

Federal Court of Appeal



Cour d'appel fédérale

Date: 20151105

Docket: A-519-14

Citation: 2015 FCA 247

**CORAM: GAUTHIER J.A.
WEBB J.A.
GLEASON J.A.**

BETWEEN:

**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**

Appellants

and

**ANDREW TAIT, LAWRENCE SANKEY,
BARB HENRY, STAN DENNIS, VICTOR
KELLY, ROBBIE HUGHES, EACH BEING
COUNCILLORS FOR 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**

Respondents

Heard at Vancouver, British Columbia, on October 26, 2015.

Judgment delivered at Ottawa, Ontario, on November 5, 2015.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

GAUTHIER J.A.

WEBB J.A.

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Respondents

REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellants are members of the Band Council of the Lax Kw'alaams Indian Band [the Band] and of a Complaints and Appeal Board [the Appeal Board] that made a decision to remove the Band's Mayor, Garry Reece, from office. The respondents are other members of the Band Council, who opposed the Mayor's removal, and Mr. Reece.

[2] In a Judgment issued November 20, 2014, Justice Manson of the Federal Court overturned the decision removing the Mayor (2014 FC 1102). His Judgment provided that:

1. The dismissal of a previous Appeal Board by the Band Council was unreasonable, contrary to the Band's Election Regulations and invalid;
2. The process for the appointment of the new Appeal Board (that made the impugned decision to remove the Mayor) was unfair and unreasonable and as such the new Appeal Board was not properly constituted and did not have jurisdiction to accept and decide the Band Council's petition to remove the Mayor from office;
3. Given that the appointment of the new Appeal Board was invalid, the decision to remove Mr. Reece as Mayor was quashed and the appointment of the replacement Mayor was declared to be invalid; and
4. The application, which sought several other declarations, was otherwise dismissed.

[3] The appellants appeal from the Judgment, and the respondents cross-appeal from paragraph 4 of the Judgment, seeking that it be amended to add a declaration that the petition that purportedly authorized or was submitted by the Band Council to remove the Mayor from office did not conform to Part 6 of the Band's Election Regulations.

[4] For the reasons set out below, I would grant the appeal in part, but only to slightly vary the Federal Court's Judgment, and would also grant the cross-appeal. In result, the decision of the application judge, quashing the decision to remove Mr. Reece as Mayor and declaring the decision invalid, remains unchanged.

I. The Band Election Regulations

[5] On January 26, 2011, the *Order Amending the Indian Bands Council Election Order (Lax Kw'alaams)*, SOR/2011-5 was adopted. That Order had the effect of removing the Band from the election process provided under the *Indian Act*, R.S.C. 1985, c. I-5 and facilitated the adoption by the Band of a customary election code that is set out in the Band's Election Regulations.

[6] Part 4 of the Election Regulations contains the provisions applicable to the Band Council. Section 4 provides that the Council consists of the Mayor and 12 Councillors. Section 7 of the Regulations provides that "the Mayor of Lax Kw'alaams or a quorum of the Council" is empowered to call a special meeting in respect of an "emergency or crisis that requires an immediate decision". Section 9 provides that the quorum for a Band Council meeting is five members of Council. Section 12 states that meetings are called to order when a quorum is present, and section 13 provides that the order of business at "each regular meeting" of the Band

Council “shall be in accordance with Robert’s Rules of Order”. Section 18 defines vacancies in the offices of Mayor or Councillor as follows:

18. The Mayor or councillor position may become vacant if, while in office:
 - a. the Mayor or councillor resigns in writing from office of his own accord;
 - b. the Mayor or councillor has been unable to perform the functions of his office for more than six months due to illness or other incapacity;
 - c. the Mayor or councillor dies;
 - d. the Mayor or councillor is removed from office in accordance with section 21;

[7] Part 14 of the Regulations establishes an Appeal Board of five members who are selected by the Band Council at least 100 days before an election and who hold office for a four year term. Section 120 of the Regulations states that Appeal Board members hold office until “the day the members of another board are selected”. The Regulations do not contain any provision for the removal of Appeal Board members before their terms expire.

[8] The Appeal Board is charged with deciding election appeals and ruling on petitions to remove the Mayor or a Councillor from office. Section 122 of the Election Regulations provides that an Appeal Board member who is “immediate family” of any “appellant or candidate, or who may be reasonably apprehended to have a bias or conflict in connection with the appeal” shall excuse him or herself from an appeal meeting.

