

Federal Court



Cour fédérale

Date: 20141120

Docket: T-1821-14

Citation: 2014 FC 1102

Ottawa, Ontario, November 20, 2014

PRESENT: The Honourable Mr. Justice Manson

In the matter of the under *Lax Kw'alaams Band Election Regulations*, SOR/2011-5

BETWEEN:

**ANDREW TAIT, LAWRENCE SANKEY,
BARB HENRY, STAN DENNIS,
VICTOR KELLY, ROBBIE HUGHES,
EACH BEING COUNCILLORS OF THE
LAX KW'ALAAMS BAND, ACTING ON
THEIR OWN BEHALF AND ON BEHALF
OF THE LAX KW'ALAAMS BAND COUNCIL
AND MEMBERS OF LAX KW'ALAAMS BAND,
AND GARRY REECE, MAYOR OF
THE LAX KW'ALAAMS BAND**

Applicants

and

**HELEN JOHNSON, CARL SAMPSON JR.,
RUSSEL MATHER, TED WHITE,
GERALDINE ALEXCEE, CHRIS SANKEY,
EACH BEING COUNCILLORS OF THE
LAX KW'ALAAMS BAND, AND
JOHN HELIN, AND RUDY KELLY,
ALLAN HELIN SR., SHARON HURDELL,
SHARON HALDANE AND CHERYL TAIT
ACTING AS THE COMPLAINTS
AND APPEAL BOARD**

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision to declare Garry Reece, elected Mayor [chief] of Lax Kw'alaams Band, ineligible to continue to hold the office of Mayor (chief) made on or about August 6, 2014 [the Decision] by Rudy Kelly, Allan Helin Sr., Sharon Hurdell, Sharon Haldane and Cheryl Tait acting as the Complaints and Appeal Board of the Lax Kw'alaams Indian Band Council [the New Appeal Board].

[2] The Applicants request from the Court:

- a. Direction regarding the interpretation of sections 21-24 and 120 of the *Lax Kw'alaams Band Election Regulations* [Election Regulations];
- b. A declaration that the Decision of the New Appeal Board is unreasonable, unfair, contrary to natural justice, arbitrary, unreasonable, without jurisdiction and/or invalid;
- c. An order of certiorari setting aside the Decision;
- d. A declaration that the dismissal of the Previous Complaints and Appeal Board [the Previous Appeal Board] by the 6 Respondent councillors was contrary to the Election Regulations and invalid;
- e. A declaration that the appointment of the New Appeal Board by the 6 Respondent councillors, including the Band Council Resolution appointing the Board, was contrary to the Election Regulations and invalid;
- f. A declaration that the petition filed by the 6 Respondent councillors on or about July 28, 2014 with the New Appeal Board was invalid and did not conform with the Election Regulations;
- g. A declaration that the appointment of John Helin as chief was invalid;
- h. A declaration that Garry Reece is still the chief of the Lax Kw'alaams Band.

I. Facts

[3] The Lax Kw'alaams Band [the Band] is a band pursuant to the *Indian Act*, RS 1985, c I-

5.

[4] For many years, election of the Band's band council was conducted pursuant to the *Indian Act*. On November 19, 2009, the Band held a ratification vote in which the majority of Band members voted in favour of being removed from the election provisions of the *Indian Act* and adopting a custom election code, what would become the *Lax Kw'alaams Band Election Regulations* [the Regulations]. The Regulations are a complete code, are binding and must be followed.

[5] The Regulations were registered as SOR/2011-5 after an Order Amending the Indian Band Council Elections Order was made on January 26, 2011.

[6] The Regulations govern, among other things, the appointment of a Complaints and Appeal Board and removal of a member of the band council (which is made up of a Mayor and 12 councillors).

[7] The Complaints and Appeal Board is to be appointed prior to an election (at least 100 days prior, under section 121) and remain in office until the next election cycle. The Regulations also provide criteria for eligibility as a member of the Complaints and Appeal Board. A person must be (1) a resident of the Band's reserve land, I.R. No. 1, (2) at least 18 years of age, and (3) not have a vested interest in the outcome of an election appeal or petition for removal of a council member from office.

[8] There is no express provision in the Regulations for dismissal of appointees to the Complaints and Appeal Board.

