Federal Court  Cour fédérale

Date: 20150218

Docket: T-1466-13

Citation: 2015 FC 204

Ottawa, Ontario, February 18, 2015

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

BERNARD CONRAD LEWIS

Applicant

And

THE GITXAALA NATION, ELMER MOODY, JAMES BOLTON AND WENDY NELSON

Respondents

And

THE GITXAALA JUSTICE TRIBUNAL

Intervenor

JUDGMENT AND REASONS

[1] This is an application for judicial review dated August 30, 2013, on behalf of the Applicant, Bernard Conrad Lewis, in respect of a decision of the Gitxaala Justice Tribunal ("the

Tribunal") made on July 26, 2013, pursuant to the *Gitxaala Nation Custom Election Code* ("the Election Code"). The Applicant was declared winner of the election for Chief Councillor of the Governing Council of the Gitxaala Nation. By official count, the Applicant won by thirteen (13) votes, however, within 30 days of the election, as prescribed by the Election Code, five electors filed appeals.

[2] The Tribunal allowed an appeal of the April 15, 2013 election results and directed a new election for the position of Chief Councillor of the Gitxaala Nation.

[3] The Applicant is seeking the following relief:

a. An order to quash and set aside the July 26, 2013 decision of the Gitxaala Justice Tribunal;

b. A declaration that Bernard Conrad Lewis is the Chief Councillor of the Gitxaala Nation;

c. An interim injunction restraining the Gitxaala Nation from holding a by-election for the position of Chief Councillor of the Gitxaala Nation until the next regular election of the Governing Council, or until there is a vacancy, as provided for in the Election Code;

d. An order for mandamus compelling the Gitxaala Nation to pay the salary of Chief Councillor to the Applicant for the month of August 2013 to the date of judgment; and to continue paying it to the Applicant for as long as he remains lawfully in the office;

e. Such other relief as to this Honourable Court may seem just; and

f. Costs.

[4] Following the election, various band members appealed the result to the Tribunal with allegations of irregularities. The three irregularities the Tribunal investigated were:

a. Improper handling of mail-in ballots: three mail-in ballots were found unopened in the band office after the election;

b. A withdrawn candidate's name appearing on the ballot: six electors voted for the withdrawn candidate;

c. Failure to update addresses of electors: four electors requested mail-in ballots and did not receive the mail-in package.

[5] The current Election Code has been in place since December 15, 2009. The Gitxaala Justice Tribunal roles and responsibilities are set out at section 6.22 to section 6.26 of the Election Code and the Appeals Process is set out in section 11. One of the Tribunal's roles is at section 6.26(a):

> Administer all Governing Council vacancy related appeals in accordance with the provisions in this Code

[6] Section 11.1 particularly sets out the circumstances under which an appeal may be made and the nature of the errors that are considered:

> Any Elector, including any Candidate, may within thirty (30) days of the date on which the Election was held appeal, in whole or in part, an Election result if he or she has grounds for believing that there was an error made under, or violation of, this Code during the Election process that *might have affected the outcome of the Election*. (Emphasis added)

[7] Following their investigation, the Tribunal found:

> …there were errors made and violations of the Code in the conduct of the Election and that these errors made under and violations of the Code affected the Election result for the position of Chief Councillor. The Tribunal, therefore, grants the Appeals in accordance with section 11.8 (b) of the Code. Moreover, the Tribunal requires the Gitxaala Governing Council to pass a resolution calling a By-Election and that such By-Election shall take place as soon as reasonably possible pursuant to the provisions of the Code.

[8] The Tribunal determined that there were thirteen ballots with errors that they found could have affected the outcome of the election. Because the Applicant won by a margin of thirteen votes, the Tribunal granted the appeal and ordered a by-election for Chief Councillor.

I. Standard of Review

[9] The Applicant submitted that the appropriate standard of review is correctness because the Tribunal is comprised of members of the community who have no demonstrated expertise in interpreting the Election Code.

[10] The Applicant submits that on a correctness standard, the election should be confirmed and not remitted back to the Tribunal for re-determination. Further, the Applicant submits that he is entitled to compensation for loss of income as Chief Councillor.

