Federal Court of Appeal Cour d'appel fédérale

Date: 20170705

Docket: A-467-16

Citation: 2017 FCA 147

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

BETWEEN:

COUNCILLOR DORIS JOHNNY

Appellant

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 appellant, Doris Johnny, was elected as a Band Councillor of the Adams Lake Indian Band in February 2015, for a three-year term of office. She was removed from that office effective December 9, 2015, and prohibited from running in the Band election for the Chief and Councillors to be held in 2018 because she was found to have breached her oath of office. The appellant's challenge of the decision removing her from office was rejected by the Federal Court.

The Federal Court found the decision was reached in a procedurally fair manner and was reasonable (2016 FC 1399). This is an appeal from the judgment of the Federal Court.

[2] 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.

[3] The Band opposed the appellant's 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.

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

[5] 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."

[6] 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).

[7] In November 2015, a petition was presented seeking the removal of the appellant as a member of the Band Council. The petition was supported by an affidavit which detailed numerous complaints about the appellant. The Community Panel found only one ground of complaint had merit.

[8] That ground of complaint was:

> Sept. 9, 2015 – I attended a taxation meeting at Pierre's Point Hall, I arrived late excusing myself for this due to being quite ill. I was asked by the Kenoras family to attend these meetings to hear the tax implications on CP property. Once given the floor and during my questions, Doris Johnny interrupted me three times with rude comments saying, "We don't want to hear of your illness." "We don't need to hear of your problems." and another comment. On the last comment I said, "What is wrong with you? Stop this."
>
> After the meeting I said, "Hey Doris, please don't be getting lippy to me in public." Words were said and Carolyn Johnny stepped in. I told Carolyn, "You have not heard what rude things your daughter said to me and you are only sticking up because she is your daughter, maybe my mom should be here." Carolyn Johnny pushed me and said, "Get out of here." I did not engage with her. I was urged by my elders to go to the police so I went the next day and there is a file on this. RCMP File # 2015-4798. Constable McLean. I should have pressed charges but instead the officer talked to Carolyn Johnny who turned the story around and said I pushed her and I was drunk at the taxation meeting. This is not true. I have witnesses who saw Carolyn push me. Doris Johnny instigated this situation. This is not proper professional conduct of a Council member. This situation was very abusive by both Doris Johnny and Carolyn Johnny. Breach of Oath of Office 2,3,4,5,6,8,10.

[9] The brief reasons of the Community Panel finding the ground of complaint to be made out are in their entirety:

- The Community Panel has completed their investigation and find Doris Johnny has breached
  - Oath of Office # 2 – I will honestly, impartially and fully perform the duties of my office with dignity and respect and,
  - Oath of Office # 5 – I will uphold the Adams Lake Indian Band Community Vision.
- Investigations consisted of witness statements and correspondence related to the incident.
- As a result of the investigation the Community Panel has determined Doris Johnny did not fully perform the duties of office with dignity and respect and did not uphold the Adams Lake Indian Band Vision Statement by "ensuring that we live in a safe, healthy, self-sufficient community where cultural values and identity are consistently valued promoted and embraced by all."
- Our leaders are required to conduct themselves at a higher level of standard at all times.

(Emphasis in original omitted)

[10] The Community Panel concluded by finding "Doris Johnny breached Oath of Office #2 & #5. Therefore in accordance with the 2014 Secwepemc Election Rules, the Community Panel is removing the Band Council Member from office and declaring the office vacant." The Community Panel went on to impose a penalty preventing the appellant from running for office until the 2021 Band Council Election.

[11] On this appeal from the judgment of the Federal Court, the appellant asserts that the Federal Court erred in law in its determination of the content of the duty of fairness and erred in its application of the reasonableness standard of review.

[12] As explained below, I agree that the Federal Court erred in its application of the reasonableness standard. As this conclusion is dispositive of the appeal I need not consider, and do not consider, the Federal Court's analysis on the issue of procedural fairness. This said, these reasons should not be read to endorse the reasons of the Federal Court on the issue of procedural fairness.

[13] With respect to the Federal Court's selection and application of the reasonableness standard, on appeal this Court is required to determine whether the Federal Court selected the proper standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36, [2013] 2 S.C.R. 559).

[14] I agree that the Federal Court properly selected reasonableness as the applicable standard of review. Except in limited circumstances not present in this case, it is presumed that when an administrative decision-maker applies its home statute the proper standard of review is reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654). This presumption of reasonableness review has not been rebutted in the present case.