[9] The Previous Appeal Board was appointed prior to the November 2011 election consisted of 5 persons, one of whom passed away during his term, another who resigned for health reasons, and another who resigned as well but was replaced. The Previous Appeal Board consists of 3 members whose term has not expired.

[10] The most recent elections of the Band were held on November 24, 2011, the outcome of which was the election of Gary Reece as mayor, along with 12 councillors whose terms all expire on November 23, 2015.

[11] The Regulations describe the grounds and procedure to follow to remove a member of Council from office. The grounds are stated in section 21(1) as follows:

The Mayor shall be removed from office if he:

- a) has been absent from three Council meetings within a one-year period without prior authorization from Council;
- b) fails to uphold the Code of Conduct guidelines;
- c) fails to remove himself from a Conflict of Interest situation; or
- d) accepts or offers a bribe, forges a Council document or otherwise acts dishonestly in his role

[12] Section 22 of the Regulations provides for the initiation of proceedings to remove a member of Council.

[13] Section 23-26 of the Regulations set out the procedures to be followed by the Complaints and Appeal Board when it receives a petition to remove a member of Council. Only a properly appointed Complaints and Appeal Board has the power under the Regulations to remove a member of Council, and only based on the grounds listed in section 21(1) of the Regulations.

[14] On July 2, 2014, Deputy Mayor and Respondent councillor, Helen Johnson, became aware of a rumour that Mayor Reece was having an affair with his assistant Lynn Doolan. Ms. Johnson then sent an email to Mayor Reece on the same day, mentioning talk in the community about such a relationship. Mayor Reece responded on July 3, 2014, denying the existence of the relationship.

[15] On July 9, 2014, Ms. Johnson and Chris Sankey (another Respondent councillor) received a complaint with respect to Mayor Reece and the complainant's wife (the Mayor's administrative assistant Lynn Doolan) engaging in texting of a sexually explicit nature.

[16] The Applicants submit the Respondent councillors did not bring the complaint before Council or advise the Mayor after receiving the complaint.

[17] On July 16, 2014, a number of the Respondent councillors met to discuss the complaint. They obtained travel information from the Lax Kw'alaams office, which they took to be additional proof of the affair between the Mayor and Ms. Doolan, and, by extension Mayor Reece lying about the affair.

[18] The Respondent councillors obtained legal advice on July 18 and 21, 2014.

[19] On or about July 22, 2014, the Respondent councillors called an emergency meeting of Council to be held July 23, 2014. Mayor Reece was in Vancouver on band business, and the Applicants councillors were unable to attend (except Barb Henry, who called in).

[20] On July 22, 2014, Ms. Johnson sent an email to Mayor Reece with the complaint from Ms. Doolan's husband attached, the text messages alleged to be between the Mayor and Ms. Doolan and the travel documentation that the Respondent councillors had obtained on July 16.

[21] At a meeting on July 23, 2014, a Band Council Resolution [BCR] was passed to present a petition to remove Mayor Reece from Office. The New Appeal Board was also appointed to hear the petition.

[22] The New Appeal Board met later on July 23, 2014, and decided to accept the BCR submitted by Council and set a hearing to deal with the matter on July 28, 2014.

[23] Either at the July 22 emergency meeting or immediately thereafter, the Respondent councillors presented a petition to the New Appeal Board. A subsequent BCR was also prepared. The Applicants' allege that neither conformed to the requirements included in the Regulations. The New Appeal Board approved the BCR the same day.

[24] The Applicants submit that the Previous Appeal Board was not inactive and had heard 4 appeals from Council decisions in 2012 and 2013. They received training in administrative law and procedure, and operated at all times with legal advice and following the rules of procedural fairness.

[25] Respondent councillor Helen Johnson emailed Mayor Reece on July 23, 2014, to advise him that he had been removed from the office of Mayor. He was advised that a hearing was to

occur on July 28, 2014. The Respondents' submit that Ms. Johnson erred in sending this email, in that Mr. Reece had not yet been removed as Mayor.

[26] In response to Ms. Johnson's erroneous email, Mayor Reece emailed Council, alleging that the July 23, 2014 meeting was not properly convened. In response, the Council agreed to schedule another meeting on July 28, 2014, to consider withdrawing the BCR, and starting the process again with Mayor Reece present.

[27] July 26, 2014, the Respondent councillors notified Council by email that another emergency meeting was to be held on July 28, 2014, for the purpose of voting on the previous BCR and filing a new BCR removing Mayor Reece.

