Federal Court Cour fédérale

Date: 20210520

Dockets: T-664-20
T-863-20

Citation: 2021 FC 462

Ottawa, Ontario, May 20, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

CARRY THE KETTLE FIRST NATION, MORRIS PASAP, SHAWN SPENCER, SCOTT EASHAPPIE, BRADY O'WATCH, CONRAD MEDICINE ROPE AND ORLEEN DAWN SAULTEAUX

Applicants

and

JAMES KENNEDY, RAQUEL PASAP, AL HUBBS, MATTHEW SPENCER, JACQUELINE MAXIE, DENITA DEEGAN, NELLIE IRON QUILL, TANIS COTE-LARTEY, KURT ADAMS, CONSTANCE GRAY-BELLEGARDE AND MILDRED HOTOMANI

Respondents

JUDGMENT AND REASONS

I. Nature of the Matters

[1] This matter concerns two applications for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. Both Applications are brought by the Applicants, Carry The Kettle First Nation [CTKFN], Morris Pasap, Shawn Spencer, Scott Easappie, Brady O'Watch, Conrad Medicine Rope, and Orleen Dawn Saulteaux [Applicants]. The Applicants request a review of Tribunal Orders [Orders] of the Cega-Kin Nakoda Oyate Tribunal [Tribunal] dated December 10, 2018, January 11, 2019, February 13, 2019, March 20, 2019, April 22, 2020, April 27, 2020, May 1, 2020, and May 5, 2020.

[2] The Applicants request an Order quashing, setting aside, or declaring invalid or unlawful the Orders. They submit that the Orders are invalid as they lacked approval by a majority of the Tribunal pursuant to section 12(7)(i) of the *Cega-Kin Nakoda Oyate Custom Election Act* [*Election Act*].

[3] The Applications for judicial review are allowed.

II. Background

[4] Section 74 of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] provides for a band to conduct elections. As of 2015, First Nations could opt out of the *Indian Act* and follow an election model set out in the *First Nations Elections Act*, SC 2014, c 5 [*FNEA*] and *First Nations Elections Regulations*, SOR/2015-86. CTKFN did not adopt a procedure under the *FNEA* but instead chose

to adopt its own community election code, the *Election Act,* which came into effect in January 29, 2018, through a Ministerial Order.

[5] The *Election Act* states that the Chief and Councillors must appoint five individuals to the Tribunal to accept, hear, and decide appeals.

[6] Following the April 7, 2018 Election, two CTKFN members, Constance Gray-Bellegarde and Mildred Hotomani [Appealing Parties] appealed the results. The Tribunal heard the Appealing Parties' appeals and it appears that three Tribunal members dismissed the appeal of the Appealing Parties in a June 15, 2018 decision.

[7] The Appealing Parties appealed the Tribunal decision to the Saskatchewan Court of Queen's Bench [SKQB] and on November 23, 2018 the SKQB remitted the matter to the Tribunal for redetermination (*Gray-Bellegarde v Kennedy*, 2018 SKQB 324 [*Gray-Bellegarde 2018*]). The Applicants in this matter sought leave to appeal to the Saskatchewan Court of Appeal [SKCA] but the SKCA ultimately denied leave on January 10, 2019. The Respondents maintain that the Orders set out in *Gray-Bellegarde 2018* remain in force and effect.

[8] Upon the Appealing Parties' appeals being remitted to the Tribunal, a disagreement arose between the Tribunal members concerning the selection of legal counsel to assist the Tribunal in considering the appeals of the Appealing Parties. The parties do not have the same version of events as to whether legal counsel, Nathan Phillips [Mr. Phillips], was, in fact, retained by the Tribunal. This dispute is central to this judicial review. On one side of the dispute is the Chair,

James Kennedy [Chair] and Tanis Cote-Lartey [Ms. Cote-Lartey] who I refer to jointly as the minority Tribunal members [Minority Tribunal Members]. On the other side are Al Hubbs [Mr. Hubbs], Matthew Spencer [Mr. Spencer], and Raquel Pasap [Ms. Pasap], the majority Tribunal members [Majority Tribunal Members]. The Majority Tribunal Members are the Tribunal members who dismissed the appeal of the Appealing Parties' appeal on June 15, 2018.

