Federal Court		Cour fédérale

Date: 20100702

Docket: T-2003-09

Citation: 2010 FC 722

OTTAWA, Ontario, July 2, 2010

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

JOHN M. LABOUCAN

Applicant

and

LITTLE RED RIVER CREE NATION #447

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Laboucan is asking the Court to set aside the decision of the Little Red River Cree Nation #447 (LRRCN) Chief and Council removing him from his position of Councillor of the LRRCN.

[2] For the reasons that follow, this application for judicial review is allowed.

Background

[3] LRRCN is a custom band located approximately 10 hours away from Edmonton. The band is composed of approximately 4000 members spread in three different communities, namely John D'Or Prairie, Fox Lake and Garden River. It is governed by the LRRCN Custom Election Code 2003 (Code).

[4] Mr. Laboucan is a member of the band and was elected to the LRRCN's Council for his third term as one of the Councillors for Fox Lake on April 5, 2007. At that time, Gus Loonskin was elected as Chief of the Council. The election was challenged before an Appeal Committee and later in Federal Court, the judicial review was dismissed and the election results were upheld.[1] There is no dispute that Mr. Laboucan was a duly elected Councillor on October 19, 2009.

[5] Mr. Laboucan was appointed Portfolio officer for Public Works and Child Welfare by the Council pursuant to the policy entitled Little Red River Cree Nation Portfolio Officers and Governance Policy Guidelines adopted in a band council resolution on February 8, 2006 (the Policy). Portfolio officers are responsible for setting programs, policies and procedures within their given area of expertise.

[6] The applicant moved to John D'Or Prairie, about 120 km or 6.5 hours from Fox Lake, as a result of marital problems and because he could not find new housing in Fox Lake at the end of February 2008.

[1] *Laboucan v. Loonskin*, 2008 FC 193, 165 A.C.W.S. (3d) 266.

[7] On March 4, 2008, Chief Loonskin filed a complaint with the Royal Canadian Mounted Police alleging that the applicant had uttered threats against Mark Adams in his presence. This resulted in a criminal charge being laid against Mr. Laboucan pursuant to section 264.1(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. After the applicant was charged, Chief Loonskin, supported by 5 other Councillors, attempted to have him suspended from Council. However, he could not get quorum to pass that resolution.

[8] In April 2008, the applicant agreed to take a temporary and voluntary leave of absence with pay until the charges were dealt with. Once on voluntary leave, Mr. Laboucan was no longer provided with notice of the date and place of Council meetings and he did not attend any such meetings.

[9] Mr. Laboucan alleges that, on September 2, 2008, the charge against him was withdrawn and that he entered into a peace bond which required him not to have any contact with Mark Adams. In its memorandum, the respondent appears to dispute that the charge was withdrawn saying that the applicant received an alternative sentence for the criminal charge with a restraining order against John Laboucan. However, in his affidavit, Chief Loonskin categorically states that the charges laid against the applicant had been withdrawn (para. 7).

[10] The applicant then contacted the LRRCN Band office. He advised them that he wanted to return to Council as the charge had been withdrawn and requested information regarding the next

Council meeting. As he received no response, he later contacted the LRRCN Administrator and asked to be invited to a Council meeting. He also talked to four of his fellow Councillors (the Four Councillors) about the withdrawal of the criminal charge and asked them to speak to the Chief and the other Councillors about his return. All of his efforts remained unsuccessful.

[11] In November 2008, the applicant wrote a letter to Council regarding the fact that he was not being informed of Council meetings.[2] He also expressed concerns regarding the fact that he was not involved in the affairs of the band as an elected member of Council ought to be.

