TSAWWASSEN FIRST NATION
sc̓əwaθən məsteyəxʷ

JUDICIAL COUNCIL

Mike Baird, Appellant, and Bruce Mack, Respondent,
File: JC00102

- and -

Christina Shellard, Appellant, and Bruce Mack, Respondent,
File: JC00103

Before: Paul Fraser, Q.C., Chair of Judicial Council; Bruce MacDougall and Leif Nordahl, Members of Judicial Council

Date of Hearing: 24 November 2012
Date of Decision: 11 December 2012

R E A S O N S

By the JUDICIAL COUNCIL:

These election appeals arise as a result of the general election held in the Tsawwassen First Nation ["TFN"] on Wednesday 5 September 2012. This was the second general election held since the 2009 Treaty and under the rules set out in the *Election Act* and associated regulations.

A. Background and Facts

The rules in the statute and the regulations set out clearly the procedures to be used for an election, including the notices to be sent out. Section 32 of the *Election Act* provides:

> s. 32(1) The election officer must, in the prescribed form, post notices of the election

(a) in conspicuous public places frequented by Tsawwassen Members on Tsawwassen Lands,

(b) on the Tsawwassen First Nation website, and

(c) in the Tsawwassen First Nation community newsletter.

(2) The notices must include

(a) the date of election day,

(b) the individuals who are declared by the election officer to be candidates,

(c) the times during which voting stations will be open,

(d) the location of the one or more voting stations where eligible voters may vote,

(e) the methods for voting at the election, and

(f) any other matters described in the regulations.

More detail is given in the Election Notice Regulation under the *Election Act*, as follows:

4 No less than 90 days before the election day, the first notice of the election will be posted of the general election.

5 The notice referred to in section 4 will identify

(a) that the election is for an election of Tsawwassen Government;

(b) the date of the election day; and

(c) the number of positions in each component of Tsawwassen Government that will be elected during that election.

6 Not less than 90 days before election day, the notice referred to in section 4 of this regulation will be

(a) posted in a visible and frequently travelled location at the Tsawwassen administration office;

(b) published in the first Tsawwassen First Nation weekly newsletter;

(c) mailed to every eligible voter; and

(d) published on the Tsawwassen First Nation website.

7 No less than 30 days before the election day, the second notice of the election will be posted of the election.

5 The notice referred to in section 7 will identify

(a) that the election is for an election of Tsawwassen Government;

(b) the date of the election day;

(c) the times during which voting stations will be open;

(d) the locations of one or more voting stations where eligible voters may vote;

(e) the number of positions in each component of Tsawwassen Government that will be elected during that election;

(f) the Tsawwassen Members who are declared by the election officer to be candidates for positions for each component of Tsawwassen Government; and

(g) the methods for voting at the election.

9 Not less than 30 days before election day, the notice referred to in section 8 of this regulation will be

(a) posted in a visible and frequently travelled location at the Tsawwassen administration office;

(b) published in the first Tsawwassen First Nation weekly newsletter and in every newsletter thereafter until the last newsletter prior to election day;

(c) mailed to every eligible voter; and

(d) published on the Tsawwassen First Nation website.

These notices were issued as prescribed, except that the second notice - which was sent with the mail-in ballots - said that the election was to be held on *Thursday* 5 September 2012. (emphasis added) The correct weekday was Wednesday. The first notice, sent out in early June 2012, correctly identified Wednesday as the election day. The second notice

was sent out on 23 July 2012. No person reported the mistake in the second notice until 4 September 2012, the day before the election. Given the short period of time available to correct the mistake, the election officials did what they could. An email was sent to those for whom there were email addresses. There were about 75 such email addresses. Also written notices of correction were delivered to residences on the Tsawwassen Lands. Of those eligible to vote, 133 reside on Tsawwassen Lands and 127 do not. A person residing off the Lands and for whom there was no email address may have been unaware of the correction.

There were a number of other notices, official and informal, in the pre-election period. For example, the election time-line was available on the TFN website and the Newsletter contained information about the election. All such notices had the correct date, but none referred to the weekday.

The election proceeded on Wednesday 5 September 2012. There were two candidates standing for Chief. There were 20 candidates standing for positions as Legislators. The twelve of these who received the most votes would fill the Legislators' positions. Of these twelve, the four who received the most votes would be said to be elected to the Executive Council. There were 148 ballots cast, but one of them was rejected during the counting of the ballots for Chief. Thus 147 of 260 possible votes were validly cast for Chief, including 38 mail-in ballots received by the end of election day. For Legislators (and Executive Council) 148 of 260 possible votes were cast, again including the 38 mail-in ballots. There was uncontradicted evidence that nobody appeared trying to vote on Thursday 6 September 2012. No completed mail-in ballots were received after 5 September 2012.

For the position of Chief, Bryce Williams received 78 votes and Kim Baird 69 votes - a nine vote difference. For Legislator, the candidate receiving the 12th-highest number (and thereby elected) received 54 votes; the candidate receiving the 13th-highest number (and thereby not elected) received 51 votes. For the twelve people elected as Legislator, the numbers of ballots cast, from highest number to lowest, were 87, 87, 85, 85, 81, 79, 69, 68, 63, 60, 55, 54. Thus, in terms of those four Legislators elected to the Executive Council, four votes made a difference.

The *Election Act* allows for an appeal of election. It says:

> s. 62(1) Within 30 days after election day, an eligible voter may appeal to Judicial Council the results of the election on the grounds that:
>
> > (a) this Act or the regulations were contravened and the contravention did or may have affected the outcome of the election,
> >
> > (b) an offence was committed, whether or not the offence is or was the subject of a prosecution, and the contravention did or may have affected the outcome of the election, or

(c) a candidate was ineligible to be a candidate or to be elected.

(3) The appellant has the sole responsibility to provide relevant evidence in support of the appeal.

s. 63(4) In its decision Judicial Council may

(a) dismiss the appeal;

(b) disqualify the chief or one or more legislators from office;

(c) order a by-election for the office of chief or for some or all of the offices of legislator;

(d) make recommendations to the Tsawwassen Legislature.

(5) If Judicial Council finds that the appeal was filed without just cause, or if the appeal is denied, the deposit paid to make the appeal is forfeited to the Tsawwassen First Nation.

