Federal Court Cour fédérale

Date: 20201002

Docket: T-174-19

Citation: 2020 FC 949

Ottawa, Ontario, October 2, 2020

PRESENT: Madam Justice Strickland

BETWEEN:

JAMES GREY

Applicant

and

WHITEFISH LAKE FIRST NATION #459

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Election Appeal Arbitrator [Arbitrator], with respect to an appeal [Appeal] by the Applicant, James Ian Bennett Grey, of the election of Albert J. Thunder as Chief of the Whitefish Lake First Nation #459 [WLFN] at the WLFN general election held on April 13, 2018 [Election]. The Arbitrator dismissed the Appeal and affirmed the election of Albert Thunder as Chief of the WLFN.

Factual background

[2] On March 9, 2019, Mr. Garry Laboucan, of the law firm Ackroyd LLP, sent a letter to Mr. Drew Jarisz, of Taylor Janis LLP, to confirm that Mr. Jarisz had been retained by the WLFN to act as the Appeal Arbitrator for the election to be held on April 13, 2018. The letter states that Mr. Jarisz's job would be to supervise and ensure that any appeals from the Election were conducted in accordance with the Customary Election Regulations of the Whitefish Lake First Nation #459 [WLFN Election Regulations]. It also attaches a copy of the March 8, 2018 Band Council Resolution confirming the appointment. The Band Council Resolution states that then Chief and Council appointed Drew Jarisz as the Appeal Arbitrator to supervise and ensure that any appeals from the General Election, By-Election or Run-off Election are conducted in accordance with the WLFN Election Regulations and the rules of natural justice. The same Band Council Resolution appointed Mr. Lorne Ternes as the Electoral Officer for the upcoming Election.

[3] The Election was held to elect candidates to four band councillor positions and one candidate to the position of chief. The Applicant unsuccessfully ran for election as a councillor. Albert Thunder was elected as Chief with 254 votes, winning by a margin of 70 votes over Jesse Grey, the incumbent Chief, who came fourth in the election with 184 votes. Although the Applicant did not seek election as Chief, he appealed the results of the election of Albert Thunder as permitted by s 16.2 of the WLFN Election Regulations.

[4] The Applicant filed a Notice of Appeal challenging the election of Albert Thunder on three grounds:

- A candidate who ran in the election, Jesse Grey, was ineligible to run and provided false information or failed to disclose

information relevant to the Nomination. Specifically, that Jesse Grey was convicted of an indictable criminal offense as of the date of his nomination and did not receive an eligible pardon;

- A candidate, Jesse Grey, was guilty of Corrupt Election Practices (as defined in the WLFN Election Regulations) or benefited from and consented to a Corrupt Election Practice. Specifically, that he allegedly paid the travel expenses of Cindy or George Grey on the condition that they disclose that they had voted for Jesse Grey;

- Other circumstance, event or action which improperly, and directly affected the conduct and outcome of the Election, being the violation of ballot secrecy. Specifically, that George Grey violated the secrecy of the ballot by showing a picture of his ballot to Jesse Grey.

[5] For the reasons set out in his decision, the Arbitrator denied the appeal and upheld the election of Albert Thunder as Chief.

[6] The Applicant filed a Notice of Application on January 23, 2019, commencing this application for judicial review challenging the decision of the Arbitrator. The primary basis of the application for judicial review is the Applicant's assertion that Election Appeal was tainted by a lack of independence, impartiality and a reasonable apprehension of bias on the part of the Arbitrator. The Applicant asserts that he had no knowledge of the circumstances giving rise to these allegations prior to the hearing of the Appeal.

Arbitrator's Decision

[7] The Election Appeal hearing was held on May 8, 2018. The Applicant and the WLFN introduced evidence through witnesses and made oral submissions. Jesse Grey made submissions on his own behalf. On behalf of the Applicant, Elise Laboucan made submissions regarding Jesse

Grey's alleged prior criminal conviction and George and Cindy Grey made submissions regarding the alleged vote buying and the revealing of George Grey's ballot.

[8] As to the allegation that George Grey violated the secrecy of his ballot by voluntarily showing a picture of it to Jesse Grey after George Grey had voted, the Arbitrator found that no evidence or arguments were advanced that this alleged breach of secrecy affected the outcome of the election, and dismissed the ground of appeal pursuant to ss 16.17.1 and 16.17.2 of the WLFN Election Regulations.

[9] The Arbitrator also found that the Applicant had not established on a balance of probabilities that Jesse Grey was ineligible to run for Chief in the Election. The Arbitrator identified the evidence before him on the issue, being a statutory declaration of Jesse Grey stating that he had never received pardon for any indictable offence; a non certified criminal record check dated January 30, 2018 showing no criminal record, which the Arbitrator accepted as valid; a finger print record check dated March 10, 2014, which the Arbitrator also accepted as valid; and, the oral testimony of Jesse Grey and of Elise Laboucan. The evidence of Elise Laboucan was that she believed that Jesse Grey had been convicted of rape because, decades ago, her family was told this by the purported victim's family and that information had subsequently been conveyed to Ms. Laboucan by her mother. The Arbitrator found Ms. Laboucan's evidence to be hearsay and unreliable. He concluded that the evidence overwhelmingly demonstrated that there were no reasonable grounds to believe that Jesse Grey was ineligible to participate in the Election due to a past conviction for an indictable criminal

offence. The Arbitrator denied that ground of appeal pursuant to s 16.17.1 of the WLFN Election Regulations.

[10] As to the allegation of Corrupt Election Practices, the Arbitrator described the evidence of George Grey (who is Jesse Grey's cousin) and his wife Cindy Grey, as well as Jesse Grey's version of events – which differed significantly from that of George and Cindy Grey. The Arbitrator noted that Jesse Grey admitted giving a sandwich and $200 to George Grey and $150 to Roberta Grey when they came to his house after the election at which time George Grey requested help and said that he was hungry. Further, that Jesse Grey's evidence was that this money was for travel and food, not in exchange for votes. The Arbitrator noted that George Grey had changed aspects of his evidence under cross-examination and that his animosity towards Jesse Grey was "palpable at the hearing". George Grey testified that Jesse Grey in his previous role as Chief, and the then Council had promised him a house to live in, which did not materialize. George Grey blamed Jesse Grey, as former Chief, for this as well as for rapists, drug addicts and killers being on the reserve. He also testified that he was coming forward to testify at the hearing because he had not been given a house and because Jesse Grey had accused him of being a liar. Roberta Grey did not give evidence. Ultimately, the Arbitrator preferred the evidence of Jesse Grey. The Arbitrator found that the evidence was not sufficient for him to conclude, on a balance of probabilities, that Jesse Grey offered money in exchange for votes. The Arbitrator denied this ground of appeal pursuant to s 16.17.1 of the WLFN Election Regulations.

[11] The Arbitrator found, in the alternative, that if Mr. Jesse Grey did offer money in exchange for votes then on the evidence before the Arbitrator it could only be reasonably

concluded that there were two impugned votes, which was less than the plurality of the victory. He would therefore uphold the results of the Election under s 16.17.2 of the WLFN Election Regulations.

Legislation

[12] The relevant sections of the WLFN Election Regulations are contained in Annex A of these reasons.

Issues and standard of review

[13] In my view, the issues identified by the parties can be framed as follows:

i. Was there a reasonable apprehension of bias on the part of the Arbitrator?

ii. Are there reviewable errors arising from the Arbitrator's assessment of the evidence and analysis?

[14] As to the standard of review, the Applicant submits that the standard of review on the issues of bias and lack of independence, which relate to procedural fairness, is correctness (*Temate v Canada (Attorney General),* 2018 FC 1004 at para 18). Alternatively, if no standard of review applies, than the question is whether the procedure was fair in all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 [*CPR*]). Further, that questions regarding substantive review attracts the standard of reasonableness (*Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]). The Respondent relies on *CPR* with respect to the first issue and submits that the standard of review when weighing the evidence is reasonableness.

