

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20150513**

**Docket: A-364-14**

**Citation: 2015 FCA 122**

**CORAM: GAUTHIER J.A.  
RYER J.A.  
NEAR J.A.**

**BETWEEN:**

**RICHARD HORSEMAN**

**Appellant**

**And**

**DUSTIN TWINN, ELECTORAL OFFICER  
FOR HORSE LAKE FIRST NATION**

**Respondent**

Heard at Vancouver, British Columbia, on May 13, 2015.  
Judgment delivered from the Bench at Vancouver, British Columbia, on May 13, 2015.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**RYER J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Vancouver, British Columbia, on May 13, 2015).**

**RYER J.A.**

[1] This is an appeal from a decision of Justice O'Reilly (the "Judge") of the Federal Court (2014 FC 758), dated July 30, 2014, dismissing an application for judicial review of a decision made by Mr. Dustin Twinn in his capacity as the Electoral Officer for the Horse Lake First Nation ("the Band").

[2] In a registered letter, dated October 11, 2013, Mr. Twinn informed Mr. Horseman that he was ineligible to be a candidate for Band Chief in an election scheduled for October 30, 2013. (the "Election").

[3] On October 16, 2013, Mr. Horseman responded with an application for judicial review of Mr. Twinn's decision to reject his candidature in the Election.

[4] In his application, Mr. Horseman sought:

- a) an interim injunction declaring that his removal from the candidate's List for Chief is invalid and contrary to the *Horse Lake First Nation Election Regulations, 1991* (the "Election Regulations") and restoring him to the Candidate's List in the Election, and
- b) orders for the removal of Mr. Twinn as Electoral Officer, and declaring himself to be a Candidate for Band Chief in the Election.

[5] By Order dated October 24, 2013, Justice Katherine Kane of the Federal Court denied the request for an interim injunction. No appeal was taken from her Order.

[6] The Judge exercised his discretion and declined to entertain the remaining aspects of the application for judicial review on the basis that Mr. Horseman had failed to pursue an adequate alternative remedy under the appeal provisions of the Election Regulations. In so concluding, the Judge found, in paragraph 6 of his reasons, that:

- a) The appeal mechanisms under the Election Regulations "[...] are far more convenient, expeditious, and cost-effective than applying for judicial review in this Court.";
- b) Mr. Horseman was aware of the appeal mechanisms under the Election Regulations;

- c) The appeal remedies available under the Election Regulations were drafted by members of the Band to suit local circumstances; and
- d) The alleged error by Mr. Twinn “[...] related directly to the electoral process, for which the remedy of an appeal was specifically provided [...]”.

[7] This Court has determined that discretionary decisions – such as the decision of a Federal Court judge to decline to entertain an application for judicial review because the applicant had failed to pursue an adequate alternative remedy – are questions of mixed fact and law that should be reviewed within the framework of *Housen v. Nikolaisen*, 2002 SCC 33. (See *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC and Reckitt Benckiser (Canada) Limited*, 2015 FCA 104 and *Imperial Manufacturing Group Inc. and Home Depot of Canada Inc. v. Decor Grates Incorporated*, 2015 FCA 100.) In paragraph 36 of that decision, the Supreme Court of Canada determined that questions of mixed fact and law, in respect of which there are no readily extricable questions of law, may be set aside only if a palpable and overriding error can be established. In the same paragraph, the Court held that questions of law are reviewable on the standard of correctness.

[8] Before this Court, Mr. Horseman asserts that the decision of the Judge is premised upon two errors of law, which we assume, for the purposes of these reasons, to be readily extricable questions of law. Thus, if either of those errors is established, we can intervene and set aside his decision.

[9] Mr. Horseman asserts that the Judge erred in law in concluding that the appeal provisions in sections 57 to 60 of the Election Regulations provided him with *any* remedy – much less an

*adequate* remedy – with respect to Mr. Twinn’s decision to reject his candidature for Band Chief in the Election.

[10] Mr. Horseman argues that he could not appeal Mr. Twinn’s decision under the Election Regulations because at the time of Mr. Twinn’s decision, as well as at the time he filed his application for judicial review, the Band had no Chairperson of the Appeal Board, as defined in section 58 of the Election Regulations. At all relevant times, Mr. Horseman says, the office of the Chairperson of the Appeal Board was vacant. In furtherance of this argument, Mr. Horseman asserts that the appointment of Mr. Craig Neuman, Q.C., to fill that vacancy, was invalid. This was so, according to Mr. Horseman, because the Band Council Resolution, dated October 21, 2013, that authorized Mr. Neuman’s appointment was invalid on the basis that it was passed by the Band Council after the date that the Election was called, when the Band Council was no longer empowered to act.

[11] We are unable to accept these assertions.

