Federal Court  Cour fédérale

Date: 20161102

Docket: T-2027-15

Citation: 2016 FC 1222

Ottawa, Ontario, November 2, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

SONNY GAGNON

Applicant

and

MARK BELL, SHELDON ATLOOKAN, JOESEPH BAXTER, LUCIEN MENDOWAGON (AKA LUCIEN MATASAWAGON MENDOWEGAN), MARCEL GAGNON SR., ROBINSON MESHAKE, DOROTHY TOWEDO-BAXTER, BRENDA MEGAN, and DAMIEN BOUCHARD

Respondents

JUDGMENT AND REASONS

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[1] This is an application for judicial review [Application] pursuant to section 18.1 of the *Federal Courts Act*, RCS 1985, c F-27 [the Act] , concerning decisions made by Respondents Brenda Megan and Damien Bouchard [the Electoral Officers] and the remaining Respondents who were elected on November 7, 2015 [the Election] as Chief and Band Council of Aroland First Nation [AFN or Band]: to wit, Dorothy Towedo as Chief, and Mark Bell, Lucien Mendowegan, Marcel Gagnon Sr., Joe Baxter, Sheldon Atlookan, and Robinson Meshake as Councillors [together, the Council or Band Council].

[2] The Applicant is seeking an order for the issue of a writ in the nature of *quo warranto* declaring that the Chief and Council elected November 7, 2015, never properly held office, quashing the November 7, 2015 AFN Election results, directing the parties to convene a General Assembly to appoint new Electoral Officers and ordering that a new election be held.

[3] For the reasons that follow, the application is dismissed.

I. Background

[4] The AFN is a First Nation community of approximately 491 voting members located in Northern Ontario. The AFN community holds elections every two (2) years to elect six (6) councillors and one (1) chief. AFN's election procedure is not currently governed by a written election code, the election regulations of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*], or the new *First Nations Elections Act*, SC 2014, c 5, election system. A draft election code, the *Aroland First Nation Election Code Draft #8*, was never adopted or ratified by AFN's membership. It is

common ground that AFN therefore currently relies on an oral election code, often called “Band Custom”.

[5] On September 2, 2015, a community meeting was held where Brenda Megan and Damien Bouchard were appointed respectively as the Electoral Officer and Deputy Officer. The Electoral Officers thereafter set dates for the Thunder Bay and Aroland advance polls, the election on November 7, 2015, and the candidate nomination meeting on September 23, 2015.

[6] On September 3, 2015, the Electoral Officers set up a Facebook page and posted the following information:

- Nominations for chief and council [Nomination Meeting] would be held on September 23, 2015 at 6:00 pm at Johnny Therriault Memorial School in Aroland;
- Advance Polls would be held in Aroland on October 26, 2015 from 8:00 am to 4:00 pm;
- Advance Polls would be held in Thunder Bay at the Landmark Inn on October 29, 2015 from 8:00 am to 4:00 pm;
- Election Day would be November 7, 2015 from 8:00 am to 8:00 pm at Johnny Therriault Memorial School in Aroland.

[7] Also on September 3, 2015, an election memo communicating the above information was posted at a local smoke shop, the Band Office and Health Centre (all on-reserve) and at O’Sullivan Gas Bar (off-reserve). The same memo was also delivered to every home in Aroland. Even though AFN elections had in previous years been advertised in print media such as newspapers, the Electoral Officers only used Facebook for the purposes of advertising the 2015 AFN election. Off-reserve AFN members were notified of the Election by the Election Facebook

page, by family members on the reserve, and by word of mouth. Once notified, AFN members could contact the Electoral Officers to request a ballot.

[8] On September 23, 2015, the Nomination Meeting was held as planned.

[9] On September 25, 2015, the advance polling dates were changed and advertised on the AFN Election Facebook page. The Thunder Bay advance polling date was changed from October 29, 2015 to October 17, 2015. The Aroland advance polling date was changed from October 26, 2015 to October 24, 2015.

[10] On October 15, 2015, the advance polling dates were again changed because an elder of the community had passed away. The Thunder Bay and Aroland advance polling dates were thus changed from October 17, 2015 to October 24, 2015 and from October 24, 2015 to October 25, 2015, respectively.

