Federal Court Cour fédérale

Date: 20170208

Docket: T-2003-16

Citation: 2017 FC 156

Ottawa, Ontario, February 8, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

**COUNCILLORS GEORGINA JOHNNY,
BRANDY JULES and RONALD JULES**

Applicants

and

ADAMS LAKE INDIAN BAND

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of a decision of the Community Panel of the Adams Lake Indian Band (the Panel), dated October 22, 2016, removing them from elected office as Band Councillors for breach of their Oath of Office. They claim that the process that led to the Panel's decision, which is comprised of three separate sets of reasons – one for each Applicant - is plagued with procedural flaws and that the Panel's decision should, as result, be quashed.

II. Background

[2] The Applicants are members of the Adams Lake Indian Band (the Band), a small First Nation community of approximately 800 members located near Chase in British Columbia. Brandy and Ronald Jules were elected Councillors in February and July 2015, respectively. Georgina Johnny was acclaimed as Councillor in January 2016. All three Applicants' term as Councillor end in February 2018.

[3] Since December 1996, the Band's Chief and Council are elected in accordance with band custom. The current version of the Band's election rules are set out in the *Adams Lake Secwepeme Election Rules* approved on June 19, 2014 (the Election Rules).

[4] According to Part 22 of the Election Rules, a Band member who is elected to the Band Council shall swear an Oath of Office. Part 24 of the Election Rules provides for the removal from office of a Band Councillor on a number of grounds, including breach of the Oath of Office. The authority to remove a Band Councillor from office is vested in the Panel, a body created under Part 9 and Appendix E of the Election Rules. The Panel consists of five (5) members appointed for a three-year term through an election held at a General Band Meeting called for that specific purpose. The current Panel members are Lynn Kenoras, Sandra Lund, Maryann Yarama, Hilda Jensen and David Norquist.

[5] According to sections 24.2 and 24.3 of the Election Rules, removal proceedings are to be commenced by a petition filed with the Panel and signed by ten (10) electors. The petition must

be accompanied by an affidavit setting out the facts substantiating the grounds for removal as well as by a three hundred ($300.00) dollars non-refundable fee. Pursuant to Appendix E of the Election Rules, the Panel must render its decision in writing within 30 days of receipt of the Petition. A majority of the Panel constitutes *quorum*.

[6] The petition at issue in the present matter (the Petition) was filed with the Panel by Valerie Joan Mitchel, who is a member as well as an employee of the Band, on September 26, 2016. The Petition, which was served on the Applicants the same day, alleges that the Applicants violated the Election Rules and breached their Oath of Office in the following manner:

a) With respect to Ronald Jules, by advocating for one of his immediate family members to get a house and by participating in discussions that had a direct effect on his immediate family without declaring a conflict of interests;

b) With respect to Georgina Johnny, by advocating for her immediate family to receive money from the Band Council and by approving the use of the Council’s travel budget for her brother to attend a tourism workshop; and

c) With respect to Brandy Jules, by directing the decision for the release of the Band’s Executive Director, Lawrence Lewis, for personal reasons having to do with her family.

[7] Ms. Michel claims that these allegations of misconduct amount to a breach of sections 2, 3 and/or 4 of the Oath of Office which provide that Band Councillors shall:

a) Honestly, impartially and fully perform the duties of their office with dignity and respect;

b) Always consider the bests interests of the Adams Lake Indian Band; and

c) Always uphold the [Adams Lake Indian Band]'s Election Rules, Band policies and the Chief and Council Terms and Reference of the Adams Lake Indian Band.

[8] On October 22, 2016, the Panel, after having held a number of meetings and interviews and considered a number of documents, including Council meeting minutes, handed down its decision. Except for the allegation that Ronald Jules had advocated for one of his immediate family members to get a house, which was found to be unsubstantiated, the Panel held that the Petition's allegations of misconduct against each of the Applicants had been established and amounted in each case to a breach of sections 2, 3 and 4 of the Oath of Office.

[9] The Panel also considered a number of allegations that were not particularized or specified in the Petition, as filed on September 26, 2016. First, with respect to Brandy Jules, it considered but dismissed, the allegation that she had hollered at an employee of the Band. However, it was satisfied that Ms. Jules had participated in lateral violence towards another member of the Band Council and had breached, as a result, her Oath of Office. Also, it found on the basis of "additional information" provided to it, that Ms. Jules had further breached her Oath of Office by inquiring to the Band Administration Staff regarding a job posting involving her immediate family as well as by participating in discussions and advocating (and signing) a Band Council Resolution transitioning, to the benefit of her family, all existing Security Staff to the Band's Staff.

