Federal Court of Appeal | Cour d'appel fédérale

Date: 20210623

Docket: A-469-19

Citation: 2021 FCA 123

CORAM: **WEBB J.A.**
RENNIE J.A.
DE MONTIGNY J.A.

BETWEEN:

KEY FIRST NATION

Appellant

and

STEPHANIE C. LAVALLEE, DONALD WORME, RODNEY BRASS, ANGELA DESJARLAIS, SIDNEY KESHANE AND GLEN O'SOUP

Respondents

Heard by online video conference hosted by the registry on March 16, 2021.

Judgment delivered at Ottawa, Ontario, on June 23, 2021.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: WEBB J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal from the judgment of the Federal Court (2019 FC 1467, *per* Walker J.), dismissing a judicial review application by the Key First Nation. The Key First Nation sought to set aside a resolution of its band council authorizing the retention of a law firm and subsequent decisions to use band funds to settle the accounts tendered by the firm.

[2] The Federal Court dismissed the application on the basis that it was not commenced within the 30-day time limit prescribed by subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and that the band failed to demonstrate an extension of time would be in the interests of justice. In its consideration of whether an extension of time was warranted, the Federal Court recognized a link between the issue of timeliness of the application and the question of the band's standing to bring the application, as the timeliness of the application depended on when the band knew of the resolution (the BCR), the retainer and related payments. In examining this question, the Federal Court found that the band, in targeting a resolution of the band council made on behalf of the band, was seeking to set aside its own decision, something it did not have standing to do.

[3] An understanding of the issues that came before the Federal Court and the reasons why I would allow this appeal begins with the 2016 band election.

I. Background

The disputed election of 2016

[4] The legitimacy of the 2016 band council election was the subject of a judicial review application in the Federal Court. The application was brought by band members Clarence and Glenn Papaquash and Clinton Key. Clarence Papaquash and Clinton Key were also successful candidates in the election. The application named four other newly elected councillors and the band as respondents.

[5] The other newly elected councillors, Rodney Brass, Glen O'Soup, Sidney Keshane and Angela Desjarlais, passed a BCR retaining Semaganis Worme Legal (SWL) to resist the application. Whether the meeting leading to the adoption of the BCR was convened with the notice and procedural requirements of the *Indian Act*, R.S.C. 1985, c. I-5 (*Indian Act*) and by-laws of the band was one of the substantive questions that the Key First Nation sought to have determined in the judicial review application that came before Walker J., whose decision is now before us.

[6] The November 10, 2016 BCR authorized the payment for legal services up to $10,000.00. Nevertheless, on the same day as the BCR was adopted, the retainer executed by the respondent Rodney Brass, then newly elected Chief, was for $20,000.00. A second retainer was executed on February 3, 2017 to update the billing rates of the lawyers at SWL. A third retainer was executed by the respondent Brass on November 15, 2017 committing a further $100,000.00 in band funds to respond to the judicial review application. A chronology of some of these events was outlined by Walker J. (Reasons at para. 16):

Date	Event (Decision/Payment)
November 10, 2016	Band Council Resolution (BCR) to retain SWL.
November 10, 2016	Retainer agreement and transfer of $10,000 to SWL/Legal Counsel Respondents.
February 3, 2017	Retainer agreement with SWL [Note: Updates hourly billing rates]
March 27, 2017	Transfer of $8,130.94 to SWL/Legal Counsel Respondents.
April 26, 2017	Transfer of $40,000 to SWL/Legal Counsel Respondents.
July 7, 2017	Transfer of $10,000 to SWL/Legal Counsel Respondents.
July 17, 2017	Transfer of $25,000 to SWL/Legal Counsel Respondents.
September 19, 2017	Transfer of $25,000 to SWL/Legal Counsel Respondents.
November 16, 2017	Transfer of $24,766.79 to SWL/Legal Counsel Respondents.
January 2, 2018	Transfer of $48,236.47 to SWL/Legal Counsel Respondents.
March 21, 2018	Retention of SWL in respect of an anticipated appeal to the Federal Court of Appeal [Note: the retainer agreement in the record pertaining to an appeal is dated November 15, 2017]
March 21, 2018	Transfer of $40,000 to SWL/Legal Counsel Respondents.

[7] In sum, although the BCR authorized SWL to provide services up to $10,000.00, $231,134.20 was transferred from band accounts to SWL.

[8] The purposes for which the November 15, 2017 retainer was executed remain unclear. This retainer authorized the expenditure of $100,000.00. Although it is said to be in respect of the “Federal Court of Appeal” matter, it was signed a day before the hearing of the matter in the Federal Court, and the Federal Court decision was not released until March 21, 2018, 4 months later. Also, as Walker J. found, a further retainer for the Court of Appeal proceeding was executed on March 21, 2018, following the release of the Federal Court decision.

