Federal Court  Cour fédérale

Date: 20210902

Dockets: T-653-20

Citation: 2021 FC 843

Ottawa, Ontario, September 2, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

BRENDAN ANDERSON

Applicant

and

ALVIN FRANCIS, SHAUNA BUFFALOCALF, WESLEY DANIEL, ROBERTA FRANCIS, AND NEKANEET FIRST NATION

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 of a May 26, 2020 decision [the Decision] of a one member panel of the Nekaneet Appeal Body [NAB] of the Nekaneet First Nation [Nekaneet]. Nekaneet is an Indian

Band under the *Indian Act*, RSC 1985, c I-5 and conducts its elections pursuant to the *Nekaneet Constitution* [*Constitution*] and the *Nekaneet Governance Act* [*Act*].

[2] The NAB dismissed the Applicant's appeal of the March 25, 2020 Nekaneet election [Election] without a hearing. The NAB found that the Applicant had not met the test to overturn the Election results and therefore had not established a legal basis for his appeal. The NAB also found that the appeal did not contain any grounds that would support the appeal even if the factual basis for such grounds were proven.

[3] The Applicant argues that their rights to procedural fairness were breached and that the Decision was unreasonable. Accordingly, he requests that the Court set aside the Decision and remit the matter to a different member of the NAB.

[4] The application for judicial review is dismissed.

II. Background

[5] During the Election, gathering restrictions were implemented due to the COVID-19 pandemic. Voters were, however, still able to vote in person pursuant to the *Act* and the candidates, scrutineers, and security were present at the polling area. The ballots were counted in the presence of candidates and scrutineers. No one raised any concerns during the count.

[6] The incumbent, Chief Francis, was re-elected with 111 votes while the Applicant received 23 votes and a third candidate received 55 votes.

[7] Members of Nekaneet can appeal election results to the NAB. Article 8.02 of the *Constitution* sets out the appointment of persons to the NAB:

> A member of the Nekaneet Appeal Body must be an individual who is of good character and reputation, a lawyer who is a member in good standing of one of the Law Societies of Canada for at least ten (10) years and reduced to at least five (5) years if the lawyer fluently understands and speaks the Cree language, independent and impartial, is not a Citizen of Nekaneet or is materially connected to Nekaneet by family, employment or business, has no criminal record and was at no time disbarred from practicing law.

[8] On March 2, 2020, the Nekaneet Band Council appointed John Hill [Mr. Hill], Crystal Eninew, and Lisa Abbott to the NAB through a band council resolution [the BCR]. Mr. Hill had previously sat on the NAB from 2011 until 2016. As of 2011, he had leased an office from New Horizon First Nations Administration Inc. [New Horizon], an operating entity of Nekaneet whose directors are the Nekaneet Band Council. Mr. Hill's lease expired in September 2019 and negotiations ensued between September 2019 until September 2020 when he entered into a new lease agreement.

A. *The Appeal*

[9] On April 22, 2020, the Applicant appealed the Election results to the NAB. Pursuant to section 19.11 of the *Act*, a single member can hear an appeal if an appellant chooses. The Applicant chose Mr. Hill. The Applicant states that at the time the appeal was filed he was unaware that Nekaneet and Mr. Hill had a leasing arrangement.

[10] The Applicant submitted that he received at least 43 votes rather than the 23 votes that the Election results indicated. The appeal documentation included 33 affidavits by electors,

including the Applicant's, each stating that they voted for the Applicant. The appeal documentation also included notice of an additional 10 electors who were prepared to testify to the same. Seven of the affiants indicate that the electors voted for the Applicant; there were no seals on the ballot boxes for the Chief and Councillors; and either there were locks on ballot boxes but they were not locked or there were no locks at all. The Applicant also submitted that Alena Louison, the Electoral Officer [the EO], improperly prevented another candidate, Jordi Fourhorns [Mr. Fourhorns], from being a candidate in the Election. The Applicant included an affidavit of Mr. Fourhorns, who was represented by the same counsel as the Applicant.

[11] On May 6, 2020, Chief Francis submitted a Notice of Dispute, an affidavit that focused significantly on why Mr. Fourhorns was prevented from being a candidate in the Election, and the EO's statement concerning the Election and the situation of Mr. Fourhorns. The statements of Chief Francis and the EO both explained that the ballot boxes were empty prior to ballots being deposited and that the boxes were secured with locks and tape. Chief Francis and the EO also explained the COVID-19 restrictions that required adjustments to the polling stations to ensure proper social distancing measures and that this impacted the number of people who could be present during the ballot count.

[12] Chief Francis' affidavit also outlined the counting of the votes, that both he and the Applicant were present, and that no person objected to the process. Only one ballot for a Councillor was in issue and the parties agreed that it would be counted. Chief Francis questioned how it could be known with certainty who voted for whom, particularly when some of the electors who apparently voted for the Applicant had nominated other candidates for Chief.

