Federal Court of Appeal

Cour d'appel fédérale

Date: 20180704

Docket: A-93-17

Citation: 2018 FCA 131

CORAM: **STRATAS J.A.**
WEBB J.A.
LASKIN J.A.

BETWEEN:

STURGEON LAKE CREE NATION

Appellant

and

DARWIN HAMELIN, KEVIN HAMELIN AND WILMA GOODSWIMMER

Respondents

Heard at Edmonton, Alberta, on June 13, 2018.

Judgment delivered at Ottawa, Ontario, on July 4, 2018.

REASONS FOR JUDGMENT BY: LASKIN J.A.

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

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] The Customary Election Regulations of the Sturgeon Lake Cree Nation vest in the Election Appeal Committee established under the Regulations the authority to hear and decide appeals relating to elections for the offices of Councillor and Chief. In this appeal, SLCN seeks

to set aside the judgment of Justice McVeigh of the Federal Court (2017 FC 163) granting, on terms, an application for judicial review of decisions of the Appeal Committee on the appeals brought by the three respondents, Darwin Hamelin, Kevin Hamelin, and Wilma Goodswimmer, in relation to the March 2016 election.

[2] The application judge found that the decisions to reject their appeals were made not by the Appeal Committee as a whole but unilaterally by the Electoral Officer appointed by the SLCN's Council to supervise and ensure proper conduct of the election. She therefore found a breach of procedural fairness, and ordered that the respondents' appeals be determined by the Appeal Committee, without the participation of the current Electoral Officer.

[3] SLCN submits that the application judge erred in making this finding and in granting the judgment that she did. It argues among other things that under the Regulations there is no absolute right to an oral hearing of an appeal before the Appeal Committee, and that the Regulations give the Electoral Officer the authority to screen out unmeritorious appeals. It also argues that the Appeal Committee has no jurisdiction to decide whether a prospective nominee for election to the position of Chief or Councillor owes money to SLCN, a factor that under the Regulations is relevant to entitlement for nomination. It further submits that the application judge erred in failing to have regard to the requirement of the Regulations that the Electoral Officer be a member of and chair the Appeal Committee, and in preferring the evidence of a member of the Appeal Committee over that of the Electoral Officer as to how and by whom the appeals were decided. Finally, it argues that in providing in her judgment that "the four appeals previously filed […] be determined by the Appeal Committee," the application judge incorrectly granted

relief in relation to the appeal brought by Sophia Hamelin, who did not seek judicial review of the denial of her appeal.

[4] I would allow the appeal to the extent of setting aside the term in the judgment that the appeals be determined without the participation of the current Electoral Officer. In my view it was not open to the application judge to include this term, given the clear stipulation in the Regulations that the Electoral Officer chair meetings of the Appeal Committee and have a vote in its decisions.

[5] I would otherwise dismiss the appeal. In my view, the application judge made no reviewable error in coming to her conclusion as to how and by whom the respondents' appeals were decided. Nor did she err in concluding that the Regulations do not give the Electoral Officer the authority to screen out appeals, but provide for decisions on all appeals to be made by the Appeal Committee. Since it is not apparent that there is no basis for the respondents' appeals, respect for the decision-making role of the Appeal Committee requires that the appeals be referred back to the Appeal Committee, to be dealt with in accordance with the Regulations.

[6] Lastly, on a proper reading of the judgment of the Federal Court, the application judge did not grant relief in relation to the Sophia Hamelin appeal, which was not in issue before her. Rather, I would read her reference to "the four appeals previously filed" as a reference to the two aspects of the appeal filed by Kevin Hamelin – the first relating to his own qualification for nomination and the second to the qualifications of other nominees and other alleged irregularities – and the one appeal each filed by the other two respondents.

[7] In explaining the basis for these conclusions, I will first review the relevant portions of the Election Regulations. I will then discuss the respondents' appeals and the manner in which they were addressed, before turning to the decision of the Federal Court and the issues raised by this appeal.

II. The legal and factual background

A. *The Election Regulations*

[8] Since 1995, when an order was made removing SLCN from the election regime established under section 74 of the *Indian Act*, R.S.C. 1985, c. I-5, elections for Chief and Councillors of SLCN have been governed by the Regulations. Relevant excerpts from the Regulations are attached as an appendix to these reasons.

[9] The Regulations provide for a Council comprising a Chief and six Councillors, to be elected for a three-year term. Elections are to be held in March. Before each election, an Electoral Officer is to be appointed by Band Council resolution. The Electoral Officer must, among other things, not be an employee of SLCN or a First Nation-owned company, and not be a member of SLCN or any other First Nation. Robert Hall, an experienced electoral officer, was appointed to this position for the March 2016 election.