[15] As to the application of that standard, it must be kept in mind that elected Band Councillors are leaders in their community's democratic process. They are chosen by Band members and entrusted to look after the interests of the Band and its members. Band Councillors are expected to deal with all matters that affect the interests or welfare of the Band and its members – matters that may be politically charged and polarizing.

[16] To do this, Band Councillors must be able to speak and act frankly and boldly without fear of sanction, so long as they speak and act honestly, in good faith and within the margin of appreciation afforded democratically elected leaders acting within the political milieu.

[17] The Election Rules, in my view, recognize this need because they provide, among other things, that a Councillor may – not must – be removed for breach of their oath of office.

[18] To illustrate, the oath of office requires Councillors to perform their duties "with dignity and respect." A regrettable, momentary breach of civility may well, with the benefit of hindsight outside of the heat of debate, lack dignity and respect, but at the same time fall far short of conduct that causes electors to lose faith or confidence in the judgment of their Councillor or to lose such respect for the Councillor so as to justify the Councillor's removal from office.

[19] At the other end of the spectrum, some conduct may be so repellent, undignified and disrespectful as to clearly evidence a Councillor's unfitness for elected office.

[20] In every case it is for the elected Community Panel to determine whether impugned conduct rises to the level that warrants removing a democratically elected Councillor from their office. This is a decision the Community Panel must make on the basis of its knowledge of the customs and norms of the Band, taking into account realistic expectations and a goodly measure of common sense in order to determine whether a Councillor has engaged in conduct that has caused electors to lose faith or confidence in the judgment of the Councillor or to so lose respect for the Councillor that the Councillor ought to be removed from office. Realistic expectations and common sense are required because a standard of conduct based upon unfailing perfection is one not likely to be met consistently, and one likely to lead to frequent petitions to remove Councillors.

[21] In the ten and a half month period from December 9, 2015 to October 22, 2016, the Community Panel removed four Band Councillors of the Adams Lake Indian Band, including the appellant's elected successor (see 2017 FCA 146). The Adams Lake Band Council is comprised of a Chief and five Councillors. When considering a petition to remove a Band Councillor, the Community Panel should also measure the gravity of the impugned conduct against the disruption and other consequences that arise when a duly elected member of the Band Council is removed.

[22] In the present case, missing from the reasons of the Community Panel is any consideration of whether the alleged misconduct rose to the level that warranted removing the appellant from office. Indeed, the reasoning of the Community Panel is consistent with the view that any and all breaches of the oath of office justify removal from office. However, this is an

unreasonable interpretation of the Election Rules. If this was the intent of the Election Rules, Part 24.1 would require that Councillors "shall", not "may", be removed from office for a breach of their oath of office.

[23] The Community Panel's failure to explain why comments such as "[W]e don't want to hear of your illness" and "[W]e don't need to hear of your problems" merited the appellant's removal from office makes its decision unreasonable, as unreasonableness is explained in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47. Put another way, without any explanation of why these comments merited removal, the decision of the Community Panel is not justified, transparent or intelligible. It follows that the Federal Court erred in finding the decision to be reasonable.

[24] The next question to be decided is, in the circumstances of this case, what remedy should flow from this decision? Part 27.1 of the Election Rules requires that a by-election be held within 60 days of an office of a Councillor becoming vacant. As explained by the Band's Executive Director in his affidavit, once the Community Panel issued its decision, the appellant had 30 days to apply to the Federal Court for judicial review of the decision. She did not. It was only because by order dated June 3, 2016, the Federal Court granted the appellant an extension of time that she was permitted to file her application for judicial review.

[25] In the meantime, because the appellant failed to promptly challenge the decision removing her from office and failed to obtain any required order staying the decision, a by-election was held on February 13, 2016, and a new Councillor was elected. This constrains the

remedy this Court ought to grant in the exercise of its discretion; counsel for the appellant was unable to cite any authority that would permit us to remove a validly elected Councillor from office.

[26] In this circumstance, 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 on the appellant running for office in the election to be held in 2018. As the vacancy caused by the removal of the appellant has been filled and the appellant is no longer a Councillor, there is no purpose in returning the matter to the Community Panel.

[27] 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 appellant shall serve and file her 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

DOCKET:	A-467-16
STYLE OF CAUSE:	COUNCILLOR DORIS JOHNNY v. ADAMS LAKE INDIAN BAND
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CONCURRED IN BY:	WEBB J.A. RENNIE J.A.
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