Federal Court  Cour fédérale

Date: 20151123

Docket: T-1640-13

Citation: 2015 FC 1305

Vancouver, British Colombia, November 23, 2015

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

VICTOR COUTLEE

Applicant

and

LOWER NICOLA INDIAN BAND

Respondent

JUDGMENT AND REASONS

[1] The present Application is framed as a challenge of the June 6, 2013 decision of the Electors of the Lower Nicola Indian Band (LNIB) to amend the *Custom Election Rules of the Lower Nicola Indian Band (1998)* (*Rules*) to remove from the governance structure of the LNIB the Council of Elders that officiates over election appeals. However, the central issue for determination is whether, as a required precursor to a decision of the Electors, the procedure required by the *Rules* for amending the *Rules* was followed by the LNIB Chief and Council in office at the time (Council). Indeed, the conclusion on the central issue depends on the answer to

the following question: was the Council's interpretation of the amending provisions of the *Rules*, and the action taken on the interpretation, reasonable. For the reasons which follow, I find that the answer is "yes".

I. The Amending Provisions of the 1998 *Rules*

[2] The amending provisions under consideration are as follows:

> 31. These Rules may be amended by the passing of a Band Council Resolution calling for a special Band Meeting to be held for that purpose no later than 60 days after the date of that resolution, which resolution must be issued forthwith upon a Council being presented with a written petition setting out the proposed amendment along with the signatures of at least 30% of the Electors shown on the most recent Electors list.
>
> 32. A special information meeting of the Band to review the proposed amendments shall be held within 30 days of the issuance of the Band Council Resolution identified in Section 31. Notices of the information meeting shall be posted in at least two conspicuous places and shall set out the proposed amendment.
>
> 33. An amendment proposed pursuant to Section 31 above must be approved by a two-thirds majority of those Electors voting at the special Band meeting convened for that purpose.
>
> [Emphasis added]
>
> (Application Record of the Applicant, pp. 43 – 47)

The interpretation of Section 31 is a key element of the present dispute.

[3] With respect to decisions related to the interpretation of First Nation election regulations, the standard of review is reasonableness (*Testawich v Duncan's First Nation Chief and Council*,

2014 FC 1052 at para 16 citing *Fort McKay First Nation v Orr*, 2012 FCA 269 at paras 10 - 11; *D'Or v St Germain*, 2014 FCA 28 at paras 5 - 6.). Reasonableness is described by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 as follows:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[4] In *York v Lower Nicola Indian Band*, 2013 FCA 26 at paragraphs 5 and 6, Justice Stratas indicated the type of an analysis that is required in determining whether an interpretation of a provision is reasonable:

> This article is the only way in which a Chief can be removed. It is precise and clear. No provisions in the Custom Election Rules allow for a relaxation of the mandatory 30 day notice period set out in article 34(c). Another governing document, the Policy and Procedures of Chief and Councillors (1997), provides for the suspension of a Chief, but not removal.
>
> There is no indication that Council attempted to interpret article 34(c) and discern its requirements and so the reasonableness standard that normally applies to Band interpretations of provisions in election codes (e.g., *Fort McKay First Nation v. Orr*, 2012 FCA 269) does not apply here. Simply put, there is no interpretation to which this Court can defer. Further, decisions concerning the content of procedural fairness are subject to correctness review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at paragraph 100. In my view, on either standard of review, Council's resolution cannot be sustained in light of article 34(c) and the common law of procedural fairness.
>
> [Emphasis added]

Thus, in the present case, the standard of reasonableness requires an evaluation of the actual decision-making which took place at the time the amending provisions were interpreted and acted upon by the Council. Specifically, a critical feature of this approach is to discern the quality of the Council's effort to arrive at a conclusion on the interpretation of Section 31.

