Federal Court of Appeal | Cour d'appel fédérale

Date: 20250908

Docket: A-157-23

Citation: 2025 FCA 158

CORAM: **WEBB J.A.**
BIRINGER J.A.
DAWSON D.J.C.A.

BETWEEN:

SALT RIVER FIRST NATION #195

Appellant

and

RICHARD SHANKS

Respondent

Heard at Vancouver, British Columbia, on March 5, 2025.

Judgment delivered at Ottawa, Ontario, on September 8, 2025.

REASONS FOR JUDGMENT BY: DAWSON D.J.C.A.

CONCURRED IN BY: WEBB J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

DAWSON D.J.C.A.

[1] The respondent, Richard Shanks, was registered as a member of the Salt River First Nation in 2012, after the *Gender Equity in Indian Registration Act*, SC 2010, c.18 came into force. As a member, Mr. Shanks became entitled to receive a per capita distribution paid annually to members from funds held by the First Nation pursuant to a treaty settlement agreement. A number of years later, on October 26, 2021, the Council of the First Nation enacted

a Band Council Resolution that precluded Mr. Shanks and other members of the First Nation from receiving the per capita distribution to be made to members at that time. The decision to exclude Mr. Shanks and others from receiving such payment was made on the basis that the excluded individuals were neither members of the First Nation on June 22, 2002, when the initial per capita distribution payment was made, nor descendants of those members born after June 22, 2002.

[2] Mr. Shanks brought an application for judicial review challenging the validity of the Band Council Resolution. For reasons cited as *Shanks v. Salt River First Nation #195*, 2023 FC 690, the Federal Court allowed the application for judicial review and set aside the Band Council Resolution on the ground that it was unreasonable. In reaching this decision the Federal Court rejected the submission of the First Nation that the Court lacked jurisdiction to hear the application. Instead, the Federal Court concluded that when enacting the Band Council Resolution, the Council acted as a "federal board, commission, or other tribunal" and that the authority exercised by the Council was of a sufficiently public character to confer jurisdiction on the Federal Court.

[3] This is an appeal from the judgment of the Federal Court.

I. The Issue on Appeal

[4] A single issue is raised on this appeal: did the Federal Court err by concluding that the Federal Court had jurisdiction to review the challenged Band Council Resolution? No appeal is

brought from the Federal Court's decision that the Band Council acted unreasonably when it passed the impugned Resolution.

[5] For the reasons that follow, I would dismiss the appeal with costs.

II. Applicable Legislation

[6] Subject to certain exceptions that have no application to this appeal, subsections 18(1) and (3) of the *Federal Courts Act* R.S.C., 1985, c. F-7 give exclusive, original jurisdiction to the Federal Court to entertain applications for judicial review of decisions of "any federal board, commission or other tribunal".

[7] Section 2 of the *Federal Courts Act* defines the phrase "federal board, commission or other tribunal" to mean any entity "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown". Again, this definition is subject to a number of exceptions, none of which apply to this appeal.

III. The Standard of Review

[8] Whether the Federal Court had jurisdiction to judicially review the Band Council Resolution is a question of law, reviewable on the standard of correctness (*Anisman v. Canada (Border Services Agency),* 2010 FCA 52, at para. 26); (*Housen v. Nikolaisen*, 2002 SCC 33, at

para. 8). This requires the Federal Court to correctly articulate and apply the test for determining whether an entity is acting as a federal board, commission or other tribunal (*Innu Nation v. Pokue*, 2014 FCA 271, at para 10).

[9] Before turning to the application of the standard of review, nothing in this case turns on any distinction between a board, commission or other tribunal. Therefore, for simplicity, the phrase "federal board" will be used in the balance of these reasons and should be read as including reference to a federal commission or other tribunal.

IV. Application of the Standard of Review

A. *Applicable Legal Principles*

[10] The leading authority with respect to the proper interpretation of the definition of federal board is the decision of this Court in *Anisman*. There, at paragraph 29, the Court concluded that "a two-step enquiry" must be made to determine whether an entity is a federal board. The first enquiry is directed to what jurisdiction or power is being exercised. The second enquiry is directed to the source or origin of the jurisdiction or power that is being exercised. The primary determinant is the source of the entity's authority. The question is, when acting, was the tribunal empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown? Neither the nature of the power exercised nor the nature of the body exercising the power are determinative of whether a tribunal falls within the definition.