(7) The decision of Judicial Council is final.

s. 64 No election is to be declared invalid and the chief or a legislator is not to be disqualified by reason of mistake or non-compliance with this Act or the regulations if, in the opinion of Judicial Council,

(a) the non-compliance or mistake did not reasonably affect the final result of the election, and

(b) the election was otherwise conducted in accordance with this Act and the regulations.

There were two appeals of election filed. The appeals were heard together given the commonality of subject matter. Brief reasons for the appeals were set out in the Notices of Appeal. These reasons related to an alleged contravention of the Act or regulations and to an alleged infringement of constitutional rights. These issues are developed more fully later in these reasons. The person named as Respondent in the Notices was Bruce Mack, the election officer. This was the correct person to have been named, as he was the person who had overseen the election process and who had declared the election results. He made a written response and also submitted his Election Officer's Manual, a post-election report required under the *Election Act*.

In accordance with s. 63 (1) and (2) of the *Election Act*, Judicial Council notified the candidates in the election of the appeals and sent them copies of the supporting

documents. They were invited to make written responses. Nine of them did, though it should be noted that one of the appellants was also a candidate.

Because of the novelty and importance of these appeals, Judicial Council held an open pre-hearing conference on 10 November 2012 where all involved or interested could hear and ask questions about the procedure to be used at and before the hearing. At the pre-hearing conference, it was made clear that, in accordance with Tsawwassen First Nation custom, all from the Nation who wished to be heard would be heard, even though they were not named as appellants, respondents or as candidates in the election. It was also made clear that those who could not attend the hearing could submit written statements, though their non-attendance at the hearing and thus their inability to be questioned might affect the weight to be given to what they said. It was also made clear, again in conformity with TFN custom, that hearsay evidence would be accepted but its nature as hearsay might affect its weight.

The hearing was held on 24 November 2012.

B. The Issues

The issues in this matter can be categorised into two arguments:

1. That the issuance of the second election notice with the wrong weekday was an action that breached the Constitutional protections relating to voting rights.

2. That the issuance of the second election notice with the wrong weekday was a contravention of the *Election Act* that ought to invalidate the election.

C. The Constitutional Issue

The right to participate in an election and the right to vote are core constitutional values in any democratic society, such as the Tsawwassen First Nation. This core value has been discussed in constitutional terms in a number of Canadian decisions. While these decisions are not directly applicable to a consideration of the *Tsawwassen First Nation Constitution* ["*TFN Constitution*"], they are undoubtedly relevant as the *TFN Constitution* was evidently drafted with the Canadian constitutional documents in mind. Indeed, the *TFN Constitution's* provisions relating to voting rights are more detailed than the equivalent provision in the Canadian constitution and make explicit the details relating to those rights that are only implicit in the Canadian context.

1. The Relevant Provisions

The *TFN Constitution* provisions that are relevant in these appeals are:

> Chapter 4 - Rights and Freedoms

4.1 Members of the Tsawwassen First Nation are entitled to the recognition and protection of rights and freedoms under the governance of Tsawwassen First Nation including:

...

(b) political rights, including the right to vote and to publicly voice their opinions and to run for office in an election of the Chief, Legislature or other government bodies, as arise from time to time;

...

(d) equality rights and equal protection and benefit of the law;

(e) access to information, including the right to access Tsawwassen laws;

(f) electoral rights, including participation in elections and referenda;

... and

(j) equal access to programs and services delivered by the Tsawwassen Government.

Chapter 6 - Elections

6.1 The Tsawwassen Government will be democratically accountable and will hold elections at least every five years.

6.2 The Tsawwassen First Nation will have an Election Act which will set out the:

(a) criteria for Members holding public office;

(b) criteria for Members being eligible to vote;

(c) processes and procedures for nomination for election;

(d) procedures and requirements for all candidates meeting;

(e) processes and procedures for voter status;

(f) processes and procedures for election to public office;

(g) processes and procedures for appealing decisions about holding public office, eligibility to vote, nominations, voter status applications and elections; and

(h) processes and procedures for the removal of elected officials.

Thus, there are explicit constitutional guarantees of the right to vote, to voice political opinions, to run for office, to have access to information, to participate in elections, and to have an *Election Act* that sets out processes and procedures for an election and for an appeal of election.

2. The Canadian Context and Authority

In the Canadian context, s. 3 of the *Canadian Charter of Rights and Freedoms* ["*Canadian Charter*"] is the only equivalent provision. It says:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

There have been a number of decisions interpreting the meaning of s. 3 of the *Canadian Charter*. An important early case was *Dixon* v. *British Columbia (Attorney General)*, [1989] B.C.J. No. 583, 59 D.L.R. (4th) 247 (BCSC), where McLachlin, C.J.S.C., (as she then was) said that: "The maxim that a full and generous construction must be given to Charter rights and freedoms precludes a narrow, technical view of the right to vote. More is intended than the bare right to place a ballot in a box." Citing Boyer, *Political Rights: The Legal Framework of Elections in Canada* (1981), at pp. 81 et seq., she accepted that the following core values or rights form part of the s. 3 guarantee of the right to vote:

> 1. The right not to be denied the franchise on the grounds of race, sex, educational qualification or other unjustifiable criteria;
>
> 2. The right to be presented with a choice of candidates or parties;
>
> 3. The right to a secret ballot;
>
> 4. The right to have one's vote counted;
>
> 5. The right to have one's vote count for the same as other valid votes cast in a district;
>
> 6. The right to sufficient information about public policies to permit an informed decision;
>
> 7. The right to be represented by a candidate with at least a plurality of votes in a district;

8. The right to vote in periodic elections; and

9. The right to cast one's vote in an electoral system which has not been "gerrymandered" -- that is, deliberately engineered so as to favour one political party over another.

To this list, McLachlin C.J.S.C. said she would add "a tenth precept", namely "It cannot be denied that equality of voting power is fundamental to the Canadian concept of democracy."

There is every reason to assume that all these principles ought to be seen as guiding precepts in interpreting and applying the *TFN Constitution*. This statement of McLachlin C.J.S.C. has certainly been influential in the many Supreme Court of Canada cases that have considered the constitutional guarantee of the right to vote. [See, e.g., *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, [1991] S.C.J. No. 46.] In these later cases, of paramount importance has been the principle that the right to vote should be given a broad and liberal interpretation, both under the constitution and under specific election laws: *Haig* v. *Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, [1993] S.C.J. No. 84, per Cory J. at para. 102.

