Federal Court Cour fédérale

Date: 20220422

Docket: T-1224-21

Citation: 2022 FC 591

Ottawa, Ontario, April 22, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ERWIN BASTIEN AND PIIKANI NATION CHIEF AND COUNCIL ON BEHALF OF PIIKANI NATION

Applicants

and

BRIAN JACKSON

Respondent

JUDGMENT AND REASONS

[1] Mr. Bastien and Mr. Jackson are councillors of the Piikani Nation. Mr. Bastien brought a petition for the removal of Mr. Jackson, alleging that the latter took bribes, engaged in conduct contrary to the interests of the Nation or acted contrary to *piikanissini*, that is, the values, principles and way of life of the Piikani Nation. The Piikani Nation Removal Appeals Board [the Board] dismissed the petition. Mr. Bastien and the council now seek judicial review of this decision.

[2] I am dismissing their application. Contrary to their submissions, the Board did not adopt an unreasonable interpretation of *piikanissini*, nor did it fail to consider Mr. Bastien's evidence. The adaptations that the Board made to the process that was initially agreed to did not result in any breach of procedural fairness.

I. Background

A. *Relevant Legislation*

[3] Piikani Nation is a First Nation signatory to Treaty 7 in southern Alberta and a member of the Blackfoot Confederacy. It conducts its elections in accordance with the *Piikani Nation Election Bylaw, 2002* [the Bylaw]. This Bylaw contains a procedure for the removal of a chief or councillor. One way of initiating this process is for a councillor to file a petition with the council, stating the grounds for which the removal of another councillor is sought, with supporting evidence. The council then considers the petition and may make a recommendation to the Board that the councillor be removed. The Board then conducts a hearing and makes a decision regarding the removal.

[4] Section 10.05.02 of the Bylaw sets forth the grounds for which removal of a councillor may be sought:

> […] the person has failed to maintain a standard of conduct expected of a member of the Piikani Nation Council, and without limiting the generality of the foregoing, does any of the following:
>
> (a) accepted or offered a bribe, forged a Piikani Nation document or was otherwise dishonest in his official role;
>
> (b) attended a Piikani Nation Council meeting in an intoxicated state;

(c) conducted a corrupt practice;

(d) failed to act in accordance with the principles of PIIKANISSINI;

(e) abused his office such that the conduct negatively affected the dignity and integrity of the Piikani Nation or the Piikani Nation Council;

(f) used his position in an attempt to obtain a benefit for himself, a member of his immediate family, or another person with whom he is not acting at arm's length;

(g) conducted himself in a manner that undermines the lawful authority of the Piikani Nation Council and has negatively affected the Piikani Nation Council or the Piikani Nation;

(h) acted independently without the approval of the Piikani Nation Council in a manner that exceeds the authority of a member of the Piikani Nation Council;

(i) ceases to remain eligible to hold the office of Chief or Councillor pursuant to section 6.02; or

(j) such other conduct as shall be determined by the Piikani Nation Council to be of such a serious nature that removal from office is necessary and appropriate.

[5] Paragraph (d) of section 10.05.02 mentions the concept of *piikanissini* but does not formally define it. The preamble of the Bylaw equates this concept to the customs and traditions of the Nation and refers to a declaration made by the council in 2002, entitled "PIIKANISSINI." This declaration opens with the sentence, "Piikanissini, the way of life of the Piikani, sets out the inherent values and principles of the Akaa Piikani, the ancient Piikani people." It does not further define *piikanissini*.

B. *The Petition to Remove Mr. Jackson*

[6] The respondent, Mr. Jackson, was elected to his current term on the Piikani Nation council in January 2019. On September 2, 2020, the applicant, Mr. Bastien, who is another member of the council, filed a petition for Mr. Jackson's removal. The council considered the petition on September 30, 2020 and made a recommendation to the Board to remove Mr. Jackson.

[7] The allegations grounding the petition find their origin in Mr. Jackson's previous term of office as councillor and continue until the present. They can be summarized as follows. In 2006, Mr. Jackson is alleged to have received a bribe from Norwegian Petroleum in consideration for his support of the grant of oil and gas rights to that company. In about 2003, he is alleged to have attempted to transfer a large amount of money belonging to the Nation to an investment firm in the United States, to the benefit of an evangelical ministry—what became known as the "Swift transfer" issue. During the same period, he allegedly took steps to keep Ms. Liliana Kostic as the Nation's financial adviser, despite knowing that she was not qualified. He also took various steps to help Ms. Kostic in two lawsuits opposing her to the Nation. These facts were alleged to fit within most, if not all, grounds for removal enumerated above.

