from the EO, and, several candidates provided brief comments in response.

26. Upon receipt of the responses, on March 14, 2022, pursuant to its power under paragraph 223, the Board provided a list of questions to the EO aimed at receiving further information regarding the procedure that the EO adopted for the counting of votes in the Election. Included in those questions were also a request for the EO to produce the thirteen ballots. The same questions were also provided to the Appellant and respondents on the appeal.

27. No oral hearing is provided for under the Code, nor, in the view of the Board was one necessary to determine the appeal (nor was one requested).

## D. SUBMISSIONS OF PARTIES

### 1. Appellant's Position

28. The Appellant's Appeal Document relies on paragraph 144 of the Code, which provides that "In the event that the Eligible Voter loses his Mail-In Ballot, he may, at the polling station, complete an Elector's Lost Ballot Declaration, which will allow the Electoral Officer to issue a replacement Ballot."

29. The Appellant states that the thirteen ballots which arrived at the EO's post office box on January 10 should not have been counted but rather, according to paragraph 144 of the Code, the EO should have ascertained the names on those votes who were apparently at the EO's home office and issue a replacement ballot to them, and in turn, those voters could have then cast their vote anew under a proper election process that includes scrutineers.

30. The Appellant asserts that the EO circumvented the proper process by (1) making a telephone call to his home office, (2) allowing a 'security guard' to open confidential and secret ballots, (3) allowing a 'security guard' to advise the EO of the votes over the phone and (4) to do so without scrutiny.

31. The Appellant states that the outcome of the election was materially affected. But for the thirteen ballots, the Appellant and Ms. William would have been tied for the fifth council seat. The EO also confirms this and points out that had the thirteen ballots not been received/counted, paragraphs 185 to 189 of the Code would have permitted the EO to use a "random method to break the tie vote, such as a coin toss or selection out of hat, to determine the outcome of the vote."

32. The crux of the Appellant's legal arguments in the Appeal Document is that the EO, in permitting the counting of votes by telephone in the way that he did with the DEO, created an electoral custom where no custom existed. The Appellant states that there was no reasonable justification for the EO's decision to count votes by telephone and therefore the EO's decision fails to meet the standard of justification, transparency, and intelligibility.

33. The Appellant asks the Board to set aside the election result and order a re-vote by secret ballot. If a tie still exists, the Chief shall cast the deciding ballot.

**2. Electoral Officer's Response**

34. The EO's position is that he adopted a procedure that was necessary to address the unusual circumstances of this election, and, that his objective was to ensure that validly cast votes were counted.

35. He maintains that, to minimize in-person voting in light of the Covid 19 pandemic, Chief and Council requested an advance poll not be held, although required by paragraph 148 of the Code (a direction that was not challenged by way of appeal), and, that mail-in voting would be heightened. He thus made every effort to ensure that all voters would have access to mail-in ballots.

36. The mail-in ballots would be sent to the EO's post office box in Delta, British Columbia, where the EO ordinarily resided. The instructions required that all ballots be received by the EO before the close of polls at 8 pm on election day.

37. The EO stated that he picked up on mail-in ballots on Friday January 7. However, the EO had to be present on the reserve in Enderby to oversee the conduct of the election on Monday, January 10. As a result, the EO had to leave Delta for Enderby on Sunday, January 9. This meant that there was a possibility that mail-in ballots would be received at the post office box in Delta on January 10, while the EO was already present on location in Enderby.

38. Therefore, the EO appointed a DEO to pick up the mail-in ballots delivered to the post office box on January 10.

39. The EO provided the Board with a copy of the signed and sworn appointment for the DEO. Such an appointment is permitted under the Code, and, commits the DEO to comply with the Code and to uphold standards of conduct, including honesty, impartiality, and confidentiality.

40. According to the EO, the DEO's instructions were to take the mail-in ballots to the DEO's residence and not to open the ballots until the EO telephoned the DEO at 8:00 pm (after

the closing of the poll). The DEO was instructed to adjudicate the mail-in ballots that had been received without opening the ballots.

