Federal Court of Appeal | Cour d'appel fédérale

Date: 20110202

Docket: A-55-10

Citation: 2011 FCA 37

CORAM: **SHARLOW J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

THE COMMUNITY PANEL OF THE ADAMS LAKE INDIAN BAND

Appellant

and

THOMAS PHIL DENNIS, OF THE ADAMS LAKE BAND, RESIDENT AND AN ELECTOR AND ON BEHALF OF MY RELATIVES AND OTHER ADAMS LAKE BAND MEMBERS

Respondent

Heard at Vancouver, British Columbia, on November 30, 2010.

Judgment delivered at Ottawa, Ontario, on February 2, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: SHARLOW J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal and a cross-appeal from a judgment of the Federal Court: 2010 FC 62. The judge held that the Community Panel of the Adams Lake Indian Band lost its legal authority to decide certain election appeals. According to the judge, this happened because one of the members of the Community Panel resigned just before the remaining members signed a document evidencing

their decision. In his view, this brought the Community Panel below quorum. Therefore, the judge set aside the Community Panel's decisions dismissing the election appeals.

[2] For the reasons set out below, I disagree. I would allow the appeal and dismiss the cross-appeal, set aside the judgment of the Federal Court and dismiss the application for judicial review. This result will restore the decisions of the Community Panel dismissing the election appeals.

A. The facts

[3] Elections in the Band are regulated by the Adams Lake Secwepemc Election Rules. The Band approved and adopted these Election Rules after they received majority support in a referendum. In this appeal, all parties agree that the Election Rules governed a Band election held on February 14, 2009. In that election, a Band Council and a Chief were elected for a term of three years. The respondent, Thomas Phil Dennis, ran for election. He was unsuccessful.

[4] Under the Election Rules, a Band member may appeal against the election result on the ground of ineligibility of a candidate, corrupt practices in the election, or violations of the election rules that might affect the election results. Such appeals are investigated, considered and determined by a body known as the Community Panel. Mr. Dennis and others appealed against the election results, alleging irregularities and improprieties.

[5] Well before the controversies arising from the election – indeed, before any candidates were nominated for the election – the Band appointed the Community Panel. Five persons were appointed. This was because of a requirement under article 19 of the Election Rules: "[a] Community Panel of five (5) persons shall govern and decide all proceedings held to dispute an election held in accordance with these Election Rules…". Nowhere do the Election Rules relax this five person requirement.

[6] Under article 27 of the Election Rules, the Community Panel must determine the appeal within thirty days. The five persons on the Community Panel met, investigated the appeals, and received submissions over a number of days. It devoted the final two days of the thirty day period to considering the merits of the appeals.

[7] At 3:10 p.m. of the very last day, after deliberations had been completed and midway through the Community Panel's voting process, one of the five members of the Community Panel, Mr. Rodney Jules, suddenly resigned. He produced a letter setting out his reasons for resignation. All of his reasons related to the merits of the appeals before him. He was concerned about the procedure for mail-in ballots, the time period for the absentee ballot process, and the need for the Community Panel to address all of the election irregularities raised in each appeal and evaluate their seriousness. The resignation letter shows that his mind was made up on the appeals, he had reasons in mind, and he knew he was outvoted on the appeals by the other four members.

[8] Mr. Jules' resignation letter concluded with the statement that the Community Panel "cannot rule without a full roster" and so "this puts [it]…back to the community" for resolution. Based on this statement, the judge found (at paragraph 9 of his reasons) that Mr. Jules' resignation was intended "to frustrate the work of the Community Panel and to thereby place the appeals before 'the community'." However, this intention was directly contrary to the Election Rules as ratified by the community in a referendum. The Election Rules provide that appeals lie only to the Community Panel, and not to the community itself.

[9] After the sudden resignation, the Community Panel sought and received legal advice about article 19 and its requirement that "five (5) persons shall govern and decide all proceedings held to dispute an election held in accordance with these Election Rules." The Community Panel then completed its voting process as a group of four, with no further deliberations, dismissing the appeals by votes of four to zero. One appeal was dismissed on the basis that the evidence did not establish a valid ground for appeal. The other appeals were dismissed on the basis that although there were technical breaches of the Election Rules, they did not affect the election results. The Community Panel prepared documents dismissing each appeal. The four remaining members signed these documents.

B. The Federal Court's decision

[10] The judge found on the basis of several authorities that the five-person requirement in article 19 of the Election Rules established a quorum for the Community Panel and, thus, was "a

fundamental jurisdictional requirement that cannot be excused by the right of a decision-maker to determine its own procedure or…the consent of the parties" (at paragraph 21). In his view, the resignation of the single member deprived the Community Panel of its five person quorum and, thus, its jurisdiction to rule on the appeals. On that basis, he allowed the application for judicial review, quashed the decisions of the Community Panel dismissing Mr. Dennis' election appeals, and ordered those appeals to be redetermined on the merits by a newly-constituted Community Panel. He awarded the applicants costs in the amount of $1,500 inclusive of disbursements.