[10] The duties of the Electoral Officer are set out in Schedule "A" to the Regulations. They include supervising elections and ensuring they are conducted in accordance with the

Regulations. While these duties are subject to modification by Band Council resolution, the record before the Federal Court did not include any modifying resolution.

[11] The Regulations set out eligibility criteria for nomination for election to the position of Chief or Councillor, as follows:

> **6.4 Persons Eligible for Nomination**
>
> a) Subject to sections 6.4(b) and 16.3 of these Regulations [neither of which has any bearing here], any Elector [defined as a person whose name appears on the SLCN membership list and who is 18 or older before the nomination meeting] is eligible to be nominated for the position of Chief or Councillor provided:
>
> i) that he/she is at least eighteen (18) years of age by Election Day;
> ii) that he/she continuously resided on the Sturgeon Lake Reserve for at least twelve (12) months prior to the date of nomination; and
> iii) that if he/she owes money to the Band, including rent, a repayment plan has been set up three months prior to Election Day and payments have been maintained continuously.

[12] The Regulations contain detailed provisions for election appeals. Section 12.1 sets out the available grounds of appeal in the following terms:

> **12.1 Grounds for Appeal of Election**
>
> Within fourteen (14) days of and including the Election Day, […], any Elector may appeal the results of an Election […] if, on reasonable and probable grounds, they believe:
>
> a) An error was made in the interpretation or application of the Regulations materially and directly affecting the conduct and outcome of the […] Election […];

> b) A Candidate did not meet the eligibility requirements set forth in section 6.4 and 6.6 [which deals with the nomination process];
>
> c) A Candidate was guilty of promoting or aiding corrupt Election practices including, but not limited to, bribery, threats and intimidation […];
>
> d) A person voted who was not eligible to vote; or
>
> e) Any other circumstance or event materially and directly affecting the conduct and outcome of the […] Election […].

[13] By section 12.2, an appeal may be made by forwarding a notice of appeal in writing to the Electoral Officer. By section 12.3, "[t]he Electoral Officer will promptly notify all Candidates for the Office affected by the Notice of Appeal." According to section 12.5, the Electoral Officer is then, within seven days of receiving the notice of appeal, to "convene a meeting of the [Election Appeal] Committee for the purpose of hearing the appeal."

[14] Section 12.4 provides for the Chief and Council to appoint the Election Appeal Committee immediately following the nomination meeting. It is to consist of two Elders (SLCN members 55 or older), two Electors aged between 30 and 54, and two Electors aged between 18 and 29. Section 12.5 states that the meeting of the Appeal Committee "will be chaired by the Electoral Officer who will also be entitled to vote."

[15] By section 12.7, the appellant, the individual in respect of whom the appeal is brought, and other interested parties are entitled, themselves or through representatives, to make written or oral submissions, or both, to the Appeal Committee at the meeting.

[16] Section 12.8 calls for the Appeal Committee to make a decision on the appeal within three days following the meeting. It may "[d]eny the appeal on the basis that the evidence presented did not fully and properly establish the necessary ground for an appeal," "[u]phold the ground for an appeal" but let the results of the election stand on the basis that the infraction did not materially or directly affect the result, or uphold the appeal and call for a new election.

[17] Article 17 of the Regulations sets out a mechanism for their amendment. Amendments require approval by both Band Council resolution and a majority of Electors present and voting at a special general meeting.

B. *The respondents' appeals*

[18] At the nomination meeting for the March 2016 election, the Electoral Officer refused to accept the nomination of the respondent Kevin Hamelin on the basis that he owed money to SLCN. Mr. Hamelin wrote to the Electoral Officer the following day to appeal. The Electoral Officer responded in a letter that stated, "[a]fter reflection upon your representations, my decision to disqualify and not accept your nomination stands." The letter went on to advise that Mr. Hamelin could, if he wished to do so, file an appeal within 14 days after the election.

[19] The election proceeded. The six candidates elected to Council included Jeannine Calliou and Susan Wale. The respondent Darwin Hamelin received four fewer votes than the last successful candidate.

[20] Kevin Hamelin filed an appeal. He appealed both the determination that he was ineligible for nomination under section 6.4(a)(iii) of the Regulations because he owed money to SLCN, and the eligibility of four nominees, including Jeannine Calliou and Susan Wale, on the basis that they did not meet the residency requirement in section 6.4(a)(ii) because they had not continuously resided on the Reserve for at least 12 months prior to the date of nomination.

