Federal Court  Cour fédérale

Date: 20120731

Docket: T-1964-11

Citation: 2012 FC 949

Ottawa, Ontario, July 31, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

CHIEF VICTOR YORK

Applicant

and

THE LOWER NICOLA INDIAN BAND

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Chief Victor York (the Applicant) in respect of a Lower Nicola Indian Band (LNIB) Council Resolution (the Resolution) passed on November 1, 2011 removing him from office.

[2] The Court is being asked to set aside the decision and restore the Applicant to his position as Chief because the Council's meeting to pass that Resolution was not duly convened under the *Policy and Guidelines for Chief and Councillors* (the Policy and Guidelines) and there was not a

quorum of Council members in good standing. The Applicant also contends that he was denied procedural fairness.

[3] As the Respondent, the LNIB maintains that the Council has the discretionary power to remove a "member of Council", including the Chief. It could convene a valid meeting to pass the Resolution that was justified given the Chief's absence in the conduct of the affairs of the LNIB. He was provided notice of the Council's concerns and chose not to respond.

[4] The submissions of both parties reveal the deep divisions that have plagued this small community for some time. They present completely different pictures of what occurred prior to and during the Council meeting that ultimately removed the Applicant from office. There is conflicting evidence as to the conduct of the Chief and Councillors as well as the applicable LNIB laws and customs. In this context, any disposition risks being perceived as accepting one side's version of events over the other.

[5] As ably summarized by my colleague, Justice François Lemieux, in his interlocutory order regarding this matter, the application is also the latest in a series of disputes regarding the governance of the LNIB to have come before this Court (see *Lower Nicola Indian Band v Toodlican*, 2012 FC 103, [2012] FCJ no 109). Most recently, Justice John O'Keefe found there was a reasonable apprehension of bias regarding an Elders' Council decision that three Councillors were ineligible to run in the October 2010 election. He referred the election appeal back to a new Elders' Council for reconsideration (*Lower Nicola Indian Band v Joe*, 2011 FC 1220, [2011] FCJ no 1498).

This Elders' Council has yet to be constituted and the status of these three Councillors remains an issue in the current dispute.

[6] A vicious circle has emerged whereby an ongoing power struggle leads to paralysis and conflict. The Court's intervention is sought to address these conflicts, but they ultimately remain unresolved. While the Court is prepared to allow this application for the reasons set out below, it does so reluctantly - knowing that much more will need to be done in the future apart from legal proceedings to foster a cooperative governance structure within the LNIB to the benefit of all concerned parties.

I. Relevant Facts

[7] The Applicant was elected to a three year term as the Chief of the LNIB on October 2, 2010. Also elected as Councillors on that same date were Harold Joe, Mary June Coutlee, Joanne Lafferty, Lucinda Seward, Molly Toodlican, Stuart Jackson and Robert Sterling Jr.

[8] Two appeals were filed regarding the election of certain Councillors under the *Custom Election Rules* (CER) by another candidate, Charlene Joe. An Elders' Council subsequently made the decision on December 1, 2010 to remove Councillors Mary June Coutlee, Stuart Jackson and Robert Sterling Jr for ineligibility. This decision was, however, overturned by Justice O'Keefe as referred to above. Thereafter, these three Councillors continued to exercise their functions in the LNIB Council without any decision from a new Elders' Council.

[9] The Applicant's role in the governance of the LNIB following his election is contested by the parties. For example, the Respondent presents evidence that the Applicant refused to call, attend or participate in Council meetings after December 2010 with the exception of a meeting on February 22, 2011 and moved out of his office at the LNIB Administrative Building. By contrast, the Applicant insists he was driven from his office as part of a vicious campaign and his email service and monthly salary were cut during this period despite his continued conduct of business meetings representing the LNIB.

[10] In any event, the Applicant was informed by way of a letter from Council on March 9, 2011 that an investigation was being launched into his actions as a result of concerns raised at a recent Band General Meeting.

[11] Council passed a resolution suspending the Applicant from office for 30 days on September 28, 2011. He was informed of this decision by way of a letter posted the next day. Councillor Harold Joe was similarly suspended at this time.

[12] An additional letter was sent on October 18, 2011. This time the Applicant was informed that LNIB Council would meet on October 25, 2011 to discuss the allegations against him. He was also expected to "attend this meeting to respond to these purported yet evidenced violations." The Applicant did not attend this meeting, although he claims to have been prevented from doing so as a result of undergoing heart surgery. The Respondent suggests that it is not clear when exactly the Applicant was in hospital.

[13] A subsequent meeting was held on November 1, 2011. The Applicant did not attend, but similarly disputed Councillor Harold Joe attempted to do so. Meeting minutes indicate that his presence was "queried upon." He was unable to stay for the in-camera portion of the meeting that decided his fate as well as that of the Applicant.