[15] In my view it is clear that the standard of review for questions of procedural fairness, which encompasses issues of bias, is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Johnny v Adams Lake Indian Band*, 2017 FCA 146 at para 19; *Nadeau v. Canada (Attorney General)*, 2018 FCA 203 at para 11 [*Nadeau*]; *Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796 at para 45). And, as stated by the Federal Court of Appeal in *Oleynik v Canada (Attorney General)*, 2020 FCA 5 [*Oleynik* FCA] at para 39, referencing its decision in *CPR* at para 54, judicial review for procedural fairness is "best reflected in the correctness standard". No deference is afforded to the underlying decision maker on questions of procedural fairness (*Del Vecchio v Canada (Attorney General)*, 2018 FCA 168 at para 4).

[16] The standard of review otherwise applicable in this matter is the presumptive standard of reasonableness (*CPR* at para 8; *Vavilov* at paras 16-17). A review for reasonableness requires this Court to ask if the decision "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

Issue 1: Was there a reasonable apprehension of bias on the part of the Arbitrator?

[17] The Applicant asserts three circumstances that give rise to a reasonable apprehension of bias: *ex parte* communications and a lack of separation between the Arbitrator and Ackroyd LLP, WLFN's counsel; the marital relationship between the Arbitrator and a member of Ackroyd LLP; and a prior retention of the Arbitrator by WLFN.

i. Ex parte communications and lack of separation

Applicant's position

[18] Ackroyd LLP is legal counsel for WLFN. The Applicant submits that Ackroyd LLP had numerous communications with the Arbitrator without the Applicant's knowledge or involvement. These communications give rise to a reasonable apprehension of bias as they suggest that one party, the WLFN, is favoured or has some relationship with the decision maker, the Arbitrator.

[19] Further, that there was a complete failure to maintain any degree of separation between the Arbitrator and Ackroyd LLP. The Applicant submits that Ackroyd LLP had previously retained the Arbitrator on behalf of WLFN on another matter and had worked actively with him on that matter. Ackroyd LLP were then "the party" that appears to have appointed the Arbitrator with respect to the Election Appeal, contrary to jurisprudence that has held that a party should not be required to present its case before a tribunal whose members have been appointed by an opposing party.

Respondent's position

[20] The Respondent submits that there is an exception to the requirement of independence when the enabling statute permits an overlap in functions (*Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52 [*Ocean Port*] at para 42). To the extent that the overlap is authorized, it will generally not be subject to the reasonable apprehension of bias doctrine (*Brosseau v Alberta (Securities Commission)*, [1989] 1 SCR 301 at 310-311). In this case, section 7.1 of the WLFN Election Regulations

authorizes WLFN to appoint an election appeal arbitrator, even though WLFN will be called upon to respond to an appeal. Further, to the extent that the *ex parte* communications identified by the Applicant were not specifically authorized by the WLFN Election Regulations, they were administrative in substance and, in the circumstances, were necessary in light of institutional constraints. The communications did not address issues that impacted the substance of the case and did not give rise to a reasonable apprehension of bias.

Analysis

[21] The test for whether there is a reasonable apprehension of bias has been broadly accepted as that stated by Justice Grandpre in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> 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.

(see also *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para 20-21 [*Yukon*].)

[22] The issue of bias is inextricably linked to the need for impartiality. Decision makers are required to approach every case with impartiality and an open mind (*Yukon* at para 22) and to decide the case independently (*Cojocaru v. British Columbia Women's Hospital and Health*

Centre, 2013 SCC 30 at para. 22 [*Cojocaru*]). Impartiality and independence are also assessed using the reasonable apprehension of bias test.

[23] There is a strong presumption of impartiality that is not easily displaced and the "test for a reasonable apprehension of bias requires a 'real likelihood or probability of bias' and that a judge's individual comments during a trial not be seen in isolation: see *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851, at para. 2; S. (R.D.), at para. 134, per Cory J." (*Yukon* at para 25). Further:

> [26] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see *Wewaykum*, at para. 77; *S. (R.D.)*, at para. 114, per Cory J. As Cory J. observed in *S. (R.D.)*:
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> > … allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added; para. 141.]
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> (*Yukon* at para 26)

[24] The threshold for a finding of a reasonable apprehension of bias is a high one, and the burden on the party seeking to establish a reasonable apprehension is correspondingly high (*Oleynik v Canada (Attorney General)*, 2020 FCA 5 at para 57; *Yukon* at paras. 25-26).

[25] The Applicant claims a reasonable apprehension of bias based on his assertion that lawyers with Ackroyd LLP had "numerous communications" with the Arbitrator without the Applicant's knowledge and that Ackroyd LLP "appears to have worked extensively" with the Arbitrator in discharging his functions in the period leading up to the appeal. In support of this position, the Applicant points to the following communications:

a. June 10, 2017 – email from Anita Thompson of Ackroyd LLP to Drew Jarisz concerning a WLFN Agricultural Benefit Settlement Referendum Vote. The email advises that Ackroyd LLP is retaining Mr. Jarisz as a Deputy Assistant to the Ratification Officer for the WLFN Ratification Vote to be held on June 14 and 15, 2017, sets out his responsibilities and that he will be paid a flat rate of $3500 and traveling expenses;

b. March 9, 2018 – letter from Garry Laboucan of Ackroyd LLP to Drew Jarisz regarding the WLFN Election. This letter advises that it serves to confirm that Mr. Jarisz has "been retained by the Whitefish Lake First Nation to act as their Appeal Arbitrator" for their upcoming election to be held on April 13, 2018 and that Mr. Jarisz is to supervise and ensure that any appeals from the election are conducted in accordance with the WLFN Election Regulations. It attaches a copy of the Band Council Resolution appointing Mr. Jarisz as Arbitrator and appointing Lorne Ternes as the Election Officer;

c. April 17, 2018 – email from Lorne Ternes to Drew Jarisz, the Band Manager (Mabel Noskey), loria@whitefishadmin.ca, Yvonne Noskey; and Garry Laboucan concerning the Appeal. This email states that it attaches a PDF package (including the Notice of Appeal) that the Election Officer mailed out that morning to the Arbitrator, the Band Manager, the candidates for Chief and the Applicant advising that the Applicant had appealed the election of Albert Thunder. The email further states that after the appeal period closed the Election Officer would get someone, possibly Yvonne Noskey, to post it. The Election Officer also asks Mabel Nokey and Lori if the Arbitrator could give the appeal fee to Yvonne Noskey to deliver to WLFN and if the Election Officer can deliver the election record to the Arbitrator on Thursday;

d. April 17, 2018 – email from Drew Jarisz to Lorne Ternes, the Band Manager, loria@whitefishadmin.ca, Yvonne Noskey and Garry Laboucan responding to the Election Officer's email above and confirming that delivery of the election record on Thursday would be fine. The Arbitrator also asks the Election Officer where he proposed posting the Notice of Appeal and, in that regard, if Yvonne/Lorne/Garry could reply listing the prominent public places on the reserve;

e. April 17, 2018 – email from Lorne Ternes to Drew Jarisz, cc'd to Band Manager, loria@whitefishadmin.ca, Yvonne Noskey; and Garry Laboucan, responding to the email above and advising that usually WLFN requires posting at the Band Office, the Health Office, the school and at two identified convenience stores;

f. April 18, 2018 – email from Drew Jarisz to Band Manager, loria@whitefishadmin.ca and Garry Laboucan, copied to Lorne Ternes and Yvonne Noskey, concerning the Appeal. This states that Mr. Jarisz, as the Arbitrator, would like to set the first appeal date for April 30th, to hear any other appeals on the following consecutive days and to allocate one day to deal with each appeal. He asks if WLFN has an issue with the proposed dates and states that in the interests of fairness and transparency, the hearings would be open to members of WLFN. As to venue, the Arbitrator states that he did not know how many people would attend or where on or near the reserve would be an appropriate place to hold the hearing. As he understood Garry/Mabel to have coordinated similar events in the past, he asks if they could propose a suitable venue for the appeal hearing. The Arbitrator notes that a record of the hearing would be needed and that witnesses should be sworn in. He states that he did not know how WLFN had dealt with this in the past but, to his mind, a court reporter could accomplish this. He indicates to Garry Laboucan that he understood that Ackroyd LLP would coordinate this once the hearing dates were firmed up. He also advises Mabel Nosley, the band manager, that once the number of appeals and venue were confirmed that the Arbitrator would provide her with a Notice of Hearing which would need to be mailed to all candidates and be posted at the public places on the reserve, including the Band Office, the Health Office, the school and the two convenience stores on or before April 21, 2018;