[12] On December 1, 2008, Chief Loonskin responded to the applicant's letter.[3] He wrote:

> In your memo, you claim there is concern that you have not been fulfilling your duties and responsibilities as an elected member of Council. **There is nothing to be concerned about, you have no duties and responsibilities; you are still on voluntary leave of absence** (another term of SUSPENSION), with pay, due to criminal charge you received under the Criminal Code of Canada. [Emphasis added]

The letter also stated that, as the Council still considered the matter not to be resolved, the applicant had to provide information to the Council with respect to the status of his criminal charge. While it further directed the applicant to request **in writing** a meeting with Council in order to brief them on the latter issue, it did not provide any explanation regarding the applicant's prior unanswered requests. Concerns regarding the fact that the applicant was now living in John D'Or Prairie were

[2] Exhibit I of the Affidavit of John M. Laboucan.
[3] Exhibit J of the Affidavit of John M. Laboucan.

also expressed in the letter which stated that the issue related to the residency requirement was to be settled by the Nation members.

[13] Thereafter, the applicant continued to make verbal requests to band staff and to the Four Councillors, without success.

[14] On October 19, 2009, Chief Loonskin called a Council meeting in Edmonton in order to "review, discuss and decide on the matters related to Councillor John Laboucan's non-compliance with terms and conditions related to his absence from Council"[4]. The applicant and the Four Councillors were not notified of this meeting. At that time, Chief Loonskin and the other five Councillors agreed to remove Mr. Laboucan from his Portfolio and from Council. Chief Loonskin who had apparently sought legal advice in this respect told the five Councillors present that a formal resolution of the Council was not necessary to effect such removal.

[15] Despite the fact that the Chief then met with the Band's legal counsel after the meeting to draft the removal letter, he did not send the said letter to Mr. Laboucan until October 30, 2009. It stated simply:

> Over one year ago, you agreed with Chief and Council to take steps to remedy issues surrounding your attendance at and participation on the Council for Little Red River Cree Nation. On December 1, 2008, I responded to a memo from you dated November 27, 2008. Since that time, you have failed to participate in or attend any Council Meetings.

[4] Summary of October 19, 2009 meeting; Tab A of certified record.

> **<u>Pursuant to section J.1 of Portfolio Officers and Governance Policy Guidelines</u> you are removed from office for failure to attend any Council Meetings in 2009**.
>
> [Emphasis added; underlined in the original]

[16] Section J.1 of the Policy reads as follows:

> J. Discipline and Removal of Portfolio Officers
>
> 1. Absence without leave
>
> A Portfolio Officer must attend to the regular duties associated with the Portfolio. He must also attend all council meetings, unless excused by Chief and Council in writing. Absence from two Council meetings or two Portfolio meetings in a row, **without leave**, may result in revocation of the Portfolio Officer's authority and any associated compensation or benefits. He or she will remain a Councillor (**unless such authority is also removed**), but will no longer have the duties, privileges or responsibilities of a Portfolio Officer.
>
> [Emphasis added]

[17] His honorarium was stopped on the day he received the letter.

[18] On November 30, 2009, the applicant filed a Notice of Application for judicial review of Council's decision.

<u>Issues</u>

[19] The issues raised by Mr. Laboucan can be summarized as follows:

> 1. Did the LRRCN Chief and Council have jurisdiction to remove the Applicant from his position on Council?
>
> 2. Did the LRRCN Chief and Council breach the rules of natural justice and procedural fairness?

3. If the Court concludes that there was no breach of the rules of natural justice and the decision was within the jurisdiction of the Council, was the decision reasonable?

Analysis

[20] The standards of review applicable here have already been established by this Court, therefore, as was stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 57 (*Dunsmuir*), there is no need in the present case to engage in a full standard of review analysis.

[21] The applicable standard of review to the issue of jurisdiction of Council is that of correctness: *Martselos v. Salt River Nation #195*, 2008 FCA 221, 168 A.C.W.S. (3d) 224 at paras. 28-32 (*Martselos*); *Jackson v. Piikani Nation*, 2008 FC 130, 164 A.C.W.S. (3d) 549 at para. 17. In fact, such question relates to the interpretation of the Code by the Chief and Council of LRRCN. This is a question of law for which no deference is owed.