[13] The Applicant provided two possible explanations as to why the Election results did not reflect the votes cast: someone tampered with the ballot boxes or parties negligently or deliberately reported the ballots incorrectly. Mr. Hill noted that these were only posited as possible explanations without actual evidence of one or the other actually occurring.

[14] On May 26, 2020, Mr. Hill dismissed the Applicant's appeal without a hearing pursuant to section 19.06 of the *Act*. That section reads as follows:

> The Nekaneet Appeal Body shall give the parties an opportunity to present their respective cases at a hearing of the Nekaneet Appeal Body unless the nature of the Application as disclosed on the face of the Notice of Application does not disclose a legal basis for the Application or does not contain any grounds that would support the Application if the factual basis for such grounds were proven.

III. The Decision

[15] In his six page Decision, Mr. Hill found that the appeal failed to establish a legal basis or grounds to warrant a hearing. Mr. Hill reviewed the allegations about the EO not locking and sealing the ballot boxes and the allegation that the EO had not properly counted the ballots. He also considered the Applicant's allegation that more people voted for the Applicant than what was reflected in the final results. Mr Hill reviewed his authority under section 19.06 of the *Act* and considered the jurisprudence provided by the Applicant, specifically this Court's decision in *Papequash v Brass,* 2018 FC 325, aff'd 2019 FCA 245 [*Papequash*].

[16] Mr. Hill described his approach in paragraph 11 of the Decision:

> In order to determine if the Application requires a hearing pursuant to section 19.06 of the *Act*, I will look at the allegations and the nature of the evidence provided. For the purposes of consideration

> of the Respondent's request for a ruling pursuant to section 19.06, I will assume that the evidence presented can be proven. Even if I accept the evidence provided, I need to determine if that evidence discloses a legal basis for the Application or if it contains grounds to support the Application.

[17] In applying the principles in *Papequash*, Mr. Hill found that the allegations pointed to technical irregularities rather than allegations of fraud or corruption. Paragraph 13 of the Decision also noted that *Papequash* endorsed the Supreme Court of Canada's principles in *Opitz v Wrzesnewskyj*, 2012 SCC 55 [*Opitz*]. In *Opitz* the majority of the Supreme Court explained:

> [23] In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. Since voting is conducted by secret ballot in Canada, this assessment can not involve an investigation into voters' actual choices. If a court is satisfied that, because of the rejection of certain votes, the winner is in doubt, it would be unreasonable for the court not to annul the election.

[18] In keeping with *Papequash* and *Opitz*, Mr. Hill found:

> [19] This mathematical approach seems to work where voting irregularities, like disputes over spoiled ballots, are involved and votes toward candidates can be determined. Although I am of the opinion that the legal basis for an Application would not include assessing what the voter's actual choices might have been after the fact, I will continue with the mathematical analysis for the purposes of my s.19.06 determination.

[19] Mr. Hill applied the mathematical approach to assess whether the Election results should be overturned. He found that even if all disputed votes were allocated to the Applicant, Chief Francis would still have won the Election.

[20] Mr. Hill then considered whether the Election was tainted by fraud or corruption such as to call into question the integrity of the Election process. He reviewed the Applicant's two possible explanations as to why the Election results did not reflect the votes cast. He noted that there was no allegation that someone actually tampered with the ballot boxes. He also noted that there was no evidence that the EO observed and reported the marks on the ballots incorrectly, whether negligently or deliberately. Both allegations, in Mr. Hill's view, were only mere possibilities as indicated in the Applicant's written submissions. As a result, Mr. Hill dismissed the appeal without a hearing.

IV. Notice of Objection and Order of Case Management Judge Aylen

[21] Subsequent to applying for judicial review, the Applicant sought information from Mr. Hill relating to his business dealings with Nekaneet. The Applicant also sought communications between Mr. Hill and members of Nekaneet from the time of his appointment to the Decision. Mr. Hill filed a Notice of Objection and the Applicant brought a motion to dismiss the Notice of Objection and sought costs.

[22] On August 25, 2020, Case Management Judge Aylen granted the motion in part, ordering only the production of a lease between Mr. Hill and New Horizon and reserving costs to the Judge hearing the application. On August 31, 2020, Mr. Hill filed an affidavit with the Court attaching the lease with New Horizon as well as copies of lease payments.

V. The Issues and Standard of Review

A. *Issues*

[23] Based on the parties' submissions, the issues to be determined are as follows:

(1) Did Mr. Hill properly exercise his jurisdiction?

(2) Was the Decision procedurally fair?

a) Was there a breach of the right to an impartial decision maker?

b) Was there a breach of the right to be heard?

(3) Was the Decision reasonable?