A. *The Applicant's Position on Interpretation*

[5] Under the *Rules* prior to the amendment under consideration, the Council of Elders served an appellate function with respect to LNIB elections. The Applicant argues that, because an amendment to the *Rules* to remove the Council of Elders is effectively a constitutional change to the governance structure of the LNIB, wide community support is required before the amending process is engaged. Accordingly, the Applicant argues that the amending provisions require the Council to follow a set of sequential steps in order to so amend the *Rules*:

> A resolution proposed by way of petition from 30 percent of the entire electorate of the LNIB,
>
> which would then be endorsed by way of Band Council Resolution (BCR) to hold an initial special meeting no later than 60 days from the date of the resolution,
>
> with conspicuous notices of a Special Meeting in at least 2 locations, citing the specific amendments proposed,
>
> with a special information meeting after the resolution has been passed within 30 days,
>
> and then a special meeting of the band to adopt those resolutions.
>
> (Written Representations of the Applicant, para 46)

[6] In support of the interpretation of Section 31 advanced, the Applicant places emphasis on the use of the word "which", not being disjunctive and used rather than the word "or", requires the provision to be read as providing only one available means for amending the *Rules*: a petition requiring a resolution to be issued.

B. ***The Respondent's Position on Interpretation***

[7] The Respondent argues a position very different from that taken by the Applicant:

> Applying the plain, ordinary meaning of the words used in the first clause of section 31, […] it is clear that Council may, on its own volition, start the formal amendment process by passing a resolution calling for a special Band Meeting to be held. The only restriction imposed on Council is that the special Band Meeting must be held "no later than 60 days after the date of that resolution". There is no other restriction on Council's power to call the special Band Meeting in the first clause of section 31.
>
> Applying the plain, ordinary meaning to the words used in the second clause of section 31, it is equally clear that Council can be forced to call the special Band Meeting to vote on proposed amendments to the Custom Election Rules if it receives a petition signed by 30% of the Electors. However, grammatically this second clause is a "non-restrictive related clause", one that does not in any way restrict the plenary power of Council under the first clause to call a special Band Meeting on its own volition. Had the intention of the drafters been to restrict Council's power to calling a special Band Meeting only after receiving a petition," they should have used the word "that", instead of the word "which" after the comma; or alternatively, they should have made the first clause expressly "subject to" the second clause.
>
> Legal and Legislative Drafting, Paul Salembier (LexisNexis Canada Inc. 2009), pages 176 – 178; Legal and Legislative Drafting, Paul Salembier (LexisNexis Canada Inc. 2009), pages 260 – 264.
>
> (Respondent's Memorandum of Fact and Law, paras 55 and 56)

[8] In support of the interpretation advanced, Council for the Respondent argues that, pursuant to Section 31, the Council is at liberty to come to its own political decision on the need for an amendment to be made to the *Rules* and, pursuant to Section 32, upon giving due notice of the decision, it is entitled to place the decision before the Electors of the LNIB to gain the approval stated in Section 33.

II. The Process Leading to the Amendment of the *Rules* on June 6, 2013

[9] The following chronology is not in dispute.

[10] An early event in the amending process occurred in 2010 when a full review of the *Rules* was conducted by legal counsel, Mr. Cliff Thorstenson, resulting in a report submitted to the Council at the time dated March 25, 2010 (Respondent's Record (RR), pp. 232 - 243). The report included a number of proposed amendments to the *Rules*, including extending the membership of the Council of Elders to include non-elders (RR, p. 236). The report also included advice to the Council on the procedure to be followed for gaining approval from the Electors.

> Next Steps
>
> Band Council Resolution
>
> Section 31 of the current [1998] Rules states:
>
> […]
>
> Accordingly, a BCR is required to initiate the amendment process. I understand that you are having considerable difficulty achieving quorum at Council meetings. A BCR is not valid in the absence of quorum, and this could leave the amendment process at an impasse.

> This creates a significant problem for the Band. The current requirement for in-person nominations and voting are probably contrary to law. If LNIB runs an election under the letter of the Rules, the results could be challenged in court. If it allows for mail-in nominations and ballots without changing the Rules, the results could be challenged in court.
>
> One option would be for Band Members to obtain the petition described in section 31. This would mean that Council must issue the BCR under section 31, though how you would handle this if a quorum of Council still does not meet is something you would have to discuss with the Band's legal counsel. Also, I understand that 30% of the Band electors is about 300 people, and it might be very difficult to get that many signatures in support of the comprehensive proposed amendments.
>
> If you are able to get the required Band Council Resolution, please be aware of the timetable required to have the amendments in place for the upcoming General Band Election on October 2, 2010. […]
>
> [Emphasis added]
>
> (RR, p. 241)

[11] In the preparation phase of Mr. Thorstenson's report, community meetings were held on November 16, December 7, 2009, and January 4, January 18 and February 1, 2010 to discuss amending the *Rules*. On April 26, 2010, Councillors Joanne Lafferty, Lucinda Seward, and Molly Toodlican reviewed the amendments and advice provided by Mr. Thorstenson, each of whom were re-elected to Council on October 2, 2010 and signed the May 14, 2013 Resolution presently under consideration (RR, p. 12, para 35, and RR, p. 476).

