Alexander First Nation Election Appeals Board

In the matter of an appeal of the general election of the Alexander First Nation Chief and Council held September 25, 2020 pursuant to the *Alexander First Nation Band Custom Election Regulations*

Between:

Kurt Burnstick and Eric Arcand

Appellants

-and-

Alexander First Nation, Alexander First Nation Chief and Council, George Arcand Jr., Kevin Arcand, Chris Arcand, Marty Arcand, Heather Jennings, Audra Arcand and Scott Burnstick

Respondents

Decision of the Board

Introduction and Procedural History

[1] In this case, the Appellants seek to quash the results of the September 25, 2020 election for Chief and Council of the Alexander First Nation and ask that a new election be held. As will be seen, this is a case of statutory interpretation.

[2] The procedural history of this matter is as follows. On September 25, 2020, an election for Chief and Council was held at Alexander First Nation pursuant to the *Alexander First Nation Band Custom Election Regulations*, hereinafter *"Regulations"*. The election was held during the Covid-19 pandemic wherein unprecedented and robust measures were put in place by the Province of Alberta's Chief Medical Officer of Health to protect the health of Albertans.

[3] In response to the election results, thirteen unsuccessful candidates filed appeals with an Appeal Board (the first Appeal Board), established under the *Regulations*. The grounds for appeal were that certain provisions of the *Regulations* were not complied with during the election that related to the manner in which the ballots were marked (oval marks instead of X marks) and that the method used for certifying the residency requirement of some voters was also flawed.

[4] The first Appeal Board released its decision on November 1, 2020.

[5] The first Appeal Board ruled that the Chief and Council had not been elected in accordance with the *Regulations* for the following reasons: first, that the use of statutory declarations did not provide sufficient evidence to the Electoral Officer to confirm that an individual was living on Alexander reserve lands at least one month prior to the election, thereby failing to comply with section 22; second, that the use of an oval bubble beside a candidate's name on the voting ballot rather than an "X" failed to comply with section 23 and third, that the use of an oval bubble mark rather than an "X" mark on the ballots amounted to an amendment of the *Regulations* which had not been done as required by the *Regulations*.

[6] The first Appeal Board also ruled that a new election must be held, *vis*:

> The Board finds the candidates for Chief and Council have not been elected to office in accordance with the *Regulations* and the Electoral Officer shall hold a nomination meeting and election for the vacant office or offices in accordance with the *Regulations*.[1]

[7] On November 26, 2020, following the release of the decision by the first Appeal Board, an application for judicial review was filed in the Federal Court of Canada by the Respondent parties in this matter which sought to first, stay, and second, quash the decision of the first Appeal Board.

[8] The application for judicial review was focused on a number of significant procedural errors committed by the first Appeal Board in its handling of the appeal. The applicants on the judicial review urged that those procedural errors combined with the first Appeal Board's unreasonable decision were such that that the decision of that Board should be set aside and the election results restored.

[9] On June 17, 2021, the Honorable Madam Justice Strickland of the Federal Court of Canada released her decision on the application for judicial review.[2]

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[1] *Alexander, infra,* paragraph 18

[2] *Alexander First Nation et. al.* v. *Burnstick et. al.* 2021 FC 618 ("*Alexander*")

[10] In the judicial review, the Court considered the following issues. First, whether portions of affidavit evidence submitted to the first Appeal Board were inadmissible as hearsay, opinion or argument; second, whether the first Appeal Board's process was procedurally unfair; third, whether their decision was unreasonable and fourth, if the process was unfair or the decision reasonable, then what remedy should follow.

[11] The issue of whether certain affidavit evidence was admissible for the determination of the judicial review is no longer relevant to this determination because it has been addressed by Madam Justice Strickland.

