Federal Court of Appeal  Cour d'appel fédérale

Date: 20170705

Docket: A-42-17

Citation: 2017 FCA 146

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

BETWEEN:

COUNCILLORS GEORGINA JOHNNY, BRANDY JULES AND RONALD JULES

Appellants

and

ADAMS LAKE INDIAN BAND

Respondent

Heard at Vancouver, British Columbia, on June 19, 2017.

Judgment delivered at Ottawa, Ontario, on July 5, 2017.

REASONS FOR JUDGMENT BY: DAWSON J.A.

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

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellants were properly elected Band Councillors of the Adams Lake Indian Band. Each was removed from office effective October 23, 2016, and each was prohibited from running for election in the next two Band elections because each was found to have breached their oath of office.

[2] The appellants' challenge to the decisions removing them from office was rejected by the Federal Court. The Federal Court found the decisions were reached in a procedurally fair manner (2017 FC 156). This is an appeal from the judgment of the Federal Court.

[3] Before dealing with the merits of the appeal, it is important to record the position of the respondent Adams Lake Indian Band on this appeal.

[4] The Band opposed the appellants' application for judicial review in the Federal Court and initially entered an appearance in this Court indicating its intent to oppose the appeal. The Band filed a memorandum of fact and law in which it asked that the appeal be dismissed with costs. However, shortly before the appeal was argued, a notice of change of solicitors was filed. At the hearing of the appeal, new counsel advised that the Band does not take any position on this appeal, and that in disposing of the appeal the Court should have no regard to the Band's memorandum of fact and law. The Court has proceeded on this basis.

[5] I now turn to briefly review the relevant facts.

[6] Part 24.1 of the 2014 Adams Lake Secwépemc Election Rules provides that a Band Councillor "may be removed from office" on grounds that the Councillor violated the Band's Election Rules or breached their oath of office. In their oath of office, Band Councillors agree, among other things, to "honestly, impartially and fully perform the duties of my office with dignity and respect" and to uphold the "Adams Lake Indian Band Community Vision."

[7] Of relevance to this appeal are paragraphs 2, 3 and 4 of the oath of office each member of the Band Council is obliged to declare. These paragraphs state:

> 2. I will honestly, impartially and fully perform the duties of my office with dignity and respect.
>
> 3. I will always consider the best interests of the Adams Lake Indian Band.
>
> 4. I will uphold the ALIB Election Rules, Band policies, and the Chief and Council Terms and Reference of the Adams Lake Indian Band.

[8] Proceedings to remove a Band Councillor are to be commenced by a petition signed by ten electors, accompanied by an affidavit substantiating the grounds for removal (Parts 24.2 and 24.3 of the Election Rules). A decision to remove a Councillor is to be made by an elected Community Panel (Election Rules Part 9.2 and Appendix E).

[9] In September 2016, a petition was presented seeking the removal of the appellants from their positions as Band Councillors. The petition was supported by an affidavit sworn by Valerie Michel, an employee of the Band. In her affidavit, the complainant made the following allegations:

> **Ronnie Jules**
>
> Violation: I heard Ronnie was advocating for his immediate family member to get a house.
>
> This violates # 2 Oath of Office; how can you be impartial when you're advocating for an immediate family.
>
> This violates # 3 Oath of Office; by advocating for an immediate family member how can you be thinking in the best interest of the Band.
>
> This violates # 4 Oath of Office; this definitely was not following the Housing Policy showing lack of respect for Band policies.

Violation:

Ron Jules participated in discussion that had a direct effect on his immediate family. Many times he did not declare conflict of interest.

SAME AS ABOVE VIOLATES #2 and #3

Gina Johnny

Violation: Gina advocated for a member of her immediate family to receive money from the band council and approved using council travel budget to attend a workshop.

This violates # 2 Oath of Office; how can you be impartial when you're advocating for an immediate family member.

This violates # 3 Oath of Office; definitely only thinking in the best interest of her family.

This violates # 4 Oath of Office; not following proper procedures and policies for band member receiving money. How can council give money out of their own travel for her brother to attend a workshop, was this offered to anyone else?

Brandy Jules

Violation of Oath of Office # 2

Brandy is directing the decision for the release of the Executive Director Lawrence Lewis for personal reasons to do with her family. Brandy holds the Administration portfolio and was part of the decision to hire Lawrence. Council was excited to have Lawrence on board, spoke of his credentials and how he would be an asset to the band, Council even held a welcoming for him. What changed? Well when Lawrence started to hold department's heads accountable to their departments, following band policies and procedure and holding staff accountable to lateral violence? Is this the reason for his release?

