C.A. No. CV3444

IN THE COURT OF APPEAL FOR SASKATCHEWAN

Between

PRINCE ALBERT RIGHT TO LIFE ASSOCIATION AND VALERIE HETTRICK

Appellants (Applicants)

- and -

CITY OF PRINCE ALBERT

Respondent (Respondent)

APPELLANTS' FACTUM IN REPLY ON CROSS-APPEAL

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PART I. INTRODUCTION

1. This is the Appellants' responding Factum to the Respondent City of Prince Albert's (the "City's") Cross Appeal, submitted pursuant to Rule 33 of the *Court of Appeal Rules (Civil)*.

2. The City's arguments on its Cross Appeal appear throughout its Factum.[1] The Cross Appeal primarily claims that the Chambers Judge erred in her decision regarding costs, which she awarded in favour of the Appellants in the amount of $6,000, despite dismissing their Originating Application on grounds of mootness.[2]

3. The Cross Appeal also attacks the evidential basis for the Chambers Judge's conclusion that the City failed to fairly consider the Appellants' application to fly their flag on the City's courtesy flagpole.[3] It says that the Chambers Judge "erred in making findings of fact and law based on presumption rather than evidence".[4] The City further says that the Chambers Judge "erred in misapplying the Doctrine of Legitimate Expectations in finding that the Appellants had 'legitimate expectations' that procedural fairness was owed to them by the Respondents".[5] The City seeks to use these arguments to undermine the Chambers Judge's costs order.[6]

4. The Chambers Judge did not err in her findings. The Chambers Judge set aside the need to reach certain legal conclusions for purposes of her analysis of mootness. Her presumptions for the purpose of argument do not affect her factual findings. She correctly applied the doctrine of legitimate expectations.

5. The Chambers Judge made clear findings of fact, firmly based in the evidence, which are more than sufficient to support both her costs award and the relief we seek on this appeal.

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[1] The City's arguments on its Cross Appeal appear at various places in its Factum: paras 7-8, 13-15, 33, 73-85 ("The Chambers Judge erred in applying presumptions"), paras 86-90 ("The Chambers judge misapplied the doctrine of legitimate expectations"), paras 118-124 ("The costs award was unreasonable"), and para 125.
[2] Notice of Cross Appeal, para. 2(a), Appeal Book ("AB") Tab 8, p 329.
[3] The Cross Appeal says at para. 2(b) that the Chambers Judge made "errors based in fact and law at paragraphs 22-23, 30-32, 39-40,and 60" of her decision. These paragraphs contain the Chambers Judge's conclusions regarding the City's failure to fairly address the Appellants' application to use the Courtesy Flagpole.
[4] Notice of Cross Appeal, para 3(a), AB Tab 8, p 329.
[5] Notice of Cross Appeal, para 3(b), AB Tab 8, p 330.
[6] Respondent's Factum, paras 7, 118-119; Notice of Cross Appeal, para 3(a)(v), AB Tab 8, p 330.

PART II. JURISDICTION AND STANDARD OF REVIEW

6. The Court's jurisdiction for the Cross Appeal is provided in sections 7(2)(a) and 10 of *The Court of Appeal Act, 2000*.[7]

7. This Court will generally defer to a judge's costs order, as described by this Court in *McNabb v Cyr*:

> It is well-settled that an order of costs is a discretionary order and that an appellate court will interfere only if it is shown that the order was made arbitrarily or without regard to the applicable principles. In *Wongstedt v Wongstedt*, 2017 SKCA 100 (CanLII), [2018] 4 WWR 82, Caldwell J.A. said, "the appellate court looks to see whether the judge misapplied some governing principle or rule or disregarded some critical fact or other consideration or whether the costs award is itself 'so obviously unjust as to invite intervention'" (at para 41, quoting *Benson v Benson* (1994), 1994 CanLII 4554 (SK CA), 120 Sask R 17 (CA) at para 90). See also *K.R. v J.K.*, 2018 SKCA 35 (CanLII).[8]

PART III. SUMMARY OF FACTS

8. The Appellants recounted the facts in their initial Factum. We say further that the City was well aware of the Appellants' freedom of expression and its significance for their application to fly their flag before their 2017 application.

9. The City granted the Appellants' application to fly their flag in 2016 *after* the City had created its new *Flag Protocol Policy*. In fact in 2016, the City, specifically its Mayor, vocally and publicly defended the right of the Appellants to fly their flag on the courtesy flagpole, expressly on the basis of Canada's constitutional protection for freedom of expression.[9]

PART IV. POINTS IN ISSUE

10. This Factum addresses the following points from the City's Cross Appeal:

    a. The costs award was supported by "evident" findings of fact;
    b. The Chambers Judge's presumptions for the purpose of her mootness argument did not affect her factual findings; and
    c. The Chambers Judge correctly applied the doctrine of legitimate expectations.

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[7] SS 2000, c C-42.1.
[8] *McNabb v Cyr*, 2018 SKCA 51 (CanLII), para 31.
[9] See *Transcript of Mayor Greg Dionne's Comments to CBC Radio*, May 12, 2016, AB Tab 4.4 pp 99-100.

PART V. ARGUMENT

A. The costs award was supported by "evident" findings of fact

11. The City says that the Chambers Judge's costs award was based on "presumptive legal conclusions rather than findings [of fact]".[10] The Chambers Judge based her award of costs expressly on several specific findings of fact[11]:

    a. The Appellants' Originating Application was "sincerely brought";
    b. The Application was the result of the City's "mishandling of the application tendered by PARLA to fly its flag on the Courtesy Flagpole in May 2017";
    c. "It is evident that the City did not follow its own Policy";
    d. It is "evident" that the City did not "proceed in a procedurally fair manner"; and
    e. There was a "lack of intelligible or transparent reasons".[12]

    These factual findings were fully supported by the Chambers Judge in the course of her reasons.[13]

12. Based on these findings, the Chambers Judge concluded that "in these circumstances, it is fit to exercise my discretion to award costs in favour of the applicants which I fix at $6,000".[14] The costs award was not "arbitrarily reached",[15] but was based on factual findings and a considered exercise of the Chambers Judge's discretion.

