Federal Court Cour fédérale

Date: 20230213

Docket: T-1910-21

Citation: 2023 FC 212

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, February 13, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

MONIKA MOLLEN LALO

Applicant

and

APPEAL BOARD OF THE COUNCIL OF THE INNU OF EKUANITSHIT, GEORGETTE MESTOKOSHO, JULIE MESTOKOSHO, YVETTE BELLEFLEUR, COUNCIL OF THE INNU OF EKUANITSHIT and ADÉLINE BASILE

Respondents

JUDGMENT AND REASONS

[1] Ms. Basile was elected to the Council of the Innu of Ekuanitshit. Ms. Lalo challenged Ms. Basile's election alleging that her criminal record made her ineligible. The community's

Appeal Board dismissed that challenge because Ms. Basile was convicted of a summary offence, not an indictable offence.

[2] Ms. Lalo now seeks judicial review of the Appeal Board's decision. She submits that the Board was not constituted in compliance with the *Coutumes électorales des Ekuanitshinnuat* [electoral customs of the Ekuanitshinnuat] [Coutumes] and that it rendered an unreasonable decision in concluding that only individuals convicted of an indictable offence were ineligible.

[3] I am dismissing Ms. Lalo's application. She has not shown that the Appeal Board was improperly constituted. Furthermore, the Appeal Board adopted a reasonable interpretation of the expression *"dossier criminel"* [criminal record] found in the Coutumes. Since Ms. Basile was convicted of a summary offence only, it was reasonable to conclude that she did not have a criminal record and that she was therefore eligible.

I. Background

[4] Members of the Council of the Innu of Ekuanitshit are elected every three years in accordance with the Coutumes, which were adopted in 1989 and amended several times since then. Section 5.1 of the Coutumes sets out the eligibility criteria for candidates:

> [TRANSLATION]
>
> **5.1. Eligibility of candidates**
>
> (1) Be 18 years of age or older at the time of the nominations meeting;
>
> (2) Be a member in good standing of the community, i.e. be on the list of the Innu of Ekuanitshit;

> (3) Be of good moral character; Be sober, additionally, “not consume any alcohol or drugs”;
>
> (4) Live in the community;
>
> (5) Have no criminal record;
>
> (6) Have obtained a pardon if convicted of an indictable offence;
>
> (7) Those who have transferred their band number to Ekuanitshit will become eligible after residing in the community for 36 months following the resolution date on which their transfer request was accepted.

[5] The last election was held on September 30, 2021. The respondent, Adéline Basile, was elected as a councillor.

[6] In 1994, Ms. Basile was convicted of assault following summary conviction proceedings. At the time of her nomination, Ms. Basile had not obtained a record suspension (commonly known as a “pardon”) in accordance with the process set out in the *Criminal Records Act,* RSC 1985, c C-47. Upon learning this, the electoral officer consulted a lawyer and concluded that a summary conviction offence did not result in a [TRANSLATION] “criminal record” referred to in paragraph 5 of section 5.1 and was not an impediment to Ms. Basile’s nomination.

[7] The applicant, Ms. Lalo, appealed the election results alleging that Ms. Basile was ineligible because of her 1994 conviction. After receiving Ms. Basile’s written submissions, the Appeal Board formed under section 8 of the Coutumes dismissed the appeal. The relevant parts of the Board’s decision read as follows:

> [TRANSLATION]
>
> CONSIDERING the provisions of sections 5.1(5) and 5.1(6) of the *Coutumes électorales des Ekuanitshinnuat* and, specifically, the fact that the term "criminal record" is not defined;
>
> CONSIDERING that, in the 2018 election, two non-elected candidates were accepted as eligible despite past summary offences;
>
> CONSIDERING that the provisions of the *Coutumes électorales des Ekuanitshinnuat* should be clarified by the general members' meeting of the Ekuanitshit community with respect to criminal records;
>
> The Appeal Board dismisses the appeal concerning the eligibility of the elected candidate Adeline Basile.
>
> The Appeal Board strongly encourages the elected candidate to apply for a pardon as soon as possible to comply with her responsibilities as an elected member and political representative of the Ekuanitshit community.

[8] Ms. Lalo is now seeking judicial review of that decision. She submits that the Appeal Board was improperly constituted because one of its members, Yvette Bellefleur, was not [TRANSLATION] "a neutral person who does not come from the community with no stake in the elections" as set out in section 8.1 of the Coutumes. She also submits that the Appeal Board should have concluded that Ms. Basile was ineligible because of her criminal record.