[28] In the July 28, 2014 meeting, 8 councillors were present. The 6 Respondent councillors present passed a BCR, revoking the previous BCR and authorizing the filing a new (or subsequent) BCR with the same allegations and goal of removing Mayor Reece (which was presented to the New Appeal Board on July 28, 2014).

[29] July 29, 2014, the New Appeal Board advised the Respondent councillors and Mayor Reece that the second BCR conformed to the Election Regulations and a hearing would be held on August 1, 2014.

[30] August 1, 2014, the New Appeal Board conducted a hearing, but did not allow Mayor Reece to see the second BCR. There is a dispute as to whether he was permitted in the hearing room for the first hour and a half of the hearing. When he was present at the hearing, he was not

allowed to see the evidence presented against him, other than an email from Lynn Doolan. During this meeting, the text message string, the travel information, the complaint from Fred Doolan, the emails between Mayor Reece and Ms Johnson, as well as an email from Lynn Doolan, were provided to the New Appeal Board as evidence.

[31] August 7, 2014, the New Appeal Board notified Mayor Reece that they rendered a decision on August 6, approving the petition to remove him from office. The written reasons for the decision were brief, and stated:

...we believe that Mr. Reece violated conduct rules as noted by Council and that: as a role model and representative of the community, his actions have had an adverse effect on Council's ability to function and on the reputation of the community, and he showed little accountability and remorse.

Thus, our decision is that the petition... shall be allowed to stand and we declare the Council position of Mayor to be vacant effective immediately.

[32] Sometime following the New Appeal Board's decision, Ms. Johnson and another councillor met with Mr. John Helin, who had come in second in the mayoral elections to Mayor Reece, and asked him to serve as Mayor. He agreed.

[33] The Applicant councillors seek a declaration that the decision of the New Appeal Board to dismiss Mayor Reece was "unreasonable, unfair, contrary to natural justice, arbitrary... without jurisdiction and/or invalid". They further seek a declaration that the Respondent councillors' decision to dismiss the Previous Appeal Board was contrary to the Lax Kw'alaams Election Regulations and invalid, as well as their decision to appoint John Helin as Mayor.

II. Issues

[34] The issues in the present application are as follows:

- A. Was the New Appeal Board properly constituted and did it have jurisdiction to accept and decide on the Band Council's petition?
- B. Was the New Appeal Board biased or did they breach the duty of fairness?
- C. Was the New Appeal Board's decision incorrect and/or unreasonable?

III. Standard of Review

[35] Section 132 of the Election Regulations contains a privative clause stating that decisions of the Complaints and Appeals Board are final and not subject to appeal. Therefore, this matter is governed by section 18.1 of the *Federal Courts Act*.

[36] There is agreement that the standard of correctness applies to questions of procedural fairness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 129 [*Dunsmuir*]; *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[37] The Applicants submit that the standard of review in considering the Appeal Board's jurisdiction, when its members are recently appointed and lack familiarity with the applicable legislation, and bearing in mind that they have no previous experience, should be correctness as well. If not correctness, then less deference should be given to the Appeal Board's decision (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 21, 22).

[38] On this front, the Applicants attack Council's decision to appoint the New Appeal Board and failure to submit a petition to it. This issue involves determining proper construction of the Regulations, which are a custom Election Code created by the Band and brought into force by

Order-In-Council. I do not agree that lack of formal training on the part of the New Appeal Board members transforms the standard of review of a home statute into one of correctness. I do, however, agree that on the facts of this case, less deference should be given in applying the standard of reasonableness (*Orr v Fort McKay First Nation*, 2012 FCA 269 at paras 10, 11; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 39).

[39] The remaining issues involve questions of mixed fact and law and discretion, and the standard of reasonableness applies (*Dunsmuir*, above, at paras 47, 51).

IV. Analysis

A. *Was the New Appeal Board properly constituted and did it have jurisdiction to accept and decide on the Band Council's petition?*

[40] The Applicants submit that the New Appeal Board was unlawfully constituted for three reasons:

- i. Council had no authority to dismiss the Previous Appeal Board and appoint the New Appeal Board;
- ii. The July 23 meeting at which it was appointed was not properly constituted; and
- iii. At least three appointees do not meet the residency requirement to sit on the New Appeal Board.