B. *Standard of Review*

[24] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] held that the presumptive standard of review is reasonableness whenever a Court reviews an administrative decision (at paras 16, 23, 25). As stated by Justice Strickland in *Blois v Onion Lake Cree Nation*, 2020 FC 953 [*Blois*] at paragraph 20, that presumption can be rebutted in two circumstances:

> The first is where the legislature has prescribed the standard of review or has provided a statutory appeal mechanism thereby signalling the legislature's intent that appellate standards should apply (*Vavilov* at paras 17, 33). The second circumstance is where the rule of law requires the application of the correctness standard. This will be the case for certain categories of questions, namely, constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at paras 17, 53).

[25] I find that the presumptive reasonableness standard applies to the first and third issues. On the first issue of jurisdiction, the *Act* has delegated the authority to the NAB to determine election appeals and none of the circumstances exist rebutting the presumption of a reasonableness standard of review (*Blois* at paras 22-24).

[26] The third issue deals with the merits of the Decision and is reviewable on the reasonableness standard. The Supreme Court of Canada has held that "[i]n order to fulfill Dunsmuir's promise to protect the legality, the reasonableness and the fairness of the administrative process and its outcomes, reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions" (*Vavilov* at para 12 citing *Dunsmir v New Brunswick*, 2008 SCC 9 at para 28).

[27] The Court will not interfere with a decision if it is found to be internally coherent, includes a rational chain of analysis, and is justified based on the facts and law (*Vavilov* at para 85). Assessing the reasonableness of a decision does not include reweighing or re-assessing the evidence *(Canada (Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55).

[28] The second issue, dealing with procedural fairness, attracts a correctness standard of review (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 49-56; *Khela v Mission Institution*, 2014 SCC 24 at para 79). The duty of procedural fairness, however, is flexible and variable and requires an appreciation of the context, the statute, and the affected rights (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC

699 at para 22). My colleague Justice Strickland also recently confirmed that the standard of review for procedural fairness is correctness in *Taykwa Tagamou Nation v Linklater*, 2020 FC 220 at paragraphs 41-42 [*Taykwa Tagamou*].

C. *Preliminary Matter*

[29] The EO did not file an affidavit before the NAB and the Applicant asserts that the affidavit of the EO filed in this application is inadmissible in its entirety. While I disagree that it should be dismissed in its entirety, I find that this application can be decided without consideration of the EO's affidavit.

[30] It is well established that apart from well-defined exceptions, a judicial review application is to be determined based on the record that was before the decision-maker (*Chin Quee v TC, Local 938*, 2017 FCA 62 at para 5; *Assn of Universities & Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 20).

[31] Such exceptions include general background information that might assist the Court in understanding the issues relevant to the judicial review or bringing procedural defects to the Court's attention that cannot be found in the evidentiary record of the administrative decision-maker (*Keeprite Workers' Independent Union v Keeprite Products Ltd* (1980), 114 DLR (3d) 162, 29 OR (2d) 513; *Kelley Estate v Canada (Attorney General)*, 2011 FC 1335 at paras 26-27).

[32] While the EO's affidavit does not fall under an exemptive category as identified above, and I agree with the Applicant that there are some issues with it, I find that nothing turns on the

contents of the affidavit. The affidavit primarily includes a recitation of the facts that are already found in the Applicant's record with the exception of the following paragraphs.

[33] Paragraph three includes information that is not in the record, however, I find that it has no impact on this matter other than providing context as to who the affiant is:

> 3. I have served as the Chief Electoral Officer in five elections for the position of Chief and members of Council for three First Nations, including, the Nekaneet First Nation, and have served as Deputy Electoral Officer in more than 40 elections for Chief and Councils over the past 20 years. My name is maintained by Indigenous Services Canada as an individual eligible to be appointed to act as an Electoral Officer or Deputy Electoral Officer for the election of Chiefs and Councils conducted by First Nations.

[34] The following paragraphs are excluded on the basis that they go to the merits of the appeal. I note, however, that they do not include information that would impact my determination of the issues:

> 8. With respect to the ballots, I had ordered the ballots from Allied Printers in Regina, Saskatchewan. All ballots were the same size and were printed on coloured paper. Before being given to voters, ballots were stamped by hand with a unique stamp containing my initials. The stamp was placed on the ballot so that, once folded, the stamp could be seen without seeing how the ballot had been marked by the voter. Finally, ballots were folded in a specific way so as to avoid showing how they were marked when deposited in the ballot box.
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> …
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> 11. All ballots marked by voters were placed in the ballot boxes. Ballots were folded so that the marking on the ballot could not be seen. Ballots were checked to insure that they contained my stamp and were then placed in ballot boxes without looking at how votes had been cast. We matched the number of ballots given out with the list of individuals who had voted throughout the day so that the number of votes cast matched the number of ballots that had been given out.

> …
>
> 13. When the poll closed, the ballot boxes were unlocked and the tape removed. I retained the tape from the ballot boxes and placed the tape in an envelope which was then returned to the ballot box.

[35] The Applicant submits that since the Respondents refused to withdraw the EO's affidavit, the Applicant was required to conduct a lengthy cross-examination to ensure a balanced record before this Court. He states that the Respondents' conduct has implications for costs. After reviewing this affidavit, I find that nothing in it warranted such time. I find that the affidavit shall remain on the record save for paragraphs 8, 11, and 13. In any event, as stated above, the application for judicial review can be decided without reference to the EO's affidavit.