[9] Part 6 of the Election Regulations deals with removal of the Mayor or Council members from office. Grounds for removal are set out in section 21 and include a failure to uphold the

Code of Conduct guidelines. The procedure for removal is enshrined in sections 22 to 29 of the Regulations. Sections 22 to 25 are central to this appeal and cross-appeal and are therefore set out in their entirety. They provide:

22. Proceedings to declare a person ineligible to continue to hold the office of Mayor or Councillor shall be initiated by:

a. a Lax Kw'alaams member who is at least 18 years of age submitting to the Complaints and Appeal Board a petition on which shall appear:

- i. the ground pursuant to section 21(1) on which removal of a Mayor or Councillor is sought;
- ii. the evidence in support of the petition;
- iii. the signature of the petitioner;
- iv. the signatures of at least 25% of Lax Kw'alaams members who is at least 18 years of age in support of the petition; and
- v. a non-refundable filing fee of \$100.00.

b. a majority of council members passing a Band Council Resolution and submitting a petition to the Complaints and Appeal Board on which shall appear:

- i. the ground pursuant to section 21 (1) on which removal of the Mayor or Councillor is sought;
- ii. the evidence in support of the resolution; and
- iii. the signatures of all council members who voted for the removal.

23. On receipt of a petition, the Complaints and Appeal Board shall verify that the petition complies with section 21(1). If the petition does not comply, the Complaints and Appeal Board shall so notify the petitioner(s).

24. In a case where the petition complies with section 21(1), the Complaints and Appeal Board shall:

- a. determine that the grounds put forth in the petition are not true and dismiss the petition; or
- b. schedule a review hearing, which shall take place within 20 days from the date on which the petition was submitted to the board.

c. In a case where the petition has been dismissed under subsection 24(a), the Complaints and Appeal Board shall so inform the petitioner(s) in writing and provide a rationale.

d. In a case where the Complaints and Appeal Board schedules a hearing under subsection 24(b), the board shall send a written notice of the hearing by registered mail to council, the petitioner(s) and the council member who is the subject of the petition for removal.

e. The written notice described in section 24(d) shall set out:

i. the nature of the hearing and all related particulars;

ii the date, time and location of the hearing; and

iii a statement that the petitioner(s), any member of council or the council who is the subject of the petition for removal may, at the hearing, make a presentation to the board, which may include the presentation of documents and testimony by witnesses.

25. The Complaints and Appeal Board shall conduct a hearing at the time and place set out in the notice provided under section 24.

II. The Federal Court's Reasons

[10] To put the Federal Court's Reasons into context, some background is required.

[11] In July 2014, there were only three individuals on the Band's Appeal Board as one of the Board's previous members had died and another, who had resigned for health reasons, had not been replaced. Two of them had been appointed by a Band Council Resolution in August 2011 for a term from November 23, 2011 to November 23, 2015. The third was appointed to replace an Appeal Board member who had resigned, and her term likewise ran until November 23, 2015.

[12] In July of 2014, one of the appellant Councillors, Helen Johnson, received a complaint about the Mayor's conduct in allegedly having an extra-marital affair with an employee of the

Band Council. Ms. Johnson decided she would convene a special Band Council meeting to deal with the allegation and had the Band secretary send an email notice to the Councillors and the Mayor on July 22, 2014 for an emergency special Band Council meeting to be held the next day. The Mayor was out of town on the 23rd and was unable to attend the scheduled meeting.

[13] Ms. Johnson determined that one of the three Appeal Board members was in a conflict of interest situation as she was the mother of the person with whom the Mayor was allegedly involved. Ms. Johnson telephoned the other two Appeal Board members on July 22nd, but did not succeed in reaching them and therefore decided they could not serve on the Appeal Board to rule on a petition to remove the Mayor from office.

[14] On July 23, 2014, the Band Council met and passed three resolutions, the first, removing the three members of the Appeal Board, the second, naming five new members to the Appeal Board, and the third, suspending the Mayor. The new Appeal Board members attended the July 23, 2014 Band Council meeting.

[15] During the meeting, and in the absence of the Mayor, the Councillors present discussed the evidence related to the Mayor's removal with the members of the newly-constituted Appeal Board. The Appeal Board also spoke on the telephone with the complainant, the husband of the woman with whom the Mayor was alleged to have been involved. The Appeal Board met in-camera during a break in the Band Council meeting and appears to have decided to remove the Mayor from office. Ms. Johnson wrote to the Mayor later that day to advise him of his removal.

