Federal Court  Cour fédérale

Date: 20180613

Docket: T-1244-17

Citation: 2018 FC 616

Ottawa, Ontario, June 13, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ANGELINA COMMANDA, NICOLE BERNARD, TOM SARAZIN, GREG SARAZIN, on their own behalf and on behalf of the membership of ALGONQUINS OF PIKWAKANAGAN supporting this Application

Applicants

and

CHIEF AND BAND COUNCIL of the ALGONQUINS OF PIKWAKANAGAN pre March 25th, 2017 (list attached) and CHIEF AND BAND COUNCIL of the ALGONQUINS OF PIKWAKANAGAN post March 25th, 2017 (list attached) at Schedule "A"

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] On March 25, 2017, the Algonquins of Pikwakanagan First Nation [the APFN] held an election for the Chief and Band Council [the Election]. Following the Election, a number of appeals were filed with the APFN Appeal Board. This is an application for judicial review of the two decisions of the Appeal Board dated July 12, 2017 to reject the appeals of Greg Sarazin in relation to the Election.

[2] The Notice of Application in this matter referred specifically to Sarazin's two appeals, and made only general reference to other appeals that were rejected by the Appeal Board. In their Memorandum of Fact and Law, the Applicants also sought judicial review of the Appeal Board's rejections of the appeals of Angelina Commanda, Nicole Bernard, and Tom Sarazin [the Other Appeals], despite being time barred by section 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7. On the day of the hearing, the Applicants handed up a notice of motion for an extension of time to allow the Court to hear the Other Appeals alongside Sarazin's in the present judicial review application.

[3] This motion was itself out of time pursuant to Rule 362 of the *Federal Courts Rules*, SOR/98-106, could be prejudicial to the Respondents, and may be resolved by the outcome of the present application for judicial review. Consequently, the motion for an extension of time was deferred until the issuance of this Judgment, and the Applicants may then decide if they wish to bring this motion again before this Court on a proper record.

[4] Two days after the hearing, the Applicants advised the Court that they intended to bring a motion requiring that I recuse myself due to a reasonable apprehension of bias on the basis of comments made towards the end of the hearing. For the reasons that follow later, that motion is dismissed.

II. JUDICIAL REVIEW

A. *BACKGROUND*

[5] The APFN operate under a custom election code pursuant to the *Indian Act*, RSC 1985, c I-5. Elections are held every three years to elect one chief and six councillors and are conducted pursuant to the Algonquins of Pikwakanagan Custom Election Code 2010 [the Code] and the Custom Election Code Rules of Notice and Procedures passed by motion #10-112 [the Rules].

[6] Incumbents Chief Kirby Whiteduck and Councillor Jim Meness were successfully re-elected in the 2017 Election. Greg Sarazin, who had run against Whiteduck for the position of chief, appealed the Election to the Appeal Board in two separate appeals.

[7] The Code provides the following grounds for appeal:

> 13.3 Within forty-five (45) days after the election results have been posted, any candidate or voter who has reasonable grounds to believe that
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> a) there was a corrupt practice in connection with the election; or
>
> b) there was a contravention of this Code;

> that might have affected the results of the election may appeal in writing to the Appeal Board as defined.

The Rules restates these grounds as follows:

> 22.1 A voter who voted and has reasonable grounds for believing that:
>
> > 22.1.1 there was a violation of the Custom Election Code or these Election Rules of Notice and Procedures that may have affected the results of the election; or
> >
> > 22.1.2 there was corrupt practice that may have affected or has affected the results of the election; within forty-five (45) days of Election Day, may file an appeal by forwarding by registered mail to the Appeal Board a notice of his appeal, as well as a statutory declaration setting out the grounds for the appeal along with ten (10) signatures of voters supporting the appeal.

[8] In the appeal filed May 3, 2017 [the Whiteduck Appeal], Sarazin alleged that Whiteduck committed a corrupt practice during the election which affected the results by contravening the Code and Rules in relation to the handling of mail-in ballots.

[9] The facts giving rise to the Whiteduck Appeal are not in dispute. Three days before the election, a voter who lived off the reserve arranged for Whiteduck to bring to her four mail-in ballot packages. Once the packages were completed by the voter and her family, a third party delivered the completed ballots to the polling station.

[10] In the appeal filed May 4, 2017 [the Meness Appeal], Sarazin alleged that Meness violated the Rules by referring to a personal matter during a nomination meeting using information improperly obtained through his position as Councillor.

[11] The underlying facts are again not in dispute. Meness and Sarazin were both running in the Election. Meness suggested during the nomination meeting that Sarazin had failed to pay amounts owed to the APFN.