[11] The Respondent likewise submits that the standard of review is correctness if the Tribunal is interpreting the Election Code because it is a pure question of law on which the Tribunal has no expertise. However, the Respondent further submits that the standard of review

is reasonableness when reviewing the Tribunal's chosen methods of investigation and that the procedure was unreasonable because it was incomplete.

[12] In contrast, the Intervenor submits that the standard of review should be reasonableness because the Tribunal's decision is of mixed fact and law involving discretion. As the trier-of-fact, and where there is oral evidence, the Tribunal argues it should be accorded deference.

[13] The Federal Court of Appeal has held that the reasonableness standard should apply when dealing with similar fact situations (*Fort McKay First Nation v Orr*, 2012 FCA 269 at paras 10-11 (*Orr*); *D'Or v St Germain*, 2014 FCA 28 at paras 5-6 (*St Germain*); *Lower Nicola Indian Band v York*, 2013 FCA 26 at para 6).

[14] I note that the Election Code at section 11.11 states "A decision of the Gitxaala Justice Tribunal is final". This section was not argued by the Applicant nor the Respondent, however, the Intervenor suggests that this acts as a privative clause so deference should be accorded to the Tribunal's decision.

[15] I find that the standard of review is reasonableness, as this is a matter of mixed fact and law. In other disputed band election results where a custom code is involved, I in(*Chief Gayle Strikes With a Gun v Piikani First Nation*, 2014 FC 908) and other members of this Court have judicially reviewed decisions on a reasonableness standard as directed by the Federal Court of Appeal. Whether the investigations were within the jurisdiction of the Tribunal is undisputed by either party consequently, *Felix v Sturgeon Lake First Nation*, 2011 FC 1139 cited by the

Applicant, may be distinguished. In that case, the standard of review was correctness as the jurisdiction of the appeal tribunal was under review. That is not the case here.

[16] Reasonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

II. Analysis

[17] The Applicant's argument is that the decision should be returned for re-determination because the Tribunal:

- did not open the three mail-in ballots to determine if they affected the outcome of the election. In the Applicant's view, if the ballots were not for the runner-up, then they did not affect the outcome of the election;
- erred in accepting the evidence that there were six ballots cast for a withdrawn candidate rather than five. In the alternative, the Applicant argues the Tribunal should have followed a different procedure to determine the impact of the withdrawn candidate's name appearing on the ballot;
- erroneously found that addresses were not updated for four voters who asked for mail-in ballots and as a result they did not receive the mail-in ballot. The Applicant submits that the Tribunal erred as some of the affected electors did not ordinarily reside in the Gitxaala Nation Lands or within Prince Rupert municipality and did not fit into section 8.7 of the Election Code but were instead under section 8.6 and there

> is no provision to request a ballot package for electors not ordinarily residing on Gitxaala Nation Lands or within Prince Rupert municipality. In the alternative, the Applicant argues that for at least one voter, the mail problem was the elector's own. Finally, the Applicant argues that the Tribunal should have investigated further to ensure none of the mail-in voters voted in person.

[18] The Respondent generally echoes the Applicant's criticism of the Tribunal's investigative procedure.

[19] The Respondent submits that a more probing investigation should have established whether the thirteen ballots affected the outcome of the election. The Respondent submits that because the margin of victory equalled the number of affected ballots, the Tribunal should have scrutinized the circumstances of the candidate's withdrawal and also should have opened the three mail-in ballots. The Respondent submits that the matter should be remitted back to the Tribunal with specific procedural instructions from the Court.

[20] I find the decision to be reasonable for the following reasons.

[21] The Election Code gives the Tribunal the ability to investigate and set its own rules with regard to the appeals:

> 11.6 The Gitxaala Justice Tribunal shall otherwise establish its own Rules of Procedure as needed and the Tribunal may, at its own discretion, secure legal advice and hear evidence, including witnesses, in the course of its review of an appeal.

> 11.7 For greater certainty, the Gitxaala Justice Tribunal may conduct or authorize such further investigation into the appeal allegations as it deems appropriate and necessary.

[22] In addition, an administrative body is always master of its own procedure and is authorized to create a process that is flexible, adapted to their needs and fair (*Knight v Indian Head School Division No 19*, [1990] 1 SCR 653).