[10] With respect to Ronald Jules, the Panel also found on the basis of "additional information" provided to it, that Mr. Jules had made a direct racial comment to a Band's employee and participated in lateral violence towards another member of the Band Council, thereby breaching his Oath of Office. Finally, the Panel held, also on the basis of "additional information" provided to it, that Georgina Johnny had further breached her Oath of Office by participating in discussions and advocating (and signing) a Band Council Resolution transitioning, to the benefit of her immediate family, all existing Security Staff to the Band's Staff and by advocating for an immediate family member to represent the Band at an event organised by the "Together Shuswap", a First Nations' regional grouping.

[11] Overall, the Panel concluded that the Applicants had each breached sections 2, 3 and 4 of their Oath of Office, including, in the case of all three Applicants, the Band's Code of Conduct and Ethics Policy and Financial Management By law, in the case of Brandy and Ronald Jules, the Band's Employment Guidelines, in the case of Brandy Jules, the Band's Respectful Work Place Policy and, finally, in the case of Ronald Jules, the Band's Conflict Resolution Policy.

[12] As a result of these findings, the Panel removed the Applicants from elected office as Band Councillors effective on October 23, 2016 for a duration of two election terms.

[13] On October 26, 2016, following a Band meeting held the day before, removal notices were sent to the Panel members. The Applicants see this as evidence of the community's disapproval of the way the Panel handled and decided the Petition. The Respondent disputes the validity of any resolutions arising out of that meeting which, it contends, was not a General Band

Meeting as claimed by the Applicants, but a community meeting. It urges the Court to place no weight on this evidence.

[14] The following day, the Chief resigned.

[15] The present proceeding was filed with the Court on November 21, 2016. The Applicants claim that there is a reasonable apprehension of bias arising from the fact that some Panel members are Band employees and that some others were otherwise in a conflict of interest situation. They further claim that the Petition is null and void as it compounded three petitions in one and failed to have the required number of signatures. Finally, the Applicants contend that they were not provided a fair hearing as they were not fully informed of the case to meet and not permitted to fully respond to it.

[16] By order of this Court issued on consent on November 30, 2016, the Applicants, subject to certain limitations, were restored to their position as Band Councillors pending the outcome of the present proceeding and the by-election scheduled for the election of new Councillors was cancelled.

[17] In the same Court order, the present matter was expedited and set down for hearing on January 20, 2017 in Vancouver.

III. Issue and Standard of Review

[18] The sole issue to be determined in this matter is whether the Panel breached the duty of procedural fairness owed to the Applicants.

[19] The Applicants contend that issues raising procedural fairness concerns are to be decided on a standard of correctness.

[20] While the Respondent agrees that this is indeed generally the case, it claims that the procedural choices made by the Panel are owed deference and that the exact content of the duty of fairness owed to the Applicants in the present case is highly contextual and cannot be separated from the social context in which the impugned decisions were made. It further submits that to the extent the interpretation or application of the Election Rules by the Panel is engaged in resolving the present matter, then this interpretation or application is to be reviewed on a standard of reasonableness. On that last point, the Applicants disagree with the Respondent's position and claim, on the basis of this Court's decision in *Felix v Sturgeon Lake First Nation*, 2011 FC 1139 [*Felix*], that the appropriate standard to be applied to such an issue is the correctness standard.

[21] It is well established that the standard of correctness applies to questions of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79). As Justice Cecily Y. Strickland pointed out in a recent decision involving the Panel and the Band (*Johnny v Adams Lake Indian Band*, 2016 FC

1399, at para 9-10 [*Johnny*]), this standard has been applied on a consistent basis by the Court to questions of procedural fairness arising from the removal from office of band councillors (*Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 24; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 15; *Gadwa v Kehewin First Nation*, 2016 FC 597 at paras 19-20 *McCallum v Peter Ballantyne Cree Nation*, 2016 FC 1165 at para 19; *Parenteau v Badger*, 2016 FC 535 at para 36 [*Parenteau*]).