[12] Community meetings to discuss amendments to the Custom Election Rules resumed on January 10, 2013. Community meetings were held thereafter on January 21, February 4, February 18 and March 4, 2013. Following the March 4, 2013 meeting, Mr. Thorstenson drafted

proposed amendments to the *Rules* and a survey of all LNIB members, based on the draft amendments, was conducted by CopperMoon Communications in April, 2013 (RR, pp. 19 – 21, paras 59 – 73).

[13] At the February 4, 2013 Special Meeting, held for the membership of the LNIB to share their ideas about a proposed revision to the *Rules*, the record of the discussions that took place notes that:

> The current rules providing for an [sic] Council of (LNIB) Elders to determine an election appeal has been problematic. It has been sometimes been [sic] hard on the Elder participants and it is difficult to find Elders who are not connected in some way with one or more of the candidates. […] The suggestion is that a single arbitrator with experience with First Nations issues be appointed by the BC Arbitration and Mediation Institute. This will (a) reduce costs, (b) ensure competency, and (c) negate any perception of conflict of interest.
>
> (RR, p. 391, Note 6)

[14] On May 14, 2013, following consideration of the final report on the survey and a final working draft of the proposed amendments, the Council passed the following Resolution:

> BE IT RESOLVED THAT:
>
> A Special Information Meeting of the Lower Nicola Indian Band shall be held on Thursday, the 30th day of May 2013, between the hours of 6pm and 9pm, to review the proposed amendments to the Lower Nicola Indian Band Custom Election Rules.
>
> BE IT FURTHER RESOLVED THAT:
>
> A Special Band Meeting of the Lower Nicola Indian Band shall be held on Thursday, the 6th day of June 2013, between the hours of 6pm and 9pm, to vote on amendments to the Lower Nicola Indian Band Custom Election Rules.

> The current Lower Nicola Indian Band Custom Election Rules and the proposed amendments to them are attached to this Band Council Resolution for reference.
>
> This resolution is supported by the undersigned and passed this 14th day of May, 2013.
>
> (RR, p. 476)

The Resolution was signed by Chief Victor York, and Councillors Lucinda Seward, Molly Toodlican, Mary June Coutlee, Joanne Lafferty, and Robert Sterling.

[15] With respect to compliance with Section 32 of the *Rules*, following the issuance of the Resolution, the Council directed that the Final Working Draft of the proposed amendments be circulated to the membership for discussion at a Special Information Meeting to be held on May 30, 2013. The "Final Working Draft" of the proposed amendments to the *Rules* was delivered house to house on the LNIB reserves and mailed to non-resident members on May 16 and May 17, 2013 (RR, p. 21, para 73). The content of the "Final Working Draft" delivered included: a detailed description of the proposed amendments (RR, pp. 477 – 489); notice of the information meeting to be held on May 30, 2013 and notice of the Special Band Meeting to be held on June 6, 2013 (RR, p. 490); and an explanation of the proposed amendments (RR, pp. 490 – 495).

[16] The Special Information Meeting set for May 30, 2013 took place, as did the June 6, 2013 Special Band Meeting in which the vote was taken to amend the *Rules*.

III. The Reasonableness of the Council's Interpretation and Actions

[17] In my opinion, there is ample evidence that the Council made a concerted effort to interpret Sections 31, 32 and 33 of the *Rules* to discern their requirements. The Council sought and followed the 2010 advice of legal counsel, Mr. Thorstenson, in reaching a decision on the meaning of Section 31. On this point it is important to note that continuity exists on the part of the Council in receiving Mr. Thorstenson's advice in 2010 and following it in passing the Resolution under consideration: Councillors Joanne Lafferty, Lucinda Seward, and Molly Toodlican were engaged in both activities.

