Federal Court Cour fédérale

Date: 20211012

Docket: T-1186-20

Citation: 2021 FC 1063

Ottawa, Ontario, October 12, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

CALVIN WAQUAN

Applicant

and

MIKISEW CREE FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Waquan was an unsuccessful candidate in the 2020 election for the Council of the Mikisew Cree First Nation [Mikisew]. The Election Appeal Committee [the Committee] dismissed his appeal of the results of the election. He now seeks judicial review of this decision.

[2] I am dismissing Mr. Waquan's application. Mr. Waquan first alleges that two other candidates, Mr. Kaskamin and Ms. McKenzie, were ineligible because they owed a debt to Mikisew. According to the information provided to the Court, however, Mr. Kaskamin's and Ms.

McKenzie's nomination was accepted only after Mikisew's CFO certified that they did not owe any debt. The Committee dismissed Mr. Waquan's appeal because the two candidates were "approved to run." The Committee also noted that they were unaware of the debt and that it related to an ongoing court case.

[3] I conclude that the Committee reasonably relied on the CFO's certification and did not have to reach its own conclusions as to the existence of a debt. Requiring the CFO's certification is aimed at providing some degree of predictability regarding the existence of the debt and fairness to the candidates. Mr. Waquan has not brought any evidence of impropriety in the process leading to the CFO's certification of Mr. Kaskamin and Ms. McKenzie.

[4] Mr. Waquan also challenges the fact that polling stations were held at locations other than those provided in the Customary Election Regulation. The Committee found that the changes had been in place for a long time and had become customary. In my view, the Committee's decision in this regard is compatible with the manner in which this Court understands the sources of Indigenous law, including custom.

[5] Moreover, Mr. Waquan complains about the manner in which the Committee conducted its hearing. He asserts that he was constantly interrupted and was not able to put forward his arguments to set aside the results of the election. However, based on the evidence submitted by both parties, I conclude that Mr. Waquan was not interrupted and had the opportunity to present his view of the matter to the Committee. There was no breach of procedural fairness.

I. Background

[6] Elections for the Chief and Council of the Mikisew Cree First Nation are held according to the Customary Election Regulation adopted in 1996 [the Regulation]. On July 2, 2020, the Council adopted a resolution setting the election for August 27, 2020, and the polling locations as Fort Chipewyan, Fort McMurray, High Level, Edmonton and Fort Smith.

[7] Mr. Waquan was a member of Council from 2017 to 2020. In 2020, he ran for the position of councillor but was not elected. On August 28, 2020, the day after the election, he brought an appeal of the election results. He alleged that candidates were present during the counting of votes, contrary to section 9.1 of the Regulation, and that the polling stations were not in the locations mentioned in section 8.3, as Fort Smith was substituted for Peace Point and High Level was added.

[8] A hearing of the Election Appeal Committee was convened for September 3, 2020 to consider Mr. Waquan's and other appeals. The day before, Mr. Waquan amended his notice of appeal to allege that two persons elected as councillors, Mr. Kaskamin and Ms. McKenzie, were ineligible, because they owed debts to Mikisew, contrary to section 6.4b) of the Regulation.

[9] The hearing took place on September 3, 2020. There is no recording or transcript of the hearing. The evidence as to the manner in which the proceedings unfolded will be discussed later. The Committee issued its decision the day after, on September 4, 2020. It dismissed Mr.

Waquan's appeal. After reviewing the submissions it received, the Committee summarized its findings as follows:

> On the polling station appeal, the Appeal Committee finds that:
>
> - The BCR [band council resolution] contradicts the requirement in the Election Regulations. However, the BCR clearly states that it is making an exception on the issue of polling stations.
>
> - The BCR was signed by a quorum of Council, including Mr. Waquan.
>
> - A similar BCR is passed every election to set polling stations, signed by Council, and this has taken place for many years (and appears to be customary).
>
> - The purpose of the changes to polling stations is to allow more members to vote in Mikisew elections.
>
> On the other alleged irregularities, the Appeal Committee finds that:
>
> - The allegations of other irregularities, including that Mr. Kaskamin and Ms. McKenzie owed money to the Nation should have been brought up earlier and not the evening before the hearing.
>
> - The appeal concerning Mr. Kaskamin and Ms. McKenzie appears to be about a court case that is ongoing - it is not clear there is a debt. They weren't served the letter and order so they couldn't have known. And in any event, they were approved to run.
>
> - A number of the issues raised are irrelevant to any appeals. Other irregularities have not been made out on the evidence.