[22] Justice Strickland also observed that it is now firmly established that the interpretation and application of custom elections acts by a council of elders, election officers or band council is reviewable on the standard of reasonableness and held that there was no reason why this would not equally apply to the role of the Panel (*Johnny* , at para 11).

[23] I agree. In *Felix*, Justice Marie-Josée Bédard held that no deference was owed to the decision maker's interpretation of the procedural provisions of the band's election rules because of the decision-maker's lack of special expertise on such matters (*Felix*, at paras 20-23). However, *Felix* must now be read in light of the Federal Court of Appeal's subsequent jurisprudence which makes it clear that the standard of review applicable to the decisions of bodies such as the Panel interpreting election acts is reasonableness (*Johnson v Tait*, 2015 FCA 247 [*Johnson*], at para 28; *Orr v Fort McKay First Nation*, 2012 FCA 269, at para 11 [*Orr*]; *D'Or v St-Germain*, 2014 FCA 28, at para 5 [*D'Or*]). This is so because the interpretation of the bands' election acts or rules must be informed by the customs upon which they are based, a matter of which electoral bodies and Chief and Council are likely to have a better understanding than the Court (*D'Or*, at para 6).

[24] Reasonableness, as we know, is concerned with the existence of justification, transparency and intelligibility, and whether the decision falls within a range of possible, acceptable outcomes defensible both on the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47).

[25] However, as the Federal Court of Appeal pointed out in *Johnson* and *Orr*, there may ultimately be little appreciable difference between the reasonableness and correctness standards where the decision-maker's decision cannot be supported by the election acts or rules or any other source of power as in such a case, the decision cannot be said to be acceptable or defensible in law (*Johnson*, at para 28; *Orr*, at para 12).

[26] It is not disputed that the Panel is a "federal board, commission or other tribunal" within the meaning of sections 2 and 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7, and that it is subject, as a result, to the Court's supervisory power.

IV. Analysis

A. *The Content of the Duty of Procedural Fairness Owed to the Applicants*

[27] It is trite law now that the concept of procedural fairness is eminently variable and that its content is to be decided in the specific context and circumstances of each case (*Knight v IndianHead School Division No. 19*, [1990] 1 SCR 653, at 682; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 21). It is therefore correct to say, as the

Respondent does, that the exact content of the duty of fairness owed to the Applicants in the present case is highly contextual.

[28] This Court has, on a number of occasions, recognised the importance of an autonomous process for electing band governments and held that it should be reluctant, for that reason, to interfere with that process (*Sparvier v Cowessess Indian Band* [1993] 3 FC 142, at para 57 [*Sparvier*]; *Catholique v Band Council of Lutsel K'e First Nation*, 2005 FC 1430, at paras 53-55). However, although, as the Respondent points out, electoral bodies such as the Panel should be granted significant latitude to choose their own procedures, basic procedural safeguards must be in place when, as here, a person is being removed from his/her position as Chief or Councillor (*Bruno v Samson Cree Nation*, 2006 FCA 249, at para 22 [*Samson Cree Nation*]; *Parenteau*, at para 49).

[29] This means that the Applicants were entitled to know the case against them and be given an opportunity to make representations before an unbiased decision-maker (*Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165, at pp. 169-170; *Samson Cree Nation,* at para 22; *Parenteau*, at para 49). However, in such context, the right to make representations does not go so far so as to require a full oral hearing (*Samson Cree Nation,* at para 22).

B. *Reasonable Apprehension of Bias*

[30] The Applicants' claim to a reasonable apprehension of bias is two-fold. First, they contend that the three Panel members who are also employees of the Band (Sandra Lund, Maryann Yarama, and David Norquist) are in conflict of interests whenever the Panel, which is

to be impartial, is called upon to determine if Councillors should be removed because the Chief and Councillors are their "bosses in their position working for the Adams Indian Band". They further contend that the present situation is exacerbated by the fact the Petition arose in the context of an employment grievance on the part of Ms. Michel, who is also an employee of the Band.

[31] Second, the Applicants claim that another Panel member, Lynn Kenoras, is in a situation of conflict of interest as she is the daughter of another Councillor, Norma Manuel who remains on Council and is, therefore, associated to the Respondent. They say that although Ms. Kenoras declared a conflict to the Panel and refrained from hearing the evidence provided by her mother, she nonetheless put herself in a conflict of interest situation by signing all three set of reasons for decision.