Brandy and Ronnie were doing their own investigation [*sic*] his background to find things to let him go. Should this not have been part of the hiring process?

[10] The complainant went on to state that:

… This is the first term in many years it is difficult for me to see what direction the band is going. With all the conflict of Interest and council involving themselves in administration decisions that they should not be involved in, this is demonstrating the council are more worried about administration and ensuring they protect their family than moving the band forward politically. I look forward

> to meeting with the Community Panel and trust the Community Panel to investigate thoroughly and unveil the truth and make the right decision with the evidence found.
>
> In my opinion this maybe [*sic*] the tip of the iceberg, I have faith that the community panel will investigate our concerns and should more forthcoming information arise through your investigation you will deal with accordingly.

[11] The Community Panel found that all but one of the alleged violations were established. It rejected the allegation that Ronald Jules had advocated that one of his immediate family members should receive a house.

[12] The Community Panel also considered a number of allegations not contained in the petition or supporting affidavit. It found that Ronnie Jules made a "direct racial comment to a staff member" and that he participated "in lateral violence towards another member of Council". It found that Gina Johnny participated in discussions, advocated and signed "the Band Council Resolution which transitioned all existing Security Staff" to Adams Lake Indian Band Staff, which benefited her immediate family and that she had advocated for an immediate family member to represent the Band at "Together Shuswap". Finally, it found that Brandy Jules made inquiries of the Band Staff with respect to a job posting involving her immediate family, and that she participated in discussions, advocated and signed "the Band Council Resolution which transitioned all existing Security Staff" to Band Staff, which benefited her family.

[13] In the result, the Community Panel found that each appellant had breached paragraphs 2, 3 and 4 of the oath of office, and that each appellant had breached the Band's Code of Conduct and Ethics Policy and the Band's Financial Management Bylaw. Additionally, it found that Ronnie Jules had breached the Conflict Resolution Policy, the Employment Guidelines, and the

Respectful Work Place Policy. Brandy Jules was also found to have breached the Respectful Work Place Policy and the Employment Guidelines.

[14] As a result of these findings, each appellant was removed from elected office as a Band Councillor effective October 23, 2016, and each appellant was precluded from running for office in the next two Band elections. The appellants may first run for office in the election to be held in 2024.

[15] The reasons of the Community Panel are found in the minutes of its meeting of October 22, 2016, and in three letters of that date, one of which was sent to each appellant. The minutes reflect, among other things, three motions made, seconded and carried, finding the appellants to have breached their oaths of office. The letters set out the nature of each violation of the oath considered by the Community Panel and the Panel's conclusion about each alleged violation. Each letter was signed by all of the members of the Community Panel.

[16] Following the decisions of the Community Panel, the Federal Court issued an order, with the consent of the parties, which, subject to certain limitations, restored the appellants to their positions on the Band Council pending the outcome of their challenge to the removal orders. A by-election scheduled for the election of new Councillors was cancelled. Thereafter, following the issuance of the Federal Court's judgment, this Court stayed the judgment of the Federal Court pending the disposition of this appeal.

[17] On this appeal from the judgment of the Federal Court, the appellants assert that the Federal Court erred by applying the reasonableness standard of review to the decision of the Community Panel. They also assert that the Federal Court erred in failing to find that the Community Panel's decision was reached in a manner that was procedurally unfair in a number of respects.

[18] I begin my consideration of the appellants' submissions by rejecting the notion that the Federal Court selected and applied the incorrect standard of review. The Federal Court found that the sole issue before it was whether the Community Panel breached the duty of procedural fairness it owed to the appellants (reasons, paragraph 18). This finding is not challenged by the appellants and, in any event, it is a correct characterization of the issue before the Federal Court.

[19] As to the applicable standard of review, at paragraph 21 of its reasons the Court referred to both *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 43 and *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraph 79, and found it to be well-established that the standard of correctness applies to questions of procedural fairness. No error was made by the Federal Court in selecting the correctness standard of review.

