

Date: 20090210

Docket: T-230-08

Citation: 2009 FC 133

Toronto, Ontario, February 10, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

NAPOLEON JAMES SEYMOUR

Applicant

and

**ANISHINAABEG OF NAONGASHIING
as represented by CHIEF WESLEY BIG GEORGE,
COUNCILLOR ROBERT HANDORGAN,
and ELECTORAL OFFICER, VALERIE PIZEY**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] On this application Napoleon James Seymour challenges the lawfulness of a decision to remove him as a Band Councillor. He also contends that the process employed by the Respondents to remove him from Council was in breach of the duty of fairness.

I. Background

[2] As a result of a number of allegations of misconduct made against Mr. Seymour the Respondent, Anishinaabeg of Naongashiing, initiated a process under its Custom Election Code

(Code) seeking to remove him as a Band Councillor. The process started with a general meeting of the Band held on December 6, 2007 where the issue of Mr. Seymour's removal from office was discussed among other items of business. It was decided that a special meeting of the Band electorate should be convened to consider Mr. Seymour's removal from Council as authorized by Article 7 of the Code. That special meeting was scheduled for January 12, 2008.

[3] The evidence before me dealing with the Band's notice to the electors of the special meeting is not particularly detailed. The record indicates that the method of notification was in accordance with the past practices of the Band. It is also clear that a written notice of the meeting was posted in the Band Office and that a form of notice was published in several local newspapers. The only evidence I have concerning the date of publication of the newspaper notices is a copy of the advertisement dated January 10, 2008. That notice stated:

**TO ALL MEMBERS OF THE ANISHINAABEG OF
NAONGASHIING
(BIG ISLAND FIRST NATION)**

There will be a meeting held in the Resource Centre at Saug-a-gaw-sing I.R. #1 on Saturday January 12th, 2008 at 1:00 p.m.

This meeting is a follow-up to the meeting held on December 6th, 2007.

And is of great importance to the community. All members are urged to attend.

For further information please contact the office at: 807-488-5602 or toll free 1-888-238-0102.

The affidavit of the Electoral Officer, Valerie Pizey, explains that the lack of information in this notice about the purpose of the meeting was deliberate and intended to protect Mr. Seymour's reputation.

[4] The evidence from Ms. Pizey also establishes that at the date of the special meeting there were 234 qualified Band electors of whom 61 attended the meeting. Mr. Seymour's affidavit deposes that approximately 79% of the Band electors (189) lived off the reserve. It is undisputed that of the 61 electors who attended the special meeting only about 19 lived off the reserve. After some discussion, including representations from Mr. Seymour and his legal counsel, a vote was held. Of the 58 votes cast, 57 were in favour of Mr. Seymour's removal and 1 was against. The results of the vote of the electorate were then confirmed by resolution of the Band Council passed on January 14, 2008 wherein Mr. Seymour's position was declared vacant and a by-election was authorized. On March 13, 2008 a by-election was held to fill the vacant Council position. Mr. Seymour sought re-election but lost to another candidate.

[5] In this proceeding Mr. Seymour challenges the process by which he was removed from office on the basis that the Respondents failed to comply with the requirements of the Code and that the process followed was in breach of the duty of fairness.

II. Issues

- [6] (a) Did the process followed by the Respondents to remove Mr. Seymour from the Band Council comply with the requirements of the Code?
- (b) Did the process followed by the Respondents to remove Mr. Seymour from the Band Council give rise to a breach of the duty of fairness?
- (c) Should the Court grant the relief requested?

III. Analysis

Jurisdiction and Standard of Review

[7] The parties agree, as do I, that this Court has jurisdiction over the issues raised in this proceeding: see *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142, [1993] F.C.J. No. 446 at para. 13. The issue of the lawfulness of the process used to remove Mr. Seymour from office involves a matter of legal interpretation for which the standard of review is correctness. The issue of procedural fairness must also be resolved on the basis of correctness and in accordance with the principles expressed below from *Sparvier*, at para. 47:

While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

In deciding what "principles" should apply to the matter at bar, I have had regard to the Supreme Court of Canada decision in *Lakeside Colony of Hutterian Brethren v. Hofer*, S.C.C. File #

22382, October 29, 1992, where at page 33 of the decision, Gonthier J., for the majority, states:

The content of the principles of natural justice is flexible and depends upon the circumstances in which the question arises. However, the most basic requirements are that of notice, opportunity to make representations, and an unbiased tribunal.

