

Federal Court



Cour fédérale

**Date: 20091020**

**Docket: T-1573-08**

**Citation: 2009 FC 1060**

**Ottawa, Ontario, October 20, 2009**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**GISÈLE BACON**

**Applicant**

**AND**

**APPEAL BOARD OF THE  
BETSIAMITES BAND COUNCIL and  
PAUL VOLLANT and RAPHAËL PICARD**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Gisèle Bacon (the applicant) is applying under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision made by the Appeal Board of the Betsiamites Band Council on September 17, 2008, finding her election challenge inadmissible and dismissing it.

**Background**

[2] On August 17, 2008, the applicant, who was running for the office of councillor in the election for the Betsiamites Band Council (the Council), was defeated. She obtained only 291 votes. There was a difference of 321 votes between her and the candidate elected to the sixth and final seat

on the Council. In the same election, the respondents Raphaël Picard and Paul Vollant were elected to the offices of chief and councillor, respectively. The Council's election process is governed by an electoral code called the *Code concernant les élections du Conseil de bande de Betsiamites* (May 24, 1994) (the Code) (pages 38-56 of the applicant's record).

[3] The applicant submits that she saw Stéphane Tshernish handing out alcohol and other substances to certain Betsiamites members on election day. After the election, she investigated and says that she learned that the respondents and one of their representatives had committed corrupt practices to try to influence the result of the election. The respondents and Stéphane Tshernish allegedly offered money, beer and drugs to certain electors in exchange for a promise to vote for their team.

[4] On September 2, 2008, the applicant filed an appeal request with the electoral officer, Cynthia Labrie. The request contained her affidavit and 10 unsworn handwritten statements signed by persons who were aware of the alleged corrupt practices. Those statements were all drawn up by the applicant but were signed by 10 different persons.

[5] The electoral officer forwarded a copy of the appeal request to the respondents. In an answer record dated September 11, 2008, the respondents challenged the admissibility and adequacy of the evidence submitted by the applicant. The record contained the solemn declarations of the respondents and Stéphane Tshernish denying all the applicant's allegations.

[6] The electoral officer forwarded the appeal request to the Council's executive director, who convened the Council's Appeal Board (the Appeal Board). The Appeal Board is made up of the executive director, the police chief and a lawyer. Its decisions are subject to judicial review.

**Impugned decision**

[7] The Appeal Board concluded that the appeal request was inadmissible and dismissed it. The reasons for that decision are detailed and supported by relevant case law.

[8] The Appeal Board stated that the Code made it responsible for determining whether the material that had been filed was adequate and whether the allegations that had been made should be investigated. Section 8.7 of the Code provides as follows: [TRANSLATION] "The electoral officer shall then refer the record to the executive director, who shall convene the Appeal Board, which shall conduct an investigation if the material that has been filed appears to be adequate for challenging the validity of the election."

[9] After analysing the federal and Quebec interpretation statutes and the case law, the Appeal Board first determined that the election challenge request was timely (the time limit was 14 days after the election) since it had been filed on September 2, 2008. This took account of statutory holidays, weekends and the Monday of the September long weekend.

[10] The Appeal Board then considered whether the applicant's affidavit was adequate for challenging the validity of the election. After analysing the case law, the Appeal Board summarized the principles it intended to apply as follows:

[TRANSLATION]

It is therefore important for this Board to verify whether the challenge sets out facts that appear to warrant setting aside the election. For an election to be set aside on the basis of corrupt practices, the following essential elements must be present at the outset:

- a corrupt practice;
- committed by a candidate or the candidate's agent or mandatary;
- or committed by a third party with the candidate's participation, encouragement, consent or authorization, on the candidate's advice or orders, etc.