[8] The Board conducted hearings on May 13 and 14 and June 7, 2021. It heard testimony from Mr. Bastien and Mr. Jackson. It issued its decision dismissing the petition on July 7, 2021.

C. *The Board's Decision*

[9] With respect to the alleged bribes, the Board acknowledged that Mr. Jackson did not deny receiving payments from Norwegian Petroleum. It described the arrangement under which these payments were made as being creative and strange and noted that only the councillors who attended meetings to discuss the Norwegian Petroleum matter received payments. Nevertheless, the Board found that there was no evidence that Mr. Jackson was "enticed or bribed by payments he received from Norwegian Petroleum to grant the company with authorizations." In reaching this conclusion, the Board underlined that Mr. Bastien's evidence was simply that he was of the view that making direct payments to councillors "just wasn't the way things were done at Piikani."

[10] With respect to the Swift transfer issue, the Board accepted Mr. Jackson's evidence that the transfer never took place and was masterminded by Mr. Rod North Peigan, that the band council resolution [BCR] regarding the transfer was not legitimate and that his signature on a finance committee memo endorsing the transfer was forged. The Board found that the evidence did not support the allegation that Mr. Jackson engaged in a corrupt practice, and that this would be true even if Mr. Jackson had endorsed the finance committee memo.

[11] The Board briefly addressed the issue of Ms. Kostic's credentials. It accepted Mr. Jackson's evidence that he believed that it was in the Nation's best interests to keep Ms. Kostic as investment advisor.

[12] The Board devoted an important part of its reasons to *piikanissini*. After quoting the 2002 Piikanissini Declaration in full, it accepted Mr. Jackson's conception of *piikanissini*:

> Piikanissini, an ancient principle, is something that speaks to a person's heart and is their moral guide. It is a subjective construct that only the person him or herself can measure. In other words, one person can not tell another person that he or she is in violation of Piikanissini. It is for the person to decide whether he or she has acted in a manner which does not accord with Piikanissini. Piikanissini is closely related to a person's way of life and moral guide. Again, one person can not hold a yard stick up to the actions of another and tell them that they have fallen short of the standards prescribed by Piikanissini.

[13] The Board then reviewed the conduct alleged to be in breach of *piikanissini*. It found that Mr. Jackson acted in what he believed was the interest of the Nation or made statements he believed were true. Thus, it found that Mr. Jackson did not act in a manner inconsistent with the principles of *piikanissini*.

[14] The Board also rejected Mr. Bastien's allegations regarding other grounds for removal. It held that Mr. Jackson did not abuse his office; that his actions were not for his own benefit or those of a family member, and that there was no evidence that he and Ms. Kostic were close acquaintances; that there was no evidence that his participation in the lawsuit initiated by Ms. Kostic compromised the Nation's position; and that he did not leak information to Ms. Kostic.

[15] One member of the Board registered a partial dissent. He noted that Mr. Jackson "appears to have used his position to assist the Piikani Nation's opponents in litigation" and that this contravened paragraphs (d), (e) and (f) of section 10.05.02 of the Bylaw. Nevertheless, the member was of the view that the situation was not serious enough to warrant removal, and

concurred in the majority's disposition of the petition. He also shared the majority's view that it is not for others to decide whether someone acts in conformity with *piikanissini*.

D. *The Application for Judicial Review*

[16] Mr. Bastien and the Council applied for judicial review of the Board's decision. Mr. Jackson was duly served with the application, but did not file a notice of appearance nor an application record.

[17] On the eve of the hearing, Mr. Willier, counsel for Mr. Jackson, sought to file a notice of appearance. My colleague Prothonotary Catherine Coughlan refused the notice, because the time limit for filing it had elapsed and no motion for an extension of time had been filed. Mr. Willier also wrote to the Court asking for a postponement. At the hearing, I allowed him to make submissions in this regard. I then dismissed his request, because his client had been duly served, took no steps to respond to the application and failed to provide any explanation for his inaction.

[18] As Mr. Jackson did not file an application record, he is barred from making submissions at the hearing, unless the Court, in its discretion, makes an exception: *Gemstone Travel Management Systems Inc v Andrews,* 2017 FC 463 at paragraph 6. I allowed Mr. Willier to make submissions with respect to one narrow issue pertaining to this Court's jurisdiction to entertain the application.

II. Analysis

[19] I am dismissing the application for judicial review because the Board's decision is reasonable in light of the evidence and is the result of a fair process. I will first dispose of Mr. Jackson's submissions regarding this Court's jurisdiction to entertain this application. I will then provide my reasons regarding the reasonableness of the Board's decision and the lack of any breach of procedural fairness.