[21] The respondents Darwin Hamelin and Wilma Goodswimmer also filed appeals. They too contested the eligibility of Jeannine Calliou and Susan Wale for failure to meet the residency requirement. In addition, they raised a number of alleged voting irregularities.

C. *Disposition of the respondents' appeals*

[22] On the same day as he filed his appeal, Kevin Hamelin received notification from the Electoral Officer, in a document headed "Notice – Response to Notice of Appeal of Kevin Hamelin," that his appeal would not be heard by the Appeal Committee because it did not meet the requirement of the Regulations that there be reasonable and probable grounds to justify the hearing of an appeal. A few days later, following a conference call meeting of the Appeal Committee attended by the Electoral Officer, the Electoral Officer sent Kevin Hamelin a letter cast in very similar terms.

[23] Darwin Hamelin was advised by the Electoral Officer that, on the same basis, most of the grounds set out in his notice of appeal did not qualify for a hearing, and that it had been decided to grant a hearing only of the portion of his appeal relating to the eligibility of Jeannine Calliou and Susan Wale. The respondent Wilma Goodswimmer was similarly advised by the Electoral

Officer that only the portion of her appeal relating to the eligibility of Jeannine Calliou and Susan Wale would be heard.

[24] An appeal hearing took place in Edmonton. Darwin Hamelin, Wilma Goodswimmer, Sophia Hamelin (who had also filed an appeal but was not a party to the application in the Federal Court), Jeannine Calliou, and Susan Wale were each given 15 minutes to speak. Several days later, the results of the appeals were posted at the SLCN office and sent to the respondents. The reasons for the decision stated that the appeals were dismissed "[b]y majority vote."

D. *The decision of the Federal Court*

[25] One of the main issues before the Federal Court was a factual one: who actually decided the appeals, the Appeal Committee or the Electoral Officer. The application judge had before her affidavit evidence on this question from both the Electoral Officer and a member of the Appeal Committee, Victoria Sunshine. Neither was cross-examined.

[26] The Electoral Officer deposed that it was the Appeal Committee that decided which appeals would proceed to a hearing, and that its decision on this point was unanimous. He deposed that it was also the Appeal Committee that decided the appeals that it heard, by a majority vote in a secret ballot.

[27] Ms. Sunshine's evidence was very different. She deposed that the Electoral Officer, alone, decided that Kevin Hamelin's appeals would not be heard, and that he also ruled out

portions of the other appeals. She further deposed that he intimidated and influenced the Appeal Committee at and after the hearing of the other appeals.

[28] The application judge observed that Ms. Sunshine had nothing to gain from giving the evidence that she gave. She found Ms. Sunshine's evidence to be credible, and relied on it where it differed from that of the Electoral Officer. She found (at paragraph 35 of her reasons) that the Electoral Officer alone, not the Appeal Committee, decided the appeals. In coming to her conclusion she also took into account, in addition to Ms. Sunshine's evidence, the notice document that the Electoral Officer sent to Kevin Hamelin stating that his appeal would not be heard, and its similarity to the letter that the Electoral Officer sent after the conference call meeting of the Appeal Committee.

[29] The application judge also rejected (at paragraph 37) the argument on behalf of SLCN that the Regulations give the Electoral Officer the authority to screen out appeals, and not put them before the Appeal Committee, based on the Electoral Officer's assessment of whether they set out reasonable and probable grounds. She read the requirement of reasonable and probable grounds in section 12.1 of the Regulations (quoted in paragraph 12 above) as focused on the belief of the person filing the appeal. She concluded (at paragraph 38) that there was a breach of procedural fairness in not having the appeals decided by the Appeal Committee as a whole.

[30] Having reached this conclusion, the application judge (at paragraph 43) found it unnecessary to rule on the further argument that there was a reasonable apprehension of bias arising from the Electoral Officer's deciding an appeal from his own decision. While she noted

that "it would seem obvious to most observers that you should not sit in appeal of your own decision," she added that "[a] concern for the Band may be that their election regulations allow the electoral officer to vote in an appeal which may lend itself to possible bias allegations."