[23] The Tribunal established its own rules regarding this appeal. The Tribunal decided on how they would conduct the investigation and the appeal.

[24] The decision set out exactly what questions the Tribunal needed to answer, the standard of proof necessary and the steps depending on the previous answers.

[25] The procedure for gathering the evidence was described in the decision and was consistent and transparent.

[26] The Tribunal was made up primarily of elders of the Gitxaala First Nation and in the course of the investigation they received oral and documentary evidence.

[27] The Tribunal was given the right to set its own rules regarding the investigation. They interviewed people that had direct evidence regarding the election including the investigation regarding the unopened ballots, the mail-in ballot packages not mailed and the withdrawn candidate.

[28] The Applicant felt he should have been interviewed or participated in the appeal but I do not see it being procedurally unfair that he was not included in the investigation. I find it was reasonable for the Tribunal not to interview the Applicant as he did not have anything to do with whether the ballots were opened or mail-in ballot packages were mailed out or that the withdrawn candidate was still on the ballot. The errors at issue in the appeal were not ones the Applicant could have evidence of, so interviewing the Applicant would not have assisted the Tribunal in their investigation or determination.

A. *Ballots Unopened*

[29] The Applicant submitted that the Tribunal erred when it did not open the ballots that were found unopened after the election. The Applicant argued that if the Tribunal had opened the ballots and he still had enough to win, then there is no need for a new election. The Applicant gave evidence that he knew that the three unopened ballots were from three people that voted for him.

[30] The Tribunal accepted the evidence of members of the election board who confirmed that three unopened mail-in ballots were found at the Band Office in Lach Klan after the election, even though the date stamp confirmed that the ballots were delivered to the band office before the election. The package included three mail-in ballots so three electors were prevented from their vote being part of the election. The Tribunal found this was a violation of section 9.16 of the Election Code as the ballots were received in the band office before the election but were not included in the tabulation of the election results. The Tribunal did not make any other findings regarding the mail-in ballots other than the three ballots were not opened or counted.

[31] I find it reasonable that the Tribunal did not open the ballots to determine if the Applicant would still have won.

[32] It is reasonable to accept that electors' right to vote was compromised by their votes not being counted. There was no provision in the Election Code to open ballots and do a re-count. There is simply no obligation on the Tribunal to open ballots and as such, not doing so was within its discretion. Counting the ballots amounts to "remedying" the ballot irregularities which is not in something the Tribunal can do.

[33] As pointed out above at paragraph 6, the Election Code at section 11.1 mandate that an error under that Code is one that "*might have affected the outcome of the Election*". The actual candidate named in the three unopened ballots is not relevant when the standard is whether the affected votes *might* have affected the outcome.

[34] The Election Code does not require the Tribunal to determine which candidate was affected by a given irregularity; the Tribunal was reasonable in determining that it is sufficient that there was an irregularity. The Applicant argues that whether the outcome was affected should definitively be determined, however the Election Code does not require the Tribunal to do so. The Supreme Court of Canada (SCC) in *Opitz v Wrzesnewskyj*, 2012 SCC 55 at para 44, talks of the "interrelated and sometimes conflicting democratic values" when looking at *Canada Election Act*, SC 2000, c 9 voting irregularities. One of the values espoused by the SCC was voter anonymity; though this is not an election under the *Canada Election Act*, I believe is an important value included in this election.

[35] The decision is just and fair especially as the unopened ballots were not the only compromised votes. The decision the Tribunal made to determine how many electors' right to vote was compromised was within the reasonable spectrum and it would have been inappropriate for the Tribunal to determine how electors would or would not have voted.

[36] The Tribunal concluding that **three electors** had there vote affected was a reasonable assessment and based on the evidence before it.

B. *Withdrawn Candidate Still on Ballot*

[37] The Tribunal interviewed members of the election board and determined that Linda Innes's name remained on the ballot despite the fact she withdrew her candidacy. The Tribunal accepted that votes for the withdrawn candidate were considered spoiled ballots. The Tribunal found that six ballots were spoiled by electors who voted for Linda Innes.

