

Frog Lake 2023 General Election Appeal

Rita Quinney

Appellant

Decision of the Election Appeal Committee

Heard by: Tanner Stanley (Chair); Elaine Carter; Doris Okanee; and Linda Potts.

Decision of the Election Appeal Committee:

1. This is one of four Appeals of the 2023 Frog Lake General Election held on April 26, 2023 (the “Election”) heard by the Election Appeal Committee (the “Committee”) at the Appeal Hearings held on June 10, 2023 at Frog Lake (the “Hearing”).
2. The Election and its Appeals are governed by the Frog Lake First Nations Election Code dated November 12, 2023 (the “Code”).

Preliminary Matters

3. Rita Quinney (the “Appellant”) filed this Appeal on May 3, 2023. The Committee exercised its discretion under section 9.6(b) of the Code to schedule the Hearings after the period for filing appeals had expired.
4. In a Notice of Appeal Hearings and Deadlines dated May 17, 2023 the Committee established the process for seeking to participate in an Appeal Hearing and a deadline of May 30, 2023 for filing documents and submitting the names of witnesses who would be called.
5. The Committee did not receive any applications to intervene, respond, or participate in this Appeal.

Grounds of Appeal

6. The Appellant alleged that the votes for Councillors were miscounted.
7. The Code sets out four grounds for appealing the result of an Election in section 9.1(a)(i):
 - A. an error was made in the application of the Election Code that would have directly affected the outcome of the Election;
 - B. there was a violation of this Election Code or the Candidate Campaign Code of Conduct that would have directly affected the outcome of the Election;
 - C. a sufficient number of ineligible individuals voted so as to affect the outcome of the Election; or
 - D. a sufficient number of rejected or spoiled ballots were cast to affect the outcome of the Election.
8. The Appellant's allegations of a miscount are allegations of an error under section (A) and/or a violation under section (B).

Remedy Sought

9. The remedies that the Committee has the power to grant when the results of an Election are Appealed are set out in section 9.3(e)(i) of the Code. In addition to determining any constitutional matters the Appeal Committee may:

dismiss the appeal;
order a recount; and/or
set aside an Election, in whole or in part, and call for a new Election for one or more positions.
10. The Appellant has sought for the Committee to set aside the Election and call for new Election under sections 9.1(e)(i)(B)(2) and 9.1(e)(i)(D).
11. The Appellant has not sought a recount under section 9.1(e)(i)(B)(1). The Appellant has submitted that a recount would not be an adequate remedy for her Appeal, as she has lost trust in the Electoral Officer.

Burden of Proof

12. In *Opitz v Wrzesnewskyj*, 2012 SCC 55 (“*Opitz*”) the Supreme Court of Canada made it clear that overturning an Election should not be done lightly.
13. The role of the Committee is primarily to determine the truth of matters brought before it. The Election Code requires an Appellant to have reasonable and probable grounds for their Appeal (section 9.1(a)(i)).

14. The legal burden of proof for establishing the grounds of a claim or appeal in most circumstances is a balance of probabilities.
15. Taking these factors into account the Committee has determined that the Appellant has the burden to prove the grounds of their Appeal on a balance of probabilities. This means that an Appellant must evidence that all aspects of the grounds of appeal are more likely to have occurred than not.

Issues

16. There are two issues raised in this appeal:
 - a. Were the votes for Councillor miscounted; and
 - b. If the votes were miscounted, did it directly affect the outcome of the Election.

Evidence

17. The Appellant submitted documentary evidence and gave sworn testimony in support of her Appeal at the Hearing.
18. The documentary evidence submitted included photographs of papers that were used to tally and total votes at the vote count and an unsworn witness statement of Ruby Stanley.

Documents

19. At the Hearing the Appellant testified that the tally papers were used for the Councillors vote count at the polling station in Frog Lake, and that she took the photographs herself. The Committee accepts this evidence. The Appellant testified that the paper with the total votes labeled "Official Count Declaration - Council", was left at the polling station in Frog Lake and that she took the photograph of it herself. The Committee notes the document specified it was for ballots recorded at the Fieldhouse Facility, identified how many electronic and physical ballots a candidate received, and incorrectly identified Frog Lake as located within British Columbia, not Alberta.
20. As Ruby Stanley did not swear her witness statement and did not act as a witness in this Appeal the Committee has given little weight to her witness statement.