[31] The application judge also dealt with three further grounds argued before her, none of which was a live issue in the hearing before this Court. She held (at paragraphs 47-48) that it was reasonable for the Appeal Committee to have decided to hold the appeal hearing in Edmonton, despite its distance (some 350 km) from SLCN. She also found (at paragraph 49) that the conduct of the appeal meeting did not breach procedural fairness, and determined (at paragraph 51) that she would not address the reasonableness of the decision on the residency requirement appeals given the requirement for redetermination of the appeals that flowed from her finding of a breach of procedural fairness in not having the appeals decided by the Appeal Committee as a whole.

[32] In concluding her reasons, the application judge stated (at paragraph 56) that Mr. Hall "should not be the electoral officer that chairs and votes on the Appeal Committee as to do so would have him sitting in appeal of his own decisions." She otherwise left it to the Appeal Committee to decide the process to be followed in redetermining the appeals, and noted that "[t]he Chief and Council may or may not appoint a new electoral officer." Her judgment included the following in paragraph 1:

> The application is granted with the four appeals previously filed to be determined by the Appeal Committee. The appeals will be heard without electoral officer, Robert Hall's involvement.

III. The issues in this appeal

[33] In my view, the issues that call for this Court's decision are whether the application judge committed reviewable error in

(a) finding that the Electoral Officer alone, not the Appeal Committee, decided the respondents' appeals;

(b) holding that the Regulations do not give the Electoral Officer the authority to screen out an appeal on the basis that it fails to set out reasonable and probable grounds for the appeal;

(c) ordering that the respondents' appeals be heard and determined without the involvement of the current Electoral Officer, Mr. Hall; or

(d) granting a remedy in relation to the appeal by Sophia Hamelin, who was not a party to the application for judicial review.

[34] Several of these issues require consideration of the standard of review that this Court should apply in reviewing the decision of the application judge.

[35] I do not propose to consider a further issue that was raised before us: whether the Appeal Committee has the authority under the Regulations to decide whether a prospective nominee for election to the position of Chief or Councillor owes money to SLCN. This was not an issue considered by the Appeal Committee, because Kevin Hamelin's appeal was not put before the Committee. On the disposition of the appeal that I propose, the Appeal Committee will now have an opportunity to decide the issue if it sees fit to do so. It is appropriate, given the Appeal Committee's role and function, that it, rather than this Court, make this determination at first instance.

IV. Resolution of the issues

A. *Did the application judge commit reviewable error in finding that the Electoral Officer alone, not the Appeal Committee, decided the respondents' appeals?*

[36] This is one of the issues that require consideration of the applicable standard of appellate review. The current law as laid down by the Supreme Court of Canada is that in an appeal from the judgment of a first instance judge in an application for judicial review, the appellate court is to determine whether the application judge selected the correct standard of review and applied it correctly. In practice, this means that the appellate court must step into the shoes of the application judge, and focus on the administrative decision rather than the decision under appeal: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47.

[37] However, this standard of appellate review does not necessarily apply with respect to all of the issues decided in an application for judicial review. Both this Court and other appellate courts have recognized that where the application judge made findings of fact or mixed fact and law based on the consideration of evidence at first instance, rather than on a review of the administrative decision, these findings are reviewable on the standard of palpable and overriding error in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: see, for example, *Austria v. Canada (Citizenship and Immigration)*, 2014 FCA 191, [2015] 3 F.C.R. 346 at paras. 54-56; *Canada (Attorney General) v. Rapiscan Systems, Inc*., 2015 FCA 96 at para. 21; *Prudential Steel Ltd. v. Bell Supply Company*, 2016 FCA 282, [2017] 3 F.C.R. 165 at para. 11; *Northern Regional Health Authority v. Manitoba Human Rights Commission et al.*, 2017 MBCA

98 at paras. 37-39; *Buterman v. St. Albert Roman Catholic Separate School District No. 734*, 2017 ABCA 196 at paras. 23-24.

[38] The palpable and overriding error standard is a demanding and highly deferential standard: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at paras. 38-39. As Stratas J.A. put it in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46,

> "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[39] Applying this deferential standard to original findings of fact made by an application judge on judicial review is warranted because, in making findings of this kind, "reviewing courts are performing the same function as trial judges and, like trial courts, reviewing courts are better placed to make these findings than appellate courts": John M. Evans, "The Role of Appellate Courts in Administrative Law" (2007), 20 Can. J. Admin. L. & Prac. 1 at pp. 30-31.

[40] Here, the finding of the application judge as to who actually decided the election appeals was an original finding of fact, based on evidence adduced by the parties on the issue of procedural fairness after the Appeal Committee's process was complete. In my view, therefore, this finding is reviewable on appeal on the palpable and overriding error standard.