[12] Addressing the primary ground for the judicial review, being the process used by the first Appeal Board, the court noted as follows:

> In my view, the Appeal Board's approach was, at best, misguided. Rather than affording the individual Applicants, who had been elected as Chief and Council, the opportunity to know when the appeals of their election would be heard, informing them of the substance of those appeals and affording them the opportunity to respond, the Appeal Board held entirely private hearings and even balked at the identity of the appellants or its decision being disclosed.
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> The process adopted by the Appeal Board excluded the Applicants and heard only from one side, the Appellants. There was no way for the Applicants to test, or even be aware of, the evidence presented. **The process was procedurally unfair.** (emphasis added)
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> In conclusion, the Applicants were denied procedural fairness because they were not given notice of the appeal or of the case to meet or an opportunity to make submissions. The Appeal Board's process was essentially a private, one-sided process that was not open to the AFN community, Chief and Council or the AFN administration. This is sufficient to dispose of the application. I will, however, briefly address the substantive submissions of the parties because in my view, the decision is also unreasonable.[3]

[13] Addressing the issue as to whether the first Appeal Board's decision was unreasonable, Madam Justice Strickland noted that ". . . in my view, for the above

[33] *Alexander*, at paras 69-70 and 79-80.

reasons, the Appeal Board's **decision** that s. 22 of the *Election Regulations* [dealing with residency requirement declarations] was breached by use of the statutory declarations **is unreasonable**."[4] (emphasis added)

[14] In her discussion on how the first Appeal Board evaluated the issue of the voters' ballots requiring an oval mark rather than an "X" mark as prescribed by s. 23 of the *Regulations*, Madam Justice Strickland ruled as follows:

> In my view, the issue that the Appeal Board should have squarely addressed was essentially one of statutory interpretation. Specifically, whether s. 23 required that ballots can only be marked by an "X". It is arguable that the Appeal Board indirectly adopted a plain, or literal interpretation, when it found that an "X" should have been placed by the names of the selected candidate of Chief, rather than filling in an oval. However, this gives rise to a potential internal consistency, as it is not clear that the Appeal Board reached the same conclusion in its treatment of the votes for Councilors.
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> The problem here is that the Appeal Board did not engage with the interpretation of s. 23.[5]

[15] Turning to the issue of relief within her decision, Madam Justice Strickland continued:

> What the appeal board was required to do was determine whether or not the ballots were valid, even if marked with an "X", which required interpreting s. 23 of the *Election Regulations*. The appropriate remedy is to remit the matter back to a different appeal board for re-determination taking these reasons into consideration. The re-determination will be limited to the appeals of Kurt Burnstick, Ivy Bruno and Eric Arcand. I also emphasize that the new appeal panel must consider whether the alleged irregularities impacted the outcome of the Election.[6]

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[4] *Alexander*, para. 98.

[5] *Alexander*, paras. 101 and 103.

[6] Alexander, paras. 130-131. On August 4, 2021, the appellant Ms. Ivy Bruno withdrew her appeal following the Federal Court decision by email to the Chair of this Board, which reads, in part " … [t]hose who continue to support it [the new appeal board process] are continuing genocidal practice against the Treaty members of Alexander. Therefore, please remove me from this appeal and the continued denial and oppression of my Treaty rights.

Procedure Used by this Appeal Board

[16] In response to the concerns of Madam Justice Strickland regarding the concerns about procedural fairness within the first appeal hearing, the following steps were taken by this Board to ensure that the rule of law was upheld and that procedural fairness was extended to the parties in this matter.[7]

a. All communication from the Board was shared with all parties at all times, principally by email.

b. The Board created *Hearing Rules* which governed the procedure in its entirety. The *Rules* were provided to the parties at the outset. The *Rules* prescribed specific dates for the submission of materials, time limits for arguments and other matters designed to help the parties understand the procedure that applied.

c. The Board held an on-line pre-hearing, designed to represent a case management conference. This was of great assistance in identifying the issues for the appeal as well as taking care of housekeeping matters. Following the on-line pre hearing, the Board issued a written interlocutory decision which was provided to the parties. Important to this Decision is that it included a clear description of the two issues on appeal.

d. At the Appellants' (Mr. Burnstick and Mr. Arcand) request, the Board attempted to secure space on Alexander First Nation for the hearing, but none was available.

e. Upon the direction of the Board, the Notice of Appeal Hearing was posted by an administrator of Alexander First Nation at eight key locations within the community.[8]

f. The Appeal Hearing was a public hearing in a large, modern hotel with seating and refreshments for all who attended. Many breaks were taken to accommodate the people in attendance.