[12] Sarazin had been a Councillor and Algonquin Negotiation Representative for treaty negotiations in 2007-2008, and had received income for both. The Chief and Band Council informally agreed that Councillors would pay back the compensation received from the APFN, and informed the APFN of this intention. Sarazin subsequently did not pay back any money to the APFN. Meness later publically clarified that Sarazin had no legal obligation to do so, but maintains that it was a moral obligation.

[13] Although the Code stipulated that an Appeal Board be appointed prior to the day of the Election, the three members were instead named on April 11, 2017. The Appeal Board dismissed the Whiteduck Appeal and the Meness Appeal in two letters dated July 12, 2017.

[14] In the Whiteduck Appeal, the Appeal Board found that no corrupt practice or violation of the Code or Rules had occurred. The Code and Rules are silent on whether ballot packages can be given from one voter to another, or if someone other than the voter can deliver completed ballots to the polling station. The Appeal Board found it consistent with past practices, the Code's enabling of voting rights, the "intent" of the Rules, and the right to vote in the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, to allow ballots to be delivered other than by mail. There was found to be no basis to Sarazin's allegations that Whiteduck had participated in a

conspiracy, that the ballots had been tampered with, or that ballots had been delivered in bulk to the polling station.

[15] In the Meness Appeal, the Appeal Board found that Meness had not engaged in a corrupt practice and that he had not affected the final outcome of the Election. The Appeal Board refused to rule on whether Meness' statement regarding Sarazin's failure to pay money back to the APFN related to a personal matter or business at hand, and made no finding on whether the Rules were contravened. As the information relied upon by Meness came from a publicly available document, the Appeal Board found that he had not abused his power as Councillor.

[16] This single application attempted to have judicial review of two decisions (and more as earlier described). While the general rule is that judicial review should be limited to a single decision, it is convenient and efficient to have the two decisions reviewed in a single judicial review.

B. *ISSUES*

[17] The issues in this application for judicial review are as follows:

a) Was the Appeal Board properly constituted?

b) Was the Appeal Board's decision regarding the Whiteduck Appeal reasonable?

c) Was the Appeal Board's decision regarding the Meness Appeal reasonable?

C. *STANDARD OF REVIEW*

[18] The standard of review applicable to the decision of an Appeal Board on the application of an electoral code is reasonableness: *Lewis v Gitxaala Nation,* 2015 FC 204 at para 15, 476 FTR 63; *D'Or v St Germain,* 2014 FCA 28 at paras 5-6, 459 NR 197.

[19] Given that the decisions engage the Appeal Board's knowledge and expertise of the community norms and experiences and is an internal decision of a community's electoral laws, as part of the respect owed to aboriginal peoples in the governance of their internal affairs, the Board's decision should be accorded a high degree of deference within the reasonableness range of outcomes.

[20] Questions of procedural fairness, including whether there is a reasonable apprehension of bias, are reviewable on the standard of correctness: *Johnny v Adams Lake Indian Band,* 2017 FCA 146 at para 19, 281 ACWS (3d) 3 [*Johnny*].

D. *ANALYSIS*

(1) The Appeal Board

(a) *Appointment*

[21] The Code states in section 12.3 that "Council shall name 3 persons from the Appeal Board that will hear any appeal on the election, at least 40 days before the date of the vote." The Applicants argued that since the Appeal Board was appointed after the election, rather than at

least 40 days prior as required by section 12.3 of the Code, it was not properly constituted and its decisions are invalidated.

[22] The Applicants' argument has been considered and rejected in the past.

In *Sparvier v Cowessess Indian Band No 73*, [1993] 3 FC 142 at 156, 1993 CarswellNat 808 (WL Can) (TD) [*Sparvier*], Justice Rothstein provided significant guidance on this issue:

> In my view, an important reason for electing the Appeal Tribunal before the nomination meeting is that it will be in place throughout the election process to deal with the matters over which it has jurisdiction. Another reason for it being constituted before the nomination meeting may be that its members will, at an early stage, avoid becoming involved in a partisan way in the election. Neither reason, however, suggests that the timing of the election of the Appeal Tribunal is of such overriding importance that noncompliance with the timing requirement of para. 6(4)(*a*) should result in the actions of an Appeal Tribunal elected after a nomination meeting being of no legal effect.
>
> In my opinion, if the Tribunal is not elected until some portion of the election process has taken place, it may still deal with appeals once it is constituted. If any members finds that he or she has become aligned with a candidate in such a manner as to raise a reasonable apprehension of bias, he or she should not accept election to the Appeal Tribunal.
>
> Invalidating the actions of an Appeal Tribunal solely because it was elected after the nomination date could well work a serious inconvenience or injustice to the members of the Band who have no control over those entrusted with ensuring compliance with the Act. I am satisfied that the provision requiring that the Appeal Tribunal be elected before the nomination meeting is, in the context of the Act, directory and not mandatory, and that noncompliance does not result in the Appeal Tribunal not being properly constituted. Nor does noncompliance invalidate the election process or the actions or orders of the Appeal Tribunal.