[22] As for the issue of the breach of procedural fairness, it is now well settled that it is reviewable using the correctness standard of review: *Dunsmuir*, at para. 50.

[23] If the Court concludes that Council had jurisdiction to make the impugned decision and that there was no breach of procedural fairness, the decision to remove the applicant from his position of Councillor would be reviewable against the standard of reasonableness: *Prince v. Sucker Creek First Nation #150A*, 2008 FC 1268, 303 D.L.R. (4th) 438 at para. 22 (*Prince*) conf. 2009 FCA 40, 387 N.R. 173; *Martselos*, at paras. 28-32.

Did the LRRCN Chief and Council have jurisdiction to remove the Applicant from his position on Council?

[24] Mr. Laboucan argues that the Policy only grants authority to the Council to discipline and remove Portfolio Officers, and not Councillors. Also, the Code provides no such authority and no accepted Band custom was established by the respondent. In fact, he argues that the only evidence with respect to LRRCN customs concerning removal of Councillor is that a majority vote of the LRRCN membership is required. Such a vote never took place.

[25] The respondent relies on section J.1 of the Policy particularly the mention in brackets which, according to it, is an implicit grant of authority or at least recognition of the power of the Chief and Council to remove a Councillor. At the hearing, counsel for the respondent pleaded that at common law, municipal councils have the right to remove members of the councils and that this applies to Band Councils which have often been said to have powers akin to those of municipal councils. In its memorandum, the respondent deals with the issue of jurisdiction in a single paragraph which refers to the decision *Kamloops Indian Band v. Gottfriedson*, [1982] 1 C.N.L.R. 60, 21 B.C.L.R. 326 (B.C.S.C.).

[26] When pressed by the Court to explain this position and provide some more relevant authorities, it quickly became apparent (especially when reviewing the doctrine allegedly supporting this view after the hearing) that this position was totally flawed.[5] In fact, it is quite clear that even

[5] Ian MacF Rogers, *The Law of Canadian Municipal Corporations*, 2d ed., looseleaf (Toronto: Carswell Co., 1971) at paras. 35.1-35.3.

municipal council have such jurisdiction only when a relevant statute gives them express authority to do so.

[27] In fact, the removal of a Councillor between elections does not seem to be consistent with the Code which provides that the term of office should not exceed four years, **unless otherwise stated** in the Code (section 5).

[28] The Code provides a complex procedure for amendments. In fact, pursuant to section 23, an amendment is initiated by a written request to Council and if Council decides to consider such amendment, it must then submit the proposed amendment to the members of the Band during a public amendment meeting. Notice of the amendment meeting shall also comply with the requirements of this provision. The Code will be added, repealed or amended if the change is approved by consensus by the members in attendance or, in the absence of consensus, by a majority vote (51 % of eligible voters) held by secret ballot.

[29] As mentioned, in the absence of an express provision in the Code, the respondent had the burden of establishing the existence of an accepted Band custom which could modify or complete the Code: *Samson Indian Band v. Samson Indian Band (Election Appeal Board)*, 2006 FCA 249, 352 N.R. 119.

[30] The respondent filed no evidence in this respect. In fact, the only relevant evidence is contained in the affidavits of the applicant and of Floyd Auger which both state that they are not

aware that any Councillor has ever been removed or disciplined because he or she faced criminal charges or did not reside in the Community he or she represented.[6] They also declare that they are not aware of any LRRCN custom that would allow the Chief and Council to remove a Councillor from office.[7]

[31] In these circumstances, it is evident that the Policy adopted solely by Council cannot provide any legal basis supporting the Council's authority to remove a Councillor from anything other than his or her Portfolio.

