Federal Court Cour fédérale

Date: 20120126

Docket: T-1964-11

Citation: 2012 FC 103

Ottawa, Ontario, January 26, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

CHIEF VICTOR YORK AND
THE LOWER NICOLA INDIAN BAND
AS REPRESENTED BY CHIEF V. YORK
AND COUNCILLOR HAROLD JOE

Applicants

and

"THE COUNCIL" AS REPRESENTED BY
MOLLY TOODLICAN, LUCINDA STEWART,
JOANNE LAFFERTY, JR., MARY JUNE
COUTLEE, STUART JACKSON AND
ROBERT STERLING

Respondents

REASONS FOR ORDER AND ORDER

I. Introduction

[1] Chief Victor York and Councillor Harold Joe were elected to their respective offices for three year terms by the members of The Lower Nicola Indian Band (the First Nation) at a general election held on October 2, 2010 pursuant to its Custom Election Rules. They were removed from their respective offices by a Band Council Resolution at a meeting held on November 1, 2011. The

Chief and Councillor Joe say that meeting was unlawfully held. They filed, on November 30, 2011, a judicial review application in this Court challenging their removal.

[2] In the interim, they seek an interlocutory injunction from this Court, by motion dated December 22, 2011, which would enjoin the holding of a by-election of the First Nation to fill the seats of Chief of the First Nation and that of Councillor Joe pending a decision by this Court on the merits of their case. The by-election is scheduled to take place on Saturday, January 28, 2012.

II. Background

[3] The Lower Nicola First Nation (the First Nation) is a small Band of approximately 1,100 members (800 electors) centered in and around Merritt, BC but with a large component of members living off-reserve. It has been a deeply divided First Nation for approximately ten years now. In the past and at present it has been and is plagued by several court actions which, in the view of this Court, have done nothing to heal those divisions and will continue to exacerbate them despite pleas by judges of this Court that it resolve outstanding disputes themselves assisted by mediation.

[4] That plea was reiterated several times, without success, during the hearing of this interlocutory motion held on January 9, 2012, in Vancouver, at which several members of the First Nation forming part of its leadership were present and again at the videoconference hearing of January 23, 2012.

[5] I summarize below the main legal proceedings before this Court which evidence the paralysis.

1. Basil v The Lower Nicola Indian Band

This judicial review application resulted in a decision of Madam Justice Danièle Tremblay-Lamer reported at 2009 FC 741. It actually reviewed several decisions made by the then Chief and Council, all of which were connected to a decision by an Elders Investigation Committee (the EIC) established by Chief Moses after the 2007 general election. The aim of the EIC was to investigate the receipt of funds by those who held office during the October 2004 to 2007 term. The EIC reported in February 2009. It found each of the investigated councillors (three in number) to be in breach of fiduciary duties. Two of those councillors were Mary June Coutlee and Stuart Jackson. The EIC impeached the three councillors (and others) and declared them ineligible for future election; the EIC also directed that a by-election be held. As will be seen, this issue has yet to be resolved as it must.

[6] It is interesting to note that on March 10, 2009, the applicants in that case, which included councillors Coutlee and Jackson, moved the Court for an interim injunction seeking their reinstatement as councillors until a final determination could be made by the Court. All parties consented to the motion; the impeached councillors were allowed to function as councillors subject to certain conditions.

[7] Ultimately, Justice Tremblay-Lamer quashed the EIC's impeachment based on lack of jurisdiction under the *Custom Election Rules*. However, she found that the EIC had jurisdiction to investigate the councillors' alleged wrongdoing, was entitled to make the findings it did, and was allowed to report its findings to Council. She suggested a referendum of the First Nation be held to resolve the issue of the eligibility of the three Councillors to hold office. This never happened.

2. Chief Moses et al v "The Council Table" – Court File T-209-10

[8] This was a judicial review of a February 23, 2010 Band Council Resolution (the BCR) (passed at a Band Council meeting whose composition included some respondents in the proceeding before me) suspending Chief Moses during an audit of the Band's finances. He challenged that decision in this Court.

[9] On consent, the BCR was declared to be invalid and therefore quashed.