[23] The Federal Court of Appeal in *Ermineskin First Nation v Minde*, 2008 FCA 52 at para 37, 168 ACWS (3d) 225, directed that whether a legal requirement is directory or mandatory "must be analyzed in light of the purpose of the legislation under consideration and the particular action sought to be invalidated". It must therefore be determined whether section 12.3 of the Code is directory or mandatory in light of the purpose of the Code and the action of the Appeal Board sought to be invalidated.

[24] In this case, the object of the Code is to regulate the election of the Chief and Band Council pursuant to customary leadership selection rules.

The Appeal Board's role in section 12.1 of the Code is "to sit and hear cases and appeals on all laws and Codes developed by the [APFN]", which includes hearing appeals regarding elections pursuant to section 13.3 of the Code and section 22.1 of the Rules.

[25] If there were no appeals, there would be no purpose in the appointment of the Appeal Board and the object of the Code would be fulfilled. The decisions at issue dismissed two appeals in relation to the Election, and were actions fundamental to the Appeal Board's purpose. Section 12.3 of the Code provides the procedure and timing for the formation of the Appeal Board. Invalidating the decisions of the Appeal Board solely because it was appointed in noncompliance with this timing requirement would serve a serious inconvenience and injustice to the members of the APFN who rely on the appeals process to ensure the legitimacy of the Election.

[26] Section 12.3 of the Code in this circumstance is therefore directory and not mandatory, and, for reasons similar to those in *Sparvier*, noncompliance with this provision does not invalidate the Appeal Board's actions.

(b) *Reasonable Apprehension of Bias*

[27] The Applicants also argued that, once it was appointed, there was a reasonable apprehension of bias or conflict of interest on the part of the three members of the Appeal Board.

[28] The first allegation was that one Appeal Board member, Andre Carle, was biased in favour of the incumbent nominees in the Election due to having signed a petition a year before the Election that he did not support an attempt by a group called the "Grandmothers of Pikwakanagan" to remove the Chief and Band Council from office.

[29] This April 2016 petition was against an initiative outside the election process, and not a declaration to oppose legitimate challenge in the March 2017 election. There is no evidence that suggests Carle approached Sarazin's appeals with a closed mind or that a reasonable person would reasonably fear that he had.

[30] The second allegation was that the other two Appeal Board members, Lois Lavelley and Sandra Nash, were in a conflict of interest due to their employment with the APFN. This was argued to be evidenced by Lavelley's statement during the Appeal Board proceeding that the Code would be amended after the Election "[i]f we do not get fired first", and reference to Chief

Whiteduck as “the big guy”. Whiteduck was also alleged to have influenced the Appeal Board’s decision through a letter responding to Sarazin’s appeal on official APFN letterhead.

[31] Nash is employed by a cultural centre and museum, and Lavalley is employed by an assisted care facility, which are all affiliated and funded either partially or fully by the APFN. The Courts have recognized that the issue of reasonable apprehension of bias must be examined in the context of the community affected. The nature and size of those communities must be factored into the analysis and application of the legal principle.

[32] The Federal Court of Appeal in *Johnny*, in keeping with the line of reasoning in *Sparvier*, took a realistic approach to the operation of the legal principle in small communities such as the APFN:

> [41] The Election Rules do not preclude Band employees from holding office as a member of the Community Panel. Only members of the Band Council or candidates in an election are precluded from election as a member of the Community Panel. **Thus, I do not disagree with the Federal Court’s conclusion that the mere fact that a member of the Community Panel is employed by the Band does not give rise to a reasonable apprehension of bias. What is required is an actual conflict of interest in a given case** (reasons, paragraph 41). This is consistent with the reasoning in *Sparvier v. Cowessess Indian Band #73*, [1993] 3 F.C.R. 142, [1994] 1 C.N.L.R. 182 (F.C.T.D.) where Justice Rothstein wrote, at pages 167-168 :
>
> > … **it does not appear to me to be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation, to be completely without social, family or business contacts with a candidate in an election.** …
> >
> > 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.
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> [Emphasis added.]