[11] On October 24 and 25, 2015, advance polls were held in Thunder Bay and Aroland, respectively.

[12] Elections were held on November 7, 2015, and willing eligible voters of AFN voted to elect a new council and chief from 8:00 am to 8:00 pm at Johnny Therriault Memorial School in Aroland. Once the polls closed, the votes were counted at Johnny Therriault Memorial School by the Electoral Officers and witnessed *inter alia* by Gloria Wabasson, Dorothy Towedo-Baxter and

the Applicant. The results of the Election were announced past midnight that evening on Facebook by Damien Bouchard, the Deputy Officer, in the following manner:

> Mark Bell. Sheldon Atlookan. Joe Baxter. Louie Mendowagon. Marcel Gagnon Sr. Robinson Meshake. Councillors. Dorothy Towedo as Chief.

[13] On November 9, 2015, the Applicant, who is also the outgoing chief of AFN, emailed the Band Administrator (Patricia Magiskan), the Co-Managers (Cupri Consulting and Alice Towedo), and former unelected band council members to raise concerns regarding the Election and request a formal recount. The Applicant's allegations were as follows:

a) Many AFN members had contacted the Applicant and told him that they had not been informed about the Election or had not received clear instructions on how to vote.

b) Advance poll dates in Thunder Bay and Aroland had changed twice.

c) The ballot boxes were not at all times supervised appropriately.

d) Some mail-in ballots did not have a post-mark on them, indicating that they hadn't gone through the mail system.

e) Only 41 of the 50 mail-in ballots sent out to voters came back with votes.

f) The Deputy Officer (Damien Bouchard)'s father was running for chief in the Election.

g) The Electoral Officer (Brenda Megan)'s common law partner and co-habitant was running for councillor in the Election.

[14] Also on November 9, 2015, the Chief and new Council members adopted Band *Council Resolution 15/16#015* declaring that the newly elected Council should commence their duties on the same date based on the elections of November 7, 2015.

[15] On November 11, 2015, the Band Administrator retained the firm Buset & Partners LLP [B&P], the Band's legal counsel, to conduct a review of the November 7, 2015 election for the Band. That same day, B&P emailed the Band Administrator one of the Band's co-managers (Ryan Bliznikas), and the Electoral Officer (Brenda Megan) requesting certain documents, including *inter alia* an official election report, and other relevant information needed to conduct a review of the Election. Ms. Megan alleges not having received nor read this email until after November 11, 2015. She also acknowledges hearing about an appeal being spoken of concerning the conduct of the election shortly after the election.

[16] On November 13, 2015, B&P met with the Band Administrator, one of AFN co-managers (Crupi Consulting) and the Applicant to discuss the Election and obtain a legal opinion on the conduct of the Election and actions to be taken.

[17] On November 14, 2015, the Applicant wrote to the Electoral Officers to request an election report and convey other concerns, including the following allegations:

a) Ballots were numbered and the voter list was numbered, thereby affecting the anonymity of the voting system.

b) The Electoral Officer personally picked up a ballot from a voter.

c) A voter in Nakina had his ballot picked up by another band member.

d) Two eligible members were denied the ability to vote without any valid reason.

[18] On November 17, 2015, the Electoral Officers completed a report on the Election [Election Report] and submitted it to the Band office. The Election Report showed that 239 out

of 248 on-reserve voters cast a vote, while only 118 out of 245 off-reserve voters cast a vote. This corresponded to an on-reserve voter turnout of 96% and an off-reserve turnout of 48%. The Applicant had lost the Election by nine (9) votes.

[19] On November 18, 2015, the Applicant requested a copy of the Election Report.

[20] On November 21, 2015, the Applicant wrote to Band Management to request, for a third time, a recount of the Election ballots.

[21] Also on November 21, 2015, B&P's legal opinion regarding the Election was communicated to the new Chief and Band Council via email. B&P were of the opinion that the Election had been shown to have sufficient irregularities, and that the number of votes affected as a result was sufficient to affect the outcome of the Election. The opinion concluded that a new election should be ordered for each of the positions of Chief and Council and that the Applicant and his Council should be given an extended mandate until new elections are concluded.