[38] The Tribunal had conflicting evidence regarding the number of votes for Linda Innes. The Electoral Officer, Eva Spencer said that six ballots were spoiled at Lach Klan because the votes were for Linda Innes and Chief Electoral Officer Wendy Nelson said five ballots were spoiled by electors voting for Linda Innes. As Eva Spencer was in Lach Klan on the election day, the Tribunal preferred her evidence over Wendy Nelson's evidence because Wendy Nelson was not in Lach Klan. The Tribunal found that six electors were affected by this error. The Tribunal made this evidentiary finding after interviewing Eva Spencer and Wendy Nelson during the investigation.

[39] Section 8.3 of the Election Code states: "At any time before the ballots are printed, a Candidate may withdraw by delivering to the Chief Electoral Officer a completed Withdrawal of Candidate Nomination Form, a copy of which is attached to this Code as Appendix 7". The Tribunal found there was no conclusive evidence concerning the timing of the withdrawal and the printing of the ballot.

[40] The evidence before the Tribunal was that the electoral officers and assistants informed electors attending the Prince Rupert polling station and the Lach Klan polling station by posting a notice in English that Linda Innes had withdrawn, but that was not the case for the mail-in electors.

[41] The Applicant argued that the candidate had not actually withdrawn. This argument must fail, as there was evidence that election officials told some electors when they entered the polling station that the candidate should not be on the ballot as she had withdrawn. There was also evidence that a notice of the withdrawal was posted at the polling stations. There was no evidence that Linda Innes had not withdrawn as a candidate but there was evidence she had withdrawn sometime during the week of March 11, 2013.

[42] What is clear is that Linda Innes withdrew and yet her name remained on the ballot. There was evidence that signs were posted and when voters came to the polls, some electors were told she had withdrawn. There was no evidence before the Tribunal that all voters knew she withdrew but what was in evidence before them was that in the end, six voters voted for the withdrawn candidate still on the ballot.

[43] The Certified Tribunal Record did not show exactly when the ballots were printed, but there was no doubt Linda Innes had withdrawn, her withdrawal was accepted and that at least some of the electors were told. These are all findings of fact made by the Tribunal that are within its discretion and reasonable when reviewing the evidence that was before them.

[44] Ultimately, it is an inconsequential matter whether she validly withdrew from the election or not. The issue at hand is whether the Tribunal's decision to accept the evidence of six ballots cast for Linda Innes rather than five is a factual finding by the Tribunal. The Tribunal preferred the evidence of the electoral officer who was present in the location when the ballots were counted. That factual finding is accorded significant deference by the Court.

[45] The Tribunal was reasonable to find that six votes for the withdrawn candidate led them to believe that **six electors** may have had their right to vote compromised.

C. *Mail-In ballots not Received by Electors*

[46] Sections 8.6 to 8.12 of the Election Code speak to the mail-in balloting process.

[47] The Tribunal found that there were four voters residing outside of the Gitxaala Nation Lands and Prince Rupert who requested mail-in ballot packages more than 30 days before the election as required by section 8.6 of the Election Code, but did not receive them for a number of reasons. There was no evidence that any of the people that did not receive their mail-in ballot package instead voted in person, which is addressed in section 8.12 of the Election Code.

[48] The Tribunal had evidence that four electors who updated their addresses did not receive their ballot packages. The Tribunal found that the electors had properly updated their address as required in section 6.14 and 6.15 of the Election Code and should have been sent mail-in ballots in accordance with 8.6 of the Election Code.

[49] The Code directs that it is the Chief Electoral officer's duty pursuant to section 8.6 to mail to electors mail-in ballot packages 30 days before the election to each elector that does not ordinarily reside on Gitxaala Nation lands or within the municipality of Prince Rupert. It is a violation for the Chief Electoral Officer to fail to mail a ballot to the address provided. If the voter is a section 8.7 voter who lives on Gitxaala Nations Lands or with in the municipality of Prince Rupert the elector must request the ballot package be sent to them.

[50] The Tribunal found it a violation of section 8.8 of the Election Code for the electors ordinarily residing in Gitxaala Nation Lands or within Prince Rupert who complied with section 8.7 not to have received the mail-in ballot packages.

[51] The Applicant argues that at least some of the electors that the tribunal made its finding on were really section 8.6 electors and not section 8.7 as described in the Tribunal decision.