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[7] "A duty of procedural fairness is incumbent on every public authority making an administrative decision which affects the rights, privileges or interests of an individual: *Canada (Attorney General)* v. *Mavi*, [2011] 2 S.C.R. 504 at para 38 as cited in *Meeches, infra.*

[8] Notices were posted at Alexander Administration, Education, Daycare, Health, Elders' Lodge, Store, Social Services and Lands.

g. The pre-hearing and hearing were transcribed by a professional court reporter and transcripts were provided to the parties.[9]

h. At the request of the parties, the Appeal Hearing opened both days with prayers offered by Alexander First Nation Elders.[10]

i. The Hearing was live streamed by the joint efforts of the Alexander I.T. on site representative and the third party contracted by the hotel which handled the audio and visual components. Members of the public could attend in person or from the comfort of their homes. The link to the hearing was also posted to the Alexander First Nation Facebook page.

j. All caucus meetings during the hearing included representatives of both the Appellant and Respondents, including a caucus meeting at the start of day two which addressed the issue of whether the hearing should be adjourned given that an Elder from the community had passed away just that morning.

k. The parties were both given the opportunity to contribute when the Board was faced with interlocutory issues that required its direction.

l. No limit was placed on the number of witnesses either party was allowed to bring to the hearing.[11] The Appeal Board was attentive to and accepted a very broad scope of submissions from witnesses.

m. The Board allowed witness testimony in person, by zoom call and by cell phone, including witnesses calling from Saskatchewan and Montana.

n. The Board has released this Decision to the parties as promised and in compliance with the 5 day rule for release required by the *Election Regulations*.

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[9] At the time of the release of this Decision, transcripts from the hearing were not yet available. The Board has indicated to the parties that they will be provided with the transcripts forthwith upon receipt. The parties have been provided with the pre-hearing transcripts.

[10] The Board acknowledges the prayers offered by the Elders at the hearing and extends its thanks to them.

[11] A request by the Appellant Mr. Burnstick to subpoena witnesses was denied by the Board, having considered itself without authority to do so. This was communicated to the parties within the terms of the pre hearing Decision.

Issues

[17] The parties to this appeal introduced evidence that examined:

- the right to vote and to be counted as fundamental to the democratic process;
- the cost to candidates and the Alexander First Nation in holding re-elections;
- the use of "X" as a mark on a ballot representing respect for the values of Treaty;
- the emotional cost to a community and individuals arising from electoral contests and disagreements, especially in a small indigenous community such as Alexander First Nation;
- inconvenience to candidates in times of election appeal;
- disruption to the business, initiatives, social well being and economy of the Alexander First Nation because of uncertainty caused by election appeals;
- the application of Covid 19 protocols to ensure safety of all involved in the electoral process;
- the importance of accepting the authority of Alexander First Nation law.

[18] In our view, a great deal of the evidence provided was important but either irrelevant or not germane to the question that we have been assigned by the Federal Court of Canada of statutory interpretation. Madame Justice Strickland required the Board on this appeal to consider the following two issues:

[19] First, whether the manner in which voting was carried out by requiring an oval mark instead of an "X" mark on the ballots was a breach of s. 23 of the *Election Regulations,* and second, if the modified voting procedure was a breach of the regulations, then what is the effect of that breach and, if applicable, the remedy.

Law

[20] Section 23 of the *Election Regulations* states as follows:

> 23. Each ballot must be marked with an "X" being placed beside the name of the candidate or candidates from [sic] whom the elector intends to vote and such instruction shall be clearly posted at the place of voting by the Electoral Officer.

[21] With section 23 of the *Regulations* squarely at issue in this matter, this section outlines the law of statutory interpretation generally, as well as statutory interpretation in the context of a First Nation's election regulations specifically based on the materials and submissions of both Parties.

[22] Based on the authorities submitted, the Board identifies two general competing theories of statutory interpretation. Each party points to a different approach as the correct approach for this Board given the circumstances. This Board would endeavour to summarize each approach and situate each in the context of this appeal.

[23] The first approach the Board identifies is favored by the Appellants. Courts have called this method of statutory interpretation technical[12], plain and literal.[13] The Appellants invite this Board to engage with this method of interpretation and confine its analysis narrowly to the text of the *Regulations.*

[24] The Respondents favor the second method of statutory interpretation which courts have called the purposive,[14] broad[15] and modern approach[16]. The Respondents invite the Board to engage with this approach by considering the overall scheme of the *Regulations* and in their entire context, including other parts of the *Regulations*.