[22] B&P's opinion was based in part on letters from voters collected by the Applicant and on the Applicant's unverified testimony regarding other issues. None of the letters were provided to this Court or were corroborated by sworn statements, with the exception of the affidavit of Ms. Ella Gagnon. Moreover, the legal basis for B&P's opinion was *Aroland First Nation Custom Election Code Draft #8*, an election code that was never adopted by AFN, and statutes and regulations that are not applicable to AFN elections, such as the *Indian Band Election Regulations*, CRC, c 952, and the *First Nations Elections Act*.

[23] On or about November 22, 2015, the new Chief and Council were sworn in.

[24] On November 24, 2015, a Band meeting was held in Aroland to address any concerns with the Election. The Electoral Officer, Ms. Megan, did not attend the meeting. During this meeting, a first motion was passed whereby the community recognized the newly elected Chief and Council as the governing body of AFN. A second motion was passed directing the new AFN Council to remove the current Band Administrator, Patricia Magiskan, from authority.

[25] On November 26, Patricia Magiskan was suspended as Band Administrator for actions "taken to appeal the election […] during work time." Ms. Magiskan alleges that her suspension is the result of her decision to instruct the Band's legal Counsel to ascertain the legality of the Election.

[26] On December 2, 2015, Mr. Gagnon filed the present Application for Judicial Review requesting *inter alia* that this Court:

1. quash the results of the November 7, 2015 election;
2. issue a writ of *quo warranto* declaring that the Chief and Council elected on November 7, 2015 never properly held office; and
3. issue a writ of *mandamus* directing the parties to convene a General Assembly to appoint new Elections Officers and hold a new election.

II. Parties' Submissions

[27] The Applicant summarizes his principle submissions in his memorandum as follows:

> 19. The conduct of the election was done in a way that did not sufficiently incorporate the views of off-reserve voters, from the appointment of the electoral officers to nominations, to notice. This affected the results of the election.
>
> 20. This judicial review, however, is focused on the conduct of the Electoral Officers and the new Chief and Council in light of the complaints and appeals—specifically that no response was given, at all.

[28] In particular, the Applicant argues that the decision to notify AFN off-reserve members of the Election exclusively via a post on a Facebook page and by word of mouth was inadequate notice of the Election.

[29] The Applicant acknowledges that election Band Custom does not include provisions governing recounts, appeals or consideration of irregularities that arise from Band elections seeing as there has never previously been a challenge to an AFN Election. Instead, he argues that Band Custom must nevertheless conform to the rule of law and that procedural fairness was owed to him. He submits that he was treated unfairly by the decisions of the Electoral Officers and/or the Council to refuse to address his serious documented complaints about the Election.

[30] The elected Respondents submit that the complaint was not properly directed to them, but to Band Management. The Court rejects this argument, concluding that all Respondents were sufficiently aware of the Applicant's complaints and their potential to have affected the election if sustained.

[31] The Electoral Officers contend that they are a federal board and that their decisions are reviewable by the Federal Court. They also state that, as an administrative tribunal, the

application should be dismissed against them as it is improper to add them as a party to the present proceeding absent legislation to that effect.

[32] All Respondents contend that the Applicant has failed to provide any directly sworn evidence to demonstrate that off-reserve voters were unaware of the Election, unable to cast their ballot, or that the use of Facebook for providing notice and information regarding the Election impacted the results of the Election in any way.

[33] None of the Respondents contend that the Community meeting of November 24, 2015 was an appeal process or a re-consideration of the Applicant's complaints of an unfair election.

III. Issues

[34] The following issues arise in this application:

A. Should the Court exercise its discretion to allow the Applicant to bring an application for judicial review of more than one decision?

B. Does the Band Custom allow Electoral Officers and/or band Council to overturn election results?

C. Should a writ of *quo warranto* be granted?

IV. Analysis

A. *Should the Court exercise its discretion to allow the Applicant to bring an application for judicial review of more than one decision?*

[35] The Applicant asks this Court to review a panoply of decisions made by both the Electoral Officers and the newly elected Chief and Council. Rule 302 of the *Federal Courts Rules*, SOR/98-106 require [the *Rules*] that an application for judicial review be limited to a single order in respect of which relief is sought. However, this rule does not apply where there is "a continuous course of conduct" (*Shotclose v Stoney First Nation*, 2011 FC 750 at para 64 [*Shotclose*]).