[32] The most widely accepted wording for the applicable test to determine whether there is a reasonable apprehension of bias in a given case comes from the Supreme Court of Canada in *Committee for Justice v National Energy Board*, [1978] 1 SCR 369, at page 394:

> "…[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [That] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude...." Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[33] To put it another way, in order for a reasonable apprehension of bias to be established, the person considering the alleged bias must be reasonable and the apprehension of bias itself

must also be reasonable in the circumstances of the case (*R v S (RD)*, [1997] 3 SCR 484, at para 111).

[34] However, in a context such as the present one, the case law calls for a more nuanced approach to that test. In *Lower Nicola Indian Band v Joe*, 2011 FC 1220 at para 45 [*Lower Nicola Indian Band*] (upheld in *Lower Nicola Indian Band v Joe*, 2013 FCA 84), the Court held that the test of reasonable apprehension of bias will not necessarily be applied rigorously to a small First Nation community as this would otherwise inevitably create difficulty in convening a decision making body where familial or business relationships are not present. In that case, the band had approximately 800 eligible voters. Here, as mentioned previously, the Band is comprised of approximately 800 members.

[35] In the earlier case of *Sparvier*, where the band had 408 participating electors, the Court set out at para 75, the rationale for a more lenient approach in such context. Paragraph 75 reads as follows:

> If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in Bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.

[36] In applying the test for reasonable apprehension of bias, this Court must therefore be mindful of the context in which the Panel operates and of the fact such context “can and should include judicial respect for relevant custom” (*Samson Cree Nation*, at para 20).

[37] Even though the Court came to the conclusion that there was a reasonable apprehension of bias in *Lower Nicola Band*, such conclusion was warranted by the particular circumstances of that case, which can readily be distinguished from those of the present case. Indeed, in *Lower Nicola Indian Band*, one of the Elders having to rule on the petition regarding the impeachment of three elected Councillors was the mother of one of the unsuccessful Councillors who had brought the petition and several other Elders who sat on the decision-making body had signed the petition. Thus, the apprehension of bias was flagrant.

[38] Here, as indicated previously, the Applicants’ main contention is that Panel members who are also Band employees are in an immediate conflict of interests’ situation whenever the Panel is seized of a petition seeking the removal of Chief or Councillors because of the particular nature of the relationship between the two groups. They add that as Band employees, they have a duty, according to the Band’s Code of Conduct and Ethics Policy, to avoid “any situation in which there is, or may appear to be, a potential conflict which could appear to interfere with the employee[s] judgment in making decisions in the best interests of Adams Lake Indian Band” (Respondent Record, vol. 1, at p. 70-71). According to the Applicants, this duty reinforces the need for Band employees on the Panel to refrain from hearing a petition for removal of Chief or Councillors so as to avoid any reasonable apprehension of bias.

[39] I disagree with that approach. The conflict of interests provisions of the Band's Code of Conduct and Ethics Policy to which the Applicants refer have to do with the Band employees' work and dealings as employees of the Band, not as members of the Panel. The issue here is rather whether the fact that these three employees, in their capacity of Panel members, have heard the Petition, which involved the faith of the Applicants as Band Councillors, raises a reasonable apprehension of bias. In my view, in light of the context in which the Panel operates, it does not.

[40] According to the Panel's enabling customary instrument, no restriction is placed on Band employees or on those related to the Band Council from being elected to the Panel while such restriction exists for the Chief and Councillors or for a candidate in an election (Election Rules, Appendix E, section 2(b)). Also, not being an employee of the Band is not, pursuant that instrument, listed as an eligibility criterion for sitting on the Panel. Therefore, it is reasonable to assume that when the Band adopted the Election Rules in 2014, the consensus within the Community was that Band employees were eligible to sit on the Panel subject only to the restrictions expressly set out in the Election Rules.

[41] The Adams Lake First Nation community is a small community. Therefore, it is not inconceivable, as contended by the Respondent, that everyone knows each other and that when these three Panel members were elected to the Panel in 2014, the members of the Community who voted would have known that these persons were Band employees as they would have known that Ms. Keronas is the daughter of Councillor Norma Manual. I agree with the Respondent that the customary-based Election Rules imply a potential for some form of

relationship existing between the Panel members and Chief and Council or for some prior knowledge of a matter and tolerate appearances of bias which, in other contexts and with a more rigorous approach to the test for a reasonable apprehension of bias, might be disqualifying. This is true of the relationship existing between Panel members who are Band employees and Council or between Panel members related to Council members and Council. So long as they do not give rise to an actual conflict of interest in a given case, the mere fact that these relationships exist should not be sufficient to raise, in this particular context, a reasonable apprehension of bias.