Did the Process Followed by the Respondents to Remove Mr. Seymour from the Band Council Comply with the Requirements of the Code?

[8] Mr. Seymour argues that his removal from office was effected through an unauthorized process and was contrary to the requirements of Article 6 of the Code. Article 6 deals with Council vacancies. In the event of a vacancy on Council or in the position of Chief, Article 7 provides for the holding of a by-election. Those provisions state:

6. Vacancies, Resignation, Recall and Removal

- a. The office of the Chief or a Councillor will become vacant when the person holding such office:
 - i. dies, resigns or is otherwise unwilling to continue to hold their office;
 - ii. is determined by a court of competent jurisdiction to be a mentally incompetent person;
 - iii. is an undischarged bankrupt person;
 - iv. is voted by the Electorate to be removed from their office by a vote of fifty-one (51%) percent of the persons voting in favour of the removal where at least twenty five (25%) percent of the Electorate are present for the vote; or

- v. forfeits the office in accordance with paragraphs 6.b. or 6.c.

 - b. The Chief or a Councillor who during the term of their office is convicted of an indictable offence, except in the pursuit or defense of, or in the exercise of aboriginal and/or treaty rights shall automatically forfeit their office.

 - c. The Chief or a Councillor who during the term of their office is found guilty in any court of a misdemeanour involving misconduct reflecting on the dignity and integrity of Anishinaabeg of Naongashiing, Malfeasance in office, or gross neglect of duty, may be removed from office by a majority vote of the Electorate at a meeting called for that purpose with at least twenty five (25%) percent of the Electorate present at the meeting. Before any vote is referred to the Electorate by Council as provided by this subparagraph, such Councillor shall be given a written statement of the charges and shall be given an opportunity to answer to the Electorate at the meeting called by the Council for that specific purpose. The decision of the Electorate shall be final.

 - d. Any Councillor or the Chief may resign from office by tendering a written resignation to the Council, and upon receipt thereof by the Council it will become effective.
7. By-Elections
- a. In the event of a vacancy in the Office of Chief or a Councillor, and provided that no less than six (6) months remains in the term of the vacated office the remaining Council members will instruct the Electoral Officer to call a By-Election to fill and complete the remaining term of the vacant office within thirty (30) days after the vacancy has taken effect. [...]

[Emphasis added.]

[9] It is clear from the record that the decision to remove Mr. Seymour was made under Article 6(a)(iv) of the Code during the special meeting of the electorate held on January 12, 2008. Mr. Seymour contends, however, that the only basis for removing a Councillor is for cause as described in Articles 6(b) and 6(c). He says that Article 6(a)(iv) does nothing more than recognize, as one type of vacancy among the several listed, the removal of a Councillor under Article 6(c). He says that if Article 6(a)(iv) was intended to provide a stand-alone authority for the removal of a Councillor there would be no purpose served by Article 6(c) which authorizes removal upon a finding of guilt based on proof of misconduct.

[10] Article 6 of the Code is not particularly well drafted but I do agree with counsel for the Respondent that it does provide for two different methods for removing a Councillor from office. Article 6(a)(iv) establishes a form of political recall by the electors which does not require any evidence of misconduct. Article 6(c), on the other hand, provides for the removal of a Councillor for cause and, in that event, stipulates that certain procedural steps must be followed. While one might question why the Band would ever resort to removal of a Councillor under Article 6(c) for cause when a simpler process is available under Article 6(a)(iv), this is a judgment to be exercised in the political realm and not the judicial. My view of this is reinforced by reference to Article 6(a)(v), which distinguishes vacancies resulting from a political recall under Article 6(a)(iv) from vacancies resulting from a forfeiture of office for misconduct under Articles 6(b) and 6(c). Unless these provisions were intended to provide separate processes for removal, Article 6(a)(v) is meaningless.