g. April 18, 2018 – email from Drew Jarisz to Albert Thunder, copied to Lorne Ternes, Garry Laboucan and Band Manager. The email responds to questions posed to the Arbitrator by Albert Thunder about the Appeal. It states that the grounds for the Appeal are set out in s 16(1) of the WLFN Election Regulations. The Arbitrator notes that because the Arbitrator's role is that of an independent arbitrator, beyond that explanation, and outside of a hearing, he could not discuss the specific interpretation of any provisions of the regulations with any individual who may be affected by a decision the Arbitrator would render. However, the Arbitrator copied Garry Laboucan to the email, indicating that as counsel for WLFN, Mr. Laboucan would be in a better position to discuss the matter;

h. April 19, 2018 – email from Lorne Ternes to Angeline Thunder, Lorne Ternes, Drew Jarisz and Garry Laboucan. The Electoral Officer asks Angeline Thunder to print and then post the attached Notice of Appeal at the locations indicated in the above emails and asks Garry Laboucan if he could also make sure his was followed up;

i. April 19, 2018 – email from Drew Jarisz to Lorne Ternes responding to the above and asking for confirmation that the Notice of Appeal had been posted and if it had been mailed to all of the candidates as required by s 16.6 of the WLFN Election Regulations. The reply email of the same date from the Electoral Officer, copied to Angeline Thunder, Garry Laboucan and Lorne Ternes, states that Yvonne Noskey was then driving to Whitefish to post the Notice of Appeal and would email pictures to the Electoral Officer. And, that on the day before, the Electoral Officer had mailed the Notice to all candidates, the band manager and the Arbitrator;

j. April 20, 2018 – email from Drew Jarisz to Yvonne Noskey, Garry Laboucan, loria@whitefishadmin.ca and Band Manager attaching the Notice of Hearing for the Applicant's appeal, noting that this was being emailed to the candidates and must be posted at the places previously identified by 5:00 pm on Saturday April 21, 2018. The Arbitrator states that he understands that Yvonne Noskey will be doing the posting and Mabel, the band manager, may be assisting. He asks for confirmation that the hearing is

posted by return email and that he be provided with picture confirmation asap. He also asks that Garry Laboucan confirm that this will be done and to contact the Arbitrator if there are any issues; and

k. May 7, 2018 – letter from John Kudrinko of Ackroyd LLP to the Arbitrator advising that Ackroyd LLP is counsel for WLFN with respect to the Applicant's Appeal and providing WLFN's written submissions.

[26] I would first note that the March 9, 2018 letter from Garry Labuocan of Ackroyd LLP to Drew Jarisz regarding Mr. Jarisz's appointment as Arbitrator for the upcoming Election is not fairly characterized as an *ex parte* communication between a party and a decision maker. The letter specifically states that the Arbitrator is retained by the WLFN to act as their appeal arbitrator. The appointment by the WLFN is demonstrated by the attached Band Council Resolution. Further, s 7.1 of the WLFN Election Regulations specifically authorizes the WLFN Council to appoint an Election Appeal arbitrator, which must be done by way of a band council resolution:

> **7.1 Appointment**
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> At least thirty five (35) days prior to the date selected as the Election day, the Council shall, by Resolution in the prescribed form set the date of the Election, appoint and Electoral Officer and an Election Appeal arbitrator for the purpose of conducting the Election pursuant to these Regulations.

[27] Thus, the WLFN Election Regulations authorize WLFN Council to appoint an election appeal arbitrator by way of band council resolution, and that process was followed in this case.

[28] To the extent that the Applicant is asserting that the appointment process lacked independence and was procedurally unfair because the WLFN Council appointed the Arbitrator and, in this case, WLFN was also called upon to respond to the Appeal, I note that the Applicant has not challenged the validity of s 7.1 on the basis that it is procedurally unfair. Further, the Supreme Court of Canada has held that it is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. And, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication, "[i]t is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question" (*Ocean Port* at paras 19-21). This principle is equally applicable in the context of administrative decision making such as First Nation election regulations (*Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131 at paras 52 - 55).

[29] Accordingly, as s 7.1 of the WLFN Election Regulations permits WLFN Council to appoint an appeal arbitrator, the appointment of the Arbitrator by WLFN Chief and Council in this case does not give rise to a reasonable apprehension of bias. Nor does the mere fact that the notification of the appointment was conveyed to the Arbitrator by legal counsel for WLFN. Further, as will be discussed below, the appointment letter does not address the substance of the Applicant's Appeal. Indeed, it was sent before the Election was even held and, therefore, before any appeals stemming from the Election could arise.

[30] The remainder of the above communications pertain primarily to the practicalities of the administration of the Appeal. In particular, giving notice and posting of the Appeal, setting an Appeal hearing date and determining a suitable place for the hearing to be held, and communicating this information to WLFN members.

[31] The parties rely on differing case law in support of whether or not *ex parte* communications regarding administrative or procedural aspects of the Appeal give rise to a reasonable apprehension of bias.

[32] The Applicant refers to *Setlur v Canada,* [2000] 193 FTR 104 (FCA). In *Setlur*, the Federal Court of Appeal found that there was a reasonable apprehension of bias on behalf of the Chairperson of the Public Service Commission of Canada. I note that in reaching its conclusion the Federal Court of Appeal considered not only *ex parte* communications, but also the Chairperson's uneven treatment of requests for hearing tapes, and the fact that counsel for Revenue Canada agreed, given the circumstances, the Chairperson should recuse herself but that the Chairperson had not engaged with those submissions.

[33] The following *ex parte* communications were at issue in *Setlur*. First, the Chairperson initiated a phone conversation with Ms. Fox, a human resources advisor who was then representing Revenue Canada, to coordinate rescheduling for hearing dates. During that conversation, Ms. Fox raised concerns that she and the Selections Board Chairperson, Mr. Tkaczk, had about "the tone of the hearing, the manner in which the appellant's allegations were being presented, and attacks upon [Selection Board Chairperson] integrity". The Chairperson

undertook to raise those concerns when the hearing resumed, which she did. At that point Ms. Fox did not speak to her concerns and appellant's counsel expressed that he would have expected Ms. Fox to have discussed any concerns that she had with the proceedings directly with him. Subsequently, Mr. Jaworski, a lawyer with the Department of Justice, wrote to the Chairperson advising that he had been retained by Revenue Canada and requesting the hearing tapes and an adjournment. Counsel for the appellant, who was copied on the letter, responded opposing the request for the tapes on the basis that the appellant had previously made the same request and had been refused. The Chairperson then wrote to Mr. Jaworski informing him that copies of the tapes would be provided to both parties and that she would hear submissions as to the adjournment when the hearing continued. After the hearing the Chairperson released the tapes and granted the adjournment, at which point counsel for the appellant submitted that the Chairperson recuse herself.

[34] Following this, the Chairperson received a voicemail message from the team leader of the Human Resources Department at Revenue Canada requesting advice with respect to the requirement for the Selection Board Chairperson to appear before the Board due to a conflict schedule.

[35] At the recusal hearing counsel for the appellant argued that a reasonable apprehension of bias arose due to the differential treatment accorded to the parties regarding the release of the tapes and the Chairperson's allegedly negative attitude towards the appellant after the telephone call with Ms. Fox. Counsel for Revenue Canada agreed that the contact between the Department of Revenue and the Chairperson should not have been made and that a perception of bias did

arise from the Chairperson's contacts with Ms. Fox and the team leader. The Chairperson declined to recuse herself.

