

Federal Court



Cour fédérale

Date: 20210308

Docket: T-936-20

Citation: 2021 FC 209

Ottawa, Ontario, March 8, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

SHAY YELLOWBIRD

Applicant

and

SAMSON CREE NATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Yellowbird was elected to the council of the Samson Cree Nation, but his election was overturned by the Nation's Election Appeal Board, because he performed work duties during the election campaign. The Board found that this contravened a provision of the Nation's Election Law that states that candidates must be offered leave without pay for the duration of the campaign. Even though the Board found no evidence of any corrupt practice, it invalidated Mr. Yellowbird's election and called a new election in which he was not allowed to run.

[2] I am allowing Mr. Yellowbird's application for judicial review of the Board's decision. Even assuming that Mr. Yellowbird contravened the Election Law, the Board failed to ask itself whether the breach might have affected the result of the election. In my view, there is no evidence upon which the Board could have reached such a conclusion. Therefore, the Board's decision must be quashed and Mr. Yellowbird must be reinstated as a councillor.

I. Background

[3] The elections for the chief and council of the Samson Cree Nation are held according to the *Samson Cree Nation Election Law – Nipisihkopahk Wiyasowêwin* [the Election Law], adopted by referendum in 2013. The last election for the councillors was held on July 28, 2020, in the context of restrictions aimed at fighting the COVID-19 pandemic.

[4] Mr. Shay Yellowbird is an income support worker for the Nation or one of its associated organizations. As such, he is responsible for authorizing income support payments to members of the Nation. He was nominated for the position of councillor and was elected.

[5] In the days following the election, however, a complaint was made to the Election Appeal Board, alleging that Mr. Yellowbird engaged in a corrupt practice, contrary to section 3.9 of the Election Law, and failed to take leave from his employment during the election campaign, contrary to section 4.1. These allegations were based on the fact, which is not seriously in dispute, that during the night of July 27–28, Mr. Yellowbird logged into the Nation's computer system to authorize payments for a number of income support recipients. The complaint also

referred to the fact that, earlier in July, gasoline gift cards were offered to certain income support recipients.

[6] In its decision, the Board gave an account of the evidence and noted the relevant provisions of the Election Law. The Board divided its analysis into three issues: whether Mr. Yellowbird engaged in a corrupt practice or vote-buying, whether he contravened the provision of the Election Law regarding leave and what remedy was appropriate.

[7] On the first issue, the Board held that that there was not enough evidence to find that Mr. Yellowbird engaged in a corrupt practice. It noted that the complainant did not make any submissions regarding vote-buying and that there was no direct evidence in this regard.

[8] Nevertheless, the Board found that Mr. Yellowbird contravened section 4.1 of the Election Act. It interpreted that section as requiring candidates to take a leave of absence during the election campaign and found that Mr. Yellowbird, while not paid during this period, contravened the provision by performing certain work duties. The Board also rejected Mr. Yellowbird's explanation that he acted to ensure that income support recipients received their payments on time, despite office closures related to the pandemic.

[9] In selecting the appropriate remedy, the Board noted that "the breach rendered [Mr. Yellowbird] an ineligible candidate to run for a council position in election." Thus, it ordered that a by-election be held for Mr. Yellowbird's seat only. It also prohibited Mr. Yellowbird to run in that by-election.

[10] The by-election was held on August 18.

[11] Mr. Yellowbird now seeks judicial review of the decision of the Board.

II. Analysis

[12] Mr. Yellowbird challenges the fairness of the process followed by the Board as well as the substance of its decision. In my view, the Board's decision was substantively unreasonable. Thus, my analysis will focus on this question and I will not need to review procedural issues.

[13] This Court reviews decisions of bodies such as the Election Appeal Board on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. This means that we do not judge the matter afresh. We simply ensure that the decision reviewed exhibits a rational chain of analysis that complies with the factual and legal constraints bearing on the decision-maker.

[14] Deference towards administrative decision-makers is justified by the fact that the legislature tasked them, not the Court, to make the decision: *Vavilov*, at paragraph 24. In the context of this case, this translates into respect for the principle of self-government and the First Nation's choice to entrust the matter to its own decision-making body. Moreover, as I noted in *Pastion v Dene Tha' First Nation*, 2018 FC 648, [2018] 4 FCR 467, Indigenous decision-makers are typically in a better position to understand the specific needs or circumstances of the community and to appreciate the purpose of specific provisions of election laws.