[33] The Federal Court of Appeal elaborated further on this "conflict of interest" principle and confirmed the operation of the principle of "reasonable apprehension of bias" in paragraphs 42 and 43 of the decision but set the criteria of "reasonableness" in the context of the realities of a small community. The Federal Court further elaborated in *Michel v Adams Lake Indian Band Community Panel*, 2017 FC 835, 283 ACWS (3d) 681:

> [34] **In short, looking through the prism of a small First Nations community, the mere fact that a member of an administrative body may have a family or work connection to others touched in some way by matters at issue, does not lead directly or invariably to a reasonable apprehension of bias.** This is exactly the situation that we find ourselves in here: every one of the Panel members is tied either through work or family to sitting members of Chief and Council, or Band administration. Tribunal members serving small Bands cannot avoid having friends and relatives involved in Band administration and/or Council, and the fact of such ties alone does not raise a reasonable apprehension of bias. Rather, what is needed to breach that threshold is an actual conflict, such as a financial interest in the outcome of the dispute, or close family members directly linked to the allegations at issue.
>
> [Emphasis added.]

[34] Mere allegations and the casting of aspersions against one or more members of the Appeal Board is not sufficient to support the Applicants' argument.

[35] A member's employment at organizations in Pikwakanagan affiliated with the APFN is therefore insufficient, on its own, to give rise to a reasonable apprehension of bias. The Applicants have not provided evidence that points to an actual conflict of interest between employment at the cultural centre or assisted care facility and Sarazin's appeals; nor evidence that would cause an informed person, viewing the matter realistically and practically and having thought the matter through, to conclude that it was more likely than not that the Appeal Board members would not decide fairly. Additionally, allegations of bias due to employment were not raised before the Appeal Board, which weighs further against the Applicants' ability to do so now: *Majidigoruh v Jazz Aviation LP*, 2017 FC 295 at para 37, 278 ACWS (3d) 130.

[36] The Appeal Board member's comment "if we do not get fired first" was stated in the context of a discussion of amendments to the Code, not in relation to the decision to be made or potential repercussions from that decision. As was suggested by the Respondents, the member appears to have been referring to her position on the Appeal Board, not to her employment at the assisted care facility. There is also no indication that referring to Whiteduck, who had been Chief for three years and had recently been re-elected, as "the big guy" evidences a fear for her employment should Sarazin's appeal be allowed. Finally, Whiteduck's letter was submitted as part of the Appeal Board's process of providing a copy of the appeal to the persons identified in the appeal to allow them an opportunity to respond. Nothing in this letter suggests an improper threat or influence on the Appeal Board's decision making.

[37] In pointing to a comment here and there in an internal discussion, there must be recognition of collegial speech, humour or wry comment which does not mean that there is a basis for a bias claim.

[38] I therefore conclude that there were no issues in relation to composition of the Appeal Board that vitiated its decisions or resulted in a breach of procedural fairness.

(2) The Whiteduck Appeal - Ballots

[39] There are approximately 1,850 eligible voters in the APFN, of whom only 350 live on the reserve. The voting rights of those who live off-reserve are enabled through mail-in balloting.

[40] The Code and Rules provide the procedure for mail-in ballots. Section 11.3 of the Code states that mail-in ballots "will be mailed to all that have requested mail in ballots". Section 12.1 of the Rules specifies that mail-in ballots are to be provided on request to "a voter who resides in Pikwàkanagàn".

[41] Section 11.2 of the Rules provides that the Electoral Officer shall mail the mail-in ballot package to the voter who requested it at least 35 days before the election. If a voter lives off the reserve, does not request a mail-in ballot, or requests a mail-in ballot within 35 days of the election, the custom election law as codified is silent. There is no provision that states mail-in ballots cannot be provided other than by request from a voter on reserve.

[42] Regarding delivery of the mail-in ballots, section 12.3.5 of the Rules states that a voter "may vote by mail-in ballot by . . . delivering or mailing the mail-in ballot to the Electoral Officer" by the close of polls on election day. The word "may" suggests that this is a permissive provision rather than an imperative one, and there is no further direction on how mail-in ballots are to be submitted.

[43] In practice, the Electoral Officer mailed mail-in ballots to every member of the APFN, on or off reserve, for whom there was an address. A voter could request a mail-in ballot package for themselves or for another voting member and receive it other than by mail, and there was no restriction in how such a mail-in ballot package could be delivered to the polling station.

[44] The Applicants submitted that the Election was conducted in a way that breached the Code and Rules in a variety of ways, from candidate eligibility to hours of voting, that altered the outcome of the Election. These allegations, which are set out in detail in the Other Appeals, are not properly the subject of the present judicial review.

[45] The Applicants argued that by raising the issue of improper handling of mail-in ballots in the Whiteduck Appeal, other alleged infractions regarding how the ballots were distributed and processed may also rightfully be at issue here. I disagree. These allegations were not raised by Sarazin in his appeal, and were not part of the Appeal Board's decision which is the subject of this judicial review.