[9] The issue between the Majority Tribunal Members and Minority Tribunal Members can be summed up as a disagreement over the choice of legal counsel to assist the Tribunal and, flowing from that, the failure on the part of the Majority Tribunal Members to attend meetings called by Mr. Phillips. The Applicants and Respondents do not agree on if and when Mr. Phillips was retained. The Respondents also claim that the Majority Tribunal Members are closely associated to the current Chief and Councillors, who are the Applicants in this proceeding.

[10] The Minority Tribunal Members, through Mr. Phillips, issued notices of meetings resulting in the Minority Tribunal Members passing the Orders dated December 10, 2018, January 11, 2019, February 13, 2019, March 20, 2019. The scope of these Orders cover, in summary, the coordination of the Appealing Parties' appeal, the retention of Mr. Phillips, the approval of payments to Mr. Phillips, disqualifying Applicants' counsel from representing anyone before the Tribunal and calling a joint meeting of the Tribunal of certain of the Elders. These Orders are the subject of the judicial review application in T-863-20.

[11] Due to the March 20, 2019 Order, a further meeting occurred on March 30, 2019 between the Minority Tribunal Members and certain Elders of CTKFN which ultimately lead to a

decision of certain Elders on April 9, 2019, where they purportedly removed the Majority Tribunal Members from the Tribunal and appointed three replacements. More will be said on this further but suffice to say the March 30, 2019 and April 9, 2019 decisions are not the subject of these judicial review applications.

[12] In 2019, CTKFN filed a judicial review with the SKQB of the January 11, 2019, February 13, 2019, March 20, 2019, and March 30, 2019 Orders and resolution. On September 24, 2019, the SKQB quashed the Orders and resolution (*Carry the Kettle First Nation v Gray-Bellegarde*, 2019 SKQB 248). The Minority Tribunal Members appealed the judgment and the SKCA allowed the appeal, determining that the Federal Court had exclusive jurisdiction over the matter (*Kennedy v Carry the Kettle First Nation*, 2020 SKCA 32 [*Kennedy*]).

[13] Following the decision in *Kennedy*, the Minority Tribunal Members, after the purported removal of the Majority Tribunal Members and with the three purported new Tribunal members, made Orders summarized as follows:

> (1) On April 22, 2020, the Tribunal received the election complaint of the Appealing Parties and the next meeting of the Tribunal is to be held by telephone conference on April 27, 2020;
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> (2) On April 27, 2020, a hearing of the election complaint of the Appealing Parties is warranted and the next meeting of the Tribunal is to be held by telephone conference on April 29, 2020;
>
> (3) On May 1, 2020, the hearing of the election complaint will be held in person after May 19, 2020, once restrictions on public gatherings are lifted. The Tribunal retained Phillips & Co. to represent the Tribunal in relation to Federal Court matters and accept the Motion Record provided by counsel for the Applicants by email on April 30, 2020. The Tribunal had Phillips & Co. prepare a Response Motion

Record. Mr. Kennedy will advise the Elders of the Motion Record, and the next meeting of the Tribunal be held by telephone conference on May 5, 2020; and

(4) On May 5, 2020, a hearing date for the election complaint is May 19, 2020, when it is expected that the restrictions in place regarding Covid-19 would be removed by local government agencies.

[14] The Orders of April 22, 2020, April 27, 2020, May 1, 2020, and May 5, 2020 are the subject of T-664-20. In October 2020, this Court Ordered both files consolidated and future materials to proceed under T-664-20. On November 9, 2020, the Court granted leave for the four Orders under T-664-20 to be heard under the same judicial review.

III. The Issues and Standard of Review

[15] The Applicants assert that the Tribunal lacked jurisdiction to make the Orders because only two of the five Tribunal members purportedly passed the Orders. The Applicants raise four issues. The Respondents raise ten issues.

[16] After reviewing the submissions and hearing oral submissions, the only issue for determination is as follows:

(1) Did the Minority Tribunal Members act without jurisdiction in making the Orders?