(paragraph 51, Appeal Board's decision)

[11] The Appeal Board noted that the applicant's affidavit contained only five paragraphs, one of which was handwritten and seemed to have been hastily added at the last minute. Only one paragraph contained facts that could be investigated, the applicant's grounds were not clearly detailed and she had not set out the facts supporting her allegations. The Appeal Board referred to several questions that remained unanswered. It stated the following on this point:

[TRANSLATION]

Without going so far as to require a very high degree of precision or even personal knowledge of all the facts, for the Board to be able to exercise its jurisdiction and review the adequacy of the grounds, it is essential that those grounds be stated and detailed and, at a minimum, that the affidavit not only implicate a third party via that party's actions or words but also indicate, at least summarily, how those actions or words can be attributed to one of the candidates.

The affidavit is silent about this. It is not enough to say that Mr. Tshernish asked people to vote for Raphaël Picard. There should at least be an allegation that Raphaël Picard and/or Paul Vollant was a party to that offence.

(paragraphs 63-64, Appeal Board's decision)

[12] Relying on the relevant case law, the Appeal Board found that allegations of corrupt practices in the context of an election challenge must be serious, complete and specific to trigger an investigation.

[13] Finally, the Appeal Board found that the facts alleged in the applicant's affidavit were not adequate for challenging the validity of the election in issue.

### **Issues**

[14] The applicant raises the following issues:

- a. Is the electoral officer exclusively responsible for deciding whether to forward an appeal request to the executive director of the Betsiamites Band Council?
- b. In deciding to forward the applicant's appeal and the handwritten statements to the executive director, did the electoral officer exhaust the jurisdiction conferred on her by the Code?
- c. Can the Band Council Appeal Board validly determine the lawfulness of an appeal request on a preliminary basis or does it have to consider the entire record submitted to it by the executive director?
- d. Is the Appeal Board's decision unreasonable?

- e. Do the Appeal Board's composition and remuneration and the status of its members raise a reasonable apprehension of bias?
- f. Do the rules of natural justice apply to the Appeal Board and, if so, were they complied with?

[15] The respondents add the following issue:

- g. Even assuming that the Court is "satisfied" that one of the grounds of review set out in paragraphs 18.1(4)(a) to (f) of the *Federal Courts Act* has been proved by the applicant, should the Court exercise its discretion under subsection 18.1(1) and set aside the Appeal Board's decision?

[16] The Court instead considers the following issues relevant:

- a. Did the Appeal Board err in determining on a preliminary basis that the material that had been filed was inadequate, before it had even investigated?
- b. Is the Appeal Board's decision unreasonable?
- c. Do the rules of natural justice apply to the Appeal Board and, if so, were they complied with?
- d. Is there a reasonable apprehension of bias because of the Appeal Board's composition and remuneration and the status of its members?
- e. Even assuming that the Court is "satisfied" that one of the grounds of review set out in paragraphs 18.1(4)(a) to (f) of the *Federal Courts Act* has been proved by the

applicant, should the Court exercise its discretion under subsection 18.1(1) and set aside the Appeal Board's decision?

[17] For the reasons that follow, the application for judicial review will be dismissed.

### **Legislation**

[18] The relevant legislative extracts are appended.

### **Analysis**

#### *Applicable standard of review*

[19] The first issue relates to the interpretation of the Code. The third relates to the rules of natural justice. The parties agree that these two issues must be analysed on a standard of correctness. The reasonableness criteria laid down in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), apply to the other two issues.

[20] The Court agrees with the parties on this point. According to paragraphs 59-61 of *Dunsmuir*, where a decision maker does not have particular expertise in interpreting its enabling legislation or related legislation, the elements of the correctness standard must be applied when an interpretation issue arises. In the instant case, the Appeal Board does not have such particular expertise.

[21] Where the issue relates to the principles of natural justice and procedural fairness, the standard of correctness must apply (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392; *Dunsmuir*, at paragraph 57).

*Did the Appeal Board err in determining on a preliminary basis that the material that had been filed was inadequate, before it had even investigated?*

[22] Council elections have been governed by a customary electoral code since 1994. The Code provides for the conduct of elections and the method of challenging them.