[11] Subsequent to the decision of this Court in *Anisman*, the Supreme Court clarified in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018]1 S.C.R. 750, at paragraph 14, that judicial review is only available "where there is an exercise of state authority and where that exercise is of a sufficiently public character". The Supreme Court went on to state that "a decision will be considered to be public where it involves questions about the rule of law and the limits of an administrative decision-maker's exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term" (para. 20).

B. *Factual Background*

[12] To correctly determine what power the Council was exercising when it enacted the Band Council Resolution at issue that authorized the payment of a per capita distribution to some but not all Band members, and the source of that power, it is necessary to review the underlying facts. They may be summarized as follows:

1. The First Nation was a signatory to Treaty 8.

2. In November 2001, Canada and the First Nation entered into a Treaty Settlement Agreement to settle claims that arose because of Canada's failure to provide reserve land and other treaty benefits promised to the First Nation under Treaty 8.

3. Amongst other things, in the Treaty Settlement Agreement:

a. Canada agreed to pay compensation to the First Nation (Articles 12.1 and 12.2). This compensation was "to be a long-term asset to be invested for the future benefit of Salt River" (Article 12.7).

b. The compensation was to be paid to the First Nation as "personal property of Salt River situate on a Reserve" (Article 13.1). The effect of this term is that the provisions of the *Indian Act*, R.S.C. 1985, c. I-5 with respect to the management of "Indian moneys" do not apply to the compensation.

c. Compensation agreed under the Treaty Settlement Agreement was to be paid into a Settlement Trust (Article 12.6). The First Nation confirmed "that the investment, expenditure, operation, use, management, and accounting for the Compensation will be in accordance with the provisions of the Settlement Trust" (Article 12.9).

d. The Settlement Trust Agreement was appended to the Treaty Settlement Agreement.

4. Pursuant to the Settlement Trust Agreement:

a. Four trust accounts were to be opened, each for a purpose specified in the Trust Agreement (Article 4.1).

b. The Council of the First Nation was required to open a Settlement Revenue Account. Each year, the annual income from some of the trust accounts was to be paid into the Settlement Revenue Account. The

expenditure of funds from the Settlement Revenue Account was to be governed by "the Financial Policies and By-Laws of Salt River." (Article 8).

5. In 2010, the members of the First Nation passed the "Salt River First Nation Settlement Revenue Account Law" ("Revenue Account Law") which replaced settlement revenue account bylaws that had been enacted by the First Nation's Council in July 2002 and August 2007 (affidavit of Levi MacDonald, paragraph 5 and Exhibit A). In the 2010 enactment, the members authorized members of Council to "permit a per capita distribution each fiscal year to all Members of the First Nation from the amount of annual income paid into the Settlement Revenue Account in that calendar year." (section 3(a) of the Revenue Account Law).

6. On June 7, 2010, the members of the First Nation approved a referendum adding the Revenue Account Law to the Customary Election Regulations (Election Regulations) as Schedule "B" (Affidavit Levi MacDonald, paragraph 5). Section 9 of the Election Regulations (as revised to add the Settlement Revenue Account Law as a schedule) articulates the duties and responsibilities of the Chief and Council in the following terms:

> Council shall carry out the duties and responsibilities set out in Schedule "A" and as set out in any policy or conduct guidelines … and shall also comply with the SRFN Settlement Revenue Account Law set out in Schedule "B" to these Regulations.
>
> [Emphasis added.]

7. From the time the respondent was added to the membership list until 2016, the respondent received annual per capita distribution payments authorized by the Council pursuant to the settlement Revenue Account Law.

8. At a special meeting of the First Nation's members held on November 7, 2016, a majority of members directed the First Nation's Council "to take every step necessary to protect and preserve the land and trust fund established based on the original 757 beneficiaries (the TLE) and stop dilution of the benefits of the TLE, including stopping payments of any future [per capita distributions] to anyone on our Membership list who is not either an original beneficiary or a descendant of an original beneficiary". The Council then passed a Band Council Resolution accepting and adopting this direction to be applied to all future expenditures from the Settlement Trust. (MacDonald Affidavit, Exhibit B).

9. On October 26, 2021, the Council of the First Nation passed the Band Council Resolution at issue that precluded the respondent and other members of the First Nation from receiving the annual per capita distribution on the basis that only "Original Members" and descendants of Original Members born after 2002 were entitled to receive per capita distributions.

