

Federal Court



Cour fédérale

**Date: 20200305**

**Docket: T-1587-19**

**Citation: 2020 FC 340**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Ottawa, Ontario, March 5, 2020**

**PRESENT: The Honourable Mr. Justice Lafrenière**

**BETWEEN:**

**RÉAL MCKENZIE  
ANITA MCKENZIE  
BEAU ANDRÉ  
FRÉDÉRIC CLUNEY  
NATHALIE GABRIEL**

**Applicants**

**and**

**TSHANI AMBROISE  
PISHU PIERRE PILOT**

**Respondents**

**JUDGMENT AND REASONS**

I. Overview

[1] This is an application for judicial review filed under subsection 18.1(1) of the *Federal Courts Act*, RSC, 1985, c F-7, of a decision dated August 17, 2019, in which the Appeal Board for the Matimekush-Lac John Innu Nation election (Appeal Board) held the July 4, 2019, election to be invalid.

I. Factual background

[2] A summary of the undisputed facts, for the most part excerpted from the affidavits filed in support of the application and the applicants' memorandum, is useful.

A. *Matimekush-Lac John community*

[3] The Matimekush-Lac John Innu community is a band within the meaning of the *Indian Act*, RSC, 1985, c I-5. It occupies two reserves, which are enclosed by the Quebec municipality of Schefferville, which lies on the border of Labrador, over 500 km north of Sept-Îles. The community has about 1,014 members, about 184 of which live outside the two reserves. The town of Schefferville has about 250 residents.

[4] The community is remote and can only be reached by rail or plane.

[5] The area has a high unemployment rate: 21.7% in Schefferville and 33.3% in Matimekush in 2016. The band council is the community's biggest employer, employing about half of all workers. Most other jobs are in the service or mining sectors. The area does not have a post-secondary institution.

[6] The community has a housing shortage. There are about 83 applications for over 200 people on the community's waiting list for housing.

B. *Matimekush-Lac John governance*

[7] The Innu of Matimekush-Lac John are governed by the Conseil de la Matimekush-Lac John Innu Nation (Council), which is made up of one chief and four councillors.

[8] The Council is elected in accordance with the community rules contained in the *Règles de procédure régissant la tenue des élections chez les Montagnais de Schefferville selon leurs coutumes*, amended in February 2016 [rules of procedure governing the holding of elections by the Montagnais of Schefferville according to their customs] (the Rules of Procedure). These rules specifically state at section 3.A that [TRANSLATION] “only band members who have been members for more than a year, are entitled to vote, and have resided within the boundaries of Schefferville for more than a year may be nominated for the office of chief or councillor”.

C. *Parties*

[9] Applicant Réal McKenzie is a member of the Matimekush-Lac John Innu Nation. He has been chief five times already, from 1988 to 1990, 1992 to 1995, 2007 to 2010, 2010 to 2013, and 2013 to 2016. After being defeated in 2016, he was re-elected when he stood for chief in the 2019 election.

[10] Applicants Anita McKenzie, Beau André, Frédéric Cluney and Nathalie Gabriel are all members of the Matimekush-Lac John Innu Nation. They won the election for the four councillor positions on July 4, 2019.

[11] Respondents Pishu Pierre Pilot and Tshani Ambroise are the two community members who appealed the results of the July 4, 2019, election. Tshani Ambroise was elected chief in 2016 and stood again in 2019.

D. *Electoral officer's decision about the residency requirement*

[12] On May 22, 2019, at a general meeting held to prepare the election of a new council, the community members attending appointed Annie Neashish as electoral officer.

[13] Some members at the meeting wanted an explanation of the residency requirement for someone standing for the office of chief or councillor. Ms. Neashish stated that she would do some research in order to prepare an informed response for the next meeting.

[14] On June 4, 2019, the Matimekush-Lac John Innu Nation held a general nomination meeting. At the beginning of this meeting, Ms. Neashish presented a brief in response to the question regarding the residency requirement, in which she analyzed section 3.A of the Rules of Procedure and examined the case law on the issue of whether a residency-related eligibility requirement in the election codes of communities whose elections are not governed by section 74 of the *Indian Act* was lawful.