[10] Mr. Waquan now seeks judicial review of the decision of the Committee.

II. Analysis

[11] Mr. Waquan challenges both the reasonableness of the substance of the Committee's decision and the process leading to this decision. I will review both aspects in turn.

A. *Reasonableness*

[12] When we are called upon to review decisions made by Indigenous decision-makers, we apply the framework laid out by the Supreme Court of Canada in the seminal case of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Briefly stated, courts must show deference toward administrative decision-makers and must refrain from imposing their own view of what the decision should be. Courts intervene only when the decision is shown to be unreasonable.

[13] This framework takes a particular colour in the Indigenous context. Deference promotes Indigenous self-government by ensuring that decisions relevant to First Nations governance are made, to the extent possible, within the communities: *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraph 23, [2018] 4 FCR 467.

[14] In particular, Indigenous decision-making bodies are well placed to interpret First Nations electoral legislation. Because they are often composed of members of the community, they are better able than courts to understand how written laws have been implemented and how they are related to customary practices or Indigenous governance principles. In *Porter v Boucher-Chicago*, 2021 FCA 102 at paragraph 27, Justice Yves de Montigny of the Federal Court of Appeal summarized this idea as follows:

> Deference is particularly apposite when the Federal Court reviews decisions of First Nation election appeal bodies, and even more so when such decisions concern the interpretation of an electoral code. As this Court stated in many cases, the interpretation of an election code must be informed by the customs upon which it is

> based and by the general understanding in the community as to why it may deviate from those customs in some respect […].

[15] The *Vavilov* framework also requires courts to be generous when reading reasons provided by administrative decision-makers: *Vavilov*, at paragraphs 91–94. To understand the logic of the decision, a reviewing court may have to take into account the evidence before the decision-maker, the arguments made by the parties and the general context.

[16] In this case, section 12.8 of the Regulation requires the Committee to make a decision within three days of the hearing. The obvious aim is the quick resolution of electoral disputes. Therefore, one should not expect the Committee to provide lengthy reasons.

[17] With this in mind, we can now turn to Mr. Waquan's challenge to the Committee's decision with respect to the eligibility of Mr. Kaskamin and Ms. McKenzie and the issue of the location of the polling stations. Before this Court, Mr. Waquan no longer challenges the presence of candidates when counting votes.

(1) Eligibility

[18] Mr. Waquan argues that the Committee's decision dismissing his appeal regarding the eligibility of Mr. Kaskamin and Ms. McKenzie is unreasonable. According to him, there was uncontroverted evidence that these two persons owed a debt to Mikisew and were ineligible. Therefore, he asserts that the Committee failed to apply the Regulation.

[19] To understand the issue, it is necessary to explain the origins of the alleged debt. Mikisew sued certain of its members, including Mr. Kaskamin and Ms. McKenzie, for damages in the amount of $150,000 in the Alberta Court of Queen's Bench. I have little evidence as to the grounds for this lawsuit, except for Ms. McKenzie's statement that it is related to her suspension from council, which this Court declared unlawful in *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184. Neither party provided the Committee with the pleadings or any other information in this regard. It appears that the defendants were noted in default and then asked the Court to be relieved of the default. On November 1, 2019, Justice Poelman dismissed their request and condemned the defendants, including Mr. Kaskamin and Ms. McKenzie, to pay $1,500 in costs to Mikisew.

