Federal Court  Cour fédérale

Date: 20210512

Docket: T-1027-20

Citation: 2021 FC 436

Fredericton, New Brunswick, May 12, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

ROBERTA WITTY
AND BROOKLYN MERCIECA

Applicants

and

MISSISSAUGA FIRST NATION,
THE ATTORNEY GENERAL OF CANADA
AND THE MINISTRY OF INDIGENOUS SERVICES CANADA

Respondents

JUDGMENT AND REASONS

[1] The Applicants, Roberta Witty and Brooklyn Mercieca, seek judicial review of the refusal by the Mississauga First Nation (MFN) of their request for access to MFN Council's records pursuant to the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. The Applicants state that they are "appealing the August 4, 2020 decision not to provide the materials relied on by the Community Respondent."

[2] As the Applicants have not established a right to be provided with the MFN materials pursuant to provisions of *PIPEDA*, this judicial review is dismissed with costs to the Respondent MFN. Prior to the hearing of this judicial review, the Applicants discontinued their application as against the Attorney General of Canada and the Minister of Indigenous Services Canada.

Background

[3] The Applicants, who are mother and daughter, are not members of the Mississauga First Nation and do not have status under the *Indian Act*, R.S.C., 1985, c. I-5.

[4] Ms. Witty is the common law spouse of a member of the Mississauga First Nation and lived on Mississauga First Nation Reserve since 2004.

[5] On March 5, 2020, the MFN Chief, Reg Niganobe, issued a letter to Ms. Witty on behalf of the MFN Chief and Council which states in part:

> We have received information that you have been deemed a community safety risk. The risk being that you are actively involved in the drug culture in the community and are not a band member, furthermore we have been informed that you have shown aggressive behaviour to community members.

[6] The letter states that Ms. Witty must leave Mississauga Land within 30 days. The letter also notes that Council will hear an appeal of the decision on March 25, 2020.

[7] On March 23, 2020, Ms. Witty submitted a written appeal noting that she had been a contributing member of the MFN community. She provided letters of support from MFN members and she requested access to an alternative dispute resolution process.

[8] On April 6, 2020, Chief Reg Niganobe sent a second letter to Ms. Witty on behalf of the MFN Council denying her appeal. The letter states:

> Within the submitted support letters, there is an acknowledgement not only of your own drug use, but of drug distribution within the community. The letters point to a number of individuals engaged in this drug culture, and rather than challenge the Council's original decision, it bolsters it.
>
> We believe that you may be operating under a misapprehension of the allegations against you. There was not a single report or the allegation of a singled person that led to this decision by Council. Rather, it was reached considering a number of different issues, from a number or sources, related to your conduct in the community…It was your own actions that led Council to make this decision.
>
> At this time, an alternative Dispute Resolution mechanism is not available due to a lack of Coordinator and our current shutdown procedure.

[9] Ms. Witty did not seek judicial review of that decision.

[10] On April 27, 2020, Chief Reg Niganobe issued a letter to the Applicant, Ms. Mercieca, on behalf of the MFN Chief and Council. The letter advises Ms. Mercieca that she must leave Mississauga Land and that any re-entry onto Mississauga Land would be considered an act of trespass. The letter states in part:

> We have received information that you may pose a danger to the people and property of our community. These dangers are,

i) You entered our community, but did not self-quarantine for any period of time;

ii) Your serious criminal behavior in relation to drug use, trafficking and weapons;

iii) The potential that you may import illicit drugs into the community; and,

iv) That you are associated with Shawn Ranoo and if you resided here you may allow him and others back into the community, even though his right to attend in the community had been revoked.

[11] Ms. Mercieca did not seek reconsideration or judicial review of that decision.

[12] On June 3, 2020, through legal counsel, the Applicants requested access to MFN Council's records and communications in relation to the above decisions. The Respondent refused this request.

[13] On August 3, 2020, the Applicants' legal counsel requested access to the MFN Council's records and communications pursuant to the provisions of *PIPEDA* on the grounds "…the band was engaging in a commercial activity in directing non-band council members to enforce a band council resolution (BCR) that is non-existent at this point. Namely, the commercial activity is linked to the sharing of information in which the band council receives funding for and subsequently, directing non-ban members to enforce a non-existent BCR".