It has been established that voters ought in general to be treated equally, at least in the formal sense. In *Sauvé* v. *Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68, McLachlin C.J. said at paragraphs 34 and 35:

> The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.
>
> More broadly, denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual.

In *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, [1991] S.C.J. No. 46, McLachlin J. stressed the importance of "relative parity of voting power". She said that "A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted." (para. 50) That said, she noted that absolute parity is impossible and that "countervailing factors" ought to be taken into account. Such countervailing factors include geography, minority representation and difficulties in making an absolutely accurate electoral list.

In terms of ensuring voter parity and guaranteeing the right to vote, the courts in Canada have been reluctant to accept statutes that would exclude whole groups from voting: e.g. prisoners: *Sauvé* v. *Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 - though the constitutionality of laws excluding those convicted of crimes from *running* for office has been upheld: *Harvey* v. *New Brunswick (Attorney General)*, [1996] S.C.J. No. 82, [1996] 2 S.C.R. 876, as have restrictions on the age when one is eligible to vote: *Fitzgerald (Next friend of)* v. *Alberta*, [2002] A.J. No. 1544, 2002 ABQB 1086, appeal dismissed: [2004] A.J. No. 570, 2004 ABCA 184. Laws that set up procedural steps that tend to work hardship on some individuals or members of particular groups are subject to close scrutiny: e.g. *Henry* v. *Canada (Attorney General)*, [2010] B.C.J. No. 798, 2010 BCSC 610, though the voter ID requirements at issue in that case were upheld on a s. 1 *Canadian Charter* analysis.

In the *TFN Constitution*, it is not just the provisions specifically relating to voting that guarantee parity among voters, but also s. 4.1(d) that guarantees "equality rights and equal protection and benefit of the law".

The Canadian courts have taken care to underscore the right not just to cast a vote that counts but also to participate in a meaningful way in an election. In *Figueroa* v. *Canada (Attorney General)*, [2003] S.C.J. No. 37, 2003 SCC 37, Iacobucci J. said that "participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections". (para 29) [See also *Harper* v. *Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33, per Bastarache J. at para. 62.] In *Figueroa*, Iacobucci J. said at para. 26:

> Support for the proposition that s. 3 should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government, is found in the fact that the rights of s. 3 are participatory in nature. Section 3 does not advert to the composition of Parliament subsequent to an election, but only to the right of each citizen to a certain level of participation in the electoral process. On its very face, then, the central focus of s. 3 is the right of each citizen to participate in the electoral process. This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state. Defining the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the composition of Parliament subsequent to an election, better ensures that the right of participation that s. 3 explicitly protects is not construed too narrowly.

While a given voter does not have a right to an "unlimited" role in an election, Iacobucci J. said that each citizen is entitled to a "meaningful" role in the election process. (para. 36) Part of this participatory right - in a meaningful way - involves access to information

needed to exercise the right to vote. In *Harper* v. *Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33, Bastarache J. said that:

> The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has a right to be "reasonably informed of all the possible choices"....

These aspects of the constitutional protection of voting rights are part of ensuring "the maintenance of public confidence in the electoral system": per Bastarache J. at para. 17 of *R.* v. *Bryan*, [2007] S.C.J. No. 12, 2007 SCC 12. That was a case about the constitutionality of the law prohibiting the reporting of election results in one part of the country when polls in another part were still open. Bastarache J. said, in that regard: "Public confidence in the electoral system is dependent not only on the belief of Canadians that the election is fair in that the premature availability of returns does not affect the *outcome* of the election, but also on the belief in that the principle of information equality is upheld." (para. 46)

3. Application to the Present Appeals

The *TFN Constitution* makes these informational and participatory aspects of voting rights explicit in ss. 4.1(e) and (f).

The constitutional argument of the appellants here is that the mistake in the second notice led to the denial to them (or to some voters) of the information necessary to exercise their right to vote under s. 4.1(b). Their right (or the right of those other voters) to participate under s. 4.1(f) was thereby also infringed. The mistaken weekday, it is claimed, confused some voters and probably confused others. This misinformation, it is said, meant a denial of the information necessary to exercise the right to vote and to participate in the election. The basis of this claim is not just the mistaken date in the second notice but also the failure to ensure that every voter received the correction notice that was sent on 4 September. This was sent to the 75-or-so email addresses (the addressees of which may not have actually received the email or may not have opened it in time). It was also delivered to those resident on the TFN lands, but not otherwise because of the time constraints. Thus, a considerable number of voters were or may have been denied this additional information pertinent to the election.

While fully cognisant of the importance of the constitutional rights at issue, Judicial Council concludes, however, that there was no infringement of these rights in this matter.

One factor that stands out in all the Canadian constitutional cases, both where there was and was not found to have been a breach, is that there was a specific law whose constitutionality was impugned. That is not the case in the present situation. There is no

law or regulation that is being challenged here. Rather, it is what might be termed a mistake in the execution of the laws and regulations that is said to be the basis of the infringement of constitutional rights. While it is possible that such an action (as opposed to a specific law or regulation) might be the basis for constitutional scrutiny, the constitutional protections for voting rights are not really the appropriate legal mechanism to address such mistakes that were not directed at a particular individual or specified group. Indeed, the constitutional requirement under s. 6.2 of the *TFN Constitution* that an *Election Act* be promulgated to deal with procedural matters supports the idea that such procedural matters should be scrutinised under that Act, not the *TFN Constitution*, provided that the *Election Act* and regulations themselves comport with constitutional imperatives.

The election laws and regulations that are involved in these appeals and the electoral process established did not limit participatory or informational rights. It is significant that these laws and regulations are not themselves being impugned. The rules set up are in fact an exemplary set of processes and procedures designed to give abundant notice and information to voters and to facilitate their ability to participate. These rules did not exclude a category of person or a specific person from voting, except on the basis of membership in the Nation (equivalent to citizenship) and age, both accepted reasons for denying the right to vote. They did not impede the information that had to be provided to voters. In fact, as was established in evidence, there were numerous notices about the election and its date, all of them correct except the second notice, and that erroneous only with respect to the weekday. The election officials did what they could on the day before the election to notify potential voters of the mistake in the second notice. Thus, it was a small mistake in one step of these processes that is the source of the appellants' concerns.

