

Federal Court



Cour fédérale

Date: 20100616

Docket: T-2017-09

Citation: 2010 FC 655

Ottawa, Ontario, June 16, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**THERESE VILLENEUVE and BERNADETTE UNKA
ON THEIR OWN BEHALF AND ON BEHALF OF
OTHER MEMBERS OF THE
DENINU K'UE FIRST NATION**

Applicants

and

**VIOLET BEAULIEU, ALICE DEBOER, DENNIS KING,
HANK MULDER, ROBERT SAYINE, RAYMOND SIMON,
LOUIS BALSILLIE, GREG BALSILLIE, CAROL COLLINS,
DAVE PIERROT, PATRICK SIMON, DENINU KU'E FIRST NATION and
THE MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek review of three decisions which they say are interrelated:

1. The decision of the Band Council of the Deninu K'ue First Nation (hereinafter "DKFN") to call an election for Chief and Council;
2. The decision of the Electoral Officer not to follow custom and permit proxy voting for members of the DKFN who do not reside in Fort Resolution, NT; and
3. The decision of the Election Appeal Committee to reject the appeal of Therese Villeneuve.

[2] The remedy the applicants seek is an order (1) quashing the Election Appeal Committee's decision to let the election stand, (2) declaring that the election was invalid, (3) declaring that the procedure taken violated the *Charter* rights of non-resident voters, (4) declaring that the decisions of those elected be set aside, (5) appointing a receiver manager, (6) prohibiting the DKFN staff from making any substantive decisions, (7) requiring Indian and Northern Affairs Canada (hereafter "INAC") to appoint an impartial Electoral Officer for a new election, and (8) requiring that the new Electoral Officer institute proper non-resident voting procedures.

[3] This application is improperly drafted in that it purports to challenge more than one decision and names as a party INAC without there being any decision made by INAC that is under review. Further, it is not clear to the Court that the interests of the two named applicants are identical. Ms. Villeneuve participated in and may in fact have been instrumental in scheduling the election which she now challenges. Further, not once did she ever raise any objection to the exclusion of non-resident members from voting until she lost the election. Her motivation and interest appears to the Court to be personal to her, rather than having a view to the best interests of the DKFN. Ms. Unka appears to have a legitimate personal as well as a broader interest directed to members who reside away from Fort

Resolution. The applicants are, in effect, challenging the validity of the election for Chief and Council held on November 2, 2009. That is the real issue before the Court.

Background

[4] DKFN is a “band” within the meaning of s. 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5. The band office is located in the remote hamlet of Fort Resolution, NT.

[5] DKFN has approximately 831 members including some 386 who live in areas other than Fort Resolution, NT. DKFN elections are governed by the *Customary Election Regulations of the DKFN* (hereafter “Code”).

[6] It is fair to say that the DKFN has been undergoing significant turmoil relating to their independent governance for quite some time. DKFN is currently operating under a co-management agreement as mandated by INAC because of ongoing debt management and deficit issues.

[7] Immediately prior to the events giving rise to this application, the Chief and Council was comprised of (1) Louis Balsillie, who was a councillor and was appointed in January 2008 to be Acting Chief pending a by-election, retroactive to July 27, 2007 when the elected Chief, William Norn, was ousted by the Council, (2) Robert Sayline, (3) Raymond Simon, (4) Frank Lafferty, and (5) Dave Pierrot who was selected by Council on September 28, 2009 to replace Philip Beaulieu who had been removed from Council at the Annual General Meeting of September 9, 2009, because he was no longer a resident of Fort Resolution. In short, prior to January 2008, there was a Chief and five

councillors and afterwards there were 5 councillors, one of whom had been appointed as the Acting Chief.

[8] At the September 9, 2009 annual meeting of the DKFN, two important resolutions were passed by the membership. The first was that the pending election be held in accordance with the existing Code which had been adopted in 1994. An election was pending because, as we shall see, the Code prescribes that the election was to be held the first week of October, 2009. There had been some dissatisfaction with the Code and moves had been made to amend it, but they had not been finalized. It was determined that any such amendments would be better done by the new Council and membership after the election.