C. *What power did the Council exercise when enacting the Band Council Resolution?*

[13] The Federal Court found that the Band Council Resolution was enacted pursuant to the Revenue Account Law (para. 29).

[14] The First Nation argues that this finding was made in error, and that the power the Council exercised is found in the inherent right of self-government and Council's right to manage and deal with Salt River's own property.

[15] I respectfully disagree that the Federal Court erred as the First Nation asserts. The jurisprudence requires a fact-based inquiry when determining the source of a power. Here, a fact-based inquiry establishes that in the Treaty Settlement Agreement the First Nation agreed that expenditures made from settlement compensation would be made in accordance with the appended Settlement Trust Agreement. The Settlement Trust Agreement in turn requires that the compensation paid from the Settlement Revenue Account be paid in accordance with "the Financial Policies and By-Laws of Salt River". The relevant financial policy is the Revenue Account Law, passed by the First Nation in 2010.

[16] Together, these documents establish that the power exercised by the First Nation when enacting the Band Council Resolution at issue was the power found in the Revenue Account Law to make annual per capita distributions from the Settlement Revenue Account in accordance with "the Financial Policies and By-Laws of Salt River".

D. *Was the source of this power conferred by or under an Act of Parliament?*

[17] The Federal Court, after stating that the Revenue Account Law "is part of" the Election Regulations, relied upon jurisprudence such as *Horseman v. Horse Lake First Nation*, 2013 FCA 159 and *Thomas v. One Arrow First Nation*, 2019 FC 1663 to conclude that the Court has

jurisdiction to review decisions taken under custom First Nation's election codes (reasons, paras. 29 to 31).

[18] The First Nation submits that this conclusion was in error because nothing about the reference to the Revenue Account Law and its attachment as a schedule to the Election Regulations is sufficient to make the enactment of the Band Council Resolution the exercise of a power conferred by or under an Act of Parliament so to engage the Court's jurisdiction over decisions made under custom election laws. The First Nation argues that attaching the Revenue Account Law to the Election Regulations did not operate to make the Law part of the Regulations.

[19] I respectfully disagree that the Federal Court erred when it found the Revenue Account Law was incorporated into the Election Regulations as part of the governance structure. In 2010, the members of the First Nation approved adding the Revenue Account Law to the Election Regulations. These Regulations, in section 9, explicitly require the Council to comply with the Revenue Account Law. Contrary to the submissions of the First Nation, the Revenue Account Law was not simply tacked on to the Election Regulations.

[20] More particularly, section 9 of the Election Regulations requires Council to carry out the duties and responsibilities enumerated in Schedule A to the Code and comply with the Revenue Account Law. The duties specified in Schedule A included general conduct requirements and specific duties with respect to financial management and how elected officials are to deal with the First Nation's assets and property. In this respect, the Election Regulations regulate more

than the method of choosing elected representatives. They establish core governance requirements to be exercised within the framework established under the *Indian Act*.

[21] The jurisprudence of this Court and the Federal Court is to the effect that Band Councils established under the *Indian Act* are federal boards whose decisions are subject to judicial review when they exercise their powers over band members under a federal statute such as the *Indian Act* and when the issue involves a matter that is "public" in nature: *Sebastian v. Saugeen First Nation No. 29 (Council of)*, 2003 FCA 28, at paragraph 51; *Ermineskin First Nation v. Minde*, 2008 FCA 52, at para. 33; *Horseman v. Horse Lake First Nation*, 2013 FCA 159, at para. 6; *Buffalocalf v. Nekaneet First Nation*, 2024 FCA 127, at para. 19.

[22] The respondent argues that in the present case the Band Council Resolution in question was authorized under the *Indian Act* because the power to make distributions from the Settlement Revenue Account is "a component of the Band's governance structure which is regulated by the Act." (Memorandum of Fact and Law, at para. 54). More specifically, the respondent argues that the Band Council Resolution "was made by a band regulated by the *Indian Act*, pursuant to a component of that band's election code as part of the duties and oath of office of the elected chief in Council, and then was exercised within the *Indian Act* decision-making structure." (Supplementary Written Submissions, at para. 3).

