Federal Court of Appeal | Cour d'appel fédérale

Date: 20160119

Docket: A-296-14

Citation: 2016 FCA 11

CORAM: **PELLETIER J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

TERRENCE LAVALLEE, EDWARD AISAICAN, WALTER PELLETIER, WILLIAM TANNER and VALERIE TANNER

Appellants

and

DODIE FERGUSON, MALCOLM DELORME, ERNEST DELORME, CAROLE LAVALEE and KEVIN DELORME

Respondents

Heard at Regina, Saskatchewan, on November 9, 2015.

Judgment delivered at Ottawa, Ontario, on January 19, 2016.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: PELLETIER J.A.
GLEASON J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20160119

Docket: A-296-14

Citation: 2016 FCA 11

CORAM: **PELLETIER J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

TERRENCE LAVALLEE, EDWARD AISAICAN, WALTER PELLETIER, WILLIAM TANNER and VALERIE TANNER

Appellants

and

DODIE FERGUSON, MALCOLM DELORME, ERNEST DELORME, CAROLE LAVALEE and KEVIN DELORME

Respondents

REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] This is an appeal from a decision of the Federal Court in which the Court allowed an application for judicial review of a decision of the Cowessess First Nation #73 Band Council (the

Band Council) (2014 FC 569, [2014] F.C.J. No. 609 (QL)). The appeal concerns a dispute over whether the position of chief became vacant because the elected chief failed to comply with the residency requirements set out in the *Cowessess First Nation #73 Custom Election Act* (the *Election Act*).

II. Background

[2] The Cowessess First Nation #73 (Cowessess) Band Council consists of eight councillors and one chief. Four of the councillors are appellants in this appeal. The fifth appellant, Terrence Lavallee, is the chief. The other four councillors are respondents in this appeal. The fifth respondent, Dodie Ferguson, is a member of Cowessess but is not a councillor.

[3] In 1992, Mr. Lavallee entered into a "rental/purchase agreement" with the Cowessess Band with respect to Unit 134, a dwelling on the Cowessess reserve. In 2002, Mr. Lavallee was evicted from Unit 134 for rental arrears. Following Mr. Lavallee's eviction, he moved to Regina for several years to pursue a university degree. Mr. Lavallee eventually paid back these arrears when he became a candidate for chief in 2007.

[4] Mr. Lavallee was elected chief of Cowessess First Nation on April 27, 2013. Following his election, it was necessary for him to take up residence on the reserve pursuant to the *Election Act*. Section 5.01 of the *Election Act* states:

> 5.01 For the purpose of this Act:
>
> …
>
> (b) any Elector may seek nomination as a Candidate in any Election or By-Election for the position of Chief regardless of their place of residence, however,

> in accordance with the provisions of section 11.03 hereof, any individual who may be successful in obtaining office to the position of Chief and who is ordinarily resident off the Home Reserve at the time of conducting the Election or By-Election shall be required to take up permanent residence on the Home Reserve within three (3) months following their assumption of office;

[5] Similarly, section 12.03 states:

> 12.03 Any Candidate who is successful in obtaining election to the position of Chief shall be required to take up permanent residency on the Home Reserve within three (3) months following their assumption of office, and maintain their residency on the Home Reserve for the duration of their term of office.

[6] The consequence of Mr. Lavallee not taking up permanent residence within three months of his election was, pursuant to section 13.01, that the position of chief would be deemed vacant:

> 13.01 Following assuming of office by the Council pursuant to section 12.02 above, the office of Chief, Resident Councillor or Non-Resident Councillor shall only be deemed to be vacant when:
>
> (a) the person occupying such office
>
> …
>
> (v) in the context of the Chief's position, fails to take up or maintain their residency on the Home Reserve as required pursuant to the provisions of this Act following their assumption of office;

[7] Several events took place following Mr. Lavallee's election as chief. On April 27, 2013, the day of the election, Adrienne Sparvier, a member of Cowessess, moved into Unit 134. On June 17, 2013, a meeting of the Cowessess Chief and Council was held at which a motion was made to evict Ms. Sparvier and allocate Unit 134 to Mr. Lavallee. The motion was tied four votes to four, with Mr. Lavallee casting the tie-breaking vote in favour.