[36] The Federal Court of Appeal noted that in the call from Ms. Fox the Chairperson offered advice to the effect that Ms. Fox should consult with senior human resources personnel about any reservations she might have about the proceedings. Further, that the evidence disclosed that the appellant's counsel did not learn about the call from the team leader but from the Chairperson. Nor was it explained why the Chairperson would personally have contacted the parties about procedural matters rather than the Registrar, nor why she would initiate separate calls rather than a conference call with both sides at the same time.

[37] The Federal Court of Appeal also found that the Chairperson refused the appellant's request for the hearing tapes without giving the appellant an opportunity to make submissions and that the Chairperson had failed to engage with Mr. Jaworski's position in making her ruling. The Court concluded that on a full and fair review of the events, the appellant's apprehension of bias in the Chairperson was reasonably held.

[38] The Applicant also relies on *Hunt v. The Owners, Strata Plan LMS 2556*, 2018 BCCA 159. In *Hunt*, there were four *ex parte* communications. The first was between counsel for Strata and the arbitrator that Strata had nominated, Mr. Borowicz, expressing Strata's view that there should be a three-person panel and that its counsel should stress this with Strata's nominee. A second communication involved a private discussion between Strata's counsel and the arbitration chair, Mr. Sanderson, and discussed Strata's position on settlement and that Strata's counsel had

conveyed to Mr. Sanderson that the owners of other units in the building supported Strata's position as against the Hunts, to the extent of being willing to fund the cost of the arbitration. The third communication was a private discussion between Strata's counsel with Elaine Cormack, the arbitrator nominated by the Hunts, wherein she allegedly implied that the arbitration should not go much further based on the mediation comments made by Strata's counsel to the arbitration chair, Mr. Sanderson. The final communication was a telephone call between Strata's counsel and Mr. Borowicz.

[39] The British Columbia Court of Appeal analyzed each of the *ex parte* communications. It rejected Strata's characterization of them as purely procedural. It noted while some procedural matters are on the purely administrative end of the spectrum, such as the start time of a hearing, others will touch on more substantive matters, such as the right to and scope of discovery. In the case before it, the Court found that the *ex parte* communications had touched on the important issue of the number of arbitrators, the prospects of mediation including what Strata's mediation proposal would be, and the implication that the rest of the unit owners supported the costs of arbitration, which suggested that the Hunt's position was unreasonable. The Court found that these were not trivial matters.

[40] It also found that the first communication could have no purpose other than attempting to influence Mr. Borowicz, as Strata's nominee, and that other communications indicated that the off the record relationship between Mr. Borowicz and Strata's counsel was ongoing. The Court had no difficulty in concluding that these communications were inappropriate and raised a reasonable apprehension of bias.

[41] The Applicant also relies on *Ceibien v Canada (Attorney General)*, 2005 FC 167, a judicial review of decision by the Chairperson of the Public Service Commission Appeal Board denying the applicant's complaint about a staffing process. There the Chair and the departmental representative had engaged in *ex parte* discussions during the hearing, when Mr. Ciebien was out of the room, during which the Chairperson offered advice to the departmental representative on the presentation of his case. The Court found that those exchanges could lead an observer to conclude that the proceedings were not being conducted in an impartial manner. The Court also had concerns with the Chairperson's treatment of Mr. Ciebien during the hearing. The Court concluded that the tone of the proceedings and the *ex parte* discussion would lead an objective observer to conclude that Mr. Ceibien did not receive a fair hearing, and, accordingly, that a reasonable apprehension of bias had been made out.

[42] The Respondents refer to the Federal Court of Appeal's decision, made subsequent to *Setlur*, in *GRK Fasteners v Leland Industries*, 2006 FCA 118 [*GRK Fasteners*]. There a party to the proceedings, Leland, during a conference call among the tribunal research staff and the participants, offered to clarify the scope of goods considered to be the focus of their injury complaint and subsequently sent its list to the tribunal with three covering letters explaining how the list was to be read. Four days later the Tribunal circulated the list to all parties.

[43] The applicants in *GRK Fasteners* asserted that they only learned of the three covering letters after the tribunal's findings and reasons were issued. The Federal Court of Appeal rejected the applicants' allegation, that by accepting the cover letters the tribunal had unwittingly allowed Leland to set the terms of the product scope and exclusion request without input from all of the

participants. The Federal Court of Appeal held that the applicants had mischaracterized the communications from Leland and the tribunal did not breach its duty of procedural fairness by receiving the *ex parte* communications. The substance of all of Leland's letters was conveyed in a timely manner to all participants, including the applicants. Nothing in that notice pre-empted or usurped the eventual decision by the tribunal on the substance of the case, the scope of the product coverage or the matter of product exclusions as the applicant asserted. The Federal Court of Appeal found no breach of procedural fairness in the manner in which the Tribunal proceeded.

[44] In my view, the above case law demonstrates that the content, context and character of impugned *ex parte* communications must be considered when assessing whether or not they give rise to a reasonable apprehension of bias. This is in keeping with the Supreme Court of Canada's decision in *Yukon* which held that the inquiry into whether a decision maker's conduct creates a reasonable apprehension of bias is inherently contextual and fact-specific, and that there is a correspondingly high burden of proving the claim on the party alleging bias (*Yukon* at para 26).

[45] In this matter, the communications were primarily between the Electoral Officer and the Arbitrator. They also included the WLFN band manager and other WLFN administrative staff, as well as Garry Labcoucan of Ackroyd LLP, which firm appears to have been WLFN's existing counsel prior to the contested Election. As noted above, the communications were primarily concerned with the practicalities of the administration of the Appeal, in particular, giving notice and posting the Notice of Appeal, setting an Appeal hearing date and determining a suitable venue for the hearing, and the communication of this information to WLFN members.

[46] Further, given the nature of their roles as prescribed in the WLFN Election Regulations, the Electoral Officer and Arbitrator would necessarily communicate with each other. In that regard, s 16.2 of the WLFN Election Regulations deals with notice of appeal and the duties of the Electoral Officer and the Arbitrator:

> 16.6 The Notice of Appeal shall be forwarded by the Electoral Officer to all Candidates, posted in public places on the Reserve and in other public places and locations selected by the Appeal Arbitrator.

[47] Pursuant to s 16.8 of the WLFN Election Regulations, the Electoral Officer is also required to prepare an Election Record in the prescribed form and deliver it to the Election Appeal Arbitrator.

[48] Section 16.9 of the WLFN Election Regulations requires the Election Appeal Arbitrator to set the date for the hearing of an appeal within three days of receiving the Election Record. Section 16.11 requires that the notice of the hearing of the Election Appeal must be posted in public places on Reserves and in other public places and locations that the Arbitrator designates and mailed or delivered to the appellant and all candidates.

[49] In my view, the communications described above relate to implementing the WLFN Election Regulations' procedural requirements. Indeed, it was the responsibility of the Arbitrator to ensure that any appeals were conducted in accordance with the requirements of those Regulations.

[50] This is not a situation such as *Setlur* where the *ex parte* communications between the decision maker and a party representative raised substantive concerns about the conduct of the proceeding. Nor is it similar to *Hunt*, where the *ex parte* communications between counsel for a party and the arbitrators were not purely procedural, rather they disclosed information significant to the conduct and outcome of the arbitration. This case is also unlike *Ciebien*, where the decision maker gave advice to a party representative during a hearing when the other party was out of the room and there were concerns with the decision maker's treatment of the other party. Rather, in this matter the challenged *ex parte* communications dealt almost exclusively with the practicalities of the administration of the Appeal. No representations were communicated nor was information regarding the substance of the Appeal exchanged, other than the Notice of Appeal that the Applicant himself submitted and that was required by the WLFN Election Regulations to be distributed to others as part of the Appeal process.