While constitutional protections are at the heart of a legal systems of a Nation and, while they should be interpreted in a broad and generous fashion, they should not also be interpreted so that every circumvention of the rules or every administrative mistake leads to a claim that a constitutional right is infringed. Such an approach would risk trivialising these important constitutional rights. A court should be reluctant to find that a particular person's constitutional rights have been infringed when what occurred was an administrative mistake made in good faith and corrected as much and as soon as possible. This is especially so when the mistake was not in a proceeding or communication pertaining to any particular person or class of persons. The communication in question here was to the community at large. It was one of a number of other communications sent to the community at large that contained no mistake. The communication correcting it was sent to the community at large, to the limited extent that was possible in the short period of time available. The communication in question must also be seen in the context of an electoral process that otherwise has not been criticised and was conducted in accordance with the *Election Act* and regulations.

It cannot, therefore, be said that either the appellants' or anyone else's constitutional rights under Chapter 4 of the *TFN Constitution* were violated in this matter.

Concerns such as those in these appeals are better dealt with under the provisions of the *Election Act* that allow for an appeal of election. As noted earlier, s. 6.2 of the *TFN Constitution* appears to anticipate this conclusion, with its reference to the need for the promulgation of an *Election Act* to deal with procedural matters. The words of Cory J. in *Haig* v. *Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, [1993] S.C.J. No. 84, can be seen in this light. He said: "While the Canadian Charter of Rights and Freedoms guarantees certain electoral rights, the right to vote is generally granted and defined by statute." (para. 102)

It is to the *Election Act* that we now turn. A concern about a communication mistake, where that communication was directed at the community at large rather than a specific person or class of persons, is better considered in that context because such a complaint is better characterised as being one to the effect that the election process was unfair in general rather than that a particular person's constitutional rights were violated. The constitutional principles just considered are, nonetheless, still relevant under the *Election Act*.

D. The *Election Act* Issue

1. The Relevant Provisions

The relevant provisions of the *Election Act* bear repeating:

> s. 62(1) Within 30 days after election day, an eligible voter may appeal to Judicial Council the results of the election on the grounds that:
>
> > (a) this Act or the regulations were contravened and the contravention did or may have affected the outcome of the election,
> >
> > ...
>
> (3) The appellant has the sole responsibility to provide relevant evidence in support of the appeal.
>
> s. 63(4) In its decision Judicial Council may
>
> > (a) dismiss the appeal;
> >
> > (b) disqualify the chief or one or more legislators from office;
> >
> > (c) order a by-election for the office of chief or for some or all of the offices of legislator;
> >
> > (d) make recommendations to the Tsawwassen Legislature.

(5) If Judicial Council finds that the appeal was filed without just cause, or if the appeal is denied, the deposit paid to make the appeal is forfeited to the Tsawwassen First Nation.

(7) The decision of Judicial Council is final.

s. 64 No election is to be declared invalid and the chief or a legislator is not to be disqualified by reason of mistake or non-compliance with this Act or the regulations if, in the opinion of Judicial Council,

(a) the non-compliance or mistake did not reasonably affect the final result of the election, and

(b) the election was otherwise conducted in accordance with this Act and the regulations.

2. The Requirements for a Successful Appeal

Thus, the appellants must establish:

1. that the Act or regulations were contravened (s. 62(1)(a)), and

2. that the mistake or non-compliance reasonably affected the final result of the election (s. 64(a)).

There are two discrepancies between what s. 62(1)(a) says and what s. 64(a) says. In terms of the irregularity, s. 62(1)(a) speaks of a "contravention" of the Act or the regulations while s. 64 speaks of the "mistake or non-compliance" with the Act or the regulations. The latter seems to be an easier test to fulfill as a "mistake" might not be a "contravention" of the legislation. The stricter test under s. 62(1)(a) ought probably to be used, as that is the provision that sets out what the appellant must establish and it seems clear that a simple mistake that is not a contravention of the Act or the regulations is not sufficient. The other discrepancy relates to the impact of the contravention/mistake. Section 62(1)(a) says the appellant must show that the contravention "did or may have affected the outcome", while s. 64(a) says that the Judicial Council cannot give a remedy (i.e. annul the election or disqualify some or all of the winners) if the mistake or non-compliance with the Act or the regulations "did not reasonably affect the final result". In this situation, again, the stricter test - this time under s. 64(a) - ought to be preferred. The provision in s. 62(1)(a) relates to the ground of appeal, while the latter relates to the action Judicial Council can take. Therefore, it is the latter formulation - "did reasonably affect" - that governs the provision of any remedy in these appeals. Satisfying s. 62(1)(a) on this point is not sufficient if such satisfaction does not also bring the appellant within the scope of s. 64(a) that allows Judicial Council to give a remedy. On the other hand, if there is not a "contravention" under s. 62(1)(a), then the appellant has not established what is necessary to proceed to the remedies in s. 63 and s. 64. To summarise, then, in order for a remedy to be given, the appellants must establish that there was a

contravention of the Act or the regulations that reasonably affected the final result of the election.

3. The Burden of Proof

There is no doubt but that the burden of establishing these elements is on the appellants; section 62(3) effectively says as much. That said, if there is "a serious argument" that an election was irregular, it should be set aside: *Leaf* v. *Canada (Governor General in Council)*, [1988] 1 F.C. 575, [1987] F.C.J. No. 853 (TD), per Jerome A.C.J., at para. 30.

4. Canadian Authority

More or less similar provisions exist in various Canadian statutes and rules and the *Election Act* provisions are clearly derived from that legislative tradition. Therefore, cases decided under these various Canadian laws are of some relevance and will be considered. It is, however, important to note in considering these cases that the factual context is always quite different from case to case and some difference in wording in the election laws may be of relevance. There is no known Canadian case where precisely the same situation arose as affects the present appeals.

Of especial importance in the consideration of an election appeal is the very recent decision of the Supreme Court of Canada in *Opitz* v. *Wrzesnewskyj*, [2012] S.C.J. No. 55, 2012 SCC 55. In that case, in a federal election context, there were said to have been administrative errors made that allowed certain people to vote who ought not to have been allowed to do so, given that some prerequisite procedures had not been followed. The court was asked to hold that these irregularities had affected the result of the election such that it should be annulled. The majority of the Court rejected this contention, overturning the decision of the court below. In doing so, the Court set out a number of principles that are germane to the present appeals. It ought to be stressed, however, that *Opitz* was a case about a claim that people were allowed to vote because of administrative errors while the present case is about a claim that people were unable to vote because of an administrative mistake. That difference may be of significance in that in *Opitz* the court had a definite maximum number of votes (and therefore voters) who could be said to have been allowed to vote in breach of the rules; here, it can be argued that more than those voters who were discussed at the hearing in this matter might have had their votes affected. At its broadest, everybody who did not vote might have been affected by the mistake in this case. Thus, this case is necessarily less precise than was the case in *Opitz*. Furthermore, unlike *Opitz*, a decision in this case could affect (at its broadest) the "elected" status of all individuals who were "elected" on 5 September 2012. In *Opitz* the result in the case affected only one "elected" person. Thus, these appeals have the potential to be much more disruptive than was the case in *Opitz*.