41. In total, there were thirteen ballots received in the post office box on January 10.

42. Once all the voters of the thirteen ballots had been adjudicated, as per the instructions from the EO, the DEO opened the ballot envelopes separately (so as not to know how any individual voted) and called the ballot results to the EO over the phone.

43. As set out below, the Board accepts that the thirteen votes were properly received by 8 p.m. on voting day, and, were opened and counted with the assistance of a duly appointed DEO.

44. The EO maintains that the secrecy of the thirteen ballots was always maintained.

45. He submits that the paramount consideration in adopting this procedure was to ensure that all qualified voters had their right to vote respected.

46. In response to questions posed to him by the Board, the EO stated that a similar situation had never arisen in any SFN election before. In other words, there had been no previous case where mail-in ballots were received on an election day but the EO was not at the location to physical receive and open the ballots himself. The EO attributed this situation to a lack of advance polls and the lessened efficiency of Canada Post due to the COVID-19 pandemic.

47. The EO indicated that he did not consult with Chief and Council on the issue because he assumed that all would want to see all votes counted. The EO expressed the opinion that there was a strong expectation that electoral results would be announced on election day. The EO described the role that the scrutineers play in the electoral process and his personal practice for managing the counting of the votes.

48. The EO scanned and forwarded copies of the thirteen ballots (and voter registrations) that were allowed under the phone-in procedure adopted by the EO with the assistance of the DEO.

49. The EO stated that prior to his telephone call to the DEO, the EO explained to "all persons in attendance including the scrutineers" what he was doing and the reasons therefore. The EO stated that no objections were received from anyone including the scrutineers. The EO

also stated that no candidate or scrutineer requested to see the thirteen ballots and the corresponding paperwork either at the time of the count or afterwards, even though he offered to provide copies upon his return to his office in Delta.

### 3. Other Responses

50. The candidate, Laureen Felix, supported the allegations made by the Appellant. Ms. Felix expressed concern that the procedure adopted by the EO. She says, "In all my years regarding elections I have never heard of any ballots counting that way." Her understanding was that only the mail-in ballots that were in the possession of the EO should have been counted. Ms. Felix asked for a remedy that is broader than that sought by Antoine. Ms. Felix thought that a by-election should be held rather than just a re-vote process on the council position held by William.

51. The candidate, Loretta Eustache, supported the allegations made by the Appellant. Ms. Eustache indicated that she was told only she or her scrutineer could attend the polling and subsequent counting of the votes. She learned of the phoned-in votes of the thirteen ballots because her scrutineer witnessed it occurring. In response to the investigation questions sent by the Board, though Ms. Eustache was not in attendance at the polling station, she stated that she had been told that a scrutineer had questioned the EO about counting the votes by phone, as it was not the practice and they could not be scrutinized.

52. The Chief sitting at the time of the election, Wayne Christian, listed privacy concerns, ethical breaches and cultural violations as the reasons for supporting the Appellant's appeal. He stated that he has been involved with SFN elections for 26 years as Chief and 2 years as Councillor and has never seen what he called "phone in votes" as part of the SFN electoral custom. He raised concerns about the privacy of the voting process and conformity with SFN custom as reflected in the Code. In response to the investigation questions sent by the Board, Mr. Christian confirmed that the EO did not discuss use of telephone voting with Council prior to the election.

## E. ISSUE ON APPEAL

53. The Appellant's appeal must be upheld if this Board finds that there was a violation of the Code in the conduct of the election that might have affected the result of the election (paragraph 217(b) of the Code).

54. The issue is whether the EO's phone-in procedure was a violation of the Code in that the conduct of the election that might have affected the result of the election. It is important to note that the Appellant's appeal will only be upheld if this Board finds that there was a violation of the Code *and* that such violation might have affected the result of the election.