[15] Ms. Neashish determined that a full ban on people who reside off-reserve from standing for election was discriminatory within the meaning of section 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK), 1982, c 11* (the Charter), and that the ban under section 3.A was [TRANSLATION] “unjustified under section 1 of the Charter” as it [TRANSLATION] “would clearly not withstand the applicable test”. She concluded that all band members, regardless of whether they lived on or off the reserve, were entitled to stand for the office of chief or councillor in an election.

[16] Following Ms. Neashish’s presentation, the meeting nominated the election candidates. The accepted candidates included applicant Réal McKenzie and respondent Tshani Ambroise for the office of chief, and the other four applicants for the office of councillor.

#### E. *Election*

[17] On July 4, 2019, the community held a general election in accordance with the Rules of Procedure.

[18] With 200 votes in his favour, Réal McKenzie was elected to the office of chief. Respondent Tshani Ambroise received 106 votes.

[19] Applicants Anita McKenzie, Beau André, Frédéric Cluney and Nathalie Gabriel were elected to the four councillor positions.

#### F. *Challenge of results and investigation by Appeal Board*

[20] On August 2, 2019, respondent Pishu Pierre Pilot appealed the results of the election. In general terms, he alleges that the electoral officer did not [TRANSLATION] “vigorously” apply the eligibility requirements, specifically, membership, place of residence and the lack of a criminal record, to all candidates.

[21] On August 5, 2019, respondent Tshani Ambroise also filed a notice of appeal. He alleges that the chief-elect, Réal McKenzie, was ineligible under the Rules of Procedure because he had not resided within the boundaries of Schefferville for more than a year preceding the election.

G. *Appeal Board investigation*

[22] The Appeal Board, consisting of three people who are not members of the community, launched an investigation to hear and dispose of the complaints. The Board interviewed Tshani Ambroise, Pishu Pierre Pilot, Réal McKenzie and Annie Neashish.

[23] In his interview, Réal McKenzie testified that he has lived in Schefferville for 14 years and that he has no other place of residence. He explained that following his defeat in the 2016 election, he looked for a job in Schefferville for several months to no avail before finally agreeing to work as a policy advisor for the Ekuanitshit community. Because of his job, he had to leave Schefferville, but he returned home at least three or four times in the year preceding the election.

[24] At no point did the Board’s investigation address the issue of the eligibility of the councillors elected on July 4, 2019.

II. Board's decision

[25] On August 17, 2019, the Appeal Board issued its decision, which is reproduced in full below:

[TRANSLATION]

**Subject:** Unanimous decision of the Appeal Board regarding the Innu of Matimekush-Lac John election held on July 4, 2019

**Whereas** following the July 4, 2019, election, two appeals were filed in accordance with section 14.1 of the *Règles de procédure régissant la tenue des élections chez les Montagnais de Schefferville selon leurs coutumes—février 2016* [rules of procedure governing the holding of elections by the Montagnais of Schefferville according to their customs—February 2016] (Rules of Procedure);

**Whereas** under section 14.3 of the Rules of Procedure, an Appeal Board composed of three people who are not members of the Montagnais band of Schefferville but are members of the administration of other bands in the area was tasked with disposing of the appeals and making a unanimous/majority decision;

**Whereas** the Appeal Board has held six telephone conferences since August 30, 2019, including a hearing, and has analyzed the relevant evidence to help it make a fair, unbiased decision;

**Whereas** the Appeal Board believes that the Electoral Officer ignored section 8.4 of the Rules of Procedure, which regards, among other things, the meeting attendees' concerns about the residency requirement;

**Whereas** the Appeal Board has enough reasons to believe, upon analysis of the two affidavits filed and the interview with the Electoral Officer at the hearing on September 13, 2019, that the Electoral Officer did not strictly apply the Rules of Procedure, more specifically, section 3 on eligibility, particularly with respect to the residency requirement for candidates;