[20] As to the application of this standard, in my view the Federal Court reversibly erred in concluding that the decision of the Community Panel was made in compliance with the requirements of procedural fairness. It is not necessary for me to consider all of the errors

asserted by the appellants. For the purpose of this appeal, it is only necessary for me to consider the Federal Court's:

i. determination of the content of the duty of fairness;

ii. application of the principle "he who decides must hear";

iii. application of the test for bias or reasonable apprehension of bias.

[21] As I have concluded that the Federal Court made a reversible error, and as I would set aside the judgment of the Federal Court, I will also comment on the adequacy of the Community Panel's reasons in the event it comes to reconsider the allegations made against the appellants.

[22] The Federal Court began its analysis by correctly observing that the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context and circumstances of each case (reasons, paragraph 27). The Federal Court then relied upon the decision of this Court in *Bruno v. Samson Cree Nation*, 2006 FCA 249, 352 N.R. 119, to conclude that the Community Panel should be granted significant latitude to choose its own procedures. In the view of the Federal Court, it was sufficient if basic procedural safeguards were in place. Thus, a full oral hearing was not required (reasons, paragraphs 28 and 29).

[23] However, *Bruno* arose in an entirely different context from that now before the Court – an assertion that a successful candidate in a Band election was not qualified to run for the office. The present context involves the removal from office of a properly elected Councillor.

[24] The content of the duty of fairness to be applied when removing a duly elected councillor from office was considered by the Federal Court in *Testawich v. Duncan's First Nation*, 2014 FC

1052, 467 F.T.R. 38. The Federal Court concluded that application of the factors articulated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 243 N.R. 22 favoured a duty of fairness "on the more robust end of the spectrum." The Federal Court reasoned that:

> [34] In my view, the *Baker* factors weigh in favour of a duty on the more robust end of the spectrum. First, the Committee reached its decision through a process resembling that of a court, since it has the task of resolving complaints by reference to Regulations establishing rights and duties. The Supreme Court has stated that such decisions warrant a high degree of procedural fairness: *Baker*, above, at para 23. The fact that there is no internal appeal in the statutory scheme also militates in this direction: *Baker* at para 24.
>
> [35] The decision itself did not affect the applicant's liberty or security interests and is, therefore, of moderate importance. However, it has affected his reputation in the community and has also deprived the members of the First Nation of their elected representative. The applicant submits that his expectations were that the hearing would be procedurally fair and that the Committee would maintain a record of the proceedings and provide written reasons of its decision.

[25] I agree. To the analysis of the Federal Court I would only add with respect to the importance of the decision to the appellants that the position of Band Councillor is generally a remunerated position. The *First Nations Financial Transparency Act*, S.C. 2013, c. 7 requires that First Nations disclose and publish on the internet the remuneration and expenses paid to members of Band Councils. This disclosure is also to be published on the website of Indigenous and Northern Affairs Canada. Members of the Adams Lake Indian Band Council receive remuneration of approximately $4,000 per month. This heightens the importance of the decision to the appellants. Their tenure as a paid office holder is at stake.

[26] This was a case that involved conflicting evidence and issues of credibility. To briefly illustrate, on October 7, 2016 the then Chief informed the Community Panel that:

- He was not aware of Ronnie Jules being in a conflict of interest with his immediate family members.
- Ronnie Jules excused himself from the discussion concerning Roddy Jules' roof.
- The Chief did not believe Ronnie Jules acted in a position of conflict with respect to David Jules.
- Gina Johnny excused herself from Council when Council discussed having a family member receive funding to attend a conference or a workshop.

[27] A current member of the Band Council advised the Community Panel on October 7, 2016 that "for sure" Ronnie Jules declared a conflict of interest with respect to the security staff issue.

[28] On the facts of this case, it is not necessary to precisely enumerate the participatory rights enjoyed by the Band Councillors. However, where, as in this case, there is contradictory evidence and issues of credibility, Councillors facing removal are entitled to a full oral hearing before the Community Panel with a right to cross-examine witnesses.

[29] In this case, the relevance of the content of the duty of fairness arises with respect to the Federal Court's application of the principle "he who decides must hear" and its approach to the test for bias.

[30] The maxim "he who decides must hear" expresses the general principle that where an administrative tribunal is responsible for hearing and deciding a case, only those members of the Tribunal who hear the case may take part in the decision.

[31] Justice Binnie, in dissent but not on this point, has stated that "[n]othing is more fundamental to administrative law than the principle that he who hears must decide" (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, paragraph 66). Where the rule applies it requires that all members of the Tribunal who take part in a decision must hear both the evidence and the representations of the parties. The rule does not apply where legislation expressly or by necessary implication ousts its application (*International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pages 329-330).