### 1. The Appellant's Reliance on paragraph 144 of the Code

55. Before proceeding to the main issue on appeal, the Board first addresses the Appellant's reliance on paragraph 144 of the Code, which applies in a situation where a voter loses their mail-in ballot. The Appellant appears to rely on paragraph 144 to say that the thirteen ballots at the EO's home office (received in the post office box) should not have been counted and, instead, the EO should have issued replacement ballets to the thirteen voters.

56. However, paragraph 144 is only triggered if a voter loses their mail-in ballot. Based on the facts, the thirteen mail-in ballots received at the post office box on January 10 were not lost. The ballots were received at the address set out in the letter of instruction of the ballot packages, satisfying the requirement under paragraph 140(f) of the Code. They were valid mail-in ballots in the possession of the EO, via the DEO.

57. The Board finds that paragraph 144 of the Code is not applicable to the Appellant's appeal.

### 2. Did the Phone-In Procedure conducted by the EO for the thirteen mail-in ballots violate the Code?

58. The key question is whether the phone-in procedure undertaken by the EO for handling the thirteen mail-in ballots that were received on January 10 at the EO's post office box violates the Code.

59. An examination of the relevant provisions of the Code discloses that the phone-in procedure adopted by the EO has no explicit foundation in the Code.

***(a) The Code***

60. As referenced above, the Code has several express provisions regarding mail-in voting in SFN elections.

61. Paragraph 140(f) of the Code provides that an elector shall vote by mail-in ballot and deliver, mail, or otherwise ensure receipt by the EO of the envelope before the close of polls on the day of election.

62. Paragraph 143 of the Code provides that mail-in ballots not received by the EO before the close of the polls of the day of the election shall not be counted. Where an eligible voter loses his mail-in ballot, he may receive a replacement ballot from the EO at the polling station pursuant to paragraph 144 of the Code.

63. The manner in which mail-in ballots are to be opened are governed by paragraph 175 of the Code, which provides:

> 175. At the time published in the notice for the counting of the votes, the Electoral Officer or Deputy Electoral Officer shall, in the presence of any candidates or their agents who are present, open each envelope containing a Mail-In Ballot that was received before the close of the polls and, without unfolding the ballot:
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> (a) reject the ballot if:
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> (i) it was not accompanied by a Voter Declaration Form, or the Voter Declaration Form is not signed or witnessed;
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> (ii) the Voter Declaration Form does not contain a date of birth or a Band Number that matches the information contained for that elector on the Voters List;

(iii) the name of the elector set out in the Voter Declaration Form is not on the Voters List;

(iv) the Voters List shows that the elector has already voted;

(b) in any other case, place a mark on the Voters List opposite the name of the elector set out in the Voter Declaration Form, and deposit the Ballot in a ballot box.

64. After the mail-in ballot is deposited into the ballot box pursuant to paragraph 175(b), then paragraphs 176 to 179 of the Code govern the procedure for counting the ballots. To summarize:

(a) Paragraph 176: the EO or the DEO shall provide those present at the counting of the ballots and who so request a tally sheet to keep their own tally of the votes;

(b) Paragraph 177: immediately after the mail-in ballots have been deposited into the ballot box, the EO or the DEO shall, *in the presence of any candidates or their agents who are present,* open all ballot boxes…and examine each ballot… [Emphasis added];

(c) Paragraph 178: the EO or the DEO shall call out the names of the candidates for whom the votes were cast on all valid ballots; and

(d) Paragraph 179: the DEO shall mark a tally sheet in accordance with the names being called out to count the total number of votes cast for each candidate.

65. At minimum, paragraphs 175 and 177 of the Code provide that the opening and counting of mail-in ballots must require that the ballots be physically placed into the ballot box, and immediately thereafter, the EO or the DEO shall "in the presence of any candidates or their agents who are present, open all ballot boxes…and examine each ballot…"

66. The thirteen mail-in ballots at issue were not placed into a ballot box in the presence of the candidates or their agents (scrutineers), examined.

67. The Code exhaustively sets out the mechanisms for in-person and mail-in voting. A process for counting mail-in ballots via the phone does not have foundation in the Code.

