Federal Court  Cour fédérale

Date: 20220517

Docket: T-1185-21

Citation: 2022 FC 702

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 17, 2022

PRESENT: Madam Justice St-Louis

BETWEEN:

JOHN ROCK AND CHRISTELLE ROCK

Applicants

and

CONSEIL DES INNUS DE PESSAMIT, GÉRALD HERVIEUX, JEAN-NOËL RIVERIN AND MARIELLE VACHON

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] In the Notice of Application [Notice] filed with the Court on July 27, 2021, John and Christelle Rock [applicants] challenge (1) the election of Gérald Hervieux, Jean-Noël Riverin and Marielle Vachon to the position of councillor in the September 17, 2018 and August 17, 2020 elections; and (2) the refusal of the Betsiamites Band Council (Conseil des Innus de

Pessamit) [the Council], on June 28, 2021, to call a by-election. In their Notice, the applicants seek a series of remedies for each of their challenges.

[2] In the applicants' Notice, they do not include a request for the production of documents, as permitted by section 317 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. Nor do the applicants serve a request on the Council to provide documents or materials relevant to the application that they do not have but that are in the possession of the Council, as also permitted by section 317 of the Rules.

[3] As the applicants argued, there is no indication that they are required to make a Rule 317 application. However, there may be consequences for choosing not to make such an application or failing to do so. In this case, and in accordance with the explanations of the Federal Court of Appeal in *Canada v Merchant (2000) Ltd*, 2001 FCA 301 [*Merchant*], those consequences are fatal to the application since the applicants failed to meet their burden of proof. Accordingly, and for the reasons set out below, the application for judicial review is dismissed.

II. Procedural history

[4] I will not repeat in detail the facts leading to this application, as it is not necessary in view of my reasons. The parties have set out these facts in their respective memorandums. However, it is important to examine the procedural history of this application.

[5] In support of their application for judicial review, the applicants each filed an affidavit in which they state, (1) at paragraph 18 of the affidavits of both applicants, that on June 28, 2021,

they sent a formal notice to the Council and to the councillors to call by-elections to fill the positions of Messrs. Hervieux and Riverin and Ms. Vachon pursuant to subsection 3.9(e) of the *Code électoral concernant les élections du Conseil de bande de Betsiamites* [Electoral Code]; and (2) at paragraph 19 of the affidavits of both applicants, that on June 30, 2021, Marie-Christine Gagnon sent a reply to their formal notice in which she stated that the Council and herself did not agree with the claims of Mr. and Mrs. Rock and that Messrs. Hervieux and Riverin and Ms. Vachon held their positions as councillors validly.

[6] The applicants attached to their affidavit a copy of the formal notice they sent to the Council and a copy of the reply they received from Ms. Gagnon. By way of motion, the Council, Mr. Hervieux, Mr. Riverin and Ms. Vachon [the respondents] requested the striking of certain paragraphs of these two affidavits and the Court, by order, struck these paragraphs, as well as Exhibit P-6, from the respective affidavits of Mr. and Ms. Rock. That striking is not determinative in this case and my decision would be the same if I had found otherwise on this application.

[7] In support of the applicants' application for judicial review, they also filed an affidavit from Jean-Marie Vollant, currently the Chief of the Council, who testified as to the decision-making process of the Council and who stated, among other things, that he was out of Pessamit between June 28 and 30, that he never had any discussion about the response to the aforementioned formal notice, and that he first became aware of Mr. Gagnon's response on July 4, 2021.

[8] At the hearing of this application for judicial review, the applicants unequivocally confirmed that they were no longer contesting the election of Mr. Hervieux, Mr. Riverin and Ms. Vachon to the position of councillor in the elections of September 17, 2018 and August 17, 2020, and that they were therefore no longer seeking the remedies in this regard. At the conclusion of the hearing, the only challenge remaining before the Court concerned the Council's refusal to call a by-election.