II. Analysis

[9] I am dismissing Ms. Lalo's application because she failed to show that the composition of the Appeal Board was contrary to the Coutumes or that the Appeal Board rendered an unreasonable decision regarding Ms. Basile's eligibility.

[10] Before I provide detailed reasons for this conclusion, it is useful to clarify the role of this Court on judicial review. With respect to the merits of a decision, the Court's role is not to reassess the matter anew, but rather to ask whether the administrative decision maker—the Appeal Board, in this case—rendered a reasonable decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*]. As long as the Appeal Board has complied with the constraints that bear on its decision-making authority, this Court must consider its decision to be reasonable. With respect to the interpretation of legislation, such as the Coutumes, there are situations where more than one interpretation is reasonable. In those cases, it is for the Appeal Board, not this Court, to choose among those interpretations: *Vavilov* at paragraphs 120–24; *Porter v Boucher-Chicago*, 2021 FCA 102 at paragraphs 26–28 [*Porter*]; *Pastion v Dene Tha' First Nation*, 2018 FC 648, [2018] 4 FCR 467 at paragraphs 22–28 [*Pastion*]. However, when judicial review focuses on the fairness of the process followed by the Appeal Board, the reasonableness standard does not apply. Instead, "[a] court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 at paragraph 54. In either case, the burden is on the applicant to establish the grounds relied on: *Vavilov* at paragraph 100.

A. *Composition of the Appeal Board*

[11] Ms. Lalo's first argument concerns the Appeal Board's composition. Under section 8.1 of the Coutumes, the board must consist of an elder, a [TRANSLATION] "person from the community who is very knowledgeable about traditions and values" and a [TRANSLATION] "neutral person who does not come from the community and has no stake in the elections". Ms. Lalo submits

that Ms. Bellefleur does not meet these conditions because she has lived in the community for over 10 years, is the Chief's sister-in-law and is employed by the Council.

[12] Even though Ms. Lalo presents the issue as being about the interpretation of a provision of the Coutumes, it is clear that the issue concerns procedural fairness, specifically, the requirement of impartiality. No doubt section 8.1 requires the presence of a [TRANSLATION] "neutral person who does not come from the community and has no stake in the elections" to ensure a high degree of impartiality, given the community's small size.

[13] There is a compelling reason to reject Ms. Lalo's allegations: she failed to challenge the Appeal Board's composition in a timely manner. The Federal Court of Appeal recently reiterated a well settled rule that [TRANSLATION] "procedural fairness arguments must generally be raised at the first opportunity, that is, as soon as the party becomes aware of the possibility of doing so": *11316753 Canada Association c Canada (Transports)*, 2023 FCA 28 at paragraph 85. Ms. Lalo has not alleged that she did not know who the Appeal Board members were. The way she addressed her request to appeal suggests that she knew their identities. In addition, these individuals were elected at the general meeting of the community members. It can therefore be assumed that their identities were generally known. Therefore, Ms. Lalo should have expressed her disagreement with the Appeal Board's composition no later than when she filed her request to appeal. She could not wait until she received an unfavourable decision. This reason alone is sufficient to reject Ms. Lalo's first argument.

[14] In any event, Ms. Lalo has not shown that the Appeal Board was improperly constituted. At the hearing, the parties filed submissions concerning the appropriate standard of review. I do not need to dispose of this issue because, even if the matter were to be considered from a procedural fairness standpoint, Ms. Lalo has not proven that Ms. Bellefleur did not meet the criteria of section 8.1 of the Coutumes and has not established the existence of a reasonable apprehension of bias.

[15] Ms. Lalo first claims that Ms. Bellefleur [TRANSLATION] “comes from” the community because she has lived there for over 10 years. I disagree. The idiom [TRANSLATION] “to come from” refers to origin. When the Coutumes are read in their entirety, it is clear that [TRANSLATION] “to come from the community” means a person who is a member of the Ekuanitshit First Nation, regardless of that person’s place of residence. Other expressions like [TRANSLATION] “to live in the community” or [TRANSLATION] “to reside in the community” are used to refer to the concept of residence in sections 5.1 and 7.1, among others. It is not in dispute that Ms. Bellefleur is a member of another First Nation. Therefore, she does not [TRANSLATION] “come from” the community of Ekuanitshit, even though she resides there.

[16] Ms. Lalo also objects to the fact that Ms. Bellefleur is the Chief’s sister-in-law and works for the Council. However, these facts alone are not sufficient to raise doubts about her neutrality or to conclude that she has a stake in the election results. There is no concrete evidence demonstrating that she favoured a specific candidate. She does not report directly to the Council as part of her job. In a community like Ekuanitshit, the council (and its affiliated agencies and

businesses) is often the main employer. The mere fact of being employed by the Council is not sufficient to prove a conflict of interest or a lack of neutrality.

