Federal Court Cour fédérale

Date: 20231129

Docket: T-2165-22

Citation: 2023 FC 1597

[ENGLISH TRANSLATION]

Montréal, Quebec, November 29, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

RENÉ ROCK

Applicant

and

COMITÉ D'APPEL DES ÉLECTIONS DU CONSEIL DE BANDE DE PESSAMIT, CYNTHIA LABRIE, GÉRALD HERVIEUX, JEAN-NOËL RIVERIN, MARIELLE VACHON AND ANDY CANAPÉ

Respondents

JUDGMENT AND REASONS

[1] The applicant challenged the results of the last elections of the Pessamit Innu First Nation. He argues that a provision of the Electoral Code renders the respondents ineligible, as they have been found to be in contempt of court or, in one case, guilty of an indictable offence. The Appeal Committee ruled against him because the Electoral Code provision in question does

not set out the criteria for eligibility, but rather situations that justify dismissal during term of office. The applicant now seeks judicial review of the Appeal Committee's decision. His application is dismissed. The interpretation adopted by the Appeal Committee is reasonable because it is consistent with the text and the structure of the Electoral Code.

I. Background

[2] The applicant, René Rock, ran for a position as councillor of the Pessamit Innu Nation in the election that took place on August 17, 2022. He was defeated.

[3] Mr. Rock challenged the election results, alleging that the respondents, Gérald Hervieux, Jean-Noël Riverin, Andy Canapé and Marielle Vachon, were ineligible. Of these four people, Ms. Vachon was elected to the office of chief and Mr. Hervieux, to the office of councillor, while Mr. Canapé and Mr. Riverin were defeated. Mr. Rock bases his challenge on section 3.9 of the Electoral Code, which reads as follows:

> [TRANSLATION]
>
> 3.9 The office of chief or councillor becomes vacant when the person who holds that office, as the case may be:
>
> a) is found guilty of an indictable offence for which the appeal period has expired;
>
> . . .
>
> e) is guilty of corrupt practice, dishonesty, or malfeasance, or has not complied with local community policy, particularly with regard to conflict of interest;

[4] Mr. Rock submits that the four respondents are ineligible because they were found in contempt of court in *Bacon St-Onge v Conseil des Innus de Pessamit*, 2019 FC 794, aff'd *Simon v Bacon St-Onge*, 2022 FCA 168, and *Bacon St-Onge v Conseil des Innus de Pessamit*, 2021 FC 217, aff'd *Gauthier v Bacon St-Onge*, 2023 FCA 187. They would therefore be subject to paragraph 3.9(e) of the Electoral Code because the conduct that gave rise to this contempt of court would constitute dishonesty, a conflict of interest or non-compliance with local policy. Furthermore, Mr. Canapé was found guilty of an indictable offence, which would render him ineligible under paragraph 3.9(a). Mr. Rock also challenged the impartiality of the electoral officer and that of the Appeal Committee.

[5] The Appeal Committee rejected Mr. Rock's challenge. The substantive part of its reasons can be found in the following excerpt:

> [TRANSLATION]
>
> Section 3.9(a) of the Electoral Code provides that an office becomes vacant when the *person who holds that office* is found guilty of an *indictable offence* for which the appeal period has expired.
>
> Section 3.9(a) is written in the future tense; an office will become vacant if the person who holds the office is found guilty of an indictable offence. Thus, an office will not become vacant by reason of a previous finding of guilt.
>
> As currently written, the Electoral Code is not clear to the effect that the situations listed in section 3.9 could be interpreted to be conditions of eligibility for *running* for election. It is up to the members of the community, using the processes intended and adopted for this purpose, to determine the conditions of eligibility for running for election.
>
> In other words, it is not for this Appeal Committee to define new eligibility conditions in a dispute such as in this case.

[6] The Appeal Committee also rejected Mr. Rock's claims regarding its impartiality and that of the electoral officer. It also stated that it only had jurisdiction to make decisions regarding the eligibility of elected candidates, not defeated ones.

[7] Mr. Rock brought an application for judicial review of the Appeal Committee's decision. He named as respondents not just the four people whose eligibility he has challenged, but also the Conseil de la nation innue de Pessamit [Conseil], the Appeal Committee and the electoral officer.