A. *Standard of Review*

[17] The Applicants submit that this issue is one of pure jurisdiction. The Supreme Court held in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] that jurisdictional questions are no longer a distinct category nor do they attract a correctness review (*Vavilov* at paragraph 65). Further, the Supreme Court found that reasonableness is the presumptive standard of review unless certain exceptions were present that warranted a departure from the reasonableness standard (*Vavilov* at paragraphs 16, 53-64). These circumstances do not exist in this matter.

[18] The Court in *Vavilov* at paragraph 68 spoke to a reasonableness review in matters concerning administrative decision makers interpreting their enabling statutes:

> [68] Reasonableness review does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of reasonable interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect (*Vavilov* at para 68).

B. *Preliminary Issues*

[19] The preliminary issues to be determined are as follows:

(1) Should all or portions of the Elders' Affidavits be struck or disregarded?

[20] The Applicants take issue with six affidavits filed by the Respondents, specifically, those sworn by certain Elders, namely, Elsie Jack, James Kennedy, Kathy Leader, Agnes Thomson, Denita Deegan, and Howard Thomson [Respondents' Elders]. The Applicants submit that they filed evidence from two Elders in reply, namely, Clint Haywahe and Bernice Saulteaux [Applicants' Elders]. The Respondents then filed the reply affidavit of Howard Thompson. The case management judge left the determination of relevance and admissibility to the applications judge.

[21] The Applicants have provided extensive examples of the issues they take with the Respondents' Elders' affidavits. Firstly, they focus on whether the Elders who passed the March 30, 2019 and April 9, 2020 resolutions had the authority to pass them. They submit that this is irrelevant as the Applicants were only seeking to quash the Orders of the Tribunal made without the requisite majority of Tribunal members. Secondly, they contain opinion, argument or legal conclusions. Lastly, the Applicants state that Howard Thomson's affidavit is not proper reply evidence.

[22] The Respondents submit that the Applicants were advancing evidence and argument challenging the decisions of the Elders and the Respondents were required to respond to this evidence and submissions with these affidavits. In short, the Applicants are essentially challenging the decisions of the Elders and, therefore the Applicants should have named the Elders as Respondents.

[23] The Applicants claim that the Respondents cannot now claim any procedural issues as they should have made an application pursuant to *Federal Courts Rule* 58 but they chose not to do so.

[24] The Respondents submitted that if the Court is of the view that the Elders' evidence is beyond the scope of this proceeding and that the affidavits should be struck as against both parties, they accept the same.

[25] I have determined that neither the Applicants' Elders nor the Respondents' Elders' affidavits are relevant for the consideration of the above issues. I am not suggesting that Elders' evidence is not relevant. Rather, the evidence within these affidavits relating to customs and whether the *Election Act* codified all customs, is not required for the Court to dispose of the issue. I will only be guided by the evidence relating to the jurisdiction of the Tribunal and whether the Minority Tribunal Members had the authority to make the Orders.

[26] Based on a typographical error or oversight the Applicants had included two dates of orders or decisions being challenged that were not in their notices of application, namely March 30, 2019 and April 9, 2019. This was acknowledged as an error and the Court is clear that the Applicants are not challenging the decisions that took place on these dates. The Applicants submit that the Court's findings on the jurisdiction issue will essentially nullify what took place on those two dates.

(2) Mootness

[27] The Respondents submit that since the Minority Tribunal Members were replaced by three new members, there has been a functioning Tribunal. Therefore, the issue before the Court is now moot. I disagree. The issue concerning a lack of majority in the challenged Orders is relevant for the purposes of whether the Minority Tribunal Members had the authority to make any of the Orders, which ultimately led to the removal and replacement of the Majority Tribunal Members.

IV. Parties' Positions

A. *Applicants' Position*

(1) Reliance on custom to extend jurisdiction

[28] The Applicants state that while section 3 of the *Election Act* refers to Cega-Kin Nakoda Oyate traditional laws and customs, there is no indication that there were such additional laws and customs relating to elections not codified in the *Election Act*.

[29] The Applicants also cite *Shirt v Saddle Lake Cree Nation*, 2017 FC 364 at paragraphs 31-34 and 41-42, which states that a majority of the Band's members must recognize and agree to the custom but also must know that they have agreed.