***(b) Nature and significance of non-conformity with the Code***

68. The EO adopted an *ad-hoc* process he determined as a means to ensure that the counting of the thirteen mail-in votes. As just stated, the thirteen mail-in votes at issue were in fact duly submitted under the requirements to validly vote by mail.

69. The issue, then, is whether the *ad-hoc* procedure adopted by the EO is, in its nature and significance, a "violation" of the Code, or whether it is, instead, an administrative error that does not constitute a violation and cannot be regarded as materially affecting the result of the election.

70. Under the Code, an EO must have "experience in the conduct of First Nations elections and have received appropriate training." (Paragraph 43(e) of the Code) The EO has the duty of "supervising all Elections to be sure they are carried out in accordance with this Splatsin Custom Election Code." (Paragraph 47(d) of the Code) Furthermore, the EO must swear an Oath of Office and must abide by the requirements of the Code dealing with responsibilities and ethics. (Paragraph 49 of the Code) The EO may make such orders and issue such instructions, consistent with the provisions of the Code as he may deem necessary for the effective administration of the Election. (Paragraph 73 of the Code)

71. The EO is in fact an experienced electoral officer, and, has administered numerous elections for SFN.

72. In applying paragraph 73 of the Code, the Board asks whether the phone-in procedure adopted by the EO to ensure the counting of the thirteen mail-in ballots that were in a different geographical location from the polling station was an order or instruction that the EO deemed necessary for the effective administration of the election. In other words, was the EO's determination to effect the phone-in procedure validly founded in the discretion of the EO for the effective administration of the election, where such discretion as being vested in the EO can be found to be consistent with authority under the Code.

73. The instructions issued by the EO to the DEO, and the procedure adopted, *may* have been an exercise of power under paragraph 73 of the Code. However, given that there were express provisions in the Code for counting mail-in ballots, it is necessary to grapple with the nature and significance of the non-conformity with those express provisions to determine this appeal.

74. The Board shall closely review the provisions of the Code in the context of self-governing First Nations electoral regimes, the decision of the Supreme Court of Canada in *Opitz v. Wrzesnewskyj*, 2012 SCC 55 (*"Opitz"*), and decisions of the Federal Court of Canada that consider administrative errors made in elections.

***(c) Custom***

75. The core elements governing the interpretation of First Nations electoral regimes enacted under the self-governing authority of the First Nation are succinctly explained in *Waquan v. Mikisew Cree First Nation*, 2021 FC 1063 at para. 40:

> [40] This is not an invitation to disregard the provisions of election codes or to attempt to change them without following the prescribed amending process. First Nations councils, of course, are subject to the rule of law, which includes Indigenous law. Sources of Indigenous law encompass both custom and written (or positivistic) law. The adoption of an election code comprising an amending formula does not foreclose the subsequent emergence of custom. Nevertheless, proving custom in these circumstances is a heavy burden: see, for example, *Bacon St-Onge v. Conseil des Innus de Pessamit*, 2017 FC 1179 at paragraph 72, aff'd 2019 FCA 13. Where, however, a practice at variance with written law has been followed for several election cycles, it cannot simply be ignored: see, for example, *Bertrand v. Acho Dene Koa First Nation,* 2021 FC 287 at paragraph 52.

76. In this appeal, there is no allegation that the Code does not represent the custom of SFN. Nor is there any evidence presented that will support the EO's *ad-hoc* phone-in procedure as being founded on a custom of the SFN that is supplementary to the Code.

***(d) Opitz***

77. In *Opitz*, the majority of the Supreme Court of Canada ruled that not every procedural irregularity would lead to the invalidation of a contested election. *Opitz* considered the interpretation of the phrase "irregularities…that affected the result of the election" in the *Canada Election Act*. The Court concluded procedural rules or mechanisms should not be considered as ends in themselves but should be considered against the purpose of elections legislation – the promotion of the democratic franchise. This led the Court to focus on whether the three conditions for establishing a right to vote had been satisfied (ie: age, residency, and confirmation

of identity). If it had satisfied itself that these conditions have indeed been met, then there is a strong presumption that the right to vote must be upheld.