[9] The Federal Court (*per* Barnes J.) set aside the election and annulled the results effective March 21, 2018 (*Papequash v. Brass*, 2018 FC 325, 2018 CarswellNat 1135). The Court found that the newly elected councillors had engaged in vote buying (at para. 40):

> I am satisfied on the evidence before me that the integrity of the Key First Nation Band election conducted on October 1, 2016 was sufficiently corrupted by the misconduct of Rodney Brass, Glen O'Soup, Sidney Keshane, and Angela Desjarlais that the election must be annulled and a new election conducted. I would add that the corrupt practices employed by several of the Respondents during the 2016 Band election appear to reflect a long-standing tradition and acceptance by some members of vote buying and other dishonest attempts to influence electoral outcomes. These practices appear to be sufficiently entrenched that, in the election to follow, rigorous efforts will be required to ensure the integrity of the process.

[10] Barnes J. was also troubled by the failure of the band and SWL to appreciate the conflict of interest between the band and the individual councillors, and by SWL's willingness to represent both parties. As I will explain later, his observations in this regard are pertinent to the issues before this Court and bear repetition (at para.2):

> At the heart of these proceedings is an extremely acrimonious dispute between the Applicants and the Respondents. The conduct of the parties and their respective legal counsel during these proceedings leaves much to be desired and, in a number of aspects, is deserving of censure. […] It is also appropriate to observe that it is not counsel's role in cases like this to deliberately aggravate already strained relationships in the community. Where possible, counsel should aim to resolve disagreements, particularly with respect to unnecessary procedural disputes. Further, counsel should always bear in mind that it is ultimately the members of the Band who pay the legal bills for their litigation choices and recommendations. I also question whether the Key First Nation should have been represented in this proceeding by the same legal counsel as the other named Respondents. Given the allegations of misconduct directed at some of those Respondents, the Band should undoubtedly have been represented by separate, independent counsel whose sole mandate would be to advocate for the best interests of the First Nation and its members.

[11] The councillors found to have subverted the election, the respondents Brass, O'Soup, Keshane and Desjarlais, were not deterred. They filed an appeal to this Court. Although removed from office, and although the band was not a party to the appeal, the former councillors retained and instructed SWL and appropriated band funds to fund the appeal. On March 21st, $40,000.00 was transferred from a band account to SWL in respect of the appeal. SWL continued to receive instructions from their client, former Chief Rodney Brass after March 21, 2018 (see, *e.g.*, Invoice # 9693 (Appeal Book, page 350) and the affidavit of Stephanie Lavallee at paragraph 27 (Appeal Book, page 250)). SWL drew on funds in the Federal Court of Appeal trust account and also moved funds from that trust account to the account established for the Federal Court proceeding (Appeal Book, pages 108, 365).

[12] The matter returned to the Federal Court for determination of the costs. Barnes J. refused the band's request, as represented by new counsel, to recover its costs from the respondents to the application (*Papequash v. Brass*, 2018 FC 977, 2018 CarswellNat 5724 (*Papequash Costs*)). The judge noted that the Key First Nation "was the author of its own predicament" by pursuing a joint legal strategy with councillors and failing to appreciate the conflict it was in vis-à-vis the band council whose legitimacy was in question and "must now accept the financial consequences of so acting" (at para. 3). However, the Court awarded the applicants Clarence Papequash, Clinton Key, and Glenn Papequash, $86,170.00. This amount was payable by the respondents Brass, O'Soup, Desjarlais and Keshane jointly and severally, as the applicants had withdrawn their claim to costs against the band.

[13] The appeal of the Federal Court decision was dismissed on October 2, 2019 (*Brass v. Papequash*, 2019 FCA 245, 2019 CarswellNat 14726).

[14] A new band council was elected on June 12, 2018.

[15] On July 27, 2018, the band council commenced the judicial review application that came before Walker J. The respondents in that application and the respondents on this appeal are the former members of band council identified by the Federal Court as being responsible for the subversion of the election. Stephanie Lavallee and Donald Worme, also respondents, were and continue to be lawyers at SWL, the firm retained to defend the election results.

[16] The band asked the Federal Court to quash the BCR and decisions to retain and pay SWL in the judicial review application and the subsequent appeal to this Court. The band sought a declaration that the BCR was *ultra vires* as it had not been decided following a public meeting with notice to the community and contravened paragraph 2(3)(b) of the *Indian Act.* The application noted the conflict of interest of the respondents in authorizing the use of band funds to defend their own election and the subsequent decisions to retain, instruct and pay SWL.