(2) The need for a majority for the Tribunal to have jurisdiction

[30] The Applicants state that any refusal by the Majority Tribunal Members to attend meetings as of November 2018 was because of the purported retention of Mr. Phillips despite

objections and that the Minority Tribunal Members ignored their repeated requests to hold a Tribunal meeting without Mr. Phillips present.

[31] The Applicants submit that the Minority Tribunal Members did not have the authority to make decisions, interim or otherwise, on behalf of the Tribunal. Therefore, the Orders are not Tribunal decisions.

[32] Additionally, the Applicants state that the "three meeting rule" pursuant to section 14(1)(vi) of the *Election Act* only applies to the Chief and Council.

B. *Respondents' Position*

(1) Reliance on custom to extend jurisdiction

[33] The Respondents submit that the only proper grounds plead by the Applicants for the judicial review applications concern the issues involving majority versus minority decision-making authority and the jurisdiction of the Tribunal.

[34] The Respondents submit that even in the face of a competing reasonable interpretation of the *Election Act*, the Court should refrain from interfering with decisions where a Tribunal and Elders, with the benefit of their expertise, have resolved a statutory uncertainty by adopting an interpretation that the statutory language can reasonably bear. This deference was particularly important where there are unforeseen or extenuating circumstances citing *Lavallee v Ferguson*, 2016 FCA 11 at paragraphs 20-30.

[35] The Respondents state that the onus of establishing why custom does not apply or is irrelevant to this matter rests with the Applicants.

(2) The need for a majority for the Tribunal to have jurisdiction

[36] The Respondents state that the Majority Tribunal Members failed to attend two consecutive meetings on November 28 and December 6, 2018. As such, the Chair issued a Notice of Meeting in good faith on December 6, 2018. This required attendance of all Tribunal members on December 10, 2018. The option to attend via a conference call was also offered when they declined to attend but this offer was not accepted. The Majority Tribunal Members ultimately missed the Tribunal meetings on December 10, January 11, February 13, March 20, and March 30, 2019.

[37] The Respondents point out that the Tribunal was under an obligation to move forward with decisions pursuant to the Order in *Gray-Bellegarde 2018.* The Respondents also state that the Majority Tribunal Members disregarded the reality confronting Indigenous decision-makers required for effective self-governance. Further, they submit that the *Election Act* provided the authority for the Minority Tribunal members to move forward without the full participation of all members of the Tribunal.

[38] The Respondents have additionally pled that this judicial review is premature and judicial intervention in a pending administrative proceeding is “only justified in the most exceptional circumstances” citing *Saskatoon (City) v Wal-Mart Canada Corp.,* 2019 SKCA 3 at paragraphs 72-82, 90.

[39] The Respondents also submit that the Applicants have failed to seek judicial review of the March 30, 2019 and April 9, 2019 Elders resolutions and that the Applicants are attempting a collateral attack on these decisions.

V. Analysis

[40] Both parties have made extensive submissions and have cited many decisions focused on how this Court has addressed custom. Given my finding that this judicial review does not concern the March 30, 2019 and April 9, 2019 Elders' resolutions, and my finding that neither the Applicants' Elders' affidavits nor the Respondents' Elders' affidavits will be relied on, it is not necessary to delve into the issue of custom or whether the *Election Act* is a complete articulation of CTKFN's custom. The matter involves the application and interpretation of the provisions of the *Election Code,* which CTKFN recently adopted.

[41] Related to the above point, both parties also blended or tied the issues of the Tribunal's jurisdiction with the Elders' jurisdiction, however, only the jurisdiction of the Tribunal and its decision-making authority will be considered. This is in keeping with the Notices of Application as well as the submissions of the Respondents.

(1) Did the Minority Tribunal Members act without Jurisdiction in making the Orders?

[42] Regardless of the reasons for the Majority Tribunal Members not attending meetings called by the Chair, the Applicants submit that the Tribunal passed the Orders without a majority of the appointed Tribunal members present and therefore lacked jurisdiction.

[43] Furthermore, the Applicants submit that the Respondents' argument that the Tribunal can replace the Majority Tribunal members after not attending three meetings is without merit. They state that this rule only applies to Chief and Council pursuant to section 14(1)(vi) of the *Election Act*. The Applicants submit that while section 3 of the *Election Act* speaks to the use of Cega-Kin Nakoda Oyate traditional laws and customs to interpret the provisions of the *Election Act*, this does not extend the jurisdictional power of the Tribunal to include the removal and replacement of Tribunal members.