78. This presumption is particularly compelling where there is no evidence that either candidates or voters engaged in any wrongdoing. The Court in *Opitz* expressed the view that adjudicators should be reluctant to invalidate an election based on an administrative error.

79. In the Appellant's appeal, there is no evidence that someone who was not entitled to vote in fact voted. Electoral procedures are not to be compared to a standard of perfection, but are to be judged against their contribution to securing the purpose of encouraging the exercise of the right to vote. Administrative errors beyond the voter's control should not be determinative.

80. In *Opitz*, "irregularities" were held to be serious administrative errors that are capable of undermining the electoral process – those errors must be tied to and have a direct bearing on a person's right to vote. The Court said:

> [58] … First, an applicant must prove that there was an "irregularity"; breach of a statutory provision designed to establish a person's entitlement to vote…
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> [59] Second, an applicant must demonstrate that the irregularity "affected the result" of the election: someone not entitled to vote, voted. Where that is established, the vote is invalid, and must be rejected. Rejecting a vote affects the result of the election in the sense that it changes the vote count…

81. As applied to this appeal, the thirteen voters' entitlement to vote have been established. The DEO, duly appointed and subject to an oath of office to uphold the Code, examined all thirteen voter's declarations and determined that all thirteen voters satisfied the conditions for entitlement to vote under the Code. The Board took the investigative step, pursuant to paragraph 223 of the Code, to examine the thirteen voters' declaration and could find no evidence of any irregularity that would question the voters' right to vote. No one who was not entitled to vote voted.

82. Cases which confirm the ability of the Board to review ballots include *Alexander First Nation v. Burnstick*, 2021 FC 618, and *Bird v. Paul First Nation*, 2020 FC 475. The Board acknowledges that the decision of *Lewis v. Gitxaala Nation*, 2015 FC 204 (*"Lewis*"), finds that there is no obligation on an administrative tribunal to open ballots and counting ballots amounts

to "remedying" the ballot irregularities which is not in something that the tribunal can do. The *Lewis* decision dealt with unopened mail-in ballots. There, the tribunal exercised discretion not to open the mail-in ballots. The court stated that the actual candidate named in the unopened ballots is not relevant when the standard is whether the affected votes *might* have affected the outcome.

83. The factual circumstance raised in Antoine's appeal is distinguishable in that the thirteen phoned-in ballots did not affect the outcome of the election. Only the exclusion of the thirteen ballots would affect the outcome of the election, as there would have been a tie between the Appellant and Ms. William. This appeal is not about whether the thirteen phone-in ballots gave those who were not entitled to vote an opportunity to vote. Furthermore, the Board's intention of reviewing the thirteen phone-in ballots was not to count or remedy an irregularity, but rather, determine whether the administrative error of the EO *might* have affected the outcome of the election.

84. The Board also considered paragraph 143 of the Code which mandates that mail-in ballots received after the close of polls must not be counted. This strongly implies that valid mail-in ballots received prior to the close must be counted.

85. Furthermore, this is not a case where fraud or improper conduct by voters or candidates is alleged.

86. While paragraph 217(b) of the Code uses the term "violation" rather than 'irregularity', the fundamental principles established in *Opitz* are persuasive in the resolution of this appeal.

87. Based on *Opitz*, the Board concludes that the EO's phone-in procedure was not a violation of the Code in that the procedure did not permit improper votes to be counted. Rather, the EO's phone-in procedure constitute an administrative error, albeit a serious one. The error was in the method of counting, not the counting of the ballots per se.

88. It is also clear that there was no technical compliance with the requirement to place the mail-in ballots directly in the ballot box. Further, "scrutiny" at a distance, over a telephone line, is a poor substitute for a function that is normally observed in person by candidates and scrutineers.