[11] It is evident from the judge's reasons (at paragraphs 21 and 22) that he regretted this loss of jurisdiction by the Community Panel as a result of a "very late" and "unfortunate" resignation. He found that the Community Panel had conducted itself fairly, appropriately and diligently. He recognized that his decision might cause "political uncertainty," "impose administrative burdens on the Band," and add "costs and inconvenience." However, those regrets were not sufficient to deter the judge from making the order that is now the subject of this appeal and cross-appeal.

C. The parties' submissions in this Court

[12] In this Court, the appellant submitted that the Community Panel had the jurisdiction to decide the appeals as a body of four. It submitted that article 19 specified only a "composition requirement" rather than a "quorum requirement," and that there were certain authorities supporting this: *Montreal Trust Co. v. The Oxford Pipe Line Co.*, [1942] O.R. 260 (H.C.), aff'd [1942] O.R. 490 (C.A.); *Murray v. Rockyview (Municipal District No. 44)* (1980), 110 D.L.R. (3d) 641, 12 Alta.

L.R. (2d) 342; *Canada (A.G.) v. Allard*, [1982] 2 F.C. 706, 49 N.R. 301 (C.A.); *Boucher v. Métis National of Alberta Association*, 2009 ABCA 5, [2009] 2 W.W.R. 581. It also submitted that the Community Panel had inherent jurisdiction to decide the appeals as a body of four. Finally, it submitted that the Community Panel was master of its own procedure and could continue to vote as a four person panel if it chose to do so.

[13] I do not accept the appellant's submissions. Article 19 is worded in a particularly strict way. It requires, unconditionally and unequivocally, that appeals be governed and decided by five persons. The authorities cited by the appellant must be viewed with caution because they do not set out the text of the relevant provisions, they concern provisions that allow quorum requirements to be relaxed, or they concern provisions that do not impose quorum requirements at all. As for inherent jurisdiction, "statutory tribunals…do not enjoy any inherent jurisdiction" (see *Tranchemontagne v. Ontario (Director, Disability Support Program*), 2006 SCC 14 at paragraph 16, [2006] 1 S.C.R. 513) and so it is hard to see how the Community Panel established under the Election Rules enjoys such a jurisdiction. Finally, while the Community Panel is master of its own procedure (*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 685, 69 D.L.R. (4th) 489), absent an express power to amend or depart from the Election Rules, it cannot change the requirements of article 19.

[14] The respondent submitted to us that article 19 was intentionally drafted as a "democratic safeguard" to permit a member to resign and to prevent the Community Panel from deciding an appeal, thereby requiring the entire community to decide the appeal. However, in argument, the

respondent fairly admitted that the record does not show evidence of such an intention. Further, had this been the intention, one would have expected a rule requiring that decisions be unanimous, failing which an appeal could be taken to the entire community. There is no such rule.

[15] The respondent also urged us that his Band needed to be governed democratically and effectively in order to address the problems and hardships he sees in his community. His submissions were passionate, eloquent and moving. However, as an appellate court, we can only examine the evidence in the record and address the narrow legal issue in this appeal: whether the decisions of the Community Panel should be quashed because the resignation caused the Community Panel to lose its quorum under article 19 of the Election Rules.

D. Did the Community Panel lose its quorum and, if so, at what point?

[16] As mentioned above, the Federal Court judge found that the resignation of the single member deprived the Community Panel of its five person quorum and, thus, its jurisdiction to rule on the appeals. The judge found that the "jurisdiction of a decision-maker is dependent upon the maintenance of a proper quorum from the beginning to the end of the adjudicative process" (at paragraph 12). In his view, having a quorum through to the completion of an adjudicative process is necessary. As the Community Panel lost its quorum before the completion of its adjudicative process, it lost its authority to decide the election appeals.

[17] In argument, the appellant accepted that the Community Panel fell below the five person requirement in article 19. Instead, in argument, it focused on the issue whether the Community Panel could proceed as a panel of four. In doing this, it did not address the judge's finding that quorum was lost before the completion of its adjudicative process. The respondent also did not address this issue.

[18] In my view, based on the particular record filed in this appeal, the Community Panel completed its adjudicative process before it lost its quorum. When it lost its quorum, all that was left to do was to complete the administrative work necessary to signify formally its decision and communicate it to the parties. However, since we did not receive argument on this issue and since I do not need to decide this point in order to determine this appeal, I decline to rule definitively upon it. However, for the benefit of future litigants, I would like to offer some observations on this issue.