[16] The Mayor replied, citing the procedural irregularities that had occurred, and took the position that his removal was a nullity. Thereafter, Ms. Johnson decided to call another emergency special Band Council meeting for July 28, 2014. During the meeting, six of the eight Band Councillors who were present voted in favor of withdrawing the earlier Band Council Resolution naming the five new members of the Appeal Board, passed another Resolution re-naming them and passed a third Resolution approving the submission of a petition to the newly-constituted Appeal Board seeking to remove the Mayor from office. It appears, though, that no formal petition was signed following the passage of the third Resolution.

[17] On August 1, 2014, the newly-constituted Appeal Board met and discussed the issues with the Councillors who wished the Mayor to be ousted, in his absence, and then met the Mayor to receive his version of events. The Appeal Board had documents before it that it did not disclose to the Mayor and also appears to have received advice from a lawyer who was representing the Councillors who sought to have the Mayor removed.

[18] On August 6, 2014, the Appeal Board decided to remove the Mayor and wrote to him advising him of its decision.

[19] In setting this decision aside, the application judge concluded that the summary dismissal of the previous Appeal Board and the appointment of the new Appeal Board were procedurally unfair and unreasonable due to the short timeframe in which these measures were taken (at paragraph 73). More specifically, he held that it was incumbent upon the Councillors present at the July 23, 2014 meeting to make every effort to contact the three remaining Board members

before dismissing them. He also concluded that the third Board member, who was found to be in a conflict of interest situation, should have been given the opportunity to respond to the allegation that she was in a conflict of interest (at paragraph 54).

[20] The application judge went on to consider the appointment of the five new members to the Appeal Board and held that they had not been unreasonably pre-selected and that there was no basis upon which to impugn their integrity or impartiality (at paragraphs 55, 73). However, he held that the meeting between the appellant Councillors and the new Appeal Board on July 23, 2014 to discuss the petition and the evidence required for it to succeed, in the absence of Mayor Reece and without his knowledge, gave rise to a process which “was not totally independent or free from bias” (at paragraph 74).

[21] The application judge also stated that the Election Regulations should be construed flexibly so as to allow the Band Council to replace members of the Appeal Board before the expiry of their terms in appropriate circumstances (at paragraph 51).

[22] The application judge additionally found that the July 28th Band Council Resolutions had been properly adopted by a quorum majority of five Council members, in accordance with sections 9 and 22(b) of the Election Regulations. Relying on section 22 of the *Interpretation Act*, R.S.C. 1985, c. I-21 and on *Robert's Rules of Order*, 9th ed. (Reading, Mass.: Addison-Wesley, 1997), he concluded that where a quorum is present, a decision made by the majority of members present is deemed to have been made by the Band Council. He thus held that the phrase

“majority of council members” employed in section 22(b) of the Election Regulations means a quorum majority (at paragraphs 58-60).

[23] The application judge further concluded that the failure to submit a petition in support of the July 28, 2014 Band Council Resolution authorizing the presentation of a petition was not fatal to the removal procedure initiated against the Mayor because the Resolution contained the grounds on which removal was sought, the evidence in support of the allegations and the signatures of all Band Councillors (at paragraph 57).

III. Issues

[24] The appellants submit that the application judge erred in holding that the dismissal of the previous Appeal Board was unreasonable, contrary to the Election Regulations and invalid because:

- The decision is inconsistent with his finding that the Election Regulations permit the appointment of new Appeal Board members during the four year term;
- The procedural errors related to the removal of the previous Appeal Board members affected only them and thus could not be raised by the Mayor or provide a basis for setting aside the decision to remove him from office;
- There was no evidence that two of the previous Appeal Board members were willing to serve and thus the application judge erred in finding their removal to be unreasonable;
and

- The conflict of interest on the part of the third previous Appeal Board member, who was the mother of the individual who was allegedly involved with the Mayor, was obvious, and the judge therefore ought not have found her removal to have been unreasonable.

[25] The appellants also assert that the application judge erred in premising his decision on the alleged unfairness to the Mayor of the July 23, 2014 decisions and instead should have focussed on what occurred on July 28, 2014, when the Mayor was present. They also say that the application judge applied the wrong test for bias and instead of assessing whether the process “was not totally independent or free from bias” he ought to have asked whether there was a reasonable apprehension of bias arising from the actions of the Appeal Board.

[26] In terms of the cross-appeal, the respondents submit that the application judge erred in his interpretation of the Election Regulations because section 22(b) of the Regulations, as properly or reasonably construed, requires that a majority of Band Council members (as opposed to a mere quorum majority) approve a Band Council Resolution to remove the Mayor *and* also requires that the majority sign a petition in favour of removal before the issue of removal can be put to the Appeal Board. The respondents also say that the application judge erred in finding the Band Council Resolution of July 28, 2014 met the requirements of the petition required under section 22(b) of the Election Regulations.