[44] The Respondents state that regardless of why the Majority Tribunal Members missed meetings, the Minority Tribunal Members were under an obligation to move forward with decisions pursuant to the Order in *Gray-Bellegarde 2018.* Further, they state that an important consideration in assessing the jurisdictional issue, is the power of the Chair, specifically, the Chair's power to call meetings pursuant to sections 12(7)(e) and (g) and 12(2)(a)(b)(c)(d) of the *Election Act*. Moreover, the Chair has broad powers beyond those conferred upon members of the Tribunal to make decisions regarding an election appeal based on section 12(2)(c). Lastly, section 12(7)(i) of the *Election Act* does not contain a quorum requirement or any requirement that all five members of the Tribunal attend, deliberate, and decide interim issues.

[45] The Respondent also takes issue with the clarity of relief and grounds pled by the Applicants. I see no confusion on this issue. The grounds plead by the Applicants is that the Minority Tribunal Members acted outside the scope of their jurisdictional authority. The relief sought is the quashing of the Orders.

[46] I find the Federal Court of Appeal (FCA) decision of *Community Panel of the Adams Lake Indian Band v Adams Lake Band*, 2011 FCA 37 [*Adams Lake*] instructive. The FCA overturned the findings of the Federal Court [FC] judge, where the FC judge quashed the decision of a community panel because a panel member's resignation caused the panel to lose its quorum under its election rules. In *Adams Lake,* the FCA found that the community panel completed its adjudicative process before it lost its quorum (*Adams Lake* at paragraph 18).

[47] In *Adams Lake,* Stratas JA made the following observation:

> [24] In my view, there is a astrong argument on the facts of this case that quorum under article 19 was not lost. All five members of the Community Panel, including the resigning member, participated over multiple days (see paragraphs 6-9, above). When deliberations ended and voting began, all five members, informed in their deliverations by the views of the others, had reached a decision on the merits of the appeals:
>
> (a) Four members had made up their minds and decided to dismiss the appeals. The four later evidenced their decision by signing a document.
>
> (b) The resigning member had also made up his mind. In his resignation letter, he expressed his disagreement with the other members of the Community Panel on the merits of the appeal, setting out his reasons. This is a case where, unlike Mehael, there is ample evidence showing that the resigning member did participate in the overall decision and had reached a conclusion concerning it.
>
> One could argue that the decisions of the Community Panel were made with the requisite quorum under artile 19 of the Election Rules and so they should not be quashed.
>
> [25] However, as mentioned above, the parties did not raise this point in written or oral argument, so I decline to rule on it definitively. Instead, I prefer to determine this appeal on a fully argued ground – namely that as a matter of judicial discretion the Community Panel's decisions should not be quashed.

[48] Stratas JA then went on to analyze the Federal Court's discretion under subsection 18.1(3) of the *Federal Courts Rules* in light of *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR [*MiningWatch*]. He stated that "The message in *MiningWatch* is that the broadest range of practical factors must be considered and legal error or non-compliance should not be given undue weight: The practicalities may outweigh the legalities" (*Adams Lake* at paragraph 30). Stratas JA found that the FC judge did not give weight to all relevant considerations. The FCA went on to consider the resigning member's motives to frustrate the Community Panel's mandate, the costs and impracticality of redoing the appeals, and the difficulty in staffing a new Community Panel to deal with the appeal (*Adams Lake* at paragraphs 33 to 36).

[49] Like in *Adams Lake*, there is no specific provision in the CTKFN *Election Act* speaking to a quorum for decision-making. The *Election Act* contains only the following provisions concerning quorum or majority:

> 12(1) Prior to the nomination meeting, or the concluding of any election, the Carry the Kettle Chief and Councillors shall pass a resolution:
>
> > (a) appointing the Cega-Kin Nakoda Oyate Tribunal, consisting of five (5) individuals, four (4) Carry the Kettle band members and one 91) non-band member, to provide oversight to the upcoming election or by-election. Band lawyer may be consulted as needed.
>
> 12(7) The following procedures shall govern the conducting of election appeals:
>
> > i. without restricting the generality of the foregoing, the Cega-Kin Nakoda Oyate Tribunal shall determine their own procedure and all questions relating to the conduct of the appeal and all issues in

> question shall be settled by a majority decision of the Tribunal.