[36] In addition to the EO, both the Applicant and Chief Francis were cross-examined on their affidavits filed on this application. After reviewing the transcripts of the cross-examinations of the Applicant and Chief Francis, I find that their testimony does not aid in deciding this application.

[37] The Applicant also filed a redacted affidavit of Mr. Fourhorns, which primarily provides context on the appointment of the NAB during the time Mr. Fourhorns served on the Band Council. After reviewing the contents, I find that there is nothing in his affidavit that assists in deciding this application.

[38] Other than the Applicant and Mr. Fourhorns, none of the individuals who had sworn affidavits before the NAB in support of the Applicant filed affidavits in this application.

VI. Parties' Positions

(1) Did Mr. Hill properly exercise his jurisdiction?

[39] The Applicant submits that Mr. Hill exceeded his jurisdiction by conducting a review that extended beyond the Notice of Appeal. He states that Mr. Hill incorrectly assessed and weighed the Respondents' evidence and relied upon his own personal knowledge. Specifically, the Applicant states that in six paragraphs of the Decision, Mr. Hill described the COVID-19 restrictions, the adjustments made to the polling stations, and the impact on the number of people who could be present during the ballot count.

[40] While some of the Applicant's background facts, as well as Mr. Fourhorn's affidavit, refer to the timing and/or manner of appointment of the NAB, the validity of the NAB's appointment is not being challenged in this application.

[41] The Respondents' submissions focus only on the jurisdiction of this Court to hear the matter. The parties ultimately agree that this Court has jurisdiction.

(2) Was the Decision procedurally fair?

a) The Right to an Impartial Decision Maker

[42] The Applicant states that Mr. Hill was neither impartial nor independent and that there was a reasonable apprehension of bias because Mr. Hill was dependent on Nekaneet for his

livelihood. This is in contravention of Article 8.02 of the *Constitution* as set out in paragraph 7, above.

[43] The Applicant submits that Nekaneet rewarded Mr. Hill for dismissing the Appeal with preferential lease rates that are inconsistent with his prior lease contract. He also takes issue with outstanding debts for rent in the approximate amount of $2,500 that Mr. Hill has not appeared to pay to Nekaneet or New Horizon.

[44] Additionally, the Applicant submits that Mr. Hill was counsel for Nekaneet and for a committee of the Federation of Sovereign Indigenous Nations [FSIN], of which Chief Francis represented Nekaneet, and therefore he was neither independent nor impartial. He states that Mr. Hill was obligated to disclose this relationship. Finally, in review of Mr. Hill's invoices to Nekaneet, the Applicant states that the amounts exceed the proper remuneration payable to him for his role on the NAB.

[45] The Respondents submit that the onus is on the Applicant to establish bias and the accepted test is what an informed person viewing the matter realistically and practically would conclude. The Respondents submit that Mr. Hill met the qualifications under Article 8.02 of the *Constitution* including that he not be "materially connected to Nekaneet by family, employment or business", though materiality is not defined in the *Act*. They state that there is no bias.

[46] The Respondents submit that the Applicant chose Mr. Hill as the sole NAB member to hear his appeal and that no issues concerning his ability to hear the appeal were raised prior to

the Decision. They submit that while a written lease was not signed until September 2020, Mr. Hill had received a lease renewal in 2019. The Respondents submit that while Chief Francis is on the board of New Horizon and signed the renewal agreement, there is no evidence of direct involvement by him or the Band Council in arranging the lease as this is handled by a third party.

[47] The Respondents submit that Mr. Hill did not act as counsel for Nekaneet but rather rendered accounts as a member of the NAB, which is permitted.

[48] The Respondents point out that the Applicant's submissions ignored that New Horizon's delay in enforcing the lease arrangement started seven months prior to the filing of the appeal and that there was already an offer to extend the lease on the same financial terms when it expired in 2019.

[49] Concerning the lack of disclosure of a potential conflict, the Respondents state that it was the Applicant who chose Mr. Hill as his single panel member. As well, the Applicant's counsel represented another party who filed an appeal under Mr. Hill, and his counsel was aware of the tenancy arrangement but made no allegations of bias in that prior matter.

b) The Right to be Heard

[50] The Applicant submits that pursuant to section 19.06 of the *Act,* set out above in paragraph 14, his appeal warranted a high degree of procedural fairness, including a hearing, which he never received.

[51] The Respondents submit that Mr. Hill carefully examined the facts and allegations before him and properly exercised his authority under section 19.08 of the *Act* by not conducting a hearing. That section reads:

> The Nekaneet Appeal Body is not bound by the rules of evidence or any other law applicable to judicial proceedings and has power to determine the admissibility, relevance and weight of any evidence and the Nekaneet Appeal Body may determine the manner in which sworn evidence is to be admitted.