[41] In construing the Regulations to determine if the New Appeal Board had the authority to dismiss Mayor Reece, the Applicants urge me to follow the decision of Justice Campbell in

Bugle v Lameman, [1997] FCJ No 560 at para 2 [*Bugle*]:

2 First, I find that the Tribal Election Law is the all-encompassing code of legal authority to elect and remove a Chief and Council of the Beaver Lake First Nation. Thus, it is only within the words of this law itself that any authority can be found to remove Chief

Lameman from his office. I find that the words of the Tribal Election Law must be strictly construed; that is, I cannot be liberal in interpreting their meaning because, in my view, the results of removal from office are so severe that a strict interpretation is required.

[42] Justice Campbell went on to say the fact that ineligibility was for such a long time (six years) made it absolutely essential that the rules regarding removal had to be meticulously followed. In this case, the impact of the New Appeal Board's decision would result in a five and one-half year suspension of Mayor Reece.

[43] The Respondents states that the decision in *Bugle*, above, is no longer good law and has been superseded by more recent decisions.

[44] In determining the correct approach that should govern my decision, I take note of the following jurisprudence.

[45] Justice Rothstein (as he then was) in *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142 at paras 46-48, 56, 57 [*Sparvier*], which was cited to me by counsel for both parties, is helpful in applying the correct approach:

46 No authority was cited by counsel for the respondents to the effect that the principles of natural justice or procedural fairness are not to be applied in situations where band custom dictates procedures to be followed by band tribunals.

47 While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in

procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

48 In deciding what "principles" should apply to the matter at bar, I have had regard to the Supreme Court of Canada decision in *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, where at page 195 of the decision, Gonthier J., for the majority, states:

The content of the principles of natural justice is flexible and depends upon the circumstances in which the question arises. However, the most basic requirements are that of notice, opportunity to make representations, and an unbiased tribunal. [My emphasis.]

56 In my view, the function of the Appeal Tribunal is adjudicative. Its duty is to decide appeals based on contraventions of the Cowessess Indian Reserve Elections Act or illegal, corrupt or criminal practices on the part of candidates. Even though Appeal Tribunal members may not be legally trained, it appears that they are to decide, based on facts and their application of the Act or other Band customs, traditions or perhaps other laws, whether or not to uphold an election or order a new election. Members are not popularly elected. Although the Act uses the term "elected", members are selected by the Band Council.

57 This leads me to conclude that in the absence of compelling reasons, a more rigorous rather than a less strict application of the reasonable apprehension of bias test would be desirable in the case of the Appeal Tribunal. I will comment further on the question of compelling reasons to the contrary subsequently. I should add, however, that on the facts of this case, a less strict application of the test leads me to the same conclusion I would have reached had I applied the test in a more rigorous fashion.

[46] The Council's interpretation and application of the Regulations must be reviewed on the standard of reasonableness – where the decisions taken must be justified, transparent and intelligible and within a range of possible, acceptable outcomes.

[47] The Federal Court of Appeal has established that band election laws are to be construed using the general principles of statutory interpretation and the modern approach (*Boucher v Fitzpatrick*, 2012 FCA 212 at para 25). The Court must look at the ordinary meaning of the words in question which play a dominant role in the interpretive process when they are precise and unequivocal (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10).

[48] In addition, the more recent decision of the Federal Court of Appeal in *Orr v Fort McKay First Nation*, 2012 FCA 269, is relevant. In that case, Mr. Orr submitted that the Election Code did not allow the Band Council to suspend him from office by way of resolution alone and, secondly, there was no cause for his suspension under section 101.3 of the Election Code, for having been charged with sexual assault. In reviewing the Band's Election Code, the Court stated the following, at paras 19, 28, 30, 31:

19 The democratic backdrop of the provisions of the Election Code also undermines the suggestion that Council could simply act on its own based on an inherent power. As we shall see, relevant provisions of the Election Code require a democratic vote of the electors of the First Nation before a suspension or removal will be effective. These provisions must be interpreted in light of the fact that a councillor holds office on the basis of a majority vote of the electors of the First Nation. A paragraph in the preamble to the Election Code stresses that "the culture, values and flourishing of the Fort McKay First Nation [are] best advanced by...the selection and removal of leadership on the basis of democratic principles." The relevant provisions of the Election Code and that paragraph in the preamble have been democratically adopted: they came into force only after a majority of the electors of the First Nation ratified the Election Code.