Nonetheless, *Opitz* sets out the structure that ought to be used in these cases, even if the language there requires some adjustment to fit well. Rothstein and Moldaver JJ. gave the reasons for the majority in *Opitz*. They said at paragraph 23 that:

> In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. Since voting is conducted by secret ballot in Canada, this assessment cannot involve an investigation into voters' actual choices. If a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election.

In the present appeals, that basic approach can be adopted, though the equivalent question here is whether Judicial Council is satisfied that, if the inability of certain people to vote is established, it is also established that the winners are in doubt.

In assessing whether an irregularity could have affected the result, the majority in *Opitz* approved what they called the "substantive" approach, as opposed to the "strict procedural" approach. As to the distinction, Rothstein and Moldaver JJ. said at paragraph 57:

> The substantive approach is recommended by the fact that it focuses on the underlying right to vote, not merely on the procedures used to facilitate and protect that right. In our view, an approach that places a premium on substance is the approach to follow in determining whether there were "irregularities ... that affected the result of the election". On this approach, a judge should look at the whole of the evidence, with a view to determining whether a person who was not entitled to vote, voted. Unlike the "strict procedural" approach, evidence going to entitlement is admissible. By the same token, direct evidence of a lack of entitlement is not required. Proof of an irregularity may itself be sufficient to discount a vote.

The substantive approach will, presumably, result in fewer annulments of or disqualifications in elections than would be the case under a strict procedural approach.

The provisions of the Canada Elections Act at issue in *Opitz* are slightly different from the provisions in the TFN *Election Act*. Section 524(1) of the *Canada Elections Act* says:

> 524. (1) Any elector who was eligible to vote in an electoral district, and any candidate in an electoral district, may, by application to a competent court, contest the election in that electoral district on the grounds that
>
> > (*a*) under section 65 the elected candidate was not eligible to be a candidate; or
> >
> > (*b*) there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.

In the TFN *Election Act* at issue here, what must be established is that there was a "contravention" (rather than an irregularity, fraud or corrupt or illegal practice) that could *reasonably* have affected the result.

In considering whether there had been a breach of s. 524(1)(b), Rothstein and Moldaver JJ. said:

> 24 This case involves interpreting the phrase "irregularities ... that affected the result of the election". The phrase is composed of two elements: "irregularities" and "affected the result". As we shall explain, "irregularities" are serious administrative errors that are capable of undermining the electoral process -- the type of mistakes that are tied to and have a direct bearing on a person's right to vote.
>
> 25 "Affected the result" asks whether someone not entitled to vote, voted. Manifestly, if a vote is found to be invalid, it must be discounted, thereby altering the vote count, and in that sense, affecting the election's result. "Affected the result" could also include a situation where a person entitled to vote was improperly prevented from doing so, due to an irregularity on the part of an election official. ...
>
> 26 In construing the meaning of "irregularities ... that affected the result", we have taken into account a number of aides to statutory interpretation, among them: (1) the constitutional right to vote and the objectives of the Act; (2) the text and context of s. 524; and (3) the competing democratic values engaged.

According to this analysis, the constitutional issues considered earlier in these reasons are, therefore, relevant not just for the purposes of the constitutional challenge, but also as an "aide to statutory interpretation" of the *Election Act*. The interpretation of its provisions should be made so as to further those constitutional imperatives, even if it cannot be said that there was a breach of the *TFN Constitution* itself. In particular informational irregularities ought to be considered as having the potential to reasonably affect the election outcome.

5. The Value of Certainty in Elections

In *Opitz*, the majority stressed the requirement of a serious irregularity in part because of the competing values and imperatives that preclude a need for or expectation of absolute perfection in an electoral process. Rothstein and Moldaver JJ. said at paragraph 44:

> Central to the issue before us is how willing a court should be to reject a vote because of statutory non-compliance. Although there are safeguards in place to prevent abuse, the Act accepts some uncertainty in the conduct of elections, since in theory, more onerous and accurate methods of identification and record-keeping could be adopted. The balance struck by the Act reflects the fact that our electoral system must balance several interrelated and sometimes conflicting

> values. Those values include certainty, accuracy, fairness, accessibility, voter anonymity, promptness, finality, legitimacy, efficiency and cost. But the central value is the *Charter*-protected right to vote.

In these appeals, as noted earlier, the disruption to the electoral process might be complete if the result of the appeals is an annulment of the whole election. A number of those who gave evidence at the hearing noted the tensions, divisions, intemperate language, bitterness and hard feelings this matter has already caused within the Nation. A new election, even if it were not for all legislative and executive (including Chief) positions, might do little to lessen those negative sentiments. The contrary may, in fact, quite occur. Furthermore, any degree of success in these appeals would likely increase the "margin of litigation" in the future. All participants in this process have commented with concern on the cost and complexity of the election appeal process. These concerns are not unique to the TFN procedure. In fact all election appeals involve rather complex litigation.

6. Establishing a Contravention or Mistake

In *Opitz*, the Court said that an "irregularity" in order to be relevant had to be "serious". It justified that interpretation in part on the basis of the language in s. 524(1)(b) of the *Canada Election Act* - i.e. its listing along with concerns such as fraud and illegal practices. The TFN *Election Act's* use of the term "contravention" can be seen as comprehending all those events listed in the *Canada Elections Act* provision. As the court did in *Opitz*, therefore, it is appropriate to import some requirement of seriousness into a misstep in order to make it a "contravention" in the meaning of s. 62(1)(a). The idea of seriousness is clearly implicit also in the requirement that the contravention have affected the outcome.