[51] Moreover, the WLFN does not have a registry or similar discreet and neutral entity through which administrative communications pertaining to the Appeal could be channeled. And, the practical reality was that WLFN administrative staff and the Electoral Officer were familiar with the best places to post notices concerning the Appeal as well as available and suitable places to hold the Appeal hearing. This was local knowledge that was not held by the Arbitrator, as is evidenced by his communications seeking input in that regard, but which information was necessary to enable him to perform his function.

[52] As to Garry Laboucan, I agree that it certainly would have been preferable if the Arbitrator had not also copied WLFN's counsel on the subject emails and requested that Mr.

Laboucan lend assistance in ensuring that the subject procedural requirements were effected. However, as I have already stated, the communications and the requested assistance in no way touched on the substance of the Appeal. Further, during the hearing before me, counsel for the Respondent advised that Garry Laboucan is the Respondent's general counsel. Viewed in the context of his role as such, his inclusion on the communications is reflective only of the efforts of the Arbitrator and the Electoral Officer to ensure that the above described administrative procedural requirements of the WLFN Election Regulations were effected. It is also of note that Mr. Laboucan did not act for WLFN when it responded as a party to the Appeal, another lawyer from Ackroyd LLP, John Kudrinko, did so.

[53] In summary, the Applicant has not challenged the validity of s 7.1 of the WLFN Election Regulations, pertaining to the appointment of an arbitrator by WLFN Council, or the conduct of the Arbitrator in implementing the WLFN Election Regulations requirements. Further, the subject *ex parte* communications between the Arbitrator and the Electoral Officer as well as to WLFN administrative personnel were for the sole purpose of effecting the practicalities of the administration of the Appeal and otherwise ensuring compliance with the requirements of the WLFN Election Regulations with respect to the Appeal. Garry Laboucan, WLFN's general counsel, was included in those early communications for the same purpose. The impugned communications were purely of a procedural nature and do not touch on the substance or the subject matter of the Appeal.

[54] Read in whole, in context and considering the character of the challenged communications, I am not persuaded that they raise the spectre of impartiality or meet the test necessary to give rise to a reasonable apprehension of bias.

[55] Finally, as to the Applicant's arguments that are premised on the view that Ackroyd LLP appeared before the Arbitrator as an adverse "party" in the Appeal, these are of no merit. The record establishes that the Arbitrator was appointed pursuant to a WLFN Band Council Resolution as was required by the WLFN Election Regulations. At no time was Ackroyd LLP a party in its own right to the Appeal, its role was as solely that of counsel to WLFN.

ii. Spousal relationship

Applicant's position

[56] The Applicant refers to social media evidence he and his counsel located after the Appeal was decided that indicates that the Arbitrator is married to a partner at Ackroyd LLP. The Applicant submits that, because the Arbitrator has a personal connection to the law firm representing WLFN, a reasonable observer would conclude that the Arbitrator is biased in favour of his spouse's firm. Further, that a personal relationship between the decision maker and one of the parties has been held to give rise to a reasonable apprehension of bias.

[57] The Applicant submits that while the jurisprudence is clear that an apprehension of bias is context specific, in this case there are unique circumstances that support a finding that this particular familial relationship raises a reasonable apprehension of bias. These are that the Arbitrator was not randomly selected or on a roster but rather "was deliberately selected as the

decision maker by an Ackroyd lawyer" and that Ackroyd LLP then appeared before the Arbitrator in an adversarial proceeding "as one of the parties". Further, the Arbitrator was not selected due to particular expertise in the area; and, the applicable qualification criteria could have been met by many lawyers.

[58] Based on these assertions, the Applicant submits that it is difficult to conclude that the Arbitrator was selected for any reason other than his relationship with a lawyer with Ackroyd LLP, his spouse, and this gives rise to a reasonable apprehension of bias.

Respondent's position

[59] The Respondent points out that the Applicant's evidence establishes that a spousal relationship did not exist at the time of the hearing. Mr. Jarisz was married in November of 2018, and the appeal was heard on May 8, 2018. The presumption of impartiality is therefore not rebutted. Further, that the jurisprudence concerning impartiality of spouses has developed since the cases from the 1960s and 1970s that the Applicant relies on. The Respondent cites *Newfoundland (Treasury Board) v Newfoundland Association of Public Employees*, 184 Nfld & PEIR 237 at paras 24-25 [*Newfoundland (Treasury Board)*] which held that a marital relationship should not prevent a husband from serving on a board in an unbiased manner simply because his wife had previously provided legal advice to one of the parties on different issues. The Respondent submits that this is particularly relevant in this matter as the Arbitrator's spouse had no involvement in the Election Appeal but had previously advised WLFN on the ratification vote for one of its agricultural settlement benefits.

[60] Finally, the Respondent submits that the Applicant's assertion that the Arbitrator was selected by Ackroyd LLP on the basis of the spousal relationship is not supported by the evidence. Nor does the Applicant provide any evidence as to the Arbitrator's experience. The Applicant's unfounded assertions as to the Arbitrator's selection cannot sustain an allegation of bias because "[t]he threshold for a finding of real or perceived bias is high and mere suspicion is not enough: a real likelihood of probability of bias must be demonstrated" (*Northwest Territories v Public Service Alliance of Canada*, 2001 FCA 162 at para 39).

Analysis

[61] The Applicant relies on four cases in support of his view that a personal relationship will give rise to a reasonable apprehension of bias. The first of these is *Ladies of the Sacred Heart of Jesus v Armstrong's Point Association*, [1961] 29 DLR (2d) 373 (MBCA) [*Sacred Heart*]. There, the Manitoba Court of Appeal set aside a decision of a municipal board on the basis of a reasonable apprehension of bias because a member of the board was married to an executive of the Armstrong Point Association and the board member and his wife co-owned property situated near the area at issue.

[62] The Applicant also relies on *Bailey v Barbour*, 2012 ONCA 325 [*Bailey*] where, based on a reasonable apprehension of bias, the Ontario Court of Appeal set aside the trial judge's decision because of the trial judge's wife's "deep and current and multi-layered" connection as a real estate agent with the property in dispute, which included that one of the wife's clients was anticipated to be a witness in the trial and had close connections to the property in dispute.

[63] The Applicant further relies on *Re Greene and Borins*, [1985] 18 DLR (4th) 260 [*Re Greene*] and *Moll v Fisher*, [1979] O.J. No. 4113 [*Moll*]. In *Re Greene*, the Ontario Superior Court found that a municipal councillor was in a conflict of interest, as defined by provisions of the *Municipal Conflict of Interest Act*, because he voted on development proposals which were located close to properties owned by his father and other family members and failed to disclose his direct or indirect pecuniary interest in the property at issue. In *Moll*, the Ontario Superior Court found that two school trustees had violated the conflict of interest provisions of the *Municipal Conflict of Interest Act* by voting on collective agreement issues because their spouses were teachers employed by the board of education. The Court found that it would be contrary to the public interest to allow an elected official to bargain on behalf of the public when his private economic interest was at stake.

[64] In my view, *Re Green* and *Moll* are not relevant to the matter before me. They are concerned with the breach of statutory conflict of interest provisions. In this matter, the Applicant does not identify any applicable conflict of interest legislation, nor do the WLFN Election Regulations contain conflict of interest provisions that would serve to disqualify the Arbitrator because of this spousal relationship. Nor does the Applicant assert that the Arbitrator's spouse has a pecuniary interest in the outcome of Election Appeal as was the circumstance in *Sacred Heart* and *Bailey*.

[65] This case is factually more similar to *Newfoundland (Treasury Board)*. There, the employer's appointee to the arbitration board, a lawyer, was married to a lawyer with the provincial department of justice. The department of justice lawyer spouse had previously

provided legal advice to the agency deemed the employer for the purposes of the litigation. At issue was whether the spousal relationship would disqualify the employer's nominee to the arbitration board, on the ground that such relationship created a reasonable apprehension of bias. The evidence was that the nominee's spouse was assigned, at least at one point in time, to provide legal advice to the agency. However, there was no evidence that the nominee's spouse had given advice to the employer with respect to matters related to the grievance. The Newfoundland Supreme Court held that a spousal relationship between solicitors, in and of itself, does not automatically establish the existence of a reasonable apprehension of bias on the part of a decision maker and the facts of that case did not support such a finding.