13. The City conflates legal assumptions that the Chambers Judge was willing to grant for purposes of developing her reasons with her actual factual findings – which she viewed as "evident"[16] – about the City's actions in the circumstances. The City's actions fully support the Chambers Judge's award of costs against the City.

B. The Chambers Judge's presumptions did not undermine her factual findings

14. For the purpose of addressing the mootness issue, the Chambers Judge decided not to analyze:

    1) the scope of the record (of which there is presently no dispute[17]),

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[10] Respondent's Factum, para 118.
[11] Chambers Decision, para 60, AB Tab 6, p 323.
[12] Chambers Decision, para 60, AB Tab 6, p 323.
[13] The Chambers Judge accessibly summarizes all the important facts at paras 1 through 8, 10, 29-31 and 39 of her reasons.
[14] Chambers Decision para 60, AB Tab 6, p 323.
[15] Respondent's Factum, para 7.
[16] Chambers Decision, para 60, AB Tab 6, p 323.
[17] Appellants' Factum, para 34.

2) the determination that a decision was made by the City, or

3) the determination that the decision falls within the scope of this court's power of review.

15. While these three issues may be central to administrative grounds for judicial review, they have little, if any, relevance to the appropriateness of the costs award, or to the declaration now sought by the Appellants pursuant to section 24 of the *Charter* that the City unreasonably violated the Appellants' freedom of expression.

16. The City continues to assert that "[t]here was no decision made by the Director of Community Services to judicially review."[18] This argument is disingenuous: the City did not permit PARLA *to fly the flag it applied to fly* on the Courtesy Flagpole *at the time PARLA applied to fly it*, and *would not allow that flag to be flown at any other time*, because of what it portrayed. No other interpretation of the evidence is possible.

17. As the Chambers Judge found: "In this instance, despite granting the applicants' request to fly this particular flag for many years, the City did not grant the applicants' request in 2017."[19] The Director of Community Services, along with the Mayor, made a specific decision to reject the Appellants' request to fly their flag from May 8-14, 2017.[20] The City's own news release concerning the Appellants' application states that "[t]he Mayor's office, along with the Director of Community Services, reviewed the objections and concluded that the flag is not consistent with any nationally or provincially approved flag, which is unique to this group."[21]

18. Nor were the Chambers Judge's findings concerning procedural fairness somehow "tainted" by her decision to not address, for the purposes of her mootness analysis, the scope of the record, whether a decision was made, and whether it was subject to judicial review.[22] The Chambers Judge's findings were independently and overwhelmingly supported by the evidential record before her, and do not rely on legal assumptions made for purposes of argument.

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[18] Respondent's Factum, para 77.
[19] Chambers Decision, para 39, AB Tab 6, p 315.
[20] City's Media Release, May 5, 2017, AB Tab 4.22, p 233; see also *Request to Fly a Flag on Courtesy Flagpole*, April 6, 2017, AB Tab 2.b, p 24.
[21] City's Media Release, May 5, 2017, AB Tab 4.22, p 233. The City did not provide this news release to the Appellants until after they had commenced the court proceedings against the City.
[22] Respondent's Factum, para 75.

19. There is nothing "hypothetical" or "academic"[23] about the Chambers Judge's reasoning concerning the City's treatment of the Appellants and their application to fly their flag. As the Chambers Judge stated:

> Here there is no doubt that the Policy was not followed. The applicants were not advised of the case to be met, given an opportunity to be heard, provided with adequate reasons or had the assurance that the decision was made by an impartial decision-maker with the prescribed authority to make it. No intelligible response nor decision was communicated to the applicants. Instead, the requested days came and went without the City raising the requested flag. In the circumstances, I would have no hesitation in finding that there was a denial of procedural fairness.
>
> . . .
>
> This "decision" was neither the product of a transparent process nor was it supported by intelligible reasons. In fact, no reasons were articulated to the applicants at all.[24]

20. The Chambers Judge's factual findings are not only free of palpable and overriding error, they are clearly correct and supported by the record before her.

C. The Chambers Judge's findings concerning the Appellants' legitimate expectations were centered on the City's own policy

21. The City takes issue with the Chambers Judge's use of "legitimate expectations" in interpreting the Respondent's duty of fairness, based on its *Flag Protocol Policy* ("*Policy*").[25]

22. The City asserts that the Chambers Judge "misapplied" the doctrine of legitimate expectations by finding that the Appellants "held a legitimate expectation . . . *that the designated decision maker would advise them if the application was adequate and if not, what needed to be done and that he/she would advise them of the decision that was ultimately made.*"[26] Further, the City argues that this was "determinative" in the finding that the City denied the Appellants procedural fairness.[27]

23. The Chambers Judge looked to the City's *Policy* in finding a lack of procedural fairness:

> In this instance, there appears to be little debate that the City held a duty of procedural fairness to the applicants. ...

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[23] Respondent's Factum, para 75
[24] Chambers Decision, paras 31, 39, AB Tab 6, pp 311-12, 315.
[25] Chambers Decision, para 30, AB Tab 6, p 311.
[26] Respondent's Factum, para 86 quoting Chambers Decision, para 30 [emphasis made in Respondent's Factum].
[27] Respondent's Factum, para 90.

> It was also reasonable and appropriate for the applicants to expect that the City would adhere to the process outlined in its Policy. It has been held that a prescribed process sets a minimum level of procedural fairness to be accorded and creates a legitimate expectation that it will be followed [citations omitted].
>
> . . .
>
> The City had a duty to follow its own prescribed procedure and to ensure general fairness in so doing. When the applicants submitted their application, as they had done in prior years, they held a legitimate expectation that the process prescribed by the Policy would be followed, that the designated decision-maker would assess the application within the context of the Policy and its criteria, that the designated decision maker would advise them if the application was adequate and if not, what needed to be done and that he/she would advise them of the decision that was ultimately made.[28]

24. Further, the Chambers Judge was correct in invoking the Appellants' legitimate expectations. She refers to cases to support her conclusion, which correctly say that legitimate expectations can be created by published guidelines, such as the *Policy*.[29]

25. It is an implication of the *Policy* itself that the Appellants could expect that the "designated decision maker" under the *Policy* would give them appropriate notice concerning their application to fly their flag. Contrary to what the City argues, this finding does not require any further "clear, unambiguous, and unqualified representations" apart from the City's *Policy*.[30]

26. The City is in fact objecting to the Chambers Judge's finding that it had a duty to give the Appellants notice of its decision and of its true objection to their application to fly their flag. It strains credulity to assert that the City did not owe the Appellants a duty of notice, or that the City did not violate its duty of procedural fairness to the Appellants by failing to provide them with notice or follow its own *Policy*. The City's failure to "follow its own Policy or proceed in a procedurally fair manner" is "evident".[31] The Chambers Judge appropriately relied on her factual findings to assess costs against the City.

