Federal Court Cour fédérale

Date: 20210504

Docket: T-1376-19

Citation: 2021 FC 396

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 4, 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 a motion to dismiss the application for judicial review filed on August 23, 2019, by Normand Pilot and Rolland Thirnish [applicants] against the decision of the Appeal Board of July 25, 2019, dismissing the applicants' grievance concerning the election of the Band Council of the Takuaikan Uasha mak Mani-Utenam Innu Nation [ITUM] having taken place on June 26, 2019. With this application, the applicants are also seeking to have the election itself reviewed and set aside, by way of *quo warranto*.

[2] In their motion to dismiss the application, respondents Mike McKenzie, Normand Ambroise, Antoine Grégoire, Kenny Régis and Dave Vollant [respondents] argue that the application on the merits is unjustifiably delayed, especially considering that it attacks the legitimacy of a Band Council election.

[3] The nearly two-year delay since the contested election, while it may reasonably appear interminable to the respondents and the community, is not sufficient in itself to justify dismissing the application on the merits.

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

II. Facts

[5] The facts concerning the merits of the application for judicial review and some of the procedural history relating to this matter are set out in my rulings on the motions to appeal the August 31, 2020 order of Prothonotary Steele (*Pilot et al. v McKenzie et al.*, 2021 FC 296) and the January 15, 2021 order of Prothonotary Tabib (*Pilot et al. v McKenzie et al.*, 2021 FC 297). I heard these appeals jointly on March 30, 2021, two days before I heard the present motion on April 1, 2021.

[6] In short, on July 10 and 11, 2019, the applicants petitioned the ITUM's Appeal Board to contest the election held on June 26, 2019, pursuant to the procedures set forth in the community's Electoral Code. On July 22, 2019, the Appeal Board held a hearing to which the applicants had been duly invited. Both applicants declined to attend or testify at the hearing.

[7] On July 25, 2019, the ITUM's Appeal Board issued a detailed written decision rejecting the applicants' challenge, making the following finding, among others:

> [TRANSLATION]
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> 65) As noted in the judgments cited in paragraph 21 of these reasons for decision, election results enjoy a presumption of regularity and, in order to counter this presumption of validity, evidence must be adduced by the applicants, on whom the burden of proof rests. The applicants chose not to testify before the Appeal Board and did not demonstrate on a balance of probabilities that there were irregularities in the electoral process that could have affected the outcome of the election and that would be sufficient to warrant the annulment of the election.
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> 66) <u>the contestation and annulment of an election have serious consequences for the community as well as for the elected candidates, and the process of challenging an election must be undertaken seriously and with respect for the presumption of innocence of the persons concerned</u>.

> 67) the Appeal Board is of the opinion that the applicants demonstrated an enormous lack of seriousness in their approach.
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> [Emphasis added.]

[8] On August 23, 2019, the applicants commenced the present application for judicial review. An initial attempt on September 29, 2019, by the respondents to have the application dismissed failed, but not without contextual observations by Prothonotary Alexandra Steele, who took this opportunity to note that the Court may grant appropriate relief if the proceedings prove vexatious in the course of the proceeding:

> [TRANSLATION]
> Notwithstanding the strong plea made by counsel for the respondents at the hearing to demonstrate the full range of deficiencies in the application for judicial review to justify striking it out at the preliminary stage, I find that none of these arguments constitute a "show stopper" or "knockout punch" warranting the immediate striking out of the application for judicial review. The lack of evidence before the Appeal Board, the lack of respect for authority and process before the Appeal Board, the use of the proceedings for purposes other than those for which they are intended, the potential irregularity under Rule 304, and the explosion of costs and delays do not affect the ability of this Court to hear the application. This is not to say, however, that these arguments have no merit. Rather, these arguments fall within the ambit of the challenges that the respondents might raise at a hearing on the merits of the application for judicial review.
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> It is not the role of this Court in the context of a motion to strike to assess the likelihood of success of the application on the merits, when the record has yet to be perfected. Rather, it will be for the trial judge to determine whether the record as constituted by both parties allows him or her to grant one or more of the conclusions sought in the notice of application.
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> In addition, if it is found that judicial review of the Appeal Board's decision has been improperly sought or that the proceedings are otherwise vexatious, the Court may also order appropriate relief in such circumstances.
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> [Emphasis added.]