[46] It is worth noting the circumstances of the voter who arranged for Whiteduck to bring her the mail-in ballot packages. She wished to vote in the Election, and was entitled to do so, but had mobility issues. She lived in Renfrew, not Pikwakanagan, so there was no way for her to request a mail-in ballot in accordance with section 12.1 of the Rules. Even if she had lived in Pikwakanagan, as it was only three days before the Election, the Electoral Officer would have been unable to mail her the ballot 35 days before the day of the Election, as required by section 11.2 of the Rules. Her situation put her squarely within the gaps in the Code and the Rules.

[47] The Appeal Board reasonably found in this context that one voter bringing mail-in ballots to another to be completed, and having another voter deliver those completed ballots to the polling station was not contrary to any provision of the Code or Rules, was in line with past practices, and furthered the voting rights of APFN members in accordance with the objectives of the Code and Rules. The Appeal Board's reasons demonstrate justification, transparency, and intelligibility in reaching this decision.

[48] The Appeal Board's reasoning is entitled to deference as it applied relevant factors and engaged its expertise and knowledge of the community.

[49] The Appeal Board also found no conspiracy involving Whiteduck to have occurred that indicated a corrupt practice. The Appeal Board noted that Sarazin alleged that some of his own supporters were involved in the improper handling of and tampering with ballots as part of this supposed conspiracy. The record supports the reasonableness of finding that no such conspiracy

took place. Whiteduck did not attend the APFN office to get the mail-in ballots, but picked them up at the voter's request from her sister to bring them to her. The mail-in ballots were only completed by the voter and her family after Whiteduck left, and were brought to the poll not by Whiteduck but by the voter's friend.

[50] While it may appear informal to have someone other than the voter drop off several ballots at a time, it is not contrary to the custom elections law as codified by the Code and Rules, and there is no evidence that any actual tampering or malicious conduct occurred, merely vague speculation by the Applicants. It was within a range of acceptable outcomes defensible on the facts and law for the Appeal Board to find that no corrupt practice occurred.

[51] The Appeal Board's decision in the Whiteduck Appeal is therefore reasonable.

(3) The Meness Appeal - Allegation of Personal Matter

[52] Section 8.3 of the Rules states that questions to the nominees at a nomination meeting "must be related to business at hand and not to personal matters." During the nomination meeting, Meness referred to money that Sarazin had agreed to pay back to the APFN while he was a councillor but did not subsequently pay back. Sarazin asserted in his appeal, and the Applicants maintained in this judicial review application, that this was an impermissible reference to a personal matter, and that Meness improperly used his authority as a councillor to obtain that information.

[53] Section 22.1 of the Rules provides grounds for an appeal on the basis of either 1) a corrupt practice that could have affected the results of the election, or 2) a violation of the Code or Rules that could have affected the results of the election. As Sarazin sought an appeal on both grounds, the Appeal Board had to address both of these grounds.

[54] In relation to the first ground, the Appeal Board found that Meness had not committed a corrupt practice. The Manager of Finance confirmed to the Appeal Board that the auditor's report containing information about funds paid to the APFN was a publicly available document.

[55] The Applicants argued that this was not a publically available document because the chartered accountants who prepared it noted in the attestation document that it was "provided solely for the purpose of assisting Chief & Council in discharging its responsibilities and should not be referred to or used for any other purpose".

However, disclosure of the auditor's report to community members suggests financial transparency and accountability, which are part of the Chief and Band Council's responsibilities. There is nothing unreasonable about the Appeal Board's finding on this point.

[56] In relation to the second ground, the Appeal Board refused to rule on whether the statement referred to a personal matter contrary to section 8.3 of the Rules:

> Your appeal is asking us, the Appeal Board, to make a ruling to find if your decision on the issue was indeed a personal matter. However, such a decision would appear or perceived to condone or endorse your position that by your own words that you were no longer a councillor so you didn't have any obligation to give back any First Nation money back even though it was earned while you were serving as an elected official.

> The onus is on each candidate to present their argument to the elective voting members. We, the Appeal Board determined that it is up to each individual voter to make their own personal opinion on such matter and to vote at their own discretion. The Appeal Board has absolutely no right or the obligation to impose an opinion on the voter.

[57] The Respondent argued that the Appeal Board implicitly determined that this was not a personal matter by indicating that it was a relevant issue that should be left up to the voter to decide.

[58] That position cannot be upheld. First, the Appeal Board explicitly stated that they refused to decide whether the statement was a personal matter or related to business at hand, and cannot in this instance be taken to have implied the opposite. Second, a personal matter could be very relevant to who somebody would support in an election, but is nevertheless disallowed by section 8.3 of the Rules from being raised as a question at a nomination meeting.

[59] In refusing to decide whether Meness' statement referred to a personal matter or to business at hand, the Appeal Board in dismissing the appeal effectively found that there had been no impact on the election outcome.

[60] Importantly, in the closing statement of the decision, the Appeal Board states that "we, the Appeal Board, find that Jim Meness, did not commit a corrupt practice in connection with the Election and he did not affect the final outcome of the Election".