[32] Moreover, this is confirmed in the Policy itself. In effect, section A.1 of the Policy provides that "[…] [n]othing in this policy is intended to limit a Council member's ability to carry out the usual responsibilities as an elected representative of the Council on behalf of his or her members in accordance with custom and conventions of the Little Red River Cree Nation". Thus, it may be useful here to repeat the analogy used during the hearing. Portfolio officers are somewhat like the members of Cabinet of a parliamentary government who are appointed as Ministers by the Prime Minister (here the Chief) while a similar analogy can be drawn between the Councillors and Members of Parliament. Evidently, a duly elected Member of Parliament cannot be removed from his seat by the Prime Minister or the Cabinet unless expressly authorized by statute.

[6] Affidavit of John M. Laboucan, paras. 10, 12; Affidavit of Floyd Auger, para. 13.
[7] Affidavit of John M. Laboucan, paras. 6; Affidavit of Floyd Auger, para. 14.

[33] There was much discussion about the right to even remove Mr. Laboucan from his Portfolio in this case. For reasons given under procedural fairness, the Court agrees with the applicant that this was also improperly done.

Did the LRRCN Chief and Council breach the rules of natural justice and procedural fairness?

[34] The applicant submits that the Chief and Council breached the rules of procedural fairness and natural justice by failing to notify him of the meeting and to provide him with a meaningful opportunity to respond. These rights are the most basic requirements which, even without performing the full analysis developed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (*Baker*), would be included in the duty of fairness owed by Council. In any event, he argues that a contextual analysis using the *Baker* factors further confirms that the Chief and Council were in fact subject to "an extremely high standard of fairness".

[35] The Respondent's argument is twofold:

a. The letter dated December 1, 2008 was a sufficient and proper notice to Mr. Laboucan regarding the information he needed to provide to return to Council. It allowed him to make representations (see para. 23 of the respondent's memorandum).

b. Mr. Laboucan could and should have known of the date and place of the Council meetings (see para. 8 of the respondent's memorandum).

[36] It is now settled law that Band Councils must act according to the rule of law.[8] This implies that Council must act in accordance with the duty of procedural fairness when taking decisions which may affect the legal rights or interests of a band member. In *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142, 63 F.T.R. 242 at paras. 47-48, Justice Marshall Rothstein (as he then was) wrote :

> 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**.
>
> [Emphasis added]

[37] In *Desnomie v. Peepeekisis First Nation*, 2007 FC 426, 157 A.C.W.S (3d) 231, Justice Pierre Blais (as he then was) confirmed that even when a decision to remove a Chief or Councillor from office would “per se” be reasonable (para. 34) and the behaviour of the removed member of

[8] *Long Lake Cree Nation v. Canada (Minister of Indian and Northern Affairs)* (1995), 56 A.C.W.S. (3d) 781, [1995] F.C.J. No. 1020 at para. 31 (QL).

the Council (in this case, the Chief) was clearly reprehensible, the decision must be set aside if procedural fairness was not observed. In that case, the Court made it clear that, at a minimum, there was an obligation to provide adequate notice and an opportunity to respond (para 33).

[38] Similarly, in *Prince*, Justice Kelen held that the suspension of Band Councillors, which occurred at a secret meeting held three and a half hours away from the community, without due notice to the concerned councillors and without providing them any opportunity to respond to the allegations raised against them, was "entirely lacking procedural fairness" (para 42).

[39] In *Balfour v. Norway House Cree Nation*, 2006 FC 213, [2006] 4 F.C.R. 404, a Band councillor's honorarium was changed from $60,000 to $5,000 annually and his responsibilities as a Band councillor were reduced without prior notice. The Court held that the band had breached its duties of procedural fairness as it did not provide valid notice and reasons for the modification in the applicant's honorarium and responsibilities and did not provide him with an opportunity to respond to the actions taken against him.

[40] That said, did the December 1 letter provide Mr. Laboucan with such an opportunity and ought he have known of the meeting held on October 19, 2009?

[41] The meeting of October 19 was a "secret meeting" – as mentioned, not only was Mr. Laboucan not notified, the Four Councillors were not advised of it either. It is disingenuous to

even argue that Councillors (including Mr. Laboucan) ought to inquire as to when and where meetings of the Council will take place like any member of the public.