[52] The argument was that further investigation was necessary to determine what section of the Election Code the electors fell under and it was an error to say the electors missing ballot packages were section 8.7 electors. Further, the Applicant submitted that the disclosure already

shows that one elector did not receive her mail-in vote because of issues with Canada Post and it was not because of any fault of the Electoral Officer or a wrong address being used.

[53] The Tribunal is given the power to determine its own specific investigative method in the circumstances. The kind of investigation that the Applicant now proposes at the Judicial Review stage that the Tribunal should have undertaken regarding the mail-in ballots not reaching the electors, is not what the Tribunal determined was necessary. Section 11.6 and 11.7 gives the Tribunal the ability to determine the particular investigative tool. A review of the Certified Tribunal Record (CTR) assures me that the Tribunal took the level of investigation that was fair and reasonable at the time and what was presented as the basis for the appeals.

[54] When the entire file is reviewed, the Tribunal made an administrative error and should have cited section 8.6 in its decision instead of section 8.7 or possibly stated both sections as being violated. Materially it makes no difference if the mail-in ballot was to be automatic mailing of the mail-in pursuant (section 8.6) or by request under section 8.7. In this case some of the electors that qualified under section 8.6 also made a request for a mail-in ballot though it was not necessary. Section 8.6 and 8.7 elector ballot mail-in packages are identical so it is not material on these facts the exact section the four electors fell under. The reason it makes no difference is that none of the four received their mail-in ballot package.

[55] Section 6.14 makes it the voters' responsibility to make sure they are on the voters list prior to the mailing of the mail-in ballot package. The Tribunal found evidence that all four electors had given proper updated addresses.

[56] The Tribunal's error was a minor error that did not affect the actual decision in any way. This error does not make the decision unreasonable or one that would make this decision reviewable.

[57] A further argument was made that the Tribunal erred when it did not investigate thoroughly. The tribunal was given a number of names that did not receive mail-in ballot packages and only investigated four of the electors and not all of the individuals named.

[58] As part of the investigation the Tribunal was provided an email from Eva Spencer (Electoral Officer) dated June 3, 2013 listing a significant number of names of members who requested mail-in ballots and did not receive them. One person that appealed also named a number of electors that did not receive their mail-in ballots.

[59] Only evidence of four electors was in the CTR and the tribunal only made a finding of four electors being affected. When I compare the list given by the electoral officer, all four of those electors were on the list.

[60] I find the decision made by the Tribunal to not investigate all the electors they were told did not receive a mail-in ballot package to be a reasonable decision. It may have been more prudent to investigate more of the members on the list provided by the Electoral Officer or the appeal. In hindsight it is easy to criticize what and how the Tribunal chose to investigate but that is not the standard of review of this court. There was evidence before the Tribunal of at least four electors that did not receive the mail-in ballots. It appears the Tribunal did not investigate any

one else once they reached the number of electors affected that was equal to the margin of victory.

[61] Accordingly the Tribunal found that **four electors** were proven to have been impacted by the violations of the Election Code as they did not receive their mail-in ballots.

III. Conclusion

[62] The Tribunal compared the number of affected electors against the margin of victory. The margin of victory was **thirteen votes** and because the affected electors numbered **thirteen** (**three electors (above at paragraph 36) + six electors (above at paragraph 45) + four electors (above at paragraph 61**) that a by-election must be called for the position of Chief Councillor.

[63] The Tribunal had the evidence to support their findings and did not overlook any material evidence.

[64] In sum, I cannot conclude that the decision is unreasonable. The Tribunal considered all of the evidence and submissions of the affected parties and rendered a decision that falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47). There is no reviewable error.

IV. Costs

[65] The Applicant and Respondent both sought costs but both wished the decision to be overturned but neither was successful. The Intervenor will be granted costs payable by the Applicant in the amount of $500.00 to be payable forthwith.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;

2. The Intervenor is granted costs payable by the Applicant in the amount of $500.00 to be payable forthwith.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1466-13
STYLE OF CAUSE:	Lewis v Gitxaala Nation et al

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	February 18, 2015

WRITTEN REPRESENTATIONS BY:

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