[11] I am satisfied, as well, that the voting requirements established by Article 7 of the Code were met. There was a sufficient quorum present and the vote overwhelmingly supported Mr. Seymour's removal from office. The evidence concerning the alleged incapacity of three of those attending the special meeting is not compelling and I do not accept it.

Did the Process Followed by the Respondents to Remove Mr. Seymour from the Band Council Give Rise to a Breach of the Duty of Fairness?

[12] Mr. Seymour points out that his reputation and his continuing right to hold office were at stake in the recall process. There is no doubt that these were important interests sufficient to attract a duty of fairness: see *Sparvier*, above. Although Article 6(a)(iv) provides for no specific procedural safeguards around a special meeting of the electorate, Article 9 speaks to the importance of electoral fairness and impartiality. It is also at least implicit in Article 9(i) that electoral notices are required to be effective. The Respondents do not dispute that these basic principles of due process apply to the removal of a Councillor.

[13] On the issue of effective notice I subscribe to the views expressed in the following passage from *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at paras. 81 and 82:

81 Likewise in *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523 (C.A.), the notice indicated only that the conduct of a particular member would be reported on and discussed. The court held that this was insufficient notice to allow for a decision to expel. Sterndale L.J. agreed that it would be sufficient if the notice made it quite clear to everyone what would happen at the meeting, but decided that the notice in question did not even convey in substance what would happen (at p. 531):

I quite agree with what has been said to the effect that one ought not to examine this agenda and these

notices of meetings too particularly and too meticulously; if in substance they convey to the members of the committee what is going to be done, that is sufficient, although one might have thought it might have been better done.

82 As is apparent in *Young*, adequate and timely notice is as important for two reasons. First, it gives the person who may be expelled an opportunity to consider his or her position and either see the error of his or her ways and seek reconciliation, or prepare to defend himself or herself. Second, adequate and timely notice allows the members of the group who are to make the decision an opportunity to ensure that they will be able to attend the meeting and contribute to the discussion, or perhaps to ask for an adjournment if they are unable to attend.

Also see *McLeod Lake Indian Band v. Chingee*, [1998] F.C.J. No. 1185, 165 D.L.R. (4th) 358.

[14] Mr. Seymour complains that the notices of the special meeting of the electorate on January 12, 2008 were profoundly deficient in both content and distribution.

[15] The Respondents say that some latitude or discretion must be allowed for the provision of notice to the electors and that the means adopted by the Electoral Officer were in conformity with past practice and, in practical terms, effective. The Respondents contend that the proof is in the pudding and that approximately 26% of the electorate appeared for the special meeting including 19 off-reserve members.

[16] The evidence before me indicates that there were 189 voting members of the Band living off-reserve. Although one could expect a higher level of absenteeism from members living away

from the reserve, the fact that only about 10% were present for the special meeting suggests that notice to the off-reserve membership may have been inadequate. It also stands to reason that in the relatively brief period between the publication of these notices and the date of the meeting (2 days) the typical informal methods of word getting around among off-reserve members did not have enough time to work.

[17] To my mind effective distribution of notice of a meeting of such importance requires more than a one-time publication in a handful of local newspapers printed two days before the meeting. With a total membership of only 234, effective notice to the electors could be accomplished at minimal expense by mail or by phone. I have no evidence that the Band does not have current contact information for its members and it would be both surprising and of concern if it did not. In fact, Article 13 of the Code describes a process for mail-in balloting for Band elections. That provision requires the Electoral Officer to keep a record of the addresses for all electors to whom a mail-in ballot was sent by mail or otherwise and to provide the ballots to electors no later than 37 days before the election. The provision of a timely notice of a special meeting of electors could have been accomplished by direct mail, and it would also have minimized any concern about possible reputational damage to Mr. Seymour from the broader publication of the allegations made against him in local newspapers.