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[28] Chambers Decision, paras 27, 28, 30, AB Tab 6, pp 310-11.
[29] Chambers Decision, para 28, AB Tab 6, p 310.
[30] Respondent's Factum, para 88.
[31] Chambers Decision, para 60, AB Tab 6, p 323.

PART VI. RELIEF

27. The Appellants ask that this Honourable Court dismiss the City's Cross Appeal, with costs.

Respectfully submitted, November 26, 2019

for: **Rod Wiltshire**
Counsel for the Appellants

Marty Moore
Counsel for the Appellants

PART VII. AUTHORITIES

Cases	**TAB**
McNabb v Cyr, 2018 SKCA 51	1

TAB 1

Court of Appeal for Saskatchewan **Citation: *McNabb v Cyr*, 2018 SKCA 51**
Docket: CACV2989 **Date: 2018-06-21**

Between:

Bryan McNabb Jr., Donna Anderson, Corey R. Blind, Hugh Pratt, Nathan Bitternose, Jason Morris and Angela McNab

Appellants (Respondents)

And

Howard McMaster

Appellant (Respondent)

And

Solomon Cyr

Respondent (Applicant)

And

Terry-Lynn McNab and Glenn Pratt

Respondents (Applicants)

And

John McNab, Shawn Longman, Byron Bitternose, Joseph McNab, Ashley Whitehawk, Howard Anderson, Dennis Hunter, Lance McNab, Delvina Cyre, Alice Bitternose, Lyndon Oochoo, Brian Sinclair, Edward Daniel Bitternose, Lisa Longman, Ian Morris, Ramona Windigo, Stan Bird, Lawrence McNab, Erma Asoon, Frank Cyr, Jason Bitternose, Randy Cyr, Ryan James Cyr, Patsy Pratt, Dennis Bird, Arlene Bitternose, Jeff Oochoo, Elliot Laslo and Clinton Bird

Respondents (Respondents)

And

George Gordon First Nation

Prospective Respondent

And

Phillips & Co.

Prospective Respondent

And

Attorney General of Saskatchewan

Intervenor

Before:	Jackson, Caldwell and Whitmore JJ.A.
Disposition:	Appeal of costs dismissed; costs of appeal determined
Written reasons by:	The Honourable Mr. Justice Whitmore
In concurrence:	The Honourable Madam Justice Jackson The Honourable Mr. Justice Caldwell
On Appeal From:	QBG 983/16, Regina
Appeal Heard:	January 23, 2018
Counsel:	Kirk Goodtrack for Bryan McNabb Jr. et al. Stephanie Lavallee for Howard McMaster Wilfred Brabant for George Gordon First Nation Nathan Phillips and Merv Phillips for Solomon Cyr Macrina Badger for the Intervenor

Whitmore J.A.

I. INTRODUCTION

[1] This appeal concerns the costs awarded in the Court of Queen's Bench and the determination of what costs to award with respect to an appeal in this Court in the context of the *First Nations Elections Act*, SC 2014, c 5.

II. BACKGROUND AND PROCEDURAL HISTORY

[2] On March 31, 2016, George Gordon First Nation [George Gordon FN] held a general election. The following persons were elected:

(a) Chief – Mr. Bryan McNabb Jr.; and

(b) Councillors – Donna Anderson, Terry-Lynn McNab, Glenn Pratt, Corey R. Blind, Hugh Pratt, Nathan Bitternose, Jason Morris, and Angela McNab. (I refer to them as the [individual appellants] in this judgment.)

[3] Mr. Howard McMaster, an appellant, was the Chief Electoral Officer of that election and the respondents, other than Mr. Solomon Cyr, were candidates who were unsuccessful in the election. One respondent, Mr. Cyr, applied as an elector to set aside the March 31, 2016, election pursuant to s. 31 of the *First Nations Elections Act*.

[4] Although the history of this matter is long and tortured, because it has a bearing on the issue of costs, I will set it out.

A. The Court of Queen's Bench

[5] On May 19, 2016, a judge of the Court of Queen's Bench in Chambers clarified the named parties, reserved costs for the determination of the judge adjudicating the matter, and ordered the following:

(a) Mr. McMaster must serve upon Mr. Cyr any affidavits by 4:00 p.m. on June 8, 2016;

(b) Mr. Cyr must serve any affidavits on the respondents by 4:00 p.m. on June 13, 2016; and

(c) the parties must provide notice to the other party if they wish to cross-examine any individual on his or her affidavit by June 16, 2016.

[6] Mr. McMaster did not file his materials by June 8, 2016. Counsel for Mr. Cyr, Mr. Nathan Phillips of Phillips & Co. (hereafter [Mr. Phillips]), wrote to the Court of Queen's Bench on June 8, 2016, stating that his client would not be filing any affidavits given the absence of Mr. McMaster's materials and requesting that the matter be scheduled for cross-examination and argument. Counsel for Mr. Cyr also gave notice that Mr. Cyr wished to cross-examine Mr. McMaster that same date.

[7] On June 9, 2016, Mr. McMaster filed his materials.

[8] On July 13, 2016, Mr. Cyr filed an application requesting the following:

(a) that the originating application proceed without cross-examination on July 21, 2016, on a peremptory basis;

(b) that the affidavits filed on June 9, 2016, by Mr. McMaster be struck;

(c) an order permitting Mr. Cyr to amend the originating application;

(d) an order abridging the time for service of the application; and

(e) solicitor–client costs jointly and severally against Mr. McMaster and his counsel (Josephine A. de Whytell and Donald E. Worm) fixed in the amount of $2,000.