[17] Three days later, on July 30, 2018, the band commenced an action in the Court of Queen's Bench for Saskatchewan against SWL, seeking the repayment of $231,134.20 legal fees on the basis of unjust enrichment and failure to comply with the *Legal Profession Act*, 1990, S.S. 1990-91, c. L-10.1. SWL moved to strike the action. The Court of Queen's Bench adjourned the

motion as premature pending the disposition of this appeal. Clackson J. considered the decision of this Court on the *vires* of the BCR and retainers to be the "lynch-pin" to the contract action:

> […] if the Federal Court rules that the Band Decisions are valid and subsisting, then there may be a juristic reason for SWL's enrichment and KFN's statement of claim might be regarded as disclosing no reasonable cause of action. While the outcome of the Federal Court Application is still up in the air, this Court cannot determine whether the claim of unjust enrichment has no reasonable chance of success, is frivolous, vexatious or otherwise an abuse of process.

[18] Against this background, I return to the decision under appeal.

Decision of the Federal Court

[19] After reviewing the evidence, Walker J. concluded that there was no reason to believe the band was unaware of the BCR, the retainer agreements or payments at the times they were made, which were well beyond the 30-day time limit imposed by subsection 18.1(2) of the *Federal Courts Act*. The Federal Court judge reasoned that as the band was a respondent to the judicial review application to set aside the 2016 election, it could not credibly assert a lack of knowledge of the BCR, the retainer agreement or the payments to SWL.

[20] The affidavit evidence before Walker J. asserted that councillors Key and Papequash were not given notice of the band council meetings when the contested decisions to retain and pay SWL were taken. However, the Federal Court rejected the band's argument that the knowledge of councillors Key and Papequash should be used for the purposes of determining when time began to run under subsection 18.1(2), noting that this line of argument was inconsistent with the band's argument that it, and not the councillors, was the proper applicant.

[21] The Federal Court judge also reasoned that even if the councillors' personal knowledge was the relevant point of view from which to assess the timeliness of the application, there was evidence the band, through its councillors, "had sufficient knowledge" of the decisions to retain SWL at least as early as August 23, 2017 (at para. 45). As this was approximately eleven months prior to the filing of the application on July 27, 2018, the judge concluded that, regardless of the perspective from which the question of timeliness was examined, that of the band or the councillors, the judicial review application had been filed beyond the required time limit.

[22] As noted earlier, the Federal Court judge recognized that the question of the band's standing to bring the application was dependent on its legal relationship to band council. The relationship had consequences for when the band had knowledge of the decisions and could not be segregated from the decision to extend time. On this issue, Walker J. held that "[t]he BCR, whether properly adopted or not, was a resolution of the Band made 'not by the individual members personally but on behalf of the First Nation'" (at para. 41). The band council, in authorizing the retainers and payments to SWL, was acting on behalf of the band. Consequently, the band was "challenging its own decisions", something it could not do (Federal Court Reasons at paras. 23, 32).

[23] The Federal Court declined to exercise its discretion to extend the time within which the application could be filed. Relying on the criteria in *Crowchild v. Tsuut'ina Nation*, 2017 FC 861, [2018] 2 C.N.L.R. 85 (*Crowchild*), Walker J. noted that the applicant must demonstrate: "(i) a continuing intention to pursue the matter; (ii) that the application has some merit; (iii) that the respondent will not be prejudiced by the delay; and (iv) that there is a reasonable explanation for

the delay." Walker J. found that subsection 18.1(2) serves an important public interest, as "[i]t provides certainty and finality for both administrative decision makers and those bound by their decisions and allows the implementation of decisions without delay (*Canada v Berhad*, 2005 FCA 267 at para 60 (*Berhad*))" (Federal Court Reasons at para. 51).

[24] The judge also observed that the delay in bringing the application undermined the public interest as it opened the door to permitting a new band council, acting in the band's name, to mount a challenge to a resolution adopted by a former band council. However, what was determinative, in the judge's view, was the absence of a reasonable explanation for the delay in bringing the application to challenge the BCR. The band did not act as soon as possible; rather it awaited the outcome of the judicial review application challenging the 2016 election. The Federal Court also considered that the fact that the band brought the judicial review application for a strategic purpose, to assist its argument in the Saskatchewan Queen's Bench action, militated against exercising discretion in the band's favour.

II. The Arguments

[25] The band states that the clock under subsection 18.1(2) of the *Federal Courts Act* only starts ticking once an applicant has knowledge of a final decision (*Meeches v. Assiniboine*, 2017 FCA 123, 2017 CarswellNat 8735 at para. 40). It points to the "uncontested" evidence of councillors Key and Papequash as proof they were unaware of the BCR and payments until they received the contents of Exhibit "H" of the Key Affidavit, sent by letter on June 28, 2018. The band says that the evidence relied on by the Federal Court establishing the knowledge of the

band was a letter sent by Nathan Phillips, counsel to Clarence Papequash, Clinton Key, and Glenn Papequash to SWL on August 23, 2017. The letter makes no specific mention of the BCR or the specific decisions in issue. The band argues that it is the councillors' knowledge of these specific decisions that is determinative of the issue of timeliness. The letter reads:

> I represent Councillor Clinton Key, former Councillor Clarence Papequash, and concerned Members of the Key First Nation. Since assuming office in October, 2016, your clients Rodney Brass, Angela Desjarlais, Sidney Keshane and Glen O'Soup have unlawfully conducted the affairs of the Key First Nation. Despite repeated demands that they cease, Rodney Brass, Angela Desjarlais, Sidney Keshane and Glen O'Soup have asserted that they can conduct the affairs of the Key First Nation as a "quorum". They have failed to invite Councillors Clinton Key and Councillor Clarence Papequash to purported meetings of Band Council.
>
> The execution of your "retainer" and receipt of "instructions" from Rodney Brass, Angela Desjarlais, Sidney Keshane and Glen O'Soup on behalf of the Key First Nation, to the exclusion of Councillors Clinton Key and Clarence Papequash, is unlawful and unenforceable. Any funds that your firm received from the Key First Nation must be subject to accounting.
>
> On behalf of Councillor Key, I demand that your firm immediately provide a copy of all invoices rendered to the Key First Nation and an accounting of all funds received therefrom between October 1, 2016 and today.
>
> Furthermore, Councillor Clinton Key in addition to a large proportion of the Membership of Key Fist Nation have significant concerns with respect to quality and cost of legal services rendered by your firm. This correspondence represents a formal complaint within the scope of a forthcoming application to have all your firm's accounts to the Key First Nation in the last six years assessed pursuant to s.67 of *The Legal Profession Act, 1990*.

[26] The appellant alleges the Federal Court made an error of law and applied the wrong test in considering whether to extend the time limit. The test that the Judge should have applied is that set forth in *Attorney General (Canada) v. Larkman*, 2012 FCA 204, [2012] 4 C.N.L.R. 87 at paragraph 61 and its well known criteria: (i) a continuing intention to pursue the matter; (ii) that the application has some merit; (iii) that the respondent will not be prejudiced by the delay; and

(iv) that there is a reasonable explanation for the delay. In contrast, in following the *Crowchild* criteria, the judge considered the public interest in finality, the fact of delay and that the application would be considered based on incomplete evidence.

[27] The band contends that the Federal Court provided no compelling rationale explaining why the finality of these decisions was in the public interest and that the record was as complete as required to determine the lawfulness of the decisions. Further, any subsequent use of a judgment of the Federal Court quashing the BCR in the Saskatchewan action was an irrelevant consideration in determining the public interest.

[28] Had the Federal Court considered the *Larkman* factors it would have realized: (i) there was an intention to challenge the decisions as soon as they were learned of (June 28, 2018); (ii) the application has merit; (iii) there is no prejudice to the respondents; and (iv) awaiting the outcome of the Federal Court proceeding and the fact that the band was not aware of all the actions of the respondents until after the June, 2018 elections, constitute reasonable explanations for the delay.

Respondents' Position

[29] SWL submits the application for judicial review represents a collateral attack on the findings of the Federal Court in *Papequash Costs*. In that decision the Court found the band, itself, had participated in the original election challenge, a finding the band now wants this Court to reverse. This is a collateral attack as it is "an attack made in proceedings other than those

whose specific object is the reversal, variation, or nullification of the order or judgement" (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 33).

[30] In relation to the band's argument on timeliness, SWL submits since councillor Key knew of the BCR by May 15, 2017 and the application for judicial review was not brought until over a year later, there was no continuing intention to pursue the matter and no reasonable explanation for that delay. It asserts that an extension undermines the purpose of section 18, namely to provide certainty and finality to decisions (*Berhad* at para. 60).

III. Analysis

[31] The Federal Court erred in the assessment of how and when the period under subsection 18.1(2) is determined. This error, however, does not affect the conclusion that the application was brought out of time.

[32] I have concluded, however, that the decision not to extend the time within which the application could be filed must be reversed. The decision cannot be sustained in light of the controlling statutory provisions, the March 21st decision of the Federal Court and uncontroverted factual underpinnings of the case. In the unique circumstances of this case, the interests of justice are served by having this Court determine the validity of the BCR and the matters that cascaded from it.

[33] While I will develop these points in greater detail, suffice to say at this point that the Federal Court did not have regard to the factual and legal context which framed the consideration whether an extension of time would serve the interests of justice (*Larkman* at para. 62). Pertinent factual considerations were omitted. Neither the Federal Court decision of March 21, 2018 nor the provisions of the *First Nations Elections Act*, S.C. 2014, c. 5 were taken into account. Each have direct legal consequences on the analysis of the standing issue and are highly pertinent considerations in the exercise of discretion whether to extend the time. In fairness to the judge, however, it does not appear that these factors were brought to the Court's attention.