[23] The Code states that a challenge may be filed on the grounds set out in sections 8.1 and 8.2 within 14 days after the election. Here, an Appeal Board was established after the candidates were nominated, and therefore before the election, to decide any future challenge.

[24] The Appeal Board is made up of the executive director of the Council, the police chief and a lawyer designated by those two members (section 8.3 of the Code).

[25] A copy of the appeal request is forwarded to the candidates whose election is challenged. They can file a written answer (sections 8.4 and 8.5). The electoral officer then refers the entire record to the Council's executive director.



[26] Section 8.7 of the Code provides as follows:

[TRANSLATION]

The electoral officer shall then refer the record to the executive director, who shall convene the Appeal Board, which shall conduct an investigation if the material that has been filed appears to be adequate for challenging the validity of the election.

[27] Based on that provision, the Appeal Board concluded that it was responsible for determining the adequacy of the material filed by the applicant even before going on to the following step, namely an investigation.

### **Applicant's arguments**

[28] The applicant suggests that the interpretation of the Code shows that the electoral officer, and not the Appeal Board, is responsible for verifying whether an appeal is consistent with section 8.1. Once that work is done, the electoral officer refers the record to the executive director, who decides to convene the Appeal Board if the executive director is satisfied that the material that has been filed is adequate. The Appeal Board's only role is to investigate and make a decision in accordance with section 8.8 of the Code.

[29] This interpretation means that, in the original French version of section 8.7 of the Code, the word "qui" after the words "le comité d'appel" necessarily refers to the executive director: "Le président d'élection réfère alors le dossier au directeur général qui forme le comité d'appel qui conduira l'enquête si les faits allégués lui paraissent suffisants pour contester de la validité de l'élection." [Emphasis added.]

[30] According to the applicant, this interpretation of the Code takes account of the fact that the Appeal Board should not be needlessly convened in cases where the material filed is considered inadequate by the executive director.

[31] The Appeal Board therefore exceeded its jurisdiction by appropriating a power conferred first on the electoral officer and then on the executive director.

[32] With respect, the Court cannot agree with the applicant's interpretation. Chapter 8 of the Code provides that the electoral officer is responsible for referring the record to the executive director once all particulars and documents have been filed in accordance with sections 8.1 and 8.4. Nowhere in the Code is the executive director given any special discretion to determine the adequacy or inadequacy of the material filed to challenge the election.

[33] The wording of section 8.7 is clear. The word "qui" comes immediately after the words "le comité d'appel" in the original French version. In the Court's opinion, this necessarily refers to the Appeal Board, not the executive director.

[34] This reading of the text is consistent with the purpose and the other provisions dealing with election challenges. It would be very surprising, to say the least, to give a single person so much discretion. That could lead to abuses.

[35] The Code was drafted to establish mechanisms to ensure that elections are fair and equitable and that, where grounds of appeal under section 8.1 are found to exist, the situation can be remedied quickly.

[36] The Court does not think that the Appeal Board's only functions are to conduct an investigation and make a decision under section 8.8. The preliminary issue of the adequacy of the material filed to challenge an election is too important for a single individual to have the final power to decide it.

[37] The Appeal Board therefore had jurisdiction to determine on a preliminary basis whether the material as filed was adequate to trigger an investigation.

*Is the Appeal Board's decision unreasonable?*

[38] The applicant submits that the Appeal Board should have concluded that the evidence was adequate to begin an investigation. However, the Appeal Board made a reviewable error by requiring the applicant to show that she had personal knowledge of the facts she was alleging as a precondition to finding those facts adequate.

[39] The applicant adds that the Appeal Board imposed a burden heavier than the balance of probabilities and should have accepted in evidence the 10 handwritten statements supporting her affidavit. She cites the following cases: *Pellerin v. Thérien*, [1996] J.Q. No. 2895 (C.Q. Civ.); *Pellerin v. Thérien*, [1997] R.J.Q. 816 (C.A.) (QL).