[20] Before doing so, I wish to emphasize what this judgment is not about. It is obvious from the record that the parties represent two groups who hold sharply divergent perspectives about events of the last two decades. These divergences have given rise to sprawling litigation in various forums. My decision pertains to one narrow issue: whether the Board's decision is reasonable and fair. In turn, the Board's decision pertains to a specific issue: whether Mr. Jackson should be removed from council. As I explain below, my role is not to substitute my view of the matter for the Board's. I am not making any pronouncement as to matters that are the subject of other proceedings nor as to the merits of each side's political views.

A. *Jurisdiction of the Court*

[21] Mr. Jackson submits that this Court does not have jurisdiction to hear this application for judicial review. He asserts that the Board's decision is final, as provided by Section 11.07 of the Bylaw:

> The decision of the Piikani Nation Removal Appeals Board shall be rendered within thirty (30) days of the hearing and shall be final and binding upon all parties, with no further appeal to the Piikani

> Nation Council, the Piikani Nation Removal Appeals Board or to any Court of Law.

[22] I disagree. This Court has jurisdiction. An application for judicial review is not a "further appeal" within the meaning of section 11.07. Appeal and judicial review are fundamentally distinct: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. In any event, this Court's jurisdiction to review decisions made by First Nation election appeal bodies is firmly established: *Canatonquin v Gabriel*, [1980] 2 FC 792 (CA); *Ratt v Matchewan*, 2010 FC 160 at paragraphs 96-106; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paragraphs 29-63.

B. *Substantive Reasonableness*

[23] The applicants' main challenge pertains to the merits of the Board's decision. On judicial review, however, a decision will be overturned only if it is unreasonable: *Vavilov*. In other words, this Court shows deference towards decisions made by First Nations' electoral appeal tribunals. The applicant bears the burden of demonstrating that a decision is unreasonable: *Vavilov*, at paragraph 100. With respect to a decision-maker's treatment of the evidence, the Court intervenes only in exceptional circumstances, where the decision-maker "has fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, at paragraph 126. Decision-makers must give reasons for their decisions, but these reasons need not be perfect: *Vavilov*, at paragraph 91. This principle is especially relevant in this case, as section 11.07 of the Bylaw gives the Board only 30 days to issue its decision. For these reasons, the Court may consider the evidence before the decision-maker to understand why a particular outcome was reached: *Vavilov*, at paragraph 94.

(1) *Piikanissini*

[24] The applicants first submit that the Board's interpretation of *piikanissini* is unreasonable. As I explained above, the Board stated that *piikanissini* is a person's moral guide and cannot be used as a yardstick to measure another person's conduct. The applicants argue that this interpretation renders the removal provisions of the Bylaw meaningless. They also argue that the Board ignored this Court's jurisprudence regarding *piikanissini*.

[25] I am not persuaded that the Board made any reviewable error in its discussion of *piikanissini*. By referring to *piikanissini*, the Bylaw incorporates unwritten Piikani legal concepts in what is otherwise a written election code. The Bylaw conspicuously refrains from defining *piikanissini*. Rather, sections 20.03.03 and 21.03.03 of its companion Regulations state that members of the Election Appeals Board and Removal Appeals Board must be "of Blackfoot origin." Members of these boards are thus assumed to be familiar with *piikanissini*. The same is true of participants in the proceedings before these boards, who are necessarily members of the Piikani Nation.

[26] This Court, in contrast, is not familiar with *piikanissini*. This warrants a high degree of deference towards the Board's findings with respect to *piikanissini*: *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraphs 20-27, [2018] 4 FCR 467; *Porter v Boucher-Chicago*, 2021 FCA 102 at paragraphs 27–28.

[27] The applicants take issue with the Board’s acceptance of Mr. Jackson’s subjective view of *piikanissini*. However, there is no evidence in the record that points to a different conception of *piikanissini*. I cannot benefit from the guidance of Elders or knowledge keepers. Mr. Bastien, in particular, did not describe an alternative vision of *piikanissini* in his testimony. For instance, he did not assert that *piikanissini* had anything to say about accepting payments from a company doing business with the Nation: Applicants’ record [AR] at 3603. While there may be debates among the Piikani Nation regarding the precise contents of *piikanissini* or what it requires in specific circumstances, it is for the Board to make a decision in this regard. Moreover, in rendering its decision, the Board is not required to provide a degree of explanation that would make the nuances of *piikanissini* accessible to non-Blackfoot persons.

[28] In any event, the Board did not end its analysis of *piikanissini* with the idea that it cannot serve as a yardstick. It reviewed each allegation of breach and concluded that Mr. Jackson acted in conformity with *piikanissini*, because he acted upon what he believed to be the truth or what he thought was in the interests of the Nation. In their submissions, the applicants do not challenge these specific findings nor the underlying idea that acting upon one’s honestly held beliefs or in the perceived interests of the Nation is compatible with *piikanissini*. Therefore, I find the Board’s decision to be reasonable in this regard.

