Federal Court Cour fédérale

Date: 20210406

Docket: T-1376-19

Citation: 2021 FC 296

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 6, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

NORMAND PILOT ET ROLLAND THIRNISH

Applicants

and

MIKE MCKENZIE, NORMAND AMBROISE, ANTOINE GRÉGOIRE, KENNY RÉGIS, DAVE VOLLANT AND ZACHARIE VOLLANT

Respondents

and

INNU TAKUAIKAN UASHAT MAK MANI-UTENAM

Intervenor

and

ATTORNEY GENERAL OF CANADA

Third party

ORDER AND REASONS

I. Overview

[1] This is a motion to appeal filed by the applicants against an order issued on August 31, 2020, by Prothonotary Steele allowing, in part, the motion to strike by the respondents, Mike McKenzie, Normand Ambroise, Antoine Grégoire, Kenny Régis and Dave Vollant [respondents], for nine of ten affidavits that had been submitted by the applicants in support of the underlying application for judicial review.

[2] This application involves the July 25, 2019, decision rendered by the Appeal Board, a body constituted under the Electoral Code adopted by the Innu Takuaikan Uashat mak Mani-Utenam [ITUM] Band Council, dismissing the applicants' grievance against the June 26, 2019, election of the ITUM Council. The applicants also wish to have the election itself reviewed and set aside, by way of *quo warranto*.

[3] The main issue in the present motion to appeal is whether Prothonotary Steele was correct to strike the affidavits considering the component of the underlying application for judicial review involving the Appeal Board's decision but not the component involving the setting aside of the election itself.

[4] The applicants did not convince me that there was any reviewable error in Prothonotary Steele's decision. Her reasoned decision correctly strikes nine of the ten affidavits submitted by the applicants, essentially because this evidence was not before the Appeal Board at the time the impugned decision was made and this evidence does not fall under any jurisprudential exception regarding the admissibility of such documents as evidence in these circumstances.

[5] Moreover, Prothonotary Steele did not commit a reviewable error by not addressing the motion in terms of the setting aside of the election.

[6] For the following reasons, I would dismiss the appeal.

II. Facts

[7] On June 26, 2019, the respondents were elected to the ITUM Band Council.

[8] According to the applicants, there were several irregularities during this election, that [TRANSLATION] "threw the results of this election into complete disrepute and thereby destroying any democratic legitimacy the respondents could have claimed as a result of this election."

[9] The applicants contested the election before the Appeal Board, a body constituted under article 7.1 of the Electoral Code adopted by the ITUM.

[10] On July 26, 2019, for reasons that are not relevant to this motion, the Appeal Board dismissed the challenge and, on August 23, 2019, the application for the underlying judicial review was filed against this decision by the Appeal Board, and the election itself.

[11] On November 21, 2019, the applicants notified the respondents of ten additional affidavits in support of their application. In a 16-page order with reasons dated August 31, 2020, Prothonotary Steele partially allowed the motion to strike submitted by the respondents, striking all the affidavits, with the exception of the affidavit of Rolland Bastien Joseph Thirnish dated July 22, 2019.

[12] Prothonotary Steele reviewed the issue of striking the affidavits through the lens of the notice of application. She deemed that the aim of the application for judicial review was not to challenge the election itself, but to review the Appeal Board's decision. This was the main consideration that led her to allow the motion to strike with regard to the majority of the affidavits.

[13] Prothonotary Steele concluded that the affidavits, with the exception of Mr. Thirnish's affidavit dated July 22, 2019, aimed to supplement the evidence that had been filed before the Appeal Board *ex post*, which is generally inadmissible in judicial review unless there are exceptional circumstances, which were not present in this case.

III. Legal Framework and Issue

[14] The legal framework that applies to discretionary prothonotary orders was recently set out by Justice Mosley in *Constantinescu v Canada (Attorney General)*, 2021 FC 213:

> [TRANSLATION]
> [12] … [T]he applicable standard of review for discretionary prothonotary orders is correctness with regard to questions of law, and the palpable and overriding error for questions of mixed fact and law when there is no extricable question of law: *Housen v Nikolaisen*, 2002 SCC 33, at paras 8, 10, 36 and 83 [*Housen*].
>
> [13] As confirmed by the Federal Court of Appeal in *Rodney Brass v Papequash*, 2019 FCA 245, "the standard of palpable and overriding error…is a high and difficult standard to meet…" This was expressed by the Court in *Canada v South Yukon Forest Corporation*, 2012 FCA 165, at para 46 [*South Yukon Forest Corporation*]:
>
> > "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[15] Moreover, to determine the applicable standard for questions of fact and law, it must be determined whether the legal principle is bound with, or extricable from, the finding of fact (*Arntsen v Canada*, 2021 FC 51 at paras 25-26).

[16] The applicable legal framework for striking affidavits was set out in Prothonotary Steele's order:

> [TRANSLATION]
>
> (a) The Court must exercise its discretion to strike affidavits only in the clearest cases, for example, when the opposing party is likely to suffer prejudice or where not striking all or part of the affidavit could impair the proper conduct of the

hearing (*Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 29; *Gravel v Telus Communications Inc.*, 2011 FCA 14 at paras 5 and 10; *Mayne Pharma (Canada) Inc. v Aventis Pharma Inc.*, 2005 FCA 50 at paras 13, 15 and 16).

