Federal Court  Cour fédérale

Date: 20090916

Docket: T-1516-08

Citation: 2009 FC 919

BETWEEN:

COUNCILLOR ALBERT DEAN LAFOND
AND COUNCILLOR CLIFF TAWPISIN, JR.

Applicants

and

CHIEF GILBERT LEDOUX

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. INTRODUCTION

[1] The events surrounding this case and its procedural history are convoluted. The status of some of the parties has changed significantly but the problem of the approvals voted on by the Muskeg Cree Nation (Band) remains and may be binding on the Band until otherwise determined. For this reason and bearing in mind the criteria in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Court will determine the issue of the legality of a vote conducted authorizing certain actions to be carried out by the Band.

[2] The Court has been advised by counsel that Cliff Tawpisin (one of the original Applicants) is now the Chief of the Band and that Chief Ledoux (who was a Respondent by virtue of his office) no longer holds that office. There has been no motion to change the style of cause but in order to avoid further procedural issues, the Court will not do so.

[3] As the real point of this litigation is to grant relief in the nature of declaration so that the Band is aware of the legal status of the vote and approvals in issue, pursuant to Rule 55, this Court will add the Band as a Third Party so that the style of cause shall read:

Councillor Albert Dean Lafond and
Councillor Cliff Tawpisin, Jr.

Applicants

- and -

Chief Gilbert Ledoux

Respondent

- and -

Muskeg Cree Nation

Third Party

[4] The Court was advised by the McKercher firm, solicitors of record for the Respondent, that they had no instruction from the Band and that they would not appear at the hearing of this judicial review.

[5] The Court notes that the McKercher firm was listed as counsel for Chief Ledoux and that no motion had been made to be removed as solicitors of record pursuant to Rule 125. The law firm had known since at least February that it had no instructions yet it took no further steps regarding removal. As officers of the Court, it was surprising that as reputable a firm as this one, it took no steps for removal and did not have the courtesy to be present or send an agent to address any questions as to status that the Court might have. In any event, the firm remains on the record.

[6] Although there were no opposing arguments presented, the issues are not moot and thus the Court ought to pronounce judgment on the issues raised.

II. BACKGROUND

[7] This matter is a judicial review related to a vote taken by the Band on September 29, 2008. The Applicants alleged that the vote was unfair and conducted without jurisdiction – being contrary to the Community Land Code (Land Code) of the Band. The essence of the relief requested is an order that the vote is quashed and declared improper as contrary to law. The law relied upon is principally the Band's Land Code but s. 35 of the *Constitution Act, 1982*, and various provisions of the *Canadian Charter of Rights and Freedoms* have also been pleaded.

[8] The Band consists of approximately 1,200 members, most of whom live off the reserve. There are two reserves, a rural one near Marcelin, Saskatchewan and an urban one in Saskatoon. The land at issue in this proceeding is that which is in Saskatoon.

[9] The Band is governed by an elected Chief and Council. At the time of the impugned vote, the Respondent was the Chief and the Applicants were council members.

[10] In about 2003, the Band withdrew its land from the *Indian Act*, R.S., 1985, c. I-5 pursuant to the *First Nations Land Management Act*, 1999, c. 24. It then declared the Land Code in 2005 which provides for the approval of various land matters including the leasing and financing of buildings on the reserve.

[11] Under the Land Code there is a Land Advisory Committee of which the Chief is not a member but is entitled to sit in on the Committee's meetings.

[12] At issue in this proceeding are motions approving the following: a) negotiations of a financing package for a wellness centre; b) the lease with TDL Group Corp. (Tim Horton's); and c) a mortgage on the leasehold interest of Stor All Mini Storage.

[13] The Land Code requires approval of these matters at a Community Meeting. Following the Land Advisory Committee's notice to members of the Band and an informational session, a Community Meeting was held on August 27, 2008.

[14] In accordance with the requirements in the Land Code, the vote on the three motions was conducted by a show of hands. The motions were defeated.

[15] Subsequent to the vote, on September 2, 2008, a group consisting of Chief Ledoux, Lester Lafond, a consultant, the Band administrators and possibly others (the precise composition and nomenclature of the group is not clear) had a meeting at which they determined that a new vote had to be conducted using a different method of voting.

[16] The voting method required that each individual's vote was to be conducted in private and witnessed by three non-band members. A voter was required to sit behind a curtain in front of the witnesses, indicate whether they were for or against the motions and to put their initial beside the written entry of their vote made by the witnesses.

[17] The voting, using this new method, was conducted over September 19, 20, 21 and 27, 2008 at Edmonton, Muskeg Cree Nation Gymnasium, Prince Albert and Saskatoon. The three motions, this time, were approved.

[18] The essential issue is whether this voting method, and hence the vote itself, complies with the Land Code.

III. ANALYSIS

[19] While the issue of standard of review was not addressed, the issue is one of law as to compliance with the voting methods approved by the Band. As such, it is a matter to be decided on a standard of correctness. To the extent that the issue engages procedural rights and fairness, these too are governed by a standard of correctness.

[20] The Applicants raised numerous grounds of voting irregularity. These included that more votes were cast than was possible to do given the time taken to vote; that voters were turned away; that there were voting counting irregularities; and that voters were required to respond orally to whether they were for or against the motions. While any one of these allegations might be sufficient to overturn the vote, this matter can be resolved by reference to the Land Code itself and the method of voting set by the group on September 2, 2008.

[21] The Land Code states that certain decisions (such as the ones in issue) must be approved by a majority of members present at a Community Meeting. The Land Code goes on to outline procedures for the meeting, voting processes and notice and informational requirements.

[22] Most specifically, s. 13.7 of the Land Code provides:

> Decisions are to be made by a majority vote of the Eligible Voters present at a Community Meeting, by a show of hands or in such other method determined by Land Law.

[23] The voting method at issue does not comply with s. 13.7. The first vote, which was never challenged, shows how a "show of hands" vote is conducted – in a group setting by the raising of hands indicating the vote. The requirement to go behind a curtain and to face three people to indicate the person's vote (a scene reminiscent of something from the Cromwellian era), even if to do so by raising their hand (although evidence indicated that many people had to respond orally),

bears no resemblance to a “show of hands” voting procedure. The requirement to initial the record of their vote is just further confirmation that the vote was not in accordance with the Land Code.

[24] It is no response to argue that the Land Code contemplated other voting methods. Any method other than the “show of hands” vote would have to be approved specifically in the Land Code, not by some group of individuals even if they were the Land Advisory Committee. There is a method for altering provisions of the Land Code established in the Land Code. The stipulated method was not followed; therefore, the Land Code was not amended to authorize the voting method used in the second vote.

[25] In these circumstances, it is unnecessary to determine the constitutional and *Charter* issues. It is also unnecessary to decide the other claims of voting process irregularities. The vote approving the motions was not lawful and the vote must be quashed.

“Michael L. Phelan”

Judge

Ottawa, Ontario
September 16, 2009

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1516-08
STYLE OF CAUSE:	COUNCILLOR ALBERT DEAN LAFOND et al and CHIEF GILBERT LEDOUX
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APPEARANCES:

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No appearance by counsel	FOR THE RESPONDENT

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