[25] Both the Appellant and Respondent cite the *Opitz* decision on the issue of statutory interpretation but for differing reasons. *Opitz* addresses how a decision maker should interpret statute in the context of adjudicating an elections related dispute. In *Opitz*, the majority identified the applicable principles of statutory interpretation as follows:

> The overriding principle of statutory interpretation is that "the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21). The best indication of Parliament's intent is found in the language of the statutory provisions: *R.* v. *Knott*, 2012 SCC 42, [2012] 2 S.C.R. 470, at para. 54.[17]

[26] This principle is consistent with the Respondents' submissions that this Board should consider the overall scheme of the *Regulations* in their entire context. On the other hand, the Appellants submit that this Board does not have the discretion to enter into the type of inquiry set out in *Opitz.* The Appellants submit that the Appeal Board is required to apply Alexander First Nation's laws, not the *Canada Elections*

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[12] *Alexander First Nation* v. *Burnstick*, 2021 FC 618 at 82

[13] *Ibid* at 101

[14] *Ibid* at 103

[15] *Opitz* v. *Wrzensnewskyj*, 2012 SCC 55 at 37

[16] *Boucher* v. *Fitzpatrick*, 2012 FCA 212 at 25

[17] *Opitz*, paragraph 144

Act provisions that were considered in *Opitz*. The Appellants submit that an administrative tribunal like the Appeal Board only has the jurisdiction that is granted to it. In their view, statutory interpretation principles and cases on election law generally cannot overcome the clear language of the *Regulations,* which in their view, requires a finding that s. 23 is breached and that a new election "shall" be called without an inquiry into the interpretation of the *Regulations.*[18]

[27] The Board concurs with the Appellant that applying provisions from the *Canada Elections Act* is outside the authority of the Board. The applicable statute is the *Alexander First Nation Band Custom Election Regulations*. However, in being constituted to apply the *Regulations* to the issue at hand, the Board is of the view that it must engage in interpretation of the provisions as directed by the Federal Court of Canada. So, the question remains, which approach to statutory interpretation is required?

[28] The Respondents cite authority to support the proposition that a modern, purposive interpretation is applicable given the context of First Nations governance legislation. In *Boucher* v. *Fitzpatrick,* another First Nation elections dispute case, the Federal Court of Appeal held that:

> The Election Code must be construed using the general principles of statutory interpretation and the modern approach set out in E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at page 87 and adopted by the Supreme Court of Canada in numerous decisions since *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193.[19]

[29] The Respondents also cite *Henry* v. *Roseau River Anishinabe First Nation*. In *Henry*, the Federal Court ruled that:

> The modern rule for statutory interpretation was set out by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at 41, 36 OR (3d) 418, where the Court cited with approval the following statement of Elmer Driedger:
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> > Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[20]

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[18] Appeal Package of Appellants, page 7

[19] *Boucher* v. *Fitzpatrick*, 2012 FCA 212, para 25

[20] *Henry* v. *Roseau River Anishinabe First Nation*, 2017 FC 1038, para 45

The Court in *Henry* continued:

> This approach has application with custom governance legislation enacted by First Nations, with this Court using this principle in the past to examine the purpose of a different First Nation's Election Act in *Meeches*. In this case, Justice James Russell, when using the interpretation technique outlined in *Rizzo*, found at paragraph 85 that:
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> > The purpose of the *Election Act* is to ensure fair elections that lead to legitimate government. It is not the purpose of the *Election Act* to allow officers who may have come to power in an unfair election to remain in power at their own discretion. The *Election Act* must be read in a way that makes sense of its obvious purposes.[21]

[30] In addition to the authorities and submissions presented by the parties, this Board has the benefit of Honourable Madam Justice Strickland's ruling which remitted the matter to this Board and identifies applicable law. In her decision, she held:

> 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). To my mind, one would have to consider whether insisting that the marking of a ballot with an "x", as opposed to filling in an oval (accompanied by appropriate instruction), achieves that objective. For example, does that approach rely on form over substance, rather than taking a substantive approach that "focuses on the underlying right to vote, not merely on the procedures used to facilitate and protect that right" (*Opitz* at paras 54-57). The problem here is that the Appeal Board did not engage with the interpretation of s 23.[22]

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[21] *Henry,* at paras 45 and 46, citing *Meeches* v. *Meeches*, 2013 FC 196, 428 FTR 208.
[22] *Alexander First Nation* v. *Burnstick*, 2021 FC 618 at para. 103

[31] In her reasons, Madam Justice Strickland relies on a purposive approach, and as cited above, sees fit to apply the purposive approach in the context of First Nations elections as per *Opitz* and *Boucher*. In the summary of her judgement orders, Madam Justice Strickland's order was that this Board re-determine the matter and take her reasons into consideration. This is consistent with the Respondents' position which invites this Board to engage in a purposive, broad and modern approach.