[9] On November 21, 2019, the applicants served exhibits and 10 affidavits relating to the conduct of the election process. In contrast, the respondents filed a motion to strike these affidavits on December 10, 2019, on the grounds that they had not been filed before the Appeal Board and constituted inadmissible new evidence.

[10] Since then: (i) the other respondent, Jonathan St-Onge, filed pleadings seeking injunctive relief—supporting the applicants' action and attacking the legality of ITUM's decisions; (ii) a hearing was held on the merits of the 10 affidavits; (iii) the change of counsel for the applicants caused delays and necessitated a change of case management judges due to a perceived conflict with the new counsel; (iv) this Court's decision regarding the striking out of 9 of the 10 affidavits in support of the applicants' application was delivered; (vi) the contested motion to intervene was filed by the intervener; (vii) the contested motion for an Okanagan order for costs was filed by the applicants; (viii) hearings on both motions were held following scheduling orders by this Court; (ix) appeals were heard on the decisions to strike out 9 of the 10 affidavits and to refuse to issue an Okanagan order; (x) countless case management conferences have been required to encourage the applicants to move their cases forward; (xi) the applicants have never produced a clear and precise road map as to how their applications will proceed, and there have been repeated requests for additional time to amend and complete their motion records; (xii) there have been a series of orders extending the time limits for filing pleadings; and (xiii) all of this transpired during a period, beginning in March 2020, in which our country has had to deal with the destabilizing changes brought about by a global pandemic.

III. Relevant law

[11] The respondents rely primarily on section 167 of the *Federal Courts Rules*, SOR/98-106 [FCR], to have the application dismissed. This provision provides as follows:

Dismissal for delay	**Rejet pour cause de retard**
167 The Court may, at any time, on the motion of a party who is not in default of any requirement of these Rules, dismiss a proceeding or impose other sanctions on the ground that there has been undue delay by a plaintiff, applicant or appellant in prosecuting the proceeding.	167 La Cour peut, sur requête d’une partie qui n’est pas en défaut aux termes des présentes règles, rejeter l’instance ou imposer toute autre sanction au motif que la poursuite de l’instance par le demandeur ou l’appelant accuse un retard injustifié.

[12] In *Ruggles v Fording Coal Limited*, 1998 CanLII 8262 (FC) [*Ruggles*], Justice Gibson relied on *Nichols v Canada et al*. (1990), 36 FTR 77 [*Nichols*], to formulate the “classic test” for undue delay under this provision:

> The classic test to be applied in these matters is threefold: first, whether there has been inordinate delay; secondly, is the delay inexcusable; and thirdly, whether the defendants are likely to be seriously prejudiced by the delay?

[13] This test was endorsed by the Federal Court of Appeal in *Canada v Aqua-Gem Investments Ltd.* 1993 CanLII 2939 (FCA), [1993] 2 FC 425.

[14] Although there is no fixed limit on the amount of time that has elapsed since the commencement of the proceeding for the purpose of determining undue delay, the respondents have not been able to cite for me (and I have not been able to find) any decision that dismissed

an application on the basis of undue delay when less than two years has elapsed since the application was filed, as in this case.

[15] In fact, the case law teaches that this Court is generally reluctant to dismiss an application on the basis of a delay in proceeding on the merits.

[16] In *Morand v Bank of Nova Scotia (Scotiabank)*, 2017 FC 85 [*Morand*], for example, the application was filed in April 2012 and, after it was decided that the matter would proceed as a special management proceeding in November 2012, nothing further happened in the proceeding until December 9, 2014. The hearing on the merits finally took place in 2016. In a judgment that also decided the merits of the case, Justice Heneghan used her discretion to refuse to grant the respondent's motion to dismiss based on section 167 FCR as it would have been "unfair and inequitable" to do so (*Morand* at paras 109, 110 and 122).