[9] In their statement of facts and law, the applicants refer to Ms. Gagnon's response and they point out that the response was not sent after consent had been given by a majority of the councillors of the Pessamit Innu Band [the Band] present at a duly convened meeting of the Council as would be required by paragraph 2(3)(b) of the *Indian Act*, RSC 1985, c I-5 [the *Indian Act*]. In their statement of facts and law at paragraph 25, the applicants write that [TRANSLATION] "the response of Marie-Christine Gagnon, dated June 30, 2021 . . . is not valid and does not bind the Council because the Chief, Jean-Marie Vollant, was never consulted before she sent this correspondence to the applicants . . ." and at paragraph 26, that [TRANSLATION] "Marie-Christine Gagnon's reply . . . was not sent following the consent given by a majority of the Band councillors . . .". Although the applicants refer to Ms. Gagnon's letter, it is not the contested decision, which is the one taken by the Council not to call a by-election. This is also suggested by the applicants' argument regarding the quorum required for a valid decision in paragraph 84 of the applicants' statement of facts and law: [TRANSLATION] "[i]n addition, it is impossible for the Council to achieve a quorum of four (4) persons to make a valid decision regarding holding an election because the three (3) respondent councillors have a conflict of interest" and the applicants' argument as to the need for the Council to have validly elected

members, because the Council makes decisions on a multitude of matters that affect the Band (paragraphs 87 et seq. of their statement of facts and law). Similarly, at paragraph 109 of their statement of facts and law, the applicants state that [TRANSLATION] ". . . the application for judicial review is not out of time within the meaning of subsection 18.1 (2) [sic] of the Federal Courts Act since the Council has never made a valid decision regarding the calling of elections for the three (3) vacant councillor positions, as provided for in section 3.9 of the Electoral Code". Paragraph 111 of the applicants' statement of facts and law refers to [TRANSLATION] "decisions made by sub-groups of councillors".

[10] Yet, the applicants' file does not contain a "decision" made by the Council on or about June 28, 2021, or any information about the content of that decision, nor does it contain any documents that would inform the Court as to the reasons for the alleged decision.

[11] On February 10, 2022, the respondents filed a motion for leave to file a supplemental affidavit from Jean-Noël Riverin in response to the arguments in relation to paragraph 2(3)(b) of the *Indian Act*, first made by the applicants in their statement of facts and law. The applicants consented to the respondents' motion and waived cross-examination of Mr. Riverin. The motion was granted and Mr. Riverin's affidavit was therefore accepted for filing. In his affidavit, Mr. Riverin states, among other things, that (1) on June 30, 2021, six members of the Council met to discuss and respond to the contents of the demand letter; (2) the Council's clerk was present; (3) the Council unanimously declined to call a by-election when each of the six vice-chiefs present expressed the opinion that the positions of the three councillors in question

were not vacant within the meaning of the Elections Code; and (4) the Council was not paralyzed by an apparent conflict of interest.

[12] Mr. Riverin, testifying for the respondents, confirmed that the Council did make a decision on June 30, 2021, to refuse to call a by-election.

III. Standard of review, burden of proof and section 317 of the Rules

[13] The parties agree that the standard of reasonableness should be applied. The applicants cited *Bacon St-Onge v Conseil des Innus de Pessamit*, 2017 FC 1179 at paragraph 71 and added that the standard of reasonableness is, in a case such as this, similar to that of correctness and that the decision must be justified by the language of the Electoral Code. The respondents added that the standard of reasonableness applies and that the courts recognize the importance of deference when interpreting written Indigenous laws (*Pastion v Dene Tha' First Nation*, 2018 FC 648 at paras 16–29; *Porter v Boucher-Chicago*, 2021 FCA 102 at para 27).

[14] For greater certainty, deference places the burden on the applicant to show that the decision subject to judicial review is unreasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, citing *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 SCR 83 at para 108; *Mission Settlement v Khela*, [2014] 1 SCR 502 at para 64; *May v Ferndale Settlement*, [2005] 3 SCR 809 at para 71; *Northern Telecom v Communication Workers*, [1980] 1 SCR 115 at 130).