(b) The general rule that applies to all applications for judicial review is that the case before the Court must be confined to that which was before the decision-maker (*Paradis v Canada (Attorney General)*, 2016 FC 1282 at para 21; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 13 [*Bernard*]; *Perez v Hull*, 2019 FCA 238 at para 16 [*Perez*]).

(c) There are a number of limited exceptions to this rule, namely: (1) to provide background information to help the court understand the issues related to the judicial review; (2) to highlight the complete absence of evidence before the administrative tribunal when it made a finding; or (3) to bring to the attention of the judicial review court defects that cannot be found in the evidentiary record of the administrative tribunal (*Bernard* at paras 20, 24-25; *Perez* at para 16; *ES v Canada (Attorney General)*, 2017 FC 1127 at para 24 [*ES*]).

[17] This summary on the subject is clear and concise and does not appear to be contested on appeal. The appeal file indicates that the applicants are contesting the application of this legal framework to the affidavits in question. More specifically, the applicants submit that Prothonotary Steele erred by analyzing the issue of striking the affidavits, while not considering that the application also involved setting aside the election and not only a review of the Appeal Board’s decision.

[18] The parties did not make any submissions about the applicable standard of review for this alleged error, but I believe it is a question of mixed fact and law from which it is not possible to extract or isolate a legal principle. Therefore, the question to be asked is whether the alleged error is palpable and overriding.

IV. Analysis

[19] It must first be noted that the applicants appear to be presenting their arguments *de novo*. It was only at the hearing that the applicants' position became clear and I was able to determine the above-noted alleged error in Prothonotary Steele's reasoning.

[20] The applicants submit that all of the affidavits that were struck involve issues of natural justice, procedural fairness, and potential fraud. The applicants add that the affidavits [TRANSLATION] "reveal the many procedural defects during the election." This evidence would therefore be admissible in accordance with one of the exceptions set out in *Bernard*.

[21] However, it appears from the affidavits (and counsel for the applicants even acknowledged this during the hearing) that the alleged issues of [TRANSLATION] "natural justice, procedural fairness, and potential fraud" raised by the affidavits related to the electoral process itself and in no way involved the Appeal Board's decision.

[22] When striking the affidavits, Prothonotary Steele added the following:

> [TRANSLATION]
> The subject of the judicial review, which is the legality of the July 25, 2019, Appeal Board decision, must not be confused with the remedies sought by the applicants, in particular setting aside

> the June 26, 2019, election and holding a new election. It goes without saying that one cannot consider remedies without first determining whether the Appeal Board's decision should be upheld.
>
> In other words, the proceeding initiated before this Court is not to "re-try" the "case" of the elections held on June 26, 2019; rather, it is to review the legality of the decision rendered on July 25, 2019, by the Appeal Board (s. 18.1 of the *Federal Courts Act*). To do this, considering the allegations in the applicant's judicial review, the Court must review the July 25, 2019, decision and the manner in which it was made. This review is first conducted in light of the evidence that was before the Appeal Board.
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> [Emphasis added.]

[23] There is no reviewable error by Prothonotary Steele on this issue. The purpose of the exception set out in *Bernard* regarding issues of procedural fairness is to allow the applicants to complete the evidentiary record that was before the administrative decision-maker with evidence that was not in that record. Indeed, evidence of a breach of procedural fairness is not always present in the record that was before the administrative decision-maker. However, in these circumstances, it is the issue of presumed violations by the decision-maker that is at issue. In this case, the alleged abuse noted in the affidavits only involved the conduct of the election.

[24] Thus, the evidence in this case could raise issues of procedural errors, but this evidence does not involve the Appeal Board's procedure. The applicants could have and should have submitted this evidence to the Appeal Board directly (*Bernard* at paras 26 and 30). As correctly noted by Prothonotary Steele, an application for judicial review is not a trial *de novo*.

[25] Moreover, I do not feel that Prothonotary Steele erred in her assessment of the admissibility of the affidavits by deeming that the underlying application targeted the Appeal

Board's decision and not the election itself. For many reasons, some of which were noted by Prothonotary Tabib in her October 30, 2020, order, the underlying application cannot validly be connected to the election itself and to the Appeal Board's decision. The applicants were not authorized (nor did they make the request) to contest the election in addition to the Appeal Board's decision contrary to Rule 302 of the *Federal Courts Rules*, SOR/98-106.

[26] Without discussing these points at length, the doctrine of exhaustion, subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7, and the fact the application was presented more than a year and a half ago render this attempt difficult now.

[27] It is also relevant to note that the applicants' attempt to put the election on trial before the Federal Court without first addressing the ruling on the Appeal Board's decision, if accepted, would short-circuit the election process adopted by the community and would be an affront to the principles that the applicants themselves claim to support, such as the self-determination of Indigenous people, a principle that is recognized and compliant with section 35 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, and the *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res., U.N. GAOR, 61st Sess., Supp. No. 49, UN Doc A/RES/61/295 (2007) [UNDRIP] (*First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (Representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36 at para 11).