[14] A Resolution was passed by Council to remove the Applicant from office. It was signed by the six Councillors present; including Mary June Coutlee, Stuart Jackson and Robert Sterling Jr., still awaiting a determination by a new Elders' Council as to their eligibility in the October 2010 election. The Resolution stated:

> In the correspondence we requested you attend a special duly convened meeting on October 25, 2011 to address/respond to the breaches and transgressions listed therein.
>
> Since then and to date, you have not communicated with the Council members to address the seriousness of the contents contained in the October 28, 2011 correspondence. Nor did you attend the specially convened meeting scheduled on October 25, 2011, to address valid and legitimate allegations contained in the October 18, 2011 correspondence.
>
> Therefore based on the evidence in the October 18, 2011 correspondence and deliberations resulting from meetings held on October 25, October 28, and on November 1, 2011, the Council members found that you have repeatedly violated:
>
> i) Your sworn Oath of Office, you signed on October 25, 2010,
> ii) Your fiduciary duty to the Lower Nicola Indian Band,
> iii) Lower Nicola Indian Band's Custom Election Rules – 1998,
> iv) LNIB Chief & Council Policy and Guidelines – December 2010,
> v) Lower Nicola Band of Indians 1987 By-Law #1
> vi) And your role as Trustee of Naik Development Corporation; and
> vii) The interim Court Order of the Honourable Justice Noël – February 8, 2011.
>
> […]

II. Issues

[15] The application raises various issues that can be addressed as follows:

(a) Did the LNIB Council have jurisdiction to remove the Applicant from office on November 1, 2011?

(b) Did the Council afford the Applicant procedural fairness?

(c) Was the Council's Resolution reasonable?

III. Standard of Review

[16] The Council's jurisdiction in this matter in so far as it requires the interpretation of LNIB's laws must be reviewed based on correctness. Once the interpretation is found correct in law, its application to the facts and the exercise of its discretion by the Council warrant the deference afforded by the reasonableness standard (*Martselos v Salt River First Nation #195*, 2008 FCA 221, [2008] FCJ no 1053 at para 32).

[17] Matters of procedural fairness always necessitate review according to correctness (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 42).

IV. Analysis

A. *Jurisdiction*

[18] Council has discretion, based on Article 34 of the CER, to remove a "Member of Council" by way of a resolution for having failed to fulfill his responsibilities for a period of more than 30 days after receiving a written notice to that effect. Since the Council is to be comprised of the Chief and Councillors as identified in section 1, the Chief can appropriately be considered a "Member of Council" subject to this removal provision.

[19] As for whether the Chief or Council can convene a meeting to bring a resolution for such a removal from office, the issue is somewhat more ambiguous. The Chief argues that he has the sole authority to duly convene a meeting of the LNIB Council. This is one of the responsibilities assigned to him under the Policy and Guidelines. By contrast, the Respondent relies on a different 2010 version of the Policy and Guidelines that it claims were recently updated that assign concurrent responsibility to Chief and Council for many aspects that were previously assigned solely to the Chief.

[20] Despite the dispute as to which set of Policy and Guidelines apply, there appears to be at least some concurrency between the Chief's ability to "convene all meetings in accordance with established procedures" under subsection 23(a) and that of Council more broadly to schedule meetings at least 12 times per fiscal year based on section 26. There is nothing in the Policy and

Guidelines to expressly preclude the Council from involvement in convening meetings as customarily scheduled, even if it is a main responsibility of the Chief.

[21] The Applicant also contends that the Council could not pass the Resolution to remove him from office at the meeting because the three Councillors currently subject to an appeal could not form part of the quorum. A quorum is to be five members and, according to the Applicant, those members must also be in "good standing." He insists that by virtue of the election appeal there is a cloud of uncertainty over the three disputed Councillors and they should not be able to participate in Council duties despite the efforts of family and supporters to keep them in their position.

[22] The CER does provide for an election appeal process. There is nothing to suggest that Councillors are not in good standing or cannot constitute quorum until their status is resolved. There are practical reasons for allowing those individuals to remain in office to ensure the day-to-day administration of the LNIB Council continues and to reflect that the corrupt election practices alleged have not formally been established.

[23] The potential problem in this case is the length of time it has taken to resolve this matter, particularly since Justice O'Keefe ordered that a new Elders' Council be convened for reconsideration. The Councillors at issue cannot be allowed to remain in their positions solely to avoid the matter being resolved by a new Elders' Council or make adjustments to the laws that govern such matters. This issue is, however, more appropriately dealt with as a question of procedural fairness and with respect to the reasonableness of the Resolution.

[24] Despite the submissions of both parties regarding the eligibility of the three Councillors based on the existence or non-existence of Article 3(d) relating to indebtedness to the Band in the CER, that matter must be resolved by the newly convened Elders' Council as opposed to a pronouncement in this application for judicial review.

[25] Recognizing some of the uncertainties as to the application of relevant LNIB laws, the Court is prepared to accept that the Council has jurisdiction to schedule a meeting and pass resolutions to remove a Member of Council, including the Chief, from office. Nevertheless, there are still concerns regarding how that jurisdiction was exercised in the present case that will be addressed throughout the remainder of the analysis.

B. *Procedural Fairness*

[26] In terms of the notices sent to the Applicant regarding Council's intentions as to his suspension and removal, he would appear to have been afforded procedural fairness. The Applicant suggests at one point that he did not receive these notices but did acknowledge in cross-examination that he received the letter of October 18, 2011 making him aware of the allegations and the October 25, 2011 meeting.

