

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130319

Docket: A-285-12

Citation: 2013 FCA 84

**CORAM: PELLETIER J.A.
GAUTHIER J.A.
MAINVILLE J.A.**

BETWEEN:

CHARLENE JOE

Appellant

and

**LOWER NICOLA INDIAN BAND,
COUNCIL OF ELDERS OF THE LOWER NICOLA BAND,
MARY JUNE COUTLEE, STUART JACKSON
and ROBERT STERLING JR.**

Respondents

Heard at Vancouver, British Columbia, on March 18, 2013.

Judgment delivered at Vancouver, British Columbia, on March 19, 2013.

REASONS FOR JUDGMENT BY:

MAINVILLE J.A.

CONCURRED IN BY:

**PELLETIER J.A.
GAUTHIER J.A.**

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This concerns an appeal from a judgment of O'Keefe J. of the Federal Court (the "judge"), cited as 2011 FC 1220, allowing two consolidated applications for judicial review from an order of an *ad hoc* Lower Nicola Indian Band Elders Council (the "Elders Review Council") acting as an elections review body dealing with complaints concerning the band council elections of the Lower Nicola Indian Band (the "Band") held on October 2, 2010.

[2] The Elders Review Council had found three elected band councillors (Mary June Coutlee, Stuart Jackson and Robert Sterling Jr.) were ineligible to run in the band election. It also declared as elected councillors the appellant Charlene Joe, as well as two other unsuccessful candidates (Marcy Garcia and David Clayton).

[3] The membership of the Elders Review Council included the appellant's mother and several other individuals who had signed one or more of the complaints which that council was required to adjudicate. In these circumstances, the judge correctly concluded that there existed a reasonable apprehension of bias in the Elders Review Council investigation and decision making process. He consequently found that the decision of the Elders Review Council could not stand.

[4] The appellant makes two principal submissions in her appeal to our Court:

(a) the Band could not have initiated the judicial review application since the Band council resolution authorizing the proceeding was made without a proper quorum, was not properly seconded, and did not properly reflect the minutes of the Band council meeting; and

(b) any real or perceived bias on the part of the members of the Elders Review Council was of no consequence since the ineligibility to office of the elected candidates was a foregone conclusion by reason of *res judicata* or issue estoppel following the judgment of Tremblay-Lamer J. in *Basil v. Moses*, 2009 FC 741, [2009] 4 C.N.L.R. 1.

[5] Concerning the appellant's first submission, it is useful to note that pursuant to paragraph 303(1)(a) of the *Federal Courts Rules*, SOR/98-106, the Band was also made a respondent to the judicial review application brought by Mary June Coutlee which also challenged the order of the Elders Review Council on the ground of bias. That application was subsequently consolidated with the application of the Band. Consequently, irrespective of whether the Band had the authority to initiate its own judicial review application, it was an interested party in the other application. Moreover, the record shows, and the judge found, that the Band council had adopted a resolution with the required quorum authorizing its own proceedings against the order of the Elders Review Council. In these circumstances, I cannot conclude that the judge erred in deciding as he did.

[6] The appellant's second submission is also without merit. The judgment of the Federal Court in *Basil v. Moses* found that it was reasonable for an *ad hoc* Elders Investigation Committee of the Band to find that some of the then councillors of the Band (including Mary June Coutlee, the applicant to one of the consolidated judicial review applications at issue here) had breached their fiduciary duties to the Band during the 2004-2007 election term in relation to certain band transactions. The Federal Court also found that in light of the terms of the councillors' oath of office, that breach of fiduciary duties resulted in the deemed resignation from office of the concerned councillors.

[7] All the other matters at issue in the *Basil v. Moses* proceedings, including the effect of the breach of fiduciary duties on the eligibility of the concerned councillors for future band elections,

were referred back by the Federal Court to the Band membership to be determined by way of referendum. No such referendum was held, the Band council apparently being incapable of reaching a consensus on the conduct of the referendum. The issue of the possible ineligibility of the concerned councillors for future elections, including that of the applicant Mary June Coutlee, was consequently not resolved by the judgment of the Federal Court in *Basil v. Moses*.

[8] In light of these facts, the outcome of the decision of the Elders Review Council following the complaints related to the Band election held on October 2, 2010 was not a foregone conclusion. The elected councillors who were the subject of the complaints were entitled to procedural fairness. Since the proceedings of the Elders Review Council were clearly tainted by a reasonable apprehension of bias, the judge in this case committed no reviewable error in setting aside those proceedings and sending the matter back for a new determination

[9] I would thus dismiss this appeal, with costs.

"Robert M. Mainville"

J.A.

"I agree
J.D. Denis Pelletier"

"I agree
Johanne Gauthier"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-285-12

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT (THE HONOURABLE MR. JUSTICE O'KEEFE) DATED, SEPTEMBER 23, 2011, DOCKET NO. T-2128-10

STYLE OF CAUSE:

Charlene Joe v. Lower Nicola
Indian Band and others

PLACE OF HEARING:

Vancouver, British Columbia

DATE OF HEARING:

March 18, 2013

REASONS FOR JUDGMENT BY:

MAINVILLE J.A.

CONCURRED IN BY:

PELLETIER J.A., GAUTHIER J.A.

DATED:

March 19, 2013

APPEARANCES:

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FOR THE APPELLANT

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Mary June Coutlee, Stuart Jackson,
Robert Sterling Jr.

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Mary June Coutlee, Stuart Jackson,
Robert Sterling Jr.