[66] That approach is consistent with the Supreme Court of Canada's decision in *Wewaykum*. There the Supreme Court rejected the idea of automatic disqualification of a judge of that Court, Justice Binnie, due to an alleged reasonable apprehension of bias. That allegation of bias was founded on Justice Binnie's involvement in the matter under appeal in his capacity as federal Associate Deputy Minister of Justice fifteen years prior. The Supreme Court held that what was relevant when assessing whether a reasonable apprehension of bias arose was the nature and extent of the Justice Binnie's role. The evidence in *Wewaykum* was that the solicitor-client relationship was of a limited supervisory and administrative role (para 82). The Supreme Court held that test for a reasonable apprehension of bias had not been met.

[67] The Supreme Court also stated that the idea that "justice must be seen to be done" cannot be severed from the standard of reasonable apprehension of bias (para 67). And, that:

> [71] A more recent decision of the English Court of Appeal suggests that this extension of the rule of automatic

> disqualification, beyond cases of financial interests, is likely to remain exceptional (*Locabail (U.K.), supra*). **Even so extended, the rule of automatic disqualification does not apply to the situation in which the decision-maker was somehow involved in the litigation or linked to counsel at an earlier stage, as is argued here.**
>
> [72] Whatever the case in Britain, **the idea of a rule of automatic disqualification takes a different shade in Canada**, in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge's state of mind, either as a matter of fact or as imagined by the reasonable person…
>
> (emphasis added)

[68] Further, the Supreme Court held that the test for a reasonable apprehension of bias refers to an apprehension of bias that rests on serious grounds – as opposed to the "very sensitive or scrupulous conscious" (at para 76 citing *Committee for Justice and Liberty* at p 35) - in light of the strong presumption of judicial impartiality. And, that the inquiry remains highly fact specific (at para 77).

[69] In my view, based on this jurisprudence it cannot be concluded that a reasonable apprehension of bias arises simply because a personal relationship existed between the decision maker, the Arbitrator, and a lawyer at Ackroyd LLP.

[70] In this matter, whether the Arbitrator and his spouse were actually married as of the date of the hearing is not particularly relevant if they were in a serious relationship at that time. However, there is no evidence before me on that point. And, even if it is reasonable to assume that they were in a serious relationship, there is no evidence that the Arbitrator's spouse had a direct or indirect financial interest in the outcome of the Appeal. In fact, the evidence of the

Applicant indicates that Ackroyd LLP was counsel for WLFN before the subject Election and Appeal. Therefore, the solicitor-client relationship pre-existed the events giving rise to this application, and there is no evidence or basis to infer that the continuation of the solicitor-client relationship was in any way dependant on the outcome of the Arbitrator's decision in the Appeal.

[71] While the Arbitrator's spouse is a member of Ackroyd LLP, there is also no evidence that she had any involvement with the subject Appeal. Moreover, and in any event, as a member of the legal profession, she would presumably be ethically bound not to disclose or discuss the Appeal with her spouse, and there is no evidence to suggest that she was in breach of that obligation.

[72] In my view, keeping in mind that there must be a real likelihood of a reasonable apprehension of bias and that speculation is insufficient to meet the test, the mere fact that the Arbitrator's spouse is a member of Ackroyd LLP is insufficient, in and of itself, to give rise to a reasonable apprehension of bias by the Arbitrator in favour of his spouse's firm.

[73] As indicated above, there is no evidence that the Arbitrator's spouse was involved in the Appeal or would financially benefit directly or indirectly from the outcome of the Appeal. Further, in today's world where many families are comprised of two working professionals, the mere fact of the marriage is insufficient to establish a reasonable apprehension of bias or to overcome the strong presumption of impartiality of the Arbitrator.

[74] Finally, as to the Applicant's assertion that the Arbitrator "was deliberately selected as the decision maker by an Ackroyd lawyer" and that Ackroyd LLP then appeared before the Arbitrator in an adversarial proceeding "as one of the parties", this is contradicted by the record which establishes that the Arbitrator was appointed by WLFN Band Council Resolution. Further, Ackroyd LLP was not a party in the appeal. There is also no evidence before me indicating why Mr. Jarisz was selected by WLFN as the Arbitrator. In my view, the Applicant's assertion that the Arbitrator was selected only because of his spousal relationship, giving rise to a reasonable apprehension of bias, is entirely speculative. It does not meet the high threshold to establish a reasonable apprehension of bias.

iii. Prior retainer of Arbitrator

Applicant's position

[75] The Applicant submits that the Arbitrator's previous retainer by WLFN raises a reasonable apprehension of bias. Further, that this view is supported by *Ahumada v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 97 at paras 57-61 [*Ahumada*], where the Federal Court of Appeal found that a reasonable apprehension of bias exists where the decision maker has a business or employment relationship with one of the parties. The Applicant also refers to *Rothesay Residents Assn Inc v Rothesay Heritage Preservation and Review Board*, 2006 NBCA 61 [*Rothesay*] at para 20 in support of his view that there is a reasonable apprehension of bias in circumstances where the decision maker is now or was previously the solicitor or client of one of the parties. The rationale for this rule being that a decision maker previously retained by one of the parties might be mindful of how their former client might view any decisions made.

[76] In addition to these common law principles, the Applicant submits that s 7.6 of the WLFN Election Regulations acts as an absolute bar against appointing a lawyer that has ever been previously retained by the WLFN. The Arbitrator's prior retainer is demonstrated by the above described June 10, 2017 email from Anita Thompson of Ackroyd LLP, to Drew Jarisz, the Arbitrator in his matter, advising that Ackroyd LLP is retaining Mr. Jarisz as a Deputy Assistant to the Ratification Officer for the WLFN Agricultural Benefit Settlement Referendum Vote to be held on June 14 and 15, 2017. Accordingly, the Applicant submits that the Arbitrator was not eligible to act as the Appeal Arbitrator and his appointment was in breach of s 7.6 of the WLFN Election Regulations.

[77] The Applicant also submits that, in his previous role as a Deputy Assistant to the Ratification Officer for the WLFN Ratification Vote, Mr. Jarisz would have worked with the incumbent Chief and Council, including Mr. Jesse Grey who was the Chief at that time. According to the Applicant, a reasonable person would conclude that because of their previous relationship, the Arbitrator would favour the evidence of Mr. Jesse Grey when assessing the allegation of corrupt election practises and vote buying during the Appeal.

Respondent's position

[78] The Respondent submits that s 7.6 of the WLFN Election Regulations should be interpreted as barring anyone previously retained to provide legal or adjudicative services to WLFN from being appointed as an arbitrator. The Respondent rejects the Applicant's interpretation, which would preclude the appointment of any person who has provided administrative services to the WLFN. Further, that a relationship of loyalty was at issue in

Rothesay. Therefore, *Rothesay* and related cases are distinguishable because here the previous employment was in an administrative capacity characterized by impartiality. Deputy Assistant to the Ratification Officer is a position requiring impartiality with respect to the outcome of the ratification vote, not a position imputing loyalty to a Chief or Councillor. Under cross-examination, the Applicant admitted that he would expect the Ratification Officer and Deputy Assistant to be impartial.

[79] The Respondent also submits that the Applicant's speculation that, because of his prior retainer, the Arbitrator would be inclined to prefer Mr. Jesse Grey's evidence is not supported by the evidence. The letter retaining Drew Jarisz as Deputy Assistant to the Ratification Officer identifies the two councillors, Hughie Tallman and Darren Auger, who would be present at the Edmonton polling station where Mr. Jarsiz was posted during the vote. And, on cross-examination, the Applicant admitted that he had no basis for believing that the Arbitrator had ever met Jessy Grey in the past.

Analysis

[80] Section 7.6 of the WLFN Election Regulations states as follows:

> **7.6 Qualifications of Election Appeal Arbitrator**
>
> The Election Appeal Arbitrator shall be a retired Judge or a lawyer who is not or has not been retained by the First Nation or any Member of the First Nation, other than as an Election Appeal Arbitrator.