[20] When Mr. Waquan amended his notice of appeal to challenge Mr. Kaskamin's and Ms. McKenzie's eligibility, he provided the Committee with Justice Poelman's order, which deals only with costs, as well as letters and emails from Mikisew's lawyers regarding the lawsuit. These communications include a legal opinion to the effect that Mr. Kaskamin and Ms. McKenzie are ineligible to run for council, as well as a draft letter to be sent by council to the defendants in the lawsuit, to inform them of their ineligibility. One email suggests that the main debt is not liquidated and that more evidence is needed to secure a judgment against the defendants.

[21] Thus, the only evidence of an exigible debt that was put before the Committee was the $1,500 costs order. Mr. Kaskamin's and Ms. McKenzie's position in this regard is that they were never made aware of this costs order before the Committee hearing. They also state that they

never received any communication from the council regarding their ineligibility. Indeed, there is no evidence that the letter drafted by Mikisew's lawyers was ever sent to them.

[22] The Committee's decision was reproduced above. Briefly, it stated that Mr. Waquan should not have raised the eligibility issue on the eve of the hearing; that Mr. Kaskamin and Ms. McKenzie did not know about the costs order or the correspondence between Mikisew and its lawyers; and that, in any event, "they were approved to run."

[23] Mr. Waquan asserts that the Committee's decision cannot be reconciled with the evidence. His challenge, however, is based on his own view of how the rule regarding debts should be interpreted and implemented. According to him, the Committee had a duty to adjudicate the existence of debts that candidates may owe and to disqualify any candidate who has a debt outstanding for more than 90 days. The test would be objective, with the result that the candidate's lack of knowledge of the debt would be irrelevant. Likewise, the Committee could not rely on the electoral officer's decision to accept a candidate's nomination package.

[24] The Committee took a different view. The evidence shows that the rule regarding debts is implemented through a process whereby candidates must obtain confirmation from Mikisew's CFO that they do not owe money to the First Nation. If they owe money, they are given an opportunity to pay off the debt before being nominated. The Committee was obviously referring to this process when it found that Mr. Kaskamin and Ms. McKenzie were "approved to run."

[25] I fail to see anything unreasonable in the Committee's decision. The Committee was entitled to interpret the rule regarding debts in a manner that differs from what Mr. Waquan now urges upon the Court. The Committee is composed of Mikisew elders who must be aware of the manner in which elections are conducted and the rule regarding debts is implemented. It was reasonable for the Committee to rely on a well-known process that informs candidates of any debts they may have, provides them with an opportunity to pay these debts and generates a neutral certification of the outcome. While this process is not spelled out in the Regulation, the Committee was entitled to take notice of its existence and to rely on its outcome. Mr. Waquan has not pointed me to anything in the Regulation that would be incompatible with the Committee's approach.

[26] Mr. Waquan nevertheless argues that the Committee had a duty to determine the existence of a debt and to provide detailed reasons for its conclusion. I disagree. I emphasize again that on judicial review, the Court's role is not to impose its (or the applicant's) preferred interpretation of the Regulation. If the rule regarding debts has always been enforced through the process described above, the Committee's role was to ensure that the process was followed, not to conduct its own inquiry into the existence of a debt.

[27] In support of his argument that the Committee had to make its own findings regarding the existence of a debt, Mr. Waquan relies on *Felix v Sturgeon Lake First Nation*, 2014 FC 911, and *Cowessess First Nation No 73 v Pelletier*, 2017 FC 692. In these cases, decision-makers had disqualified candidates on the basis of costs awards against them. The costs, however, had not yet been assessed. The Court held that these findings were unreasonable, because the decision-

makers failed to turn their minds to the fact that the debt was not yet enforceable. In other words, if the decision-maker embarks upon an inquiry into the existence of a debt, their findings must be reasonable. These cases, however, do not support the proposition that an election appeal committee must itself determine if a candidate owes a debt instead of relying on certification by an official of the First Nation. They are of little assistance to the present case.