[10] Justice Douglas Campbell, in his order of June 4, 2010, issued a permanent injunction which (1) prohibited the respondents in that case from acting on the BCRs of January 24 and February 23, 2010; (2) prohibited all parties from otherwise suspending or removing Chief Moses or any Councillor from office for the balance of his or her term without leave of the Court; and (3) making decisions in secret for the balance of Council's term of office. His order also set aside the BCR dated January 19, 2010 impeaching Aaron Sam and Yvonne Basil (two of the then respondents).

[11] It is to be noted in that case that amongst the respondents were Aaron Sam and Yvonne Basil, Councillors Joanne Lafferty, Molly Toodlican and Lucinda Seward. Amongst the applicants was Connie Joe.

3. *Basil v Lower Nicola First Nation*, 2009 FC 1039 [Docket: T-1531-09]

[12] In this case, Justice Robert Barnes of the Federal Court was seized of an application for an interim injunction to prevent the holding of a by-election to fill Band Council vacancies that arose

from deemed resignations of several Councillors following an August 13, 2009 Band Council Resolution signed by Chief Moses and two Councillors that purported to declare ineligible several past members of the Band Council from presenting themselves as candidates at the scheduled by-election to be held on October 24, 2009. That decision was subsequently endorsed by the Electoral Officer.

[13] Justice Barnes dismissed the application prohibiting the holding of the by-election. He wrote as follows:

> The only evidence before me of irreparable harm and balance of convenience is that some of the Applicants will lose the opportunity to stand for election and the others will lose the right to vote for them. This evidence must be weighed in the context of a full Band election to be held in 2010 and a right of appeal from the impugned decision to a council of Elders. In *Sweetgrass First Nation v. Gollan,* 2006 FC 778 (CanLII), 2006 FC 778, 294 F.T.R. 119, I made the point that the Court should be cautious about treading unduly into the political affairs of a First Nations band. These Applicants have not exhausted their internal rights to challenge this decision through the council of Elders. While there may be some inconvenience associated with a process of appeal that takes place after the election, it is, nevertheless, a process that should not be usurped collaterally by seeking an interim injunction through the Court. If an appeal is successful the by-election can be re-held. It seems to me that the circumstances of this case are far less compelling than those addressed by Justice Edmond Blanchard in *Gopher v. Saulteaux First Nation*, 2005 FC 481 (CanLII), 2005 FC 481, 138 A.C.W.S. (3d) 989, and where an interim injunction was similarly refused.
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> [Emphasis added]

4. *Lower Nicola Indian Band v Joe et al* [Docket T-2128-11] 2011 FC 147 dated February 8, 2011

[14] This is a decision by Justice Simon Noël dated February 8, 2011 in respect of an application before him for interim relief pending the hearing and determination of a judicial review application of the December 1, 2010 decision of the Lower Nicola Indian Band Elders Council deciding election appeals from the First Nation's October 2, 2010 election at which Chief Victor York and councillor Harold Joe and the Respondents were elected.

[15] The Elders Council decreed that the elections of Mary June Coutlee, Stuart Jackson and Robert Sterling (the elected councillors) vacant on the ground of their being not eligible to run as candidates for office and had appointed Charlene Joe, Marcy Garcia and David Clayton who had been defeated (the named Councillors) retroactively as councillors.

[16] The interim order sought by the First Nation was an order staying or suspending the operation of the decision made by the Elders Council pending the determination of the underlying judicial review application which argued the Elders Council's decision was contrary to the First Nation's *Customs Election Rules*. To preserve the status quo of the October 2, 2010 election, the First Nation also sought an order prohibiting the named Councillors from holding themselves out and acting as Councillors and thereby "declaring" that the other respondents, Mary June Coutlee, Stuart Jackson and Robert Sterling Jr. (the elected Councillors) are or shall continue to sit as Councillors pending the determination of the application. Justice Noël issued an interim order but not the one requested by the First Nation.

[17] Justice Noël noted the First Nation's Band Council made up of the Chief and seven (7) councillors "is in a power struggle" and three (3) Councillors' seats are at play. He noted that four (4) of the seven (7) seats on Council and the Chief's office are not in question. He further noted that the underlying application for judicial review "stems from the political uncertainly that has nearly paralyzed the governance structures of the First Nation." He observed that "what is at play in the present litigation is the balance of power to be exercised at Council meetings. He referred to the Basil decision "as background information on this struggle".

