

Federal Court



Cour fédérale

Date: 20210707

Docket: T-644-20

Citation: 2021 FC 718

St. John's, Newfoundland and Labrador, July 7, 2021

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**CHIEF AARON SOCK AND
COUNCILLORS, BARRY AUGUSTINE,
JONATHAN AUGUSTINE, STEPHEN
AUGUSTINE, CAMERON FRANCIS,
JOSEPH FRANCIS, LANA FRANCIS,
ROBERT FRANCIS, DEAN LEVI, MARY
LEVI, JOSEPH MILLIEA, JONATHAN
SOCK, AND PETER SOCK ON BEHALF OF
THEMSELVES AND THE MEMBERS OF
THE ELSIPOGTOG FIRST NATION**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

[1] By a Notice of Motion dated June 18, 2021, filed pursuant to Rule 369 of the *Federal Courts Rules*, S.O.R./98-106 (the “Rules”), the Attorney General of Canada (the “Respondent”)

seeks the entry of judgment in an Application for Judicial Review filed in respect of a decision made by the Indigenous Services Canada First Nation Child and Family Services (FNCFS) Interim Board of Appeal (the “Interim Board of Appeal”), on February 20, 2020.

[2] In his Notice of Motion, the Respondent requests an Order in the following terms:

1. Allowing the application for judicial review of the February 20, 2020 decision of the Indigenous Services Canada First Nation Child and Family Services (FNCFS) Interim Board of Appeal on the basis there was an incomplete record before the decision maker constituting a prima facie breach of procedural fairness;
2. Setting aside the February 20, 2020 decision of the Indigenous Services Canada First Nation Child and Family Services (FNCFS) Interim Board of Appeal;
3. Referring the Applicant’s appeal back for reconsideration by the newly constituted FNCFS Interim Board of Appeal within 20 days;
4. Directing the Respondent to advise the Applicant of the date of the reconsideration hearing by FNCFS Interim Appeal Board;
5. Directing the Applicants to provide the Respondent with any new evidence 5 days prior to said hearing; and
6. The Respondent consents to costs in the within judicial review in accordance with Tariff B of the *Federal Courts Rules*, to the date of filing this motion.

[3] In support of his Notice of Motion, the Respondent filed the affidavit of Dany Basque and Written Representations.

[4] Chief Aaron Sock and Councillors, Barry Augustine, Jonathan Augustine, Stephen Augustine, Cameron Francis, Joseph Francis, Lana Francis, Robert Francis, Dean Levi, Mary

Levi, Joseph Milliea, Jonathan Sock, and Peter Sock on behalf of themselves and the Members of the Elsipogtog First Nation are the Applicants (the “Applicants”) in this proceeding. In the Notice of Application for Judicial Review that was filed on June 16, 2020, the Applicants seek the following relief:

- a) an order in the nature of certiorari;
- b) a declaration that the Minister has a duty to provide procedural fairness in making such a decision, which includes the opportunity to be heard and, ensuring the provision of an unbiased review panel;
- c) a declaration that the Minister failed to take into consideration that the function of the Elsipogtog Child and Family Services Agency was to provide welfare services to the Elsipogtog Band Members, a provincially regulated activity, in a manner consistent with provincial standards and provincial legislation;
- d) a declaration that the Minister’s decision as conveyed to the Applicants failed to demonstrate justification, transparency and intelligibility;
- e) such further and other relief as this Honourable Court may deem mete and just in the circumstances.

[5] The Respondent, in written submissions, acknowledges that the decision that is the subject of the application for judicial review was made in the absence of a complete record, thereby giving rise to a breach of procedural fairness. He argues that early disposition of this proceeding by the Court will serve the interests of justice and judicial economy, as directed by Rule 3 of the Rules.

[6] The Applicants acknowledge the Respondent’s concession that the decision under review was made in breach of procedural fairness, but they oppose the motion for judgment on the

grounds that the relief proposed by the Respondent does not address their request for certain declarations.