[17] In the *Ruggles* case, the action was commenced in September 1995, and the defendant did not hear from the plaintiff from November 1995 until July 1997, when a notice of intention to proceed was finally given. Under the "classic test", however, the motion to dismiss under section 167 FCR was not granted as Justice Gibson could not find undue delay or prejudice to the defendant if the proceeding were to continue. Justice Gibson nevertheless ordered that the matter be continued as a special management proceeding pursuant to section 384 FCR.

[18] Similarly, in the *Nichols* case, the action was commenced on June 22, 1979, and no concrete steps were taken in the proceedings until the action was dismissed more than a decade later. According to Justice Dubé, the issue in that case was whether it was still possible to have a

fair trial after such a long delay. Applying the classic test, Justice Dubé dismissed the action: "In the case at bar, the ten year delay is clearly inordinate. As to the delay being inexcusable, counsel himself admits that he lost track of the file 'through his own responsibility'".

[19] Although it does not form the core of their argument, the respondents also rely on section 168 of the FCR, which provides as follows:

Dismissal where continuation impossible	**Annulation ou rejet par la Cour**
168 Where following an order of the Court it is not possible to continue a proceeding, the Court may dismiss the proceeding.	168 Lorsque la continuation d'une instance est irrémédiablement compromise par suite d'une ordonnance de la Cour, celle-ci peut rejeter l'instance.

[20] The respondents argue that the continuation of the proceeding is in jeopardy because, in their view, it is unrealistic to expect a judgment on the merits before the next election. I am not satisfied that this is the correct interpretation of section 168 FCR, but it does not change the outcome of the present case since, in any event, this argument cannot be accepted.

IV. <u>Issue</u>

[21] In view of the foregoing, the issue to be decided is whether the application is unjustifiably delayed or whether it is now impossible to proceed on the merits of the case.

<u>Discussion</u>

[22] Before discussing the merits of the present motion, it is worth examining the particular context in which the underlying application is made.

[23] The ITUM Electoral Code provides for very short deadlines for election disputes. An application to contest must be made within 14 days of the election (article 7.3 of the Electoral Code), the candidate whose election is contested has 7 days to respond to the allegations (article 7.5 of the Electoral Code), and the Appeal Board must deliver its decision within 14 days of receiving the challenge (article 7.6 of the Electoral Code).

[24] Subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7 [Act], provides that an application for judicial review must be made within 30 days of receipt of the decision being contested, in this case the decision of the Appeal Board or the election itself. Subsection 18.4(1) of the Act requires that all applications for judicial review be heard and determined "without delay and in a summary way".

[25] The latter requirement is reiterated in the *Aboriginal Law Practice Guidelines*: "Subject to possible delay in proceeding to allow for settlement discussions, it is then meant to be heard and determined "without delay and in a summary way"—meaning that it is to proceed quickly to the hearing".

[26] This is not a private dispute before the Court. It is an application for judicial review that casts doubt not only on the legality of the decision of the Appeal Board, an institution created by the ITUM Electoral Code, but also on the election itself, which was also conducted under the Electoral Code. While the Federal Court has jurisdiction to hear such disputes, it must be

mindful of its special role (see for example *Potts v Alexis Nakota Sioux Nation*, 2019 FC 1121 at paras 38–41; *Pastion v Dene Tha' First Nation*, 2018 FC 648).

[27] Since the commencement of this litigation, the community representatives who, until proven otherwise, have been duly and legally elected have been subjected not only to the costs and time associated with this litigation, but also, more importantly, to allegations by the applicants that undermine their position as decision-makers and representatives of the community.

[28] As ITUM's intervention demonstrates, far from having an effect limited to the respondents, the present proceedings and the allegations on which they are based also have a detrimental effect on the community itself. As the Appeal Board noted in its decision: [TRANSLATION] "contesting and annulling an election comes with serious consequences for the community as well as for the elected candidates, and the process of contesting an election must be done seriously and with respect for the presumption of innocence of the persons concerned".