[9] The second resolution of note was that there was to be “a new election 25 days from now, for Chief and a complete Council of six, for a two year term.” It was recognized at the meeting that this might be problematic and legal advice might be required. The difficulties with this motion were many, including the following:

1. The Code provided for 5, not 6 Councillors;
2. Two of the existing Councillors had two years remaining on their term and under the Code their positions were not up for election; and
3. The term of office set out in the Code was a four year term, not two years.

[10] It is not clear from the record what transpired next. The record is replete with confusion as to the sequences of events and counsel were of little assistance to the Court in clarifying matters. There is some reference in the record to an election date of October 6, 2009 being set but there is no indication

as to how or by whom it was set. The record reveals that an Electoral Officer was appointed and an election date of October 26, 2009 was set. Again, it is unclear who set this date and under what authority.

[11] The October 26, 2009 date was cancelled when the Electoral Officer stepped down. A new date was set for November 2, 2009, and Violet Beaulieu, the respondent, was appointed as the Electoral Officer.

[12] Near the end of October 2009, counsel for DKFN advised that the November 2, 2009 election might be improper and that it should not proceed until the pending wrongful dismissal litigation relating to the former Chief's removal from office was completed. Notices cancelling the election were posted. On learning the news of the cancellation, INAC wrote the DKFN Council on October 23, 2009, expressing its concern that with the removal of Philip Beaulieu as councillor, because he no longer resided in the community, and the cessation of Louis Balsillie's interim mandate, which INAC claimed ended September 12, 2009, the remaining two councillors lacked the necessary "quorum to make decisions and exercise the community governance function." INAC asserted that it was "necessary for an election to be held as soon as possible to fill, at a minimum, the councillor positions so that quorum can be attained and governance restored." INAC asked the DKFN to advise on how this situation would be remedied, and warned that "should it not appear that an electoral process is underway to fill the vacant positions, the Department will have to consider alternative governance measures, which may include the appointment of a third party manager."

[13] Whether the DKFN Council was without quorum is a disputed fact. The applicants take the position that the Council lacked quorum. INAC appears to also have taken this position in their correspondence, but its memorandum is silent on this issue. The other respondents submit that the DKFN was governed by the Acting Chief and four remaining Councillors until the November 2009 election that is in dispute.

[14] A meeting was held where a Membership Committee was formed to respond to INAC's October 23, 2009 letter. It is unclear how this meeting occurred or under what authority it was held. The applicant, Therese Villeneuve, was a member of this Membership Committee and its Chairperson. By letter dated October 25, 2009, the Membership Committee informed INAC of the steps they were taking to address the DKFN's governance issues, one of which included proceeding with the November 2, 2009 elections. Public notices informing that the election was back on were then posted. Violet Beaulieu remained the Electoral Officer.

[15] The election proceeded on November 2, 2009 with two candidates for Chief: Louis Balsillie received 67 votes and Therese Villeneuve received 66 votes. On November 6, 2009, Therese Villeneuve requested a recount of the ballots; this request was denied by the Electoral Officer. Therese Villeneuve appealed this decision to the DKFN Election Appeal Committee the same day.

[16] On November 10, 2009, the Election Appeal Committee received written submissions from Violet Beaulieu, Electoral Officer, and Steve Cuthbert, DKFN Chief Financial Officer that responded to the substance of the allegations raised in the appeal. It appears that these were not provided to

Therese Villeneuve. On November 12, 2009, the Election Appeal Committee denied Therese Villeneuve's appeal and provided her with handwritten reasons consisting of a single sentence.

Issues

In my view, the issues in dispute are the following:

1. Did the Minister make a decision that is properly the subject of this judicial review application, and if so did the Minister commit a reviewable error in failing to appoint a third party manager and/or failing to demand that an election take place pursuant to s. 74 of the *Indian Act*?
2. Was the election improperly conducted?
3. Did the Election Appeal Committee breach procedural fairness in denying the applicant Therese Villeneuve's appeal?
4. If an affirmative answer is provided for issue 2 or 3 what is the appropriate remedy?