[40] The respondents argue that the Appeal Board's decision is reasonable having regard to the requirements of the Code, particularly sections 8.1 and 8.5. Those provisions ensure that the election review process is based on reliable evidence. This is all the more important given that the decision must be made within a short time. The Code does not provide for a formal hearing or for the hearing of witnesses.

[41] As well, the power conferred on the Appeal Board by section 8.7 is a discretionary power. The Appeal Board can reach conclusions as to the probative value of evidence or determine that a complaint is not worthy of pursuit because of a defect that is apparent, provided that the rules of procedural fairness are observed (*Abbott v. Pelican Lake Band Appeal Board*, 2003 FCT 340, 231 F.T.R. 69 (*Abbott*); *Bill v. Pelican Lake Band*, 2006 FC 679, 294 F.T.R. 189).

[42] The respondents argue that the Appeal Board did in fact properly refer to the fundamental weaknesses in the documentation filed by the applicant to challenge the election.

[43] The Court must ask itself the following question: "Does the Appeal Board's decision meet the reasonableness criteria set out in *Dunsmuir*, at paragraph 47? Is it justified, transparent and intelligible, and does it fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law?"

[44] First of all, the Court notes that the Appeal Board structured its decision by starting with the purpose of the appeal, the appeal request and its role and jurisdiction. Relying on the relevant case law, particularly regarding the degree of proof required in an election challenge, the Appeal Board then reviewed and analysed the admissibility of the evidence in light of the requirements set out in the Code and concluded that the evidence was inadequate and that it was not necessary to begin an investigation.

[45] After thoroughly analysing that decision, the Court is satisfied that it has all the characteristics of a reasonable decision.

*Is there a reasonable apprehension of bias because of the Appeal Board's composition and remuneration and the status of its members?*

**Applicant's arguments**

[46] Referring to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 18-28 (*Baker*), the applicant submits that the Appeal Board should have investigated. By ending the proceedings prematurely, the Appeal Board breached the principles of natural justice and procedural fairness.

[47] The applicant further argues that she was entitled to an oral hearing before her appeal request was summarily dismissed. She also submits that she was denied the right to reply to the respondents' arguments. She cites the following cases: *Abbott*; *Sound v. Swan River First Nation*, 2003 FC 850, [2004] 1 F.C.R. 336.

**Respondents' arguments**

[48] The respondents note that *Lameman v. Cardinal*, 138 F.T.R. 1, [1997] F.C.J. No. 1518 (FC) (QL), applies here because the requirements of procedural fairness are minimal where an Aboriginal council election is challenged. The time limits were shortened precisely to avoid uncertainty. It is therefore normal not to hold a formal hearing each time.

[49] As regards the applicant's argument that she was unable to reply to the respondents' answers, the respondents point out that the Appeal Board did not consider their answer record. This seems clear from reading the transcript of the cross-examination of Mr. Nepveu (the Appeal Board chairman) on this point, and it is confirmed in a letter written by Mr. Nepveu. In the circumstances, it was therefore unnecessary to give the applicant a right to reply.

[50] The Court notes that the case law establishes that procedural fairness and the principles of natural justice must be observed by an appeal board created by a customary code in dealing with a challenge to an Aboriginal election.

[51] The Court agrees with the applicant that procedural fairness is "flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected" (*Baker*, at paragraph 22). However, the Court cannot accept the applicant's argument that the case law confirms her position that an investigation is necessary whenever an Aboriginal election is challenged.

[52] There are many differences among the customary electoral codes of the various band councils in Canada. In the instant case, nothing requires the Appeal Board to begin an investigation as soon as an appeal has been forwarded to it.