[29] The applicants argue that the Board disregarded this Court’s jurisprudence regarding *piikanissini*, that is, two decisions regarding elections or removals at Piikani Nation. I must first say that this Court’s decisions should not be taken as binding with respect to unwritten Indigenous law. The manner in which the Bylaw incorporates *piikanissini* evinces an intention

not to allow non-Blackfoot people to make pronouncements regarding the substance or application of *piikanissini*. The autonomy of the Piikani Nation in defining its own law would be jeopardized if this Court's decisions were to acquire the force of binding precedent with respect to *piikanissini*.

[30] In any event, the decisions the applicants rely upon are not incompatible with the Board's decision in this case. My colleague Justice Michael Phelan's decision in *Jackson v Piikani Nation Election Appeals Board*, 2008 FC 130, did not purport to define or apply *piikanissini*. Rather, he interpreted the eligibility provisions of the Bylaw, as they then read, as not allowing the Chief Electoral Officer to prevent a candidate from running based on an alleged breach of *piikanissini*. In *Chief Gayle Strikes With a Gun v Piikani First Nation*, 2014 FC 908 [*Strikes With a Gun*], my colleague Justice Glennys McVeigh dismissed an application for judicial review of a decision of a differently constituted Board, which removed the Chief for breaching the principles of *piikanissini*. While I do not have the Board's reasons in that case, Justice McVeigh's reasons suggest that Ms. Strikes With a Gun was in a conflict of interests, disobeyed a court order and tolerated abusive behaviour on the part of her supporters. There is no indication that Ms. Strikes With a Gun acted upon her honest beliefs or in the interest of the Nation. Thus, no analogy can be drawn with the present matter. Even if the Board's decision in that case could not be reconciled with the one presently under review, the fact that an administrative tribunal issues conflicting decisions is not in itself a ground of judicial review: *Vavilov*, at paragraphs 71-72.

[31] Lastly, I do not agree that the Board's interpretation of *piikanissini* renders the Bylaw's removal procedure ineffective. There are several grounds of removal besides a breach of

piikanissini. In spite of Mr. Jackson's assertions regarding the subjective nature of *piikanissini*, the Board conducted a detailed review of his conduct. The *Strikes With a Gun* case provides an example of a breach of *piikanissini* leading to removal.

(2) Consideration of the Evidence

[32] The applicants also challenge the Board's treatment of the evidence. In substance, they argue that the Board accepted Mr. Jackson's evidence without explaining why Mr. Bastien's evidence was rejected. While they assert that this occurred frequently, they provide only three specific examples.

[33] In my view, the applicants' criticism is unwarranted. The reality is that Mr. Bastien was not a first-hand witness of most of the conduct he holds against Mr. Jackson. He was not a member of council from 2003-2007, when many of these facts took place. His case is largely based on documentary evidence. Although he asked the Board to adopt one interpretation of that evidence, he was often unable to provide the context that would have helped the Board understand the transaction giving rise to a particular document. This context was often provided by Mr. Jackson.

[34] The bribery issue illustrates the contrast between Mr. Bastien's and Mr. Jackson's evidence. Mr. Bastien based his case on certain documents showing that Mr. Jackson and other councillors received payments directly from Norwegian Petroleum. Beyond these documents, however, Mr. Bastien had little concrete evidence that these payments constituted bribes. For

example, when questioned by counsel for the Board, he could only offer this explanation (AR at 3590–3591):

> Q. […] do you have any evidence to show that those payments were made to induce or encourage Mr. Jackson to sign a deal with Norwegian Petroleum?
>
> A. Just what we have in the petition that the cheques led up to them signing the final thing the day of – they all got the cheque.
>
> Q. Right. So your evidence is that the cheques preceded the signing of the deal?
>
> A. Yeah.
>
> Q. Do you have any evidence for the Board that those cheques were made for the purpose of buttering up Mr. Jackson or the other people that made the deal so that it could fit into a box called "bribery." Do you have any evidence on that?
>
> A. Just the common practice that we use back home that we don't do that.
>
> Q. Okay.
>
> A. We put everything to the Nation so that it can never come back so that you're looking like you're taking a bribe.
>
> Q. Okay.
>
> A. So to the Nation, to what we follow at the Nation is you said — if you're going to come on to the Reserve, you pay to the Nation, and the Nation will pay you.
>
> Q. Right. Okay.
>
> A. Other than that, that's all I have.
>
> Q. So your evidence is it wasn't the way we normally do things. It wasn't the Piikani Nation standard of doing things?
>
> A. Exactly.