[42] It is worth noting in this respect that Band employees are governed by contracts between the employee and the Band, not any individual Band Councillors, and that routine employment matters are handled by the Band Manager, not Band Councillors. The Band Council only intervenes on matters of termination and remuneration (Respondent Record, Affidavit of George Baily, vol. 2, at p. 510, para 14). In other words, there is some distance between the Band employees and the Chief and Councillors when it comes to defining their so-called employment relationship. This is part of the context that must inform a bias analysis in the present case.

[43] Another important consideration in this analysis is that one of the two main functions the Panel is entrusted with is to provide oversight of Chief and Council. The approach advocated by the Applicants would, *de facto*, deprive the current Panel, or any future Panel having as members Band employees, of its ability to play that role. With the risk that this poses to its election process and oversight mechanism of elected Chief and Council, this can hardly be what the Band had in mind when it adopted the Election Rules. Borrowing from *Sparvier*, if that approach would be allowed to stand, this important oversight function “would be frustrated under the weight of

[bias] assertions" with the risk of constituting "a danger to the process of autonomous elections of band governments" (*Sparvier*, para 75).

[44] It may be that allowing Band employees or persons related to Council members to sit on the Panel is not optimal in terms of potential bias but this is a matter for the Band to address if and when, in its opinion, there is a need to do so.

[45] Again, the situation in the present case is different from the one encountered in *Lower Nicola Indian Band*. Here, there is no evidence that Ms. Michel's employment grievance was in any way linked to the issues set out in the Petition which were about undue influence favoring family members and lateral violence. There is no evidence that the Panel members who are Band employees were predisposed to grant the Petition. There no evidence either of any Panel member actually placing himself or herself in a conflict of interests situation.

[46] The record shows that Ms. Keronas, the daughter of Councillor Norma Manual, declared a conflict relating to the evidence of her mother regarding the allegations made against the Applicants. The evidence before me is that Ms. Keronas left the Panel's meetings whenever evidence from her mother was received by the Panel and whenever the Panel deliberated on that evidence. The evidence is also that Ms. Keronas did not vote on matters relating to her conflict.

[47] Therefore, the fact that she signed the three impugned set of reasons has to be considered in light of that evidence and is therefore not indicative that, by doing so, she put herself in a situation of conflict of interests. It would probably have been preferable to find in these reasons

some mentions of the aspects of the decision on which Ms. Keronas did, or did not, vote. However, having considered the record as a whole and being mindful that the Panel members are laypersons, I find that this is not fatal to these decisions. I note that Ms. Keronas' mother neither introduced nor signed the Petition and was not involved in any way, shape or form, as Councillor or in any other capacity, in the decision-making process leading to the removal of the Applicants. She was not either the subject of the Petition. She was a witness on the Panel's list.

[48] The Respondent points to the fact that Maryann Yarama, who is the Manager of Maintenance and Housing for the Band, also declared a conflict in connection with the allegations made against the Applicants regarding their conduct with respect to the Band's security contracts. As was the case for Ms. Kenoras, Ms. Yarama, according to the record, left the Panel meetings whenever evidence relevant to her potential conflict was received and whenever the Panel discussed and deliberated on these allegations. She also refrained from voting on these matters.

[49] Contrary to Ms. Kenoras's situation, the Applicants did not raised Ms. Yarama's declared conflict as an issue before the Panel or in their written submissions to the Court. It is only at the hearing of this judicial review application that the matter was brought up. That being said, I am of the view that Ms. Yamara, as did Ms. Kenoras, took steps to avoid placing herself, and the Panel, in a situation of actual or apparent conflict of interests.

[50] In sum, having regard to all the circumstances of this case, including the context in which the Panel operates, and being mindful of this Court's more lenient approach to bias's issues

raised in the context of decisions made by decisions-makers holding their authority from customary band election codes and of its general reluctance to interfere with such decisions in order to preserve, as much as feasibly possible, First Nations' autonomy in this respect, I find that the Applicants have failed to establish that the process that led to the impugned decision raises a reasonable apprehension of bias.