One of the problems for the appellants in this case is identifying what law or regulation was contravened. Section 32(2)(a) of the *Election Act* and sections 5 and 8 of the Election Notice Regulation require that "the date of the election day" be set out in the first and second notices of election. There was no mistake in the first notice and the calendar date of the election was actually correct in the second notice. What was potentially misleading, however, was that the weekday associated with that date was wrong. The appellants are burdened with establishing that this misleading information constituted a "contravention" of the requirement as to the "date" and then that it was of sufficient seriousness so as to have reasonably affected the outcome of the election.

It was argued that there was not one mistake but two in this election process. The first mistake was in the weekday set out in the second notice. The other mistake, some argued, was in the response of the electoral officer, Bruce Mack, when he was informed of the mistake in the notice. It was argued that he ought to have postponed the election to give enough time to notify everybody, on and off the TFN lands and whether or not they had a working email address, of the mistake in the weekday.

There will always be errors, mistakes, glitches, and irregularities of one sort or other in any election: *Camsell* v. *Rabesca*, [1987] N.W.T.J. No. 19, [1987] N.W.T.R. 186 (SC). In *Melnychuk* v. *Heard*, [1963] A.J. No. 72, 45 W.W.R. 257 (SC), it was held that the improper designation of one candidate as "Dr." on the ballot was not a "serious" irregularity. Greschuk J. warned against using "technical and formal" objections as the basis for overturning an election. He thought it of relevance in that case that there was "a general honest intention" on the part of the officials in charge of the election. (paragraph 40) Was the contravention in these appeals - assuming there was one - serious enough to overcome other imperatives that need to be considered in the electoral process, not least the value of certainty of result? Put another way: was the "process leading to ... the Vote ... sufficiently informative"? (per Russell J. at para 75 of *Nekaneet First Nation* v. *Oakes*, [2009] F.C.J. No. 183, 2009 FC 134, 341 F.T.R. 132)

There was, to be sure, a mistake in the weekday in the second notice. The law requires only that the date be set out and that was correct in the narrow, strict sense. Given that a broader interpretation of "date" might be said to relate to the weekday as well as the date in the strict sense, the Judicial Council accepts that the mistake satisfies the basic ingredient for a contravention. Was it serious enough, however, that it can be said to have been a "contravention" that leads to scrutiny under the *Election Act*? For these purposes we consider only the second notice and the corrective action taken on 4 September. We consider that the mistake on its own had the *potential* to be a contravention *that affected the election result*. Whether it did or not will be considered later in this decision.

It is *possible* that some may have paid little attention to any notice other than the second notice and that they might have focussed on the weekday and not the specific calendar date. If it could be said that all such people would have been reached by the corrective notices sent out on 4 September then there could not be said to have been a contravention, despite the mistake in the second notice. It is quite probable, however, that if there were people who relied only at the weekday in the second notice, not all such persons may not have received or read the corrective notices that were sent out. Only about 75 emails were sent and not all households can be said to have received one. The paper corrections were delivered only to those residing on TFN lands. Therefore, the requirement under section 32(2)(a) of the *Election Act* and sections 5 and 8 of the Election Notice Regulation that "the date of the election day" be set out in the second notice of election was contravened in this election.

As for the assertion that the failure of the election officer to postpone the election constituted a separate and additional contravention, the Judicial Council disagrees. Section 62(1)(a) of the *Election Act* clearly states that there must be a contravention of "this Act or the regulations". There is no provision for postponing the election in either the Act or the regulations. The electoral officer appears to have no authority to make such a postponement. Therefore, on this point, there cannot be said to have been a contravention.

7. Effect of Contravention or Mistake on Election Results

We now turn to consider whether it has been shown that the contravention reasonably affected the outcome of the election. It is this step in the appeal process that is at the very heart of these particular appeals. In order for this step to be satisfied, the appellants must have presented evidence that the final result can reasonably be said to have been affected.

Pursuant to *Opitz*, the effect on the results of the election by the "irregularity" under the "substantive" approach" is regulated by what is called the "magic number" test. Rothstein and Moldaver JJ. described this as follows:

> 71 To date, the only approach taken by Canadian courts in assessing contested election applications has been the "magic number" test referred to in *O'Brien* (p. 93). On this test, the election must be annulled if the rejected votes are equal to or outnumber the winner's plurality (*Blanchard*, at p. 320). [Referencing *O'Brien v. Hamel* (1990), 73 O.R. (2d) 87 (H.C.J.), and *Blanchard v. Cole*, [1950] 4 D.L.R. 316 (N.S.S.C.)]
>
> 72 The "magic number" test is simple. However, it inherently favours the challenger. It assumes that all of the rejected votes were cast for the successful candidate. In reality, this is highly improbable. However, no alternative test has been developed. No evidence has been presented in this case to support any form of statistical test that would be reliable and that would not compromise the secrecy of the ballot.
>
> 73 Accordingly, for the purposes of this application, we would utilize the magic number test. The election should be annulled when the number of rejected votes is equal to or greater than the successful candidate's margin of victory. However, we do not rule out the possibility that another, more realistic method for assessing contested election applications might be adopted by a court in a future case.

As discussed earlier, this case is more complicated than was *Opitz* because of the number of election winners who could be affected by a successful appeal. Different winners won by different numbers. One legislator candidate won with only 3 votes more than another candidate who lost. The winning candidate for Chief had 9 votes more than the losing candidate. One person made it into the Executive Council with only 4 votes more than the person with the next highest number of votes - who did not make it into the Executive Council. For these three specific situations the "magic numbers" are 3, 9 and 4 votes respectively.

It is important, therefore, to examine the evidence to determine how many people can be said to have been prevented from voting by the contravention in this case. According to *Opitz*, it does not have to be shown that those who were prevented from voting would have voted for candidates other than those who won on 5 September. It does, however, have to be established that there were enough people affected so as to meet the magic number(s).

The appellants argued that so long as it could be shown that one person was affected then that was sufficient as it could be assumed that others were also affected. It was argued that many people were reluctant to come forward with an assertion that they were affected. This was explained on the basis of personal or cultural reticence or deference and on the basis of fear of retribution of some sort. These concerns are not, however, peculiar to the TFN and must arise to a greater or lesser extent in all election appeals in all communities. To allow the appeal on such a basis is speculative and hypothetical, even if those asserting such possibilities sincerely believe these circumstances. To the extent that it is based on general assertions of retribution it would be doubly speculative and hypothetical.