89. These are serious administrative errors. Had there been any material evidence presented that questioned the entitlement of any of these voters to vote, the Board may have come to a different conclusion. However, the strong expectation is that when voters have established their right to vote and have cast a vote that fully complied with the requirements of the Code, their votes will be counted. Their democratic franchise as members of the SFN should not be defeated by an administrative error caused by the EO's lapse in judgment.

***(e) Federal Court of Canada Decisions***

90. The Board has reviewed the law referred to by the Appellant. The Board has also independently conducted research to determine if there are other Canadian decisions which may persuasively assist in interpretation and application of First Nations' electoral regimes.

91. In *Anderson v. Nekaneet First Nation*, 2021 FC 843, the Federal Court of Canada cited paragraph 34 of *Papequash v. Brass*, 2018 FC 325, aff'd 2019 FCA 245:

> [34] Not every contravention of the Act or regulations will justify the annulment of a band election. A distinction is not infrequently made between cases involving technical procedural irregularities and those involving fraud or corruption…

92. The Federal Court in *Alexander First Nation v. Burnstick*, 2021 FC 618, relied on *Opitz* and other authorities in concluding that electoral provisions should be interpreted in a manner consistent with the opportunity for voters to exercise their democratic right:

> [103] Both parties submit, and I agree, that the Election Regulations should be interpreted purposively, in a manner consistent with its object of allowing eligible voters the right to vote. In this regard, the Applicants cite *Wrzesnewskyj v. Canada (Attorney General)*, 2012 SCC 55 [*Opitz*] and the Respondents rely on *Boucher v. Fitzpatrick*, 2012 FCA 212 at para 27 [*Boucher*]. As stated in *Boucher*, election legislation "should be construed in a manner consistent with its object of providing all eligible voters with an opportunity to exercise their basic democratic right – the right to vote". *Opitz* states that "enfranchising statutes have been interpreted with the aim and object of providing citizens with the opportunity of exercising this basic democratic right. Conversely, restrictions on that right should be narrowly interpreted and strictly limited" (at para. 37).

93. The Federal Court in *Commanda v. Algonquins of Pikwakanagan First Nation*, 2018 FC 616 drew a distinction between mandatory and directory requirements in elections legislation to

conclude that the elections code at issue must be interpreted liberally to allow alternative ways to deliver mail-in ballot packages to the polling station. There, the appellant alleged that an incumbent chief had committed a corrupt practice during the election which affected the results by contravening the elections code and rules in relation to the handling of mail-in ballots. Three days before the election, a voter who lived off the reserve arranged for the incumbent chief to bring her four mail-in ballot packages. Once the packages were completed by the voter and her family, a third party delivered the completed ballots to the polling station. The appeal board dismissed the appellent's appeal and found that no corrupt practice or violation of the code or rules had occurred. The code and rules were silent on whether ballot packages can be given from one voter or another, or if someone other than the voter can deliver completed ballots to the polling station. The appeal board found it consistent with past practices, the code's enabling of voting rights, the "intent" of the rules, and the right to vote in the *Canadian Charter of Rights and Freedoms* to allow ballots to be delivered other than by mail. The Federal Court found the appeal board's reasons to demonstrate justification, transparency, and intelligibility in reaching this decision.

94. The Federal Court in *Bird v. Paul First Nation*, 2020 FC 475, cautioned that some allowance must be made for administrative error such that contraventions that are unlikely to have affected the result should not necessarily trigger a new election. The Court observed that the elections officer could have done a better job but that no persuasive evidence was provided that placed doubt on the evidence presented by the actual ballots.