IV. Analysis

[27] In assessing the Federal Court’s Judgment granting the respondents’ application for judicial review, this Court is required to step into the shoes of the Federal Court and determine

whether it selected the appropriate standard of review and whether it applied that standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45-47.

[28] Here, the application judge correctly held that the standard of review applicable to the decisions of the Band Council interpreting the Election Regulations is reasonableness. In *Orr v. Fort McKay First Nation*, 2012 FCA 269, [2012] F.C.J. No. 1353 (QL) at paragraph 11 [*Orr*], this Court determined that the case law of the Supreme Court of Canada subsequent to its decision in *Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 requires the application of the reasonableness standard to decisions of band councils interpreting their customary election codes. However, as Justice Stratas noted in *Orr* at paragraph 12, there is little appreciable difference between the reasonableness and correctness standard of review in a case such as this; if a “Council’s decision ... cannot be supported by the words of the *Election Code* or any other source of power, the decision cannot be said to be acceptable or defensible on the law”, and thus cannot be reasonable.

[29] In applying the reasonableness standard as so-defined to the Band Council’s implicit interpretation of the Election Regulations made in this case, I would find such interpretation unreasonable but for different reasons than those of the application judge.

[30] Unlike the application judge, I do not see any basis for implying into the Election Regulations a provision that permits the removal of the three previous Appeal Board members in

this case, even if they had been given ample notice and an opportunity to speak to the Band Council prior to their removal.

[31] The provisions in Part 14 of the Election Regulations, providing for Appeal Board appointments well in advance of elections and for a four year term for appointees, indicate that the Appeal Board is meant to be a stable body that, to the maximum extent possible, is shielded from involvement in the disputes it might be called upon to decide. It is consistent with this role that its appointees not be subject to removal by the Band Council during the heat of a dispute where one side to the dispute picks the members of a new Appeal Board. Thus, the absence of a provision in the Election Regulations for removal of Appeal Board members must be seen as being deliberate.

[32] That said, where there are vacancies on the Appeal Board and especially if it drops to below three members, the Election Regulations must be interpreted as providing the Band Council authority to appoint new members to the Appeal Board for the balance of the term as otherwise the Board will not be able to continue to operate. In determining when a vacancy occurs, the provisions in sections 18(a) to (c) of the Regulations, applicable to vacancies on Council, provide guidance and a list of situations when the Band Council could reasonably fill a spot on the Appeal Board.

[33] It thus follows that I would find that the Band Council's decision to remove the three previous Appeal Board members was unreasonable as the Election Regulations did not provide the Band Council with the authority to remove the three Appeal Board members in this case.

This is true even for the member who was felt to have a conflict of interest. Under section 122 of the Election Regulations, it was for her to decide whether she was in a position of conflict and, if so, to decline to take part in the decision on the Mayor's removal. Thus, this issue was not one for the Band Council to decide.

[34] As the decision to remove the previous Appeal Board members underpins all that happened subsequently, it would follow that the new Appeal Board's decision to remove the Mayor from office should be quashed as the Band Council had no authority under the Election Regulations to dismiss the three members of the previous Appeal Board on July 23, 2014. The new Appeal Board was therefore a nullity and had no authority to decide whether the Mayor should have been removed from office.

[35] The foregoing provides a sufficient basis for the determination of this appeal, and it is unnecessary to address the other issues raised by the appellants, many of which are academic in light of the conclusion regarding the Band Council's lack of authority to dismiss the three previous Appeal Board members. In addition, the parties have urged us to issue this Judgment promptly as the next election is scheduled for November 19, 2015, which provides an additional reason for declining to address academic issues.

[36] By way of guidance, however, I would note that the following should be applied in any future process to remove a Mayor or Councillor to ensure compliance with the requirements of procedural fairness:

- The Mayor or Councillor must be given adequate advance notice of the Band Council meeting where the Council debates whether to institute the removal process. Such notice should include a summary of the grounds alleged (this includes a summary of the relevant facts) as well as disclosure of all relevant evidence in support of the request for a petition;
- The Mayor or Councillor should be afforded the opportunity to address the Council before it votes on whether to authorize a petition;
- If the Band Council hears from those who are in favour of removal, the Mayor or Councillor should be present;
- The Appeal Board must provide the Mayor or Councillor with adequate advance notice of the meeting to consider the petition, must disclose to the Mayor or Councillor all evidence it considers, must provide them with an adequate opportunity to review the evidence and respond and would be well-advised to not meet with the other side of the dispute in the absence of the Mayor or Councillor;
- The Appeal Board and the Band Council should operate independently from each other and should hold separate meetings;
- The Appeal Board ought not consult with counsel for the Band Councillors who wish to remove the Mayor or another Councillor; and

- If the Appeal Board requires legal advice, it should retain independent counsel.