[8] The Conseil requested to be removed as a party. My colleague, Associate Judge Mireille Tabib, granted this request. She concluded that the Conseil was not [TRANSLATION] "directly affected" by the potential reversal of the Appeal Committee's decision and that it should therefore not be named as a respondent under Rule 303 of the *Federal Courts Rules*, SOR/98-106. She explains her decision as follows:

> [TRANSLATION]
>
> For a person to be considered directly affected by an order and, therefore, a proper respondent for an application for review, the order sought must affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way (*Forest Ethics Advocacy Association v Canada (National Energy Board)* 2013 FCA 236, at para 21). The reversal of the election, if applicable, could trigger for the Conseil the obligation to appoint an electoral officer or delay the decision-making until it is properly constituted. However, these obligations and inconveniences are just normal consequences of the reversal sought. The reversal of the election does not impose on the Conseil any new legal obligations or constraints that did not previously exist. A reversal does not legally change how the Conseil must be constituted. Thus, the interests of the Conseil are merely incidental or indirect.

[9] The Appeal Committee made an identical application. However, it was not possible for this application to be decided prior to the hearing for the application for judicial review. I address this later in these reasons. The Appeal Committee filed a memorandum dealing with all the issues.

[10] The Conseil and the four respondents who were candidates in the election were initially represented by the same counsel. This counsel stopped representing the candidate respondents after Justice Tabib removed the Conseil as a respondent. Ms. Vachon and Mr. Hervieux appeared through new counsel. This counsel did not file a memorandum but made a statement agreeing with the claims of the Appeal Committee. Mr. Riverin appeared on his own behalf but did not file a memorandum and failed to appear at the hearing. Mr. Canapé failed to appear. The respondent Cynthia Labrie, who was the electoral officer, failed to appear. No evidence was filed in defence.

II. Analysis

[11] I dismiss Mr. Rock's application. The Appeal Committee interpreted and applied section 3.9 of the Electoral Code in a reasonable manner. Before explaining why this is so, I need to clarify the Appeal Committee's role in this case.

A. *Role of Appeal Committee in application for judicial review*

[12] At this stage in the case, it is no longer useful to make an order to strike out the Appeal Committee as respondent. It is clear, however, that Mr. Rock should not have named the Appeal

Committee as a respondent. Quite simply, this is contrary to Rule 303, which states that for a judicial review,

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person	**303 (1)** Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought;	**a**) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
. . .	. . .

[13] In this case, the Appeal Committee is the "tribunal" that has rendered the decision in respect of which the application for judicial review has been brought. It should not have been a party to this litigation. In fact, absent special circumstances, a First Nation council or electoral appeal committee should not be a party to an application for judicial review of a decision rendered by that appeal committee. As Associate Justice Tabib pointed out, institutionally, a council is not directly affected by a decision of this nature, and Rule 303 explicitly prohibits the involvement of the Appeal Committee as a party.

[14] The primary purpose of Rule 303 is to prevent a situation in which a decision-maker might seek to justify his or her own decision after the fact. Rule 303 is consistent with the principles established by the Supreme Court of Canada in *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44, [2015] 3 SCR 147 regarding the participation of administrative tribunals in the judicial review of their own decisions. Such participation should result from the initiative of the Appeal Committee itself, through a motion for intervention. The

Court can then set parameters for the Appeal Committee's intervention so that it complies with the principles stated by the Supreme Court.

[15] Unfortunately, these principles were not adhered to in this case. This gave rise to an incongruous situation in which, in reality, the Appeal Committee defended the merits of its own decision and made submissions regarding appropriate remedies if its decision had to be reversed, and Ms. Vachon and Mr. Hervieux therefore added nothing significant to the Appeal Committee's claims.

[16] I am aware that the question of who is a party to the proceeding could have an impact on the payment of legal fees. The issue of who must pay the legal fees of the various parties is not before me and I have no evidence on this matter. Suffice it to say that, generally speaking, the desire to use the funds of a First Nation to pay parties' legal fees is not enough of a reason to depart from the principles stated above.

B. *Eligibility of respondents*

[17] The main issue is the eligibility of the respondents. Mr. Rock argues that the Appeal Committee rendered an unreasonable decision by not recognizing that section 3.9 of the Electoral Code imposed conditions of eligibility and by failing to explicitly decide the issue of whether the respondents were dishonest or were engaged in any other type of conduct described in paragraph 3.9(e).