[8] On July 5, 2013, Ms. Sparvier was advised by the Cowessess Housing and Infrastructure Department that she was required to vacate Unit 134 as she was in rental arrears. Ms. Sparvier filed an application with the Dispute Resolution Tribunal to appeal her eviction notice. The application was dismissed on August 19, with the Tribunal finding that it had been brought in bad faith. On July 19, 2013 the Band Council passed a resolution that Mr. Lavallee was the original owner of Unit 134 and that Ms. Sparvier was to vacate the unit effective immediately. On August 28, 2013, the Cowessess Housing and Infrastructure Department issued a follow-up eviction notice in which it advised Ms. Sparvier that she was required to vacate the unit immediately, pursuant to the July 19 Band Council resolution. Ms. Sparvier continued to refuse to vacate the unit, and Mr. Lavallee was thereby unable to move into it. Mr. Lavallee also alleges that Ms. Sparvier attempted to extract a $30,000 payment from him in exchange for her vacating Unit 134.

[9] Following the *Election Act* three-month deadline which expired on July 27, 2013, the respondent councillors ceased to recognize Mr. Lavallee as chief and claimed that his office was vacant by operation of the *Election Act*. Malcolm Delorme purported to take up the position of acting chief, pursuant to the custom that in the absence of the chief, the councillor who received the most votes in the most recent election occupies the position of chief.

[10] The respondents brought a motion for an injunction against the appellants that would restrain Mr. Lavallee from performing the duties of or holding himself out as chief. The motion was adjourned *sine die* by the Federal Court on September 18, 2013, on the condition that Mr.

Lavallee provide an undertaking to the Court that he would allow a vote to take place on the issue of whether a by-election should be called.

[11] At a meeting of the Chief and Council on September 25, 2013, a motion was brought on whether to call a by-election for the position of chief. The motion was brought by Councillor Kevin Delorme. The wording of the motion, from the transcript of the meeting, is as follows:

> Kevin Delorme: I'll make that motion in regards to Article 14 of our *Custom Election Act* and for the fact that Terrence Lavallee didn't obtain residency by the 27th of July, and for the fact that their dispute resolution was recognized only on August 2nd, I would like to put the motion that we call a by-election.
>
> Carol Lavallee: And the chief's position being empty.
>
> Kevin Delorme: For the chief's position, which should have been deemed vacant July 27th.

[12] The vote was tied with the four respondent councillors in favour and the four appellant councillors against. Mr. Lavallee abstained from the vote. Due to the tie, the motion died and was, in effect, defeated.

[13] Mr. Lavallee ultimately took possession of Unit 134 on November 8, 2013.

[14] The respondents brought an application for judicial review before the Federal Court in which they argued that that Mr. Lavallee failed to satisfy the residency requirement set out in the *Election Act*, that as a result, the position of chief was made vacant, and that the Band Council was therefore required to call a by-election.

III. Decision of the Court

[15] The Federal Court held that sections 5.01(b), 12.03, and 13.01(a)(v) of the *Election Act* were clear and unambiguous, and noted that the Act contains no exceptions to the three-month time period for establishing residency. It held that based on the evidence, Mr. Lavallee did not reside on the reserve within three months of taking office. The Court held that the evidence that Unit 134 was unavailable to Mr. Lavallee was irrelevant, because it was not responsive to the residency obligation in the *Election Act*.

[16] The Court dismissed the reliance of the respondents (the appellants on appeal) on the traditional common law concept of domicile, finding that there was nothing to suggest that the concept was relevant, and that the concept was contradictory to the respondents' argument in favour of a traditional aboriginal understanding of permanent residence. The Court held that the provisions of the *Election Act*, properly interpreted, required the physical presence of the Chief on the Reserve.