(3) The Reasonableness of the Decision

[52] The Applicant states that Mr. Hill failed to engage with the submissions and authorities referenced within the Notice of Appeal. Since these materials were central to his claim, the Applicant states that any determination about a lack of reliability or relevance warranted an explanation. Mr. Hill's failure to do so resulted in an unreasonable Decision.

[53] The Applicant submits that Mr. Hill failed to assess whether voting practices contravened the *Act* and had an impact on the Election results. Further, Mr. Hill improperly exercised his discretion over whether the Election should be annulled. The Applicant submits that his appeal concisely stated irregularities that called into question the integrity of the Election, which Mr. Hill failed to assess. Instead, Mr. Hill incorrectly assessed whether the number of votes at issue was sufficient to affect the winner of the Election.

[54] The Respondents submit that, while Mr. Hill was required to assume that the Applicant's alleged facts could be proven pursuant to section 19.06 of the *Act*, he was not required to accept the legal arguments. Mr. Hill found that there was no allegation of fraud and that the Applicant's

allegations around the sealing and locking of the ballot boxes were technical in nature, did not warrant an assessment of the vote counts, and did not require setting aside the Election results.

VII. Analysis

(1) Did Mr. Hill properly exercise his jurisdiction?

[55] The Applicant, citing *Felix Sr v Sturgeon Lake First Nation*, 2011 FC 1139 [*Felix*], submits that Mr. Hill exceeded his jurisdiction. In *Felix*, the Court analyzed the custom election legislation and noted that there was a two-stage appeal process to be followed by the appeal tribunal. The first stage involved determining whether the appeal is supported by sufficient evidence to warrant a full hearing. The Court found that in determining whether there was sufficient evidence to move to the second stage of the appeal process, the tribunal went beyond the evidence in the appeal documentation. In doing so, the tribunal should have given the applicant an opportunity to rebut the opposing evidence in the context of a hearing (*Felix* at paras 39, 40).

[56] The following articles, in addition to sections 19.06 and 19.08 of the *Act* quoted above, also set forth the jurisdictional confines of the NAB:

> The Nekaneet Appeal Body has the jurisdiction to hear and resolve any conflict or dispute relating to an issue governed by a law of Nekaneet or address violations of a law of Nekaneet based on remedies and processes that are fair, just and equitable and in accordance with the laws of Nekaneet [*Constitution*, Article 8.08].
>
> The Nekaneet Appeal Body shall be subject to rules and procedures as prescribed in the laws of Nekaneet governing the Nekaneet Appeal Body and in the absence of such laws the Nekaneet Appeal Body, in its absolute discretion, will determine rules and procedures that are economical, expedient and efficient,

> so that matters are resolved in a fair, just and equitable manner and principles of natural justice and procedural fairness are observed [*Constitution*, Article 8.10].

[57] Sections 19.06 and 19.08 of the *Act* and as well as the above provisions do not place any limitations on the NAB's authority or the exercise of its discretion. In reviewing the Decision, the *Constitution*, and the *Act*, I find nothing to support the Applicant's assertion that Mr. Hill exceeded his jurisdiction. As I have set out at paragraph 16, above, Mr. Hill reviewed his jurisidiction pursuant to section 19.06 of the *Act* and then responded to the allegations and possibilities set out in the Applicant's materials. He noted that the allegations in the affidavit materials did not discuss either of the two possibilities submitted by the Applicant that could have occurred.

[58] The Applicant identified six paragraphs that purportedly illustrated Mr. Hill's personal views. The circumstances outlined in these paragraphs are found within Chief Francis' affidavit and the EO's statement that was attached as an exhibit to Chief Francis' affidavit. Therefore, it cannot be said that these were Mr. Hill's personal views.

[59] Accordingly, I find that there is no error in how Mr. Hill interpreted his jurisdiction as a member of the NAB. Mr. Hill reasonably explained what section 19.06 of the *Act* required of him. There is also no error in how Mr. Hill responded to the evidence and submissions of the Applicant. Mr. Hill's interpretation of the *Act* and the scope of his jurisdiction were reasonable.

(2) Was the Decision procedurally fair?

a) The Right to an Impartial Decision-Maker

[60] The test to establish a reasonable apprehension of bias was set out in *Committee for Justice & Liberty v Canada (National Energy Board)* (1976), [1978] 1 SCR 369 at paragraph 40:

> [40] The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, 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. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[61] There is a high threshold for a finding of a reasonable apprehension of bias with the burden of proof laying with the party making the assertion *(Oleynik v Canada (Attorney General)*, 2020 FCA 5 at para 57; *Sturgeon Lake Cree Nation v Hamelin*, 2015 SCC 25 at paras 25-26). Further, impartiality and independence are connected to the issue of bias and the strong presumption of impartiality is not easily displaced (*Grey v Whitefish First Nation #459*, 2020 FC 949 at para 23).