[18] In my opinion, Mr. Thorstenson's advice meets the test for reasonableness. The opinion is transparent and intelligible in advising that Section 31 provides a choice to be made by Council with respect to amending the *Rules*: pass a resolution either on your own motion, or pass a resolution upon receiving a petition from the Electors. In following Mr. Thorstenson's advice, the Council chose to pass the Resolution on its own motion. In my opinion, this decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the *Rules*. As a result, I find that the Council's interpretation of Section 31 is reasonable.

[19] I find that the requirements of Section 32 of the *Rules* were clearly understood by the Council and were met. The required Special Information Meeting took place on May 30, 2013. As to the requirement of the physical posting of notices of the meeting in two conspicuous places, I find that this requirement was met and surpassed by the delivery door to door of notice as described in paragraph 15 of these reasons. In my opinion, there can be no question that the

persons who received the delivery were fully informed that the information meeting set for May 30, 2013 and the Band meeting set for June 6, 2013 concerned the removal of the Council of Elders from the *Rules*.

[20] In my opinion, the Council's decision to issue the Resolution was justified. A lengthy consultation process took place with respect to the amendments to be made to the *Rules*, including the removal of the Council of Elders from the governance structure of the LNIB. As evidenced by the present Application, the removal amendment was contentious. In any event, the amendment was passed by the Electors by a two-thirds majority of those Electors voting at the special Band meeting convened for that purpose on June 6, 2013 as required by Section 31 and Section 33 of the *Rules*.

IV. Result

[21] I find that Council's interpretation of the amending provisions of the *Rules*, and the action taken on the interpretation, was reasonable.

V. Costs

[22] As to an award of costs, given that the present Application addressed the content and scope of the authority of the Council of the Lower Nicola Indian Band, the issue arises as to whether the Respondent should make a contribution towards the Applicant's costs.

[23] In *Knebush v. Pheasant Rump Nakota First Nation*, 2014 FC 1247, Justice Mandamin reviews precedents with respect to costs awards in First Nations litigation where a settlement is reached. At paragraph 24, the rule on awarding costs is stated: "in a litigated proceeding, the general rule is costs follow the event, that is, the successful party is awarded costs unless there is reason for [doing] otherwise" [Emphasis added]. As to the existence of such a reason Justice Mandamin makes the following comments at paragraphs 57 to 60:

> Certainty in First Nations governance law is an important benefit for a First Nation community. In this respect, where the result is a better appreciation and commitment to observance [of] the First Nations governance law, it is appropriate to consider whether that [sic] the costs ought to be borne by the First Nation.
>
> First, costs have been awarded against the First Nation where the respondent in fact acts for the First Nation. *Bellegarde v Poitras*, 2009 FC 1212. In that decision, Justice Russell Zinn was satisfied the First Nation had paid for some of the costs of the legal fees of the respondents. He found the Court had jurisdiction to award costs against a non-party (see para 9).
>
> There is also the question of the imbalance between an individual member of a First Nation who brings a judicial review to have a First Nation's laws be observed and the respondents who are the governing body of the First Nation. Such respondents, usually chiefs and councillors, are in a position to have their legal costs reimbursed by the First Nation. If a judicial review application properly addresses a question of the First Nation's law, it seems to me that, on the basis of public interest, individual applicants may be similarly entitled to look to the First Nation for costs [Emphasis added].
>
> I should think a reasonable costs award on a public interest basis against a First Nation that has benefited by having clarity brought to its governance laws avoids any adverse inference of winners and losers. The public interest served would be having the issue resolved in a manner and form that is in keeping with the sensibilities of the First Nation.
>
> [Emphasis added]

[24] In my opinion, the present Application has resolved an important governance question being the interpretation of the *Custom Election Rules of the Lower Nicola Indian Band (1998)*, in particular with respect to Section 31. I find that this resolution is in the interests of the members of the Lower Nicola Indian Band. As a result, I find that it is fair and just for the Respondent to make a payment towards the Applicant's costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present Application is dismissed.

2. I award costs in the lump sum of $10,000 in favour of the Applicant, payable by the Respondent, forthwith.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Andreas E. Kuntze	FOR THE APPLICANT
David C. Rolf	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chouinard & Company Richmond, British Columiba	FOR THE APPLICANT
Parlee McLaws LLP Edmonton, Alberta	FOR THE RESPONDENT