

Federal Court



Cour fédérale

Date: 20250422

Docket: T-954-23

Citation: 2025 FC 724

Ottawa, Ontario, April 22, 2025

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ROBERT LOUIE

Applicant

and

**LOWER KOOTENAY BAND AND MARION
EUNSON IN HER CAPACITY AS
ELECTORAL OFFICER FOR LOWER
KOOTENAY BAND**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Robert Louie [Applicant] is a member of the Lower Kootenay Band [LKB], a band as defined in the *Indian Act* R.S.C. 1985, c. I-5. The Applicant seeks judicial review of the April 3, 2022 decision [Decision] of an arbitrator [Arbitrator], appointed pursuant to the LKB Custom Election By-Law [Election By-Law]. The Arbitrator dismissed the Applicant's appeal of the

results of the November 24, 2022 general election [Election]. The Arbitrator determined there was no evidence to establish that the Election results were affected.

[2] This application for judicial review is dismissed.

II. Background

[3] The LKB conducts its elections pursuant to its Election By-Law, adopted in 2012. The Election By-Law provides for in-person voting and mail-in balloting. The Respondents submit previous elections and/or referenda made use of telephone voting without objection.

[4] Marion Eunson was appointed as Electoral Officer. On September 25, 2022, in advance of the November 24, 2022 Election, the Electoral Officer posted the specific rules of telephone voting process she intended to use in the Election, seeking community feedback.

[5] Two electors stated they raised concerns, and later filed appeals. The BCR official minutes stated three electors were in favour. Based on this positive feedback received, and previous practice with telephone voting, the Electoral Officer determined the community supported the method overall. On October 21, 2022, the Chief and Council issued a band council resolution [BCR] authorizing telephone voting in the Election.

[6] The Election proceeded with ninety-five ballots cast, forty-six of which were casted via telephone voting. As above, the two electors that previously raised concerns filed appeals, one of which is the Applicant in the present case. The Applicant was not a candidate in the Election.

[7] The Applicant and another appellant submitted their appeals to the LKB on November 30, 2022. Before the Arbitrator, the appellants and LKB acknowledged there is no express authorization for telephone voting in the Election By-Law. LKB argued the method could be established as custom through past practice, but in any event, the telephone voting method did not impact the results of the Election.

III. The Decision

[8] The written reasons of the Arbitrator were released on April 3, 2023, and applied to both appeals. The Arbitrator specified the sections of the Election By-Law pertaining to the appeals as follows:

APPEAL PROVISIONS and TEST TO BE MET UNDER S. 28(1)

13. Both appeals are under S. 28 of the Election By-Law and are set out below.

S. 28(a)(iii) there was **a violation of any provision of these regulations in the conduct of the Election that might have affected the result of the election;** or

S. 28(a)(iv) there was corrupt or fraudulent practice in relation to the election.

REMEDIES AVAILABLE FOR THE ARBITRATOR

14. S.31(k) In case of an Election Appeal under Section 28 the Arbitrator may:

- i. confirm the election of the council member; or
- ii. invalidate the election of the council member.

S.31(m) The election of a Council member shall not be declared invalid by reason only of an **irregularity or non-compliance with the rules set out in these regulations** if it appears to the Arbitrator that the Election was conducted in good faith unless the **non-compliance, irregularity or mistake materially affected the result of the Election.**

S.31(q) The Arbitrator may in his or her discretion order by whom, to whom and in what manner costs shall be paid.

[Arbitrator's emphasis]

[9] The Applicant brought his appeal under s 28(a)(iii), dealing with violations of the regulations that may have affected the results of the Election, and s 28(a)(iv), that there was a corrupt or fraudulent practice in the Election. The Arbitrator noted that the Applicant did not identify the office being appealed and did not seek to overturn the Election results. Instead, the Arbitrator noted the Applicant was seeking a declaration that telephone voting was not permitted and should not be used in future elections.

[10] The Arbitrator noted the proposed amendment to add the telephone voting method to the Election By-Law was voted down in the April 11, 2022 Custom Election Bylaw Ratification vote, and therefore appears to be contrary to the express direction of the LKB membership. However, the Arbitrator declined to make a finding on the issues of the scope of the Electoral Officer's discretion and whether the use of telephone voting was an established custom. Rather, the Arbitrator based their decision on the grounds of appeal raised by the Applicant.

[11] In terms of evidence and allegations of fraud, the Arbitrator found there was nothing submitted beyond assertions. There was no evidence led to show that: telephone voting itself was fraudulent; or that the telephone voting substantively changed the outcome of, or affected the result of, the Election.

[12] The Arbitrator determined that allowing telephone voting was a procedural irregularity, not supported by the Electoral Officer's discretionary powers, nor by past custom. However,

finding the Election was conducted in good faith, with no evidence showing the result of the election was affected, as in *Opitz v Wrzesnewskyj*, 2012 SCC 55 [*Opitz*], the Arbitrator upheld the results of the Election. The Arbitrator found the circumstances of the case most analogous to *Labelle v Chiniki First Nation*, 2022 FC 456 [*Labelle*], and *Taykwa Tagamou First Nation v Linklater*, 2020 FC 220 [*Linklater*].