[9] In Chambers on July 19, 2016, the application and the originating application were adjourned to August 4, 2016. They were heard on that adjourned date.

[10] On October 28, 2016, the Chambers judge released her decision setting aside the entire March 31, 2016, election [*Chambers Decision*]. The order dated November 4, 2016, which set aside the entire election, provided as follows: "No order as to costs". This order was taken out by Mr. Kirk Goodtrack, counsel for Mr. B. McNabb, and the elected councillors.

[11] On November 14, 2016, Mr. Phillips, counsel for Mr. Cyr, filed a letter in the Court of Queen's Bench to the attention of the Chambers judge:

> The applicant respectfully requests clarification of the October 28, 2016, decision, of the Court. Determination of the applicant's request for costs against George Gordon First Nation is not apparent. It is my recollection that this request was made during oral argument on August 4, 2016, and is additionally contained within the draft order filed with leave of the Court during argument on August 4, 2016. For the assistance of the Court, the applicant intended to transcribe that portion of oral argument upon review of the audio recording, however a Deputy Local Registrar has indicated that the audio recording of argument may not be reviewed without an order of the Court. If the Court permits review, I will have that specific portion transcribed.
>
> The authorities in support of this request are contained at Tab U (*Memnook v. Wapass*, 2012 FC 1307 at para 44), and K (*Bellegarde v. Poitras*, 2009 FC 1212 affirmed re TAB L: 2011 FCA 317) of the supplementary book of authorities as the basis upon which an order of costs may be made against George Gordon First Nation. If the issue of costs against George Gordon First Nation remains a live issue, the applicant is prepared to submit additional written argument with respect to the same.

[12] In a letter filed November 15, 2016, Mr. Goodtrack informed Mr. Phillips of the November 4, 2016, order. Mr. Phillips then filed a letter on November 16, 2016, stating that Mr. Goodtrack had failed to comply with Rule 10-4 of *The Queen's Bench Rules* [*Rules*] by failing to serve the draft order on Mr. Cyr.

[13] On November 21, 2016, Mr. Goodtrack responded by letter, stating that the parties had been unable to agree regarding the form and content of the order and that Mr. Cyr had failed to comply with the *Rules*.

B. The Court of Appeal

[14] Mr. B. McNabb and the individual appellants filed their notice of appeal on November 7, 2016. On November 17, 2016, Mr. B. McNabb and the individual appellants filed a motion returnable November 23, 2016, to amend the style of cause, to stay the execution of the order, and to extend the time for service of the amended notice of appeal.

[15] On November 17, 2016, Mr. Cyr requested and received an adjournment to December 14, 2016.

[16] On November 21, 2016, Mr. Cyr filed a notice of constitutional question challenging the applicability of the *Rules.*

[17] Upon receiving the notice of a constitutional question, the Attorney General of Saskatchewan intervened as of right.

[18] On December 6, 2016, Mr. Cyr filed a motion seeking an order that Mr. B. McNabb and the individual appellants perfect their appeal by December 19, 2016.

[19] On December 14, 2016, the Court of Appeal Chambers judge heard Mr. Cyr's December 6, 2016, application and made the following orders:

(a) the constitutional issue be heard with the appeal proper;

(b) the appeal be scheduled for a hearing on February 10, 2017;

(c) Mr. B. McNabb and the individual appellants must perfect their appeal by 4:00 p.m. on January 5, 2017;

(d) Mr. Cyr and Mr. McMaster must file their factums by January 20, 2017;

(e) the Attorney General of Saskatchewan must file its factum by January 31, 2017;

(f) the motion to amend the notice of appeal be adjourned to the appeal proper;

(g) counsel for Mr. B. McNabb shall post a copy of the order at the Band Office, together with an additional notice setting out the names and telephone numbers of counsel for Mr. B. McNabb's, Mr. Cyr, and the Government of Saskatchewan, and indicating that any self-represented party to the proceedings wishing to obtain a copy of the appeal book or of any facta on the matter may contact counsel for a copy, with this constituting sufficient service on the self-represented parties of the appeal book and facta and as notice of the date; and

(h) costs of the application be left to the panel hearing the appeal.

[20] Counsel for Mr. McMaster and counsel for Mr. B. McNabb and the individual appellants alleged that all parties assured the Court of Appeal Chambers judge that there were no additional issues to be resolved prior to the hearing of the appeal. Apart from the parties desiring and agreeing to proceed on February 10, 2017, that assurance is not indicated on the endorsement. Nonetheless, Mr. Cyr, through his counsel, raised more issues, which are referred to in paragraph [23] au-dessous.

[21] On January 5, 2017, Mr. B. McNabb and the individual appellants perfected their appeal.

[22] On January 27, 2017, Mr. Cyr filed his factum, which had been ordered to be done by January 20, 2017. The Attorney General filed its factum that same date.

[23] On February 6, 2017, Mr. Phillips, counsel for Mr. Cyr, filed a motion to have Mr. Goodtrack removed as counsel for Mr. B. McNabb and the individual appellants. He also applied for leave to file a notice of cross-appeal with respect to the costs order flowing from the October 28, 2016, *Chambers Decision* and sought costs against George Gordon FN both in the Court of Queen's Bench and in this Court. He also sought orders requiring that the appellants correct the appeal book.

[24] On February 10, 2017, the appeal proper was heard. The late filing of Mr. Cyr's factum was accepted, the notice of appeal was amended, the constitutional challenge to the applicability of the *Rules* was dismissed, and the motion to remove Mr. Goodtrack as counsel on the appeal proper was denied. The question of costs was separated from the appeal and an additional affidavit on that issue was accepted. The Court reserved its decision on the appeal proper.

[25] On February 16, 2017, Mr. Goodtrack filed page 3 of the originating application and Mr. Cyr's July 11, 2016, affidavit.

[26] On February 17, 2017, Mr. Phillips filed a letter regarding the issue of leave to cross-appeal.