Whether the application was filed beyond the 30 day time limit

[34] Subsection 18.1(1) of the *Federal Courts Act* does not limit the Court's jurisdiction on judicial review to "decisions or orders" of a federal board. The subsection captures a broader range of conduct, as "[a]n application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by *the matter* in respect of which relief is sought" (*Krause v. Canada*, [1999] 2 F.C. 476, 1999 CarswellNat 1850 at paras. 20-23 (*Krause*); *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 at para. 24 (*Air Canada*)). Indeed, actions or "[o]ngoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment" (*May v. CBC/Radio Canada*, 2011 FCA 130, 420 N.R. 23 at para. 10).

[35] Nor is the fact that the impugned acts might be administrative in nature a bar to judicial review. Administrative acts are not excluded from the scope of review under subsection 18.1(1).

Rather, they are expressly included in paragraph 18.1(3)(*a*) of the *Federal Courts Act* which allows the Court to remedy "any act or thing" that a decision maker did or refused to do. The fact the conduct in question has ceased is not a bar to classifying the matter as a reviewable "continuous course of conduct" (*David Suzuki Foundation v. Canada (Health)*, 2017 FC 682, 2017 CarswellNat 3285 at para. 28).

[36] It is only when the "matter" is a discrete decision or order that the time limit of 30 days set out in subsection 18.1(2) applies (*Krause* at paras. 20-23; *Air Canada* at para. 25). Where the "matter" under review constitutes a course of conduct (*Save Halkett Bay Marine Park Society v. Canada (Minister of the Environment)*, 2015 FC 302, 476 F.T.R. 195 at para. 77), as opposed to a discrete decision (see, *e.g.*, *Apotex Inc. v. Canada (Minister of Health)*, 2011 FC 1308, 400 F.T.R. 28 at para. 18), the time limit of subsection 18.1(2) does not limit review of the initiating decision (*Servier Canada Inc. v. Canada (Minister of Health)*, 2007 FC 196, 2007 CarswellNat 2184 at para. 17; *Apotex Inc. v. Canada (Minister of Health)*, 2010 FC 1310, 2010 CarswellNat 4944 at para. 10). As stated in *Fisher v. Canada (Attorney General)*, 2013 FC 1108, 441 F.T.R. 273 at paragraph 79:

> [T]he important point is not whether the policy itself or individual steps to implement it are challenged, but whether there is a closely connected course of allegedly unlawful government action that the applicant seeks to restrain by means of the prerogative writs of *mandamus*, declaration, prohibition, or certiorari.

[37] In considering the scope of "the matter", the Court is "to focus on the general decision, the implementation steps, or a combination of the two where they combine to result in unlawful government action vis-à-vis the applicant" (*Fisher* at para.73).

[38] The question is, therefore, one of characterization as to whether there was a closely connected series of events, or separate discrete events. In this case, while there was a single BCR, the "matter" in question includes the steps related to its implementation and execution, namely the retainer agreements and payments which cascaded from it. Collectively, they constitute an ongoing policy or authorization to use band funds by the newly elected councillors to defend the controverted election. Given the characterization of the "matter" under review, and in accordance with previous jurisprudence, the 30 day time limit as set out in subsection 18.1(2) for reviews of a discrete decision or order would not be applicable. The "matter" under review includes the derivative steps or acts to implement the BCR in the form of the decisions to make the payments, each of which the appellant claims were made without lawful authority. To be clear, and consistent with the purpose of judicial review and the jurisdiction of the Federal Court, it is only the "decisions" that are in issue, not the actual transfer of funds to SWL.

[39] The Federal Court, however, concluded that the application was filed out of time. The application was not brought until July 27, 2018, after the adoption and implementation of the BCR and after the band, through its councillors had knowledge of the "continuing course of conduct" to use band funds to defend the election. As mentioned by the Federal Court, the letter of August 23, 2017 shows that the councillors, and other band members, knew of the BCR and of the cost of legal services provided by SWL.

[40] In my view, even if the Federal Court correctly concluded that the application was filed out of time, an extension of time should have been granted.

[41] This takes us to the question whether the judge's refusal to extend the time was reasonable. Remedies on judicial review are discretionary, and they can be denied where there has been unreasonable delay (*Krause* at para. 19). As I mentioned earlier, I have concluded that the Federal Court judge's exercise of discretion cannot be justified in light of the controlling jurisprudence and legislation and factual context. The reasons which underlie this conclusion begin with the question of the band's standing to bring the application.

Standing

[42] Subsection 2(1) of the *Indian Act* defines a band and subsection 2(3) sets out how a power conferred on a band is to be exercised. There are nuances in the relationship; the *Indian Act* grants specific powers to the band council, as a governing body, to make decisions on behalf of the band (see, *e.g.*, sections 81-86 of the *Indian Act*) but at the same time reserves certain matters and powers which may only be exercised exclusively by the band as a whole. Those include matters of aboriginal title and band membership.