[36] As was found in *Anichinapéo v Papatie*, 2014 FC 687 at para 19 [*Anichinapéo*], I find in the present case that "the various impugned decisions are closely related and stem from the same series of events." I further note that the Respondents have not objected to the present application for judicial review involving all of the issues raised, and indeed implicitly accept the merits of this approach by presenting issues and arguments themselves related both to the conduct and decisions of the Electoral Officers and of the Band Council (*Anichinapéo* at para 31). Alternatively, if I am wrong in so finding, I would exercise this Court's discretion under Rule 55 of the *Rules* and dispense with compliance with Rule 302.

B. *Does the Band Custom allow Electoral Officers and/or band Council to overturn election results?*

(1) Standard of review

[37] The parties have argued as though this was a matter of reviewing the decision of the Council or Electoral Officers with respect to their refusal to entertain the Applicant's complaints.

[38] It is the Court's conclusion, and indeed its interpretation of the Applicant's argument, that there is no Band Custom relating to appeals of elections. Indeed, no election has ever been challenged to give rise to such a custom. The Applicant's argument that this does not rule out the finding of a custom is illogical. It is the Applicant's onus to prove the existence of a custom and in this case, there is no evidence of community consensus to substantiate such a claim. It is on this ground that he relies upon this Court's line of decisions applying procedural fairness principles in the absence of any custom governing the issue: *Shotclose* at para 97, *Sparvier v Cowessess Indian Band No 73*, 1993 CarswellNat 808 at paras 11-15 (FCTD) [*Sparvier*]. However, if there is no custom on appeals of elections, the Respondents do not have the jurisdiction to hear and make decisions relating to such appeals. Consequently, the Applicant's request that he be accorded procedural fairness for a process leading up to a decision that the Electoral Officers and the Band Council had no jurisdiction to make is not sustainable.

[39] Had there been an issue of the interpretation of the Respondents' jurisdiction to conduct an appeal, I would have reviewed it on a standard of correctness (*Martselos v Salt River First Nation #195*, 2008 FCA 221 at para 30 [*Salt River Nation*], holding that " … although the Council has a greater expertise on matters such as knowledge of the Band's customs and factual determinations, the Councillors, who are elected by the members of the [First Nation], have no particular expertise in interpreting the election code, and certainly no more than this Court" [references omitted]. See also *Joseph v Yekooche First Nation*, 2012 FC 1153 at para 25.

[40] Moreover, the absence of any custom on appeals of elections is precisely the sort of case where the remedy of *quo warranto* applies. If "standing" can be established for *quo warranto*,

then the Court must determine whether the person purporting to be holding the office lacks a legal basis to hold that position. I find below that *quo warranto* does apply, and in that guise, the Court will consider the arguments put forward by the Applicant that the election was not fairly conducted in relation to Band Custom.

[41] That is not to say that procedural fairness issues cannot be considered in a *quo warranto* analysis, and indeed one arises in this matter concerning the alleged bias of the Electoral Officers, which I address below.

[42] Otherwise, the Court's examination of the facts and actions taken pursuant to Band Custom calls for a review on a standard of reasonableness. This applies to the Applicants' principal complaint concerning the treatment of off-reserve members.

(2) Can Electoral Officers and/or Band Council overturn election results?

[43] It is well established in the case law that custom must be proven by the party seeking to rely on it (*Anichinapéo* at para 46; *Taypotat v Kahkewistahaw First Nation*, 2012 FC 1036 at para 28; Francis v Mohawk Council of Kanesatake, *2003 FCT 115 at* para 21). As described, I find that election Band Custom does not include a custom governing overturning election results. Again, this case is similar to the one before Justice de Montigny in *Anichinapéo*, seeing as AFN's Band Custom does not confer any power on electoral officers or Band Council to overturn election results. Consequently, neither the Electoral Officers nor the Band Council has the jurisdiction to overturn election results without the consensus of the community.