[35] Mr. Jackson admitted receiving the payments. Therefore, there was no need for the Board to engage in a lengthy discussion of the documentary evidence. Mr. Jackson, however, testified at length regarding the negotiations with Norwegian Petroleum and the reasons that led the company to make direct payments to certain councillors. Mr. Bastien, who did not participate in these negotiations and learned of the payments many years later (AR at 3482), provided no evidence contradicting Mr. Jackson's testimony. Thus, one should not be surprised that the Board's discussion of this issue is focused mainly on Mr. Jackson's evidence.

[36] This leads me to the applicants' submissions regarding specific instances of evidence allegedly ignored. The first one pertains to Mr. Jackson's intervention in litigation involving Ms. Kostic. Mr. Bastien asserts that a councillor who does not support a decision made by council has a duty to resign, and that publicly challenging the decisions of council is incompatible with the duties of a councillor. The majority of the Board disagreed and found that Mr. Jackson could take a position in the Kostic litigation based on what he honestly believes to be true. I fail to see anything unreasonable in this conclusion. In particular, the Board did not have to discuss Mr. Bastien's evidence in this regard, as this evidence was merely a restatement of his views on the scope of the grounds for removing a councillor—in other words, a statement of law, not facts. Mr. Jackson admitted that he gave evidence in the Kostic litigation. The only factual issue was the honesty of his beliefs, a matter on which there was no contrary evidence.

[37] The applicants' second specific issue with the Board's treatment of the evidence pertains to Ms. Kostic's qualifications as an investment adviser. In this regard, Mr. Bastien's case relied almost exclusively on a 2003 memo written by Mr. Slavik, who then was Piikani Nation's legal

adviser, stating that Ms. Kostic lacked the requisite qualifications. Mr. Bastien’s testimony on this issue was vague (AR at 3790–3803). The hiring of Ms. Kostic was not the focus of his attention when he was a member of council. He was no longer present when Mr. Slavik gave his advice, and only learned of it several years later.

[38] Mr. Jackson, in contrast, provided detailed evidence as to the process that led the council to select CIBC Wood Gundy, where Ms. Kostic worked. He also explained that when Ms. Kostic changed firms, there was a brief period during which she was qualified in Manitoba, but not in Alberta, and that she quickly became licensed in the latter province as well.

[39] Faced with this evidence, the Board could reasonably decide that Mr. Jackson, as a member of council, did what he thought was in the best interests of the Nation when they hired Ms. Kostic and retained her when she changed firms. The Board’s discussion of the issue was bound to focus on Mr. Jackson’s evidence, as Mr. Bastien had little or no first-hand knowledge of the matter.

[40] The third issue, which the applicants raised at the hearing, is the presence of contradictions in Mr. Jackson’s testimony. One alleged contradiction relates to the dates of the payments received from Norwegian Petroleum. Mr. Jackson’s testimony was that Norwegian Petroleum stopped making payments to the Nation and began making direct payments to councillors who attended council meetings. However, the first payment to Mr. Jackson was made on June 30, 2006, while Norwegian Petroleum kept making payments to the Nation during the summer. Cross-examined on the issue, Mr. Jackson could not provide a clear explanation (AR at

3668–3672). The Board did not discuss this issue in its reasons. It may have been useful to know why the Board did not put much weight on this issue. However, the Board was entitled to accept Mr. Jackson's evidence despite the presence of certain contradictions: *FH v McDougall*, 2008 SCC 53 at paragraphs 57-73, [2008] 3 SCR 41. The alleged contradiction pertains to events happening 15 years ago, about which there was no contrary evidence, and was of relatively minor importance. The Board's failure to explicitly address the issue does not render its decision unreasonable.

[41] A second alleged contradiction pertains to a class action initiated by Mr. Jackson on behalf of all members of the Nation against CIBC. Mr. Jackson initially testified that the claim had been dismissed after another representative plaintiff was appointed in his stead and he became less involved in the matter. When confronted with the order dismissing the claim, still showing him as plaintiff, Mr. Jackson said that he had never seen this order. Without more, I fail to see this as a major issue that the Board had to address explicitly. I note that the class action played no role in the petition to remove Mr. Jackson nor in the Board's decision.