[61] Section 22.1.1 of the Rules provides that a voter may file an appeal where "there was a violation of the Custom Election Code or these Election Rules of Notice and Procedures that may have affected the results of the election". The wording of this provision allows the Appeal Board to dismiss the Meness Appeal on the basis that, even if there was a violation of the Rules, the outcome of the Election was not affected. The use of the conjunctive "and" in the decision suggests that this finding that the outcome of the Election was not affected was in relation to both grounds of the appeal.

[62] The Appeal Board can therefore be taken to have decided that no matter whether or not Meness' statement was a violation of section 8.3 of the Rules, the final outcome of the Election was not affected.

[63] To the extent that the Court needs to comment on the issues of "business" or "personal matter", it was open to the Appeal Board to find that the comments were related to a business matter.

[64] The record demonstrates that when Sarazin was a councillor in 2006, he drafted a "Negotiation Update" signed "Chief and Council" in the newsletter that was then sent out to members of the APFN, which stated that "[o]n those days that we receive honorariums and expenses through the ANR budget we will re-turn the normal honorariums received through General Government to the First Nation." Documentation of the funds paid to the APFN show that he did not subsequently return his honorarium.

[65] Section 8.3 of the Rules requires questions to be related to business at hand and not personal matters. These terms are not defined in the Rules. Contextually, this provision denies voters the ability to question nominees at a nomination meeting on issues irrelevant to band governance, such as interpersonal grievances or matters of an intimate or private nature. This is consistent with the need to reduce areas of conflict in a small community.

[66] Sarazin was running for chief. Meness' statement at the nomination meeting raised the issue of whether or not Sarazin had "double dipped" while in office, and contrasted Sarazin's public statement as a councillor with his subsequent actions. This involved Sarazin's accountability as a councillor on the same Chief and Band Council to which he now sought to be elected as chief, which is quintessentially "related to business at hand" and clearly relevant to voters determining his suitability for office. There is no reasonable characterization of this issue as relating to a purely personal matter irrelevant to Sarazin's nomination for chief.

[67] Where only one interpretation or solution is possible in light of the circumstances and the record, and any other interpretation would be unreasonable, this Court may exercise its discretion to not remit a matter back to the administrative decision-maker: *Giguère v Chambre des notaires du Québec*, 2004 SCC 1 at para 66, [2004] 1 SCR 3; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 44, 341 DLR (4th) 710. The only reasonable outcome for the Appeal Board to reach is that Meness' statement related to business at hand and was not a contravention of section 8.3 of the Rules.

[68] I therefore would not disturb the Appeal Board's decision in the Meness Appeal.

E. *CONCLUSION*

[69] These are the reasons for the dismissal of the application for judicial review.

III. MOTION FOR RECUSAL

[70] This motion for recusal was brought by the Applicants on the basis of comments that were made during an exchange between the Court and counsel in the Reply during the hearing of the application for judicial review particularly the use by the Court of the phrase "on y soit qui mal y pense" in the context of improper conduct in the ballots. The Applicants submitted that these comments raised a reasonable apprehension of bias.

A. *BACKGROUND*

[71] In *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 37, [2015] 2 SCR 282 [*Yukon School Board*], the Supreme Court of Canada reaffirmed the test for a reasonable apprehension of bias first stated in de Grandpré's dissent in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369, 68 DLR (3d) 716, and rephrased in *Miglin v Miglin*, 2003 SCC 24 at para 26, [2003] 1 SCR 303:

> [W]hether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias . . . . [T]he assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties.
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> [Citations omitted.]

[72] An allegation of a reasonable apprehension of bias not only calls into question judicial integrity, but also the integrity of the entire administration of justice, so it should not be made lightly: *R v S (RD)*, [1997] 3 SCR 484 at para 113, 151 DLR (4th) 193 [*S (RD)*]. A high threshold must be met to rebut the presumption of judicial impartiality: *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 16, [2013] 2 SCR 357; *Langstaff v Marson*, 2014 ONCA 510 at para 40, 375 DLR (4th) 637.

[73] Before concluding that there is a reasonable apprehension of judicial bias, an applicant must demonstrate that a reasonable, informed person would be satisfied that there is clear evidence that the judge is not approaching the case with a fair and open mind: *S (RD)* at paras 49 and 114. Impugned conduct must be looked at in a "contextual and fact-specific" manner: *Yukon School Board* at para 26.