[41] Applying this standard, I see no palpable and overriding error that would call for setting aside the application judge's finding. The palpable and overriding error standard is the same

whether findings are made on affidavit or on *viva voce* evidence: *Housen* at para. 25; *Wakefield Realty Corp. v. Cushman & Wakefield, Inc*., 2004 FCA 415, 329 N.R. 291 at para. 12. On the material before her, and taking into account the further considerations she factored into her finding, the application judge was entitled to prefer the evidence of Ms. Sunshine and to conclude that it was the Electoral Officer who had decided the appeals.

[42] It follows that unless the Regulations give the Electoral Officer authority to decide appeals unilaterally, the manner in which all of the respondents' appeals were decided here was contrary to the Regulations. SLCN submits that the Regulations do give the Electoral Officer that authority, at least to the extent of authorizing the Electoral Officer to decide whether an appeal is brought on reasonable and probable grounds, and if the decision is that it is not, to screen it out and decline to bring it before the Appeal Committee. Whether the application judge erred in holding that the Regulations do not give the Electoral Officer that authority is the next question that I will consider.

B. *Did the application judge commit reviewable error in holding that the Regulations do not give the Electoral Officer the authority to screen out an appeal on the basis that it fails to set out reasonable and probable grounds for the appeal?*

[43] The standard of appellate review applicable to this issue is, in my view, the *Agraira* standard set out above in paragraph 36. Addressing this issue requires us to consider the application judge's assessment of the Electoral Officer's interpretation of his powers under the Regulations – an interpretation embraced by SLCN in argument of this appeal. Reviewing the interpretation of regulations is a typical exercise of the Federal Court's judicial review jurisdiction. Ordinarily, therefore, it would be necessary, under *Agraira*, for this Court to decide

(1) whether the application judge selected the correct standard of review – reasonableness or correctness – and (2) whether she applied it correctly.

[44] This Court has held that the reasonableness standard applies to a First Nation's interpretation of its election regulations: *Johnny v. Adams Lake Indian Band*, 2017 FCA 147 at para. 14. But the application judge appears to have applied the correctness standard (see paragraphs 30 and 36 of her reasons), perhaps because she treated the interpretation issue as bound up in the respondents' arguments directed to the alleged breach of procedural fairness.

[45] However, in this case it is unnecessary to decide whether the application judge selected the correct standard of review, since in my view there is only one reasonable interpretation of the Regulations: *Kinsel v. Canada (Citizenship and Immigration)*, 2014 FCA 126, [2016] 1 F.C.R. 146 at paras. 33-34. That interpretation is the one adopted by the application judge: that the Regulations do not give the Electoral Officer the authority to screen out appeals based on the lack of reasonable and probable grounds.

[46] As the application judge pointed out (at paragraph 30), there is nothing in the Regulations that expressly gives the Electoral Officer this authority. Schedule "A" to the Regulations, which sets out the duties of the Election Officer, does not address the subject.

[47] On the contrary, the appeal process that the Regulations prescribe makes it clear in my view that the Electoral Officer does not have this authority. As noted above in paragraph 13, section 12.3 of the Regulations requires the Electoral Officer, once a notice of appeal is filed, to

promptly notify the affected candidates. Section 12.5 requires the Electoral Officer to convene a meeting of the Appeal Committee within seven days "for the purpose of hearing the appeal." Section 12.7 permits oral submissions. Section 12.8 specifies that it is the Appeal Committee that is to decide on the appeal following the meeting, and sets out the decisions that the Appeal Committee may make. While the Electoral Officer is to chair the meeting and may vote, it is apparent from the Regulations that the Appeal Committee as a whole, not the Electoral Officer unilaterally, is to deal with appeals on their merits. The Regulations simply do not contemplate that appeals may be screened out by the Electoral Officer and not brought to the Appeal Committee for decision.

[48] The "reasonable and probable grounds" requirement in section 12.1 does not require the opposite conclusion. Rather, as the application judge held, it goes to the belief that the Elector must have in bringing an appeal. As the application judge also pointed out (at paragraph 36), in giving the Appeal Committee exclusive decision-making authority, the Regulations reflect the importance of the Appeal Committee to the governance of the First Nation, and the knowledge that its members will have of their community and of what is best for it.

[49] The application judge thus made no reviewable error in holding that the Regulations do not give the Electoral Officer the authority to screen out appeals. While she couched her conclusion in terms of a denial of procedural fairness, what occurred here can equally be described simply as a breach of the Regulations. The consequences are the same on either description.