[19] The Federal Court judge was correct when he held that the Community Panel needed to maintain a quorum until its adjudicative process was complete. The leading case is *IBM Canada Ltd. v. Canada (Deputy Minister of National Revenue, Customs & Excise – M.N.R.)*, [1992] 1. F.C. 663, (1991), 129 N.R. 369 (C.A.). There must be "a meeting of the minds," with each member being "informed at least in a general way of the point of view of each of his colleagues," the Community Panel as a group must "at some point in time…reach a decision collectively," and each member must participate "individually in that collective decision by agreeing with it or dissenting from it": *IBM*, at page 675. The members acting together must make "one united, though not

necessarily unanimous, decision": *IBM*, at page 674. In substance, this means that the quorum must be present through the completion of the adjudication process, when all minds are made up.

[20] However, the judge did not determine on the facts whether a quorum was present through the completion of the adjudication process. Instead, he found that the quorum was not present for the actual rendering of the decision, in this case, the signing of a sheet of paper formally evidencing the collective decision. In his words, the Community Panel "*render[ed]* its decisions in the absence of a full complement of five members" and "*rendered* its decisions…in the absence of one of its members" (emphasis added, at paragraphs 10 and 12).

[21] In *IBM*, this Court found that quorum might not be required for the actual rendering of the decision. Justice Décary, speaking for the Court, said that there is "no absolute rule, as legislative provisions, rules of practice and actual practices may vary from one tribunal to the other": *IBM*, at page 675. He also said that "signature does not necessarily equate with participation" and "non-signature does not necessarily equate with non-participation"; rather, the key consideration is to determine whether a quorum was present throughout the entire adjudicative process, looking at the "meeting of the minds" described in paragraph 20, above: *IBM*, at page 675.

[22] The post-*IBM* case law shows that we must examine the legislative and factual context in order to see whether the absence of a signature on a decision matters. In *Singh v. Canada (Minister of Citizenship & Immigration)*, [1998] 3 F.C. 127, 224 N.R. 227 (T.D.), the Court found that formal signification from all members of a Board was necessary. In that case, the Board was acting under

subsection 69.1 of the *Immigration Act*, R.S.C. 1985, c. I-2, which provides for the decision most favourable to the refugee claimant to prevail where the adjudicators are split. Formal signification was necessary in order to know for sure if there was a split. In *Mehael v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 838 (T.D.), decided under the same legislative provision, the Court decided that a lack of signature could be overlooked if the evidence establishes that the non-signing member did participate in the decision and that his or her position on the merits of the decision was clear (at paragraph 13). In that case, the evidentiary burden was not met.

[23] Turning to the case at bar, article 19 of the Election Rules requires that five persons on the Community Panel "decide" the appeals. There is no definition of "decide," and there is no requirement that decisions be formally signified in writing. Unlike *Singh*, where formal signification of the decision was necessary under the particular legislative scheme, the Election Rules contain nothing that would make formal signification a necessary step in the process of the Community Panel. Finally, the record contains no evidence of a practice of requiring formal signification of a decision of the Community Panel.

[24] In my view, there is a strong argument on the facts of this case that quorum under article 19 was not lost. All five members of the Community Panel, including the resigning member, participated over multiple days (see paragraphs 6-9, above). When deliberations ended and voting began, all five members, informed in their deliberations by the views of the others, had reached a decision on the merits of the appeals:

(a) Four members had made up their minds and had decided to dismiss the appeals. The four later evidenced their decision by signing a document.

(b) The resigning member had also made up his mind. In his resignation letter, he expressed his disagreement with the other members of the Community Panel on the merits of the appeal, setting out his reasons. This is a case where, unlike *Mehael*, there is ample evidence showing that the resigning member did participate in the overall decision and had reached a conclusion concerning it.

One could argue that the decisions of the Community Panel were made with the requisite quorum under article 19 of the Election Rules and so they should not be quashed.

[25] However, as I mentioned above, the parties did not raise this point in written or oral argument, so I decline to rule on it definitively. Instead, I prefer to determine this appeal on a fully argued ground – namely that as a matter of judicial discretion the Community Panel's decisions should not be quashed.

E. The discretion not to quash the decisions

[26] In my view, the appeal should be allowed on the basis that even if the Community Panel lost its legal authority to render its decisions dismissing the election appeals, as a discretionary matter its decisions should not have been quashed.

[27] Although the judge found that the Community Panel had lost jurisdiction, he correctly recognized (at paragraph 21) that he had the discretion under subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 not to quash the Community Panel's decisions. The judge recognized certain factors against quashing the Community Panel's decisions, but ultimately decided to quash them.

[28] Just one week after the judge released his decision, the Supreme Court of Canada released its decision in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6. *MiningWatch Canada* provides us with more guidance about the power of a reviewing court not to quash a decision of an administrative body, even when there are grounds for doing so.

