

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20160923**

**Docket: A-558-15**

**Citation: 2016 FCA 239**

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

**BETWEEN:**

**VICTOR COUTLEE**

**Appellant**

**and**

**LOWER NICOLA INDIAN BAND**

**Respondent**

Heard at Vancouver, British Columbia, on September 22, 2016.

Judgment delivered at Ottawa, Canada, on September 23, 2016.

**REASONS FOR JUDGMENT BY:**

**GAUTHIER J.A.**

**CONCURRED IN BY:**

**STRATAS J.A.  
GLEASON J.A.**

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**REASONS FOR JUDGMENT**

**GAUTHIER J.A.**

[1] The Appellant, Mr. Victor Coutlee, an elder of the Lower Nicola Indian Band (LNIB) appeals the decision of the Federal Court (2015 FC 1305) dismissing his application to quash the June 6, 2013 decision of the Electors of the LNIB to amend the Custom Election Rules (“Rules”) of the Respondent. The amendment removed the Council of Elders from the task of officiating election appeals. Although the Appellant was unsuccessful, the Federal Court nevertheless ordered costs in the amount of \$10,000 in his favour.

[2] In respect of this application, the Federal Court had to determine:

- (i) The standard of review applicable to the Band Council's interpretation of the Rules.
- (ii) Whether the Band Council made a reviewable error in interpreting paragraph 31 of the Rules and whether the process set out in the Rules for amendment was followed.

[3] The Federal Court found that the standard of reasonableness applied to the Band Council's interpretation of the *Rules* and that the Band Council resolution dated May 14, 2013 signed by the Chief and five of the Councillors could validly initiate the process for amending the *Rules* in accordance with paragraph 31 of the *Rules*. The Federal Court also concluded that the procedure set out in paragraphs 32 and 33 of the *Rules* had been adhered to and that in fact the Band Council had "surpassed" the procedural requirements set out in paragraph 32 of the *Rules*: paragraph 19 of the reasons of the Federal Court.

[4] The role of this Court on appeal of decisions made by the Federal Court on judicial review is to determine whether the Federal Court identified the appropriate standard of review applicable to each issue before it and applied it correctly. In other words, this Court steps into the shoes of the Federal Court and focuses on the administrative decision under review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-46, [2013] 2 S.C.R. 559.

[5] The Appellant submits that the Federal Court applied the wrong standard of review to the Band Council's interpretation of the *Rules*. I do not agree. The Federal Court properly applied the most recent caselaw of this Court and correctly determined that the standard of

reasonableness applied. The authorities relied upon by the Appellant have been overtaken by subsequent jurisprudence of the Supreme Court of Canada and of this Court.

[6] I am also satisfied substantially for the reasons given by the Federal Court that the Band Council's interpretation of paragraph 31 of the *Rules* was reasonable and that the process followed to amend the *Rules* in 2013 met the requirements set out in the *Rules*.

[7] This should be sufficient to dispose of the appeal. However, before this Court, the Appellant attempted to raise a new issue not raised in his Amended Notice of Appeal (procedural fairness) as well as an issue that was not raised before the Federal Court, namely whether some of the Band Councillors who signed the resolution were ineligible to vote.

[8] Normally, the Court cannot entertain arguments that have not been raised in the Amended Notice of Appeal. Counsel for the Appellant acknowledged that this was so but submitted that the argument was somehow implicitly raised in the Amended Notice of Appeal. I cannot agree. But in any event, I am satisfied that the argument has no merit. The record reveals that substantial notice was given to the Band membership at large: paragraphs 10-13, 15 and 16 of the reasons of the Federal Court. The Appellant simply failed to use the opportunity given to voice his views and concerns.

[9] In my view, the Court should not consider the new argument that some of the signatories of the Band Council resolution were ineligible to vote and thus there was no quorum on May 14, 2013. This question is not a pure question of law; it involves a mixed question of fact and law

which should have been put to the Federal Court. There are no valid reasons in this case to use our discretion to consider this new argument. In any event, in my view, the Appellant's argument in that respect has no merit: *Lower Nicola Indian Band v. Mary June Coutlee*, 2013 FC 1069, at para. 34; See also Appeal Book Volume 3, pages 609, 617.

[10] In the circumstances, I would dismiss the appeal.

[11] As noted earlier, the Federal Court granted costs to the Appellant despite the fact that the application had no merit. By undertaking an appeal that had no merit and forcing the LNIB to expend further costs to defend it, the LNIB should be granted its costs on this appeal. I propose to fix those costs in the amount of \$2,000 (all inclusive).

[12] Now that this dispute has been determined and the *Rules* clarified, I hope that the parties can put aside any acrimony that existed in the past and work together for the betterment of their entire community.

“Johanne Gauthier”

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J.A.

“I agree  
David Stratas J.A.”

“I agree  
Mary J.L. Gleason J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-558-15

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE CAMPBELL  
OF THE FEDERAL COURT, DATED NOVEMBER 23, 2015, DOCKET NO. T-1640-13)**

**STYLE OF CAUSE:** VICTOR COUTLEE v. LOWER  
NICOLA INDIAN BAND

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** SEPTEMBER 22, 2016

**REASONS FOR JUDGMENT BY:** GAUTHIER J.A.

**CONCURRED IN BY:** STRATAS J.A.  
GLEASON J.A.

**DATED:** SEPTEMBER 23, 2016

**APPEARANCES:**

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David C. Rolf, Q.C. FOR THE RESPONDENT

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