[53] As the Federal Court of Appeal has noted, “[t]he Federal Court jurisprudence concerning procedural fairness in the context of custom Band elections demonstrates that the content of the duty in this context must take into account and respect relevant custom of the Band in question [citations omitted]” (*Samson Indian Band v. Samson Indian Band (Election Appeal Board)*, 2006 FCA 249, [2006] F.C.J. No. 1051 (QL), at paragraph 21). In *Polson v. Long Point First Nation*, 2007 FC 983, 331 F.T.R. 25, the applicant alleged that he was entitled to an oral hearing at the preliminary assessment stage of his complaint. After analysing the factors in *Baker*, Justice Frenette concluded that the respondent could make submissions but was not entitled to an oral hearing.

[54] Here, I am satisfied that the applicant was able to present her position through written submissions. It was up to her to provide detailed reasons to support her request, and I cannot agree that she was entitled to an oral hearing to supplement or add to her written arguments.

[55] I am also satisfied on a balance of probabilities that the Appeal Board did not consider the respondents’ answer, which means that it was not necessary to permit the applicant to reply in the circumstances. In short, the Appeal Board did not breach the principles of natural justice or procedural fairness.

*Is there a reasonable apprehension of bias because of the Appeal Board's composition and remuneration and the status of its members?*

**Applicant's arguments**

[56] Relying on *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (*Committee for Justice and Liberty*), particularly paragraphs 394-395, the applicant submits that the Appeal Board's composition gives rise to an apprehension of bias.

[57] The executive director is subject to re-evaluation after every election. That office is political, since it is filled by the newly elected administration, which here included one of the respondents, Raphaël Picard. Therefore, it is reasonable to think that the current executive director, Gérald Hervieux, would be favourable to Mr. Picard's position when his election is challenged.

[58] As for the police chief, since he was the one who took the applicant's affidavit, he should have recused himself and instead started investigating the drug trafficking alleged in a handwritten statement attached to that affidavit.

[59] Finally, the applicant alleges a conflict of interest involving the electoral officer, since she is part of the firm that represents the Council. The applicant adds that the Board members' remuneration and security of tenure are unknown to the public and the Aboriginal community, which again raises an apprehension of bias.



**Respondents' arguments**

[60] The respondents note that section 8.3 of the Code expressly provides that the executive director is an *ex officio* member of the Appeal Board. They submit that the applicant's argument is merely pure speculation without any foundation. They point out that she is relying solely on a decision by an arbitration tribunal concerning another executive director, not the current one. Indeed, the applicant admitted on cross-examination that she was not aware of the current executive director's terms of employment or the resolutions appointing him.

[61] As for the police chief, the respondents emphasize his solemn declaration and his cross-examination, in which he confirmed that, when he took the applicant's affidavit, he did not read the appended documents (handwritten statements). Before administering an oath to the applicant, he asked her if she wanted someone else to do it, and she said no. The Code does not provide for any method of replacing the Appeal Board members.

[62] With regard to the applicant's argument concerning the electoral officer, the respondents submit that the applicant had already known for a very long time that the electoral officer was part of the law firm of Nadeau Boisjoli Bh  rer, since she had received a letter from that firm on January 10, 2008. At no time did she allege a conflict of interest, and she is now precluded from doing so.

[63] As for the Appeal Board members' remuneration and security of tenure, no evidence was filed to support the applicant's argument.

[64] The applicant has correctly identified the question the Court must ask itself in determining whether there is a reasonable apprehension of bias, namely “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” (*Committee for Justice and Liberty*, at pages 394-395).

[65] However, the evidence must be probative and plausible. Suspicions and assumptions are not part of that equation.

[66] The Court is not satisfied here that the applicant has discharged her burden of proving the existence of a reasonable apprehension of bias.

[67] In the case of the executive director, nothing in the evidence shows that his office was supposed to be reviewed after the 2008 election. The executive director has been in office since 2005, and his term was renewed in 2006.

[68] As for the police chief, the evidence contained in his declaration and his cross-examination confirms that he did not read the unsworn statements appended to the applicant’s affidavit. He therefore cannot be criticized for not beginning an investigation into the drug trafficking allegations found in the unsworn statements. A reasonable person faced with such a situation would not conclude that the police chief could not decide the election challenge fairly.