[50] Given my conclusions on this and the preceding issue, in my view there was no alternative for the application judge but to order that the appeals be redetermined by the Appeal Committee. Only if it was clear that the appeals were entirely without merit, so that there would be no purpose served by sending the appeals back to the Appeal Committee, might it have been appropriate to exercise the discretion not to grant this relief: *Maple Lodge Farms Ltd. v. Canadian Food Inspection* Agency, 2017 FCA 45, 411 D.L.R. (4th) 175 at paras. 51-52. On the record before us, I cannot conclude that the appeals are entirely without merit. I will say no more about the merits of the appeals; if my proposed disposition of the appeal is implemented, that will now be a matter for the Appeal Committee.

C. *Did the application judge commit reviewable error in ordering that the respondents' appeals be heard and determined without the involvement of the current Electoral Officer, Mr. Hall?*

[51] Remedial decisions by a first instance court on judicial review are also subject to appellate review on the standards set out in *Housen*. As this Court explained in *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 at paras. 88-89, these are decisions not about what the administrative decision-maker has decided, but rather about what the court itself should do, having concluded that the administrative decision-maker was wrong to do what it did. A decision about what remedy should be granted ordinarily raises questions of mixed fact and law, on which the first instance court's decision is reviewable only for palpable and overriding error. However, where a remedial decision presents an extricable question of law, the appellate court must decide whether the first instance court's decision on that question was correct.

[52] In my view, the application judge erred on an extricable question of law in granting a remedy in the name of procedural fairness that excluded the Electoral Officer from participating in the Appeal Committee's decisions on the respondents' appeals. The respondents' entitlement to procedural fairness was bounded by the Regulations. The Regulations constitute legislation enacted by SLCN's governing body, and therefore take precedence over common law rights to procedural fairness. The Regulations expressly provide for the participation of the Electoral Officer in the hearing and disposition of appeals.

[53] The Supreme Court of Canada set out the applicable principle in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 at paras. 21-24. There the Court observed that where legislation is silent or ambiguous with respect to affected parties' procedural rights, courts will interpret it in a manner that comports with the principles of natural justice. However, the principles of natural justice (or procedural fairness) may be ousted by express legislative language, which must be given effect unless it is shown to be constitutionally invalid.

[54] This principle reflects what this Court described in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, [2017] F.C.J. No. 601 at para. 82, as the "hierarchy of law." Under the hierarchy of law, a statutory provision takes precedence over subordinate legislation and over the common law. Express procedural choices made by the legislator bind a reviewing court: *Canada (Attorney General) v. Herrera-Morales*, 2017 FCA 163 at para. 66.

[55] Here, the principle dictates that the Regulations, which were adopted by SLCN to govern the conduct of elections for Chief and Councillor, take precedence over the common law duty of procedural fairness, which was the basis for the application judge’s remedial order. The provision in the Regulations that the Electoral Officer is entitled to participate in appeals reflects a decision on the part of SLCN’s governing body as to the appropriate procedure for dealing with election appeals. The remedial order therefore cannot stand to the extent that it is inconsistent with what the Regulations prescribe.

[56] I would accordingly set aside the portion of paragraph 1 of the judgment of the Federal Court that reads, “The appeals will be heard without electoral officer, Robert Hall’s involvement.” If Mr. Hall is the Electoral Officer when the appeals are heard, he is entitled to chair the meeting of the Appeal Committee and to vote. If another individual is then serving in the position of Electoral Officer, he or she will of course have the same entitlement.

D. *Did the application judge commit reviewable error in granting a remedy in relation to the appeal by Sophia Hamelin, who was not a party to the application for judicial review?*

[57] In my view the answer to this question is no. When her judgment is read in the context of her reasons and the record, the application judge did not purport to deal in her judgment with Sophia Hamelin’s appeal.

[58] It is apparent from her reasons that the application judge was aware of Sophia Hamelin’s appeal, and aware that she was not a party and that her appeal was not in issue in the application. At paragraph 10 of her reasons, she refers, after describing the respondents’ appeals, to an

additional appeal by "one other person not relevant to these proceedings." At paragraph 15, she refers to the submissions made at the Appeal Committee hearing by two of the respondents and "a third party." These can only be references to Sophia Hamelin and her appeal.