[15] At the hearing, I discussed with the parties the impact of the lack of information about the Council's decision, including the absence of the decision itself, except for the reference to it by Mr. Riverin, and the absence of reasons for the Council's decision to refuse to call a by-election. I have communicated certain concerns to the parties and given them the opportunity to make submissions on this issue. As pointed out by the respondents, this is not a case where the Court has a complete record, but notes the absence of reasons in the decision or record, which may, depending on the circumstances, justify returning the matter to the decision maker (see these circumstances and the jurisprudence cited in *Catalyst Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FC 505).

[16] Here, the Court is faced with a situation in which it does not know whether the record before the Court is complete. In this case, the Court does not know the exact content of the decision rendered or the reasons for it, nor does it know whether or not a written decision, minutes or reasons in any form exist. This ignorance arises from the fact that the applicants have not made a request for documents under section 317 of the Rules, and the applicants' choice not to resort to section 317 is not mitigated by the fact that the parties are filing, in their respective records, the evidence necessary to consider the merits of the case.

[17] As proposed by the respondents, the situation is rather similar to that of the Federal Court of Appeal's decision in *Merchant*.

[18] In this case, the Court has before it only the demand letter sent by the applicants to the Council, the response of Ms. Gagnon and the information provided by the respondents and

contained in the affidavit of Mr. Riverin. The respondents have not confirmed that the record submitted to the Court is complete, nor that grounds exist, and there is no indication that they are required to do so. The presence of the clerk at the June 30, 2021 Council meeting might suggest that some elements of the discussion, as well as the decision, would have been put in writing, but we do not know more.

[19] In *Gagnon v Canada (Attorney General)*, 2017 FC 373 at para 60 [*Gagnon*], the Court determined that "[t]his is not a case in which the failure to produce material in possession of a tribunal (certified record)—optional pursuant to rule 317—makes it impossible to review the decision . . .". In this case, the Court had " . . . detailed affidavits and numerous relevant documents for the Court to make an informed decision regarding their respective arguments, including the reasonableness of the Deputy Minister's decision to dismiss the applicant's grievances" (*Gagnon* at para 60). This is not the case here.

[20] To paraphrase paragraphs 8 to 10 of the Federal Court of Appeal's decision in *Merchant*, the applicants in this case can only obtain relief if they establish that the decision maker made a reviewable error. The applicants bear the burden of showing that the decision is unreasonable and that the defects they allege are present. However, no evidence was filed to confirm the exact content of the Council's decision or its basis, or to detail the procedure followed by the Council members.

[21] Section 317 of the Rules permits a party to request that documents or materials relevant to the application that are in the possession of a tribunal whose order is the subject of the

application be provided to the party. The applicants have not requested such material. Since the Council's decision, its basis, or the details of the procedure followed in adopting the decision are not available to the Court, the applicants cannot show that the decision is unreasonable or invalid and that the rules relating to meetings and decisions of the Council that the applicants rely on, assuming that they apply, have not been followed.

[22] In addition, the Court notes that section 3.11 of the Electoral Code, relied upon by the applicants, provides that [TRANSLATION] "[w]here the office of chief or councillor becomes vacant more than six months prior to the date the next election would ordinarily be held, a special election shall be held in accordance with this code to fill such vacancy until the next election".

[23] The date the next election would ordinarily be held is in August 2022, less than six months from now. Thus, in any event, the applicants' application may have become moot.

[24] In conclusion, since the applicants failed to met their burden, the application for judicial review is dismissed.

JUDGMENT in T-1185-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Costs are awarded to the respondents**.**

"Martine St-Louis"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1185-21
STYLE OF CAUSE:	JOHN ROCK AND CHRISTELLE ROCK v CONSEIL DES INNUS DE PESSAMIT, GÉRALD HERVIEUX, JEAN-NOËL RIVERIN AND MARIELLE VACHON
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