[74] The comments at issue in this case occurred in the final moments of the hearing. Towards the end of his reply submissions, counsel for the Applicants argued that various contraventions of the Code and Rules had occurred in relation to the procedure for the distribution and collection of mail-in ballots. The relevant exchange on this motion is as follows, and concludes with the end of the hearing:

> MR. SWINWOOD: . . . The voter elector did not deliver them by hand or by mail to the electoral officer. I know we've had the discussion about delivery and all of that, but what remains within the context of that is the appearance that something is not right when you bring in a handful.
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> THE COURT: There's a wonderful French phrase. I think it's "on y soi qui mal y pense". Those who think evil, do evil.
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> MR. SWINWOOD: Well, I understand that that --

> THE COURT: I think you see evil --
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> MR. SWINWOOD: Actually, what I understand it to be is "on y soi qui mal y pense" is evil to him who thinks evil of it.
>
> THE COURT: Yes.
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> MR. SWINWOOD: And so shame --
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> THE COURT: In other words, you look for -- it's a person looking for evil.
>
> MR. SWINWOOD: Well, no. No, it's --
>
> THE COURT: And that seems to be the thrust of your case. You're, quite frankly, sir, you seem to be doing nothing more than casting aspersions on people with no hard evidence of breach.
>
> MR. SWINWOOD: This is hard evidence about how the ballots were dealt with. This is how the ballots were dealt with and this is given by the scrutineer. How can one say that that's not evidence, Mr. Justice Phelan?
>
> THE COURT: Well, you've got five minutes before you become a pumpkin.
>
> MR. SWINWOOD: I don't wish to be a pumpkin. The thing is, is that this appendix does serve as evidence from a scrutineer and she signed an affidavit and it's in the body of the evidentiary record that's before you. Thank you.
>
> THE COURT: Okay, thank you. That was a good day for what was to be a half-day. You will hear from me in due course. Thank you very much.

[75] Sarazin stated in his affidavit that this exchange left him with the impression that the Court had decided the issue without giving due consideration to the record before it and the submissions of counsel, and that the Court was biased against the Applicants. He asserted that the statements "it's a person looking for evil" and "[t]hose who think evil, do evil" left him with the impression that the Court considered the Applicants evil.

[76] The Order of the Garter was established in 1348 by King Edward III, and its motto is the French phrase *"Honi soit qui mal y pense"*, which means "shame on him who thinks ill of it". This motto appears on the royal coat of arms of the United Kingdom, and has been incorporated into several Canadian symbols as a result of our colonial heritage, such as the ceremonial staff carried by the Usher of the Black Rod or the badges of Canadian military regiments.

[77] Sarazin asserted in his affidavit that the use of the phrase "*Honi soit qui mal y pense*" is "an expression of the colonial mind which developed the policies designed to dominate Indigenous People." The Applicants argued that the use of this phrase sparked an "electric sensitivity" between those who are indigenous and those who administer the colonial institutions of Canada, and raised the spectre of the abuses suffered by Aboriginal people in Canada. This spectre included raising memories of such abuses as colonial abuses and particularly residential schools and other similar tragedies and trauma.

[78] The Applicants also argued that the Court's comment that "the thrust of your case . . . [is] casting aspersions on people with no hard evidence of breach" indicated that the case had already been decided, which contributed to the French phrase creating a reasonable apprehension of bias.

[79] The Respondents submitted that, in context, the exchange was the Court providing an opportunity for counsel to point to evidence that supported the Applicants' position. Once the French expression had been defined, the Applicants were told that "you seem to be doing nothing more than casting aspersions on people with no hard evidence of breach." Applicants' counsel

responded by pointing to the evidence of a scrutineer, and therefore took advantage of this opportunity to assist the Court with its deliberations.

[80] The Respondents also argued that a pointed comment, particularly one that provides an opportunity for counsel to respond to the Court's concerns, does not give rise to a reasonable apprehension of bias: *Hennessey v Canada*, 2016 FCA 180, 267 ACWS (3d) 479 [*Hennessey*]; *Ahani v Canada (Minister of Citizenship and Immigration)* (2000), 184 FTR 320 at para 8, 261 NR 40 (FCA); *Nowoselsky v Canada (Attorney General)*, 2007 FC 1065 at paras 87-88, 317 FTR 197; *Continuing Care Employers' Bargaining Association v AUPE,* 2002 ABCA 148 at para 2, 303 AR 137. In this case, the Court asked counsel to point to evidence supporting his argument during the final moments of reply submissions. This timing, as well as that the Applicant's motion regarding the Other Appeals was stood down rather than dismissed, confirms that the hearing was approached with an open mind.

B. *ANALYSIS*

[81] The context for the comments at issue in this case is significant. The exchange occurred in the final few moments of an oral hearing which was an application for judicial review of two Appeal Board decisions in relation to the APFN's Election for Chief and Band Council. Both parties were members of the APFN, so this is not a case in which unconscious prejudice and stereotypes could work disadvantage to one side. That the comments were made in the final moments of the hearing, inviting the Applicants to point to evidence in support of their allegations, works further to lessen any perception of a closed mind or a preconceived result.