(3) Overall Assessment of the Grounds for Removal

[42] The applicants also argue that the Board ignored the framework set by section 10.05.02 of the Bylaw by failing to make a global assessment of whether removal was warranted, focusing instead on a separate analysis of each ground of removal. This submission is without merit. The Board concluded that none of the individual grounds for removal was made out. Mr. Bastien did not put forward grounds for removal outside those enumerated in section 10.05.02. Having found that the evidence did not support any of Mr. Bastien's allegations, it is difficult to understand

how the Board could have nonetheless concluded that removal was warranted. While the Bylaw theoretically allows for the removal of a councillor based on the totality of evidence instead of specific grounds (see, e.g., *Strikes with a Gun*, at paragraph 171), I fail to see how that could be possible in this case. On most counts, the Board found that there was no evidence that Mr. Jackson did anything wrong. This is not a situation where evidence of some wrongdoing related to several grounds can “add up” to a level that warrants removal.

[43] In *Johnny v Adams Lake Indian Band*, 2017 FCA 147 at paragraph 20, the Federal Court of Appeal described the role of election appeal boards in removal cases:

> In every case it is for the elected Community Panel to determine whether impugned conduct rises to the level that warrants removing a democratically elected Councillor from their office. This is a decision the Community Panel must make on the basis of its knowledge of the customs and norms of the Band, taking into account realistic expectations and a goodly measure of common sense in order to determine whether a Councillor has engaged in conduct that has caused electors to lose faith or confidence in the judgment of the Councillor or to so lose respect for the Councillor that the Councillor ought to be removed from office. Realistic expectations and common sense are required because a standard of conduct based upon unfailing perfection is one not likely to be met consistently, and one likely to lead to frequent petitions to remove Councillors.

[44] Having reviewed the record, I am convinced that the Board reasonably discharged its role, as described by the Federal Court of Appeal in the aforementioned case.

(4) *Ultra Vires* Recommendations

[45] At the end of its reasons, the Board noted the scope of the litigation in which the Nation was embroiled and made two recommendations “outside of its formal ruling.” It first

recommended "that the Chief and Council of the Piikani Nation and their families make immediate efforts, through their culture, ceremony and spirituality, to reconcile with one another." It also suggested that outside counsel, such as a former judge, be retained to review whether the claims involving Ms. Kostic and Mr. McMullen can be settled.

[46] The applicants take issue with these recommendations, which would be *ultra vires*, unauthorized by the Bylaw and not properly based on the evidence.

[47] It sometimes happens that a court or administrative tribunal expresses recommendations, wishes or suggestions that go beyond its formal mandate. Such recommendations are not binding. As they do not form part of the formal decision, they are not subject to judicial review. I fail to see anything in the Board's recommendations that would taint its reasoning process or its decision.

C. *Procedural Fairness*

[48] I now turn to the applicants' allegations that the process followed by the Board was unfair. In this regard, it is well established that the removal of a councillor through an adjudicative process calls for robust guarantees of procedural fairness: *Johnny v Adams Lake Indian Band*, 2017 FCA 146 at paragraphs 24-25 [*Johnny*]. The Bylaw itself spells out some of these guarantees:

> 11.03 The Chief or Councillor against whom the proceedings are being taken shall be given full opportunity to make answer and defence to the proceedings, including being provided with full disclosure of evidence before the hearing.

> 11.04 The Chief or Councillor against whom the proceedings are being taken shall be given full opportunity to make answer and defence to the proceedings at the hearing, including requiring the production of documents, the attendance of witnesses and the right to council [*sic*].
>
> 11.05 The Piikani Nation Removal Appeals Board shall determine the rules for the conduct of the hearing as it determines necessary and appropriate in the circumstances.

[49] Nevertheless, the requirements of procedural fairness are not a straitjacket. First Nation decision-makers, such as the Board, "should be granted significant latitude to choose [their] own procedures": *Bruno v Samson Cree Nation*, 2006 FCA 249 at paragraph 22. In this context, a tribunal's procedural choices are not unfair simply because the applicant would have preferred the tribunal to have proceeded differently.

[50] Moreover, "Issues of procedural fairness must be raised at the earliest opportunity and a failure to do so amounts to an implied waiver of any perceived breach of procedural fairness": *Sanusi v Canada (Citizenship and Immigration)*, 2020 FC 1004 at paragraph 7. In other words, a party "may not raise an issue of procedural fairness [in this Court] that it could have raised, and failed to raise, before the Tribunal": *Canadian Tire Corporation, Limited v Koolatron Corporation*, 2016 FCA 2 at paragraph 33; see also *Johnson v Canada (Attorney General)*, 2011 FCA 76 at paragraph 25; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 90, [2019] 1 FCR 121.