95. The Federal Court in *Pahtayken v. Oakes*, 2009 FC 134 (paragraphs 76 to 84) drew a distinction between administrative decisions that had the effect of disenfranchising voters and those that were adopted to facilitate the right to vote:

> [77] A vote will generally not be rendered invalid as a result of irregularities unless such irregularities would have materially affected the results. A succinct statement of this principle may be found at paragraph 20 of *Ta'an Kwach'an Council (Re)*, [2006] Y.J. No. 139, 2006 YKSC 62: 20 The general common law principle is that the will of the people as expressed in an election will not be set aside unless the irregularity or non-compliance with election law or practice is such that the outcome would have been materially affected. Obviously any irregularity affects the election process in some way. Unless it materially affects

> the validity of the election results, courts will not set aside the decision of the voters.
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> …
>
> [84] … It does not appear to me that any of the steps taken by Mr. Walter Wenaas in the present case would have had the effect of disenfranchising any of the members of Nekaneet; rather, it appears that he was simply attempting to, in the words of Justice Vertes, "facilitate the right to vote".

96. These decisions support the fundamental proposition that not every administrative error should lead to the invalidation of an election or a vote. The Board's conclusion is that this principle is particularly important in a case where the contested thirteen mail-in votes were submitted (mailed and received by election day) in accordance with the Code, and, were made by voters who clearly had an entitlement to vote and had an expectation that their votes would be properly counted.

97. This conclusion finds support in the decisions of *Opitz* and the Federal Court of Canada cases cited above that weigh respect for the democratic right to vote more than enforcing strict fidelity to every procedural rule that exists under a First Nations elections code. The Board is aware that these decisions should be considered with care as they either come from non-Indigenous election litigation or they consider appeals or judicial reviews based on the electoral customs of different First Nations.

98. However, there are consistent elements of principle that emerge from consideration of these cases that are useful to interpretation of the Code and determination of the appeal. These cases reflect principles of democracy and fairness that are embedded in SFN.

## F. SUMMARY

99. I have concluded that the administrative errors that were made in the conduct of this election do not rise to a level of being a "violation" of the Code.

100. As such, I will not embark on an analysis of whether the admission of the contested votes may have affected the result of the election.

101. Having said that, I reiterate the observation that the conclusion that this appeal must fail is not an endorsement of the manner chosen by the EO to count validly casted votes. The circumstances could easily have been such that this procedure would raise real doubt about the integrity of the electoral process. It is only by examination of the voting materials for the contested ballots that the Board could be satisfied that there was no such risk in this particular case.

102. I recommend that the SFN, and/or the EO, take steps in advance of the next election to ensure that clear provisions are made for the administration of mail-in ballots that address a situation whereby ballots are received at the postal box on election day. Possibilities may include a postal box address selected for the ballots that is geographically closer to the polling station, or, setting a later time for counting the votes to allow the mail-in ballots to be brought to the polling station. It is of course up to SFN, and the EO as appropriate, to decide what procedure complies with the Code and works for their election.

## G. COSTS

103. The Appellant asks for costs in the range of $2,500 to $5,000 because she is asking the Board to clarify issues of customary governance where the SFN and its members may benefit from clarity of this nature. The Appellant submits that the following considerations are relevant in this application:

(a) there is significant power imbalance between the Appellant and SFN and the Courts have repeatedly confirmed that this can justify a costs award in this situation;

(b) The EO has access to band funds to defend the appeal and the Appellant is left to pursue this matter in her individual capacity.

104. The Appellant cites the decisions of *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 1119 (*"Whalen*") at paras. 32 and 27; *Bellegarde v. Poitras*, 2009 FC 1212 at para. 8; *Da'naxda'xw First Nation v. Peters*, 2021 FC 360 at para. 198, in support of her request for costs.

105. The Federal Court in *Whalen* stated, at para. 6:

> [6] Costs awards in this Court are governed by… the *Federal Courts Rules.* As in most other Canadian jurisdictions, the cardinal principle governing costs awards is the full discretion of the trial judge…That discretion, however, must be exercised judicially, that is, according to a set of guidelines found in the rules of court or developed by the courts over time. There is good reason for a structured approach to the exercise of discretion…

106. The Board looks to the governing Code under which this appeal arose, for jurisdiction to use discretion to order costs. The Code does not provide any authority for the Board to order costs. As such, the Board has no discretion to order costs as sought by the Appellant

107. In summary, I would dismiss the Appeal and the request for costs.

Ronald Stevenson

## H. ADDITIONAL REASONS-

*Additional Reasons of Board Members Glowacki and Cheung:*

108. We concur with the reasons of our colleague except with respect to determining whether the error might have affected the result of the election under paragraph 217(b) of the Code. At paragraph 100 of the reasons, our colleague states that he is declining to answer that question, having found that the error was not of the nature or significance that would rise to the level of a violation.