[43] In a text written prior to his appointment to the Federal Court, Grammond J. concludes that, [translation] "[t]he position generally adopted by the courts seems to be that Indian bands are *sui generis* entities with the power to take legal action where that power is ancillary to the powers granted by the Act" (Sébastien Grammond, *Aménager la coexistence: les peuples autochtones et le droit canadien*, (Belgium: Bruylant and Yvon Blais, 2003) at 321). Put otherwise, bands have the authority to institute legal proceedings where litigation is incidental or necessary to the exercise of one of the powers reserved to the band.

[44] In other matters related to the general administration of band affairs, band councils have the authority to institute proceedings and to retain legal counsel. The authority of the band membership need not be obtained, except where the aboriginal title or rights are at stake (*Gitxaala Nation Council v. Gitxaala Treaty Society*, 2007 BCSC 1845, 2007 CarswellBC 3352 at para. 53). Again, as in the case of the band, the power of the band council to retain counsel is not express, but is necessarily incidental to the exercise of the enumerated powers.

[45] The decision of band council to retain a law firm becomes a decision of the band as a whole and binds the band. The relationship can readily be analogized to that of a municipal council approving a recommendation to contract for legal services on behalf of a municipality. In the circumstances of this case, however, the question that lies at the heart of the application is whether the decision of council to retain SWL was made with the required notice to the community, requisite quorum and other procedural obligations of the *Indian Act*.

[46] In the context of this division of authority between the band and band council, I turn to how band council decisions and band elections may be challenged. There are two avenues, leaving aside any internal appeal or review mechanisms that might be available, such as under the by-laws of a particular band.

[47] First, the band membership, acting as a collective, can launch a judicial review proceeding as a separate entity to challenge the actions of council or to challenge an electoral process. That was the situation in *Cowessess First Nation No. 73 v. Pelletier*, 2017 FC 692, 2017 CarswellNat 3401 (*Cowessess*), which I will discuss momentarily. Second, all band members

have an interest in ensuring that band council decisions and band elections are held in accordance with the principles of natural justice, the applicable band by-laws, the *First Nations Elections Act* and the *Indian Act*. Consequently, any individual or group of individual band members have the necessary legal standing to bring proceedings in the Federal Court to ensure the integrity of an election process or to challenge band council decisions.

[48] I return to *Cowessess*. The band relies on this decision for the proposition that a First Nation may bring a judicial review application to challenge a band council decision, and asserts that the Federal Court erred in finding that the band could not seek judicial review of its own decisions. In *Cowessess*, the evidence established that the application was brought by and in the interest of, the band, and not simply the band council (at para. 36). The Federal Court allowed the First Nation to bring the application to challenge an election as, in "very particular circumstances", the band itself established, in the evidence, "a direct interest in ensuring that its elections are conducted in accordance with the Act, and that any decision to remove an elected member from the Band Council is made in a fair and proper way" (paras. 32-33). The record before the Federal Court in that case demonstrated that the band, as opposed to the band council, was advancing its unique and differentiated interest, and was not simply acting as a surrogate band council. This warranted the grant of standing to the band.

[49] The reasoning in *Cowessess* is consistent with the guidance that "those claiming to sue in the name of a band must be prepared to establish their authority to do so when and if that authority is challenged" (*Wewayakum Indian Band v. Wewayakai Indian Band*, [1991] 3 F.C. 420, [1992] 2 C.N.L.R. 177 at para. 19). Consequently, where a band seeks to sue or judicially

review decisions of its council, it should be clear on the facts of the case that it is not just the new band council itself bringing the proceeding under the name of the band, but the band acting as a collective.

[50] As a basic proposition, the good governance of band affairs is not furthered by allowing newly elected band councils to impugn decisions of predecessor councils. Certainty, predictability and strict adherence to decision making processes are important values in public administration. In the ordinary course, the remedy for a new band council that does not agree with a BCR of its predecessor council is to repeal the provision.

[51] However, again, in the unique circumstances of this case, where the band seeks declaratory relief that is directed to the collective interest of the band, the band has established a direct interest in the proceeding and is entitled to standing. In reaching this conclusion, I note that there was evidence that the band council decided to bring this application on behalf of the collective interests of the band. Paragraph 16 of that the Clinton Key affidavit explains "[…] that these legal proceedings should be pursed to *preserve and protect the integrity of our governance and the democratic process of our First Nation*." [Emphasis added]

[52] This statement accurately reflects the band's unique interest, separate and apart from band council, in ensuring that band council decision making is conducted lawfully. The band's interest is not in any particular decision, or, in the context of elections, in defending the results of any particular candidate. The band's interest is to ensure that band council decision making is conducted in accordance with the applicable law or custom, and with the highest degree of

transparency and integrity. These principles should be kept squarely in mind by band membership, band council and by legal counsel retained in the case of disputed elections. Discrete legal interests are engaged and if they are not respected, those interests will be compromised.