[44] While the Applicant has pleaded his request for a remedy in the nature of *quo warranto*, there were no appropriate submissions made on the matter before this Court. However, in view of the absence of a custom allowing any member or body within the AFN community to overturn election results, the Election results can only be challenged by way of *quo warranto* pursuant to section 18(1) of the Act. As stated by Justice de Montigny, "[t]his outcome may be undesirable, and it may be preferable that these questions be left to the community to decide through an internal mechanism. However, until the community reaches a consensus on such a mechanism […] it will be for the Court to decide these issues" (*Anichinapéo* at para 43).

C. *Should a writ of quo warranto be granted?*

[45] To determine whether an election should be quashed and a writ of *quo warranto issued* to remove a person from office, the following questions must be answered in the affirmative:

1. Does the Court have jurisdiction over the person holding the office?
2. Does the Applicant meet the rules for granting the remedy of *quo warranto* as set out in *Jock v R*, 1991 CarswellNat 126 (FCTD) [*Jock*]?
3. Does the person purporting to be holding the office lack a legal basis to hold that position?

[46] Below, I analyze each of these questions.

(1) Does the Court have jurisdiction over the person holding the office?

[47] The Federal Court has exclusive original jurisdiction to issue a writ of *quo warranto* against any federal board, commission or other tribunal and to hear and determine any

application in the nature of such relief (Section 18(1) of the Act. The Federal Court also has jurisdiction over custom elections (*Sparvier* at paras 11-15). It is trite law that, for purposes of judicial review, an Indian band council constitutes a "federal board, commission or other tribunal" as defined in s 2 of the Act (*Sparvier* at para 13). Therefore, this Court has jurisdiction over AFN's Chief and Council.

(2) Does the Applicant meet the rules for granting the remedy of *quo warranto* as set out in *Jock*?

[48] The rules for determining whether this Court should grant an order in the nature of *quo warranto* are as follows (*Jock* at para 49):

> 1. The office must be one of a public nature.
>
> 2. The holder must have already exercised the office; a mere claim to exercise it is not enough.
>
> 3. The office must have been created by the Crown, by a Royal Charter, or by an Act of Parliament.
>
> 4. The office must not be that of a deputy or servant who can be dismissed at will.
>
> 5. A plaintiff will be barred from a remedy if the plaintiff [sic] has been guilty of acquiescence in the usurpation of office or undue delay.
>
> 6. The plaintiff must have a genuine interest in the proceedings. Nowadays probably any member of the public will have sufficient interest, provided that he has no private interest to serve.
>
> The following matters are within the discretion of the Court (Dussault and Borgeat, Administrative Law: A Treatise, 1990, page 388):
>
> 7. Standing of the applicant.
>
> 8. The reasonableness of the length of time elapsed since the election.

> 9. The appropriateness of requiring that all internal relief avenues be first exhausted.

The following are some additional factors to be considered in a discussion of the remedy of *quo warranto*:

> 10. Whether the onus is on the applicant or the respondent to prove his case.
>
> 11. Whether the remedy of *quo warranto* may be granted independent of any other remedy.

[49] Below, I apply these factors to the case at bar.

(a) Office of a public nature

[50] The Applicant is seeking an order in the nature of a writ of *quo warranto* with respect to the newly elected chief and Councillors. Justice Teitelbaum in Jock held that the offices of councillor and chief are "of a public nature" (see also *Bone v Sioux Valley Indian Band No 290*, 1996 CarswellNat 150 at para 84 (FCTD) [*Bone*]).

(b) Exercised the office

[51] It is undisputed that the elected Respondents have exercised the offices of Chief and Councillors of AFN since the Election.

(c) Office created by an Act of Parliament

[52] As has been previously held, offices of councillors and chief could be said to have been created by the *Indian Act* even if the Band Council is elected based on Band Custom (see *Jock* at para 53; *Bone* at para 84).

(d) Deputy or servant that may be dismissed at will

[53] The offices of AFN chief and councillors are elected positions. These elected representatives of AFN may not be dismissed at will.