**Whereas** the Appeal Board finds that the requirement for residency within the boundaries of Schefferville is an essential element of the Rules of Procedure established in accordance with the customs of the Matimekush-Lac John First Nation, one that the

Electoral Officer, in light of her duties and authority, could not disregard; and

**Whereas** the Appeal Board has enough reasons to believe that the Electoral Officer did not apply section 3 on eligibility strictly and exactly to all candidates in the July 4, 2019, election;

**Now therefore**, the Appeal Board has unanimously decided to find this election invalid under section 14.9A of the Rules of Procedure and to immediately report to the Conseil de la Première Nation de Matimekush-Lac John and the appellants.

### III. Analysis and conclusion

[26] At the beginning of the hearing, counsel for the respondents conceded that it was clearly unreasonable to invalidate the election of the four councillors given that there were no allegations or evidence that they were ineligible or any other irregularity that might have influenced the fact they were elected. He further recognized that the Appeal Council did not give any reasons to justify its decision.

[27] Following the judgment in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the reasons given by administrative decision makers have taken on a greater importance and are now the starting point for the analysis. As noted recently by Justice Denis Gascon in *Braud v Canada (Citizenship and Immigration)*, 2020 FC 132 at paragraph 43:

[The reasons] are the primary mechanism by which administrative decision makers show that their decisions are reasonable, both to the affected parties and to the reviewing courts (*Vavilov* at para 81). They serve to state “how and why a decision was made”, demonstrate that “the decision was made in a fair and lawful manner” and shield against “the perception of arbitrariness in the exercise of public power” (*Vavilov* at para 79). In short, it is the reasons that establish the justification for the decision.



[28] The Appeal Board's decision does indeed contain several errors requiring this Court's intervention, including the following:

- (1) The reasons are silent on the issue of whether Réal McKenzie was ineligible for the office of chief to which he was elected.
- (2) The decision makes no reference to the evidence provided by Réal McKenzie regarding his residence in Schefferville.
- (3) The decision does not include a legal analysis of the residency requirements in the Rules of Procedure, which the Appeal Board is tasked with interpreting and applying.
- (4) The Board's decision fails to analyze the constitutional validity of the residency requirement in the Rules of Procedure. The reasons provide no justification for invalidating the election of the councillors.

[29] The Appeal Board reached a conclusion, namely that the election was invalid, without even mentioning the essential evidence before it; this makes the decision unreasonable.

[30] The parties agree that the Appeal Board's decision must be set aside; however, they disagree on whether the matter should be referred back to the Appeal Board for reconsideration of the respondents' complaints about Réal McKenzie's ineligibility.

[31] The respondents are asking the Court to make the decision that the Appeal Council should have made and to dismiss the respondents' appeals. They claim that the only reasonable outcome in light of the applicable law and the evidence before the Appeal Board was that Réal McKenzie was eligible to stand as a candidate for the office of chief under the Rules of Procedure.

[32] The applicants submit that it is within the Court's power, on judicial review, to interpret the concept of residence in section 3.A in a manner that includes people whose ordinary or usual place of residence is in Schefferville and to conclude that Réal McKenzie is a resident within the meaning of section 3.A.

[33] The Court has the discretion on judicial review to decide whether or not to grant relief, provided, of course, that it exercises this discretion judicially and in accordance with the applicable principles. I agree that an individual can have more than one residence and that a person does not stop residing somewhere simply because they were temporarily away, especially for work reasons. In my opinion, there is a strong factual argument here on the basis of which the Appeal Board could have concluded that Réal McKenzie met the residency requirement.

[34] However, the Court should be reluctant to interfere lightly or arbitrarily, without serious grounds, in the interpretation and application of an electoral law that falls squarely within the jurisdiction of the Appeal Board.