[18] I dismiss Mr. Rock's application. In my opinion, the Appeal Committee reasonably determined that section 3.9 of the Electoral Code does not set out the conditions of eligibility for the offices of chief or councillor, but rather outlines situations in which people holding these offices may be removed from office or have their mandates terminated. The failure to determine whether the respondents were dishonest or engaged in any of the other grounds for removal from office described in paragraph 3.9(e) is therefore without consequence.

[19] The role of the Court on judicial review is not to substitute its decision for that of the Appeal Committee, but rather to verify whether the decision of the Appeal Committee is reasonable: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*]. The burden is on the applicant to show that the impugned decision is unreasonable: *Vavilov*, at paragraph 100. This is a burden of demonstration and not a burden of proof. The reasonable nature of an administrative decision is a question of law, and the court is not bound by the admissions of the parties, even if the application is not contested: *Garshowitz v Canada (Attorney General)*, 2017 FCA 251 at paragraphs 17 to 19. Moreover, the Appeal Committee's reasons do not need to meet the standard of perfection: *Vavilov*, at paragraph 91; see, for example, *Lalo v Council of the Innu of Ekuanitshit*, 2023 FC 212.

[20] In this case, the structure of the Appeal Committee's reasons leaves something to be desired, but the passage cited above makes it possible to understand the central basis of the decision: *Vavilov*, at paragraph 123. In short, the Appeal Committee determined that the reasons listed in section 3.9 constitute grounds for removal from office of an elected official and not eligibility conditions for candidates.

[21] The wording of section 3.9 is enough to support the reasonable nature of the Appeal Committee's decision. It refers to the [TRANSLATION] "person who holds" an office, which means that the person concerned has already been elected. Logically, it can therefore not be a condition of eligibility. What is more, several of the other grounds for vacancy of office, such as death or absence from several consecutive meetings of the council, cannot logically apply to a candidate. Furthermore, section 3.9 is clearly modeled on section 78 of the *Indian Act*, which sets out the conditions for terminating a mandate and not conditions of eligibility; see, for example, *Beeswax v Chippewas of the Thames First Nation*, 2023 FC 767.

[22] Moreover, the Appeal Committee cites section 3.5 of the Electoral Code, which provides that the only conditions of eligibility are being an elector, being at least 18 years old and having resided in the community for at least 12 months. Although the Appeal Committee did not explicitly state this in the passage cited above, it is obvious that it was of the opinion that the eligibility conditions are set out in section 3.5, not section 3.9. This is what must be understood from the assertion that [TRANSLATION] "it is not for this Appeal Committee to define new eligibility conditions".

[23] Mr. Rock argues that section 3.9.1 of the Electoral Code shows that section 3.9 establishes eligibility conditions. I do not share this opinion. Section 3.9.1 simply states that an office becomes vacant if the Appeal Committee observes that the procedures outlined in the Electoral Code have not been followed. This provision may have seemed necessary as, in most cases, the Appeal Committee renders its decision regarding a contested election after the elected candidates have been sworn in. It does not modify the substance of the Electoral Code, however,

nor does it allow the conditions for termination of mandate that are set out in section 3.9 to be transformed into conditions of eligibility.

[24] At the hearing, the parties attempted to connect the objective described in section 3.9 to the broad principles of democracy and the rule of law, or, more prosaically, to the need to ensure the integrity of the First Nation's leadership. None of this demonstrates that the Appeal Committee's decision is unreasonable. In particular, it is entirely plausible that the Innu of Pessamit wanted to leave it up to the electors to decide whether the candidates in each election are of high enough integrity to merit being elected. Other First Nations may have chosen to impose stricter eligibility conditions, but this does not affect the reasonable nature of the Appeal Committee's decision in this case.

[25] This is enough to dispose of this application for judicial review. Given that section 3.9 simply does not apply, the Appeal Committee's failure to explicitly refer to paragraph 3.9(e) of the Electoral Code in its analysis of the contempt of court is not determinative. It is also possible that the Appeal Committee erred in stating that it does not have jurisdiction to decide the eligibility of defeated candidates, but this error is without consequence as Mr. Rock has not shown any grounds on which the respondents would be ineligible.