[62] The Applicant submits that the test for a reasonable apprehension of bias is satisfied. He bases his submission on the lease between Mr. Hill and New Horizon and that the dismissal of the appeal resulted in preferential lease rates. The evidence advanced by the Applicant is that, as a result of this leasing relationship, Mr. Hill relies on Nekaneet for his livelihood which is contrary to section 8.02 of the *Act*. The Applicant points to the cross-examination of Chief Francis where he described Mr. Hill as a business associate and where he conceded that the lease negotiations were a business transaction.

[63] The Applicant also submits that Mr. Hill acts as counsel for Nekaneet and therefore is not an independent and impartial adjudicator. Further, the Applicant states that the amounts that Mr. Hill invoiced Nekaneet exceeded the proper remuneration payable to him for his role as a NAB member.

[64] The argument that the leasing agreement resulted in preferential lease rates, leading Mr. Hill to be biased, is a serious allegation that must be backed up with evidence. In turning first to the rental relationship, I do not find that a longstanding rental relationship for even a small portion of the entire rental area rises to a level of impartiality warranting a finding of bias. As the Respondents point out, New Horizon's delay in enforcing a new lease arrangement started seven months prior to the filing of the appeal and there was already an offer to extend the lease on the same financial terms when it expired in 2019. I find insufficient evidence that there was a connection between the lease negotiations and the dismissal of the appeal. Considering this lack of evidence, an informed person would not conclude that Mr. Hill was biased. The Applicant's arguments amount to mere speculation which is insufficient to succeed on this point.

[65] I am equally unconvinced that Mr. Hill's livelihood is dependent upon Nekaneet. It is a stretch to suggest that Mr. Hill's livelihood as a lawyer would be impacted by the termination or cancellation of the lease with New Horizon. The argument that Mr. Hill's livelihood is dependent upon compensation received as a NAB member is also flawed. If this were true, the livelihood of every NAB member could be viewed as being dependent upon Nekaneet.

[66] I am persuaded by the Respondents' submission that Mr. Hill did not act as counsel for Nekaneet but rather rendered accounts as a member of the NAB. I take the Applicant's point that the BCR established the remuneration for NAB members at $1,000 per day, plus travel and expenses, and that Mr. Hill charged more than this amount. These circumstances may point to Nekaneet inadvertently paying Mr. Hill more than what was set out in the BCR or it may mean that the parties agreed to a higher remuneration. There is no evidence of why this discrepancy exists, and in any event, receiving a higher remuneration than what was agreed to be paid by Nekaneet does not, in and of itself, establish bias.

[67] The Applicant submits that Mr. Hill acted as legal counsel to the FSIN commission, of which Chief Francis is a member representing Nekaneet. I am unconvinced that this creates a direct relationship establishing that Mr. Hill is biased. There is no evidence that the FSIN commission is directly controlled by Nekaneet nor is there any evidence that Chief Francis is the directing mind of that commission.

[68] For these reasons, I do not find that the relationship between the parties rises to the level reaching the materiality threshold required to succeed in proving bias.

b) The Right to be Heard

[69] The Applicant points to section 19.06 of the *Act* in support of his submission that Mr. Hill improperly denied his right to a hearing. It states:

> The Nekaneet Appeal Body shall give the parties an opportunity to present their respective cases at a hearing of the Nekaneet Appeal Body unless the nature of the Application as disclosed on the face

> of the Notice of Application does not disclose a legal basis for the Application or does not contain any grounds that would to support the Application if the factual basis for such grounds were proven.
>
> [Emphasis added.]

[70] *Rizzo & Rizzo Shoes Ltd, Re,* [1998] 1 SCR 27 [*Rizzo*] is the governing case on statutory interpretation. Justice Iacobucci wrote at paragraph 21:

> [21] Although much has been written about the interpretation of legislation (see, e.g., *Ruth Sullivan, Statutory Interpretation* (1997); *Ruth Sullivan, Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec* (S.C.C.); *Royal Bank v. Sparrow Electric Corp.* (S.C.C.); *Verdun v. Toronto Dominion Bank* (S.C.C.); *Friesen v. R.* (S.C.C.).

[71] *Rizzo* stands for the proposition that, where the words of a provision are clear and unambiguous, the meaning that naturally flows from them should be given a high degree of weight in the interpretive process. To rebut such a meaning will take considerable evidence that the ordinary meaning cannot be harmonious with the law in question unless the Court adopts a different meaning. The Federal Court of Appeal has ruled that custom election codes enacted by

First Nations are to be interpreted using this approach (*Boucher v Fitzpatrick*, 2012 FCA 212 at para 25).

[72] Applying the rules of statutory interpretation to the above section, I find no confusion concerning the discretionary nature of determining whether a hearing should be held. A hearing is not required where there is either (a) a failure to establish a legal basis for an application or (b) no grounds that would support an application even "if the factual basis for such grounds were proven." The only requirement for a hearing is when neither of these two elements are established. A review of the Decision illustrates that Mr. Hill canvassed these factors and found neither to be present.

