

Federal Court of Appeal



Cour d'appel fédérale

Date: 20141121

Docket: A-202-14

Citation: 2014 FCA 271

**CORAM: DAWSON J.A.
WEBB J.A.
SCOTT J.A.**

BETWEEN:

**INNU NATION, PROTE POKER, JEREMY
ANDREW, AGATHE RICH, NORA
MISTENAPEO, MARIE AGATHE RICHE,
CLARENCE NUI, PETER PASTEEN,
EDWARD PIWAS**

Appellants

and

SIMON POKUE

Respondent

Heard at St. John's, Newfoundland and Labrador, on November 3, 2014.

Judgment delivered at Ottawa, Ontario, on November 21, 2014.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**WEBB J.A.
SCOTT J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellant Innu Nation is a not-for-profit corporation incorporated under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32. In September 2012, it held an election to elect its board of directors, including its president and vice-president. The President and Vice President are also known as the Grand Chief and the Deputy Grand Chief of Innu Nation. The

first two individually named appellants were elected, respectively, as Grand Chief and Deputy Grand Chief. The remaining individual appellants were elected as directors of Innu Nation.

[2] Simon Pokue, the respondent, was not elected. He then brought an application for judicial review in the Federal Court “in respect of the General Election held by the [Innu Nation]”.

[3] The appellants brought a motion to strike the underlying judicial review application.

[4] A judge of the Federal Court dismissed the motion, 2014 FC 325, [2014] F.C.J. No. 360, on the ground that the Innu Nation, in holding its 2012 election, acted as a federal board, commission or other tribunal. It followed the Federal Court had jurisdiction to entertain the judicial review application.

[5] This is an appeal from the decision of the Federal Court. For the reasons that follow, I have concluded that the Federal Court erred in law in its articulation and application of the test to be applied in order to answer the jurisdictional question. It follows that I would allow the appeal and dismiss the judicial review application.

I. Applicable Legislation

[6] Subject to certain exceptions not relevant to this appeal, subsections 18(1) and (3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 give exclusive, original jurisdiction to the Federal Court for judicial review in respect of “any federal board, commission or other tribunal”.

[7] Section 2 of the *Federal Courts Act* defines the term “federal board, commission or other tribunal” to mean “any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown”. Again, this definition is subject to certain limited exceptions not relevant to this appeal.

[8] These provisions are set out in full in the appendix to these reasons.

II. The Issue

[9] While the appellants raise a number of issues, in my view one issue is dispositive: did the Federal Court err in finding that the Innu Nation, in holding its 2012 election, acted as a federal board, commission or other tribunal? For simplicity, in the balance of these reasons I shall simply refer to a “federal board” as in this case nothing turns on any distinction between a board, commission or other tribunal. The phrase “federal board” should therefore be read in the balance of these reasons as including a federal commission or other tribunal.

III. The Standard of Review

[10] The parties agree that the Judge was obliged to articulate and apply the correct test for determining whether an entity is a federal board. I agree. This is consistent with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8.

IV. Application of the Standard of Review

[11] The leading authority with respect to the proper interpretation of the definition of federal board is the decision of this Court in *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52, 400 N.R. 137. At paragraph 29 of the reasons, Justice Nadon, writing for the Court, observed that “a two-step enquiry” must be made in order to determine whether an entity is a federal board. The first enquiry is directed to what jurisdiction or power is being exercised. The second enquiry is directed to the source or origin of the jurisdiction or power that is being exercised.

[12] At paragraph 30, Justice Nadon quoted with approval from D.J.M. Brown and J.M. Evans “Judicial Review of Administrative Action in Canada”, volume 1, looseleaf (Toronto: Canvasback Publishing, 1998) at paragraph 2:4310 to the effect that the primary determination of whether a board falls within the definition of a federal board is the source of the board’s authority. The primary determination is not the nature of either the power exercised or the entity exercising the power.

[13] Nothing in Justice Stratas’ decision in *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 detracts from this articulation of the law. This is demonstrated at paragraph 47 of his reasons where Justice Stratas cites *Anisman* for the proposition that it is necessary “to examine the particular jurisdiction or power being exercised in a particular case and the source of that jurisdiction or power”.

[14] The facts in *Toronto Port Authority* were markedly different from those now before the Court: all of the parties accepted that the Port Authority's actions at issue found their sources in federal law. What was at issue was whether the Port Authority was conducting itself privately or was exercising a power of a private nature.

[15] Having articulated the correct test, I now turn to the decision of the Federal Court.

[16] I begin by observing that the Federal Court made no reference to this Court's decision in *Anisman*. Relying on *Toronto Port Authority*, it stated that "being subject to judicial review depends principally on whether or not the power exercised possesses public character, not whether the actor exercising that power is technically public itself" (reasons, at paragraph 17). The Federal Court went on to note that "the legal question in this case is whether the Innu Nation's election possesses public character and is thus subject to judicial review" (reasons, at paragraph 19). The Court went on to apply this test to the evidence before it.

[17] In my respectful view, in these passages the Federal Court mis-states the proper questions to be answered. The proper questions to be answered were: first, what jurisdiction or power was being exercised; and, second, what was the source of that jurisdiction or power.

[18] The answer to the first question was that the Innu Nation was conducting an election of its board of directors.

[19] The answer to the second question was that the source of Innu Nation's power to do so was Article 3 of By-Law 1 of the Innu Nation (as amended by By-Law 2). As the Federal Court correctly recognized, the Innu Nation's powers in respect of the election did not originate from a federal Act or prerogative (reasons, at paragraph 20). It follows that, in conducting its 2012 election of directors, Innu Nation was not exercising powers conferred by or under an Act of Parliament or by or under an order made pursuant to a Crown prerogative. As such it was not acting as a federal board, and the Federal Court lacked jurisdiction to conduct the application for judicial review.

[20] The respondent argues that in conducting its election the Innu Nation acted as a Band Council and "purported" to exercise jurisdiction or power conferred by or under an Act of Parliament.

[21] There is no merit in this submission. The Federal Court made no finding that in conducting its election the Innu Nation purported to act either under the *Indian Act*, R.S.C. 1985, c. I-5, or through its own custom; nor could such a finding be made on the evidentiary record. Any general exercise of powers by the Innu Nation unrelated to the election is irrelevant to the analysis mandated by the definition of federal board and the decision of this Court in *Anisman*.

V. Conclusion

[22] For these reasons, I would allow the appeal and set aside the order of the Federal Court with costs payable to the appellants both in this Court and the Federal Court. Pronouncing the judgment the Federal Court ought to have pronounced, I would dismiss the application for

judicial review on the ground that in conducting its 2012 election the Innu Nation was not acting or purporting to act as a federal board.

“Eleanor R. Dawson”

J.A.

“I agree.

Wyman W. Webb J.A.”

“I agree.

A.F. Scott J.A.”

APPENDIX

Section 2 and subsections 18(1) and (3) of the *Federal Courts Act* read as follows:

2. “federal board, commission or other tribunal” means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

[...]

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of *prohibition*, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[...]

(3) The remedies provided for in

2. « office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d’une prérogative royale, à l’exclusion de la Cour canadienne de l’impôt et ses juges, d’un organisme constitué sous le régime d’une loi provinciale ou d’une personne ou d’un groupe de personnes nommées aux termes d’une loi provinciale ou de l’article 96 de la Loi constitutionnelle de 1867.

[...]

18. (1) Sous réserve de l’article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de *prohibition* ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l’alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d’obtenir réparation de la part d’un office fédéral.

[...]

(3) Les recours prévus aux

subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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SIMON POKUE

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SCOTT J.A.

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