[17] The Court concluded that the record demonstrated that the permanent residency requirement under the *Election Act* was not met. As a result, the Court held the Band Council was required to call a by-election pursuant to section 14.01 of the *Election Act*, and that its decision not to call a by-election was unreasonable. The Court directed the Band Council to set a date for a by-election in accordance with the Act.

IV. Issue

[18] The issue in this appeal is whether the Band Council's decision to not call a by-election was reasonable.

V. Standard of Review

[19] The standard of review for this appeal is governed by *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559. Pursuant to *Agraira*, this Court determines whether the Federal Court chose the correct standard of review and applied it properly (at para. 47). If it did not, this Court either chooses the proper standard of review or applies it correctly. The Federal Court determined that the standard of review was reasonableness, because the question is one of mixed fact and law involving a Band Council interpreting a custom election code and applying that interpretation to the facts (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 53, [2008] 1 S.C.R. 190; *Fort McKay First Nation Chief and Council v. Orr*, 2012 FCA 269 at paras. 10-11, 438 N.R. 379). I agree with the Federal Court that the standard of review is reasonableness.

VI. Analysis

[20] The facts of this case are compelling and in my view could not have been readily anticipated by the drafters of the Cowessess *Election Act*.

[21] It is undisputed that Mr. Lavallee was validly elected chief of the Cowessess First Nation on April 27, 2013. It is also undisputed that pursuant to section 12.03 of the *Election Act*, Mr. Lavallee was to "take up" permanent residency on the reserve within three months from the date of his being elected chief.

[22] The evidence is clear that Mr. Lavallee had a longstanding connection with Unit 134 and its adjoining lands. Mr. Lavallee brought uncontroverted evidence that Unit 134 is located on lands used by his family dating back four generations and that he has farmed these lands for many years.

[23] The evidence is also clear that Mr. Lavallee attempted both before and after his election as chief to have Unit 134 reallocated to him. In 2007, upon completing his university degree in Regina, Mr. Lavallee gave notice that he intended to return to Unit 134. He negotiated a proposal for repaying his rental arrears on the unit, and argues that the Housing and Infrastructure Program Manager resiled from his promise to reallocate the unit to Mr. Lavallee upon repayment (AB, Vol. 2, Tab 16, p. 400, 391). Mr. Lavallee paid back his rental arrears in full in 2007 (AB, Vol. 2, Tab 16, p. 300, para. 11(f)).

[24] Despite Mr. Lavallee's clear intention to re-occupy Unit 134, a band official allocated the unit to Ms. Sparvier on the date of the election. It seems that this was for no other purpose than to frustrate Mr. Lavallee's ability to occupy Unit 134. It also seems that Ms. Sparvier should not have been allocated Unit 134 in the first place due to outstanding rental arrears owed to the band. This is pursuant to section 3.6.1 of the Cowessess First Nation #73 Housing and Infrastructure

Policy, which states: "In the event that a Band Member/Tenant has outstanding rent, maintenance fee or user fees they shall not be eligible for a housing unit until such time as the rent or fees are paid in full".

[25] Mr. Lavallee and the Cowessess Band Council sought to ensure that Mr. Lavallee took up permanent residence within the three-month period as required by sections 5.01 and 12.03 of the *Election Act*. On June 17, 2013 the Band Council passed a motion to evict Ms. Sparvier from Unit 134 for rental arrears. On July 19, 2013, the Band Council passed a motion transferring Unit 134 back to Mr. Lavallee. These actions fell within the three-month period following Mr. Lavallee's election.