[28] Of course, if the CFO approved a candidate in spite of a debt recorded in Mikisew's financial system or on the basis of false statements made by the candidate, the Committee would have had to intervene. The situation would then be similar to that in *Jacko v Cold Lake First Nations*, 2014 FC 1108. However, there is no evidence that something of this nature occurred. Rather, Mr. Kaskamin's affidavit states that the CFO made no mention of any debt related to the costs order. Yet, the CFO informed him of an unrelated debt in the amount of $7,000, which he paid off before his nomination could be accepted. The logical inference is that, for whatever reason, the debt arising out of the costs order had not been recorded in Mikisew's financial system. I have no information as to why this is so and no evidence that the CFO acted improperly. As far as the record shows, the Committee received no evidence in this regard either. In these circumstances, it was reasonable for the Committee to rely on the fact that Mr. Kaskamin and Ms. McKenzie were "approved to run."

[29] Mr. Waquan also takes issue with the Committee's statements to the effect that Mr. Kaskamin and Ms. McKenzie lacked knowledge of the costs order. According to him, the existence of a debt would be an objective matter, to be determined by the Committee, and which does not depend on the debtor's state of mind. Knowledge, however, becomes relevant if we

accept that the rule regarding debts is enforced through certification of the candidates by the CFO. This process ensures fairness towards the candidates by making them aware of their debts towards Mikisew and affording them an opportunity of paying them off. It also provides a measure of certainty and objectivity to the process by requiring the CFO to confirm that a candidate is not in debt. In this context, lack of knowledge is a relevant consideration, because it tends to show that no one acted improperly in the process and, in particular, that the candidates did not make false statements to deceive the CFO. It would be unfair and contrary to the aims of the process to disqualify the candidates for a debt of which they were unaware and that they did not have an opportunity to pay.

[30] In this regard, Mr. Waquan suggests that Mr. Kaskamin's and Ms. McKenzie's statements to the effect that they were not aware of the costs order are not credible. I note, however, that there is no evidence to the contrary and that they were not cross-examined. Their evidence is not inherently implausible. I have no reason to disregard their evidence or to doubt the reasonableness of the Committee's finding that they did not know about the costs order.

[31] Mr. Waquan also impugns the Committee's comment to the effect that it was unclear that there was a debt, because it was in relation to an ongoing lawsuit. In this connection, Mr. Waquan provided the Committee with a copy of the costs order, but his speaking notes make no mention of it. Instead, they repeatedly refer to ongoing litigation that could result in Mr. Kaskamin, Ms. McKenzie and others being liable to Mikisew for up to $150,000. If, before the Committee, Mr. Waquan focused on the ongoing court case and failed to highlight the $1,500 costs order, he cannot, on judicial review, complain that the Committee failed to appreciate that a

small portion of the debt had become enforceable. In any event, as I mentioned above, the Committee found that it could rely on certification by the CFO, which implies that it did not have to determine the existence of the debt itself.

[32] Because I find that the Committee's decision regarding eligibility was reasonable, I need not decide whether it was reasonable for the Committee to state that Mr. Waquan should not have raised this ground of appeal at the last minute.

(2) Location of Polling Stations

[33] Mr. Waquan's second ground for challenging the Committee's decision is the change in the location of the polling stations. He asserts that the Council could not amend by mere resolution the provision of the Regulation that sets the location of the polling stations. To accomplish this, the formal amendment process set forth in section 17 should have been followed. He denies that a contrary custom may have emerged, because the Regulation "covers the field."

[34] The Committee, however, found that the practice of changing the location of the polling stations by resolution of the Council "has taken place for many years (and appears to be customary)." I fail to see anything unreasonable in this finding.

[35] In its decision, the Committee took note of submissions regarding Mikisew's practice with respect to the location of the polling stations. It is uncontroverted that polls were held at Fort Chipewyan, Fort McMurray, High Level, Edmonton and Fort Smith for at least the last four

elections, over a period of two decades, and that no one complained about this until Mr. Waquan's appeal to the Committee.

[36] In *Francis v Mohawk Council of Kanesatake*, 2003 FCT 115 at paragraph 36, [2003] 4 FC 1133 [*Francis*], my colleague Justice Luc Martineau described the test for establishing custom as follows:

> For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a "broad consensus" as to its applicability.