[15] Nevertheless, under the *Vavilov* framework, a decision may be unreasonable if it is not based on a rational chain of reasoning or if it is “untenable in light of the relevant factual and legal constraints that bear on it.” *Vavilov*, at paragraph 101. These legal constraints may find their origin in Indigenous law. Indigenous law may flow from a variety of sources. It may, among other possibilities, stem from deliberation among an Indigenous community and be couched in written form. Thus, where a First Nation has adopted an election code, the provisions of the code constitute a legal constraint that appeal boards cannot ignore. Here, I find the Board’s decision unreasonable, as it did not follow the logic of the remedial provisions of the Election Law. To explain why this is so, I need to review the other parts of the decision first.

A. *No Corrupt Practice*

[16] The first component of the Board’s decision is the finding that there was no evidence that Mr. Yellowbird engaged in a corrupt practice. The Election Law defines a corrupt practice as immoral, dishonest or unethical conduct, including practices such as vote-buying, intimidation or falsification of documents. The Board must make a decision based on the evidence it receives. Here, the Board considered the evidence and found that there was no corrupt practice. No one suggests that the Board acted unreasonably in reaching this conclusion. I would simply add that the Board did not have to determine whether Mr. Yellowbird acted wisely or whether others were justified in asking questions about the situation, and I refrain from expressing any views on these issues.

[17] In its written argument, Samson Cree Nation suggests that this finding of “no corrupt practice” relates only to the gasoline gift cards issue. I do not read the Board’s decision so

narrowly. Turning first to the complaint, there is no clear separation between the provisions of the Election Law that Mr. Yellowbird is alleged to have breached. In the following excerpt, the complainant asserts that authorizing payments contravened both sections 4.1 and 3.6 of the Election Law:

Under the section on Candidates not being permitted inside buildings (sec 1.1t- “Public Buildings” and Part 4.1) includes doing work within the parameters of the Samson Cree Nation Election Law that states: “...any employee who is nominated as a candidate for office in an election, and accepts that nomination, will be given a leave of absence without pay ...” (see above). Upon review, this includes employment capacity such as making payments to individuals when not entitled to act in that position (Part 3, sec 3.5- under candidacy). Section 3.6 [sic, 3.9] further states that candidates “are prohibited from engaging in corrupt practice”.

[18] Moreover, the Board treats the two issues separately in its decision. Under the heading “Submissions of the Appellant,” the Board summarizes the testimony given in support of the complaint. Towards the end of this section, it notes that it received conflicting evidence regarding the gasoline gift cards and their intended purpose. It then states that it is of the view that “this information would not influence the outcome of this appeal.”

[19] It is only in a subsequent part of its reasons that the Board concludes that there was no vote-buying or corrupt practice, and then goes on to find a breach of section 4.1. As it has already disposed of the gasoline gift card issue, the Board’s finding of no corrupt practice can only be related to the allegation that Mr. Yellowbird failed to take leave from his work when he authorized income support payments.

B. *Leave Without Pay*

[20] There is no dispute that Mr. Yellowbird obtained leave and was not paid for the duration of the election campaign, but nevertheless performed duties related to his employment during the night before election day. What is in issue is whether by doing so, Mr. Yellowbird breached section 4.1 and, in particular, whether the circumstances related to the COVID-19 pandemic provided him with an excuse for doing so.

[21] Section 4.1 reads as follows:

4.1 In order to facilitate their full participation in all elections, any employee who is nominated as a candidate for office in an election, and accepts that nomination, will be given a leave of absence without pay pending the final determination of that election.

[22] A cursory reading of this provision suggests that leave is a benefit that is offered to employees of Samson Cree Nation for a specified purpose: facilitating their participation in the election campaign. The wording of section 4.1 does not support a requirement to take leave nor purposes other than the one expressly stated. In other words, it would impose an obligation on the employer, not the employee.

[23] The Board, however, applied section 4.1 as if it imposed an obligation on the employee to refrain from working. It also rejected Mr. Yellowbird's explanations that given the circumstances, what he did was necessary to ensure that income support recipients received their August allowances in time.

[24] Mr. Yellowbird now challenges the Board's reasoning and argues that section 4.1 only imposes an obligation on the employer and does not prohibit an employee from performing work duties. In response, Samson Cree Nation argues that section 4.1 forms part of a set of provisions aimed at insulating the day-to-day administration of the Nation from the election campaign and must be interpreted so as to achieve this purpose.

[25] I doubt that the wording of section 4.1 can bear the meaning that Samson Cree Nation is now seeking to ascribe to it. I note, however, that the matter proceeded before the Board on the assumption that this was what section 4.1 meant. At that time, Mr. Yellowbird did not argue otherwise. Be that as it may, I need not reach a firm conclusion on this issue, given the manner in which I am deciding the case. I will merely assume, for the purposes of the analysis, that section 4.1 prohibits candidates from working. I would simply add that if section 4.1 is intended to create a prohibition, it would be worthwhile to amend its wording to make this clear.