28 The Election Code identifies as intrinsic to the role of councillor the concepts of honour, integrity and service as a role model. In particular, certain sections in the Election Code draw a clear connection between a councillor's conduct and public confidence in government. Section 91.1.6 states that the Council must act according to its "responsibility as a role model and representative of the first nation." Section 97.1.1 states that the

Council must "represent the interests of the first nation with honour and integrity."

30 This does not end the matter. There is Mr. Orr's first submission to consider, namely that the Council did not have the power to suspend him from office by passing a resolution alone.

31 In my view, this submission must be accepted. Various portions of sections 100-103 of the Election Code do not allow the Council to suspend Mr. Orr from office by passing a resolution alone. Several provisions of the Election Code support this:

* Under section 101.1, a "councillor may be removed or suspended from office by a vote of the electors according to the process set out in this Code." There has been no vote of electors.

* Section 103.1 describes the requirement of a vote of electors. It provides that upon resolution of the Council calling for a councillor's suspension, the Chief must call a special meeting of electors "for the purpose of conducting a vote for the suspension of a councillor."

* Sections 101.2 and 101.2.1 provide that the "process for removal" of a councillor is only "commenced" by a resolution. That process is completed by the vote of electors in section 103.1.

* The requirement of a vote of electors is underscored by a preamble in the Election Code, namely that "the culture, values and flourishing of the Fort McKay First Nation [are] best advanced by...the selection and removal of leadership on the basis of democratic principles."

* Under section 100.1 of the Election Code, a councillor automatically loses his or her office in two circumstances: upon death or upon conviction of a criminal offence, not upon a criminal charge.

[49] As will be apparent from my reasons that follow, the decisions in these above cases are applicable and guide my reasons for this decision.

[50] The Applicants argue that the Regulations do not provide for removal of members of the Previous Appeal Board, stating that the “mid-term” dismissal of the Previous Appeal Board is contrary to the intention of the Election Regulations.

[51] I disagree. The Regulations must be construed in a manner that allows Council flexibility to deal with the appointment of a new Board member during any four year term, depending on the circumstances. If a member cannot serve or should be removed for valid reasons, there must be discretion in interpreting the Regulations to permit replacement of such a Board member. To decide otherwise would unduly restrict the functioning of the Board and Council, and would be unreasonable.

[52] The Applicants argue next that in this case:

- i. There was no basis to remove the Previous Appeal Board; the members of the Previous Appeal Board were ready and able to serve.*

[53] Of the given Board members, one had died and one was too ill to continue and resigned. A third member, Gloria Russell, is the mother of Lynn Doolan and the other two members were not able to be reached at the time of the July meetings and gave no evidence.

[54] On a reasonable interpretation, there was clearly a problem with the functionality of the Previous Appeal Board. However, given the serious nature of the matter in issue and consequences that flow from it, it was incumbent upon the Respondent councillors to make every effort to contact at least the remaining two Board members, Norman Brooks and Terry Green, to participate in the meetings, before taking any action to remove or replace them. The Respondent councillors did not do so, and were unreasonable in removing and replacing Mr. Brooks and Mr.

Green. Moreover, not giving Gloria Russell an opportunity to respond to her alleged conflict of interest was also unfair and unreasonable. Even if the new members appointed could be said to be appropriate as being “honest, knowledgeable, not connected to Council and with no interest in the outcome”, the process followed by the Respondent councillors was improper and unreasonable.

- ii. *The members of the New Appeal Board were secretly pre-selected by the Respondent councillors and their rushed appointment in an “emergency” meeting was done for the sole purpose of removing Mayor Reece, for ulterior motives; and*
- iii. *The July 23 Council meeting at which the New Appeal Board was appointed was not properly constituted – there was no basis for an emergency meeting and councillor Johnson’s intent behind the meeting was to shut out the Applicant councillors and Mayor Reece; no notice was given that the Previous Appeal Board would be dismissed.*

[55] I accept that the New Appeal Board members were not unreasonably pre-selected as individuals to serve. However, it is also apparent from the evidence that Helen Johnson was intent on not involving the Applicant councillors or Mayor Reece in her meetings of July 16 and July 23. As stated during her cross-examination, at pages 372, 373 of the Applicants’ Record:

Q I see. So the meeting you had on the 16th?