Decision Under Review

[14] On August 4, 2020, legal counsel for the MFN responded stating that the provisions of *PIPEDA* did not apply to the Applicants as they were not employees of MFN and because any personal information MFN had about the Applicants was not gathered as part of a commercial enterprise. The response states in part "while we understand that PIPEDA does apply to the First Nation in relation to personal information gathered about employees, or as part of a commercial enterprise, it does not apply to your clients. They were not employees, and any personal information the First Nation has about your clients was not gathered as part of a commercial enterprise."

[15] This is the decision under review.

Issues

[16] The narrow issue for consideration on this judicial review is the refusal of the Applicants' *PIPEDA* request. In both written and oral submissions, the Applicants raise various issues and make arguments beyond the *PIPEDA* request. In fact, the majority of their submissions relate to the Respondent's decisions to revoke their access to MFN Lands and the information relied upon by MFN in support of those decisions. However, this judicial review is not a challenge to the removal decisions. The only issue before the Court is the MFN's August 4, 2020 decision not to disclose documents as requested in the Applicant's *PIPEDA* request.

[17] On the matters properly before the Court, I would state the issues for determination as follows:

a) Was the refusal to disclose documents under *PIPEDA* reasonable?

b) Has there been a breach of procedural fairness?

Standard of Review

[18] The decision of the MFN to deny access to documents is reviewed on the reasonableness standard by which the Court considers if the decision "… is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99).

[19] Any procedural fairness issues are considered on the correctness standard (*Hall v Kwikwetlem First Nation*, 2020 FC 994 at paragraph 37).

Analysis

Preliminary Objections Raised By MFN

[20] As a preliminary matter, the MFN argues that there is no decision of the MFN Council under review. Therefore, the MFN argues that the Court does not have jurisdiction to consider the Applicants' judicial review application. The MFN argues that the Applicants are in essence, attempting to gain access to documents, without establishing any legal entitlement to those documents. In any event, the MFN argues that because they filed a certified tribunal record (CTR) in response to this application, the Applicants' request for documents has been fully satisfied.

[21] I agree with the Respondent that the Applicants' request for documents pursuant to *PIPEDA* appears to be a disguised attack on the MFN decisions removing the Applicants from the MFN. The Applicants did not seek judicial review of the removal decisions, therefore they cannot launch a collateral attack of those decisions in the context of this judicial review.

[22] The Supreme Court in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at paragraph 60, citing *Wilson v The Queen,*1983 CanLII 35 (SCC), [1983] 2 SCR 594, at p. 599, described the doctrine of collateral attack as "an attack made in proceedings other than those whose specific object is the reversal, variation or nullification of the order or judgment." Moreover, Justice LeBlanc noted in *Farhadi v Canada (Citizenship and Immigration)*, 2014 FC 926 at 31 that "the doctrine of collateral attack is intended to prevent a party from circumventing the effect of a decision rendered against it [citation omitted]."

[23] During oral submissions, the Applicants' legal counsel advised that the Applicants did not seek judicial review of the MFN removal decisions because they believed that they first required the information behind the decisions before they could seek judicial review of them. Based upon this position, it is clear that the *PIPEDA* request and the judicial review of the refusal is in fact a collateral attack on the MFN removal decisions. The jurisprudence is clear that this is improper on a judicial review.

[24] In any event, I will proceed on the assumption that the Applicants can seek judicial review of the *PIPEDA* refusal.

Was the refusal to disclosure documents under PIPEDA reasonable?

[25] In their *PIPEDA* request, the Applicants assert that "the band was engaging in a commercial activity in directing non-band council members to enforce the band council resolution (BCR) that is non-existent at this point" and therefore they were entitled to the relevant documents.