[26] Assuming section 4.1 sets forth a prohibition, the Board rejected Mr. Yellowbird's argument that he is an essential worker or that his actions amounted to volunteer work or were otherwise justified. Mr. Yellowbird does not seriously challenge this aspect of the Board's decision. There is nothing unreasonable in this finding.

C. *Calling a New Election*

[27] After finding a breach of section 4.1, the Board decided that the proper remedy was to invalidate Mr. Yellowbird's election and to call a by-election to fill his position. This was

unreasonable, because the Board's reasoning cannot be reconciled with the logic of the Election Act.

[28] Not every breach of the Election Act leads to the invalidation of an election. The Election Act was carefully designed so that only serious breaches require that the electoral process be carried out afresh. The exceptional character of the invalidation of an election was underscored by the Supreme Court of Canada in *Opitz v Wrzesnewskij*, 2012 SCC 55 at paragraph 2, [2012] 3 SCR 76:

If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.

[29] The Supreme Court was then dealing with a federal election, but the principle stated in this excerpt is also relevant with respect to First Nations elections: *Assiniboine v Meeches*, 2013 FCA 177 at paragraph 63.

[30] This principle is implemented by provisions of the Election Act carefully delineating situations automatically resulting in the calling of a new election and requiring, in all other cases, a demonstration that the result of the election may have been affected. The first provision, section 20.1, deals with the grounds on which a complaint may be made and the second provision, section 20.7, enumerates the powers of the Board. They read as follows:

20.1 Within seven (7) consecutive days from the date of any election, any candidate in the election who has reasonable grounds to believe:

(a) there was a corrupt practice with respect to the election,

(b) that a person nominated to be a candidate in the election was ineligible to be a candidate; or

(c) that there was any other violation of the Samson Cree Nation Election Law, which may have affected the result of the election;

may file an appeal.

[...]

20.7 The Election Appeal Board may:

a) declare that the complaint is an invalid complaint and dismiss the appeal;

b) declare that the complaint is a valid complaint but dismiss the appeal because the violation of the Samson Cree Nation Election Law was not one which would have affected the result of the election; or

c) declare the complaint to be a valid complaint and order that a new election be held within seven (7) days of the date of the Board's determination.

[31] Section 20.1 clearly states that there are only two categories of cases that may ground a call for a new election irrespective of their impact on the outcome of the election: a corrupt practice and a candidate's ineligibility. Corrupt practices cannot be tolerated, as they go directly to the integrity of the electoral process: *Gadwa v Kehewin Cree Nation*, 2016 FC 597 at paragraphs 87-89 [*Gadwa*]. It goes without saying that ineligible candidates cannot be elected. Beyond these two cases, however, section 20.1 requires a demonstration that the result of the election may have been affected.

[32] The Board characterized Mr. Yellowbird's breach of section 4.1 as a ground of ineligibility. In my view, this is unreasonable, as it cannot be reconciled with the language and

structure of the Election Law. The conditions of eligibility are set forth in section 3.1 of the Election Law:

3.1 A person is eligible to become a candidate for the position of Chief or Councillor if:

- a) his name appears on the Samson Cree Nation's Voters list.
- b) he is of the full age of twenty-one (21) years;
- c) he has not been convicted of an indictable offense or, if he has been convicted of an indictable offense, he has received a pardon through the Canadian legal system; and
- d) he has been a resident on or within a 100 km radius of the boundaries of the Samson Cree Nation Indian Reserve #137 or Pigeon Lake Indian Reserve# 138A for a period of not less than six (6) months immediately preceding an election.

[33] There is no indication that a breach of section 4.1 results in a candidate's ineligibility.

None of the conditions listed in section 3.1 pertain to conduct during the election campaign.

Rather, this is the subject of separate provisions of the Election Law. The *Gadwa* case does not assist Samson Cree Nation in this regard.

[34] I also note that the Board did not find that Mr. Yellowbird's breach of section 4.1 had any effect on the outcome of the election. If anything, the Board's detour through eligibility suggests that it was unable to reach such a conclusion. In any event, given the Board's conclusion that there was no corrupt practice, it is difficult to imagine how Mr. Yellowbird's conduct could have affected the outcome of the election.