[26] Following the Band Council resolutions to evict Ms. Sparvier, Mr. Lavallee personally served eviction notices on Ms. Sparvier on two occasions: on July 5, 2013 and on August 29, 2013 (AB, Vol. 2, Tab 16, p. 301-302, paras. 14-15). He also filed written submissions with the Dispute Resolution Panel in its determination of Ms. Sparvier's eviction appeal in which he submitted that Unit 134 was rightfully his and that he never relinquished his claim to the unit (AB, Vol. 2, Tab 16, p. 391-392). However, Ms. Sparvier refused to move out and there is uncontroverted evidence that she delayed her removal for as long as possible. There is also evidence from Mr. Lavallee that she sought financial remuneration from him if she vacated Unit 134 in a more timely fashion.

[27] The Federal Court judge found that any evidence with respect to the availability of Unit 134 was irrelevant. She also held that the proper interpretation of the *Election Act* required Mr.

Lavallee to be in actual physical occupation of Unit 134, despite the wilful actions on the part of Ms. Sparvier and other band members to frustrate such occupation. I disagree.

[28] As noted by the appellants, "take up permanent residency" is not defined in the *Election Act*. In addition, "take up permanent residence" is not equivalent to being a permanent resident as of a given date. In my view, it was reasonable for the Band Council, in declining to order a by-election, to in effect interpret the *Election Act*—which forms part of Cowessess First Nation law—and the "take up permanent residence" provision contained in sections 5.01 and 12.03 in particular, in a way that recognized the unusual, even extraordinary, circumstances of this case.

[29] It follows that it was reasonable to interpret the provisions of the *Election Act* to conclude that given Mr. Lavallee's ongoing and legitimate efforts to obtain occupation of Unit 134 and the unusual circumstances whereby other members of the band sought to frustrate his prompt occupation of Unit 134, Mr. Lavallee satisfied the requirement in the Act to "take up permanent residence". As noted above, on June 17, 2013, a motion was made to evict Ms. Sparvier and allocate Unit 134 to Mr. Lavallee. The motion was tied four votes to four, with Mr. Lavallee casting the tie-breaking vote in favour. On July 5, 2013, Ms. Sparvier was advised by the Cowessess Housing and Infrastructure Department that she was required to vacate Unit 134 as she was in rental arrears. On July 19, 2013 the Band Council passed a resolution that Mr. Lavallee was the original owner of Unit 134 and that Ms. Sparvier was to vacate the unit effective immediately. On August 28, 2013, the Cowessess Housing and Infrastructure Department issued a follow-up eviction notice in which it advised Ms. Sparvier that she was required to vacate the unit immediately, pursuant to the July 19 Band Council resolution. Given

that Mr. Lavallee had satisfied the residency requirements, the position of Chief was never vacant and there was therefore no need for a by-election.

[30] The Court should hesitate to interfere with the duly elected Band Council's application of the *Election Act* in its efforts to govern its affairs when confronted with such extraordinary circumstances. In my opinion, the Federal Court did not show sufficient deference to the Band Council's decision.

VII. Conclusion

[31] I would allow the appeal with costs in this Court and the Court below set at the mid-level of column III of the table to Tariff B. I would set aside the Federal Court's finding that the position of chief became vacant and its direction that a by-election be held.

"David G. Near"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE HENEGHAN DATED JUNE 13, 2014, DOCKET NUMBER T-1412-13.

DOCKET:	A-296-14
STYLE OF CAUSE:	TERRENCE LAVALLEE, EDWARD AISAICAN, WALTER PELLETIER, WILLIAM TANNER AND VALERIE TANNER v. DODIE FERGUSON, MALCOLM DELORME, ERNEST DELORME, CAROLE LAVALEE AND KEVIN DELORME
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 9, 2015
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	PELLETIER J.A. GLEASON J.A.
DATED:	JANUARY 19, 2016

APPEARANCES:

Mervin Phillips Nathan Phillips	FOR THE APPELLANTS
E.F. Anthony Merchant	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Phillips & Company Regina, Saskatchewan	FOR THE APPELLANTS
Merchant Law Group LLP Regina, Saskatchewan	FOR THE RESPONDENTS