Federal Court Cour fédérale

**Date: 20210407**

**Docket: T-1376-19**

**Citation: 2021 FC 297**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, April 7, 2021**

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

**BETWEEN:**

**NORMAND PILOT AND 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**

**Intervener**

## ORDER AND REASONS

I. Overview

[1] This is an appeal by the applicants from an order of Madam Prothonotary Tabib dismissing their motion for interim costs [Okanagan Application] by order dated January 15, 2021 [January 15, 2021 Order] in accordance with the principles of *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [*Okanagan*].

[2] This motion for interim costs is directed against the respondents, Mike McKenzie, Normand Ambroise, Antoine Grégoire, Kenny Régis and Dave Vollant [respondents], the intervener Innu Takuaikan Uashat mak Mani-Utenam Band Council [ITUM], and the Attorney General of Canada [AGC], who is neither a party to nor an intervener in the underlying application for judicial review.

[3] The underlying application for judicial review is directed at the Appeal Board's decision of July 25, 2019, dismissing the applicants' grievance against the ITUM Band Council election held on June 26, 2019. The applicants also seek review and annulment of the election itself, by way of *quo warranto*.

[4] For the reasons that follow, I dismiss the appeal.

## II. Facts

[5] The facts of the underlying application for judicial review and some of the procedural history of this case are set out in my decision on the appeal from the August 31, 2020 order of Madam Prothonotary Steele, *Pilot et al. v McKenzie et al.*, 2021 FC 296, which appeal I heard in conjunction with this appeal from the January 15, 2021 Order.

[6] The underlying application for judicial review was filed on August 23, 2019. Nearly fourteen months later, on October 14, 2020, the applicants filed the Okanagan Application that is subject of this appeal.

[7] On October 28, 2020, following the hearing of ITUM's motion to intervene, Prothonotary Tabib issued an order regarding the Okanagan Application setting out the timetable and providing for a hearing on December 8, 2020.

[8] On January 15, 2021, after the hearing had taken place as scheduled, Prothonotary Tabib dismissed the Okanagan Application in its entirety, finding on the one hand that the conclusions sought against the AGC were not well founded, in particular because the AGC was not a party to the proceeding and, on the other hand, that the applicants did not meet any of the three cumulative criteria for the issuance of such an order.

[9] Prothonotary Tabib did not hide her dissatisfaction with the applicants' conduct in relation to their application, noting that:

> [TRANSLATION]
>
> It is one thing for an attorney to misunderstand the applicable law, the burden of proof, or the sufficiency of the evidence he or she offers. It is quite another for a party swearing an affidavit to demonstrate such a cavalier approach to the fair representation of facts. Both applicants have signed affidavits attesting to the truth of assertions and documents that, however, omit obviously relevant facts, to the point of misrepresentation. To exempt the applicants from paying costs in these circumstances would be to absolve them of the consequences of this lack of thoroughness, including the time and costs incurred in conducting the cross-examinations that their lack of transparency made necessary.
>
> [Emphasis added.]

[10] On January 25, 2021, the applicants filed a notice of motion to appeal the January 15, 2021 Order.

[11] Following the initial filing of the applicants' notice of motion to appeal the January 15, 2021 Order, an unsuccessful attempt by the intervener to file a motion to dismiss the applicants' motion to appeal, and a management conference with Prothonotary Tabib, finally, on March 11, 2021, the applicants served and filed their motion record to appeal the January 15, 2021 Order. On March 12, 2021, the respondents and the AGC each served and filed their response records.

## III. Issues

[12] The issues are the following:

i. What is the applicable standard of review?

ii. Should the motion to appeal the Order be denied with respect to the AGC?

iii. Did Prothonotary Tabib commit a reviewable error in her January 15, 2021 Order as to the three cumulative conditions that give rise to her discretion to award costs?

iv. Did Prothonotary Tabib commit a reviewable error in awarding costs in favour of the respondents (other than Jonathan St-Onge)?

## IV. Analysis

### A. *Standard of review*

[13] The legal framework for discretionary prothonotary orders was recently set out by *Constantinescu v Canada (Attorney General)*, 2021 FC 213:

> [TRANSLATION]
>
> [12] . . . [T]he standard of review applicable to discretionary orders of prothonotaries is correctness for questions of law and palpable and overriding error for findings of fact and questions of mixed fact and law absent an 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, "palpable and overriding error . . . is a high and difficult standard to meet". This was explained 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.

[14] Moreover, in determining the standard applicable to questions of fact and law, it is necessary to determine whether the legal principle is bound with or extricable from the finding of fact (*Arntsen v Canada*, 2021 FC 51 at paras 25–26).

[15] In making her decision, Prothonotary Tabib relied on the criteria in *Okanagan* (para 40):

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[16] Prothonotary Tabib emphasized that this remedy is exceptional, that the burden of proof rests with the applicants and that all the conditions must be met before the order can be granted. In fact, even if the criteria are met, the decision whether to grant the application remains discretionary.