[17] For the same reasons, Ms. Lalo has not shown that Ms. Bellefleur's sitting on the Appeal Board gave rise to a reasonable apprehension of bias. It is well known that impartiality requirements must be assessed in light of the small size of a community such as Ekuanitshit: *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142 (TD) at 167–68. The Federal Court of Appeal ruled that "the mere fact that a member of the Community Panel is employed by the Band does not give rise to a reasonable apprehension of bias": *Johnny v Adams Lake Indian Band*, 2017 FCA 146 at paragraph 41. In *Assu v Chickite*, [1999] 1 CNLR 14, the Supreme Court of British Columbia stated at paragraphs 53–56 that the mere existence of family ties within a First Nation did not give rise to a reasonable apprehension of bias.

B. *Ms. Basile's Criminal Record*

[18] Ms. Lalo's second argument concerns Ms. Basile's criminal record. She submits that the Appeal Board should have concluded that Ms. Basile was ineligible because of her conviction on a charge of assault in 1994.

[19] I disagree with Ms. Lalo. It is reasonable for the Appeal Board to consider that section 5.1 of the Coutumes covers only indictable offences and not summary offences. Since Ms. Basile was convicted of a summary offence, it was reasonable to conclude that she was eligible.

[20] To understand this, the distinction that Canadian criminal law makes between "indictable offences" and "summary offences" must first be explained. The *Criminal Code*, RSC 1985, c C-46, sets out two distinct procedures for prosecuting offences: "indictment" and "summary conviction". It is not necessary to describe in detail the differences between these two types of procedure other than to say that summary conviction offences are punishable by a prison term of not more than two years less a day, whereas there is no limit for an indictable offence. The statute that creates the offence specifies whether it should be prosecuted by way of indictment or by summary conviction. For some offences, called "hybrid offences", the prosecutor can choose on a case-by-case basis whether the offence will be prosecuted by indictment or summary conviction. Generally speaking, the least serious offences are prosecuted by way of summary conviction.

[21] As subsection 34(1) of the *Interpretation Act*, RSC 1985, c I-21, indicates, the concept of "indictable offence" (*"acte criminel"*) is often used as a synonym for an offence "prosecuted by indictment" as opposed to an offence "punishable on summary conviction" or, more concisely, a summary offence.

34 (1) Where an enactment creates an offence,	**34 (1)** Les règles suivantes s'appliquent à l'interprétation d'un texte créant une infraction :
(a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;	**a)** l'infraction est réputée un acte criminel si le texte prévoit que le contrevenant peut être poursuivi par mise en accusation;
(b) the offence is deemed to be one for which the offender is punishable on	**b)** en l'absence d'indication sur la nature de l'infraction, celle-ci est réputée

summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and	punissable sur déclaration de culpabilité par procédure sommaire;
(c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.	**c)** s'il est prévu que l'infraction est punissable sur déclaration de culpabilité soit par mise en accusation soit par procédure sommaire, la personne déclarée coupable de l'infraction par procédure sommaire n'est pas censée avoir été condamnée pour un acte criminel.

[22] Ms. Lalo challenges the Board's decision on two fronts. First, she alleges that the reasons for the decision are deficient. Second, she submits that it was unreasonable to interpret the concept of [TRANSLATION] "criminal record" in section 5.1 of the Coutumes as covering only indictable offences and not summary offences.

[23] With respect to the first issue, it is true that the Appeal Board's reasons, which I reproduced above, are succinct if not terse. However, this in itself is not a ground for judicial review, even when the issue relates to statutory interpretation. At paragraph 123 of *Vavilov*, the Supreme Court states the following:

> There may be … cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

[24] From reading the record, it seems clear to me that the Appeal Board was "alive" to the issue (*Vavilov* at paragraph 120) and that it interpreted section 5.1 of the Coutumes as covering only indictable offences and not summary offences. Ms. Basile's written submissions were based entirely on that distinction. She relied on the provisions of the *Interpretation Act* cited above, on the use of the words *"acte criminel"* [indictable offence] at paragraph 6 of section 5.1, on a legal opinion given a few years earlier and on the treatment of similar cases during the 2018 election. There is every indication that the Board agreed with Ms. Basile's submissions. Thus, the first recital to the Appeal Board's reasons notes the interpretation difficulty stemming from the lack of definition of [TRANSLATION] "criminal record" and mentions paragraph 6 of section 5.1. The second recital resolves that difficulty by relying on the interpretation given during the 2018 election, namely, that only indictable offences are taken into account. In light of all these indicia, the basis of the Appeal Board's decision leaves no room for ambiguity. The Appeal Board did not have to state its conclusions the way a court of law would have.

