Federal Court of Appeal  Cour d'appel fédérale

Date: 20190411

Docket: A-260-18

Citation: 2019 FCA 76

CORAM: **STRATAS J.A.**
LASKIN J.A.
LOCKE J.A.

BETWEEN:

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

Appellants

and

CHIEF AND BAND COUNCIL, of the ALGONQUINS OF PIKWAKANAGAN

Respondents

Heard at Ottawa, Ontario, on April 11, 2019.
Judgment delivered from the Bench at Ottawa, Ontario, on April 11, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: LOCKE J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on April 11, 2019).

LOCKE J.A.

[1] This is an appeal of a decision of the Federal Court (2018 FC 616, Phelan J.) dismissing an application for judicial review in relation to two decisions which dismissed challenges to the

results of an election of the Chief and Band Council of the Algonquins of Pikwakanagan First Nation (APFN).

[2] The election in issue was conducted pursuant to the Algonquins of Pikwakanagan Custom Election Code 2010 (the Code) and the Custom Election Code Rules of Notice and Procedures (the Rules). The Code and the Rules provide for appeals of election results, which appeals are to be decided by an Appeal Board made up of members of the APFN appointed by Council.

[3] The Appeal Board rendered the two decisions that are in issue here. One of these concerned a complaint that the candidate who won the election for Chief, Kirby Whiteduck, engaged in corrupt practice and contravened the Code in the handling of mail-in ballots. The other decision concerned a complaint that a candidate for Councillor, Jim Meness, violated the Rules and engaged in corrupt practice by raising questions at a nomination meeting that were personal matters.

[4] The appellants raise the following issues:

1. Was the Appeal Board biased?
2. Was the decision on the Whiteduck appeal reasonable?
3. Was the decision on the Meness appeal reasonable?
4. Should the Federal Court judge have recused himself?
5. Should this Court interfere with the Federal Court's award of costs?

I. Standard of review

[5] As regards the Appeal Board decisions, this Court must consider whether the Federal Court selected the proper standard of review, and whether it applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559.

[6] The appellants accept that reasonableness is the proper standard of review for the Appeal Board's decisions on the Whiteduck and Meness appeals. We agree.

[7] The parties also appear to be agreed, and we concur, that no deference is owed to the Appeal Board on the issue of bias of the Appeal Board to the extent that this issue was raised before the Appeal Board.

[8] In our view, the Federal Court did not err in its selection of proper standards of review.

[9] As regards the last two issues, whether the Federal Court judge should have recused himself and costs, the applicable standard of review is as contemplated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness on issues of law, and palpable and overriding error on issues of fact and mixed fact and law.

II. Was the Appeal Board biased?

[10] The appellants note that the Appeal Board was constituted only after the deadline contemplated in the Code. This issue was not raised before the Appeal Board. In addition, the appellants argue that there was a reasonable apprehension of bias on the part of the three members of the Appeal Board. Specifically, one of them had signed a petition opposing a previous attempt to remove Mr. Whiteduck from office before the election in issue here. Also, the other two members of the Appeal Board were employees of the APFN, and hence, according to the appellants, their views could have been affected by fear for their jobs. This issue was also not raised before the Appeal Board.

[11] We agree with the reasoning and conclusions of the Federal Court (at paragraphs 27 to 38) that neither the late constitution of the Appeal Board, nor its members' status as employees of the APFN or involvement in a petition is sufficient in this case to give rise to a reasonable apprehension of bias. Moreover, there is no evidence that indicates an actual conflict of interest.

III. Was the decision on the Whiteduck appeal reasonable?

[12] The appellants challenge the Federal Court's interpretation of the Code and the Rules as they relate to mail-in ballots. We are not persuaded that the Federal Court erred (at paragraphs 39 to 51) in finding that the decision of the Appeal Board on this issue was reasonable.

[13] In oral argument, the appellants impugn the distribution of the ballots. We consider the Federal Court's findings at paragraphs 41 to 43 to be determinative of this issue.

IV. Was the decision on the Meness appeal reasonable?

[14] The appellants also challenge the Federal Court's analysis of what constitutes a personal matter not to be raised at a nomination meeting. The Federal Court ultimately concluded that the Appeal Board's finding that any violation of the Rules did not affect the outcome of the election was reasonable. We are not persuaded that the Federal Court committed any reversible error on this point (see paragraphs 52 to 68).

V. Should the Federal Court judge have recused himself?

[15] We see no error in the Federal Court's analysis of this issue (at paragraphs 81 to 88), whether on the law or the facts. We see no indication that the judge was not approaching the case with an open mind: see *R. v. Hossu*, 162 O.A.C. 143 at para. 39, 2002 CanLII 45013 (C.A.), excerpting from *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 49, 151 D.L.R. (4th) 193. In our view, the exchange between the judge and counsel for the appellants (then the applicants) near the end of the hearing before him did not come close to meeting the threshold for requiring the judge to recuse himself: *Hennessey v. Canada*, 2016 FCA 180 at paras 16-18.

[16] In our view, it would have been better if the Federal Court, in questioning the appellants' counsel, did not invoke a phrase with colonial overtones. This being said, in our view, the reasonable person, fully informed, would not take the use of that phrase as being indicative of a biased attitude. Rather, understanding the phrase in the totality of the interaction between counsel and the judge, the reasonable person, fully informed, would have taken the judge as strongly encouraging counsel to address the evidentiary weaknesses in his clients' case, nothing more.

VI. Should this Court interfere with the Federal Court's award of costs?

[17] The appellants assert that the Federal Court should not have made an award of costs against them. They submit that no costs award should have been made without inviting submissions on costs, and that, in any event, the public interest nature of their application called for no costs to be awarded against them. We will not give effect to these submissions. Costs were live and should have been spoken to.

[18] Also, under Rule 403 of the *Federal Courts Rules*, SOR/98-106, the appellants could have sought directions on costs after the Federal Court rendered its judgment.

VII. Conclusion

[19] In our view, the appellants are not public interest litigants, and therefore costs should follow the event.

[20] We will dismiss the appeal with costs fixed in the all-inclusive amount of $2000.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-260-18
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PHELAN OF THE FEDERAL COURT DATED JUNE 13, 2018, DOCKET NO. T-1244-17)	
STYLE OF CAUSE:	ANGELINA COMMANDA, NICOLE BERNARD, TOM SARAZIN, GREG SARAZIN, on their own behalf and on behalf of the membership of ALGONQUINS OF PIKWAKANAGAN supporting this Application v. CHIEF AND BAND COUNCIL, of the ALGONQUINS OF PIKWAKANAGAN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	APRIL 11, 2019
REASONS FOR JUDGMENT OF THE COURT BY:	STRATAS J.A. LASKIN J.A. LOCKE J.A.
DELIVERED FROM THE BENCH BY:	LOCKE J.A.

APPEARANCES:

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