All Canadian authorities are opposed to such an approach. It is important in considering if a contravention of the Act or regulations reasonably affected the result to deal in "probabilities and not on possibilities of conjecture": per Greschuk J. at paragraph 45 of *Melnychuk* v. *Heard*, [1963] A.J. No. 72, 45 W.W.R. 257 (SC). In *Henry* v. *Canada (Attorney General)*, [2010] B.C.J. No. 798, 2010 BCSC 610, the voter ID case referred to earlier, C. Lynn Smith J. said at paragraph 180: "Courts should not decide hypothetical issues." A court ought not to act on the basis of speculation: *Big "C" First Nation* v. *Big "C" First Nation (Election Appeal Tribunal)*, [1994] F.C.J. No. 784, 80 F.T.R. 49, at para. 7; *Landry* v. *Savard*, [2011] F.C.J. No. 900, 2011 FC 720, at para. 66. It helps the appellants' argument - but it is not sufficient - to establish that one person who would have voted did not because of the mistake in the weekday set out in the notice. A number of people did not vote in the election currently under appeal. It ought not to be hypothesised that they did not vote because of the mistake in the second notice. That is pure speculation. Some people might not receive any notice but the election would not be said to have been affected by that fact: *Camsell* v. *Rabesca*, [1987] N.W.T.J. No. 19, [1987] N.W.T.R. 186 (SC).

Therefore, it is necessary to focus on situations where there was some actual evidence in this case. It is those specific situations that are to be used to generate the magic number(s), if indeed that or those number(s) can be reached.

Because of the quasi-administrative nature of Judicial Council's role and because of the importance of the oral traditions of this Nation, Judicial Council made it clear that evidence that would normally be excluded altogether as hearsay could be accepted in this proceeding when it was given by a person who was sworn or affirmed. Judicial Council also accepted that written statements from voters and other interested parties could be appended to responses submitted by the parties or the candidates. In both these situations, however, it was made clear that the weight such evidence would be given could be affected if the persons who were implicated in the hearsay evidence or who made a written statement were not available to be questioned by Judicial Council or the parties who attended at the hearing. The good faith and sincerity of those who gave sworn or affirmed evidence cannot be doubted. Judicial Council does not question the belief in the truth of such evidence of any person who gave it. Judicial Council was, it should be noted, struck by the depth of belief and the conviction of all who gave sworn or affirmed

testimony. Furthermore, Judicial Council notes the traditional approach in the Tsawwassen First Nation of elder family members speaking for those in their families.

There was evidence in some form or another about various individuals who were said not to have been able to vote because of the mistake in the second notice. These individuals fall into five categories in terms of the evidence with respect to them.

The first category - that contains only the appellant Shellard - consists of the person who gave direct evidence in person at the hearing.

The second category consists of persons who made written unsworn statements containing some detail about why they could not vote because of the mistake in the second notice and about whom there was some testimony given under oath at the hearing. Only one person fits into this category.

The third category consists of persons who made brief, written, unsworn statements simply saying they could not vote because of the mistake but who gave no further detail. Additionally, there was testimony given under oath by others at the hearing about these individuals. Three persons fit into this category.

The fourth category consists of persons who made no statement at all but who were discussed by name by others in their written responses or in their evidence under oath at the hearing. Those who spoke about such individuals in their written responses or under oath were all closely connected, usually through family ties, with those about whom they spoke. Five or six persons fall into this category.

The fifth category consists of persons who made no statement at all and were not identified at all by anybody who gave direct evidence in person at the hearing. These people were simply described as being a part of a group of "5" or "6" or "a long list".

Judicial Council accepts that the appellant Shellard (the only person in the first category) was unable to vote because of the mistake in the weekday in the second notice.

As for the other categories, it is possible that little or no weight should be given to the evidence with respect to these persons, in light of the nature of the evidence as being hearsay or the persons not being present for questioning. Nonetheless, Judicial Council accepts that there is sufficient and weighty evidence, particularly in light of the traditions of the Tsawwassen First Nation, with respect to the persons in the second, third and fourth categories. There is no reason to doubt the evidence as to these persons that was given at the hearing or in the written responses. In all cases such persons were referred to by name and an explanation was given as to why the person being referred to did not attend the hearing. Furthermore, there was no challenge to this evidence at the hearing. That these individuals were affected is a probability, not a mere "possibility of conjecture" in the language of Greschuk J. at paragraph 45 of *Melnychuk* v. *Heard*, [1963] A.J. No. 72, 45 W.W.R. 257 (SC)

As for the persons in the fifth category, Judicial Council does not accept that the evidence is sufficiently compelling or weighty that it can be used. There is simply no detail as to who these unnamed individuals were.

8. Conclusion as to Effect on the Election

As discussed earlier in these reasons, it has to be shown that at least 3 votes were affected by the mistake in the second notice in order for there to have been any impact on the results. To affect all aspects of the vote, there must be at least 9 votes that were reasonably affected by the mistake in the second notice. Judicial Council concludes that it has been established by the appellants on the balance of possibilities that over 9 votes were affected. That is sufficient to say that the results of the 5 September were in their entirety reasonably affected.

9. Additional Factors

It is appropriate to consider other factors relating to the appeals that were raised in evidence or in argument.

The first has to do with general knowledge - apart from the official notices - that there was an election. There is authority for the relevance of the fact that it is generally known that there is to be an election. In *Danyluk* v. *Wemindji Band (Wemindji Eeyou)*, [2004] 1 C.N.L.R. 87 (Court of Quebec, Civil Division), a telephone vote was allowed without proper authorisation. Lavergne J.Q.C. refused to annul the election. He said at paragraph 97: "It would not be appropriate to compromise the exercise of a democratic right on the grounds of the non observance of formalities that do not cause a prejudice to the free and full expression of a choice." Of relevance was the fact that it was widely known that the vote was being held. If there is no notice at all, however, then the outcome of the election can be said to have been affected: *Salt River First Nation 195 (Council)* v. Salt *River First Nation 195*, [2004] 1 C.N.L.R. 319 (FCA). In this case, there were a number of official and unofficial notices. There were election signs posted around the community. This is a close-knit and small community. The election was a major event. That said, nobody doubted that there was knowledge of the election. It was not the event itself that was unclear but the day on which the election would be held.