[26] Section 4 (1) of *PIPEDA* states:

4 (1) This Part applies to every organization in respect of personal information that	**4 (1)** La présente partie s'applique à toute organisation à l'égard des renseignements personnels :
(a) the organization collects, uses or discloses in the course of commercial activities; or	**a)** soit qu'elle recueille, utilise ou communique dans le cadre d'activités commerciales;
(b) is about an employee of, or an applicant for employment with, the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.	**b)** soit qui concernent un de ses employés ou l'individu qui postule pour le devenir et qu'elle recueille, utilise ou communique dans le cadre d'une entreprise fédérale.

[27] As noted by the Supreme Court in *Royal Bank of Canada v Trang*, 2016 SCC 50 at paragraph 22:

> *PIPEDA* is a federal statute that establishes rules governing the collection, use and disclosure of personal information by organizations in the course of commercial activities (s.4(1)(a)).

[28] There is no suggestion that the Applicants were employees of MFN, therefore "commercial activities" is the only potential basis for the Applicants to make a request for personal information documents. In my view, the decision of the MFN to remove the Applicants

from MFN Land is not a "commercial activity" within the meaning of the Act. The Applicants have not referenced any authority or case law to support their position that the removal decisions of MFN could be considered a commercial activity within the provisions of *PIPEDA*.

[29] The Applicants rely upon cases regarding removal decisions that lacked procedural fairness. However, to the extent that these cases did not involve requests pursuant to *PIPEDA*, these cases are of no assistance to the Applicants.

[30] I therefore conclude that the Applicants have not established a valid ground to obtain documents pursuant to the provisions of *PIPEDA*. Therefore, the refusal decision is reasonable.

Has there been a breach of procedural fairness?

[31] Having not established a valid ground to obtain documents pursuant to the provisions of *PIPEDA*, there is no merit to the Applicants' argument that the MFN breached their procedural fairness rights by not granting them access to MFN records. Again, I would note that the Applicants' procedural fairness arguments are a continuation of their collateral attack on the decisions to revoke their access to MFN Lands.

[32] The Applicants rely on *Sheard v Chippewas of Rama First Nation Band Council*, [1996] F.C.J. No. 659 [*Sheard*] to argue that the refusal is a breach of their procedural rights. In *Sheard* the issue was the removal of the Applicant from a First Nation. However that is not the issue on this judicial review. On this application, Ms. Witty and Ms. Mercieca are not challenging the

decision to have them removed from MFN; they are challenging the refusal of MFN to provide documents as requested under *PIPEDA.*

[33] The Applicants also rely on *Frank v Blood Tribe,* 2018 FC 1016 [*Blood Tribe*] to argue that providing disclosure is a necessary part of procedural fairness. Specifically, the Applicants cite paragraph 88 which states "I find that the duty of procedural fairness owed to the Applicants in this matter also includes the right to have full disclosure of the evidence being put forward by the other side." However, the decision in *Blood Tribe* is in a completely different context and related to a decision of a Land Dispute Resolution Appeal Tribunal.

[34] Overall, the Applicants have not established that *PIPEDA* applies to them, nor that they are entitled to documents under *PIPEDA.* Accordingly, there is no duty of procedural fairness owed to the Applicants in relation to the MFN's decision not to disclose documents to the Applicants.

[35] In any event, the MFN has filed a CTR on this judicial review and the Applicants have not provided any evidence to suggest that the CTR is incomplete. On the contrary, Applicants' counsel asserts that if the only documents in the possession of the MFN are those disclosed in the CTR, then that is proof that the MFN acted without evidence in its decision to have the Applicants removed from MFN. However, in respect to this judicial review, that is not an issue before the Court.

[36] Finally, the Applicants make broad *Charter* arguments that they were deprived of the right to have legal counsel and their liberty rights were impaired by the MFN removal decision. As noted, the decision of MFN to remove the Applicants is not before this Court, therefore the related *Charter* arguments will not be considered.

[37] In conclusion, the Applicants have not established any error or breach of procedural fairness on the part of the MFN. This judicial review is dismissed with costs in the all inclusive amount of $500.00 payable by the Applicants to the Respondent MFN.

JUDGMENT IN T-1027-20

THIS COURT'S JUDGMENT is that:

1. This judicial review application is dismissed; and

2. The Applicants shall pay the Respondent Mississauga First Nation costs in the all inclusive sum of $500.00.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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