[12] We do not agree with Mr. Horseman’s argument that the potential consequences flowing from a dissolution of Parliament are determinative of the validity of the Band Council Resolution appointing Mr. Neuman to the office of Chairperson of the Appeal Board. Rather, the validity of that resolution falls to be determined under the Election Regulations, which have been put in place by the Band.

[13] Section 9 of the Election Regulations reads as follows:

9. Subject to these Regulations, each Councillor shall hold office for a period of approximately FOUR (4) years commencing on the date that he/she is declared to be elected and terminating on the date that he/she is declared to be re-elected or his/her successor is declared to be elected.

[14] Under this provision, the term of office of councillors endures until termination on the date of their re-election or the date of the election of their successors. Thus, the powers of Band Councillors who passed the resolution to appoint Mr. Neuman as Chairperson of the Appeal Board, on October 21, 2013, were not diminished simply because the Election had been called for October 30, 2013. It follows that the appointment of Mr. Neuman to the office of Chairperson of the Appeal Board was not “null and void” as asserted by Mr. Horseman.

[15] Additionally, paragraph 57(b) of the Election Regulations, reproduced below, stipulates that a Notice of Appeal must be filed with the Band Council, and not the Chairperson of the Appeal Board, no later than 30 days after the election in issue. Thus, a vacancy in that office prior to October 30, 2013, the date of the Election, was irrelevant given that a Notice of Appeal could have been filed at any time within 30 days after that date. When Mr. Horseman filed his application for judicial review on October 16, 2013, it would have been impossible for him to know that a vacancy in the office of Chairperson of the Appeal Board would not have been filled by a valid resolution of the Band Council after, but within 30 days of, the date of the Election.

[16] Mr. Horseman asserts that regardless of the disposition of the arguments that we have described above and rejected, the Judge erred in law in concluding that the Election Regulations provided him with an appeal right. Mr. Horseman says that he had no such right because appeal rights under section 57 of the Election Regulations are available only to candidates in the

Election. And, because of Mr. Twinn's October 11<sup>th</sup> decision, he was not a candidate. That provision reads as follows:

57. (a) Any candidate or any Elector who voted may lodge an appeal within THIRTY (30) days of the date of the election on the grounds that:
- (i) a person or persons nominated to be a candidate was ineligible to be a candidate;
  - (ii) there was a violation of these Regulations that may have affected the results of the election;
- (b) Within the time stipulated by sub-section (a), an appellant must file with the Council his/her Notice of Appeal setting out the grounds of Appeal, stipulating the provision or provisions of these Regulations relied on and the facts alleged AND a sworn affidavit verifying such facts and, at the same time, pay the Deposit required by paragraph 57(c). The Notice of Appeal shall also state the address of the appellant to which Notices can be sent by the Appeal Board.
- (c) Concurrently with filing the Notice of Appeal, the appellant will pay the First Nation a Deposit of ONE THOUSAND (\$1,000.00) DOLLARS on account of the costs of the appeal. If the Deposit is not so paid, the Notice of Appeal will be of no effect.
- (d) If the appeal is successful, his/her Deposit will be refunded to the appellant.

[emphasis added]

[17] We cannot accept this assertion having regard to the inclusion in paragraph 57(a) of the Election Regulations, of the words "...or any Elector who voted...". Clearly, the appeal procedure was available to both candidates and Electors who voted in the Election.

[18] The record before the Judge, which includes affidavit evidence of Mr. Horseman, contains no evidence establishing that Mr. Horseman, a former Chief of the Band, was not an Elector, as defined in the Election Regulations, which is essentially a Band member who is older than 18 years of age, or that he did not vote in the Election.

[19] Moreover, having regard to this Court's decision in *Wolfe v. Ermineskin*, 2001 FCA 199, even if it could have been shown that Mr. Horseman had no appeal right under section 57 of the Election Regulations because he did not vote in the Election, the record contains no evidence that he took any steps to see whether another candidate, or an Elector who did vote in the Election, would have been prepared to file a Notice of Appeal containing his concerns and grounds of appeal. Accordingly, we cannot to accept Mr. Horseman's assertion that access to the appeal mechanism under Election Regulations was unavailable to him.

[20] In conclusion, we have not been persuaded that the Judge made the legal errors that Mr. Horseman has asserted. As such, we find no basis to intervene in the Judge's decision to decline to entertain Mr. Horseman's application for judicial review and therefore the appeal will be dismissed with costs.

"C. Michael Ryer"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-364-14

**STYLE OF CAUSE:** RICHARD HORSEMAN v.  
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OFFICER FOR HORSE LAKE  
FIRST NATION

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NEAR J.A.

**DELIVERED FROM THE BENCH BY:** RYER J.A.

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