[18] In this case the deficiencies in the distribution of the notice to off-reserve members were aggravated by the lack of meaningful content they provided. There was nothing in the public notices to indicate the purpose of the special meeting except to say that the meeting was “of great

importance to the community” and was a follow-up to an earlier general meeting of the Band.

While I understand the concern of the Electoral Officer that this vagueness was a deliberate attempt to protect Mr. Seymour’s reputation outside of the Band, this purpose could still have been served with the provision of some meaningful detail. For instance, the notice could have indicated that the purpose of the meeting was to consider the removal of a member of the Band Council.

[19] There is nothing more important in an electoral recall process like this one than the provision of effective notice to the electorate. All of the attendant rights of participation by the affected person and by the electors flow from the provision of sufficient notice. The concern for fairness is all the more critical in the context of a recall provision like the one used here.

Article 6(a)(iv) contains very low thresholds for both a quorum and for the recall vote. The provision of a selective or ineffective form of notice to a meaningful voting constituency could result in a very undemocratic outcome by undermining the will of the majority from an earlier election. Here the newspaper notices were profoundly deficient with respect to the purpose of the meeting and they failed to allow enough time to provide a realistic opportunity for off-reserve members to attend. These deficiencies clearly constitute a breach of the duty of fairness owed to Mr. Seymour.

Should the Court grant the relief requested?

[20] Although I have considerable sympathy for Mr. Seymour, this is one of those few cases where the balancing of interests does not favour the grant of discretionary relief: see *Ominayak v. Lubicon Lake Indian Nation*, 2003 FCT 596, [2003] F.C.J. No. 780 at para. 56 and *Jackson v.*

Piikani Nation, 2008 FC 130, [2008] F.C.J. No. 162 at paras. 29-36. Even though the process that was followed here was deficient, I am mindful that Mr. Seymour received only one vote of support from the 58 votes cast at the meeting of electors. If one-half of the electors of the Band had attended the meeting presumably he would have required all of the votes of the additional members to avoid a recall. This is not determinative but it is a factor to consider. In addition, instead of seeking an interim injunction in this Court to halt the by-election pending the outcome of this judicial review application, Mr. Seymour stood for re-election in the by-election 2 months after his recall and lost to another candidate. He contends now, of course, that he may have won the election had his reputation not been harmed by the recall vote; but the fact remains that he was hedging his bets somewhat by launching this challenge to the recall while at the same time attempting to regain his seat by political means. What he is now asking the Court to do is to set aside the results of the by-election in which he willingly participated and to put him back on Council. While the Court certainly has that authority, it is important to keep in mind that the electors made a choice during the by-election and that the candidate they chose has participated in the work of Council over the last 12 months. The potential disruption and uncertainty that could result from such an untimely interference with the past business of the Band cannot be ignored. Although I was invited by counsel for Mr. Seymour to declare the temporary validity of the intervening business of Council, I am not convinced that such an approach is as simple as it may seem particularly where the interests of third parties may be involved. I would add to this that the next general election will be held later this year and Mr. Seymour will then have an opportunity to defend his record should he decide to stand again for election. These are all matters which bear on the public interest and which weigh

against the granting of the relief requested. In these circumstances, I am not prepared to make a declaration which would effectively set aside the results of the intervening by-election.

IV. Conclusion

[21] This application must be dismissed but having regard to the breach of the duty of fairness which I have identified, I award costs payable by the Respondents to the Applicant in the amount of \$2,500.00 inclusive of disbursements.

JUDGMENT

THIS COURT ADJUDGES that this application is dismissed with costs payable by the Respondents to the Applicant in the amount of \$2,500.00 inclusive of disbursements.

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"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-230-08

STYLE OF CAUSE: Seymour
v.
Anishinaabeg Of Naongashiing, As Represented By
Chief Wesley Big George, Councillor Robert Handorgan,
and Electoral Officer, Valerie Pizey

PLACE OF HEARING: Winnipeg, MB

DATE OF HEARING: January 13, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

DATED: February 10, 2009

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