[17] The legal criteria employed by Prothonotary Tabib, as well as the standard of review applicable to her order, are not the subject of representations by the applicants.

[18] The applicants generally do not raise any specific error of fact or law in Prothonotary Tabib's reasoning, and confine themselves primarily to rearguing the arguments that were before

her. I will therefore revisit each of the *Okanagan* criteria in order to follow the reasoning of the applicants.

[19] It will be necessary to return first to the participation of the AGC in this application, which is surprizing, to say the least.

B. *Participation of Attorney General of Canada*

[20] In her January 15, 2021 Order, Prothonotary Tabib divided her analysis into two parts. The first part deals with the conclusions sought against the AGC and the second part deals with the conclusions sought against the other parties in the proceeding, being the respondents and the intervener. This is because the AGC was not a party to the proceeding. Moreover, as noted by Prothonotary Tabib, [TRANSLATION] "[n]o conclusions or remedies are sought against him. As the election was conducted under a custom election code, independent of the *First Nations Elections Act*, the federal government had no role in the election process or appeal process".

[21] As noted by Prothonotary Tabib, it is well established that an allowance for costs can only be made against third parties in very specific circumstances, which are obviously not present in this case (*Bellegarde v Poitras*, 2009 FC 1212, *Re Bodnarchuk*, [1995] 3 FC 300; *Lower Similkameen Indian Band v Allison* (1995), 99 FTR 305 (Prothonotary); *Barbosa v Canada (Minister of Employment and Immigration)* (1987), 4 Imm LR (2d) 81 (FCA)).

[22] It is therefore legitimate to ask: what is the AGC doing here?

[23] On appeal, the applicants made no written submissions regarding Prothonotary Tabib's conclusion on this issue. At the hearing and only in reply, counsel for the applicants, by his own admission, made the same arguments that he had made before Prothonotary Tabib.

[24] Since the applicants have failed to identify any error (let alone reviewable error) made by Prothonotary Tabib on the issue of the AGC's participation in the Okanagan Application, and since in any event the order is well founded in fact and law on this issue, I cannot interfere with this part of the Order. The fact that the applicants have not abandoned their appeal against the AGC is still deplorable given the virtual absence of representations by the applicants on this issue.

C. *Did Prothonotary Tabib commit a reviewable error in her January 15, 2021 Order as to the three cumulative conditions that give rise to her discretion to award costs?*

(1) The party seeking the order would be unable to proceed in court without it

[25] Prothonotary Tabib held that the applicants failed to meet their burden of proof to establish their impecuniosity. She attributed little probative value to the affidavits supporting the applicants' alleged lack of financial resources to carry out the underlying proceedings, as the cross-examinations on affidavits apparently disclosed sums of money, vehicles and at least one bank account that had not been mentioned in the affidavits. In addition, the applicants objected to questions about their spouses without right.

[26] Thus, the applicants have not met their burden of proof to show as complete a financial picture as possible, including the financial status of spouses or extended family members who

could serve as alternative sources of funding (*Al Telbani v Canada (Attorney General)*, 2012 FCA 188 at para 10).

[27] The applicants argue that the amounts disclosed in the affidavits are small and do not make them financially able to pursue the underlying claim. Prothonotary Tabib therefore erred in attributing too much importance to the irregularities in the affidavits, which prevented her from asking the correct question, namely whether or not the applicants could afford to pay for the action undertaken.

[28] This is an alleged error of fact. The applicants argue that Prothonotary Tabib misjudged the credibility of the affidavits on examination and erred in her assessment of the applicants' impecuniosity.

[29] I see no basis for intervention here. The incongruities Prothonotary Tabib identified are not minor, contrary to what the applicants may think. At least, Prothonotary Tabib made no palpable and overriding error in concluding that these incongruities, in addition to the applicants' objections regarding their spouses' income, ensure that the applicants did not meet their burden of proof to establish impecuniosity. It is not the Court's place to be complacent about the applicants' shaky evidence.

[30] While not necessary to determine the outcome of this matter, I would note in passing that the delay of more than a year and a half in this proceeding, without any progress on the merits, seriously undermines the applicants' claim of impecuniosity.

[31] I therefore see no reason to intervene on this issue. In principle, it would be sufficient to stop here, since the three conditions in *Okanagan* are cumulative. However, given the state of this case, it is appropriate to address the applicants' arguments on the other two conditions, in order to highlight how superfluous, if not frivolous, the present proceedings are.

(2) The application is *prima facie* meritorious

[32] At the outset, Prothonotary Tabib noted that the application for judicial review appears to be directed at the decision of the Appeal Board and not at the election itself, as set out in the Court's October 30, 2020 order, and that the applicants have made no argument to contradict this conclusion. She added that the applicants had confused the importance of the issues raised with the question of the likelihood of success of their appeal. Only the likelihood of success would be relevant at this stage of the *Okanagan* test.