Analysis

a) The Role of the Minister

[17] This issue resolved itself at the hearing when, after I informed the applicants that I had difficulty seeing how the Minister was a proper party in light of the wording of the Notice of Application, counsel for the applicants informed the Court that the applicants and the Minister had reached an agreement and that the applicants would discontinue their application against the Minister, with the Court to remain seized of the issue of costs.

b) *Was the election improperly conducted?*

[18] There are two sub issues under this heading: (1) was the election conducted in accordance with the Code or the custom of the DKFN, assuming custom can override the Code, and if so, (2) did the manner in which the election was conducted illegally disenfranchise the members who reside outside Fort Resolution contrary to DKFN custom or the *Charter*?

[19] The composition of the Council and term of officer is set out in section 3 of the Code which provides as follows:

3. COMPOSITION AND TERMS OF OFFICE OF COUNCIL

3.1 Composition

The First Nation will be governed by a council consisting of one (1) Chief and five (5) Councillors.

3.2 Terms of Office

- a) The term of office of the Chief shall be four (4) years commencing the day following the election of Chief and concluding on the day following the Election for Chief four (4) years later.
- b) The three Councillors receiving the most number of votes in the 1994 Election for Councillors will be four (4) years commencing in the day following the Election for and concluding on the day the Election for Councillors four (4) years later.
- c) The term of office for the Councillors receiving the fourth and fifth most number of votes in the 1994 Election for Councillors will be two (2) years commencing on the day following the Election for Councillors and concluding the day following the Election for Councillors two (2) years later.
- d) Thereafter, the term of office of each Councillor will be four (4) years commencing on the day following the Election in which they were elected and concluded in the day following the Election for Councillors four (4) years later.

3.3

A person appointed to the position, Council or by the Council pursuant to s. 15 to fill a vacancy caused by the death, resignation, or termination of a Councillor will hold that office for the remainder of the term of office of that councillor.

3.4 Assumption of Office

Each elected Candidate will assume office the day following the Election, By-election or Run-off Election for that office.

[20] The calling of elections is specifically provided for in the Code, as follows:

4. ELECTION DAYS

4.1 The Election for office of Chief & Councillors

The Election for the office of Chief and Councillors will be held in the first full week of October with the specific date during that week to be set by Resolution of the Council.

[21] As is evident from the provisions of the Code, the DKFN has a fixed election to be held in the first week of October every four years. 2009 was an election year. The specific day in that week on which the election is to be held is to be fixed by the Council.

[22] In this case, the election was not held in the first week of October and it was not held on a date fixed by Council. It was held on a date fixed by a committee chaired by Ms. Villeneuve. There is no evidence that Council ever passed any resolution or adopted the position of Ms. Villeneuve's Membership Committee as to the date of the election.

[23] It might be argued that the membership as a whole, at a properly conducted meeting, can override the express provisions of the Code, although there is no such provision in the Code that

provides for this. However, even if I were convinced that the membership could do so, there is no evidence before me that this is what occurred in this case. The motion to hold an election that was passed by the membership on September 9, 2009, appears never to have come to pass as there was no election in 25 days, it was not an election for an entirely new Council, and it was not for a term of two years. It is no answer for the parties before the Court to suggest that the members of the DKFN are not lawyers and don't know the niceties of the Code when the Code purports to reflect their traditional practice. I would have expected most members to understand their traditional election procedures, at least those in power. In my view, the election held on November 2, 2009 was improper, and illegal because it was not called by Council in accordance with the Code. Therefore, the election results are invalid and any actions or decisions that flowed from those purported to be elected are nullities.

[24] Although I have agreed with the applicants that the election held was improper, it was not for any of the reasons they advanced. It was not called by Council, contrary to the submissions of Therese Villeneuve and in this respect it was irrelevant whether the Council had a quorum or not. Further, I need not decide whether the failure to permit those away from Fort Resolution to vote by proxy was improper. I would note however, that there is nothing in the Code that permits it and, in fact, the Code appears to require that voters vote in person at the polling stations established by Council.

c) Did the Election Appeal Committee breach procedural fairness?

[25] In light of my finding that the result of the election was invalid, I do not need to address this issue. I would note, for those charged in the future with such committees, that the better practice would be to provide to the appellant with everything that is before the committee so that the appellant has an opportunity to respond and address that information.

d) The Appropriate Remedy

[26] Submissions were made that a “practical solution” was required as the DKFN had serious issues facing it and they required a governing body. Concern was expressed that a decision quashing the election might leave the DKFN in a position where there was no Council and where no election could be called as there was no quorum. That concern, in large measure, caused the applicants to name INAC as a party and to seek an order from this Court that the Minister order an election to be called.