(e) Plaintiff guilty of acquiescence

[54] As stated by Justice Teitelbaum in Jock *at para 49*, "[a] plaintiff will be barred from a remedy if the plaintiff has been guilty of acquiescence in the usurpation of office or undue delay." In the present matter, the application was brought without delay.

(f) Genuine Interest and Standing of the Applicant

[55] As the Applicant is a member of AFN, lives on the reserve, and was the previous Chief of AFN and a candidate in the Election, I find that he has sufficient interest in the matter to have standing.

(g) All internal relief avenues exhausted

[56] Justice Teitelbaum in Jock *at para 66* stated that "where the law provides another remedy, *quo warranto* may not be used to contest any election." Having concluded that neither

the Electoral Officers nor the Band Council has the authority under Band Custom to overturn election results, I find that the Applicant had exhausted all other available remedies at law.

(h) Onus

[57] The Applicant has the burden of establishing why the elected Respondents are not legally in office (see *Bone* at para 105).

(i) Availability of quo warranto as a remedy

[58] In view of the above, I find that a remedy in the nature of quo warranto is available and appropriate in these circumstances if the Applicant demonstrates the absence of legal basis for the Chief and Council to hold their respective offices.

(3) Does the person purporting to be holding the office lack a legal basis to hold that position?

[59] In the present matter, the newly elected Chief and Council have *prima facie* been duly elected under Band Custom. The Applicant therefore has the burden of establishing that the elected Respondents are not legally in office (see *Bone* at para 105). An election is presumed valid and "should be vitiated only if it is shown that there were such irregularities that, on a balance of probabilities, the result of the election might have been different" (*Meeches v Meeches*, 2013 FCA 177 *at para 63*), which is determined by the "magic number test" set out by the Supreme Court of Canada in *Opitz v Wrzesnewskyj*, 2012 SCC 55 at para 71 [*Opitz*]. The party seeking to annul an election bears the legal burden of proof (ibid at para 52).

[60] The Applicant alleges that a number of irregularities during the Election impacted the outcome of the Election, which the Court addresses below.

(a) *Off-reserve representation*

[61] The Applicant raises concerns over the conduct of the Election which he alleges was done in a way that did not sufficiently incorporate the views of off-reserve voters, from the appointment of the electoral officers, to nominations, to notice of the Election. The Applicant argues that these irregularities affected the outcome of the Election.

[62] The appointment of the Electoral Officers and the nomination meeting appear to have been done as they had always been done in the past. The circumstances surrounding the appointment of the Electoral Officers and the nomination meeting were known to the Applicant prior to the publication of the Election results. However, the Applicant raised concerns over these issues only after he was unsuccessful in the Election. More than 50% of the totality of eligible voters participated in the November 2015 election. There is no evidence that, at any time before or during the Election, any Band member objected to the manner in which the Band Custom Election was proceeding. The conduct of AFN community members in acquiescing the appointment and nomination procedures is sufficient evidence that these procedures were "generally acceptable to members of the band, upon which there is a broad consensus" and reflected AFN's Band Custom (see *Bigstone v Big Eagle*, 1992 CarswellNat 721 at para 20 (FCTD); *Bone* at para 65). I therefore find that the nomination of Electoral Officers and the nomination meeting were conducted according to Band Custom.

[63] Off-reserve voters were informed of the nomination meeting, the advance polls, and the Election via AFN's Election Facebook page. Because AFN's Band Custom is not in written form, it is impossible for this Court to assess whether the custom was to provide a newspaper notice or simply an appropriate notice of elections to off-reserve members. If the latter is the custom, the Electoral Officer's decision to give notice via Facebook could be reasonable. However, if the former is the custom, the Electoral Officer's decision to not advertise in newspapers could be unreasonable. In view of both the evolving nature of Band Custom and of the discretion conferred upon the Electoral Officers, this Court finds that the custom was to give an appropriate notice to off-reserve members. Whether the Facebook page notice was reasonable depends on its effectiveness at reaching off-reserve members in comparison to previous newspaper notices.

