Federal Court Cour fédérale

Date: 20220331

Docket: T-1339-21

Citation: 2022 FC 450

Ottawa, Ontario, March 31, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ALVIN ARCAND

Applicant

and

MUSKEG LAKE CREE NATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Arcand is seeking judicial review a decision of the Muskeg Lake Cree Nation [MLCN] Appeal Tribunal dismissing his appeal of the March 8, 2021 election. He submits that the use of electronic voting was contrary to MLCN's Election Act. The Appeal Tribunal, however, found that electronic voting constitutes a form of "distance balloting" authorized by the Election Act. I am dismissing his application because the Appeal Tribunal's decision is reasonable.

I. Background

[2] MLCN is a First Nation whose elections are governed by the *Act Respecting the Government Elections and Related Regulations of the Muskeg Lake Cree Nation* [the Election Act].

[3] Elections were held on March 8, 2021. Given the COVID-19 pandemic, the Chief Electoral Officer decided to use an electronic voting system, in addition to advance polls, mail-in voting and in-person voting on the day of the election.

[4] The applicant, Mr. Arcand, is a member of MLCN and was an unsuccessful candidate in the election. He filed an appeal of the results of the election. He invoked several grounds, but only one of them is relevant to this application for judicial review: he asserted that the Election Act did not authorize electronic voting. From this perspective, allowing electronic voting constituted an amendment of the Election Act, which should have been approved by MLCN electors in a referendum.

[5] The MLCN Appeal Tribunal dismissed Mr. Arcand's appeal. It considered section 7(e)(viii) of the Election Act, which states that the Chief Electoral Officer shall "preside over all electoral activities with respect to advance polls, distance balloting, and all activities on the day of the election." The Appeal Tribunal concluded that the Chief Electoral Officer

> […] was entitled to exercise a discretionary decision to use the electronic balloting method for public safety purposes without first waiting for a long referendum process to formally amend the

> Election Act. In any event, there is some authority that she can rely on under section 7(e)(vii) [*sic*] of the Act on distance balloting.

[6] Mr. Arcand now seeks judicial review of this decision.

II. Analysis

[7] Mr. Arcand's main argument is that the Appeal Tribunal misinterpreted the provisions of the Election Act regarding the manner of voting. He submits that the Appeal Tribunal failed to consider that its interpretation of paragraph 7(e)(viii) was inconsistent with paragraph 7(k)(ii) of the Election Act, which states that "voting shall take place on the election day […] by secret ballot at the polling station." According to Mr. Arcand, the Appeal Tribunal's failure to mention the latter provision renders its decision unreasonable.

[8] I disagree with Mr. Arcand.

[9] I first note that Mr. Arcand did not raise paragraph 7(k)(ii) before the Appeal Tribunal. Thus, the Appeal Tribunal cannot be faulted for failing to give explicit consideration to interpretive arguments based on that provision. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 122, the Supreme Court of Canada stated that "administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons." This is especially so where the applicant failed to raise an interpretive argument before the decision maker.

[10] In any event, I fail to see how the failure to refer to paragraph 7(k)(ii) renders the decision unreasonable. Paragraph 7(k)(ii) forms part of a subsection of the Election Act dealing with "procedure on the day of the election." Paragraph 7(e)(viii), however, clearly distinguishes between "distance balloting" and "activities on the day of the election." The logical inference is that "distance balloting" is not subject to paragraph 7(k)(ii), in particular the requirement that voting take place at the polling station. Thus, it was reasonable to give the phrase "distance balloting" an interpretation that includes electronic voting.

[11] At the hearing, Mr. Arcand recognized as much, but only with respect to a situation where electronic voting takes place before the day of the election. In contrast, in the present case, electronic voting took place on election day. I fail to see any basis in the text of the Election Act for such a fine distinction. "Distance balloting" is not defined in the Election Act and there is no rigid rule regarding when it must take place.

[12] Given that the Appeal Tribunal's interpretation of paragraph 7(e)(viii) was reasonable, Mr. Arcand's argument that electronic voting could not be allowed unless the Election Act is amended by referendum necessarily fails. This also distinguishes *Apsassin v Blueberry River First Nations*, 2022 FC 17, a case in which the election code provided for only two methods of voting, namely in-person voting and voting by mail.

[13] Mr. Arcand also takes issue with the Appeal Tribunal's characterization of the Chief Electoral Officer's powers as being "quasi-judicial." While this characterization is inaccurate, I fail to see how it affects the Appeal Tribunal's conclusion. The reasons given by election appeal

tribunals should be read generously, not with a view to finding minor defects: *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraph 28, [2018] 4 FCR 467. What the Appeal Tribunal obviously meant is that, within the parameters set by the Election Act, the Chief Electoral Officer has a discretion to decide which forms of "distance balloting" are appropriate.

III. Disposition

[14] As the Appeal Tribunal's decision is reasonable, this application for judicial review will be dismissed.

[15] The parties are in agreement that the successful party will be entitled to costs in the amount of $2500. I find that such an amount is appropriate and just in the circumstances. I will thus order Mr. Arcand to pay costs in that amount.

JUDGMENT in T-1339-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs are awarded to the respondent in the amount of $2500, inclusive of taxes and disbursements.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1339-21
STYLE OF CAUSE:	ALVIN ARCAND v MUSKEG LAKE CREE NATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 31, 2022
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	MARCH 31, 2022

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