[32] In the present case, nothing allows members of the Community Panel to absent themselves from seeing and hearing the witnesses. The fact that a quorum of the Community Panel is three of five members simply means that if all five members of the Community Panel are not eligible or available to participate in an inquiry, a majority of the members may nonetheless embark upon the inquiry. The quorum provision does not authorize members to come and go and participate in a decision when they have not heard all of the evidence or the submissions of the parties.

[33] It is particularly important when witnesses give conflicting accounts that all of the members of the Community Panel conducting the inquiry see and hear all of the witnesses. It is not sufficient for other members of the Community Panel to pass on their recollection of the evidence and their impression of the witness. Nor is it sufficient for an absent member to read a brief written summary in the minutes of what the witness said.

[34] The principle that “he who decides must hear” was breached in the present case in two types of circumstances.

[35] First, two members of the Community Panel were absent for a number of hearings. Member Lund was not present on October 3, 2016, to hear the questioning of the complainant. She also missed the testimony of three witnesses given on October 11, 2016. Member Nordquist missed an *in camera* session on October 5, 2016, which session was not minuted and missed the testimony of one witness heard on October 21, 2016.

[36] Second, two members of the Community Panel recused themselves from hearing certain evidence. Member Kenoras absented herself on the two occasions her mother, Norma Manuel, was interviewed by the Community Panel. She also absented herself for a portion of the interview of two witnesses on October 15, 2016, when the witnesses were questioned about events involving her mother. She was also asked to leave a portion of the October 14, 2016, meeting while the Community Panel reviewed the interview of her mother.

[37] Member Yarama, the Manager of Maintenance and Housing for the Band, was directly responsible for the Band’s security staff and independent contractors. She therefore declared a conflict of interest with respect to allegations made against the appellants regarding their conduct with respect to the Band’s security contracts. On my review of the record, Member Yarama only removed herself from a portion of the October 13, 2016, meeting.

[38] The Federal Court did not refer to the absence from the hearing of Members Lund and Nordquist and viewed the absences of Members Kenoras and Yarama to be appropriate in view of their conflicts (reasons, paragraphs 46, 48).

[39] I respectfully disagree. The Community Panel interviewed a total of 12 witnesses, yet only one member heard the totality of the information adduced. The Community Panel received contradictory information on central issues. In this circumstance, procedural fairness required all of the members of the Community Panel who participated in the decision to remove each councillor to hear all of the information adduced from all of the witnesses. The members' failure to do so rendered their decision procedurally unfair.

[40] While this finding is dispositive of the appeal, I wish to deal with the Federal Court's treatment of the issue of bias and more particularly with its conclusion at paragraph 50 that:

> In sum, having regard to all the circumstances of this case, including the context in which the Panel operates, and being mindful of this Court's more lenient approach to bias's [*sic*] issues raised in the context of decisions made by decisions-makers holding their authority from customary band election codes and of its general reluctance to interfere with such decisions in order to preserve, as much as feasibly possible, First Nations' autonomy in this respect, I find that the Applicants have failed to establish that the process that led to the impugned decision raises a reasonable apprehension of bias.

[41] The Election Rules do not preclude Band employees from holding office as a member of the Community Panel. Only members of the Band Council or candidates in an election are precluded from election as a member of the Community Panel. Thus, I do not disagree with the Federal Court's conclusion that the mere fact that a member of the Community Panel is employed by the Band does not give rise to a reasonable apprehension of bias. What is required

is an actual conflict of interest in a given case (reasons, paragraph 41). This is consistent with the reasoning in *Sparvier v. Cowessess Indian Band #73*, [1993] 3 F.C.R. 142, [1994] 1 C.N.L.R. 182 (F.C.T.D.) where Justice Rothstein wrote, at pages 167-168 :

> … it does not appear to me to be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation, to be completely without social, family or business contacts with a candidate in an election. …
>
> If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.

[42] It follows that if a member of the Community Panel is in a position of conflict of interest with respect to a particular issue, the member must not participate in any way in the process that leads to a decision on that issue. In some circumstances, where allegations are made with respect to a number of issues and where the nature of the conflict would cause a reasonable and informed person to perceive that the member would, consciously or unconsciously, be unable to decide other issues fairly, the member must not participate at all in deciding any issue.