A Yes.

Q You didn’t give notice to the other councillors about that?

A No.

Q The conference call that you had with the lawyer on the 17th, you didn’t give notice to the other councillors about that?

A No.

Q The meetings you had on the 18th, you didn’t give notice to the other councillors about that?

A No

Q The discussions about who was going to be on the appeal board between the 18th and the 22nd, you didn’t discuss that with other councillors?

A No.

Q You completely shut out these other six?

A Yes.

Q Because you were determined to do this on your own, weren't you?

A No. Just that they never responded to us at all.

Q Never responded to what? Did you send them an email asking for a response?

A No, I did not.

Q All right. Let me take you to – well, and in terms of the suspension of Wayne Drury on the 23rd, you didn't discuss that with those other six councillors either, did you?

A No.

Q So they shut you out and you were determined to shut them out at this meeting?

A Yes.

[56] Notwithstanding the Respondents' argument that given that the "rumour mill on the Reserve was grinding", and concerns about Mayor Reece's conduct with Ms. Doolan no longer made it a private matter, but one of public concern, natural justice required that an open and transparent process with appropriate notice to the parties concerned be employed. The Respondent councillors did not do so.

iv. Part 6 of the Regulations requires a petition for removal as well as a Band Council Resolution and no petition was made.

[57] I disagree with the Applicants' position. While a technical and restrictive reading of the Regulations suggests both a petition and BCR are necessary for a removal process, section 22 of the Regulations has three requirements for a petition: it must state the ground(s) on which removal of the Mayor is sought, the evidence in support of the resolution and the signatures of all

Council members. It is clear from the evidence before me that Mayor Reece knew fully of the complaint against him, at least from July 28 forward, and I agree with the Respondents that the BCR set out the grounds for removal, was signed by the councillors, and effectively gave notice and constituted the petition required under the Regulations.

v. There was no majority of Band Council members, as only six of thirteen Band Council members were present at the July 28 meeting.

[58] The Applicants argue that a proper interpretation of section 22(b) of the Regulations requires more than a quorum.

[59] The question before me is “what is the proper construction of the phrase “majority of council members?”. The context in which this phrase is to be considered is the triggering of the process to be determined by the Appeal Board. I agree with the Respondents’ submissions at paragraphs 67 to 69, and 71 to 72, of their memorandum:

67. The phrase “majority of council members” is not used in any other section of the Regulations, nor is it defined in the definitions section. However, the Regulations are subject to the federal *Interpretation Act*, RSC 1985, c 1-21. Section 22 of the *Interpretation Act* provides that, if a quorum is present, an act or thing done by the majority of the members present at a meeting is deemed to have been done by the board (or, in this case, the Council):

Majority and Quorum

22. (1) Where an enactment requires or authorizes more than two persons to do an act or things, a majority of them may do it.

(2) Where an enactment establishes a board, court, commission or other body consisting of three or more members, in this section called an “association”...

(b) an act or thing done by a majority of the members of the association present at a meeting, if

the members present constitute a quorum, is deemed to have been done by the association...

68. Section 9 and 12 of the Regulations outline what constitutes a quorum at a Band Council meeting:

Order and Proceedings

9. The quorum shall be 5 members of council.

12. Upon a quorum being present, the chairman shall take the chair and call the meeting in order...

69. Since quorum is established at 5 members, a quorum majority of council members constitutes a majority of Council as required by the Regulations, and permits a quorum majority to pass a Band Council Resolution and submit a petition to the Complaints and Appeal Board under section 22(b) of the *Regulations*.

71. Further, in *Alberta Federation of Labour v Alberta (Minister of Finance)* [2009] ABCQ 567, the Court outlined the law regarding the definition of “majority” as follows:

[40] [...] Robert's Rules of Order, 9th ed. (Reading, Mass.: Addison-Wesley, 1997) provides that when the term "majority" is unqualified, it means simple majority (at p. 395):

The word majority means "more than half"; and when the term majority vote is used without qualification-as in the case of the basic requirement-it means more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting at which a quorum is present.

72. The Regulations state (at paragraph 13) that the “order of business at each regular meeting of the council shall be in accordance with the Robert’s Rules of Order”, which are cited and relied upon in *Alberta Federation of Labour* case referred to above.