[35] In *Giguère v Chambre des notaires du Québec*, 2004 SCC 1, [2004] 1 SCR 3, Justice Deschamps, dissenting, provided the following explanation of the circumstances in which a reviewing court can substitute its conclusion for that of the administrative decision-maker (at paragraph 66):

A court of law may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily. It must have serious grounds for doing so. A court of law may render a decision on the merits if returning the case to the administrative tribunal would be pointless . . . . The courts may also intervene in cases where, in light of the circumstances and the evidence in the record,

only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable . . . .

[36] The Quebec Court of Appeal has held that the concept of residence is a purely factual one: *Thérien c Pellerin*, 1997 CanLII 10408 (QC CA), [1997] RJQ 816, 833 (CA). Moreover, the case law has established that “residency is a factual issue that requires an examination of the whole context of the individual under scrutiny” (*Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 at para 58).

[37] The applicants failed to establish that there is only one possible outcome, which would allow the Court to substitute its decision for that of the Appeal Board and to rule on the residency requirement in section 3.A of the Rules of Procedure. The matter will therefore be referred back to a differently constituted board for reconsideration in light of these reasons and the disposition of the judgment, to which the parties have consented.

**JUDGMENT in T-1587-19**

**THIS COURT ORDERS AND ADJUDGES** as follows:

1. The application for judicial review is allowed.
2. The Appeal Board's decision dated August 17, 2019, which had the effect of invalidating the July 4, 2019, election, is set aside.
3. Applicants Anita McKenzie, Beau André, Frédéric Cluney and Nathalie Gabriel were duly elected to the office of councillor.
4. The matter is referred back to an appeal board.
5. The electoral officer has to form a new appeal board, composed of different members than the previous board, in accordance with section 14.3 of the *Règles de procédure régissant la tenue des élections chez les Montagnais de Schefferville selon les coutumes* [rules of procedure governing the holding of elections by the Montagnais of Schefferville according to their customs] (the Rules of Procedure), within 20 days of this decision.
6. The new appeal board has to redo the investigation and hold a hearing in accordance with the Rules of Procedure, which includes receiving any relevant evidence and written submissions produced by the parties, and render a new

decision within 45 days of the board's formation by the electoral officer. The decision has to address the following issues:

- (a) How should “résidant depuis plus d'un an dans les limites de Schefferville” [have resided within the boundaries of Schefferville for more than a year] in section 3.A of the Rules of Procedure be interpreted?
  - (b) Was Réal McKenzie eligible in light of the residency requirement in section 3.A of the Rules of Procedure?
  - (c) If the appeal board determines that Réal McKenzie was not eligible, does section 3.A of the Rules of Procedure violate the right to equality protected by section 15 of the *Canadian Charter of Rights and Freedoms*?
  - (d) If it does, is this violation justified within the meaning of section 1 of the *Canadian Charter of Rights and Freedoms*?
7. In any event, the appeal board must explain its decision by referring to the applicable rules of law, the facts it will gather and the relevant administrative records, including the electoral officer's file.
  8. Until then, the Council's powers are not limited.
  9. The Court will retain jurisdiction to resolve any difficulties with the enforcement of this judgment.

10. No costs are awarded.

“Roger R. Lafrenière”

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Judge

Certified true translation  
This 14th day of April 2020.  
Michael Palles, Reviser

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1587-19

**STYLE OF CAUSE:** RÉAL MCKENZIE et al. v TSHANI AMBROISE et al.

**PLACE OF HEARING:** QUÉBEC, QUEBEC

**DATE OF HEARING:** FEBRUARY 27, 2020

**JUDGMENT AND REASONS:** LAFRENIÈRE J.

**DATED:** MARCH 5, 2020

**APPEARANCES:**

David Janzen  
Marie-Alice D'Aoust

FOR THE APPLICANTS

François Longpré  
Soudeh Alikhani

FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

Dionne Schulze s.e.n.c.  
Attorneys  
Montréal, Quebec

FOR THE APPLICANTS

Borden Ladner Gervais L.L.P.  
Counsel  
Montréal, Quebec

FOR THE RESPONDENTS