[27] Although I have quashed the election results, I do not find that this leaves the DKFN with a gap in governance.

[28] Section 3 of the Code, in setting out the term of office of the Chief and Councillors, provides that it is for a term “commencing the day following the election ... and concluding on the day following the election ... four (4) years later.” Some, including INAC read this as providing that these elected officials serve for a fixed term of exactly four years. It was on this reasoning that some were of the view that the governing body had lost quorum. I am of the view that such an interpretation is incorrect. The Code must be read in a purposive manner. The membership in approving it would not have done so if in so doing they created a possible situation where there would be a gap in governance. Rather, in my view, the drafters provided that each elected official would serve from the date after his or her election until the day after his or her replacement was elected. It was expected, in the ordinary course, that this election would be four years later because the Code provides there is to be an election in the first week of October. However, if that election is held at a later date then, in my view, the

incumbents remain in office until their successors are elected. The operative and critical component of this section of the Code is not the reference to a four year period of office; rather it is to the expiry of the term upon the successor being elected.

[29] Accordingly, I find that the current governing body is and has been comprised of the persons listed in paragraph 7 above. In light of my finding that the election held in November 2009 was invalid, Council ought to call an election for the positions of Chief and those councillors who have already served a term of four years. They have authority to do so under Article 8 of Schedule B to the Code which provides that “the powers and authority of the Chief and Council include ... other actions and decisions as deemed necessary from time to time for the proper governance of the Deninu Kue [sic] First Nation.” In so doing, this Council may wish to give consideration as to whether the members who do not reside in Fort Resolution ought to be permitted to vote by proxy.

[30] Lastly, and in keeping with its authority under Article 8 of Schedule B to the Code, the Council may also wish to consider passing a resolution approving and ratifying any of the decisions taken by the “Council” that believed that it was elected on November 2, 2009. Once a new and proper Council is elected it may review those decisions but by ratifying them, the governance of DKFN will have been regularized.

Costs

[31] I have determined, in the exercise of my discretion, that all parties, including INAC, are to bear their own costs. The principal applicant Therese Villeneuve raised a number of objections before the Court that she did not raise in the proceedings in which she participated. In fact, the election that I

have quashed was held at the specific direction of a group she chaired. The issue of non-resident voters, raised by the second applicant Bernadette Unka, was not raised with the Council or Election Appeal Committee prior to these proceedings and the Court has found it unnecessary to address that issue. Further, the applicants improperly named INAC as a party. As for INAC, part of the confusion lay at its feet. It wrongly raised the spectre that Council had no quorum. Thus, although the appellants and INAC would normally be awarded costs, in these circumstances it is my view that neither should be awarded their costs.

JUDGMENT

THIS COURT ORDERS that:

1. This application is allowed, in part;
2. The Court declares that the purported election of Chief and Council of the Deninu K'ue First Nation held on November 2, 2009, is invalid as it was not held in accordance with the *Customary Election Regulations of the Deninu K'ue First Nation*;
3. The Council of the Deninu K'ue First Nation is currently comprised of the following persons: Louis Balsillie, Robert Sayline, Raymond Simon, Frank Lafferty, and Dave Pierrot; and
4. Each party shall bear its own costs.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2017-09

STYLE OF CAUSE: THERESE VILLENEUVE ET AL v. VIOLET
BEAULIEU ET AL

PLACE OF HEARING: Yellowknife, Northwest Territories

DATE OF HEARING: June 10, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: June 16, 2010

APPEARANCES:

Jeffrey R.W. Rath FOR THE APPLICANTS
Magnolia Unka

Douglas G. McNiven FOR THE RESPONDENTS
VIOLET BEAULIEU AND OTHERS

Donna Keats FOR THE RESPONDENT
Tracy Carroll THE MINISTER OF INDIAN AND
NORTHERN AFFAIRS CANADA

SOLICITORS OF RECORD:

Rath & Company FOR THE APPLICANTS
Priddis, Alberta

McNiven Law Office FOR THE RESPONDENTS
Northwest Territories VIOLET BEAULIEU AND OTHERS

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada THE MINISTER OF INDIAN AND
NORTHERN AFFAIRS CANADA