[7] In reply to the Applicant's submissions, the Respondent argues that the declarations sought by the Applicants would have no practical benefit and in any event, would require a finding of fact that is not the role of the Court upon judicial review, but a matter within the mandate of the decision maker.

[8] I agree with the submissions of the Respondent in this matter.

[9] First, I refer to Rule 3 of the Rules which provides as follows:

General principle

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

Principe général

3 Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[10] I agree with the Respondent that the proposed disposition of the Applicants' Application for Judicial Review meets the aims of Rule 3, that is the "just, most expeditious and least expensive determination of every proceeding on its merits".

[11] Second, I observe that pursuant to subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, a remedy upon an Application for Judicial Review lies wholly within the discretion of the Court:

Powers of Federal Court

Pouvoirs de la Cour fédérale

18.1 (3) On an application for judicial review, the Federal Court may

18.1 (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[12] It is reasonable to expect that a reviewing Court would set aside the decision of the Interim Board of Appeal if satisfied that the record shows a breach of procedural fairness. It is equally reasonable to anticipate that a reviewing Court would direct a redetermination of the matter in issue before a different decision maker.

[13] On the basis of the material set out by the Respondent, it appears that a new Appeal Board has been constituted.

[14] Upon considering the affidavit filed by the Respondent and the parties' written submissions, I am satisfied that the Respondent's motion should be granted. It is clear that the record before the decision maker, that is the Interim Board of Appeal, was incomplete. I agree that this deficiency gives rise to a breach of procedural fairness and the decision should be set aside.

[15] It is in the interests of justice and judicial economy to grant the Respondent's motion.

[16] An Order will issue accordingly, with costs to the Applicants in accordance with Tariff B of the Rules, to the date of the filing of the Respondent's Motion.

ORDER in T-644-20

THIS COURT ORDERS that the motion is granted upon the following terms:

1. The Application for Judicial Review of the February 20, 2020 decision of the Indigenous Services Canada First Nation Child and Family Services (FNCFS) Interim Board of Appeal is allowed on the basis that there was an incomplete record before the decision maker constitution a *prima facie* breach of procedural fairness;
2. The decision dated February 20, 2020 of the FNCFS Interim Board of Appeal is set aside;
3. The Applicants' appeal is referred back for reconsideration by the newly constituted FNCFS Interim Board of Appeal within 20 days of this Order;
4. The Respondent is directed to advise the Applicants of the date of the reconsideration hearing by the FNCFS Interim Appeal Board;
5. The Applicants are directed to provide the Respondent with any new evidence 5 days prior to the said hearing;
6. The Respondent will pay costs in the within application for judicial review in accordance with Tariff B of the *Federal Courts Rules*, S.O.R./98-106, to the date of the filing of the within Notice of Motion.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-644-20

STYLE OF CAUSE: CHIEF AARON SOCK AND COUNCILLORS, BARRY AUGUSTINE, JONATHAN AUGUSTINE, STEPHEN AUGUSTINE, CAMERON FRANCIS, JOSEPH FRANCIS, LANA FRANCIS, ROBERT FRANCIS, DEAN LEVI, MARY LEVI, JOSEPH MILLIEA, JONATHAN SOCK, AND PETER SOCK ON BEHALF OF THEMSELVES AND THE MEMBERS OF THE ELSIPOGTOG FIRST NATION v. THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT ST. JOHN'S, NEWFOUNDLAND AND LABRADOR PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS: HENEGHAN J.

DATED: JULY 7, 2021

WRITTEN REPRESENTATIONS BY:

Stewart C. Paul FOR THE APPLICANTS

Kelly A. Peck FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart C. Paul FOR THE APPLICANTS
Barrister & Solicitor
Perth-Andover, New Brunswick

Attorney General of Canada FOR THE RESPONDENT
Halifax, Nova Scotia