[73] The Applicant cites *Papequash* for the proposition that Mr. Hill applied the incorrect test when he applied the mathematical approach as opposed to the test addressing the "integrity of the election process." I find that *Papequash* is distinguishable from the case at hand. In *Papequash*, there was significant uncontroverted evidence that election fraud occurred, unlike in the present matter. In *Papequash*, those findings of election fraud or corruption lead to the conclusion that the integrity of the election was compromised, resulting in the Court overturning or annulling the election. In the present matter, there were allegations of locks and seals not being affixed, however, the evidence was not clear or uncontroverted.

[74] There was no evidence before Mr. Hill of election fraud that would make *Papequash* instructive to the present matter, save for the legal principles discussed therein. There was only an unsupported assertion that due to locks and seals not being affixed to the ballot boxes, the

ballot boxes *could have* been tampered with. Several electors swore affidavits suggesting that the locks were either missing or not properly locked, while Chief Francis stated that there were locks and seals affixed to the ballot boxes.

[75] Similarly, the affidavits of Clarence Anderson and Barry Buffalocalf, included in the appeal documentation and highlighted by the Applicant at paragraphs 23 and 24 of his Memorandum of Argument, are also inconsistent with respect to the locks. At paragraph 7 of his affidavit, Clarence Anderson stated, "there was no lock present on either of the ballot boxes." At paragraph 8 of his affidavit, Barry Buffalocalf stated, "While a lock was present on the clasp for the ballot box for Chief, that lock was unlocked when I returned my ballots to the electoral officers to place them into the ballot boxes." The other individuals named in paragraph 22 of the Applicant's Memorandum of Argument also stated that there were either no seals and/or that there were no locks on the ballot boxes.

[76] As stated, the evidence is not uncontroverted nor is there evidence of the alleged tampering. Rather, there is only speculation that tampering could have occurred.

[77] Faced with what was before Mr. Hill, I find no error with Mr. Hill's determination that a hearing was not required based on the application of section 19.06 of the *Act*. Therefore, there is no breach of procedural fairness. Whether Mr. Hill erred in finding that the Applicant had not set out a legal basis or grounds goes to the reasonableness of the Decision as addressed below.

(3) Was the Decision reasonable?

[78] The Applicant submits that the Decision was unreasonable because Mr. Hill applied the wrong test for overturning an election. The Applicant relies on *Papequash*, where the Court stated at paragraph 34:

> Not every contravention of the Act or regulations will justify the annulment of a band election. A distinction is not infrequently made between cases involving technical procedural irregularities and those involving fraud or corruption. In the former situation, a careful mathematical approach (eg reverse magic number test) may be called for to establish the likelihood of a different outcome. However, where an election has been corrupted by fraud such that the integrity of the electoral process is in question, an annulment may be justified regardless of the proven number of invalid votes. One reason for adopting a stricter approach in cases of electoral corruption is that the true extent of the misconduct may be impossible to ascertain or the conduct may be mischaracterized. This is particularly the case where allegations of vote buying are raised and where both parties to the transaction are culpable and often prone to secrecy: see *Gadwa v Kehewin First Nation*, 2016 FC 597, [2016] FCJ No 569 (QL).

[79] The Applicant submits that on the face of the Notice of Application before Mr. Hill, he expressly pleaded that the integrity of the electoral process was in question.

[80] Annulling election results is a discretionary remedy, even where there is suspected fraud (*Papequash* at para 34). The Court in *McEwing v Canada (Attorney General)*, 2013 FC 525 at paragraph 82 states: “the Court should only exercise its discretion to annul when there is serious reason to believe that the results would have been different but for the fraud or when an electoral candidate or agent is directly involved in the fraud.”

[81] As there was no allegation of fraud before Mr. Hill, beyond the mere speculation that such occurred, he determined that the mathematical approach was required at the initial stage.

[82] I do not find that Mr. Hill unreasonably engaged with the evidence that was before him or erred in his application of the appropriate test. There is a difference between pleading that the integrity of the electoral process is in question and adducing evidence that it is in question.

[83] The Applicant provided two possible explanations for what may have transpired with the Election vote counts. However, there was no direct evidence submitted to specifically support a finding that the integrity of the Election was compromised by this alleged tampering of the ballot boxes. The tampering of the ballot boxes was raised as a possibility but there was no evidence that it actually occurred. This lack of evidence distinguishes the present matter from *Papequash,* as previously discussed above. While a different result might have been possible on the evidence before Mr. Hill, this is not the test for an assessment of the reasonableness of a decision. To find otherwise would require a re-weighing of the evidence, which this Court is unable to do on a judicial review.