[32] The Appellants submit that the Board does not have the discretion to enter into the type of inquiry set out in *Opitz*. However, the Board has been made aware of authority which supports the proposition that a purposive approach is appropriate in the context of First Nations elections. Moreover, Honourable Madam Justice Strickland reasoned that the modern approach is appropriate, not just for First Nation tribunals generally, but for this Board specifically.

[33] Both the landscape of caselaw and the reasons of Honourable Madam Justice Strickland point this Board toward the modern, purposive and broad approach.

[34] Based on the authorities submitted by the parties, key elements from the modern approach in the context of First Nation election regulations may be outlined as follows: the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament.[23] That the *Regulations* must be construed using the general principles of statutory interpretation and the modern approach.[24] The purpose of the *Regulations* is to ensure fair elections that lead to legitimate government.[25] The *Regulations* should be construed in a manner consistent with their object of providing all eligible voters with an opportunity to exercise their basic democratic right the right to vote.[26] Restrictions on that right should be narrowly interpreted and strictly limited.[27] These are the guiding principles which should inform the Board's interpretation of the *Regulations*.

Evidence and Arguments

Appellants' Evidence

[35] The Appellant, Mr. Arcand appeared before the Board to give evidence that the "X" mark had been used on ballots since he could remember and that it was standard operating procedure for Alexander First Nation elections. He indicated that the use of an "X" had significance to the "X" marks used by indigenous signing parties within Treaty 6, to which Alexander First Nation is an adherent. Under examination by the

[23] *Opitz* v *Wrzensnewskyj*, 2012 SCC 55 at 144
[24] *Boucher*, paragraph 25
[25] *Henry*
[26] *Boucher*, paragraph 27
[27] *Optiz*, paragraph 37

Board, Mr. Arcand affirmed his belief that there was no reason to modify the method in which people voted and that he believed that the election could have been conducted safely the way it always had been carried out, with the "X" mark being used on the ballots.[28]

[36] The Appellant Mr. Burnstick also appeared before the Board to give evidence that he was in his late teens when the *Regulations* were being drafted by the Alexander First Nation. His recollection was that the "X" was chosen because it was used by the Alexander First Nation and the other indigenous groups that signed Treaty 6.[29] He continued that he understood that the tabulation machines would be used to make the voting process safer and that an oval mark instead of an "X" would be used by the voters to indicate their choice of candidates. Central to the evidence of Mr. Burnstick on the issue of Treaty as it related to the "X" mark used on ballots, was that his knowledge on the issue was passed down to him orally and that it was therefore not a subject matter to which documentation could be produced. The Board accepts that Indigenous knowledge is often shared orally between generations and is not always written.

[37] Mr. Burnstick, in response to questioning by the Board, testified that despite being the incumbent Chief between the period in which the 2020 election was called by Alexander First Nation and the time that the election results were made known, that he did not attempt to stop the election from occurring and that he did not want to be seen as using his authority to interfere with the election. This is despite the fact that Mr. Burnstick knew that an oval mark would be used rather than an "X" to mark the ballots.

[38] Wanda Arcand-Whitford, a member of Alexander First Nation, appeared before the Board to give evidence by cell phone.[30] Her evidence was that during her employment with Alexander First Nation, she was involved with Loretta Pete-Lambert for setting up the 2020 election. She recalls meetings wherein the voting process was described and that she had concerns because the voting was not done with an "X" as required by the *Regulations* and that she brought her concern to the attention of the Tribal Manager and not the Chief and Councilors.

[28] Testimony of Eric Arcand, Hearing, Day 1

[29] Testimony of Kurt Burnstick, Hearing, Day 1

[30] Testimony of Wanda Paul, Hearing, Day 2. Ms. Arcand-Whitford is the former Director of Operations and member of the Executive Management Team at Alexander First Nation.