[27] On April 7, 2017, the Court rendered its decision on the appeal proper (*McNabb v Cyr*, 2017 SKCA 27), dismissing the appeal of the order annulling the election of the chief of George Gordon FN, and allowing the appeal from the order annulling the election of the councillors, thus returning the election of the eight elected candidates to the council of George Gordon FN.

[28] On May 19, 2017, the Court issued a fiat concerning the representation of the parties as it related to any further proceedings involving costs.

[29] The costs hearing was held on January 23, 2018, and the decision was reserved. This is the decision on costs.

III. ISSUES

(a) Did the Court of Queen's Bench Chambers judge err in ordering that the parties bear their own costs of the action?

(b) If so, what is the proper disposition of costs in the Court of Queen's Bench?

(c) What is the proper disposition of costs of the appeal?

IV. JURISDICTION AND STANDARD OF REVIEW

A. Jurisdiction

[30] Section 12 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, reads as follows:

> **Powers of the court**
> **12**(1) On an appeal, the court may:
>
> (a) allow the appeal in whole or in part;
>
> (b) dismiss the appeal;
>
> (c) order a new trial;
>
> (d) make any decision that could have been made by the court or tribunal appealed from;
>
> (e) impose reasonable terms and conditions in a decision; and
>
> (f) make any additional decision that it considers just.
>
> (2) Where the court sets aside damages assessed by a jury, the court may assess any damages that the jury could have assessed.

B. Standard of Review

[31] It is well-settled that an order of costs is a discretionary order and that an appellate court will interfere only if it is shown that the order was made arbitrarily or without regard to the applicable principles. In *Wongstedt v Wongstedt*, 2017 SKCA 100, [2018] 4 WWR 82, Caldwell J.A. said, "the appellate court looks to see whether the judge misapplied some governing principle or rule or disregarded some critical fact or other consideration or whether the costs award is itself 'so obviously unjust as to invite intervention'" (at para 41, quoting *Benson v Benson* (1994), 120 Sask R 17 (CA) at para 90). See also *K.R. v J.K.*, 2018 SKCA 35.

V. POSITIONS OF THE PARTIES

A. Costs in Court of Queen's Bench Chambers

[32] Mr. Cyr's brief of law, filed May 17, 2016, made the following argument regarding costs of the application to set aside the election:

> [39] Thus far none of the respondents have opposed this application. As such the applicant does not seek an award of costs. If any respondent subsequently opposes this application, the applicant seeks an award of costs against that respondent.
>
> [40] If the applicant is unsuccessful, it is submitted that no award of costs should be made. It has not been alleged that the applicant has at any time acted in bad faith. To the contrary, the extensive affidavit evidence submitted in support of this appeal forms a solid foundation upon which the applicant and the vast majority of the members of George Gordon First Nation who support him have pursued this appeal in the public interest of George Gordon First Nation in the novel context of the *First Nations Elections Act*. Notwithstanding the very limited financial resources of the applicant, he and the vast majority of the members of George Gordon First Nation feel very strongly that this Honourable Court should review conduct of the George Gordon First Nation election and that absent such review that the membership of George Gordon First Nation will lose respect for the democratic process and their ability to self-govern as an independent nation if elections are conducted in the manner that they were on March 31, 2016 … .

[33] The draft order filed by Mr. Cyr's counsel on August 4, 2016, contained the following paragraph:

> 3. Service of this order upon George Gordon First Nation shall be deemed upon posting of the same at the George Gordon First Nation Band Office, which the applicant shall do no later than August 9, 2016. George Gordon First Nation, Josephine A. de Whytell and Donald E. Worme, QC, shall have until 4 pm on August 18, 2016, to serve and file written submissions as to costs. The applicant shall have until August 31, 2016, to serve and file reply written submissions. In the absence of such written submissions, the applicant shall have costs in the amount of $10,000 jointly and severally as against Josephine A. de Whytell, Donald E. Worme, QC, and Howard McMaster, and $15,000 as against George Gordon First Nation.

[34] The record discloses no further argument regarding costs. Specifically, Mr. Cyr's application dated April 28, 2016, did not seek costs against George Gordon FN, but only sought costs against "any respondent that opposes the application".

B. Costs of the Appeal

[35] Mr. Cyr seeks costs on a solicitor–client basis against George Gordon FN or, alternatively, against Mr. B. McNabb

[36] Mr. B. McNabb and the elected councillors (the individual appellants) seek costs against the respondent Mr. Cyr.

[37] Mr. McMaster seeks costs against Mr. Cyr or, alternately, against Phillips & Co., the solicitors for Mr. Cyr.

[38] The respondent George Gordon FN seeks costs against Mr. Cyr in relation to its participation in the proceedings.

[39] Phillips & Co. seeks to have the request for costs against it dismissed and seeks costs against Mr. McMaster for impugning the professional integrity of legal counsel.

VI. ANALYSIS

A. The Court of Queen's Bench Award of Costs

[40] The *Chambers Decision* dealt with costs as follows:

> [163] The applicant seeks costs on a solicitor–client basis.
>
> [164] I begin with the observation that the [*First Nations Elections Act*] is silent with respect to who bears the cost of an election challenge or if court costs should be awarded.
>
> [165] In the absence of statutory direction to the contrary, costs are always at the discretion of the court and are generally awarded to the successful litigant.
>
> [166] That said, an application challenging the validity of an election is unique insofar as the parties are not truly adverse in interest, at least not in the traditional sense. Proceedings of this sort are more akin to a public service in that they serve as a check and balance on the electoral system.

> [167] Mr. McMaster has maintained a neutral position throughout. Quite frankly, it would have been inappropriate for him to take a position which favours or even has the perception of favouring one candidate over the other. He has simply reported on what transpired in relation to the impugned election and filed explanatory affidavits in response to the numerous complaints made by the applicant. In spite of attempts by applicant's counsel to characterize proceedings differently, he was not truly a party adverse in interest.
>
> [168] Counsel for Mr. Cyr submits that absent an award of costs, electors will be reluctant to come forward and fund an election challenge. He has a point. However, it is equally true that if Mr. McMaster, who performed a public service and was not indemnified for his legal expenses in these proceedings should be required to bear a costs award, there would be clear reluctance for anyone to step forward to perform this important task in the future.
>
> [169] Bearing in mind there was no finding of fraud or misconduct in this case, the only fair result is to make no order as to costs.