[18] Justice Noël stated the underlying judicial review application was an attack on the Elders Council's decision because it was alleged that there was a reasonable apprehension of bias in its composition in that some of the members of the Elders Council who made the appeals decision were family related to some of the elected Councillors or named Councillors or had sat on the EIC itself.

[19] Examining the three-part conjunctive test which must be established by those seeking the injunction, Justice Noël wrote on the first factor of the existence of a serious issue:

> There is no doubt that serious issues arise from the present litigation. Governance of the LNIB and transparency are at pay. Being divided as the respondents are and also the Band Council, the interest of the Band as a whole is not adequately served with the preservation of the *status quo*. Indeed, the *status quo*, as is indicated in the parties' representations of the facts, is one of tension and uncertainty as to who holds valid office.
>
> The underlying application raises serious issues in regards to, among other issues, the scope of the Elders Council's powers as well as the validity of the October 2, 2010 election results. This aspect of the test is thus clearly met.
>
> [Emphasis added]

[20] On the second factor of irreparable harm, he stated:

> Harm clearly arises from this situation: as Joanne Lafferty's affidavit indicates, at para 45, several important matters of governance and negotiations are to be monitored and decided upon by the LNIB Council. Among these issues are negotiations and activities of a commercial nature that are essential to the interests of the LNIB.
>
> …
>
> Irreparable harm is not qualified as "irreparable" because of the scope or importance of the harm caused. Rather, what must be shown is that, but for the injunctive relief sought, the harm caused could not later be compensated through damages (*White v E.B.F. Manufacturing Ltd*., 2001 FCT 1133 (FC), at para 13). Madam Justice Tremblay-Lamer has noted the particular implications of the loss of elected office and how it differs to the normal employment context in *Gabriel*, above. This was cited approvingly by Mr. Justice Kelen in *Prince*, above, in the context of the dismissal of Councillors, a situation not unlike the case at bar. Justice Kelen noted in all clarity at paragraph 32 that:
>
>> Removal from this office means that the applicants cannot speak out on behalf of those policies for which they were elected, either at Council meetings or within the community at large. Such a situation not only irreparably harms not only the applicants themselves, but also those individuals who elected them as their representatives (…)
>
> However, in this case, the Court distinguishes the scope of Justice Kelen's *dicta*, as without proper nuance, the present Interim application may skew the underlying application. Here, the irreparable harm is not to be interpreted as being personal to any named person or the Council in particular. Rather, it is common to all Parties, but more importantly, it is the members of the LNIB who suffer irreparable harm by having such conflict and uncertainly in their power structures.
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> [Emphasis added]

[21] On the third issue of balance of convenience, he was of the view any order he issued must not favour the interest of one party or another. He stressed again that "an untenable political situation has befallen the Council" and that an equitable solution must be reached and in the case before him the aim is to remedy the potential prejudice which would occur if the validity of any member of Council affected the important decisions to be made by that institution.

[22] Justice Noël stressed that an interim injunction required the Court to exercise its equitable jurisdiction and that in the unique circumstances before him the remedy the Court crafted had to be fair for all concerned. He underlined again the important matters that the Chief and Council had to deal with in the near future and that those matters went beyond the interest of Council members. He repeated again at paragraph 36 of his reasons it was the First Nation "which is being irreparably harmed by the loss of certainty in the authority and legitimacy of Council decisions relating to both its internal members and staff and to its external dealings with governments and business." [Emphasis added] It was that uncertainty and paralysis in the government structures of the First Nation which he tried to remedy.

[23] Justice Noël also noted that the two factions i.e. the elected Councillors and the named Councillors derived their power from legitimate sources (the elected Councillors from the election notwithstanding their eligibility was contested and the named Councillors by appointment of the Elders Council). "They [the elected Councillors] are presumed legitimate until the matter at hand is resolved by way of judicial review." [Emphasis added]

[24] Before setting out his equitable solution he wrote the following at paragraph 32:

> While it remains clear that the Court should thread cautiously in intervening unduly in the political affairs of First Nations (*Sweetgrass First Nation v Gollan*, 2006 FC 778 (CanLII), 2006 FC 778), the remedies sought on an interim basis clearly call for a direct intervention in a difficult political situation. In light of the best interests of LNIB membership pending determination of the application, the Court orders the following on an interim basis. This Order sufficiently mitigates the "balance of convenience" aspect of the tripartite test.
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> [Emphasis added]

[25] That solution consisted in creating a two tier decision making structure. Certain decisions would be taken by the Council as it was elected on October 2, 2010, but with a limited right of participation by the three Councillors appointed by the Elder Council. Those matters are described as day-to-day administrative matters, the provision of essential services, ordinary accounts payable, management of administrative staff, urgent acts to safeguard the rights of the membership, subscribing of insurance and like matters.