[64] For hearsay evidence to be admissible, the evidence must comply with the requirements of the "principled approach" by establishing its necessity and reliability (*R v Khan*, [1990] 2 SCR 531 at 546-547 (SCC)). These requirements balance the interests of justice while maintaining the reliability of the evidence in order to ensure the integrity of the truth-seeking legal process. B&P's letter of opinion on the validity of the Election as well as several affidavits tendered by the Applicant are replete with hearsay evidence and the Applicant has not satisfied this Court that this evidence is reliable or necessary.

[65] The affidavit of Ms. Ella Gagnon, an off-reserve member of AFN living in Thunder Bay, Ontario, states that she missed the advance poll in Thunder Bay because she was unaware that it closed before 8:00 p.m. That evidence is admissible, but not very helpful to the Applicant. Ms.

Gagnon was told of the Election by an on-reserve member of AFN, which explains why she knew the advance poll date, but not the time at which the advance poll closed. Ms. Gagnon does not state whether she had access to Facebook or usually found out about elections by reading the newspaper. Ms. Gagnon's evidence only shows that she was not properly notified of the Election, not that she would have been properly notified had the notice been advertised in newspapers. Ms. Gagnon's statement that her son, daughter, and granddaughter were also unable to participate in the Election for the same reason is hearsay and cannot be considered by this Court.

[66] The only evidence indicating that the Facebook notice may have had an impact on voter turnout is the Election Report. The Election Report shows that the off-reserve voter turnout was 48%, while on-reserve voter turnout was of 96%. The issue with this evidence is that there is no indication that the voter turnout for off-reserve members in the November 2015 election was substantially different from previous elections. Based on the evidence, no such reports were made in past elections.

[67] The Applicant submits that there is sufficient evidence demonstrating substantial problems in the conduct of the Election to shift the burden of proof onto the Respondents who must then demonstrate that the Election was performed legally according to Band Custom (*Laboucan v Little Red River Cree Nation No 447*, 2008 FC 193 at para 13). However, the above evidence only shows that the on-reserve voter turnout was significantly higher than the off-reserve voter turnout.

[68] Even if I was to consider all the hearsay evidence in B&P's opinion, it would not have convinced this Court that the Election would have been materially affected. B&P's magic number analysis is based *inter alia* on seven (7) letters from AFN members who allegedly were unable to vote or were unaware of the Election, on the unverified statements of the Applicant, and on comments posted on the AFN Election Facebook page. In addition to being hearsay, the evidence is unreliable for several reasons. For example, the circumstances explaining why certain members (Liz Jabic, Mason Jabic, Merle Jabic and Bill Johnson) would not have received ballots in the mail are unexplained. It is impossible for this Court to know whether these members ever requested a ballot. It is also impossible for this Court to know if Ricky Medowegan and Annabelle Mendowegan, who were allegedly, told that they must vote using their mail-in ballot, ever voted. Alex Sagutch allegedly was unable to vote in the advance polls because, like Ms. Ella Gagnon, he thought they would be open until later in the day. Like Ms. Gagnon, he seems to have been aware of the advance poll dates and the evidence shows at best that he was not properly notified of the Election. The evidence does not show that Mr. Sagutch would have been properly notified had the notice been advertised in newspapers. Lawrence Marlatt appears to have been aware of the date, location and time of the advance polls, but was unable to vote due to the hours of the Thunder Bay advance poll. This indicates that Mr. Marlatt received proper notice of the Election, but was unable to show up to the poll.

[69] Accordingly, I find that the limited admissible evidence before this Court does not lead me to believe that providing notice to off-reserve members via a Facebook page materially affected the results of the Election.

(b) *Chain of custody of the ballot boxes*

[70] The Applicant argues that the lack of security for the ballots and ballot boxes has vitiated the Election process. This argument is speculative. Ms. Megan's evidence is that Sargent Wesley of the Nishnawbe-Aski Police Service [NAPS] refused to attend the advance poll to take possession of the ballot box because NAPS did not want to be part of any potential conflict over the Election. However, Ms. Megan states that Sgt. Wesley indicated that an officer may check the Election on November 7, 2015, and that the ballot box could be stored at the NAPS Aroland detachment. Ms. Megan's evidence does not lead this Court to believe that the ballot boxes were compromised at any time. Ms. Megan did bring the ballot box home after the Thunder Bay advance poll, but the ballot box was sealed and padlocked. Ms. Megan could not have opened the ballot box as Ms. Wabasson had the key. While Ms. Megan had planned to bring the ballot box to the NAPS office the next day, following the Aroland advance poll, the office was closed so she brought the ballot box to her home. It is not clear whether the ballot box was locked, and if so, who had the keys at that time. However, Ms. Megan brought the ballot box to the NAPS office after it opened the following day. After the counting of the ballots on Election Day, the ballots were returned to the ballot box and padlocked again. Again, it is not clear who had the keys at that time.