[81] In my view, the language of s 7.6 is clear and unambiguous. It states that a person previously retained by WLFN may not be appointed as an election appeal arbitrator. Further, the

WLFN Election Regulations do not qualify this limitation by making a distinction between positions of loyalty and positions of impartiality. The June 10, 2017 letter from Ackroyd LLP to Mr. Jarisz makes it clear that Ackroyd LLP "is retaining" Mr. Jarsiz as a Deputy Assistant to the Ratification Officer. The Respondent does not suggest that the retainer was not made on its behalf. Nor does the Respondent point to any case or principle of statutory interpretation supporting its loyalty and impartiality distinction other than, when appearing before me, suggesting that its interpretation was purposeful as what s 7.6 was intended to avoid was previously retained solicitors whose retainer gave rise to a duty of loyalty to the WLFN being appointed as arbitrators.

[82] In the result, it appears that WLFN breached s 7.6 of the WLFN Election Regulations when it appointed Mr. Jarisz as Arbitrator.

[83] However, the Applicant is not challenging the WLFN's appointment of Mr. Jarisz as Arbitrator as he makes clear in his Amended Notice of Application. Rather, he submits that the Arbitrator's previous retainer leads to a reasonable apprehension of bias in his decision making in the Appeal.

[84] In my view, s 7.6 was very likely intended to avoid precisely this situation, being an allegation of apprehended bias on the part of an arbitrator. However, in these circumstances, the question remains whether an informed person, viewing the matter realistically and practically – and having thought the matter through – would think that it is more likely than not that

Arbitrator, whether consciously or unconsciously, would not decide fairly. In my view, the mere fact that WLFN's appointment of Mr. Jarisz breached s 7.6 does not address that question.

[85] The Applicant's submission as to bias are, in my view, speculative. He asserts that because Mr. Jarisz was previously retained as a Deputy Assistant to the Ratification Officer for the WLFN Agricultural Benefits Settlement Referendum Vote, the Arbitrator would have worked with the incumbent Chief, Jesse Grey, and Council. Therefore, any reasonable person informed of the facts would conclude that the Arbitrator may have favoured Jesse Grey because of his previous retainer "and his work with Jesse Grey".

[86] The only documentary evidence concerning the nature of Mr. Jarisz's previous role is the Ackroyd LLP retainer letter. The letter states that Mr. Jarisz's polling station would be located in West Edmonton; identifies the electoral officer and his contact information and states that it is very important that Mr. Jarisz contact the electoral officer if he has any questions; identifies the polling clerk; identifies WLFN Councillors Hughie Tallman and Darren Auger as the Councillors who would be present at the polling station; and notes that, pursuant to the Voting Guidelines, Mr. Jarisz was required to have one of the Councillors witness Mr. Jarisz count the votes and sign the certification. For this, Mr. Jarzis was to be paid $3500, plus reasonable traveling expenses. When cross-examined on his affidavit, the Applicant stated that he was not familiar with the role of deputy assistant to the ratification officer, other than he was supposed to be working with the ratification officer. Based on the retainer letter, it seems reasonable to infer that Mr. Jarisz's role was a one-day appointment that required him to impartially count the referendum votes, as witnessed by specified councillors, and to record and certify his count.

[87] The retainer letter does not establish that Mr. Jarisz worked with Jesse Grey or had any contact with Jesse Grey and there is no other documentary or other evidence supporting the Applicant's assertion that Mr. Jarisz and Jesse Grey worked together. When cross-examined, the Applicant was asked if he knew whether Jesse Grey had any relationship with Mr. Jarisz prior to the Appeal. The Applicant said he would not know. Asked whether or not Jesse Grey had ever met Mr. Jarisz, the Applicant said he could not answer that question, that is, he did not know.

[88] Given the manner of the retainer, through Ackroyd LLP, as well as the circumscribed, limited and impartial role that Mr. Jarisz played as Deputy Assistant to the Ratification Officer, and an absence of any evidence to support the Applicant's assertion that Mr. Jarisz and Jesse Grey had previously worked together, I am not persuaded a reasonable person informed of these facts would conclude that the Arbitrator may have favoured Mr. Grey's evidence pertaining to the allegation of vote buying.

[89] Further, a previous employment relationship does not automatically give rise to a reasonable apprehension of bias (see, for example, *Nadeau v Canada (Attorney General)*, 2018 FCA 203 at para 14). As to the Applicant's reliance on *Ahumada*, there the concern was that an appeals officer on temporary leave from the branch of Citizenship and Immigration Canada [CIC] that advises the Minister on whether intervention is appropriate in a given case, and represents the Minister when the Minister does intervene, took a temporary role as a panel member of the Convention Refugee Determination Division [CRDD] deciding refugee claims. The Court noted that she "might well be mindful of how her colleagues were likely to view her decisions as a CRDD member and what effect her decisions might have on her career prospects

or opportunities when she returned to CIC". The Court held that employees occupy a sufficiently vulnerable position that a reasonable person might think that their decisions were likely to be influenced by extraneous consideration connected with their employment status.

[90] In my view, *Ahumada* is distinguishable from this matter. Here the Arbitrator's prior retainer on behalf of WLFN was a one-day appointment as a Deputy Assistant to the Ratification Officer. Accordingly, the concern that animated *Ahumada* does not apply here. The Arbitrator is not an employee of WLFN Chief and Council and therefore would not be similarly influenced by what WFLN Chief and Council might think of his decisions as a returning employee.

[91] The Applicant also relies on *Rothesay* to support the proposition that a previous solicitor-client relationship raises the spectre of a reasonable apprehension bias. However, in this case the June 10, 2017 prior retainer letter appointed Mr. Jarisz as Deputy Assistant to the Ratification Officer for the purposes of the WLFN Agricultural Benefits Settlement ratification. Mr. Jarisz was retained by WLFN's counsel and was not appointed in a solicitor role to provide services to WLFN. Thus, no previous solicitor-client relationship between Mr. Jarisz and WLFN has been established.

[92] In my view, the fact that Mr. Jarisz was retained by the WLFN for one day as Deputy Assistant to the Ratification Officer is not sufficient to give rise to a reasonable apprehension of bias.

[93] In conclusion, viewed in context and in light of the record, neither the *ex parte* communications, the spousal relationship nor the prior retainer give rise to a reasonable apprehension of bias in the factual circumstances of this matter. As these three allegations do not give rise to a reasonable apprehension of bias individually, I cannot accept the Applicant's view that viewed collectively they would meet the test.

Issue 2: Are there reviewable errors arising from the Arbitrator's assessment of the evidence and analysis?

[94] Although the Applicant also makes submissions asserting errors on the part of the Arbitrator pertaining to his decision and his weighing of the evidence, s 16.20 the WLFN Election Regulations clearly precludes challenges on that basis, restricting challenges on judicial review to matters of procedural fairness. Accordingly, in my view, it is not open to the Applicant to challenge the Arbitrator's decision on the merits.

[95] In any event, when appearing before me, counsel for the Applicant advised that these arguments were made from an anticipatory perspective. As the Respondent had not made the anticipated arguments, the Applicant was no longer pursuing this issue.

Costs

[96] The Applicant submits that this is an appropriate case to award solicitor-client costs or, alternatively, a lump sum costs award on an elevated scale. Further, that where a First Nation is paying the legal fees of one party, it is appropriate for the other party to also have their legal fees paid by the First Nation. The Applicant also notes that this Court has shown sensitivity to the

power imbalance between an applicant and their First Nation, which has greater resources, and that there can be a public interest indemnifying members of a First Nation when they bring litigation to address important matters. Finally, given his motivation in bringing this application for judicial review, he should be awarded costs in any event of the cause.

[97] The Respondent submits that there is no basis for an award of solicitor client costs and no basis for an award of costs in any event of the cause.

[98] I agree with the Respondent.