[29] In *MiningWatch*, the Supreme Court found that certain aspects of an environmental assessment process did not comply with the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37: the responsible authorities "acted without statutory authority" and in contravention of "the requirements of the [Act]" (at paragraphs 42 and 52). However, the substantive decisions made by the responsible authorities at the end of that non-compliant process were not challenged. The Supreme Court adopted a balance of convenience approach, looking at a very broad range of factors, and found that there was "no justification" to quash the substantive decisions made and force everyone to go through the assessment process again (at paragraph 52). The Court acknowledged that its approach would "allow a process found not to comply with the requirements

of the CEAA to stand." However, this was preferable to the potentially disproportionate impact that quashing the decision would have had on the parties and the broader community.

[30] The message in *MiningWatch* is that the broadest range of practical factors must be considered and legal error or non-compliance should not be given undue weight: the practicalities may outweigh the legalities.

[31] This Court may substitute its own discretion on this matter where "the judge at first instance has [not] given weight to all relevant considerations": *MiningWatch Canada*, at paragraph 43. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at paragraph 104, and *Mazda Canada Inc. v. Mitsui O.S.K. Lines Co.*, 2008 FCA 219, [2009] 2 F.C.R. 382 at paragraphs 17-20.

[32] In my view, the judge did not give weight to all relevant considerations. He took into account some factors such as possible political uncertainty, administrative burdens, and added costs and inconvenience that might arise if the election appeals had to be redone. Based on those factors and noting the importance of enforcing the legal quorum requirement in article 19 of the Election Rules, the judge found that "[t]hese are not considerations which ought to stand in the way of [granting] discretionary relief in this case" (at paragraph 21). However, as will be seen below, there were other relevant considerations to weigh and, as held in *MiningWatch*, the legal quorum requirement, even as interpreted by the judge, does not necessarily predominate.

[33] First, the resigning member's motives are an important consideration in the exercise of discretion in this case. The resigning member had fully evidenced his decision and the reasons for it in his resignation letter. He resigned in order to stop the Community Panel from completing the mandate given to it under the Election Rules and to do what he could to prevent the decision from taking effect. His resignation caused no difference to the substantive outcome of the appeals: as I have mentioned above, in a very real sense four of the five members had already decided to dismiss the appeals.

[34] Further, the cost of redoing the appeals must be evaluated not just in abstract, but against the other needs of the Band. The record shows that the needs of the Band are significant. Quashing the Community Panel's decision would cause the Band to expend its time and resources on appeals that, for all practical purposes, have already been investigated, considered and determined. On the other hand, there is nothing in this evidentiary record to suggest that a Band meeting to settle upon the composition of a new Community Panel and a re-running of the appeals before it would have any beneficial effects whatsoever.

[35] Another important factor is that it is impractical to redo the appeals. It may be that by 2012, the new Community Panel will have been appointed, the appeals will have been redetermined and all recourse to the Federal Courts will have been completed. But by then the three year terms of office of the existing Band Council and Chief will have expired and a new election will be required anyway.

[36] Yet another important factor is the difficulty in staffing a new Community Panel to deal with the appeals. The Community Panel in this case was staffed before any candidates for election had been announced. As a result, the appeals were decided with an appearance of fairness and impartiality. The new Community Panel will be staffed after the election results and during all of the current controversy. The appearance of fairness and impartiality will likely suffer.

[37] In light of the foregoing, even if the Community Panel lost its quorum under article 19 of the Election Rules, I would exercise my discretion under subsection 18.1(3) of the *Federal Courts Act* and in accordance with the principles in *MiningWatch Canada* to dismiss the application for judicial review. This would leave in place the decisions of the Community Panel dismissing the election appeals.

F. Decision on the cross appeal

[38] Mr. Dennis has brought a cross appeal raising very limited issues. He seeks an order that the four remaining members of the Community Panel be prevented from deciding any redetermination of the appeals. He also seeks an order that any reconstituted Community Panel consider certain matters when it redetermines the appeals. He also seeks enforcement of the costs award in the Federal Court's judgment. As I have decided that the Federal Court's judgment must be set aside, all of these issues are moot.

G. Proposed disposition

[39] For the foregoing reasons, I would allow the appeal and dismiss the cross-appeal, set aside the judgment of the Federal Court and dismiss the application for judicial review. In the circumstances of this case, I would award no costs in this Court or in the Federal Court.

"David Stratas"
J.A.

“I agree
K. Sharlow J.A.”

“I agree
Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-55-10
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BARNES DATED JANUARY 19, 2010, NO. T-587-09	
STYLE OF CAUSE:	The Community Panel of the Adams Lake Indian Band v. Thomas Phil Dennis, of the Adams Lake Band, Resident and An Elector and on Behalf of My Relatives and Other Adams Lake Band Members
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	November 30, 2010
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Sharlow J.A. Trudel J.A.
DATED:	February 2, 2011

APPEARANCES:

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