[27] The Applicant argues that he was prevented from attending that meeting because he was undergoing heart surgery in Kelowna, British Columbia. There is, however, no reason why the Applicant could not have done more to respond in this instance to the charges against him or at least make the Council aware that he would be unavailable at that time. The Applicant's only response in

these matters was to initiate applications for judicial review, in response to the initial suspension and his subsequent removal. As the Respondent argues, the refusal not to attend should not allow an argument that procedural fairness was not respected (see *Martselos v Salt River Nation #195*, 2008 FC 8, [2008] FCJ no 13 at para 23).

[28] Regardless, this does not imply that there were no procedural fairness concerns raised by the Council's conduct. For example, the nature of the original investigation into the Applicant's conduct remains unclear. Also, the attempt by similarly targeted Councillor Harold Joe to attend the subsequent November 1, 2011 meeting was merely "queried upon" as though he was not supposed to be there, despite the measures being taken to remove him from his position. Under cross-examination, Councillor Toodlican was not certain whether the Applicant would have been treated differently or been allowed to attend the critical in-camera portion of the meeting. This raises doubts as to whether the Applicant would truly have been afforded the opportunity to respond to the allegations against him.

[29] Similarly, the involvement of the three Councillors, whose status is outstanding in the election appeal, is also questionable. The Applicant raises a reasonable apprehension of bias argument in this case that the Councillors participated in meetings and signed the Resolution removing him from office, along with previous motions that would change the CER or Policy and Guidelines to their benefit. According to the Applicant, this is particularly disconcerting where there are express LNIB laws governing conflict of interest.

[30] While the Councillors at issue may well be cleared by the Elders' Council in the future, unless that matter is resolved their involvement in Council and participation in the removal of the Applicant from office requires greater scrutiny. Using their positions in any way to improve the outcome of the appeal or avoid a final determination would undermine the legitimacy of the Council as a whole. In these situations where parties are in such conflict, it underlines that where a "Band Council fails to respect the results of an election, or attempts to circumvent the outcome of an election, then democracy is at risk" (*Balfour v Norway House Cree Nation*, 2006 FC 213, [2006] FCJ no 269 at para 9).

[31] Given the notices provided, the Applicant was afforded procedural fairness in a formal sense. In other respects, the Court has some lingering concerns at the speed with which the Council moved to remove the Applicant from office and whether he would have been given an opportunity to properly respond to their allegations.

C. *Reasonableness of Decision*

[32] By far the most significant issue that emerges for this Court is the reasonableness of the Council's decision. It simply does not demonstrate the existence of justification, transparency and intelligibility (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[33] The Respondent submits that the Applicant was provided clear communications as to the allegations raised against him and the evidence on which it was based. However, it is not clear that this was the case.

[34] The Resolution itself merely lists the violations committed by the Applicant including of his oath of office, fiduciary duty, the CER and so on. It never indicates on what basis the Applicant supposedly committed these violations.

[35] The Respondent insists that the October 18, 2011 letter provided the evidentiary basis for Council's decision because it consisted of 24 appendices. That letter does not address the critical issue. It again recites the violations committed by the Applicant but this time guides him to the appendices.

[36] These appendices consist of various communications issued by the Applicant. It is unclear why these communications in and of themselves demonstrate that the Applicant somehow committed the violations. Indeed, the communications show he was attempting to represent the LNIB as Chief during this period. It is understandable that members of the Council may not agree with some of those communications, but it does not mean that they automatically support the conclusion that he committed serious violations. That is a matter of interpretation and requires further explanation.

[37] It is acknowledged that the evidence as to the Applicant's lack of attendance at meetings would be a concern to the Council. This is not, however, what was put forward in the decision removing him from office. He was instead provided with a list of charges without full explanation. It remains unclear what the investigation uncovered and why communications referred to support the conclusion that the Applicant committed the plethora of violations cited.

[38] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 16, the Supreme Court recently stated "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met." In this case, it is not clear on what basis the Council made its decision. The Court is left merely with a list of charges and series of communications. Without more information, the Court is only left to speculate and the decision cannot be reasonable.

V. Conclusion

[39] Given some lingering procedural concerns identified and that the Resolution is unreasonable for failing to address the basis on which the charges were brought against the Chief, this application for judicial review is allowed. The Resolution is quashed and the Chief is restored to his position to continue his term in office.

[40] As a final note, the Court urges the LNIB to convene a new Elders' Council to resolve the appeal regarding the three Councillors at issue and work towards identifying the current CER and Policy and Guidelines that apply to its governance as per the previous orders of this Court by Justices Noël and Justice O'Keefe. Failure to do so will continue to generate uncertainty for the members of the LNIB. It will also perpetuate the ongoing power struggle and further disputes. For the sake of its future, the LNIB should aim to put past differences aside and give those elected the

opportunity to appropriately fulfill their responsibilities in office according to clearly agreed upon standards.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed. The Resolution is quashed and the Chief is restored to his position to continue his term in office.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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