IV. Issues and Standard of Review

[13] After considering the parties' submissions, the sole issue for determination is whether the Decision is reasonable.

[14] The standard of review is that of reasonableness and that none of the exceptions apply to this matter (*Vavilov* at paras 17, 33, 53). Jurisdiction or legal authority questions no longer attract a correctness review (*Vavilov* at para 65), rather they attract a reasonableness standard. In addition, interpreting provisions of First Nations election codes also attracts a reasonableness standard, requiring a high level of deference (*Gladue v Beaver Lake Cree Nation*, 2021 FC 909 at para 18-22).

V. Analysis

(1) Applicant's Position

[15] The Election By-Law does not allow telephone voting, therefore its use in the Election was illegal. The Election By-Law is explicit on method of voting, is explicit on means of amendment, and the survey of community feedback was not a sufficient basis for amendment

(*Apsassin v Blueberry River First Nations*, 2022 FC 17 at paras 28, 32-33). The analysis should end here.

[16] The BCR permitting telephone voting was not disclosed to the LKB membership prior to the Election. The Applicant only became aware of the BCR on January 13, 2023.

[17] *Opitz* has no application to the case at bar. *Opitz* dealt with irregularities, administrative mistakes, and rights to vote. The matter at hand deals with a lack of jurisdiction to introduce a method of voting, placing the Decision of the Respondents outside the law. *Opitz* would only apply if the Respondents' actions were legal. The Arbitrator's focus on whether the illegal votes "substantially affected the outcome of the election" was a misapprehension of the law.

[18] Legal arguments such as colour of right, the doctrine of necessity, or innocent mistake are no defence and cannot justify the illegal action. The forty-one illegal votes cannot stand. In oral submissions, the Applicant stated there is no verification method in place that would allow scrutiny of the telephone votes to adduce evidence of the impact. The Applicant clarified that since every elected position was based on nearly half of the votes conducted through an illegal telephone voting method, every elected position ought to be overturned.

(2) Respondents' Position

[19] The Election By-Law does not expressly permit telephone voting. Notwithstanding this, there had never been any objections to the use of telephone voting in previous elections or referenda. In advance of the Election, the Electoral Officer posted the specific rules she intended to use and sought community feedback. There were a number of positive comments about the

use of telephone voting as well as the concerns raised by the Applicant and another member. On balance the Electoral Officer determined there was sufficient consensus in the community supporting telephone voting. As a result, the Chief and Council passed a BCR authorizing the use of telephone voting for the Election.

[20] The present application is not a judicial review of the BCR authorizing telephone voting, nor is this an application for judicial review of the Electoral Officer's individual decisions made during the Election. The only issue is whether the Arbitrator's Decision is reasonable. LKB submits that it is.

[21] Sections 28 and 31 of the Election By-Law set out the powers of the Arbitrator to confirm or invalidate an Election if "there was a violation of any provision of these regulations in the conduct of the Election that might have affected the result of the Election". The Applicant's assertions of illegality are not the proper line of inquiry.

[22] The Arbitrator accepted the position of the Applicant, that telephone vote was an irregularity, but found this was not sufficient to invalidate the Election. The appeal was dismissed because the irregularity did not impact the Election results. The Arbitrator's findings were reasonable.

[23] *Opitz* is the leading case for tribunals to evaluate the impact of irregularities on election results. The Arbitrator reasonably highlighted a well-established principle of election law: any breach of an election statute that has no impact on an election's outcome cannot justify setting an election aside. This is reflected in s 28(a)(iii) of the Election By-Law.

[24] The Applicant's argument that the Electoral Officer violated the Election By-Law is outside the jurisdiction of the Arbitrator. The Election By-Law confines the Arbitrator to consider appeals under section 28 and make determinations on the grounds of such appeals. The Arbitrator properly and reasonably exercised that jurisdiction.

[25] The forty-one votes the Applicant refers to as "illegal" misconstrues the Election By-Law and the principles of election law. An election can only be set aside where there is sufficient evidence to conclude the contravention impacted the results of the election. This requirement was not met.

[26] This application for judicial review should be dismissed, with costs awarded to the Respondents.

(3) Conclusion

[27] Since this application concerns the judicial review of the Arbitrator's Decision regarding an appeal of an election held pursuant to a First Nation election law, this Court has jurisdiction over the matter (*Buffalocalf v Nekaneet First Nation*, 2024 FCA 127 at para 22).

[28] As the parties have acknowledged, the Election By-Law makes no provision for the use of a telephone voting system. The parties, however, have different perspectives on how to approach this issue. It is important to note exactly what the parties are submitting on this application for judicial review.

[29] The Applicant submits that the fact that the Election By-Law does not permit telephone voting means that the Electoral Officer lacked jurisdiction to introduce this method of voting and acted above the law. Accordingly, the forty-one votes are illegal and cannot stand.

[30] The Respondents submit that the sole issue is whether the Arbitrator's Decision was reasonable. They argue this is not a judicial review of the issuance of the Chief and Councillors' BCR authorizing telephone voting; nor is it a judicial review of any individual decisions made by the Electoral Officer during the Election.