[99] Although the parties have offered to make further submissions as to costs subsequent to my decision being issued, in my view this is not necessary. This application for judicial review based on allegation of bias would not have arisen had the WLFN not appointed the Arbitrator in breach of s 7.6 of the WLFN Election Regulations. That said, the Applicant's allegations of bias were weak and largely speculative. Nor, in my view, does the Applicant raise a matter of public importance. In these circumstances, I am exercising my discretion under Rule 400 of the *Federal Courts Rules* SOR/98-106, and have determined that there shall be no award of costs.

JUDGMENT IN T-174-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs

"Cecily Y. Strickland"
Judge

ANNEX A

The most relevant provisions of the Customary Election Regulations of the Whitefish Lake Fist Nation #459 are reproduced below.

2. DEFINITIONS

2.6 "Corrupt Election Practices" means:

2.6.1 attempting or offering money or other valuable consideration in exchange for an Elector's vote; or the falsification of a declaration of a ballot account, vote result, or declaration of Election result, or

2.6.2 threatening adverse consequences, coercing or intimidating an Elector or an election official for the purposes of influencing an elector's vote; or a ballot account, vote result, or declaration of Election result, or

2.6.3 forging documents or providing false or misleading information for the purposes of influencing an Elector's vote; or a ballot account, vote result, or declaration of Election result.

7. APPOINTMENT OF ELECTORAL OFFICER AND ELECTION APPEAL ARBITRATOR

7.1 Appointment

At least thirty-five (35) days prior to the date selected as the Election day, the Council shall, by Resolution in the prescribed form set the date of the Election, appoint an Electoral Officer and an Election Appeal Arbitrator for the purpose of conducting the Election pursuant to these Regulations.

7.6 Qualifications of Election Appeal Arbitrator

The Election Appeal Arbitrator shall be a retired Judge or a lawyer who is not or has not been retained by the First Nation or any Member of the First Nation, other than as an Election Appeal Arbitrator.

8. NOMINATIONS

8.4 Persons Eligible for Nomination

In order to qualify for nomination a person must:

8.4.5 not have been convicted of any indictable criminal offenses as of the date of nomination; and

8.4.6 not have received a pardon for the following indictable offences:

8.4.6.1 Murder;

8.4.6.2 Attempted Murder;

8.4.6.3 Sexual Assault, where the Crown Prosecutors office proceeds by Indictment;

8.4.6.4 Sexual Assault with a weapon;

8.4.6.5 Aggravated Sexual Assault with or without use of a firearm.

8.5 Any Elector who is ineligible pursuant to section 21.4 is not eligible to be nominated.

11 ELECTIONS

11.18 Secret Vote

Subject to 11.20 and 11.24, voting in all Elections, By-elections and Run-off Elections will be by secret ballot.

16 ELECTION APPEALS

16.1 Grounds for Appeal of Election

Within five (5) consecutive days of and including the Election Day, or the date on which the Candidate is Acclaimed pursuant to section 10, any Elector, who voted in the Election, may appeal the results of an Election, By-election, Run-off Election or Acclamation if, on reasonable and probable grounds, they believe:

16.1.1 the Electoral Officer made an error in the interpretation or application of the Regulations which materially and directly affected the outcome of the Election, By-election, or Run-off election as the case may be; or

16.1.2 a Candidate who ran in the Election, By-election, or Run-off election, as the case may be, was ineligible to run and provided

false information or failed to disclose information relevant to the validity of their nomination; or

16.1.3 a person voted in the Election, By-election, or Run-off election, as the case may be, who was ineligible to vote and provided false information or failed to disclose information relevant to their right to vote; or

16.1.4 a Candidate was guilty of a corrupt Election practice or benefited from and consented to a corrupt Election practice; or

16.1.5 a falsification of an Electoral Report or any other actions by the Electoral Officer or Polling Clerk that materially affected the outcome occurred; or

16.1.6 any other circumstance, event or action which improperly, and directly affected the conduct and outcome of the Election.

16.2 Notice of Appeal

A Notice of Appeal in writing and signed-by the Appellant shall be forwarded to the Electoral Officer outlining the grounds for the Appeal with a cash deposit or certified cheque payable to the First Nation of Five Hundred Dollars ($500.00) delivered to the Electoral Officer. The Notice of Appeal shall state:

16.2.1 the Election results appealed from and the name of the affected Candidate or Candidates;

16.2.2 the grounds upon which the appeal is made including reference to the relevant sections of these Regulations;

16.2.3 the material facts on which the appellant relies;

16.2.4 the names of any witnesses the appellant intends to call or a statement that the appellant does not intend to call any witnesses; and,

16.2.5 a list of documents or records the appellant intends to rely on or a Statement that the appellant does not intend to rely on any documents or records.

16.5 A person who files a Notice of Appeal may not introduce any witness or use any document that has not been disclosed in the Notice of Appeal.

16.6 The Notice of Appeal shall be forwarded by the Electoral Officer to all Candidates, posted in public places on Reserve and in other public places and locations selected by the Appeal Arbitrator.

16.9 Election Appeal Arbitrator

Within three (3) days of receiving the Election Record, the Election Appeal Arbitrator shall set the date for the hearing of the Election Appeal.

16.11 Notice of the hearing of the Election Appeal shall be posted in public places on Reserves and in other public places and locations the Election Appeal Arbitrator designates and mailed or delivered to the appellant and all Candidates.

16.13 The appellant, or other Electors, or their representatives, shall be entitled to make verbal or written submissions to the Election Appeals Arbitrator and be subject to cross-examination by the parties or the Arbitrator.

16.14 Appeal Arbitrator Powers

The Election Appeal Arbitrator has the following powers:

16.14.1 to determine the time, place and date of the appeal hearing;

16.14.2 to determine whether the appeal hearing is open to Members and who may or may not attend the appeal hearing;

l6.14.3 to determine questions or law arising in the course of the appeal hearing;

16.14.4 to rule on any objections made in the appeal hearing;

16.14.5 to order production of documents which are material and relevant to the appeal;

16.14.6 to determine the procedure to be followed having regard for fairness and equality between the parties to the hearing;

l6.14.7 to determine the manner in which evidence is to be admitted; and

16.14.8 the Arbitrator is not bound by rules of evidence and has the power to determine admissibility, relevance and weight of any evidence.

16.17 Appeal Arbitrator's Decision

Within five (5) days of the conclusion of the Hearing, the Election Appeal Arbitrator shall promptly make one of the following decisions in writing:

16.17.1 to deny the Appeal on the basis that evidence presented did not fully and properly establish the necessary grounds for an Appeal; or

16.17.2 to uphold the grounds for an Appeal but allow the results of the Election to stand, as the infraction did not materially affect the result of the Election; or

16.17.3 to uphold the Appeal and call for a new Election or Run-off Election.

16.20 Judicial Review

No decision, order, directive, declaration, ruling on proceeding by the Election Appeal Arbitrator shall be questioned or reviewed in any court by application for judicial review or otherwise and no order shall be made or process entered or proceedings taken in any court whether by way of injunction, declaratory judgement, prohibition, quo warranto, or otherwise to question, review, prohibit or restrain the Election Appeal Arbitrator's decision or proceedings.

16.21 Notwithstanding section 16.20 a decision, order, directive, declaration, ruling or proceeding of the Election Appeal Arbitrator may be questioned or reviewed by way of an application for judicial review in the Federal Court of Canada on the basis that the Election Appeal Arbitrator failed to comply with the law or failed to observe a principal of natural justice.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-174-19
STYLE OF CAUSE:	JAMES GREY v WHITEFISH LAKE FIRST NATION #459
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	SEPTEMBER 15, 2020
JUDGMENT AND REASONS	STRICKLAND J.
DATED:	OCTOBER 2, 2020

APPEARANCES:

Evan C. Duffy	FOR THE APPLICANT
John Kudrinko and Eric Pentland	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Parlee McLaws LLP Edmonton, Alberta	FOR THE APPLICANT
Ackroyd LLP Barristers and Solicitors Edmonton, Alberta	FOR THE RESPONDENT