[26] In respect of important matters which involved long term interests of the First Nation spelled out at paragraph 35 of his reasons a "Special Council" was created in which decisions are to be made at duly constituted meetings of Chief and Council composed of both the elected and named Councillors.

[27] Justice Noël had this to say about Chief Victor's Office:

> It is clear that Chief York will need to fully assume the leadership responsibilities entrusted to him by the LNIB membership, who undoubtedly expect no less than an effective and proactive resolution of the present issues. The *Lower Nicola Indian Band – Chief and Council Policy and Guidelines* clearly recognize leadership functions

> to the Chief, for example to convene Council, act as spokesperson, act in a supervisory capacity to other Council member's activities, as well as making decisions as necessary for good government.
>
> Respect for Chief York's functions and role is mandatory. He will have to manoeuvre a difficult political situation. However, his Office is not debated or at issue in the present application for judicial review. As such, his authority and functions are not contested, as are the three elected "Councillors" and three named "Councillors" hypothetical functions are. As such, his legitimacy is manifest, but needs to be exercised with proper consideration of the LNIB's membership's interests. These interests go above and beyond the resolution of the present matter. Surely, no one will be satisfied by the present Order and its consequences. However, the Order transcends the Parties wishes in order to fully address the needs of the LNIB membership in terms of good governance and transparency during the resolution of the application.
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> [Emphasis added]

5. *Lower Nicola Indian Band v Joe* [Dockets T-2127-10 and T-2128-10] 2011 FC 1220

[28] It was on September 23, 2011 that Justice John O'Keefe of this Court decided the merits of two underlying judicial review applications which had been consolidated into one. Court file T-2128-10 was the judicial review application which underpinned Justice Noël's interim order.

[29] The decision which Justice O'Keefe had to make was whether the Elders' Council's appeals decision in respect of the challenge to the election of some of the Councillors elected on October 2, 2010 was properly reached at law. He decided that the Elders' Council's appeals decision was not lawful because some of its members who participated in the decision raised a reasonable apprehension of bias they could not fairly decide the appeals on account of family relationship or previous participation in the 2009 EIC.

[30] In the result, Justice O'Keefe quashed the Elders' Council's December 1, 2010 decision which as noted had found three elected Councillors not eligible to stand for election. He referred back to a new Elders' Council for determination the allegations in the election petition that he labelled as the "Joe Appeal". In other words, the eligibility of the three elected Councillors is still to be decided by a new Elders' Council panel selected in accordance to the First Nation's Council Election Rules, i.e. through a draw. In the meantime the contested Councillors have exercised their offices sitting as Councillors.

[31] On October 25, 2011, Justice O'Keefe provided lengthy reasons for his September 23, 2011 judgment. They are reported at 2011 FC 1220. Justice O'Keefe's decision was not appealed to the Federal Court of Appeal. The information which this Court has is that the Elders' Council directed to be formed by Justice O'Keefe has yet to be constituted.

III. Other Federal Court Applications

[32] If this litany of legal proceedings was not sufficient, the list is not complete. Other proceedings have been commenced. I note Court file T-1731-11 filed on October 25, 2011 by Chief Victor referring to a September 28, 2011 meeting of the First Nation's Council at which he was suspended for a period of 30 days.

IV. Is the test for the grant of an interlocutory injunction met

[33] Counsel for the Respondents concedes because of its low threshold, the existence of one or more serious issue to be tried dealing with the proper interpretation of the Band Custom Rules and,

in particular, the ability of the Council to remove the Chief and the validity of the meetings called by the Respondents at which the three contested Councillors participated.

[34] In terms of irreparable harm, counsel for the Respondents argued there was no evidence before me that either Chief York or Councillor Joe would suffer irreparable harm if the by-election was held. In particular, he argued that both individuals could have been nominated and, in any event, this judicial review challenging their removal will continue and if they succeed, will have their remedy of regaining office.