[41] As stated above, the standard of review of a discretionary decision of a judge in Court of Queen's Bench Chambers is decidedly narrow. Based upon this standard of review, I do not see any basis to intervene and, indeed, given the proceedings before the Chambers judge, I think her determination was fair and reasonable.

[42] I would dismiss the appeal as to costs in the Court of Queen's Bench.

B. Costs of the Appeal

[43] Mr. Cyr seeks costs on a solicitor–client basis against George Gordon FN. Alternatively, Mr. Cyr requests costs against Mr. B. McNabb, or that the matter of costs in the Court of Queen's Bench be remitted to the Queen's Bench Chambers judge who heard the matter for further consideration.

[44] As I have dealt with the matter of costs in the Court of Queen's Bench, that issue shall not be remitted to the Court of Queen's Bench Chambers judge.

[45] As summarized in *Cowessess First Nation No 73 v Pelletier*, 2017 FC 859, "In the First Nations context, it is sometimes argued that the First Nation should pay the unsuccessful applicant's costs because judicial review applications in such communities further the public interest" (at para 24).

[46] Mr. Cyr argues that there is a presumption that the appellant's legal expenses have been paid by George Gordon FN and invites the Court to draw an adverse inference to that effect. He notes there is no evidence the appellants paid their own expenses and that it is appropriate to draw such an inference based on the decisions in *Memnook v Wapass*, 2012 FC 1307 at para 43, [2013] 1 CNLR 215 [*Memnook*], and *Knebush v Maygard*, 2014 FC 1247, [2015] 4 FCR 367 [*Knebush*].

[47] In *Memnook*, the applicant sought costs against a First Nation that had not been a party to the application and, despite being served with the submissions seeking costs, made no submissions of its own. Justice Rennie concluded the following:

> [43] In the ordinary event, costs follow the event, unless special reasons can be shown, in the conduct of the successful party, or in the conduct of the case, to warrant departing. No such rationale has been identified here. The respondents contend that the decision in question was that of the Appeal Tribunal and they should not bear the consequence of the Tribunal error. This argument has no merit. To avoid costs by suggesting that it was the error or responsibility of the Appeal Tribunal or court would, in effect, insulate unsuccessful parties to a proceeding. With respect to the argument that the applicants are, in effect, the cause of the problem as they were late in filing their appeal, it is sufficient to note the role of the respondents in the underlying facts which gave rise to the proceedings before the Appeal Tribunal. Moreover, the respondents opposed the applicants' request for an extension of time, when they could have consented. Presumably, their counsel's letter to the Appeal Tribunal was not copied to the applicants, precipitating the breach of procedural fairness. Finally, the respondents' position on costs is inconsistent with their pleading on the merits of the judicial review application, wherein they argue that even if there were issues in the putative election, they were regularized by the December 18 election, at which time they became "the government". The respondents cannot at the same time argue that they are not part of the government, and seek to displace the presumption that, as government, they will be indemnified by the Band: *Bellegarde v Poitras*, 2009 FC 1212.
>
> [44] To conclude, I am satisfied, for the reasons advanced by the applicants, that this is an appropriate case to award costs against the third party. The issues raised address important questions of band governance, touching interests beyond those of the immediate case. I am also satisfied, given the length of the pre-trial proceedings, the award of costs requested at Column III is justified. Indeed, the respondents concede that the request is not excessive.

[48] In *Knebush*, the applicants made a similar argument seeking costs against a First Nation. Justice Mandamin commented on the policy behind such awards:

> [57] Certainty in First Nations governance law is an important benefit for a First Nation community. In this respect, where the result is a better appreciation and commitment to observance the First Nations governance law, it is appropriate to consider whether that the costs ought to be borne by the First Nation.

> [58] First, costs have been awarded against the First Nation where the respondent in fact acts for the First Nation: *Bellegarde v Poitras*, 2009 FC 1212. In that decision, Justice Russell Zinn was satisfied the First Nation had paid for some of the costs of the legal fees of the respondents. He found the Court had jurisdiction to award costs against a non-party (see para 9).
>
> [59] There is also the question of the imbalance between an individual member of a First Nation who brings a judicial review to have a First Nation's laws be observed and the respondents who are the governing body of the First Nation. Such respondents, usually chiefs and councillors, are in a position to have their legal costs reimbursed by the First Nation. If a judicial review application properly addresses a question of the First Nation's law, it seems to me that, on the basis of public interest, individual applicants may be similarly entitled to look to the First Nation for costs.
>
> [60] I should think a reasonable costs award on a public interest basis against a First Nation that has benefited by having clarity brought to its governance laws avoids any adverse inference of winners and losers. The public interest served would be having the issue resolved in a manner and form that is in keeping with the sensibilities of the First Nation.
>
> [61] Having regard to the foregoing, it is my view that consideration of costs is appropriate in settlements of First Nations governance judicial review applications rather than merely being an exception to the general practice of not awarding costs in settlements.

[49] *Knebush* went on to conclude that the First Nation should pay costs:

> [67] Since the respondent councillors were sitting members of the Pheasant Rump Nakota First Nation Council, I find the presumption that their legal expenses were covered by the First Nation has not been displaced by evidence to the contrary.
>
> [68] As the respondent councillors and the respondent McArthur are the councillors of the Pheasant Rump Nakota First Nation, I see no reason not to consider the First Nation to be represented in this matter as if it were a named party. All parties made reference to Pheasant Rump Nakota First Nation directly or impliedly as if a party. Accordingly, I will treat it as a party for purposes of this costs award.

See also *Michel v Adams Lake Indian Band Community Panel*, 2017 FC 835 at para 57–61, which relied on *Bellegarde v Poitras*, 2009 FC 1212 (aff'd 2011 FCA 317) [*Bellegarde*].