[29] Without revisiting the entire procedural history, which has already been set out in detail above, including the numerous breaches of the time limits prescribed by the FCR and the Court's orders, I must make it clear that I understand the respondents' contention that the applicants appear to have no interest in having these judicial review proceedings move forward on the merits.

[30] The applicants' lack of seriousness was noted from the outset by the Appeal Board. It appears from the impugned decision that the Appeal Board had duly summoned Mr. Thirnish to

a hearing which took place on July 22, 2019, at 1:00 p.m., to allow him to make oral submissions, among other things. Mr. Thirnish arrived at the hearing late, at approximately 1:30 p.m., submitted additional documents relating to his challenge, and although the Appeal Board suggested that he testify under oath, Mr. Thirnish refused and immediately left the room. Mr. Pilot simply decided not to attend the hearing to which he had been duly summoned. His counsel was also not present. For these and other reasons, the Appeal Board found that [TRANSLATION] “the applicants demonstrated an enormous lack of seriousness in their approach”.

[31] Then, almost three months after filing their appeal, the applicants filed 10 affidavits, most of which were clearly inadmissible because they contested the election itself rather than the decision of the Appeal Board and had not been presented to the Appeal Board in a timely manner. Prothonotary Steele, in part because of the serious procedural issues affecting the portion of the notice of application that dealt with the challenge to the election itself, struck 9 of the 10 affidavits by order dated August 31, 2020.

[32] Although the same procedural issues were reiterated by Prothonotary Tabib in her October 30, 2020 order and she invited the applicants to address those issues [TRANSLATION] “without delay”, the applicants persisted in appealing the August 31, 2020 order without any serious effort to correct the procedural deficiencies vitiating their notice of application, which had resulted in the striking of the affidavits. The motion to appeal was therefore doomed to fail, and I dismissed it accordingly.

[33] It is important to note that the applicants have never availed themselves of their right to obtain the Certified Tribunal Record pursuant to the procedure established by section 317 FCR.

Prothonotary Tabib pointed out this deficiency in the applicants' record in her October 30, 2020 order, but again, to date, no request under section 317 FCR appears to have been made by the applicants. Yet, it seems to me that any applicant concerned with having their application for judicial review heard on the merits should have at least consulted the documents that form the basis of the impugned decision. However, this does not seem to have been a priority for the applicants. Instead, it took the initiative of the intervener to have the Certified Tribunal Record filed with the Court.

[34] The respondents' argument based on an abuse of process by the applicants appears plausible. In fact, this abuse of process has already been found by Prothonotary Tabib in her October 30, 2020 order on ITUM's motion to intervene:

> [TRANSLATION]
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> At the hearing, the applicants raised the possibility of amending their application to include arguments about the lack of impartiality inherent in the manner in which the Appeal Board was constituted. The addition of new grounds of review, more than a year after the proceedings began, may appear to be just an *in extremis* effort to legitimize a flawed procedure. The Court refuses to sanction such an abuse of process by seizing upon this suggestion at this stage.
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> [Emphasis added.]

[35] Moreover, the Okanagan application filed on October 14, 2020, which had to be postponed more than once at the request of the applicants, also raises questions about their true intentions. If they were truly impecunious, under the first stage of the *Okanagan* test, one wonders why this motion was not filed earlier. In any event, in her January 15, 2021 order

dismissing that motion, Prothonotary Tabib, clearly exasperated by the applicants' behaviour, stated:

> [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.

[36] The applicants also filed a motion to appeal Prothonotary Tabib's order. That motion, like the motion on Prothonotary Steele's August 31, 2021 order, was doomed to failure. The applicants merely reargued their position and maintained the patently unfounded conclusions they sought against the Attorney General of Canada.

[37] At the hearing of the present motion, counsel for the applicants repeatedly pointed out that his clients had the right to appeal the prothonotaries' decisions. There is no doubt about that, and I agree. I am simply assessing all of the facts of the case, including the procedural history. That the applicants appealed decisions simply because they had the right to do so is another indication that the applicants are not before this Court for the right reasons.