[71] No evidence before this Court clearly establishes AFN's customs relating to the handling of ballot boxes. Given the informal nature of AFN's Band Custom, Ms. Megan's statement that she has no reason to believe that the ballot boxes or the ballots were tampered with, and the absence of credible evidence suggesting otherwise, this Court finds that the ballot boxes and

ballots were not tampered with. Further, this Court finds that any procedural defect in the handling of ballots or ballot boxes that may have occurred has not affected the results of the Election.

(c) *Reasonable apprehension of bias on the part of the Electoral Officers*

[72] The test for reasonable apprehension of bias was set out by Justice de Grandpré, dissenting, in *Committee for Justice & Liberty v Canada (National Energy Board)* (1976), [1978] 1 SCR 369 at 394 (SCC):

> ... the 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... [T]hat 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 [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[73] The Supreme Court of Canada has endorsed this expression of the test in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] at para 46. In *Baker*, the Court held that standards for reasonable apprehension of bias vary according to the context and the type of function performed by the administrative decision-maker involved (at para 47). In *Sparvier* at paras 75-76, Justice Rothstein explained why a rigorous test for reasonable apprehension of bias within Indigenous and First Nation communities is sometimes inappropriate:

> 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.
>
> […]
>
> However, the Court must work within the framework of the existing law. I have added these comments because of the difficulties I see with the application of a more desirable strict bias test in the case of an adjudicative board such the Appeal Tribunal, to the particularities of inevitable social and business relationships in a small community such as the Cowessess Band.

[74] AFN is a small community. It is not uncommon for most of AFN members to have a family member running in an election. The evidence does not suggest bias beyond the relationship itself. Further, there is no evidence that AFN band members raised any objection to the appointment of the Electoral Officers until after the Election results were published. It is also noteworthy that Ms. Megan's common law partner and the Deputy Officer's father were not successful in the Election. This Court therefore finds that there was no reasonable apprehension of bias.

V. Conclusion

[75] This Court finds that the Election was held in conformity with AFN's Band Custom. The Applicant has failed to demonstrate irregularities that vitiated the Election process.

[76] Accordingly, the application is dismissed.

[77] In the process of completing this decision, the Court notes that the band has what appears to be a very acceptable election code now in its eighth revision. Had it been adopted, there is every likelihood that this application would have been avoided and along with it the harm to the AFN's shared sense of community.

[78] The Court is reminded of the wise words of Justice Trudel that, having opted for a democratic election process, a clear "election code construed and applied in a fair and transparent manner would go a long way in achieving this noble goal and in avoiding, one would hope, situations like the present, which are counter-productive and extremely disturbing for all concerned" (*Salt River First Nation* at para 48).

[79] The Court awards no costs in this matter. Although the Respondents were successful, the Court finds that their failure to respond to the serious complaints of the Applicant in some manner contributed to the initiation of legal proceedings. The last thing this Court wishes to do is to set a precedent in First Nation jurisprudence that serious complaints about the conduct of an election can be completely ignored and sent on to the Federal Court for resolution just because there is no custom.

[80] Council, in particular as representatives of the community, has a duty to attempt to mitigate controversy that divides their community. As the Court indicated to the numerous community members that attended the proceedings, it is not in the AFN's best interests that the Court becomes a surrogate of Council for resolution of these disputes. Legal proceedings create an enduring rancour among the participants and do nothing to promote a shared sense of

community, the attainment of which should be an overriding objective of Council. As for the Electoral Officers, I do not see their interests as being distinct from those of the Council.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed without costs**.**

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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