[50] Both *Memnook* and *Knebush* rely on the decision in *Bellegarde*. In *Bellegarde*, the applicant sought full solicitor–client costs from a First Nation. The applicant filed an affidavit attesting that the First Nation's ledgers reflected payment of the respondent's legal fees. Justice Zinn concluded that the First Nation had paid for at least some of the legal fees:

> [8] It is clear to the Court that the First Nation has paid for at least some of the respondents' legal fees in this application. The enforceability of the retroactive motion raised by the respondents is questionable. It would have been very easy for one or more of the respondents to swear an affidavit that they are or will be personally responsible for their legal expenses. None was filed and an adverse inference is drawn from that failure. In short, the Court is satisfied that the First Nation has paid and in all likelihood will

> continue to pay for the respondents' legal costs, on a solicitor–client basis. There is no principled reason why the applicant's costs should not also be paid on that same basis by the First Nation.
>
> [9] Contrary to the submissions of the respondent, the Court has jurisdiction under Rule 400(1) of the *Federal Courts Rules* [SOR/98-106] to award costs against a non-party: see *Lower Similkameen Indian Band v. Allison* (1995), 99 F.T.R. 305; *Re Bodnarchuk*, [1995] 3 F.C. 300; and *Barbosa v. Canada (Minister of Employment and Immigration)* (1987), 4 Imm. L.R. (2d) 81 (Fed. C.A.).
>
> [10] The decisions under review in this application were decisions of a group who purported to act as the Council of Elders in the best interests of the First Nation. In such circumstances, the First Nation is the appropriate party to be liable for costs when those decisions are set aside by this Court. Further, the respondents sought their costs if they were successful. Knowing now that their costs were paid by the First Nation, presumably the First Nation would have been the beneficiary of any such order and not the personal respondents. This provides further support that the First Nation is the appropriate payee.
>
> (Emphasis added)

[51] In this matter, there is no evidence that Mr. B. McNabb's costs, or the costs of the elected councillors, have been paid for by George Gordon FN. In fact, representations were made to this Court in the course of the hearing that George Gordon FN had not paid costs of any party.

[52] In the circumstances of this case, I do not think it is appropriate to award costs of any of the parties against George Gordon FN. George Gordon FN was not named as a party to the proceedings and did not participate in the proceedings. Costs were not sought against George Gordon FN in the originating application but were only raised in final argument before the Chambers Judge. George Gordon FN was not named as a party to the appeal and Mr. Cyr did not apply to join George Gordon FN for the purpose of seeking costs against it in the appeal. After costs had been sought against it, and this Court sought its submissions, George Gordon FN responded, opposing costs being assessed against it. This distinguishes this case from *Memnook*, where that First Nation took no position on costs and from *Knebush*, where the respondents were named parties, both in their personal capacity and in their capacity as Band Councillors of the First Nation.

[53] While subsequent jurisprudence has interpreted *Bellegarde* as establishing a presumption that a First Nation has paid legal costs, in *Bellegarde*, itself, there was evidence that the First Nation was paying the respondent's legal costs. See also *Shotclose v Stoney First Nation*, 2011 FC 1051 at para 18, where the respondents' costs were being paid by a First Nation, and the applicants' costs were ordered to be paid on the same basis.

[54] The principles behind a First Nation paying costs of the parties are set out in *Knebush*:

(a) the promotion of "First Nations governance law" (at para 57);

(b) the recognition of the "imbalance between an individual member of a First Nation who brings a judicial review to have a First Nation's laws be observed and the respondents who are the governing body of the First Nation" (at para 59); and

(c) the avoidance of the "inference of winners and losers" (at para 60).

[55] In this case, to order George Gordon FN to pay costs to Mr. Cyr would not achieve those goals. It would penalize the respondent councillors who have not sought costs against George Gordon FN, and who were successful in their appeal. Further, it strikes me as somewhat of an ambush to not name George Gordon FN in the application and to raise the issue of costs only in argument in the Court of Queen's Bench and before this Court.

[56] As I have set out above, Mr. Cyr's success was divided. Accordingly, he should bear his own costs of the appeal.

[57] Mr. B. McNabb and the individual appellants similarly were successful only in part. They have not sought costs against George Gordon FN, but have sought costs against Mr. Cyr. Like Mr. Cyr, they should bear their own costs.

[58] As a general rule, it seems to me it would be appropriate that a chief electoral officer be indemnified for his costs by the First Nation. However, Mr. McMaster has not sought costs against George Gordon FN, nor did he seek to add the First Nation as a party. As Mr. McMaster was properly named by Mr. Cyr, and as Mr. Cyr was partially successful in the appeal, Mr. Cyr should not be charged with Mr. McMaster's costs either. Unfortunately, the *First Nations Elections Act* does not provide for reimbursement of an election officer's court costs in these or any other circumstances. As such, the circumstances dictate that Mr. McMaster should bear his own costs.

[59] George Gordon FN seeks costs against Mr. Cyr. Mr. Cyr, as an elector, has a right to bring this action, which resulted in a new election for a chief. It would not be appropriate to award costs against Mr. Cyr. George Gordon FN shall pay its own costs.

[60] Phillips & Co.'s request for costs against Mr. McMaster is devoid of merit. Mr. McMaster made no allegations impugning the professional integrity of Phillips & Co.

[61] The conduct of Mr. Phillips, of Phillips & Co., in this action, however, is troubling. The *Chambers Decision* noted the following:

> [6] Howard McMaster, who appears from the style of cause to be named as one of the applicants, was appointed as the electoral officer for the March 31, 2016, election. In spite of being named as an applicant in these proceedings, Mr. McMaster has provided response evidence to Mr. Cyr's application, has engaged separate legal counsel at his own expense to rebut the various allegations made by Mr. Cyr and has been treated throughout as a party adverse in interest.
>
> …
>
> [42] Before leaving this issue, a brief comment on [Mr. Cyr] the applicant's characterization of the specific allegations advanced in relation to Mr. McMaster is warranted. The applicant's counsel frequently, and quite deliberately, chose to characterize the alleged contraventions and irregularities as fraud. This word was used often, and in my view, it was used intentionally.
>
> [43] This type of narrative was unhelpful and misplaced from both a legal and evidentiary perspective. As discussed above, s. 31 of the [*First Nations Elections Act*] does not require proof of fraud; the [*First Nations Elections Act*] prescribes a less stringent standard. Second, based on the evidence before me, I find nothing which points to fraud, bad faith or corruption on the part of Mr. McMaster or any of his electoral officials. Although some of the practices fall short of the electoral safeguards prescribed by the [*First Nations Elections Regulations*, SOR/2015-86], I find no evidence they amounted to fraud, corrupt practice or were motivated by an ulterior purpose aimed at altering the democratic will of the electorate.