109. We consider the facts described and analysis conducted by our colleague to effectively answer the question of whether the error might have affected the result of the election, albeit by a somewhat different analysis. It is possible to answer that question, and, for certainty, we do so here.

110. The reasoning above dismisses the appeal on an interpretation of paragraph 217(b) that finds the non-compliance with the Code in counting the valid mail-in ballots by an improper process was not a "violation" of the Code, when violation is interpreted in accordance with

applicable case law, which imports an assessment of the nature and impact of the non-compliance in the very meaning of violation.

111. However, if "violation" in paragraph 217(b) of the Code is interpreted in a more technical sense, wherein *any* non-compliance with the election provisions in the Code is a "violation", and as such, the EO's process of counting the thirteen ballots is a violation within the meaning of the Code, then, we would turn to the second element of section 217(b)- whether the violation may have affected the result of the election. And, we would find that the second element is not established. That is, the answer to the question of whether the non-compliance or violation might have affected the result of the election is "no".

112. The EO did not comply with the Code in the manner in which he counted the thirteen mail-in ballots. The non-compliance affected the ability to scrutinize the counting, and, the impact on transparency raised concerns, certainly for the Appellant, regarding the election. Yet, the Appellant did not assert that the thirteen persons who voted were not entitled to vote, and, as described above, the evidence in the appeal demonstrates that they were in fact entitled to vote, and, had cast their ballots in accordance with the Code. Their ballots should be counted in the election. No one voted who was not entitled to vote.

113. Despite the non-compliance, both the DEO and the EO had ethical obligations to count votes honestly and to the best of their abilities. The DEO and EO together confirmed voter eligibility and counted the votes. Persons present at the polling station heard the results read aloud, despite not having the opportunity to observe the counting in person. Having had the opportunity to review the ballots, the Board confirms that the votes were as they were counted and reported on election night.

114. As such, the non-compliance was in the manner of counting, not in the fact of, or, the result, of counting the thirteen ballots. The votes ought to have been counted and they were.

115. In election cases, a "magic number test" has been applied to assess when there is an irregularity that went to a person's right to vote in an election - unqualified electors voted or the votes of qualified electors were excluded. As stated by the Supreme Court of Canada in *Opitz*, *supra*, "the election should be annulled when the number of rejected votes is equal to or greater

than the successful candidate's margin of victory" (*Opitz*, para. 73). This magic number test is recognized by the court to be imperfect, as it assumes that all votes go to the challenger, an improbable reality (*Opitz*, para. 72, *Pastion v. Dene Tha' First Nation*, 2017 F.C. 648, paras. 48-53). It is used in *Opitz* and other cases because the secrecy of the ballot means that the actual result of the irregularity on the outcome of the election is not known.

116. However, the facts of the present case are distinct. In the specific factual circumstances of this case, it is not necessary to apply a substituted theoretical number to assess whether, in circumstances where votes were counted or not counted that ought not to have been, and it may have affected the outcome of the election. As stated above, the effect of the non-conformity in counting the thirteen ballots *is* known. No one voted who was not entitled to vote. No vote was excluded. The results of the thirteen ballots are known. As such, it can be determined on the evidence that the irregularity did not result in votes being counted that ought not to have been; and, that the irregularity did not affect the result of the election.

117. As such, even assuming that the non-conformity by the EO is a violation within the meaning of the Code, the second element of paragraph 217(b) is not established in this case, and, the appeal should be dismissed.

Wendy Cheung

Wendy Cheung

Lisa Glowacki