C. *The Validity of the Petition*

[51] The Applicants contend that the Petition is null and void as, contrary to the Election Rules, it compounds three petitions in one and fails to have the required number of signatures. This argument cannot succeed.

[52] This argument engages the application of section 24.2 of the Election Rules which provides that "proceedings to remove a Band Council member shall be commenced by a petition filed with the Community Panel and signed by ten (10) Electors determined as of the date the petition is filed". First, I find it is reasonable to read that provision as not requiring 10 signatures in addition to the signature of the person actually bringing the petition. It can reasonably be read, in my view, to mean that in order to be valid, a petition must be signed by ten (10) persons having the status of "Elector" within the meaning of the Election Rules at the date the petition is filed, irrespective of the fact the petition is brought forward at the initiative of a single individual.

[53] Second, the argument that Ms. Michel had to file one petition per Applicant and pay the corresponding $300.00 fee for each of the petitions is, in my view, overly formalistic. As the Respondent points out, paragraph 18.1(5) of the *Federal Courts Act*, RSC, 1985, c F-7, allows

the Court not to grant relief where judicial review is grounded in technical irregularities or form defects and where no substantial wrong or miscarriage of justice has resulted from it.

[54] Here, there is no evidence that such wrong or miscarriage of justice has occurred from the fact the Petition was brought against the three Applicants collectively as opposed to individually. The alleged violations against each of the three Applicants were set out in the Petition and the Petition was hand-delivered to each of them on the same day it was filed with the Panel, that is on September 26, 2016. At that point, the Applicants knew the case they had to meet.

[55] At a meeting held on that day, the Panel considered whether this was a proper way to proceed and concluded that it was (Responded Record, vol. 1, at p. 235). I see no reason to interfere with this finding in the circumstances of this case.

D. *The Right to be heard*

[56] As indicated at the outset of my analysis, the Applicants were entitled to know the case against them and to make representations to the Panel. However, they were not entitled to a full oral hearing (*Samson Cree Nation*, at para 22).

[57] The Applicants contend that they were not provided a fair hearing as they were not fully informed of the case to meet and not permitted to fully respond to it. In particular, they claim that the majority of the Panel's findings were made on grounds that were not raised in the Petition and on information that was not communicated to them, including the evidence given by the persons interviewed by the Panel.

[58] A review of the entire record does not support the Applicants' contention. The evidence points rather to the fact that despite being invited to do so on a number of occasions, the Applicants have refused to participate in the process in a meaningful manner.

[59] There is no doubt that the content of the Petition, as filed on September 26, 2016, has somewhat evolved. As I indicated at paragraphs 9 and 10 of these Reasons, some of the allegations set out in the Petition were particularized on the basis of additional information filed by Ms. Michel and some new allegations were considered on the basis the evidence collected by the Panel. These particularized or new allegations are:

a) In the case of Brandy Jules, that she had (i) hollered at an employee of the Band, (ii) participated in lateral violence towards another member of the Band Council and (iii) inquired to the Band Administration Staff regarding a job posting involving her immediate family as well as participated in discussions and advocating (and signing) a Band Council Resolution transitioning, to the benefit of her family, all existing Security Staff to the Band's Staff;

b) In the case of Ronald Jules, that he had (i) made a direct racial comment to a Band's employee and (ii) participated in lateral violence towards another member of the Band Council; and

c) In the case of Georgina Johnny, that she had (i) participated in discussions and advocated (and signed) a Band Council Resolution transitioning, to the benefit of her immediate family, all existing Security Staff to the Band's Staff and (ii) advocated for an immediate family member to represent the Band at the "Together Shuswap" event.

[60] The issue here is not whether the Petition could be particularized or expanded the way it was but whether the Applicants were taken by surprise and deprived, as a result, of the right to know the case against them and to respond it.

[61] The record shows that the Petition was served on the Applicants on September 26, 2016 and that on September 28, 2016, the Applicants informed the Panel that they each refused to accept removal of office and denied all allegations made in the Petition (Respondent Record, vol. 1. at p. 245-248). It is clear, therefore, that on September 28, 2016, the Applicants knew the case against them, as set out in the Petition filed on September 26, 2016.

[62] On September 29, 2016, the Panel issued a notice informing the Band's electors that the Petition had been received, inviting them to make submissions and indicating that the Panel would issue a written decision within 30 days of the receipt of the Petition, as required to do so by section 7(b) of Appendix E of the Election Rules.