[53] I turn to the reasons why there was an error in principle in the exercise of discretion.

The Federal Court Judgment of March 21, 2018

[54] On March 21, 2018, the Federal Court set aside the election and annulled the results. The band council ceased to have the authority to conduct further business on behalf of the band.

[55] Subsection 35(1) of the *First Nations Elections Act* states, "[a]fter hearing the application, the court may, if the ground referred to in section 31 is established, set aside the contested election." Subsection 35(2) provides that a councillor's term of office ceases upon a decision of the Federal Court to set aside an election. Absent a stay of the Federal Court decision, the council positions are vacant.

[56] The judgment of the Federal Court set aside the election. That judgment was not stayed.

[57] Three consequences flow from this.

[58] First, as of March 21, 2018, the respondents had no lawful authority to act on behalf of the band. The Federal Court's judgment, the *Indian Act*, and the *First Nations Elections Act* put

this beyond dispute. Nevertheless, former Chief Brass retained and purported to "instruct" SWL with respect to the conduct of the appeal to this Court. On the same day as the Federal Court set aside the election, former Chief Brass authorized the transfer of $40,000.00 in band funds to SWL's trust account to prosecute the appeal. SWL continued to take and act upon instructions from the band council respondents. Three months later, on June 18th, SWL removed band funds from the appeal retainer trust account and deposited them in the Federal Court proceeding trust account (Appeal Book, pages 108, 350, 365).

[59] As a second consequence, the Federal Court decision of March 21st shifted the legal foundation of the application for judicial review. For decisions taken on and subsequent to March 21, 2018, the application challenges the authority of those purporting to act in its name and the legality of the decisions taken at that time, a classic application of the writ of *quo warranto*. The Federal Court's jurisdiction under section 18 extends not only to the supervision of band council, but also to the individual chief and councillors acting, or purporting to act, in their official capacity (*Lake Babine Band v. Williams* (1996), 194 N.R. 44, 61 A.C.W.S. (3d) 256 (F.C.A.); *Marie v. Wanderingspirit*, 2003 FCA 385, [2004] 1 C.N.L.R. 319 (F.C.A.)).

[60] The declarations sought by the band with respect to the lawfulness of the March 21, 2018 payment and relief against band councillors purporting to act in their official capacity under the *Indian Act* is a matter over which the Federal Court has exclusive jurisdiction (*Horseman v. Horse Lake First Nation*, 2013 FCA 159, 446 N.R. 198 at para. 7).

[61] The third consequence of the March 21st decision lies in the question whether, given the delay in bringing the application, the Court ought to hear the matter.

[62] The delay ought to have been measured only from June 12, 2018, when a new council was elected and able to act, to July 27, 2018, when the application for judicial review was commenced. Viewed in this light, the discretionary considerations relating to whether to extend the time take on a much different character.

[63] Section 18.1 reflects an important public interest in ensuring that certainty and finality in public decision making. However, it is not the only public policy concern.

[64] The over-arching purpose of judicial review is to ensure that the governance and administration of public authorities is conducted in a manner consistent with the law, including, in this case, the *Indian Act* and any applicable by-law of the band. The focus of judicial review is to quash decisions that were not made in accordance with legal requirements or to prohibit, pre-emptively, such decisions from being made. The *Federal Courts Act* is designed to enhance accountability and to promote access to justice, and it should be interpreted in such a way as to promote those objectives (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at paras. 26, 32).

[65] Judicial review serves a critical role in ensuring that the rule of law is respected. Here, that requires recognition of the judgment of the Federal Court, which set aside the results of the 2016 election. Band councils must operate according to the rule of law and are subject to judicial

supervision when they do not. As Rothstein J. said in *Long Lake Cree Nation v. Canada (Minister of Indian and Northern Affairs)*, [1995] F.C.J. No. 1020, 1995 CarswellNat 3203 at paragraph 31:

> On occasion, conflicts can become personal between individuals or groups on Council. But Councils must operate according to the rule of law whether that be the written law, custom law, the Indian Act or whatever other law may be applicable. Members of Council and/or members of the Band cannot take the law into their own hands. Otherwise, there is anarchy. The people entrust the Councillors to make decisions on their behalf and Councillors must carry out their responsibilities in a way that has regard for the people whose interest they have been elected to protect and represent. The fundamental point is that Councils must operate according to the rule of law.