[28] Moreover, in all of the rulings relied on by the applicants in support of their allegations that the application for judicial review can also target the Appeal Board's decision, the decision that was actually the subject of the application for judicial review was the decision of the Appeal

Board or of an electoral officer, not the election itself: *Laboucan v Loonskin*, 2008 FC 193; *Assiniboine v Meeches*, 2013 FCA 177; *Bacon v Appeal Board of the Betsiamites Band Council*, 2009 FC 1060; *Gadwa v Kehewin First Nation*, 2016 FC 597*; Landry v Savard*, 2011 FC 720; *Medzalabanleth v Abénakis of Wôlinak Council*, 2014 FC 508.

[29] The only exception is *Bird v Paul First Nation*, 2020 FC 475. In that case, the election was held pursuant to the *First Nations Elections Act*, SC 2014, c 5, a completely different legal regime than in the present case; it was essentially the election itself that was challenged pursuant to section 31 of that Act. It may be superfluous to add that none of these judgments challenged the election itself as well as the decision of the Appeal Board or of the electoral officer.

[30] As a second argument, the applicants suggested that the affidavits aimed to expose reasonable concerns about partiality in terms of the composition and members of the Appeal Board.

[31] I do not see how the affidavits relate to the composition and members of the Appeal Board. At any rate, this argument was not presented to Prothonotary Steele as part of the motion to strike. This argument was also not included in the notice of the application itself. It is true that the applicants submitted a motion for authorization to amend the notice of application, but that motion is still pending. In the circumstances, I find it difficult to see how the applicants can criticize Prothonotary Steele for not considering this argument in her decision.

[32] Lastly, in the event that their other arguments were to be dismissed, the applicants attempted to cover all bases by asking this Court to create a new jurisprudential exception for the

admissibility of affidavits as evidence. It is not clear what this exception would be based on, or what its content would be. The applicants cited the *audi alteram partem* rule, which was allegedly not [TRANSLATION] "applied in the contested order", section 5 of the UNDRIP , the rule of law, and access to justice. On the last two points, the applicants relied on lengthy excerpts from the dissent written by Justices Brown and Rowe in *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and Mani-Utenam)*, 2020 SCC 4 [*Uashaunnuat*].

[33] This argument was not presented to Prothonotary Steele. With due respect to the applicants, an appeal, as with an application for judicial review, is not a trial *de novo*.

[34] At any rate, I do not see how the excerpts from *Uashaunnuat* cited by the applicants would help with their claims. That case had nothing to do with striking affidavits or the admissibility of new evidence in the context of a judicial review. That case was about the jurisdiction of Quebec courts to hear a private prosecution brought by the Innu against a mining project that straddled Quebec and Newfoundland and Labrador.

[35] In this case, the rule of law and access to justice were respected with the striking of the affidavits. It does not violate access to justice to dismiss the applicants' affidavits since they apparently do not comply with the jurisprudential rules for the admissibility of such documents as evidence. On the contrary; the rules and procedures of the courts exist to ensure access to justice for all, by framing the discussion and preventing deviations such as those that occurred in this case.

[36] The applicants' arguments have not convinced me that a new jurisprudential exception should be created to avoid the striking of their affidavits.

[37] Despite their impassioned plea for greater flexibility in the procedural rules in their favour, the applicants must bear in mind that these rules exist to guarantee their rights as well as those of the respondents. The Court would not be doing anyone any favours by setting aside these rules, which are clear and unequivocal, just to please a party that presented a deficient case.

V. Conclusion

[38] I would dismiss the motion to appeal.

[39] Moreover, I asked the parties to make submissions on costs. In the circumstances, an amount of $2,500 will be awarded to the respondents.

ORDER in T-1376-19

THIS COURT ORDERS that:

1. The motion for appeal is dismissed.

2. Costs in the amount of $2,500 are awarded to the respondents.

"Peter G. Pamel"
Judge

Certified true translation
This 16th day of April 2021

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1376-19
STYLE OF CAUSE:	NORMAND PILOT AND ROLLAND THIRNISH v MIKE MCKENZIE, NORMAND AMBROISE, ANTOINE GRÉGOIRE, KENNY RÉGIS, DAVE VOLLANT AND ZACHARIE VOLLANT AND INNU TAKUAIKAN UASHAT MAK MANI-UTENAM
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ORDER AND REASONS BY:	PAMEL J.
DATED:	APRIL 6, 2021

APPEARANCES:

Patrick Lamarre	FOR THE APPLICANTS
Robert Gagné Coralie Martineau	FOR THE RESPONDENTS
Denis Cloutier Thomas Dougherty	FOR THE INTERVENOR
Éric Gingras	FOR THE THIRD PARTY

SOLICITORS OF RECORD:

Jalbert Lamarre Avocats Québec, Quebec	FOR THE APPLICANTS
Gravel Bernier Vaillancourt	FOR THE RESPONDENTS

Québec, Quebec

Cain Lamarre Montréal, Quebec	FOR THE INTERVENOR
Attorney General of Canada Ottawa, Ontario	FOR THE THIRD PARTY