[60] As such, I am of the view that a quorum of Council members was sufficient.

[61] The Applicants also raised the issues of whether the New Appeal Board was properly constituted by having three new members from off the reserve.

[62] The Applicants argue that “the Election Regulations imposed residency requirements for I.R. No.1 for both a majority of Council and for the Complaints and Appeal Board”.

[63] The requirement that a candidate or other person be resident or not resident on the reserve is stated in section 4(b), which provides that the councillors shall be Lax Kw’alaams band members, “a maximum of three of whom shall be off-reserve councillors with the highest votes and the remainder of whom shall be on-reserve councillors”.

[64] Other provisions in the Regulations state when residency requirements are imposed. By way of example:

- a. Sections 30 and 31, and other sections, refer to “on-reserve councillors”, “off reserve councillors”, and “on-reserve candidates”;
- b. Section 38 refers to elects “who do not reside in Lax Kw’alaams”;
- c. Section 69 refers to elects “who reside off-reserve”;
- d. Section 76 refers to electors who are “ordinarily Resident of Lax Kw’alaams”. The term “Resident” is defined in s.3.

[65] Given the attention to distinguishing between resident on-reserve and off-reserve in the above sections of the Regulations, I do not find that Lax Kw’alaams Band members who reside off-reserve are excluded from serving on the Appeal Board in the absence of clear language to that effect.

B. *Was the New Appeal Board biased or did they breach the duty of fairness?*

C. *Was the New Appeal Board’s decision incorrect and/or unreasonable?*

[66] The Applicants argue that the notice to Mayor Reece by the New Appeal Board, on August 7, 2014, advising him that he would be removed as Mayor, did not identify his alleged conflict of interest, his breaches of rules of conduct, or his dishonesty, the three grounds relied upon to justify his removal. The New Appeal Board stated in its decision:

...we believe that Mr. Reece violated conduct rules as noted by Council and that: as a role model and representative of the community his actions have had an adverse effect on Council's ability to function and on the reputation on the community, and he showed little accountability and remorse.

Thus, our decision is that the petition...shall be allowed to stand and we declare the Council position of Mayor to be vacant effective immediately.

[67] The Applicants' position is also that Mayor Reece was never notified or given an opportunity to respond to any of those particulars and therefore he could not discern the basis for the decision from the notice sent to him August 7, 2014. As a consequence of his removal, the Applicants submit that Mayor Reece, a popular elected leader who was serving his seventh term as Mayor of the Lax Kw'alaams Band, was significantly and negatively impacted as well as the electorate and democratic governance of the Lax Kw'alaams Band. He would also be barred from finishing his current term as Mayor (for another year) and prohibited from running in the next election, resulting in a five and a half year ban from office. These consequences result from the biased, unfair, incorrect and unreasonable decision of the New Appeal Board:

- i. the New Appeal Board lacked the necessary institutional independence, given the secret investigation of the complaint against Mayor Reece, the summary dissolution of the Previous Appeals Board, and the Appointment of the New Appeals Board specifically selected by the Respondent councillors;
- ii. the Respondent councillors selected and appointed the New Appeals Board and afterwards held a meeting with that Board to discuss the petition and the evidence they would need for it to succeed, in Mayor Reece's absence and without his knowledge;
- iii. during the meeting between the Respondent councillors and the New Appeals Board, the New Appeals Board sought legal advice from the same lawyer who was

- previously used by the Respondent councillors in advising them on the process being used to remove Mayor Reece;
- iv. there was an ulterior motive for the entire process undertaken by the Respondent councillors, in seeking to take control away from Mayor Reece and his supporters, which lacked any transparency or impartiality or process fairness.

[68] In addition to the allegations of bias by the Applicants, they also allege procedural unfairness in the (i) failure to provide notice to Mayor Reece, (ii) the failure to give Mayor Reece a right to be heard, and in (iii) the failure to give reasons for the decision taken by the New Appeals Board.

[69] Finally, the Applicants argue that the decision by the New Appeals Board was both incorrect and unreasonable, in that there was no valid basis to find a breach of the Code of Conduct, no conflict of interest in relation to a matter before Council, and no dishonesty as defined under section 21(1)(d) of the Regulations, which provides for removal of a council members when that member “accepts a bribe, forges a council document or otherwise acts dishonestly in his role”.