[23] I accept this submission. The cumulative effect of the Treaty Settlement Agreement, the Settlement Trust and the Revenue Account Law is to restrain the power of Council to make annual per capita distributions from the Settlement Revenue Account and enact Band Council

Resolutions with respect to per capita distributions. Council's power has been constrained such that this governance power must be exercised within the decision-making structure established and regulated under the *Indian Act*. Therefore, I am satisfied that payment of the per capita distributions from the Settlement Revenue Account pursuant to the Band Council Resolution was made under federal legislation within the contemplation of the definition of federal board.

[24] Before leaving this point, I have noted the First Nation's argument that the Federal Court erred in law in finding that all decisions of Band Council's at "duly convened" meetings are subject to judicial review. However, when the reasons of the Federal Court are read fairly and as a whole, the Court did not err as asserted. At paragraph 33 of its reasons, the Court expressly acknowledged that not all decisions made by a Band Council are reviewable and that inherently private decisions do not attract the Court's judicial review jurisdiction.

E. *Was the power exercised of a sufficiently public character so as to make judicial review available?*

[25] At paragraphs 33 to 35 of its reasons, the Federal Court considered and rejected the submission of the First Nation that the exercise of power at issue was not public in nature and so was not amenable to judicial review.

[26] The First Nation argues that the Federal Court erred by not conducting a full analysis of the nature of the power exercised in accordance with the factors set out by this Court in *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at paragraph 60. The First Nation argues that instead the Court over emphasized Council's status as the government of the First Nation.

[27] This submission requires this Court to consider the nature of the holding in the *Air Canada* case. In decisions such as *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court restated the principle that relationships that are essentially private in nature are to be redressed by way of the private law not public law. In *Air Canada*, this Court then directed itself to the question of how to determine where a particular matter falls on the public-private spectrum. At paragraph 60, the Court observed that in determining the public-private issue, all of the circumstances are to be weighed. The Court then went on to enumerate a number of factors relevant to the determination of whether a matter is sufficiently public to bring it within the purview of judicial review. The Court's listing did not purport to be exhaustive, and the Court noted that whether one factor or a combination of factors operate to tip the balance to make a matter public in nature depends upon the facts of the case.

[28] In the present case, the Federal Court did not cite *Air Canada*; nor did the Court explicitly review the factors enumerated in *Air Canada*. This said, the Court did review a number of factors to reach its conclusion that Council was not acting privately when it exercised the power at issue. Particularly, the Court considered that the decision was made following a meeting duly convened within the meaning of subsection 2(3) of the *Indian Act*, that the decision concerned a payment made pursuant to the terms of the Revenue Account Law, and that the decision to authorize per capita distribution payments was inherently a governance issue relating to the management and disposition of funds from a settlement which was established for the benefit of the First Nation. These facts fall within the scope of factors articulated in *Air Canada*, particularly: the nature of the decision-maker and its responsibilities, the extent to which the

decision is founded and shaped by law as opposed to private discretion, and the character of the matter for which review is sought.

[29] While it would have been preferable for the Court to have specifically referenced the factors articulated by this Court in *Air Canada*, and while the parties and this Court would have been assisted by an express consideration of those factors, I am not persuaded that the Court committed any reviewable error when it concluded that the impugned Band Council Resolution was of a sufficiently public character to properly attract judicial review.

[30] Applying the factors articulated in *Air Canada* that are of particular relevance to this case:

- The character of the Band Council Resolution was not a private, commercial matter. The decision involved the distribution of public funds and flowed from the Revenue Account Law adopted by members of the First Nation and incorporated into the Election Regulations. The fact that compensation was paid to the First Nation as “personal property” did not make the Band Council Resolution private in nature.

- The decision-maker was the governance body recognized by the *Indian Act* and the Band Council Resolution was registered with the appropriate Minister.

- The decision was not founded in private discretion but rather in the terms of the Treaty Settlement Agreement, the Settlement Trust Agreement, the Revenue Account Law and the Election Regulations.

- Judicial Review is a suitable public law remedy to challenge the lawfulness of the Band Council Resolution.

[31] It follows that when making per capita payments pursuant to the Revenue Account Law and enacting the Band Council Resolution, Council was not acting in a private capacity. Therefore, the Resolution is subject to judicial review.

V. Conclusion

[32] For these reasons, the Federal Court correctly concluded that it had jurisdiction to review the Band Council Resolution. I would dismiss the appeal and award the costs of the appeal to the respondent.

"Eleanor R. Dawson"
D.J.C.A.

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

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	WEBB J.A. BIRINGER J.A.
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