[50] The above provisions do not indicate much more than there are five Tribunal members to be appointed and that any questions related to an appeal and “all issues in question” are to be settled by a majority decision. There is also no provision for the three-meeting rule as submitted by the Respondents. There is not much guidance from the *Election Act* itself.

[51] *Rizzo & Rizzo Shoes Ltd., Re,* [1998] 1 SCR 27 [*Rizzo*] is the governing case on statutory interpretation. Iacobucci J 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*, (sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp*., [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R*., [1995] 3 S.C.R. 103 (S.C.C.).

[52] I take *Rizzo* to stand 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.

[53] The FCA has ruled that custom election codes enacted by First Nations are to be interpreted using this approach (*Boucher v Fitzpatrick*, 2012 FCA 212 [*Boucher*] at paragraph 25).

[54] I note that there are some inconsistencies between powers of the Tribunal as a whole (12(1) and 12(7)), highlighted above, and the powers of the Chair. Respecting the Chair, he or she has the power to “make decisions regarding the appeals” under 12(2)(c) and the power of “entering into dispute resolution procedures if agreed to by the parties to an appeal” under 12(1)(d). It would seem that these provisions would require the entire Tribunal to be involved.

[55] While guidance has been provided by *Adams Lake*, the facts and circumstances of this matter are unlike what occurred in that case. Other than the initial decision on the Appealing Parties’ appeal, there has not been a decision rendered after it was remitted to the tribunal by the SKQB. In fact, the Tribunal members have not even been able to hold one meeting together. To complicate matters, the only provision for appointing and/or replacing Tribunal members does not contemplate a situation as in the present matter where Tribunal members’ actions, regardless

of which vantage point one looks at the current situation, frustrates the ablity of the Tribunal to do its work.

[56] This is not a comparable situation as in *Adams Lake* where the Tribunal has already deliberated on the appeal that is before them. There has been no decision on the Appealing Parties' appeal. The Court is faced with these exceptional circumstances.

[57] Concerning the Applicants' submissions of a collateral attack on of the Elders resolutions of March 30, 2019 and April 9, 2019, I am not persuaded. The first four orders in T-863-20 should not have been made by only the Minority Tribunal Members, according to my interpretation of the *Election Act*. There are two possible interpretations of section 12(7)(i) of the *Election Act*; This provision would only apply to a decision of an appeal after the Tribunal has heard it or alternatively, it applies to any decision of the Tribunal. Due to its ambiguity, and using the principles of statutory interpretation, including the provision in the *Election Act* for five members to sit on the Tribunal, it is my determination that a majority of Tribunal members is required to make any decision or order.

[58] In further applying the rules of statutory interpretation, a review of the *Election Act* also reveals that the power of the Chair is not so expansive as to dispense with the requirement of the participation of all members of the Tribunal. For instance, the Chair is to receive appeals (12(1)(a)), review the grounds of appeals (12(1)(b)), and confirm receipt of the appeal and provide copies to the Tribunal, candidates, and individuals (12(7)(d)). Additionally, the Chair is to convene a meeting of the Tribunal to review the appeals (12(7)(e)), and set the appeal hearing

date (12(7)(g)). There is no provision in the *Election Act* that confers any power for the Tribunal to make decisions or orders with only two members.

[59] Given the above facts and circumstances, neither the Majority Tribunal Members nor the Minority Tribunal Members have acted in an exemplary manner. On one hand, the Majority Tribunal Members refused to engage in any meetings or actions required of them for the sole reason that they disagreed with the Chair's retention of Mr. Phillips. They could have attended a meeting and used their majority to address that issue and to proceed with processing the appeal of the Appealing Parties within the confines of the *Election Act*. On the other hand, the Minority Tribunal Members could have accommodated their colleagues by having at least one meeting without legal counsel present. The Chair's insistence on having meetings with Mr. Phillips present at all times is puzzling.