[70] The Applicants’ position is that the affair between Mayor Reece and Ms. Doolan and his failure to be honest about the affair, when both responding to the July 2 email from councillor Johnson and again in not being forthcoming about the length of the affair at the July 28 meeting of Council, do not constitute grounds for removal for any of the reasons provided by the New Appeals Board. The affair was a private matter and provided no basis for the Respondent councillors or the New Appeals Board to take the actions they did.

[71] In reply, the Respondents state that:

- i. Mayor Reece had notice and was advised in writing that he had failed to uphold the Code of Conduct guidelines, in failing to remove himself from a conflict of interest situation; acting dishonestly in his role as mayor in having an inappropriate relationship with one of the Band's top administrative employees and denying same and refusing to address or remedy his actions when they became public and the subject of Council's concerns;
- ii. Mayor Reece was not excluded from the August 1 meeting for the first part of the meeting, but chose not to attend;
- iii. Mayor Reece knew of the July 2, 2014 e-mail between himself and Ms. Johnson;
- iv. Not only was Mayor Reece's dishonesty covered by the Code of Conduct and a ground for removal, but the requirement under the Code to carry out his duties "with integrity, honesty, professionalism, and respect for human rights and dignity" was clearly breached;
- v. Mayor Reece's actions are also covered by paragraph 6 of the Code of Conduct, which state that council members have a "responsibility to conduct themselves in a manner that does not compromise the ability of Council to accomplish its mandate". His actions were toxic to a devoted council in a small community.

[72] The last ground was not referred to by the New Appeals Board in its decision and I agree with the Applicants is not properly before me as a ground for consideration.

[73] The parties are agreed that, as a starting principle, minimum standards of natural justice and procedural fairness must be met, and that members of bands are entitled to due process and procedure fairness in procedures or tribunals that affect them (*Sparvier*, above, at paras 47, 48). Notice, opportunity to make representations, and an unbiased tribunal are all basic requirements of procedural fairness. Based on careful review of the evidence before me, I find that:

- i. Mayor Reece was given adequate notice of the alleged grounds for his dishonesty, conflict of interest and breach of the Code of Conduct. He was well aware from the outset that the affair with Ms. Doolan and his dishonesty in acknowledging the affair, which had become public with the Band and was not private, was the basis for the actions taken by Respondent councillors and the New Appeals Board appointed by them who accepted the Respondent councillors' petition;
- ii. There was no basis on which to impugn the integrity or impartiality of any of the New Appeals Board members;
- iii. However, there were more than mere procedural irregularities, as suggested by the Respondents, in how they proceeded to dismiss the Previous Appeals Board and appoint the New Appeals Board, which was procedurally unfair and unreasonable in the time frame in which they proceeded.

[74] While there may have been some urgency in dealing with a perceived improper relationship between Mayor Reece and Ms. Doolan, particularly in the Lax Kw'alaams Band with a relatively small population, that does not excuse the summary dissolution of the Previous Appeals Board, nor does it excuse the subsequent meeting of the New Appeals Board to discuss the Respondent councillors' petition and the evidence needed for the petition to succeed. This is particularly true when these actions were taken in Mayor Reece's absence and without his knowledge. The process was not totally independent or free from bias (*Desnomie v Peepeekisis First Nation*, 2007 FC 436 at para 27; *Kane v University of British Columbia*, [1980] 1 SCR 1105 at 1113-14).

[75] Given my findings above, I need not consider whether the New Appeals Board's decision was properly supported by reasons, or whether the decision was unreasonable. There may have been sufficient grounds as alleged for Mayor Reece's removal, but the process taken for his removal was fatally flawed.

THIS COURT'S JUDGMENT is that:

1. The dismissal of the Previous Appeal Board was unreasonable and contrary to the Election Regulations and invalid;
2. The process for the appointment of the New Appeal Board was unfair and unreasonable. As such, the New Appeal Board was not properly constituted and did not have jurisdiction to accept and decide the Band Council's petition;
3. Given that the appointment of the New Appeal Board was invalid, the decision to remove Garry Reece as Mayor is quashed and the appointment of John Helin is invalid. Garry Reece remains Mayor.
4. The Application is otherwise dismissed.

“Michael D. Manson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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JUDGMENT AND REASONS: MANSON J.

DATED: NOVEMBER 20, 2014

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