[38] However, while I understand the respondents' frustration with the conduct of this proceeding, they brought their motion under section 167 of the FCR and argued that the applicants were unjustifiably late. They also argued that the application could not be allowed to

stand and should be dismissed under section 168 FCR. It is therefore under these provisions that I must make this order.

[39] Thus, while there is no doubt that the applicants' behaviour has been so sloppy as to amount to an abuse of process, that is not the issue in this case. Rather, I must determine whether there is undue delay in the case, that is, whether (1) the delay is excessive, (2) it is inexcusable, and (3) the respondents are likely to suffer serious prejudice as a result of the delay.

[40] In my view, it is at the stage of the first prong of the test that the respondents cannot meet their burden of proof. I am simply unable to find undue delay in this case.

[41] Except for the period from January to July 2020, which appears to be attributable to the applicants' lack of cooperation with their former counsel, the respondents have not been able to draw to my attention any period of inactivity in the present proceeding. If the proceeding is ongoing, it does not necessarily mean that it is progressing, but it may be an indication. Presumably, the applicants' multiple motions, while appearing mostly frivolous to the Court, appeared to have merit to the applicants. There is no doubt that the applicants' multiple motions delayed the hearing on the merits, but I do not have sufficient evidence before me to conclude, on a balance of probabilities, and despite the numerous indicia noted above, that the applicants were acting in bad faith and that their multiple motions were undertaken for the sole purpose of causing this delay.

[42] Thus, the delay caused by the applicants' conduct was not excessive. Having made no finding of bad faith on their part, I cannot consider the period of one year and eight months since

the decision of the Appeal Board to be an undue delay. Any application for judicial review takes time; a change of counsel and good faith motions are to be expected during the course of the proceedings and may delay the hearing. The conduct of the applicants, or even their abuse of the Court's process, is not a relevant factor for the purposes of section 167 FCR.

[43] Nor was there a complete lack of progress in this case (*Friedrich v Canada*, 2001 FCA 325). Among other things, applicants must be given an opportunity to remedy any defect before their action is dismissed (*Interbox Promotion Corp. v 9073 --0433 Québec Inc.* 2004 FC 144).

[44] With respect to section 168 FCR, even if we interpret it as the respondents wish, I am not satisfied that it is now impossible for a decision to be rendered on the merits before the next election. The respondents' concerns, while understandable, are not yet confirmed. It is not yet clear that the new election will take place before this case is heard. It has not yet become moot, but it will soon if the process does not move forward quickly (see *Bill v Pelican Lake First Nation (Appeal Board)*, 2006 FCA 397).

[45] The applicants pledged before me that they will diligently pursue the underlying application, and implored me to find in their favour, as their only true intent is to advance the interests of the community. The Court may have found a lack of diligence on the part of the applicants and even conduct that often borders on abuse, but I am not prepared to find undue delay, all things considered.

[46] However, I must be clear that if the applicants fail to honour their commitment to due diligence, avoiding ill-conceived and unsuccessful procedures that only consume time and resources, they expose themselves to a possible motion to strike for abuse of process.

[47] At this time, I must dismiss this motion.

[48] With respect to costs, I am not inclined to award them to either party. Although the applicants were successful in having this motion dismissed, their conduct was the cause of frustration on the part of the respondents, so there was nothing unreasonable in their filing of the present motion.

V. Conclusion

[49] I therefore dismiss the respondents' motion, without costs.

ORDER in T-1376-19

THIS COURT'S ORDER is as follows:

1. The motion is dismissed.

2. Without costs.

"Peter G. Pamel"

Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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:	APRIL 1, 2021
ORDER AND REASONS:	PAMEL J.
DATED:	MAY 4, 2021

APPEARANCES:

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Denis Cloutier Thomas Dougherty	FOR THE INTERVENER
Éric Gingras	FOR THE THIRD PARTY

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