[51] Four interrelated reasons justify the requirement to raise procedural fairness matters at the earliest opportunity. First, this provides the decision-maker with an opportunity to correct the alleged breach. Second, the lack of timely complaint often indicates that the situation is not as

serious as it is later alleged to be. Third, litigants should not be encouraged to remain silent about potential breaches of procedural fairness and raise the issue only if the outcome of the proceeding is unfavourable. In such circumstances, the opposing party may have legitimately relied on the lack of objection. Fourth, alleging a breach of procedural fairness should not be a manner of reversing tactical choices that, in hindsight, a party regrets.

[52] The applicants' procedural grievances fail to meet this basic requirement. Most of them pertain to matters to which Mr. Bastien did not object during the Board proceedings.

[53] I would also emphasize that an applicant bears the onus of establishing a breach of procedural fairness. Yet, many of the applicants' complaints are general in nature and are not supported by references to specific portions of the hearing transcript. This makes it difficult for me to assess their validity. Based on my review of the record, I can only say that the Board afforded both parties a full opportunity to bring evidence and make submissions during a three-day hearing.

(1) Last-Minute Changes to the Hearing Process

[54] The applicants' first specific complaint pertains to the Board's decisions regarding the presentation of the evidence. The hearing rules initially adopted by the Board provided that the evidence would mainly be tendered in writing and that the hearing would be reserved for rebuttal evidence, questioning by the Board and submissions. Yet, two days before the hearing, the Board directed the parties to provide testimony in chief regarding all the issues in dispute. Moreover, after the hearing began, the Board, after discussing with counsel, directed the parties to provide

their evidence on an issue-by-issue basis, with Mr. Bastien and Mr. Jackson alternating on the witness stand.

[55] I acknowledge that these last-minute changes required the parties and their counsel to show a measure of flexibility. They do not, however, constitute a breach of procedural fairness.

[56] First, Mr. Bastien did not complain when these changes were announced. Upon learning that he would have to testify, Mr. Bastien did not ask for a postponement or otherwise asserted that the process was unfair. The decision to proceed issue-by-issue was made after the parties' and the Board's counsel discussed the matter during a break. Mr. Bastien did not raise any objection, nor suggest that this process would result in any form of unfairness.

[57] Second, I fail to understand how a requirement to provide oral testimony constitutes a breach of procedural fairness. Litigants usually make the opposite complaint—that the decision-maker refused to allow an oral hearing. If anything, the Board's decision to hear witnesses injected additional fairness into the process. The Board did not provide reasons for its decision to require the parties to testify. Upon reviewing the parties' written statements, it may have concluded that it could not properly decide the case without oral testimony, especially as it involved issues of bribery. The Board was certainly entitled to insist on receiving oral testimony.

[58] While Mr. Bastien may have had little time to prepare, I fail to see how this raises to the level of procedural unfairness. After all, Mr. Bastien had to know his case and be prepared to answer questions, whether or not he was to testify in chief. Indeed, counsel for Mr. Bastien

stated, in an email dated May 10, 2021, that her client would be "prepared to provide any evidence, clarification, or answer questions as requested by the Board."

[59] Likewise, Mr. Bastien has not explained in what respect the Board's decision to hear evidence issue-by-issue prevented him from presenting his evidence or responding to Mr. Jackson's evidence or otherwise constituted a breach of procedural fairness.

[60] Third, Mr. Bastien cannot claim to have a legitimate expectation that no witnesses would be heard. To the extent that the alleged expectation is based on the hearing rules adopted by the Board, these rules preserve the Board's discretion to vary the process:

> 18. These rules are subject to revision or addition by the Board at any time in the event that the Board determines such changes are necessary and appropriate to ensure that these proceedings are conducted in a manner which is both fair to all parties, efficient and respects the rule of law.

[61] Mr. Bastien perhaps thought that a paper process would be more advantageous for him. This, however, does not generate a legitimate expectation.

(2) Management of the Evidence

[62] Mr. Bastien then challenges a number of decisions made by the Board with respect to the admissibility of evidence. As I mentioned above, many of Mr. Bastien's allegations are not particularized and are difficult to assess. One should also bear in mind that a decision-maker such as the Board is called upon to make several decisions with respect to the admissibility of evidence and not all of them affect the fairness of the process. In making these decisions, the

Board must ensure that the process is not only fair, but also efficient and keep in mind the principle of proportionality.

[63] Mr. Bastien's most specific allegation is that the Board denied his request to bring new evidence. A few days ahead of the resumption of the hearing in June, Mr. Bastien sought leave to introduce documents that were recently filed in related proceedings in this Court and would prove further collaboration between Mr. Jackson and Ms. Kostic, the existence of a relationship between them and Mr. Jackson's leaking of documents to Ms. Kostic. The Board refused the request, noting that written evidence should have been filed according to the deadlines set forth in the hearing rules. In my view, the Board's decision did not render the process unfair. From the description given by Mr. Bastien, I understand that the evidence regarding collaboration would simply have reinforced what was already on the record. As the Board was of the view that such conduct did not constitute a ground for removal, additional evidence or evidence of repetition would not have changed the result. As to Mr. Jackson's relationship with Ms. Kostic, nothing prevented counsel for Mr. Bastien from cross-examining him on the issue.