[37] Turning to the cross-appeal, I disagree with the application judge that a reasonable interpretation of the requirements of section 22 of the Election Regulations would allow for what occurred in this case, namely, the mere adoption of a Resolution by a simple quorum majority at a hastily-called Band Council meeting to institute the removal process. Such interpretation contradicts the plain wording of section 22 of the Election Regulations, which requires that the Resolution to seek to remove a Mayor from office must be adopted by a majority of Band Councillors (and not merely the majority present at a meeting) and also requires that the majority sign a petition, containing the grounds upon which removal is sought, the evidence in support of the removal and the signatures of the majority of Band Councillors who support the petition.

[38] In interpreting the majority requirement in section 22 of the Election Regulations, the application judge erred in his reliance on *Robert's Rules of Order* and the *Interpretation Act* to support the conclusion that the term "majority" meant only the majority of Councillors present at a Band Council meeting where there is a quorum.

[39] By virtue of section 13 of the Election Regulations, *Robert's Rules of Order* apply only to the order of business at *regular* meetings of the Band Council and thus are inapplicable to special meetings held to consider removal of the Mayor.

[40] As for the *Interpretation Act*, it is doubtful that it applies to the Election Regulations, which, strictly speaking, are not federal regulations. Moreover, even if the *Interpretation Act*

were applicable, it would not lead to the conclusion that the term “majority”, as used in section 22 of the Election Regulations, means a quorum majority. The application judge relied on paragraph 22(2)(b) of the *Interpretation Act* in support of his interpretation, which provides that:

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;	tout acte accompli par la majorité des membres de l'organisme présents à une réunion, pourvu que le quorum soit atteint, vaut acte de l'organisme;
--	--

[41] This provision defines what constitutes a decision (or “act or thing”) of an association, which in this case was the Band Council. Yet section 22 of the Election Regulations does not require the decision of the Band Council to initiate the removal process, but, rather, support of a majority of Band Councillors. This means at least seven Councillors, which is greater than a quorum majority at a Band Council meeting. By virtue of section 9 of the Election Regulations, a quorum majority could be as few as three Band Councillors. It is unreasonable to construe the Election Regulations as authorizing so few Councillors to initiate the removal of the Mayor, when so doing contradicts the plain wording of section 22 of the Election Regulations and could lead to significant instability in the governance of the Band. Thus, the term “majority” as used in section 22 of the Election Regulations must be interpreted to mean a majority of Band Councillors.

[42] Similarly, the clear wording of section 22 of the Election Regulations requires both a Band Council Resolution and a petition to institute the removal process, and there is no ambiguity in this requirement.

[43] Moreover, the July 28, 2014 Band Council Resolution could not reasonably be found to constitute a petition because, contrary to what the application judge found, it did not set out the evidence against the Mayor.

[44] Thus, I would grant the appeal in part, grant the cross-appeal and modify the Federal Court Judgment to read as follows:

THIS COURT'S JUDGMENT is that:

1. The dismissal of the previous Appeal Board was unreasonable, contrary to the Election Regulations and invalid;
2. The Band Council therefore had no authority to appoint the New Appeal Board;
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 as Mayor is invalid. Garry Reece remains Mayor;
4. The Band Council Resolution of July 28, 2014 seeking the removal of the Mayor did not conform to section 22 of the Election Regulations and is invalid; and
5. The application is otherwise dismissed.

[45] Given the success of the respondents on this appeal and cross-appeal, I would award them their costs of the appeal, the cross-appeal and before the Federal Court, calculated at the mid-point of Column III of Tariff B to the *Federal Courts Rules*, SOR/98-106.

"Mary J.L. Gleason"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-519-14

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HELIN, AND RUDY KELLY,
ALLAN HELIN SR., SHARON
HURDELL, SHARON HALDANE
AND CHERYL TAIT ACTING AS
THE COMPLAINTS AND
APPEAL BOARD v. ANDREW
TAIT, LAWRENCE SANKEY,
BARB HENRY, STAN DENNIS,
VICTOR KELLY, ROBBIE
HUGHES, EACH BEING
COUNCILLORS FOR 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

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

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REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: GAUTHIER J.A.
WEBB J.A.

DATED: NOVEMBER 5, 2015

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