[43] This said, the Community Panel must be free from a reasonable apprehension of bias. A tribunal such as the Community Panel which is primarily adjudicative in its functions, must meet the test for bias articulated in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at page 394:

> …[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [That] test is "what would an informed person,

> viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[44] In the present case, the decisions to remove the appellants were made at the October 22, 2016, meeting of the Community Panel.

[45] The minutes of this meeting reveal that with respect to Ronnie Jules, Member Yarama did not leave the meeting at all. Member Kenoras withdrew from the meeting for ten minutes while the Community Panel discussed the evidence of her mother, Norma Manuel. Member Kenoras then returned to the meeting and seconded the motion to remove Mr. Jules from office. The motion which was carried found that Mr. Jules had violated his oath of office by, among other things, participating in discussions and signing the Band Council Resolution which transferred all security staff to the Band Staff and that he participated in "lateral violence" toward Member Kenoras' mother.

[46] A reasonable apprehension of bias arises from Member Yarama's participation in a decision about Ronnie Jules' conduct with respect to the Band's security contract when she had previously declared this to be an issue in which she was in a position of conflict.

[47] Similarly, a reasonable apprehension of bias arises from Member Kenoras' participation in a decision that found misconduct based on Ronnie Jules' treatment of her mother. Absenting herself from her mother's interview and from interviews which discussed her mother was wholly insufficient to cure the perception of bias.

[48] With respect to Georgina Johnny, Member Yarama did not leave the October 22, 2016, meeting, yet she voted on a motion that removed Ms. Johnny from office for, among other things, participating in discussions and signing the Council Resolution which transferred all security staff to the Band Staff. Again, a reasonable apprehension of bias arises from Member Yarama's participation.

[49] With respect to Brandy Jules, again a reasonable apprehension of bias arises from Member Kenoras' participation in a decision that found misconduct based in part on Brandy Jules' treatment of Member Kenoras' mother.

[50] The presence of a reasonable apprehension of bias on the part of two members of the Community Panel provides an independent ground for setting aside the decisions removing the appellants from office as members of the Band Council.

[51] As this matter may be returned to the Community Panel, it is important that I also address the issue of the adequacy of its reasons, an issue not addressed by the Federal Court.

[52] As explained above, the reasons of the Community Panel consist of the minutes of the October 22, 2016 meeting together with the three letters which set out the nature of the violation of the oath of office considered by the Community Panel for each appellant. Missing from these reasons is any reference to the conflict in the information provided to the Community Panel. Instead, a generic description is given in respect of each violation that describes the nature of the material the Community Panel considered in its investigation. An example is the following

statement which described the Panel's investigation into the allegation that Ronnie Jules participated in discussions that had a direct effect on his immediate family without declaring a conflict of interest: "The Community Panel has completed their investigation which consisted of evidence provided by the petitioner, witness interviews, and Chief and Council meeting minutes".

[53] The purpose of reasons is to allow a reviewing court to understand why an administrative decision-maker made its decision and to assess whether the decision falls within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, paragraph 16). In the present case, nothing in the record allows this Court to determine why the Community Panel preferred the inculpatory information and ignored the exculpatory information received with respect to the allegations levied against the appellants. In this circumstance, this Court cannot conduct reasonableness review.

[54] It follows that I would allow the appeal and set aside the judgment of the Federal Court, with costs here and in the Federal Court. Pronouncing the judgment that should have been pronounced by the Federal Court, I would set aside the decision of the Community Panel in its entirety, including the prohibition placed on the appellants' running for office in the elections to be held in 2018 and 2021.

[55] If the petition to remove the appellants is to be pursued, the petition should be returned to the Community Panel for redetermination in accordance with the Court's reasons. For clarity, if

allegations related to the appellants' dealings with Norma Manuel are to be pursued, Member Kenoras is to take no part in the decision-making process. Similarly, if allegations related to the transition of the existing security staff to the staff of the Adams Lake Indian Band are to be pursued, Member Yarama is to take no part in the decision-making process.

[56] In accordance with the request made by counsel for the Band, if the parties are unable to agree on the quantification of costs in this Court within 14 days of these reasons, they may serve and file written submissions on the issue of costs, each submission not to exceed three pages in length. The appellants shall serve and file their submission within 21 days of these reasons. The respondent shall serve and file its submission within 28 days of these reasons.

"Eleanor R. Dawson"
J.A.

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

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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