Federal Court Cour fédérale

Date: 20210820

Docket: T-1376-19

Citation: 2021 FC 859

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 20, 2021

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NORMAND PILOT
AND
ROLLAND THIRNISH

Applicants

and

MIKE MCKENZIE
AND
NORMAND AMBROISE
AND
ANTOINE GREGOIRE
AND
KENNY REGIS
AND
DAVE VOLLANT
AND
JONATHAN ST-ONGE
AND
ZACHARIE VOLLANT

Respondents

and

INNU TAKUAIKAN UASHAT MAK MANI-UTENAM

Intervener

JUDGMENT AND REASONS

[1] Prior to trial, Patrick Lamarre was discharged, following which the applicants decided to represent themselves (realizing that they could not be represented by a third party who is not a lawyer in the Federal Court).

[2] At the outset, the Court was reluctant to interfere in the internal affairs of Indigenous governance. “That being said, it is well established by decisions of this Court that while it is important that Bands have autonomous processes for the election of governments, minimum standards of procedural fairness or natural justice are nonetheless required: see, for example, *Sparvier v. Cowessess Indian Band No. 73* (1993), 63 F.T.R. 242, at 47” (*Alook v Bigstone Cree First Nation (Second Election Appeal Review Board),* 2007 FC 853 at para 26 [*Alook*]).

[3] This application for judicial review relates solely to a decision rendered by the Appeal Board on July 25, 2019, with respect to applications challenging the election held on June 26, 2019, in the community of Uashat mak Mani-Utenam.

[4] The challenges dated July 10, 2019, related to irregularities that the applicants claim occurred during the election process.

[5] The Appeal Board heard the challenges on July 22, 2019.

[6] On July 25, 2019, the Board dismissed the challenges on the grounds that the applicants had not met the burden of proof to rebut the presumption of regularity of the elections or of the innocence of the respondents, or the benefit of the doubt afforded to the respondents. Moreover, the report of the electoral officer, summoned *proprio motu* by the Board, contradicted or largely mitigated the challenges. The same was true of the evidence from the respondents who came forward.

[7] The Board was also of the view that how the applicants proceeded demonstrated an extreme lack of seriousness. Consideration was also given to their failure to meet their obligations with regard to serving documents, and to their failure to participate in the hearing and present evidence.

[8] Based on the history of the case as outlined at the hearing before this Court on July 14 and 15, 2021, and more specifically on July 15, 2021, this judicial review focuses solely on adherence to procedural fairness, and thus on the reasonableness of the Board's decision. Apart from the procedural fairness argument, the standard of review applicable by this Court is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 77).

[9] The applicants argue that there was a breach of procedural fairness due to the violation of the *audi alteram partem* rule. They also argue that the decision is unreasonable due to the error in calculating the deadlines for the challenges.

[10] The Court finds that there was a breach of procedural fairness in this case. The choice of procedure, then discretionary—given the absence of an internal process established by the election code, the *Code électoral concernant les élections d'Innu-Takuaikan dans la communauté Uashat mal Mani-Utenam*, or of a process based on traditional or customary practice or evidence—and requiring a degree of deference, must be made fairly (see *Kane v Bd. of Governors of U.B.C.*, [1980] 1 SCR 1105 at paras 29, 32–36). This requires the right to be heard and understood by a decision-maker, the equivalent of the Latin expression *audi alteram partem.*

[11] As the Federal Court of Appeal noted in *Wagg v Canada (Attorney General)*, 2003 FCA 303 at para 19, citing *Asomadu-Acheampong v Canada (Minister of Employment and Immigration)* (1993), 69 FTR 60 at para 8 (FC):

> A right to counsel is no more absolute than the right of a tribunal to determine its own process. In the event that there is a conflict between the two, I believe that for the right to counsel to predominate over the other, regard must be had to surrounding circumstances to determine if in fact an applicant has suffered any prejudice. In my view, the right to counsel is but an adjunct to the doctrine of natural justice and fairness, to the rule of *audi alteram partem*, to the rule of full answer and defence and to similar rules which have long developed to assure that the rights and obligations of any person subject to any kind of inquiry are to be adjudged and determined according to law. Unless there be found a breach of any such rule, resulting in some prejudice to a person, it cannot be said that a refusal to adjourn deprives a tribunal of its jurisdiction or is grounds to quash its decision.

[12] In this case, the Appeal Board denied the request of counsel for one of the applicants to be heard by video conference due to lack of equipment. A second accommodation request to reschedule the hearing to a suitable date, given the above and the short five-day notice of the

hearing date, was also denied without cause and later justified in the decision by the short 14-day limitation period for responding to challenges.

[13] Accordingly, counsel for the applicant in question made written submissions, together with affidavits, and requested that the Board contact him for further submissions or clarifications to ensure that the applicant's rights were fully respected under the applicable legal rules.

[14] However, the Board did not act on this request. Moreover, new evidence was introduced at the hearing without the party concerned being able to review or prepare for it and make any appropriate submissions. This was done without the knowledge of the party concerned, contrary to the Supreme Court of Canada's guidance in *Sitba v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at paras 86, 93.

[15] It amounts to a choice to make no effort to accommodate this represented party, regardless of the explanations given regarding the tight deadlines. This can only mean an actual violation of this party's right to be heard and understood by the Appeal Board in carrying out its mandate.

[16] While there may appear to be weaknesses in the merits of the challenges based on the history of the case, the very crux of the claim before the Court demonstrates a significant breach of procedural fairness that is evident from the course of events. The denial of the right to a fair hearing is clear, such that there can be no fairness or reasonableness in this case. This is sufficient to invalidate the decision as a whole since the challenges are interrelated.

[17] Nonetheless, for the foregoing reasons, the Court allows the application for judicial review, recognizing the potential implications, but hoping that the guidance provided in this process may inform future proceedings in accordance with established customs and traditions (*Alook*, above, at para 26).

[18] Therefore, the Board’s decision is overturned in its entirety, and the application for review is allowed.

JUDGMENT in T-1376-19

THIS COURT ORDERS AND ADJUDGES that the judicial review be allowed on the above grounds, without costs, in light of the public interest and the need for the internal community to regain its balance.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles, Reviser

<u>FEDERAL COURT</u>

<u>SOLICITORS OF RECORD</u>

DOCKET:	T-1376-19
STYLE OF CAUSE:	NORMAND PILOT ET AL v MIKE MCKENZIE ET AL
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	JULY 13 AND 14, 2021
JUDGMENT AND REASONS:	SHORE J.
DATED:	AUGUST 20, 2021

<u>APPEARANCES</u>:

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Robert Gagné Coralie Martineau	FOR THE RESPONDENTS
Denis Cloutier Thomas Dougherty	FOR THE INTERVENER

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