The election officer, Bruce Mack, gave evidence that there were no concerns expressed at all about possible confusion as to the date of the election until the call on 4 September. No person showed up to vote on the 6th. Furthermore, no mail-in ballots were received after election day. While this evidence is certainly relevant it does not explain away the issue of concern in this case. The fact that nobody questioned the information in the second notice could well be the result of persons reading it differently. Some may have ignored that notice. Some may have focussed on the date in the strict sense. Others may have focussed on the weekday set out in the second notice. The evidence supports this assessment. Nobody had reason to point out the mistake in the notice if they did not realise it existed. As to nobody's showing up to vote on the 6th, that was likely because they heard in the evening of the 5th or the morning of the 6th that the results had been

declared. There was considerable media attention given to these results. The appellant Shellard gave evidence that she heard about the results in the media before she went to vote and therefore concluded there was no point in going to vote. As for the mail-in votes, there is no reason why any would have arrived on the 6th. Those who chose to vote by mail would likely do well in advance of *any* deadline to ensure that their votes would be counted. Bruce Mack also gave evidence that nobody contacted the election officials after the 5th with their concerns. The appellant Shellard states that she did in fact make such a call, but that may not have been received. In any event such expression of concern are of little relevance when the *Election Act* itself establishes these appeals as the method by which concern should be expressed.

Another issue relates to the percentage turn-out for the election. The margin of victory and the number of votes that might have been affected by a mistake will be of some relevance: *Leonard* v. *Courtenay (Chief Election Officer)*, [2003] B.C.J. No. 281, 2003 BCSC 203. Also of relevance is the voter turn-out rate at the election, perhaps as compared with other elections: *Nekaneet First Nation* v. *Oakes*, [2009] F.C.J. No. 183, 2009 FC 134, 341 F.T.R. 132, at para. 41. In the present appeals, the evidence in this regard is equivocal. The voter turn-out rate was 58.1%. For the previous general election in 2009, the rate was 48.5%, but the position of Chief was not contested then. For the 2007 general election, there was a 59.9% turn-out rate when there was a contest for the position as Chief. There was a 44.4% turn-out rate for the 2012 *Land Act* referendum and a 75.4% turn-out rate for the 2009 Treaty referendum. The election that is the subject of these appeals was an election that attracted considerable community attention and energy. In this context, the turn-out rate would be expected to be high and perhaps higher than what actually occurred. That said, the evidence here is inconclusive.

A final factor to take into account in these appeals is the effect that allowing the appeals would have on the value of certainty that ought to arise from an election process. The importance of this issue was underscored in *Opitz* and was discussed earlier. The uncertainty that is caused by allowing the appeals in this case is significant. Not just one winning candidate is affected, but all winning candidates. Allowing the appeals in this case may perhaps encourage litigation in any future election where any mistake in procedure or in notices is made. That said, such concerns cannot outweigh the fact that some people have been disenfranchised by what has occurred. As discussed in the section earlier on constitutional issues, the right to vote is of paramount importance and should not be too readily denied. The right for all to participate in elections is especially important in the TFN in these early days of the new constitutional arrangement.

E. Result

After giving this matter our very best consideration, we have unanimously determined that these appeals should be allowed and that the entire result of the 5 September 2012 general election is, therefore, declared to be invalid.

F. Consequences of Allowing the Appeals

The final issue to address is what happens as a result of allowing these appeals.

It cannot be assumed that the *TFN Constitution* and legislation of the TFN were intended to result in the Nation being without a Chief and government even for a few weeks while new elections are held. That said those laws also do not explicitly say what is to happen in these circumstances, though, as noted, s. 64 of the *Election Act* does contemplate that the results of an election might be annulled.

It is true that s. 77(1) of the *Election Act* provides:

> If at a general election there is no one acclaimed or elected as legislator, or if there are an insufficient number of legislators acclaimed or elected to form a quorum in the Tsawwassen Legislature, Judicial Council becomes the trustee of the Tsawwassen First Nation pending further elections.

That result ought to be avoided if at all possible as it results in unelected people, most of whom are not TFN members, controlling the affairs of the Nation. In any event, s. 77(1) appears to apply when there has been a valid election held but there is an insufficiency in the number of candidates to make an effective government. That is not the situation here. There were sufficient candidates. The problem is the invalidity of the election.

The alternatives are that those "elected" on 5 September 2012 be deemed to continue in office until new elections can be held or that those elected in 2009 be deemed to continue in office until new elections can be held.

Supporting the latter approach is the decision in *Villeneuve* v. *Deninu Ku'e First Nation***,** [2010] F.C.J. No. 794, 2010 FC 655, 373 F.T.R. 89. In that case the purported election of Chief and Council was held to be invalid as it was not held in accordance with the Customary Election Regulations of the Deninu K'ue First Nation. The question then arose as to what resulted from that annulment. Zinn J. held that the previous government should be said to continue in office, despite the expiration of their term, until new elections could be held. That case can be distinguished, however, because the relevant legislation there said that those elected to office held office until new elections were held. In this case, s. 3(1) of the TFN *Election Act* clearly states that the maximum term of office is 36 months. Those elected on 17 September 2009 simply have no authority beyond 17 September 2012.

Those "elected" on 5 September 2012 have not had their good faith impugned. There has been no suggestion that they were responsible for the contravention that is the subject of these appeals. They are in place and have been acting for the past few months. To allow them to continue to act until new elections are held - and that process should be started forthwith - is the least disruptive solution to the allowing of these appeals. The authority discussed earlier in these reasons stressed that an election appeal should lead to as little disruption as possible while still ensuring that fair elections be held and that people's

voting rights be respected. Therefore, we declare that those elected on 5 September 2012 are deemed to validly hold office until the result of the new election is known. This result is broadly consistent with s. 61 of the *Election Act* that provides that a candidate declared elected by the election officer takes office despite an appeal to Judicial Council. That provision is not directly applicable here because it does not state what happens once the appeal is decided and allowed. However, it does illustrate the idea that election appeals should not result in there being no government in place.

G. Orders

In the result, we make the following orders:

> 1. The appeals filed on 5 October 2012, and assigned file numbers JC00102 and JC00103, are allowed and the deposits made by the appellants refunded.
>
> 2. The entire result of the general election held on 5 September 2012 is declared to be invalid, except that those declared elected on 5 September 2012 are deemed to validly hold office until the result of the new general election is known and confirmed.
>
> 3. The Executive Council must post notice by no later than 11 January 2013 of the date for a general election, pursuant to s. 6(2) of the *Election Act*.

11 December 2012