[25] Ms. Lalo submits that the third recital to the Appeal Board's reasons suggests that the Panel abdicated its responsibility to interpret the Coutumes by suggesting that they should be clarified by the general meeting of the members. I do read these comments in this manner. The Coutumes were amended several times recently apparently to resolve various interpretation difficulties. It is entirely appropriate for the Appeal Board to bring the issue to the attention of the general meeting for the members to have the last word with respect to future elections. Nevertheless, the Appeal Board did decide the issue with respect to the 2021 election. Similarly, the recommendation made to Ms. Basile to obtain a pardon does not mean that the Appeal Board refused to apply the Coutumes. It was open to the Appeal Board both to find that Ms. Basile was

eligible under the Coutumes and to make that recommendation to her for political or moral reasons.

[26] This brings me to the determinative issue of the case: was it unreasonable to interpret [TRANSLATION] “criminal record” as excluding summary offences?

[27] In this respect, Ms. Basile’s submissions, which the Appeal Board clearly accepted, are based on recognized methods of statutory interpretation. They appear to be reasonable because they are logical and respect the constraints that the text of the Coutumes and the other elements of the record bring to bear on the decision. Even though the Appeal Board was not bound to apply the *Interpretation Act* to discern the meaning of the Coutumes, it could use it to understand the legal context in which the concepts of [TRANSLATION] “criminal record” and “indictable offence” are used. As the Supreme Court notes in *Vavilov*, at paragraphs 129–131, it is generally expected that administrative decision makers will treat like cases alike. For that reason, the Appeal Board could base its decision on previous practices of electoral officers even if those practices were not the subject of a decision of the Appeal Board.

[28] In reality, Ms. Lalo is asking this Court to impose its own interpretation of [TRANSLATION] “criminal record”. At the hearing, she argued that the interpretation adopted by the Board is based on an excessively technical distinction that community members do not understand. She also stated that the spirit of the Coutumes is to make ineligible anyone convicted of an offence, regardless of whether it is an indictable or summary offence.

[29] Ms. Lalo's allegations are certainly reasonable, in the sense that they are plausible interpretive arguments, but the Board's reasons are also reasonable. In such a situation, it is not the Court's role to impose its own interpretation or to decide which interpretation would be the most reasonable. As indicated in *Porter* and *Pastion*, that is the Appeal Board's role. The Appeal Board's decision is reasonable, and that is sufficient for dismissing Ms. Lalo's application for judicial review.

[30] Ms. Lalo also criticizes the Appeal Board's deliberation process. The Board members were cross-examined about this as part of this application for judicial review. Their testimony reveals that they initially considered allowing Ms. Lalo's appeal, but that they changed their mind after consulting a lawyer. In addition, they were not able to clearly explain the difference between an indictable offence and a summary offence.

[31] This evidence does not render the decision unreasonable. Ms. Lalo acknowledges that the Appeal Board members could seek legal advice. They cannot be asked to recite from memory the legal basis for the advice they received. Nor can they be criticized for reconsidering their initial impression after obtaining such advice.

III. Conclusion

[32] Since the Appeal Board was constituted in accordance with section 8.1 of the Coutumes and since it rendered a reasonable decision concerning the interpretation of [TRANSLATION] "criminal record", Ms. Lalo's application for judicial review will be dismissed.

[33] Ms. Basile does not seek costs. No order will therefore be made regarding costs.

JUDGMENT IN T-1910-21

THE COURT'S JUDGMENT is as follows:

1. This application for judicial review is dismissed.

2. There is no order as to costs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1910-21
STYLE OF CAUSE:	MONIKA MOLLEN LALO v APPEAL BOARD OF THE COUNCIL OF THE INNU OF EKUANITSHIT, GEORGETTE MESTOKOSHO, JULIE MESTOKOSHO, YVETTE BELLEFLEUR, COUNCIL OF THE INNU OF EKUANITSHIT AND ADÉLINE BASILE
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	FEBRUARY 7, 2023
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	FEBRUARY 13, 2023

APPEARANCES:

Alexandra B. Lapointe	FOR THE APPLICANT
Alexis Wawanoloath Annie Neashish	FOR THE RESPONDENT (ADÉLINE BASILE)

SOLICITORS OF RECORD:

Beauvais Truchon Québec, Quebec	FOR THE APPLICANT
Neashish & Champoux, LLP Wendake, Quebec	FOR THE RESPONDENT (ADÉLINE BASILE)