[62] Despite the directness and clarity of the Chambers judge's comments in the course of the hearing, in Mr. Cyr's appeal factum, Mr. Phillips, makes the following statement:

> 13. The coordination of Mr. McMaster and the appellants has become explicit in this Court: a common factum was signed by legal counsel for Mr. McMaster and legal counsel for the appellants. Clearly, Mr. McMaster has not taken a neutral position with respect to the application, nor has he done so with respect to this appeal. Mr. McMaster has throughout pursued his personal interests, which are adverse to those of Mr. Cyr and the people of George Gordon First Nation.

[63] Further, under a heading in the factum entitled "Mr. McMaster's affidavit and supplementary affidavit are inaccurate and misleading", Mr. Phillips puts forward innuendo about Mr. McMaster, attacking his credibility:

> [59] Mr. McMaster deliberately fails to extend his statement to females, such as Ms. Pooyak or Ms. Wuttunee. Furthermore, while at AB146 at para 11 Mr. McMaster asserts that Kiefer Sutherland completed an "Oath of Office", he fails to allude to any such "Oath of Office" completed by Ms. Pooyak or Ms. Wuttunee.

[64] Mr. Cyr is a respondent in the appeal, has not cross-appealed, and is seeking to uphold the *Chambers Decision*. Nevertheless, Mr. Phillips seized the opportunity to attack the credibility of Mr. McMaster. As part of that attack, Mr. Phillips claims that the Chambers judge erred in not striking portions of Mr. McMaster's affidavit, and defends his own position and the attack on Mr. McMaster by saying, in his factum, there were arguments to suspect Mr. McMaster of fraud. He argues the Court should not be holding his own conduct to a level of perfection, yet perfection is exactly what Mr. Phillips was seeking in Mr. McMaster's affidavits.

[65] Elections are managed by volunteers and it is trite to say that not all elections run smoothly and without a hitch. Mr. McMaster was such a volunteer. He is not a professional returning officer, yet Mr. Phillips characterizes each and every alleged shortcoming of Mr. McMaster – whether in the conduct of the election or in his affidavit material – as part of a plot to deprive the respondent, Mr. Cyr, and the electors of George Gordon FN, of a fair election.

[66] During the course of the appeal, the Court, on two occasions, remarked to Mr. Phillips that his comments alleging Mr. McMaster had acted fraudulently were not of assistance to his client. Yet, he persisted in that language and the Court, finally, had to firmly instruct Mr. Phillips to discontinue such language.

[67] Now, in argument before this Court on the issue of costs, Mr. Phillips purports to have seen the light. He states he is not alleging fraud by Mr. McMaster. In fact, Mr. Phillips now says Mr. McMaster's allegations against him and his firm have put him to expense and effort, such that he now seeks costs against Mr. McMaster. This claim is patently devoid of merit. In material on file, and in arguments before this Court, Mr. Phillips disputed factual findings in the *Chambers Decision*, even though those facts were not at issue in the appeal. It is Mr. Phillips who put the parties and the Court to unnecessary work.

[68] I have considered whether to assess costs against Mr. Phillips personally and turn to the following instructive excerpt from The Honourable Stuart J. Cameron, *Civil Appeals in Saskatchewan: The Court of Appeal Act and Rules Annotated* (Regina: Law Society of Saskatchewan Library, 2015) at 221–222:

> Only where there has been "a serious dereliction of duty" by the lawyer does the court have jurisdiction to order the lawyer to pay the costs of proceedings personally. Mere error of judgment, even if it constitutes the equivalent of negligence, is insufficient; there must be something that amounts to a serious even gross, dereliction of duty, though normally it is unnecessary to establish *mala fides*: *Boyko v Sitter; Re Hawrish* (1964), 49 DLR (2d) 464, 50 WWR 616 (Sask CA).
>
> An order for costs against a lawyer personally is essentially compensatory not punitive and, having regard to the "entirely satisfactory analysis" of principle in *Young v Young* (1990), 75 DLR (4th) 46, 50 BCLR (2d) 1 (CA), an order of this nature may be made against a lawyer if the proceedings are characterized by repetitive and irrelevant material, excessive motions, and bad faith on the part of the lawyer in encouraging this abuse. The court must be "extremely cautious", however, in awarding costs against a lawyer in these situations, given the duty of lawyers to respect the confidentiality of their instructions and to pursue even unpopular causes with courage. A lawyer should not be placed in a situation where "fear of an adverse order of costs may conflict with these fundamental duties of his or her calling" and, assuming that costs might, in certain circumstances, "be imposed for contempt of court", no such finding had been against the lawyer: *Young v Young*, [1993] 4 SCR 3 (per McLachlin J. at 135–6).

[69] I am not persuaded that Mr. Phillips's conduct is such that it should be reflected in an award of costs against him personally. While counsel's conduct is close to the line, I cannot say it was a serious dereliction of duty. Mr. McMaster is a party to this action by virtue of his position of Chief Electoral Officer, and he would have necessarily incurred costs in any event, although perhaps not to the amount he will necessarily have incurred to address some of the unmerited allegations advanced by Mr. Cyr.

[70] Mr. Phillips submitted further materials after this costs hearing was heard. The acceptance of those materials was objected to. We do not accept those materials and have not considered them.

VII. CONCLUSION

[71] The appeal of the order of costs in the Court of Queen's Bench is dismissed. Each party shall bear its own costs of the appeal proper and the hearing as to costs.

"Whitmore J.A."
Whitmore J.A.

I concur. "Jackson J.A."
Jackson J.A.

I concur. "Whitmore J.A."
for Caldwell J.A.