[84] In the Notice of Application, the Applicant also provided legal authority for his position that the failure to seal ballot boxes may result in an annulment of an election (*St Mary's (District) (Re)*, 2017 NSSC 8 at para 17 [*St Mary's*]; *Frobisher Bay Municipal Election Re*, [1986] NWTR 183 at paras 46, 49, 56, 59 [*Frobisher Bay*]). He states that Mr. Hill did not refer to these authorities in the Decision. I find that the Decision is not unreasonable in Mr. Hill's failure to refer to *St Mary's* and *Frobisher Bay*.

[85] I note that a decision-maker's reasons are not to be judged on a standard of perfection. The fact that a decision-maker does not refer to all arguments, legislative provisions, precedents,

or other details that the reviewing Judge would like is not a basis in and of itself to overturn a decision (*Vavilov* at para 91).

[86] In any event, I find that *St Mary's* is distinguishable from the present matter. In that case there was an agreed statement of facts and it was undisputed that there were irregularities departing from the legislation in question (*St Mary's* at paras 11, 12). I also find that *Frobisher Bay* is distinguishable from the present matter. In *Frobisher Bay* there was evidence of a corrupt election practice involving forgeries of a polling officer's initials on 85 ballot papers (*Frobisher Bay* at para 56). As in *Frobisher Bay*, the Applicant points to the lack of proper seals or locks. However, in that case, the Court did not find that the seals or locks in question, on their own, were sufficient to annul the election (*Frobisher Bay* at para 46). In my view, the Court in *Frobisher Bay* was presented with non-speculative evidence that a corrupt election practice had been committed, unlike the present matter.

[87] I find that the Decision is internally coherent, includes a rational chain of analysis, and is justified based on the facts and law (*Vavilov* at para 85).

VIII. Conclusion

[88] For all of the above reasons, the application for judicial review is dismissed.

A. *Costs*

[89] The Applicant seeks leave to submit a solicitor's bill of costs in the amount of $45,000. If he is not successful, he maintains his request for costs against Nekaneet, or alternatively, that no costs be ordered. The Applicant submits that this matter involves the public interest and that this factor weighs in his favour.

[90] The Respondents request that cost be awarded in line with Rule 400(3) of the *Federal Courts Rules*.

[91] My colleague Justice Sébastien Grammond has summarized the principles surrounding the awarding of costs in *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119 [*Whalen*]. There, he relied on *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [*Okanagan*] in setting out the following principles related to the awarding of costs at paragraphs 3-5:

> The first and more traditional goal of costs awards is the indemnification of the successful party. […]
>
> Thus, costs awards provide incentives to make rational use of scarce judicial resources. […] Likewise, costs awards are thought to discourage frivolous or vexatious lawsuits, because litigants who bring such lawsuits know they will have to indemnify the defendant.
>
> Thirdly, costs awards have the potential of facilitating access to justice.

[92] In addition to these principles, Rules 400-422 of the *Federal Courts Rules* also apply. Rule 400(1) provides that the trial judge has full discretion on awarding costs. This discretion is to be exercised judicially. As well, the default mechanism for awarding costs is a tariff (*Whalen* at para 8).

[93] Other tools a Court has at its disposal are “solicitor and client costs”, typically used to sanction a party’s wrongful conduct in a proceeding, as well as lump sum awards, pursuant to Rule 400(4) of the *Federal Courts Rules* (*Whalen* at paras 10 and 11).

[94] As my colleague Justice Luc Martineau stated in *Eurocopter v Bell Helicopter Textron Canada Ltee,* 2012 FC 842 [*Eurocopter*] at paragraph 9: “the exercise of costs assessment involves an inescapable risk of arbitrariness and roughness on the part of the Court.”

[95] Another principle can be found in *Knebush v Maynard*, 2014 FC 1247, where the Court stated that if a judicial review properly addresses a question of First Nation’s law, it is a matter of public interest on the basis that the First Nation has benefited by the clarity and the resolution of the issue (at para 60). As such, individuals may be entitled to costs. The Court in *Coutlee v Lower Nicola First Nation*, 2015 FC 1305 and *Strawberry v O’Chiese First Nation,* 2017 FC 869 applied similar reasoning.

[96] I am exercising my discretion to award lump sum costs to the Respondent. I do not find that this matter was novel or that it will assist the community through clarity or future assistance in its election process. I also find that the Applicant’s actions in this matter significantly increased the expenses for all the parties involved. The Applicant conducted a lengthy cross-examination (by his own description) on an affidavit that did not contain material which would have impacted this Court’s analysis. In addition, the Applicant filed a large volume of material that did not have a direct bearing on this judicial review. Furthermore, making a serious allegation of bias on speculative grounds justifies an award of costs against the Applicant.

[97] The Respondents are awarded lump sum costs in the amount of $5,000, inclusive of tax and disbursements.

JUDGMENT in T-653-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Respondents are awarded costs in the amount of $5,000.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-653-20
STYLE OF CAUSE:	BRENDAN ANDERSON v ALVIN FRANCIS, SHAUNA BUFFALOCALF, WESLEY DANIEL, ROBERTA FRANCIS, and NEKANEET FIRST NATION
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APPEARANCES:

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