Sworn Testimony

21. The Appellant testified that the Councillors vote count was done incorrectly. She identified inconsistencies in the number of tally marks on the tally sheets and the numbers written down on the tally sheets and in the vote totals. She also identified inconsistencies between the vote totals on the sheets photographed at the polling station and the vote totals in the Final Electoral Officer's Report. The Appellant also testified that there was only one person at the table counting votes and that there was no one double checking the vote count.

Factual Findings

22. The Committee found the witness to be credible and accepts her testimony as set out above. There are discrepancies on the tally sheet between the number of tally marks and the written number representing the total of the tally marks. In the case of each discrepancy the number written to represent the total number of tallies is ten greater than the actual number of tally marks. There are also discrepancies between the vote totals on the sheets photographed at the polling station and the vote totals in the Final Electoral Officer's Report.

Analysis

Were the Votes Miscounted

23. Although the documents submitted have discrepancies on their face and differ from the Final Electoral Officer's Report, there is no evidence that discrepancies on the tally sheets were left uncorrected in the final vote count or that the vote count sheet photographed at the polling station titled "Official Count Declaration - Council", was actually intended to be and truly was a final and correct copy of the total vote count for all polls (online, mail-in, Edmonton-advance, and the Election day poll at the Field House).
24. The Committee is also not prepared to conclude that votes were miscounted on the basis that no one was double checking the count. The Committee does not accept that it is more probable than not that the votes were miscounted because they were not double checked.
25. In reaching its conclusion on this issue the Committee has been mindful of the supervisory role of scrutineers under the Code with respect to the vote count and handling of ballots.
26. Under section 8.1(e) of the Code scrutineers may submit objections with respect to the handling and counting of the ballots to the Election Officer. The Electoral Officer is in the best position to determine whether an error or violation has occurred and to take corrective action as required by section 8.1(g). The Electoral Officer is also required to record the time, substance, and evidence of all objections under section 8.1(f). There is no evidence that scrutineers made objections to the Electoral Officer under these provisions.
27. Based on the evidence submitted the Committee is not persuaded that, on a balance of probabilities, the votes were miscounted.

Was the Outcome Directly Affected

28. All grounds of Appeal under the Code require the Appellant to demonstrate that the outcome of the Election was affected.
29. In both Canadian elections (*Opitz* at para 71) and First Nations' customary elections (*Johnstone v Mistawasis Nehiyawak First Nation*, 2022 FC 492 at paras 83-88) the legal test that is applied for determining whether the outcome of an Election was affected is the 'magic numbers' test.

30. This test asks whether the number of impugned votes is greater than the margin of victory. In this case the impugned votes are the number of votes proven to have been miscounted and the margin of victory is the difference between the number of votes for the Candidate elected to the sixth Councillor position and the Candidate for Councillor who came in seventh.
31. The Final Electoral Officer's Report lists 277 votes for Wanda Stanley as the Candidate elected to the sixth Councillor position and 208 votes for Hans McCarthy as the Candidate for Councillor who came in seventh, this difference is 69 votes. Thus, the margin of victory for the magic numbers test is 69 votes.
32. In order to prove on a balance of probabilities that the alleged miscount directly affected the outcome the Appellant must provide persuasive evidence (*Bird v Paul First Nation*, 2020 FC 475 at para 30) that, on a balance of probabilities, more than 69 votes were miscounted to change the outcome of electing the sixth councillor.
33. The Committee is not persuaded that, on a balance of probabilities, any votes were persuasively evidenced to be uncorrected in the Final Electoral Officer's Report. However, the Committee also finds that the evidence provided could not have impugned a greater number of votes than the margin of victory when considering:
 - a. the discrepancies in the tally sheets amounted to overcounting ten votes each to five different Candidates;
 - b. the discrepancies between the vote total on the sheet photographed at the polling station and the vote total in the Final Electoral Officer's Report, ranges from 0 to 42 votes per Candidate; and
 - c. the same six Candidates for Councillor are successful in the vote totals on both the sheet photographed at the polling station and in the vote total in the Final Electoral Officer's Report by a similar margin
34. The Committee finds that the Appellant has not demonstrated that on a balance of probabilities, more than 69 votes for Councillors were miscounted, and concludes that the outcome of the Election was not affected by a miscount of the votes for Councillors.

Decision

35. For the reasons above, the Committee dismisses the Appeal by a simple majority vote.

Dated: June 23, 2023

Tanner Stanley
Name


Signed

Chair of the Frog Lake First Nation Elections Appeal Committee