[37] Thus, given the uncontroverted evidence before it, the Committee's finding that the practice "appears to be customary" is in line with this Court's understanding of custom as a source of Indigenous law.

[38] Relying on cases such as *Fort McKay First Nation v Orr*, 2012 FCA 269, and *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732, [2019] 4 FCR 217 [*Whalen*], Mr. Waquan nevertheless asserts that a custom cannot set aside rules found in the Regulation, because the latter "covers the field." Positivistic or written Indigenous law, such as the Regulation, would take precedence over custom, even where the custom arose more recently than the written law.

[39] However, as I explained in *Whalen*, at paragraph 40, this Court's approach is more nuanced:

> First Nations who deliberately choose to reduce their governance principles to writing should not be deprived of the certainty associated with written law merely because that law is not strictly

> adhered to. However, there may be circumstances where a First Nation clearly makes a decision to change its ways without taking the trouble of amending its written law. In such a case, this Court would not do justice if it were to insist on strict adherence to written law.

[40] This is not an invitation to disregard the provisions of election codes or to attempt to change them without following the prescribed amending process. First Nations councils, of course, are subject to the rule of law, which includes Indigenous law. Sources of Indigenous law encompass both custom and written (or positivistic) law. The adoption of an election code comprising an amending formula does not foreclose the subsequent emergence of custom. Nevertheless, proving custom in these circumstances is a heavy burden: see, for example, *Bacon St-Onge v Conseil des Innus de Pessamit*, 2017 FC 1179 at paragraph 72, aff'd 2019 FCA 13. Where, however, a practice at variance with written law has been followed for several election cycles, it cannot simply be ignored: see, for example, *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 at paragraph 52.

[41] In this regard, the case of *Angus v Chipewyan Prairie First Nation*, 2008 FC 932, invoked by Mr. Waquan, can be easily distinguished. In that case, a newly elected council attempted to remove the electoral officer, which had the effect of thwarting the appeal process in which their own election was being challenged. My colleague Justice James Russell found that there was nothing in the election code empowering the council to remove the electoral officer. There was no evidence of any longstanding practice to this effect. Thus, that case is of no assistance to Mr. Waquan.

[42] Given the above, I need not address Mikisew's argument that Mr. Waquan is attempting to challenge indirectly the Council's resolution setting the locations of the polling stations, contrary to rule 302 of the *Federal Courts Rules*, SOR/98-106.

B. *Procedural Fairness*

[43] Lastly, Mr. Waquan challenges the manner in which the Committee conducted the hearing. He asserts that, while he was making his submissions to the Committee, other persons constantly interrupted him, thus preventing him from making his case fully. He also complains about the presence of many other persons in the hearing room, who had no direct interest in his appeal.

[44] No one disputes that procedural fairness entitled Mr. Waquan to a genuine opportunity to make his submissions to the Committee. The issue pertains to what really happened at the hearing before the Committee.

[45] Mr. Waquan's account of the events is contradicted by affidavits sworn by Mr. Powder, who was elected chief, and Mr. Kaskamin and Ms. McKenzie. Specifically, Mr. Kaskamin and Ms. McKenzie state that Mr. Waquan's presentation to the Committee was not interrupted. Rather, it is Mr. Waquan who constantly sought to interrupt others who were speaking. They add that Mr. Waquan spoke more than anyone else did.

[46] Mr. Waquan bears the burden of proving the breach of procedural fairness he alleges. The Committee was not under a duty to record its proceedings or to provide a transcript. In the

absence of a transcript, Mr. Waquan must bring convincing evidence that he was unable to make his submissions. To that end, he relies solely on his affidavit. He did not cross-examine the other affiants.