[35] I do not agree for the following reasons that the notion of "irreparable harm" can be narrowly drawn as counsel for the Respondents seeks to do:

a. The substance of the dispute within this First Nation is in fact a continuation of the challenges surrounding the validity of the election of the Councillors whose eligibility to run is still being disputed. Justice Noël in his February 8, 2011 decision wrote eloquently about the nature of the struggle with the First Nation and the irreparable harm which each member of the First Nation will suffer by having such conflict and uncertainty in their power structure, particularly, the tension and uncertainty as to who holds valid office. That ambiguity and detriment will be further exacerbated if the by-election to fill their seats is held and if Chief Victor York and Councillor Joe are successful in their judicial review.

b. Justice Noël's analysis in *Lower Nicola Indian Band v Joe* is directly transferable to the situation facing this Court. See also *Duncan v Behdzi Ahda First Nation* 2002 FCT 581 (*Duncan*); *Francis v Mohawks of Akwesasne Band of Indians* [1993] FCJ No 369 (*Francis*); and *Martselos v Salt River First Nation* #195, [2007] FCJ No 832 (*Martselos)*, particularly at paragraph 15 on the concept of irreparable harm suffered by a Chief when removed.

[36] In my view, the balance of convenience favours the Applicants. As stated in *Duncan* relying on *Francis* the Court must take into account the public interest which must be assessed by considering the need and the best interest of the First Nation (see *Martselos*, Justice Blanchard's paragraphs m to p).

[37] In *Gopher v Saulteaux First Nation*, 2005 FC 481 Justice Edmond Blanchard drew upon *Francis* for the proposition that where the evidence shows that it would be "immeasurably worse" for an election to be held and subsequently be declared invalid than to postpone it, it should be enjoined to maintain the status quo. That is the situation here.

[38] I close by stating that in reaching this decision to suspend the holding of the by-election I am very aware of the charge aimed at Chief Victor that for over a year now he has not called a meeting of Council and has not participated in such meetings. In other words, he has been an absentee Chief. The evidence on this point is conflicting. Chief York was not cross-examined on his affidavit. He paints a somewhat different picture. Moreover, I refused Chief York the ability to reply to the affidavit of Joanne Lafferty who was cross-examined. He should have a full

opportunity to tell his side of the facts when the merits of the judicial review applications are decided.

[39] In the end what troubles this Court is the inability or unwillingness of the parties to compromise as they had done in the past. The case in which Chief Moses was involved is one example. Another is the consent in the *Basil* case to an interim injunction moved by some of the Respondents who were reinstated as Councillors pending decision on the merits. The case before me shows the power struggle is deteriorating for lack of willingness to reach accommodations which is in the highest interest of the First Nation as a whole. The interim injunction now ordered by this Court is by far not an ideal result but, in the circumstances, is the best of a bad situation.

ORDER

THIS COURT ORDERS that:

1. The by-election to fill the Offices of Chief of the First Nation held by Chief York and the Office of Councillor held by Harold Joe is stayed pending the determination of the underlying judicial review application.

2. The removal of Chief Victor York and Councillor Joe is likewise stayed.

3. The hearing of the underlying judicial review application shall be scheduled for Vancouver, B.C. at the earliest possible available date to be determined by the Judicial Administrator (likely in mid-May 2012).

4. The Court will hold a telephone conference call with the parties on Friday, February 3, 2012 to discuss compliance with Rules 306, 307 and 308 of the Federal Courts Rules (SOR/98-106).

5. This proceeding shall be continued as a specially managed proceeding and presided by a judge and/or prothonotary of this Court selected by the Chief Justice.

6. During the interim period, in matters concerning such as the day-to-day administration of the First Nation as spelled out at paragraph 25 of these reasons shall be decided by the Chief and Council, as elected on October 2, 2010 and in accordance with the Lower Nicola Indian Band – Chief and Council Policy and Guidelines. For other decisions, Chief and Council shall operate by consensus.

7. Chief York is entitled to his costs related to his application for the interlocutory injunction.

"François Lemieux"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1964-11
STYLE OF CAUSE:	CHIEF VICTOR YORK ET AL v "THE COUNCIL" ET AL
PLACE OF HEARING:	Vancouver, BC and Ottawa, ON
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REASONS FOR ORDER AND ORDER:	Lemieux J.
DATED:	January 26, 2012

APPEARANCES:

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