[82] It is often fairer to a party to confront them with an issue that is troubling the Court than to decide the matter without giving some last opportunity to address the troublesome matter.

[83] As was highlighted by the Respondents, a pointed comment that provides counsel an opportunity to get to the heart of the matter does not give rise to a reasonable apprehension of bias. The Federal Court of Appeal stated as follows in *Hennessey*:

> [16] The appellant says (at para. 35 of his Memorandum of Fact and Law) that on the first day of trial the Federal Court pointedly asked his counsel where the evidence supporting a "big conspiracy" was. Assuming the Federal Court said those words, they must be seen in context.
>
> [17 The Federal Court—mindful of the need under Rule 3 of the *Federal Courts Rules*, S.O.R./98-106 for proceedings to be prosecuted expeditiously and efficiently—had every right to ask that sort of question. The reasonable, right-minded, informed person would not view those words as expressing pre-judgment of the appellant's case. Rather, that person would see them as an intervention aimed at encouraging the appellant to get to the real issues in dispute. Assuming the Federal Court said the words alleged, they were an instance of good trial management, not bias.
>
> [18] The appellant also suggests (again at para. 35 of his Memorandum of Fact and Law) that the Federal Court showed bias in expressing its frustration after several days of evidence that it had not seen any evidence supporting the appellant's case. Again, viewed from the perspective of the reasonable, right-minded, informed person, this was a comment directed at encouraging the appellant to adduce relevant evidence and get to the point if there was a point to be made. This too was an instance of good trial management, not bias.

[84] A reasonable, right-minded, and informed person would similarly view the comments at issue in this motion as encouraging the Applicants to point to relevant evidence and to get to the point if there was a point to be made. A reasonable person would not be left with the impression that these comments were a personal assessment of the Applicants as evil.

[85] There is no question that colonialism in Canada has had a negative and lasting impact on Aboriginal people. The establishment and operation of residential schools and other aspects of Canada's assimilationist Aboriginal policy resulted in cultural genocide.

[86] The Applicants' perception of the comments at issue, however, demonstrates a view of the words used in isolation, detached from the hearing in which they occurred, with a special subjective sensitivity. In arguing the motion, counsel for the Applicants referred to how the comments at issue made his clients feel. This subjective sensitivity is insufficient to meet the objective test for a reasonable apprehension of bias. The phrase may have colonial connotations, but so do many other features and symbols in the Canadian legal system, and this alone is an inadequate basis to rebut the presumption of impartiality.

[87] It is also worth noting that the Respondents had grave concerns regarding the manner in which the Applicants have used the legacy of residential schools and colonialism to advance their arguments in a community-level dispute between members of the APFN. It was felt to be offensive and a disservice to those who have suffered due to these policies to invoke them in this manner. This speaks to the subjective and individualized nature of the Applicants' perception of bias in this case.

C. *CONCLUSION*

[88] Based on the above, I find that from an objective viewpoint, a reasonable, informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and

practically, would not conclude that the exchange at issue on this motion gives rise to a reasonable apprehension of bias.

[89] This motion will therefore be dismissed.

JUDGMENT in T-1244-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs at the usual level. This Judgment is without prejudice to the Applicants' motion for an extension of time in respect to the other decisions of the Appeal Board.

"Michael L. Phelan"
Judge

SCHEDULE "A"

Pre March 25, 2017

Chief Kirby Whiteduck, Councillors: Jim Meness, Sherrlyn Sarazin, Cliff Meness, H. Jerrow Lavalley, Dan Kohoko, Ronald Bernard

Post March 25, 2017

Chief Kirby Whiteduck, Councillors: Jim Meness, Wendy Jocko, Steven Benoit, Barabara Sarazin, Dan Kohoko, Ronald Bernard

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1244-17
STYLE OF CAUSE:	ANGELINA COMMANDA, NICOLE BERNARD, TOM SARAZIN, GREG SARAZIN, on their own behalf and on behalf of the membership of ALGONQUINS OF PIKWAKANAGAN supporting this Application v CHIEF AND BAND COUNCIL of the ALGONQUINS OF PIKWAKANAGAN pre-March 25th, 2017 (list attached) and CHIEF AND BAND COUNCIL of the ALGONQUINS OF PIKWAKANAGAN post March 25th, 2017 (list attached) at Schedule "A"
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 27 AND MARCH 23, 2018
JUDGMENT AND REASONS:	PHELAN J.
DATED:	JUNE 13, 2018

APPEARANCES:

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Benjamin Mills Carly Haynes	FOR THE RESPONDENTS

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Conlin Bedard Barristers and Solicitors Ottawa, Ontario	FOR THE RESPONDENTS