C. *Allegations of bias*

[26] Mr. Rock also argues that both the electoral officer and the Appeal Committee have given rise to a reasonable apprehension of bias.

[27] In his complaint to the Appeal Committee, Mr. Rock brought up the fact that the electoral officer acted as counsel for Ms. Vachon and Mr. Hervieux during the second contempt of court proceeding. The Appeal Committee concluded that it did not have jurisdiction to decide this issue. Moreover, it noted the absence of any evidence of the electoral officer's alleged bias.

[28] The Appeal Committee noted that its jurisdiction is defined in section 8.1 of the Electoral Code and that the remedies that it can grant are specified in section 8.8. Although the Appeal Committee's reasons are somewhat unclear, it is understood that the Appeal Committee concluded that the evidence before it failed to show that any of the situations referred to in section 8.1 had occurred, whether corrupt practice, [TRANSLATION] "a violation of the Electoral Code that might have affected the result of an election to an office" or the ineligibility of a candidate.

[29] This decision is reasonable. The only concrete acts that the electoral officer is alleged to have carried out, according to Mr. Rock, is having stated, in an information document, that section 3.9 applies only during the term of office, and having dismissed the challenge to Ms. Vachon's, Mr. Hervieux's, Mr. Riverin's and Mr. Canapé's eligibility. As has been shown above, these acts were based on a reasonable interpretation of section 3.9. They cannot be among the reasons referred to in section 8.1 of the Electoral Code. It was therefore reasonable for the Appeal Committee to conclude that it did not have jurisdiction.

[30] Mr. Rock also argued that the composition of the Appeal Committee gave rise to an apprehension of bias, because two of its members were employees of the Conseil. The Appeal Committee summarily dismissed this allegation as it has no basis in fact.

[31] Mr. Rock has not reiterated this ground of attack before this Court. Nonetheless, the composition of the Appeal Committee is explicitly set out in section 8.3 of the Electoral Code and does not, for this reason alone, give rise to an apprehension of bias: *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paragraphs 20 to 24, [2001] 2 SCR 781.

[32] Instead, Mr. Rock states that by making submissions to the Court, the Appeal Committee [TRANSLATION] "colluded with" Ms. Vachon and Mr. Hervieux, which gives rise to a reasonable apprehension of bias. As I have stated earlier, the Appeal Committee overstepped its role by defending its own decision. However, this situation arose after the decision which is the subject of the application for judicial review. Therefore, it cannot constitute grounds for quashing that decision. There is no evidence that the Appeal Committee was biased in reaching that decision.

III. Conclusion

[33] The Appeal Committee reasonably determined that section 3.9 of the Electoral Code does not create conditions of eligibility. Since the Appeal Committee's decision was reasonable, Mr. Rock's application for judicial review will be dismissed.

[34] Given that respondents Ms. Vachon and Mr. Hervieux did not file a memorandum and that the Appeal Committee's submissions went beyond the legitimate scope of intervention of a tribunal whose decision is being challenged, it is my view that no costs should be awarded.

JUDGMENT in T-2165-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no order as to costs.

"Sébastien Grammond"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2165-22
STYLE OF CAUSE:	RENÉ ROCK v COMITÉ D'APPEL DES ÉLECTIONS DU CONSEIL DE BANDE DE PESSAMIT, CYNTHIA LABRIE, GÉRALD HERVIEUX, JEAN-NOËL RIVERIN, MARIELLE VACHON AND ANDY CANAPÉ
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APPEARANCES:

François Boulianne	FOR THE APPLICANT
Stéphanie Lisa Roberts Ivan da Fonseca	FOR THE RESPONDENT COMITÉ D'APPEL DES ÉLECTIONS DU CONSEIL DE BANDE DE PESSAMIT

Laurent Fournier	FOR THE RESPONDENTS MARIELLE VACHON AND GÉRALD HERVIEUX

SOLICITORS OF RECORD:

François Boulianne Québec, Quebec	FOR THE APPLICANT
Novalex Law Firm Inc. Montréal, Quebec	FOR THE RESPONDENT COMITÉ D'APPEL DES ÉLECTIONS DU CONSEIL DE BANDE DE PESSAMIT
Grondin Savarese Legal Inc. Montréal, Quebec	FOR THE RESPONDENTS MARIELLE VACHON AND GÉRALD HERVIEUX