[59] As for the statement in the judgment that "the four appeals previously filed" should be determined by the Appeal Committee, the logical conclusion is that the application judge intended to refer to the appeals filed by each of Darwin Hamelin and Wilma Goodswimmer, plus the appeal filed by Kevin Hamelin. As she noted at paragraph 9 of her judgment, Kevin Hamelin's appeal was in two parts: it addressed both his own eligibility and the eligibility of other nominees, along with other issues. As the application judge had earlier noted (at paragraph 6), Kevin Hamelin had also expressed his desire to appeal immediately after the nomination meeting, and advised the Electoral Officer then in writing of his desire to appeal. He subsequently filed a separate notice of appeal.

[60] In these circumstances, the reference to "the four appeals" can readily be understood as a reference to all of the appeals advanced by the respondents. The application judge did not in my view purport to grant relief to Sophia Hamelin, and committed no reviewable error in this regard.

V. Proposed disposition

[61] For these reasons, I would allow the appeal only to the extent of setting aside the portion of paragraph 1 of the judgment of the Federal Court that reads, “The appeals will be heard without electoral officer, Robert Hall’s involvement.” I would otherwise dismiss the appeal. Since the respondents were substantially successful, I would grant them their costs.

“J.B. Laskin”
J.A.

“I agree.
David Stratas J.A.”

“I agree.
Wyman W. Webb J.A.”

APPENDIX

THE CUSTOMARY ELECTION REGULATIONS OF THE STURGEON LAKE CREE NATION

…

5. ELECTORAL OFFICER

5.1 Appointment

a) At least thirty six (36) days prior to the date set for an Election, an Electoral Officer shall be appointed by a Band Council Resolution.

b) The Band Council Resolution shall also provide for the appointment of an Alternate Electoral Officer.

5.2 Qualifications

The Electoral Officer shall:

a) Be over 30 years of age;

b) Not be an employee of the Sturgeon Lake Cree Nation, First Nation owned Companies or Western Cree Tribal Council;

c) Not be a member of the Sturgeon Lake Cree Nation or any other First Nation;

d) Provide a clear Criminal Records Check and Child Welfare Check;

e) Sign an Oath of Confidentiality; and

f) Understand these Regulations and be able to administer them.

5.3 Term of Appointment

a) The Electoral Officer's appointment will commence on the date specified in the Band Council Resolution and continue until six (6) months after the expiry of the Election Appeal period described in section 12 of these Regulations.

b) Unless otherwise determined by a Band Council Resolution, the Electoral Officer will serve as the Electoral Officer for any Run-off Elections arising from the Election for Councillors or Election for Chief.

5.4 Remuneration

a) The Band Council Resolution appointing the Electoral Officer shall state the remuneration to be paid to the Electoral Officer as determined by Council, subject to section 5.4(b) of these Regulations.

b) The remuneration shall be fair and reasonable.

5.5 Duties

The general duties and obligations of the Electoral Officer are outlined in Schedule “A” of these Regulations, and may be redefined by the Council from time to time by Band Council Resolution.

…

6.4 Persons Eligible for Nomination

a) Subject to sections 6.4(b) and 16.3 of these Regulations, any Elector is eligible to be nominated for the position of Chief or Councillor provided:

i) that he/she is at least eighteen (18) years of age by Election Day;
ii) that he/she continuously resided on the Sturgeon Lake Reserve for at least twelve (12) months prior to the date of nomination; and
iii) that if he/she owes money to the Band, including rent, a repayment plan has been set up three months prior to Election Day and payments have been maintained continuously.

b) A person may only be nominated for the Office of Chief or Councillor. No one may be nominated for both Offices.

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12 ELECTION APPEALS

12.1 Grounds for Appeal of Election

Within fourteen (14) days of and including the Election Day, or in the event a Councillor or Chief is elected by acclamation, with fourteen (14) consecutive days of and including the day of the Nomination Meeting, any Elector may appeal the results of an Election, By-Election or Run-off Election if, on reasonable and probable grounds, they believe:

a) An error was made in the interpretation or application of the Regulations materially and directly affecting the conduct and outcome of the Nomination Meeting, Election, By-Election or Run-off Election;

b) A Candidate did not meet the eligibility requirements set forth in section 6.4 and 6.6 of these Regulations;

c) A Candidate was guilty of promoting or aiding corrupt Election practices including, but not limited to, bribery, threats and intimidation of Candidates, Electors, the Electoral Officer or Polling Clerk;

d) A person voted who was not eligible to vote; or

e) Any other circumstance or event materially and directly affecting the conduct and outcome of the Nomination Meeting, Election, By-Election or Run-off Election.