[47] I am mindful that the failure to cross-examine an affiant does not, in itself, constitute an admission that the evidence contained in an affidavit is true: *Exeter v Canada (Attorney General)*, 2015 FCA 260 at paragraph 9. Nevertheless, in this case, three persons swore affidavits stating that Mr. Waquan's version of the events was inaccurate. Mr. Waquan elected not to cross-examine them. In my view, given the circumstances of this case, this failure casts doubt on his own evidence. Put simply, if the hearing unfolded as described by Mr. Waquan, it is difficult to understand that he would not seek to challenge the contrary assertions made by the three deponents.

[48] Moreover, Mr. Waquan never asked the Committee to take corrective measures, either at the hearing or afterwards. For example, Mr. Waquan could have written to the Committee to complain about the manner in which the proceedings were conducted. He could also have sent his speaking notes to the Committee. His failure to complain about the situation is difficult to reconcile with his description of the meeting.

[49] Thus, I conclude that Mr. Waquan has not discharged his burden of proving a breach of procedural fairness.

[50] I also fail to understand Mr. Waquan's complaint about the presence of other persons in the room. The component of his appeal that challenged the location of the polling stations affected all elected candidates, as their seats were in jeopardy. They too were entitled to procedural fairness, which entails a right to be present at the hearing. The fact that the Committee allegedly failed to adhere to its guidelines regarding the COVID-19 pandemic does not give rise to a breach of procedural fairness.

III. Concluding Comments

[51] While the foregoing is sufficient to dispose of the case, I feel compelled to comment briefly about a troubling aspect of the case. There are serious indications that Mr. Waquan was involved in bringing about the situations about which he is now complaining.

[52] First, Mr. Waquan was a member of council when the resolution setting the polling locations was adopted. The resolution bears his signature. At the hearing before me, Mr. Waquan's counsel suggested that his client might have voted against the resolution, even though he signed the document evidencing the decision. If this were true, I would have expected Mr. Waquan to disclose this fact in his affidavit. I find that Mr. Waquan participated in the decision regarding the polling locations, and one should not easily be allowed to challenge one's own decision.

[53] Second, as a member of council prior to the election, Mr. Waquan was aware of the facts underlying his assertion that Mr. Kaskamin and Ms. McKenzie are ineligible. Specifically, he

states in his affidavit that he was aware, before the election, of a legal opinion to this effect and of a draft letter to be sent to the ineligible candidates.

[54] It is curious, to say the least, that the Council made no attempt to collect Mr. Kaskamin's and Ms. McKenzie's $1,500 debt, and chose instead to seek a legal opinion regarding the consequences of the debt on Mr. Kaskamin's and Ms. McKenzie's eligibility for the upcoming election.

[55] It is equally curious that the Council requested a draft letter informing the affected persons of their ineligibility, but did not actually send the letters.

[56] While the evidence does not reveal more than what I set out above, it is clear that, at the very least, Mr. Waquan stood by silently while he was aware of the grounds he is now putting forward to challenge Mr. Kaskamin's and Ms. McKenzie's eligibility. It is also clear that alerting Mr. Kaskamin and Ms. McKenzie to the existence of the debt would almost certainly have prompted them to pay it, thereby depriving Mr. Waquan or others of a ground for challenging the results of the election. I can only say that if one had wanted to devise a scheme to challenge an opponent's win, one would not have acted differently. Tolerating such behaviour can only undermine public confidence in the electoral process.

[57] Had I concluded that the Committee's decision was unreasonable, these facts would most likely have prompted me to exercise my discretion to withhold any remedy.

IV. Disposition

[58] For these reasons, the application for judicial review will be dismissed. There are no reasons for departing from the usual practice of awarding costs to the successful party.

JUDGMENT in T-1186-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The applicant is condemned to pay costs to the respondent.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1186-20
STYLE OF CAUSE:	CALVIN WAQUAN v MIKISEW CREE FIRST NATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 16, 2021
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	OCTOBER 12, 2021

APPEARANCES:

Sean Jones Katelyn Jones	FOR THE APPLICANT
Evan C. Duffy Maura McDowell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MLT Aikins LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Parlee McLaws LLP Barristers and Solicitors Edmonton, Alberta	FOR THE RESPONDENT