[66] Applying these principles in the context of this case, the role of the Court is to ensure respect for the Federal Court decision that set aside the election and to ensure compliance with the provisions of the *First Nations Elections Act.* These ought to have been paramount considerations in the exercise of discretion whether the Court ought to hear this matter. Nor should it be forgotten that the band council is under an obligation, sometimes characterized as being fiduciary in nature, in dealing with band funds and the band membership (*Buffalo v. Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCT 1299, 226 F.T.R. 65 at para. 11; *Cottrell v. Chippewas of Rama Mnjikaning First Nation*, 2009 FC 261, 342 F.T.R. 295 at paras. 49, 75). Quite apart from the sums of money involved, which were significant, the judicial review application raised questions of transparency and lawful governance. These considerations were not taken into account in the exercise of discretion.

[67] In contrast, the judge did take into account, and held against the band, the fact that the band's motive in bringing the application was to support its action in contract. This was an

irrelevant consideration. The question that ought to have been addressed was whether the declarations sought would be of any utility, as a declaration will not be granted that has no utility (*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 at para. 11). Here, the declarations and associated relief readily crossed that threshold. The declaration will settle a live controversy – the *vires* of the BCR and associated payments. This will, as a practical matter, resolve an outstanding legal question, one which is preliminary to the Saskatchewan action proceeding.

[68] While it is perhaps obvious, I emphasize that the *vires* of the BCR is not determinative of the outcome of the Saskatchewan action. Whether SWL was entitled to rely on the BCR and retainers in defence of the band's contract action is a matter for Saskatchewan Court of Queen's Bench to determine.

[69] I turn now to the reason why the decision in its entirety must be reversed.

[70] It will be recalled that the judge rejected the request for an extension, as the band's decision to await the outcome of the election was unreasonable. In reaching this conclusion, the judge did not consider the troubled circumstances of this case.

[71] The application to set aside the election was commenced within 30 days of the vote. The band itself was a respondent in that application. The respondent councillors and the band were represented by the same counsel. Under the Federal Court's reasoning, the band itself ought to have removed itself from the conflict and commenced a separate judicial review application

challenging the BCR. This is problematic, from both a practical and legal perspective. From a practical perspective, it was unrealistic to expect the band to extricate itself from the situation it was in, given that its interest had been collapsed into, or captured by, the personal interests of the councillors defending the election result. From a legal perspective, the result would have been chaotic. There would have been two parallel applications in the Federal Court – one in which the band was a respondent, and the second in which the band was the applicant. In the former, the band would have been defending the legitimacy of the election council and, implicitly, council's authority and in the second, it would be attacking the authority of council and the legitimacy of the BCR.

IV. Conclusion and Disposition

[72] The situations wherein a band has standing to seek judicial review of a previous decision of the band council are exceptional and rare. Permitting a successor band council, cloaked in the identity of the band, to set aside a decision of previous band council does nothing to foster values essential to good governance – certainty, predictability and adherence to open, transparent decision making process. As mentioned earlier, if a new band council does not agree with a resolution adopted by council, the proper recourse is, after debate, repeal the resolution. That is what the new band council did here, on June 18, 2018, two weeks after the election.

[73] Remedies on judicial review are discretionary and, in the circumstances of this case, warrant the use of the power under paragraph 52(b)(i) of the *Federal Courts Act.* The appellants are entitled to a determination of the *vires* of the decisions in question.

[74] The question of the legality of the decisions to retain, instruct and pay SWL is a pure question of law. No evidence was filed by the former councillors or band administration responding to the substantive question as to whether the BCR and payments were properly authorized and the assertion that the BCR was adopted without notice. The evidentiary record is complete as is necessary for the question to be determined.

[75] SWL argues that it does not have access to the band records and therefore cannot defend itself against the allegations made against it. This argument reflects a continuing failure to understand that SWL's interest is separate and apart from that of the band. Whether SWL was entitled to rely on the authority of the Chief is for the Saskatchewan Court of Queen's Bench to determine. It is a separate question from whether the BCR and payments were properly authorized. Insofar as access to documents is an issue, this is a concern which presumably would be remedied in discovery.

[76] Deciding this question now is also consistent with the guidance of the Supreme Court in *Vavilov*, 2019 SCC 65, Carswell Nat. 7883 at paragraphs 139-142, as it promotes the timely, effective and least costly resolution of the matters put in issue by the application. More broadly, deciding this question now also clears the path for the band to address the issues of concern between it and SWL, on a full record, before the Saskatchewan Court of Queen's Bench. Deciding this question now also allows the band to move forward in addressing issues of internal governance. The Supreme Court observed that access to justice requires that a claimant be permitted to pursue its remedy directly and, to the greatest extent possible, without procedural

detours (*TeleZone* at para. 19). I would therefore grant a declaration setting aside the BCR and the decisions that cascade from it.

[77] Before concluding, I wish to emphasize that nothing in these reasons nor in this disposition should be construed as an opinion on any of the other questions in dispute between SWL and the band in the Saskatchewan action.

[78] I would allow the appeal with costs. I would grant a declaration setting aside the BCR as well as the associated decisions to transfer band funds to SWL.

"Donald J. Rennie"
J.A.

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

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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