Appellants' Argument

[39] The Appellants' argument is that the law does not support the Board in conducting statutory interpretation in this context and that if it does, that a literal, strict and narrow approach ought to be used in interpreting s. 23 of the *Regulations*. The Appellants ask the Board to consider the fact that the "X" used in the signing of Treaty No. 6 correlates to the "X" used in the *Regulations* and that it is no accident that the 'X" was selected by the drafters of the *Regulations*.[31]

[40] Regarding the significance of the "X" as related to the Treaty, the Appellants assert:

> The "X" was very specifically included in reflection of this history and this cannot be ignored simply because the Electoral Officer decided she wanted to do the election in her own way.[32]

[41] The Appellants further submit that a literal interpretation of s. 23 of the *Regulations* is required and that since the "X" was not the prescribed voting mark in the 2020 election then the only available outcome under the Regulations is that the election "shall" be annulled and a new election called.

Respondents' Evidence

[42] George Arcand Jr, the current Chief of Alexander First Nation, appeared before the Board to give evidence that his understanding of the significance of the "X" in the *Regulations* was that there was, simply, no significance or attachment to Treaty.[33] Rather, he understood the "X" to be related to the requirements of the *Indian Act* to previous election requirements for First Nation communities. He cited the need for the *Regulations* to be updated and for its new laws to not require the approval of the Government of Canada as a notion of exercising its law making authority as a nation independent of Canada. Mr. Arcand Jr. also spoke to the inconvenience that calling a new election would have on Alexander First Nation, its daily operations, its business ventures and its ability to move ahead with government and industry.

[43] Chris Arcand, a current (2020-present) and former (2017-2020) Councilor of Alexander First Nation, appeared before the Board to give evidence about the Alexander First Nation hiring the Electoral Officer, Loretta Pete-Lambert, for the

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[31] *Opitz*, at paragraphs 22 and 23
[32] Appeal Package of the Appellants, page 6
[33] Testimony of George Arcand, Hearing, Day 1

2020 election and his understanding about the use of the oval mark and the electronic tabulator. He also testified to the significant inconvenience to the Nation and to himself personally should a new election be called at Alexander First Nation. He also gave evidence that there was dysfunction within Chief and Council leading up to the 2020 election.[34]

[44] Collette Arcand, a member of and technical advisor[35] to the Alexander First Nation, appeared before the Board to give evidence. She provided evidence about the process for raising Treaty issues in a proceeding such as this. She discussed a 1991 position paper on the protocol to be used by Alexander First Nation in the assertion of its rights under Treaty No. 6. Her evidence was that the manner in which the Appellants introduced the Treaty argument in the within matter and the substance of the argument being made about the Treaty "shocked and appalled" her.[36]

[45] Ms. Arcand also provided evidence about the "X" being referred to in the *Regulations* and was asked whether that had significance to the Treaty. She also confirmed that the "X" requirement was from the "old *Indian Act*" days and that it was something that was imposed upon Alexander First Nation. She did not perceive a link between the "X" used in the *Regulations* to the "X" marks used in Treaty 6. Upon cross examination by Counsel for the Appellants, her evidence was that she was not present when the *Regulations* were ratified and could not speak directly to the drafter's intent of s. 23.

[46] Ms. Arcand also provided evidence about Alexander First Nation's experience responding to a pandemic. She asked this Board to take into account the fact that the Nation has had to respond to a pandemic in the past, the Spanish Flu pandemic (the Great Influenza). She noted that based on her review of operations records from that time period, that protective measures were put in place by Alexander First Nation to protect the citizens of the Alexander First Nation. Ms. Arcand understood the logic of the Nation wanting to ensure the safety of its citizens for the 2020 election, being held during the Covid-19 pandemic.

[47] Loretta Pete-Lambert, the Electoral Officer for the 2020 election, appeared before the Board to give evidence by cell phone[37]. Her evidence was that she had

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[34] Testimony of Chris Arcand, Hearing, Day 1

[35] Testimony of Collette Arcand, Hearing, Day 1 – Ms. Arcand is a member of Alexander First Nation. She has an MA in Indigenous Governance and has conducted research on indigenous governance practices for Alexander First Nation. She has also been involved with archival and historical research at Alexander. She has studied the oral transmission of traditional knowledge within Alexander and has experience with Alexander First Nation's Band owned company(ies) principally in the area of resource development.

[36] *Ibid*.