12.2 Notice of Appeal

a) An appeal may be made by forwarding a Notice of Appeal in writing to the Electoral Officer at the First Nation office outlining the grounds for the appeal.

b) The Notice of Appeal must be received at the First Nation office within fourteen (14) days from the Election Day or, in the case of an election by acclamation, within fourteen (14) days from the Nomination Meeting giving rise to the appeal.

12.3 Notification to Candidates

The Electoral Officer will promptly notify all Candidates for the Office affected by the Notice of Appeal.

12.4 Election Appeal Committee ("Committee")

The Election Appeal Committee:

a) Shall consist of:

   i) Two (2) Elders from the First Nation;

   ii) Two (2) Electors thirty (30) years of age or older but under the age of fifty five (55); and

   iii) Two (2) Electors eighteen (18) years of age or older but under the age of thirty (30);

b) Members shall not be part of the immediate family of the person or persons who are the subject of the appeal or who are bringing the appeal, or anyone who may be in a conflict of interest, as determined by the remaining members of the committee;

c) Members who have not been disqualified pursuant to section 12.4(b) shall be responsible for replacing any members who have been disqualified pursuant to section 12.4(b);

d) Shall have legal representation;

e) Shall be appointed by Chief and Council immediately following the Nomination Meeting; and

f) Shall have its remuneration set by Chief and Council.

12.5 Meeting of the Election Appeal Committee

Subject to 12.6, within seven (7) days of receiving the Notice of Appeal, the Electoral Officer will convene a meeting of the Committee for the purpose of hearing the appeal. The meeting will be chaired by the Electoral Officer who will also be entitled to vote.

12.6 Notice of Election Appeal Meeting

Notice of the meeting must be posted in the same places as the Notices of Election were posted at least three (3) days prior to the date set for the meeting.

12.7 Submissions

The following individuals, or their respective representatives, are entitled to make written or oral submissions, or both, to the Committee at the meeting:

a) the appellant;

b) the individual in respect of which the Appeal is brought; and

c) other interested parties.

12.8 Decision

Within three (3) days following the meeting, the Committee will promptly make one of the following decisions:

a) Deny the appeal on the basis that the evidence presented did not fully and properly establish the necessary ground for appeal;

b) Uphold the ground for an appeal but allow the results of the Election in question to stand as the infraction did not materially or directly affect the result of the Election; or

c) Uphold the appeal and call for:

i) A new Nomination Meeting, Election, By-Election or Run-off Election;

ii) A new Nomination Meeting, Election, By-Election or Run-off Election for only those offices directly affected; or

iii) A Run-off Election.

12.9 Notification

Forthwith, the Electoral Officer shall notify affected parties of the decision by the Committee in writing.

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SCHEDULE "A"

TO THE CUSTOMARY ELECTION REGULATIONS OF THE STURGEON LAKE CREE NATION

DUTIES OF THE ELECTORAL OFFICER

The Electoral Officer will be responsible for completing and/or performing the following:

1. Preparing a list of Electors;

2. Establishing an Election file for each Election containing copies of all correspondence, memorandums, and other information relevant to the conduct of each Election, By-Election or Run-off Election;

3. Undertaking any activities or responsibilities necessary to conduct the nominations in the manner prescribed in these Regulations;

4. Supervising and ensuring that all Elections, By-Elections or Run-off Elections are conducted in accordance with the Regulations and procedures outlined herein and do all things necessary to ensure proper conduct of any Election, By-election or Run-off Election;

5. At least seven (7) days prior to an Election Day, appointing such Polling Clerks and interpreters as he/she deems necessary for the proper conduct of the Election, By-Election or Run-off Election. Polling clerks must not be Electors, Interpreters must not be members of Sturgeon Lake Cree Nation and must be fluent in the Cree Language;

6. Arranging for the appropriate Polling Booths to be constructed in such a manner as to ensure the secrecy and privacy of the voting procedure; and

7. Any other duties assigned by the Council from time to time relating to the conduct of an Election, By-Election or Run-off Election.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-93-17

(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE McVEIGH DATED FEBRUARY 9, 2017, DOCKET T-615-16)

STYLE OF CAUSE:	STURGEON LAKE CREE NATION v. DARWIN HAMELIN, KEVIN HAMELIN AND WILMA GOODSWIMMER
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	JUNE 13, 2018
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	STRATAS J.A. WEBB J.A.
DATED:	JULY 4, 2018

APPEARANCES:

Mark Freeman	FOR THE APPELLANT
Priscilla Kennedy	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Rath & Company Priddis, Alberta	FOR THE APPELLANT
DLA Piper (Canada) LLP Edmonton, Alberta	FOR THE RESPONDENTS