[35] Thus, none of the grounds listed in section 20.1 for challenging the results of an election were applicable to Mr. Yellowbird's case. The wording of section 20.7 is not intended to open up

the categories of cases in which a new election may be called. Indeed, in finding that Mr. Yellowbird was ineligible, the Board implicitly recognized that it needed to fit the situation in one of the categories of section 20.1. Section 20.7b) simply allows the Board to declare that a provision of the Election Law was breached, even though the breach does not lead to calling a new election.

[36] Samson Cree Nation argues that any breach of the Election Law may affect the result of the election and can trigger a new election. If it were otherwise, breaches of the Election Law would go unpunished, which would be unfair to candidates who strictly complied with the Election Law. Moreover, the inherent difficulty of proving how the outcome of the election may be affected justifies, according to Samson Cree Nation, a presumption that it may have been.

[37] It is true that the Election Law does not provide for monetary penalties or other sanctions for breaches that did not affect the result of an election. Nevertheless, section 20.7b) empowers the Board to declare a complaint valid, without ordering a new election. In doing so, the Board expresses its disapproval of a candidate's conduct, which constitutes a form of sanction. That Samson Cree Nation now finds it desirable to impose harsher consequences for such breaches does not empower the Court, nor the Board, to rewrite the Election Law to provide for a broader range of penalties. To put it simply, the calling of an new election is not the presumptive remedy for breaches of the Election Law.

[38] To summarize, while I recognize that our Court should show deference to election appeal boards, I must nevertheless be satisfied that the Board's decision complies with the relevant legal

constraints: *Vavilov*, at paragraphs 101, 108, 120. Here, the wording and structure of the relevant provisions of the Election Law constitute insuperable arguments establishing a legal constraint that the Board could not ignore. They give the “knock-out punch” to the Board’s reasoning: *Mason v Canada (Citizenship and Immigration)*, 2019 FC 1251, [2020] 2 FCR 3. As the Supreme Court said in *Vavilov*, at paragraph 121, the Board’s “responsibility is to discern meaning and legislative intent, not to “reverse-engineer” a desired outcome.”

[39] Given the above, I need not decide whether the Board acted reasonably in deciding to hold only a by-election for Mr. Yellowbird’s seat and to prohibit him from running in that by-election.

III. Remedy

[40] As the Board’s decision is unreasonable, I must quash it.

[41] When the Court quashes a decision, the usual remedy is to send the matter back to the administrative decision-maker: *Vavilov*, at paragraphs 139-142. In doing so, the Court acknowledges that under the applicable legal framework, the primary responsibility for making the decision is ascribed to someone else. Nevertheless, “[d]eclining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose:” *Vavilov*, at paragraph 142.

[42] In my view, the Board cannot reasonably find that Mr. Yellowbird's breach of section 4.1 may have affected the outcome of the election. The Board found that there was no evidence of any corrupt practice. This precludes any suggestion that Mr. Yellowbird's conduct was meant to improperly influence the outcome of the election. Moreover, as I mentioned above, the Board's conclusion that the breach of section 4.1 rendered Mr. Yellowbird ineligible strongly suggests that it was unable to find any support for the proposition that the results may have been affected. At the hearing, when asked about this issue, counsel for Samson Cree Nation simply asserted that any breach of the Election Law may affect the result of an election. This, however, simply reads out a portion of section 20.1c). In the end, there is nothing in the record that would allow the Board to reach a finding that the result of the election may have been affected. Thus, it "would serve no useful purpose" to send the matter back to the Board.

[43] It follows that Mr. Yellowbird's election is valid and that the subsequent by-election is invalid. He must be reinstated in his position. Mr. Yellowbird has not asked for further specific declarations in this regard and I trust that Samson Cree Nation will act accordingly.

[44] Mr. Yellowbird claims solicitor-client costs. In *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119, I explained that solicitor-client costs may be ordered where there is "reprehensible, scandalous or outrageous conduct" or where the matter raises issues of public interest. I am not persuaded that this matter falls within either of these categories. Given the circumstances and the amount of work that is typically required in similar cases, I will award costs in a lump sum of \$5000.

JUDGMENT in T-936-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Samson Cree Nation Election Appeal Board in respect of the applicant's election, dated August 11, 2020, is quashed.
3. The applicant was validly elected as a councillor of Samson Cree Nation on July 28, 2020.
4. The by-election held on August 18, 2020 is invalid.
5. Costs are awarded to the applicant in a lump sum of \$5000, inclusive of taxes and disbursements.

“Sébastien Grammond”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-936-20
STYLE OF CAUSE: SHAY YELLOWBIRD v SAMSON CREE NATION
PLACE OF HEARING: HELD BY VIDEOCONFERENCE BETWEEN
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