[63] According to the Panel's standard procedure, each Applicant was to be provided with a two-hour time-period to make submissions which would be followed by interviews where the Applicants could answer questions about the allegations made against them, including questions about any new information collected by the Panel in the course of its investigation (Respondent Record, vol. 1, Affidavit of David Nordquist, at p. 3, para 17).

[64] The Applicants were first scheduled to appear before the Panel on October 3, 2016, in the case of Ronald Jules, and October 4, 2016, in the case of Georgina Johnny and Brandy Jules.

However, all three requested more time to seek legal advice. Georgina Johnny did appear before the Panel at her scheduled interview but she did not make any substantive submissions (Respondent Record, vol. 1, Affidavit of David Nordquist, at p. 3, para 22). The Panel accepted to reschedule the Applicants' interviews.

[65] On October 3, 2016, the Panel interviewed Ms. Michel. On that occasion, Ms. Michel filed with the Panel a package of additional information consisting of Band Council meeting minutes, various Band Policies and further details of the allegations set out in the Petition (Respondent Record, vol. 1, at p. 144-230). This package of additional information was hand-delivered to the Applicants on October 4, 2016 (Respondent Record, vol. 1, at p. 258).

[66] On October 11, 2016, the Panel sent a notice to Ronald Jules advising him that an interview held in the course of the investigation of the Petition had disclosed verbal abuse on his part and that this matter would be investigated further by the Panel.

[67] On October 12, 2016, the Applicants requested to meet with the Panel on October 14, 2016. The meeting was scheduled for October 15, 2016. At that meeting, the Applicants each brought a letter of identical content dated October 11, 2016 (Respondent Record, vol.1, at p. 395-396), requesting the dismissal of the Petition on the basis that:

a) It was improperly filed as it compounded three petitions in one and lacked the required number of signatures and fee;

b) The Panel was the wrong venue as the Petition, being initiated by a Band employee, should be dealt with under Grievance Procedure of the Band's Employment Guidelines;

c) The three Panel members who were Band employees were in a conflict of interests situation;

d) Ms Kenoras, being the daughter of another Band Councillor, was also in a conflict of interests situation;

e) The Petition should not proceed as there was a pending litigation before the Federal Court in the matter of *Councillor Doris Johnny v Adams Lake Indian Band*;

f) Ms. Yamara was also in a conflict of interest situation as she had a pending employee complaint against a Band member that she asked the Council to deal with; and

g) The "further submissions" served as part of the Petition, including the additional information filed by Ms. Michel, could not be considered as they were filed and served after the filing of the "Original Complaint".

[68] The letter was read to the Panel by Ronald Jules who then asked the Panel to rule on the matters raised therein. He also indicated to the Panel that he and the other two Applicants had no further comments and would not be answering any questions at this time (Respondent Record, vol. 1, at p. 381). The Panel indicated that the Applicants would receive a response in writing once the Panel has had a chance to review the letter.

[69] On October 16, 2016, the Panel responded to the Applicants' letter, indicating that the Petition met all the requirements of the Election Rules and that it would therefore continue to be

processed. The Panel also indicated it had the authority "to allow for additional information from a petitioner or others under s 23.5(b) and (d), 23.6(f) and (g)". It further reminded the Applicants that as per section 23.6 (e) of the Election Rules, no proceedings before the Panel "shall be invalid due to a party not being available to make a presentation to the Community Panel". The Panel concluded the letter by noting that the Applicants had already been provided with the opportunity to meet the Panel on two occasions (October 4 and 15, 2016) and by informing them that they were being offered a final opportunity to meet with the Panel on October 21, 2016 (Respondent Record, vol. 2, at p. 427).

[70] On October 21, 2016, only Georgina Johnny attended the re-scheduled interviews. Ronald Jules and Brandy Jules did not (Respondent Record, vol. 2, at p. 435). Ms. Johnny provided the Panel on that occasion with written submissions and supporting documents (Respondent Record, vol. 2, at p. 438 and 452). However, she declined to answer the Panel's questions. Her appearance before the Panel that day lasted a total of 8 minutes according to the Minutes of the Panel's meeting (Respondent Record, vol. 2, at p. 438).

[71] As indicated at the outset of these Reasons, the Panel reached a decision on October 22, 2016 and issued three separate sets of Reasons in support of its finding that the Applicants had breached their Oath of Office and were, as a result, to be removed from office.