[31] As noted above, the Arbitrator found "...allowing telephone voting was a procedural irregularity contrary to the LKB By-law and not supported by the discretion afforded to the electoral officer or past custom." This satisfied the first part of section 28 (iii) of the Election By-Law. The Arbitrator also noted the circumstances surrounding the attempts to permit telephone voting. In particular, that the proposed amendment to add telephone voting was voted down April 11, 2022, and that previous public health steps taken in light of COVID-19 could not properly be found to establish telephone voting as a custom.

[32] However, the Arbitrator's Decision turned on the second part of section 28(iii), whether the irregularity might have affected the outcome of the Election. The Arbitrator, relying on *Opitz*, found this requirement was not met due to a lack of evidence that the Election result was materially affected.

[33] The Arbitrator's application of *Opitz* is summarized in para 54 of the Decision, followed by a case review, and summary of findings at paras 64-5:

54. In short then, under the analysis recommended by the majority in *Opitz*, and employed by numerous Canadian courts since, including the cases that follow, an applicant seeking to demonstrate that an irregularity has "affected the result" of an election must establish that someone not entitled to vote, voted, or that someone entitled to vote was improperly prevented from doing so. Clearly, a vote cast by someone not entitled to vote will be considered invalid and discounted. A discounted vote affects the result of the election because it changes the vote count. (*Opitz* at para. 59)

...

64. I find the facts and circumstances that occurred in the 2022 LKB election are analogous to both *Labelle* and *Linklater* set out above. The LKB By-law does not explicitly provide for voting by telephone. If the elector officer's jurisdiction under s. 12(f) of the By-law is considered insufficient to extend for allowing voting by telephone, then her allowance of telephone voting is a procedural breach of the By-law.

65. On the facts in this matter, as in *Linklater*, allowing telephone voting affected the election, since if telephone voting was not allowed, no members would have cast ballots in such a manner. But also, like *Linklater*, there is no evidence that allowing telephone voting changed the substantive outcome of the election. There is no evidence demonstrating that telephone voting decreased or increased the number of voters based on the existence of telephone voting, that without telephone voting, voters would not have voted using an alternative method, that more or fewer voters would have impacted the substantive results, or that voters would have cast their vote for a different candidate if they could not vote by telephone.

[34] The Arbitrator notes ninety-five votes total, forty-six via telephone and five via mail-in ballot. However, for the Arbitrator, there was insufficient evidence submitted by the Applicant that the use of electronic voting materially affected the outcome of the Election. For instance, the Arbitrator noted that the appellants did not identify the offices being appealed.

[35] As for the allegations of fraud and corruption, the Arbitrator noted there was nothing submitted in the appeals beyond assertions.

[36] The Arbitrator's findings on the two grounds of appeal submitted by the Applicant are reasonable. There is no reason to disturb these findings.

[37] While there may be a basis to the Applicant's concern with the election process employed by the Electoral Officer, and the approval of the Chief and Council in the October 21, 2022 BCR, this application for judicial review does not pertain to the BCR.

[38] In my view, this matter is similar to the circumstances in *Anderson v Tait-Reaume*, 2022 FC 1382 [*Anderson*]. In *Anderson*, the Norway House Cree Nation adopted electronic voting due to the ravages of the COVID-19 epidemic, even though the changes to the election processes were not authorized in the election regulations. Justice Henry Brown noted that "the time to litigate the electoral officer and/or the First Nation's decision to proceed with online voting started to run January 22, 2022 when the electoral officer posted her decision and communicated it to the NHCN members. The proper procedure to follow for persons wishing to object would have been to file an application for judicial review within 30 days under section 18.1 and subsection 18.2(2) of the Federal Courts Act. This was not done."

[39] *Anderson* is directly applicable to this matter. The Arbitrator's Decision is the focus of this judicial review. The BCR is not. Here, the application for judicial review of the Arbitrator's April 3, 2023 Decision was commenced on May 4, 2023. If the Applicant wished to commence

an application for judicial review of the Chief and Council's BCR, he was required to do so within 30 days of its issuance, October 21, 2022. This was not done.

VI. Conclusion

[40] The Arbitrator's Decision is reasonable. The Arbitrator engaged with the Applicant's submissions, reasonably determining that the evidence did not give rise to fraud or corruption, and that the results were not materially affected by the use of telephone voting.

VII. Costs

[41] After the conclusion of the hearing the parties submitted an agreement that the successful party would be entitled to a fixed sum of costs in the sum of \$1,500.

JUDGMENT in T-954-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The Respondents are awarded costs in the sum of \$1,500 all inclusive, payable by the Applicant within ninety days of this Order.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-954-23

STYLE OF CAUSE: ROBERT LOUIE v LOWER KOOTENAY BAND AND
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BAND

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: SEPTEMBER 26, 2024

JUDGMENT AND REASONS: FAVEL J.

DATED: APRIL 22, 2025

APPEARANCES:

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EVAN C. DUFFY	FOR THE RESPONDENTS

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