[60] On the issue of legal counsel, while the SKQB and SKCA both commented on the drafting issues with the *Election Act*, my additional observation is that if legal counsel is required to assist in the interpretation of the *Election Act*, then perhaps the *Election Act*, as drafted, requires amendments to make it more understandable and easily applied.

[61] My other observation is that decision-making bodies, such as the Tribunal, have a very important function in the self-government and self-determining actions of First Nations governments. The community expects its decision-making bodies to conduct themselves within the spirit and intent of their commmunity's laws. Decision-making bodies have an incredible opportunity to create a body of jurisprudence that can be relied on and applied in the event there

are any further issues in the future. It is unfortunate that the Tribunal was unable to perform a basic task such as meeting or agreeing on basic principles of meetings going forward, and deciding whether Mr. Phillips was necessary for even a preliminary meeting.

[62] As observed by Justice Russell in *Marcel Colomb First Nation v Colomb*, 2016 FC 1270 at paragraph 29:

> [29] Justice Rennie made the principal issue before the Court very forcefully in *Poker v Mushuau Innu First Nation*, 2012 FC 1 [*Poker*]:
>
> > [30] The Court makes no findings in regard to this later allegation. In any event, regardless of which individual or individuals may have cause or contributed to the shortcomings in the process, *the paramount consideration in considering whether to grant or withhold relief is the Band membership's confidence in the electoral process itself. There is an overarching public interest in ensuring that Band confidence in Band elections is merited, as it strengthens Band governance. In consequence, given the importance of the electoral process, relief will not be withheld.*
> >
> > [emphasis added]

[63] Similarly, I agree that CTKFN's membership must have confidence in the electoral process and the appeal process. The proper conduct of an appeal will undoubtedly strengthen the community's governance and it will strengthen the community's faith and confidence that all disputes will be handled professionally.

[64] It is my finding that the Minority Tribunal Members did not have the requisite authority to make the Orders described above. Put another way, the Minority Tribunal Members did not

have jurisdiction to move forward with any decision or Order without the participation of the Majority Tribunal Members. The Majority Tribunal Members were clear in their reasons for not attending and they requested a meeting with only the Tribunal members without legal counsel present. The Minority Tribunal Members simply disregarded the request and continued calling meetings and making Orders, which they had no authority to do in the absence of the Majority Tribunal Members. It follows that, in the absence of any provisions in the *Election Act* for either the Band Council or Elders to replace the Majority Tribunal Members, I find that the Majority Tribunal Members remain Tribunal members.

[65] I make this finding in spite of the guidance of *Adams Lake* and *Boucher*, guided by *MiningWatch*, where the FCA and SCC caution against placing undue weight on legalities. I do not disagree with this guidance, but note that the circumstances in the present situation are truly exceptional. The validity of the appointment of the initial Tribunal has never been disputed. The terms of the *Election Act* are clear that the Tribunal consists of five members and the only reasonable interpretation of the *Election Act* is that decision of the Tribunal must be by way of majority of the members. Permitting only the Minority Tribunal Members to select legal counsel and schedule meetings is not in keeping with the provisions of the *Election Act*, approved by the electors of the CTKFN. If the sense of the community is that the *Election Act* requires amendments then the provisions of section 17 should be applied.

[66] The judicial reviews in both T-863-20 and T-664-20 are granted. The Tribunal Orders dated December 10, 2018, January 11, 2019, February 13, 2019, March 20, 2019, April 22, 2020, April 27, 2020, May 1, 2020, and May 5, 2020 are quashed. The Orders in T-863-20 were not

made with the requisite majority of the five Tribunal members and therefore were made without jurisdiction. It follows that any Order purportedly made thereafter, such as those that are the subject of T-664-20, were also made without jurisdiction and without the participation of the five original and validly appointed Tribunal members.

[67] The Court has acknowledged on several occasions that it prefers to find the least intrusive manner in which to oversee election matters out of respect for the efforts the First Nation and its membership have taken to enact rules governing their election processes (*Shirt v Saddle Lake Cree Nation*, 2017 FC 364; *Loonskin v Tallcree*, 2017 FC 868; *Sweetgrass First Nation v Gollan*, 2006 FC 778). Notwithstanding the Court's reluctance to become too involved, in light of my determination and the remedy granted, and in light of the litigious pattern of the parties, I feel that the Tribunal would benefit from some guidance of the Court in addressing the appeal of the Appealing Parties.