[64] Mr. Bastien also complains that the Board showed more generosity towards Mr. Jackson, by allowing him to file a supplementary affidavit before the hearing and to testify beyond the confines of his written statement. He also says that Mr. Jackson's evidence was disorganized and not properly indexed. Some of this may be true. Mr. Jackson's bundle of documents was not a model of organization. Both Mr. Bastien and Mr. Jackson had a tendency to testify about facts, the relevance of which was not immediately obvious. None of this, however, rendered the process unfair. Mr. Bastien was not deprived of the possibility to make his case. Nor was he

unable to understand his opponent's case, which remained substantially the same throughout the hearing, even though it could have been better organized and side issues were sometimes raised.

(3) Absence of a Board Member

[65] The applicants' last procedural complaint is the fact that one board member was absent on the last day of the hearing, but nevertheless participated in the decision, after reviewing the transcript.

[66] In *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282 at 329-330, the Supreme Court of Canada stated that "as a general rule, the members of a panel who actually participate in the decision must have heard all the evidence as well as all the arguments presented by the parties." This rule is often described by the maxim, "he who decides must hear." In *Johnny*, for example, the decision of an election appeal tribunal was struck down because certain members of the tribunal did not attend all the hearings.

[67] Nevertheless, like all breaches of procedural fairness, the application of this rule may be waived if a party fails to raise the issue at the earliest opportunity. In *Bart v McMaster University*, 2016 ONSC 5747 [*Bart*], the Ontario Divisional Court held, at paragraph 151:

> […] having consented to a process and procedure whereby a Tribunal member would be absent for a limited period of time and would review the audiotape of what he missed, the Applicants "cannot now be heard to complain that it was deficient or that [they were] entitled to some other process" (*Taucar v. University of Western Ontario*, 2011 ONSC 3069, 336 D.L.R. (4th) 305 (Div. Ct.), leave to appeal to Ont. C.A. refused, 211 A.C.W.S. (3d) 748, 2011 CarswellOnt 15071, leave to appeal to S.C.C. refused, [2015] S.C.C.A. No. 13, at para. 16). To find otherwise would be to

> encourage applicants to make the tactical choice of holding on to a potential ground for judicial review and raising it only if they receive an unfavourable decision.

[68] Likewise, the Federal Court of Appeal contemplated the possibility of a waiver in similar circumstances: *Re Grain Workers' Union and Prince Rupert Grain Ltd*, [1987] 3 FC 479 (CA).

[69] In this case, counsel for the Board wrote to the parties on June 4, 2021 to inform them that one member of the Board would be unable to attend the hearing set for June 7. He asked the parties whether they would consent to proceeding in the absence of that member, who would later review the recording or transcript of the hearing, or if they preferred to postpone the hearing. Counsel for Mr. Jackson gave his consent, but counsel for Mr. Bastien stated, in a brief email, that "we would prefer to resume when all Board members can be presented [sic] to hear the evidence and ask questions of the witnesses." Later the same day, the Board announced that it would proceed with the hearing on June 7, in the absence of one member.

[70] This manner of proceeding would raise concerns, were it not for Mr. Bastien's tacit consent, which prevents him from raising the issue in this application for judicial review. In the email exchange on June 4, counsel for Mr. Bastien simply expressed a preference for postponing the hearing. She never mentioned that it would be unfair to proceed in the absence of a board member. She did not raise any objection when the Board announced that it would not postpone the hearing. When the hearing resumed on June 7, she made no mention of any concern regarding the absence of a board member.

[71] Raising this issue now is exactly the kind of tactics condemned by the Ontario Divisional Court in *Bart*. If Mr. Bastien had concerns that the absence of a member would render the hearing unfair, he had to state them before the Board. His failure to do so in clear terms and in a timely fashion amounts to tacit consent.

III. Disposition

[72] For the foregoing reasons, the application for judicial review will be dismissed.

[73] As Mr. Jackson did not file a notice of appearance and did not participate in the proceeding until the very last minute, no costs will be awarded.

JUDGMENT in T-1224-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No costs are awarded.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1224-21
STYLE OF CAUSE:	ERWIN BASTIEN AND PIIKANI NATION CHIEF AND COUNCIL ON BEHALF OF PIIKANI NATION v BRIAN JACKSON
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 29, 2022
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	APRIL 22, 2022

APPEARANCES:

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