[37] Testimony of Loretta Pete-Lambert, Hearing, Day 2

functioned as an Electoral Officer for approximately 100 elections over the last 20 years. She provided the Board with a description of how electronic tabulators worked with the ballots marked with an oval. She also confirmed that even if a voter used an "X" on the ballot to signify their choice of candidate, that the ballot would be accepted and counted. She confirmed that the electronic tabulation and oval marking method were used to the protect voters during Covid-19 as authorized by the administration of Alexander First Nation.[38] Her key evidence was that whether an "X" or an oval or a slash type of mark was used on the ballot, as long as the ballot showed the voter's intention, it was counted as a valid vote. Further, she testified that the procedure used did not affect the election results.

[48] Ms. Pete-Lambert, upon cross examination by the Appellant, Mr. Arcand, also gave evidence that her training as an Electoral Officer was the reason by which she took a liberal interpretation of s. 23 of the *Regulations* and proceeded to use an oval on the ballot rather than the "X" discussed in s. 23.

[49] Dora Courteoreille, a member of Alexander First Nation, appeared before the Board to give evidence. Initially, she addressed the Board in Cree. Her evidence was that among other positions that she has held with Alexander First Nation, she was on the committee that had the responsibility of creating the *Regulations*. She testified that the "X" did not have significance to the Treaty and that it was simply a mark that had always been used and was therefore chosen by the committee.[39]

[50] Ms. Courteoreille also testified that she had functioned as an Electoral Officer many times. She indicated that her training and approach to the marking of the ballot was that regardless of the mark that was used, as long as the Electoral Officer could identify the voter's intention, then the ballot was counted as valid. Ms. Courteoreille saw no reason to depart from this approach for the 2020 election.

[51] Rene Paul, a member of Alexander First Nation appeared before the Board to give evidence. Mr. Paul is a knowledge keeper and a designated Treaty protector. His evidence was that it was against protocol for the Appellants to put the Treaty in issue on this appeal at the Federal Court. He also testified that there was no relationship of significance between the "X" used on the voting ballot and the Treaty itself.[40]

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[38] Ms. Pete-Lambert was asked in Cross Examination by the Appellant, Mr. Burnstick where she considered her authority to have been given for using the electronic tabulation and oval ballot marking system. She confirmed that she proceeded based on the administrator's advice.

[39] Testimony of Dora Courteoreille, Hearing, Day 2

[40] Testimony of Rene Paul, Hearing, Day 2

[52] Marvin Yellowhorn appeared before the Board to give evidence by cell phone. He testified that he had functioned as an Electoral Officer for about thirty elections. He has also conducted referendums. His experience as Electoral Officer includes the 2014 and 2017 elections at Alexander First Nation. He testified that in his experience, the important part of the ballot marking was not whether an "X" was used, but whether the ballot demonstrated the intention of the voter. If it did, then the ballot would be counted as valid.[41]

Respondents' Argument

[53] The Respondents urge the Board to take a generous, broad and purposive approach to the interpretation of s. 23 of the *Regulations* to find that the voter's intention as shown on the ballot is the paramount concern in interpreting s. 23 of the *Regulations*.[42]

[54] Further, the Respondents ask the Board to adopt an enfranchising approach to the question of interpreting the *Regulations*:

> It is well recognized in the jurisprudence that where electoral legislation is found to be ambiguous, it should be interpreted in a way that is enfranchising: *Haig* v. *Canada*, [1993] 2 S.C.R. 995. Although he was in dissent in that case, Cory J. made the following observations at pp. 1049-50, with which L'Heureux-Dubé J., for the majority, at p. 1028, expressed total agreement:
>
> > The courts have always recognized the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it. This traditional approach is not only sound it is essential for the preservation of democratic rights. The principle was well expressed in *Cawley* v. *Branchflower* (1884), 1 B.C.R. (Pt. II) 35 (S.C.). There Crease J. wrote at p. 37: 112
> >
> > > [21] The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with. ... It looks to realities, not technicalities or mere formalities, unless where

[41] Testimony of Marvin Yellowhorn, Hearing, Day 2 – Mr. Yellowhorn is a member of Piikani Nation, located in southern Alberta.
[42] Written Argument of the Respondents, para. 36

> forms are by law, especially criminal law, essential, or affect the subject-matter under dispute.[43]

[55] The Respondents further submit that the results of the 2020 election in fact show the intention of the electors that voted in the election whether by oval mark or otherwise and that the election results should remain.