[68] As stated, this is a tremendous opportunity for the Tribunal to instil confidence within the community in how the Tribunal addresses the appeals of the Appealing Parties. The Tribunal would be well-advised to adopt principles of procedural fairness in the hearing of the appeals. There are two key aspects to achieving procedural fairness; The right to be heard and the right to make representations where a decision represents one's interests (*Tsetta v The Band Council of the Yellowknives Dene First Nation* 2014 FC 396 at paragraph 39).

[69] As well, once the Appealing Parties have had their appeal heard, the decision of the Tribunal should be intelligible and have sufficient reasons to illustrate how it engaged with the evidence.

VI. Conclusion

[70] The Applications for judicial review in T-664-20 and T-863-20 are granted. The Decisions of December 10, 2018, January 11, 2019, February 13, 2019, March 20, 2019, April 22, 2020, April 27, 2020, May 1, 2020, and May 5, 2020 are quashed.

[71] While the Court is reluctant to delve too deeply into the workings of First Nations and their appeal tribunals, the circumstances are such that I must expedite matters. As there is less than one year left in the four-year term, I am setting out an expedited time frame in which the Tribunal is to undertake its work. Therefore, the reconfirmed Tribunal will meet within 14 days of this Order. It will then conduct its affairs such that a decision on the appeals of the Appealing parties is rendered by no later than July 16, 2021.

[72] As for costs, Justice Grammond, in *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 summarized the various categories of costs and set out the applicable principles at paragraph 27:

> I would summarize the applicable principles as follows:
>
> - In First Nations governance cases, as in other cases, an award of costs is in the trial judge's discretion, which must be exercised after taking all relevant factors into consideration;

- The imbalance between the financial resources of an applicant and those of the First Nation, or a party whose legal fees are paid by the First Nation, is a relevant factor;
- Taken in isolation, however, the resource imbalance is not a sufficient factor to justify an award of costs on a solicitor-client basis;
- The fact that an application contributed to clarify the interpretation of a First Nation's laws or governance framework may be taken into account when making a costs award; but not every application falls in that category.

[73] The Applicants are successful in the applications. However, considering that this proceeding involves the conduct of the first appeal under the *Election Act*, and taking into consideration the interests of the community in having some guidance on the interpretation of the *Election Act*, I am exercising my discretion not to award costs.

JUDGMENT in T-664-20 and T-863-20

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in T-664-20 and T-863-20 are granted. The Orders are quashed. The Minority Tribunal Members have no jurisdiction to make the Orders without a majority of the Tribunal members approving any decision or Order.
2. The Tribunal originally appointed by the CTKFN Band Council is reconfirmed and maintained for the purposes of re-determination of the appeals of the Appealing Parties.
3. The Tribunal is ordered to meet within 14 days of this Order without legal counsel present, unless the three of five Tribunal members can agree to legal counsel.
4. The Tribunal is also directed to conduct its affairs such that a final decision on the Appealing Parties' appeal is rendered by July 16, 2021.
5. There is no order for costs.
6. I retain jurisdiction over this matter to deal with any issues that may arise from this Judgment and Reasons.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-664-20 AND T-863-20
STYLE OF CAUSE:	CARRY THE KETTLE FIRST NATION, MORRIS PASAP, SHAWN SPENCER, SCOTT EASHAPPIE, BRADY O'WATCH, CONRAD MEDICINE ROPE AND ORLEEN DAWN SAULTEAUX v JAMES KENNEDY, RAQUEL PASAP, AL HUBBS, MATTHEW SPENCER, JACQUELINE MAXIE, DENITA DEEGAN, NELLIE IRON QUILL, TANIS COTE-LARTEY, KURT ADAMS, CONSTANCE GRAY-BELLEGARDE AND MILDRED HOTOMANI
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 14, 2021
JUDGMENT AND REASONS:	FAVEL J.
DATED:	MAY 20, 2021

APPEARANCES:

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