[69] Finally, the reasons relied on by the applicant to try to show that the electoral officer was biased in favour of the respondents are not convincing. The applicant had known since January 2008 that the electoral officer was part of the law firm that represented the Council. At no time before the election challenge did she raise that question. In the Court's opinion, the question should have been raised much earlier, namely when the electoral officer was appointed by a Council resolution, when the applicant forwarded her affidavit challenging the election to the electoral officer (section 8.1 of the Code) or at least before the Appeal Board was convened.

[70] The Court therefore concludes that no reasonable apprehension of bias has been established.

[71] In light of the decisions on the first four issues, it is not necessary to decide the fifth, which was raised by the respondents on an alternative basis.

**JUDGMENT**

**THE COURT ORDERS** that the application for judicial review be dismissed. The applicant will have to pay the respondents a single lump sum of \$3,000 as costs.

“Michel Beaudry”

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Judge

Certified true translation  
Brian McCordick, Translator

## SCHEDULE

Betsiamites Band Council, *Code électoral concernant les élections du Conseil de bande de Betsiamites* (May 24, 1994)

[TRANSLATION]

### CHAPTER 8 ELECTION APPEAL

- |                           |     |  |
|---------------------------|-----|--|
| <i>Ground of appeal</i>   | 8.1 | <p>Within fourteen days after an election, a candidate in the election or a voter who voted or attended at a polling place for the purpose of voting may, after paying a non-refundable deposit of \$300.00, challenge the election where the candidate or voter believes that:</p> <ul style="list-style-type: none"> <li>(a) there was corrupt practice in connection with an election to an office; or</li> <li>(b) there was a violation of this Code that might have affected the result of an election to an office; or</li> <li>(c) a person nominated to be a candidate in the election was ineligible for that office,</li> </ul> <p>and the candidate or voter may lodge an appeal by sending particulars thereof in an affidavit to the electoral officer by registered mail.</p> |
| <i>Appeal Board</i>       | 8.2 | An Appeal Board shall be established following the nomination of candidates to decide any future challenge.  |
| <i>Composition</i>        | 8.3 | The Appeal Board shall be made up of the executive director of the Band Council, the police chief and a lawyer designated by the two members.  |
| <i>Time for appealing</i> | 8.4 | Where an appeal is lodged with the electoral officer under section 8.1, the electoral officer shall send the candidates, by registered mail, a copy of the appeal and all supporting documents within seven days of receipt of the appeal.   |
| <i>Answer to appeal</i>   | 8.5 | Any candidate whose election is challenged may, within seven days of receipt of the copy of the appeal, respond in writing to the particulars set out in the appeal and attach any supporting documents duly verified by affidavit.  |
| <i>Appeal record</i>      | 8.6 | All particulars and documents filed in accordance with the provisions of sections 8.1 and 8.4 shall constitute and form the record.  |
| <i>Investigation</i>      | 8.7 | The electoral officer shall then refer the record to the executive director, who shall convene the Appeal Board, which shall conduct an  |

investigation if the material that has been filed appears to be adequate for challenging the validity of the election.

*Decision*

8.8 Within fourteen days of receipt of the answer provided for in section 8.5, and after analysing the appeal record, the Board shall decide:

- (a) whether the election is void;
- (b) whether the candidate whose election is challenged was duly elected;
- (c) whether another person was elected and who that other person is;
- (d) where the person who challenged the election is not satisfied with the Appeal Board's decision, that person may apply to the court of competent jurisdiction, which shall decide the matter.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1573-08

**STYLE OF CAUSE:** **GISÈLE BACON AND  
APPEAL BOARD OF THE BETSIAMITES BAND  
COUNCIL and PAUL VOLLANT and  
RAPHAËL PICARD**

**PLACE OF HEARING:** Québec, Quebec

**DATE OF HEARING:** October 5, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Beaudry J.

**DATED:** October 20, 2009

**APPEARANCES:**

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