Analysis

[56] The Board does not take issue with the credibility or reliability of any of the witnesses that appeared at the appeal hearing. The Board acknowledges the assistance of every witness in helping the Board to obtain a full understanding of the issues and the related evidence.

[57] The purposive approach to interpreting the *Regulations* demonstrates Alexander First Nation's desire to exercise its law making authority combined with the intention of wanting to prescribe, among other things, who can run for office, who can vote and the process that will govern elections.

[58] Conversely, the technical and narrow approach to interpreting s. 23 of the *Regulations* does not reflect the reality of what has happened in Alexander First Nation elections in the past and indeed, in the 2020 election. The reality is that some ballots got marked with a mark other than an oval and they were still counted as valid. Such marks as a slash and a check mark, for instance, were used. The context and intent of the *Regulations* must be used in the Board's interpretation. Simply put, while the strict approach to statutory interpretation may have value in the election context involving fraud or misfeasance, for example, the Board fails to see the value or usefulness in interpreting s. 23 using a narrow approach in the present instance. Using this approach, the 2020 election results would grind to a halt before the elector's intention ever made it to the counting table. Future elections would as well. The Board is simply at a loss as to how this approach to statutory interpretation has any utility especially in the current social and business context involving Covid-19, when organizations are being asked to pivot, pivot and pivot again. This includes the Alexander First Nation.

[59] The Board accepts the submissions of the Respondents addressing how s. 23 should be interpreted and of the importance of the use of the "X" mark in a Treaty context. The Board finds that the character of Treaty No. 6 to Alexander First Nation

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[43] Book of Authorities of the Respondents. *Re: Judicial Recount: West Vancouver-Sea to Sky Electoral District in the 2020 Provincial Election* 2020 BCSC 1957 per Crerar J., para. 131, citing *Haig* v. *Canada* [1993] S.C.R. 995 at p. 1028, citing *Cawley* v. *Branchflower* (1994) 1 B.C.R. (Pt. II) 35 (S.C.) per Crease J. at p. 37

and its citizens is that of a sacred trust and that it has enduring value that can not be quantified. The Board also finds that the evidence has not established that there is a spiritual, cultural or other meaningful link between the "X" marks that were used in the signing of Treaty No. 6 and the "X" mentioned in s. 23 of the *Regulations*.

[60] The evidence has established that historically, the intention shown on a voter's ballot has been used as the benchmark by Electoral Officers in interpreting the marks used and that this accords with the training that they receive. This approach has been applied and used in Alexander First Nation elections and other first nation communities.

[61] The oval marks on the ballot were required so that the tabulation machine used by the Electoral Officer and her staff could safely and quickly read the ballots. This system was used as an attempt to limit the spread of the Covid-19 virus from surfaces and ballots and to minimize the spread of airborne virus. This departure from the normal voting procedure was justified in the circumstances and had been made known to the Alexander First Nation Council, its administration and had the continuing approval of the Tribal Manager.

[62] The fact that the incumbent Chief and Council (or any one of them) at the time of the 2020 election did nothing to stop the use of the oval-filled ballot card or, the election completely, is noteworthy. This fact gains importance when considering the Appellants' argument that any diversion from the "X" prescribed under the *Regulations* would also be a diversion from their belief in and attachment to the importance of Treaty.

Decision

[63] The Board has heard and considered all of the evidence presented and has considered the submissions of the parties and makes the following unanimous decision.

[64] We use a broad and meaningful approach to statutory interpretation in this matter and find that the use of an oval mark on a voter's ballot is consistent with the purpose and objectives of the *Regulation*, which is to promote enfranchisement in the electorate of the Alexander First Nation. Accordingly, we find that s. 23 of the *Regulation* was not breached in this instance. We find that the evidence has established that the irregularity in using the oval to mark ballots did not impact the outcome of the election.

[65] Given our findings above, we do not need to consider the second issue on this appeal, being the issue of remedy. The election results shall stand.

[66] The Alexander First Nation Election Appeals Board dismisses the appeal in its entirety.

Dated this 2nd day of September, 2021

Darrin Blain, Board Chair

Lorne Ternes, Board Member

Vince Vermillion, Board Member

Solicitors for the Appellants	Parlee McLaws LLP, Edmonton Evan Duffy
Solicitors for the Respondents	Gowling WLG, Vancouver Maxime Faille Keith Brown

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