[33] Finally, Prothonotary Tabib found that the applicants [TRANSLATION] "have not substantiated their claims that the [Appeal Board] decision was tainted by a lack of transparency and obstruction of the process". She added that in her view, it is difficult to [TRANSLATION] "discern any particularly serious grounds for challenge" in the decision.

[34] The applicants again emphasize to me the importance of their appeal by relying once again on the affidavits struck out by Prothonotary Steele.

[35] The applicants add that Prothonotary Tabib noted in her October 30, 2020 order that the application raised serious issues. The position taken by Prothonotary Tabib in that order was

inconsistent with the position she took in her January 15, 2021 Order and the applicants argue that her position in the earlier order should stand.

[36] Finally, the applicants point out that the composition of the Appeal Board is a sufficiently successful argument on its own to allow them to pass this stage of the *Okanagan* test.

[37] Once again, the applicants persist in making the same arguments before me, while still relying on expunged exhibits that they made before Prothonotary Tabib.

[38] As to Prothonotary Tabib's alleged change in position between her October 30, 2020 Order and her January 15, 2021 Order, this change is easily explained by the fact that for the more recent order, Prothonotary Tabib had the benefit of the Appeal Board's decision, which was produced on consent at the hearing (a year and a half after the Notice of Application was filed).

[39] Finally, it is difficult to find fault with Prothonotary Tabib's failure to address the issue of the composition of the Appeal Board, since this issue was not raised before her and is not found in the Notice of Application. In any event, considering that this argument was not raised at the first opportunity, it is difficult to share the applicants' enthusiasm about the chances of success of this argument on the merits (*Transport Car-Fré Ltée v Lecours*, 2018 FC 1133 at paras 50–54).

[40] There are no grounds for intervention here.

(3) The issues raised go beyond the interests of the litigant, are of public importance and have not yet been decided.

[41] The applicants take issue with Prothonotary Tabib's conclusion that they have not identified at least one issue raised by the application that has not been decided by the case law and that would be of general application. The applicants suggest that it would be a [TRANSLATION] "grossly unreasonable" burden to require them to review all past decisions to distinguish their situation from these.

[42] The applicants are putting the cart before the horse. Before even considering whether the issue raised by the application is so special that it would never have been decided before, one must first identify a special issue raised by the application. As with the other two conditions mentioned above, the applicants fail miserably at this task. The applicants do not raise a single special issue that would allow the Court to ascertain whether the issue has been decided before.

[43] The Supreme Court of Canada is clear that only "rare and exceptional" cases can justify an allowance for costs (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 140):

> First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

[44] Here, the applicants have failed to show that their claim raises new issues. Moreover, they failed to demonstrate a reviewable error in Prothonotary Tabib's reasoning.

## V. Costs

[45] Finally, the applicants vehemently contest Prothonotary Tabib's order regarding costs. In their opinion, in making this order, Prothonotary Tabib gave undue weight to information that came out in cross-examination. In their opinion, this information does not show the applicants' bad faith.

[46] Again, the applicants do not identify any error in Prothonotary Tabib's reasoning on the issue of costs. They do not even address the question of why Prothonotary Tabib should have deviated from the usual practice of awarding costs to the successful party. Her determination must therefore stand.

[47] As to the costs of this appeal, they will be dealt with by my own judgment on the respondents' motion to dismiss.

## VI. Conclusion

[48] I dismiss the motion for appeal.

[49] I have also asked the parties to make submissions on costs. In the circumstances, an award of $2,500 will be made in favour of the respondents. Costs of $2,500 will be awarded to the intervener ITUM and the same amount will be awarded to the AGC.

[50] In addition, the AGC has requested to be removed from the style of cause as it is not involved in these proceedings. I agree; therefore, the style of cause will be amended to remove the AGC as third party.

**ORDER in T-1376-19**

**THIS COURT ORDERS** as follows:

1. The application for appeal is dismissed.

2. An amount of $2,500 is awarded in favour of the respondents.

3. An amount of $2,500 is awarded in favour of the intervener Innu Takuaikan Uashat mak Mani-Utenam.

4. An amount of $2,500 is awarded in favour of the Attorney General of Canada.

5. The style of cause is amended to remove the Attorney General of Canada as third party.

"Peter G. Pamel"
Judge

Certified true translation
Michael Palles

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **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 |
| **PLACE OF HEARING:** | MATTER HEARD BY VIDEOCONFERENCE BETWEEN MONTRÉAL, QUEBEC; QUÉBEC, QUEBEC; AND OTTAWA, ONTARIO |
| **DATE OF HEARING:** | MARCH 30, 2021 |
| **ORDER AND REASONS:** | PAMEL J. |
| **DATED:** | APRIL 7, 2021 |

**APPEARANCES:**

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|---|---|
| Patrick Lamarre | FOR THE APPLICANTS |
| Robert Gagné<br>Coralie Martineau | FOR THE RESPONDENTS |
| Denis Cloutier<br>Thomas Dougherty | FOR THE INTERVENER |
| Éric Gingras | FOR THE THIRD PARTY |

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