[72] In my view, the written submissions and supporting documentation filed with the Panel by Ms. Johnny on October 21, 2016, evidenced the fact that this Applicant was, at that date, clearly aware of the substance of the allegations that formed the basis of the Panel's decision to

remove her from office and that she was in a position to make representations in a meaningful way. She could have been in a position to respond more fully to these allegations if only she would have accepted to sit down with the Panel and respond to its questions, something she refused to do, as did the other two applicants, throughout the whole process.

[73] As there is no affidavits from Ronald and Brandy Jules on record, I can only assume, since all three Applicants were served with the exact same materials and had, up to that point, a common approach to the proceedings before the Panel, that on October 21, 2016, they both knew, as Ms. Johnny did, the substance of the allegations that formed the basis of the Panel's decision to remove them from office and that they too were in a position to respond to them. The onus was on them to show that their situation was different than that of Ms. Johnny. There is no such evidence on file. In any event, I am satisfied that except for the allegation of verbal abuse that was notified to Ronald Jules on October 11, 2016, the substance of these allegations transpires from the Petition and the additional materials that was served on the Applicants on October 4, 2016.

[74] Therefore, I am unable to conclude that the Applicants were not provided with adequate notice of the case to meet or with the opportunity to make representations on the substance of the allegations against them. As the record shows, they were provided with such opportunity on more than one occasion. In a procedural fairness analysis, it is no excuse not to show up or refuse to participate in a meaningful way to a hearing when the opportunity to do so was provided even where the person concerned has expressed some reservations about the process at hand. The Applicants' main – and sole – objective, particularly when it comes to Brandy and Ronald Jules,

appears to have been to derail the process before the Panel and avoid at all costs having to address the substance of the allegations against them. In my view, this is fatal to their claim that there were not provided with an opportunity to fully participate in the process before the Panel.

[75] The Applicants complaint that they were not given access to the evidence provided by the persons interviewed by the Panel. In *Johnny*, Justice Strickland held that it was open to the Panel, given the deference to be afforded to its choice of procedure, to withhold the minutes of its meetings in order to protect the rights to confidentiality of community members who were interviewed (*Johnny*, at para 36). According to the evidence on record, the confidentiality of the information provided to the Panel by Band members is important in order to reduce the community tensions from which the Adams Lake First Nation community, a small community, already suffers (Respondent Record, vol. 1, Affidavit of David Nordquist, at p. 2, para 8).

[76] The evidence also shows that according to the Panel's standard procedures, the Applicants would have been provided with an opportunity to know and respond to any new information the Panel received during its investigation had the Applicants not adopted the approach of refusing to hold an interview with the Panel and answer its questions (Respondent Record, vol. 1, Affidavit of David Nordquist, at p. 3, para 18). In any event, there is no evidence on record that such a request was ever made by the Applicants. In these circumstances, I see not merit to that argument.

[77] There is no merit either to the Applicants' contention that the allegations the Panel was authorised to consider in this case were only those relating to breach of the Oath of Office, not

those related to violations of Band policies such as the Code of Conduct and Ethics Policy. As counsel for the Respondent pointed out at the hearing, the Oath of Office taken by the Applicants provides that Councillors “shall [...] always uphold the ALIB Election Rules, Band policies and the Chief and Council Terms and Reference of the Adams Lake Indian Band”. It was therefore open to the Panel to consider these alleged violations as part of the Petition it had to investigate and decide.

[78] Finally, I agree that no weight should be placed on the meeting that was held on October 25, 2016 and what came out of it. As the Respondent points out, there are no mechanisms in the Election Rules providing for a decision of the Panel to be reviewed, quashed or otherwise reversed on grounds of procedural fairness, or any other ground for that matter, by Band members. In other words, there is no alternate legal remedy to judicial review in this respect. For the purposes of this judicial review application, this “evidence” has therefore no bearing. In any event, I note that the exact nature of that meeting and of the resolutions that came out of it is highly in doubt. However, given my previous finding, I do not need to determine this issue.

[79] In sum, I am satisfied, considering all the circumstances of this case, that the Applicants were provided with sufficient notice of the allegations against them and given an opportunity to respond to them before an unbiased decision-maker.

[80] The judicial review application will therefore be dismissed. Given that the Applicants are on the losing end of this proceeding, costs are awarded to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. Costs are awarded to the Respondent.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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