[42] Moreover, there is no evidence that the public was actually invited to such meetings or that an advance schedule or notice of those meetings was posted. This is especially so when one is dealing with a "special meeting" with only one item on the agenda – the removal of Mr. Laboucan. One also wonders why this meeting was held 10 hours away from the community so that in order to attend one would have to know well in advance of its location.[9] Also, it is not even clear when the date of the October meeting was set by Chief Loonskin.

[43] Also, the December 1, 2008 letter appears to be in direct contradiction with what happened on October 19 and the reasons for removal found in the October 30 letter. Mr. Laboucan was removed because he "failed to participate in or attend any Council Meetings". In his December 1, 2008 letter, Chief Loonskin in fact reassured the applicant that he did not need to worry about the fact that he could not attend Council meetings or fulfill his duties because he was still on voluntary leave (suspension).[10] There was no deadline fixed for settling the issue of the criminal charge.

[44] The respondent focused on the fact that Mr. Laboucan failed to properly clarify the outcome of the charges with Council for 10 months. There is no need for the Court to decide whether Council could insist that representations in that respect be made in writing especially considering that, in his affidavit, the Chief confirmed that he was well-aware that the charges laid against the

[9] The Court notes that in 2008 the meetings appear to usually have been held in High Level – Forestry.
[10] Nothing herein is meant to imply that the Court agrees or acknowledges the right of Council to suspend a Councillor.

applicant had been withdrawn. This was not the basis for the removal and regardless of whether there was a good basis to remove the applicant from his Portfolio, he was still entitled to procedural fairness. There was an egregious breach of Mr. Laboucan's right.

[45] Before concluding, it is worth mentioning that the Policy on which the respondent relies for its authority to remove the applicant as Councillor and Portfolio officer is unequivocal as to the need to respect principles of procedural fairness.

[46] In section B.2 of the Policy, Portfolio officers are said to hold offices "at the pleasure of Chief and Council" and "may be removed from office, assigned to another Portfolio or subject to other disciplinary measures, all at the discretion of Chief and Council **acting in good faith according to traditional teaching and having first adhered to the rules of natural justice and procedural fairness**" [Emphasis added].

[47] Similarly, when a Portfolio officer is to be disciplined or removed from office, such duties must also be observed. Section J.2 of the Policy provides:

> Breach of any part of this Policy is cause for revocation of a Portfolio Officer's authority, at the absolute discretion of Chief and Council. Remember: Portfolio Officers are not employees, and are removable at the discretion of Chief and Council **upon notice in accordance with the traditional teachings of procedural fairness and rules of natural justice**.
> [Emphasis added]

[48] Procedural fairness is a term defined as follows in the Policy[11]:

> "Procedural Fairness": Whenever significant consequences may flow from a decision and which consequences may impact those whose livelihood, reputation, health and future are subject to the process. Rules of Procedural Fairness must be met which includes consideration or attention to: […]
>
> (5) Rules of natural justice
> a) Duty to act fairly
> b) Duty to hear the other side
>
> (6) Right of notice and hearing

The expression "Rules of natural justice" is in turn defined as including, among other things, the following rights and duties: duty to act fairly, duty to hear the other side, right to notice and hearing, right of knowing the case to be met, right of hearing before the decision-maker and providing reasons for the decision.

[49] There is absolutely no doubt that the duty of the Chief and Council to act fairly was breached even in respect of the removal of Mr. Laboucan's Portfolio.

Reasonableness of the decision

[50] As noted earlier, the respondent's argument focused, in its memorandum, on the reasonableness of the decision to remove Mr. Laboucan from his functions.

[51] While there is no need to discuss the reasonableness of the Council's decision considering the conclusions reached in respect of the first and second issues, it is useful to make a few

[11] Section A.4 of the Policy.

comments. First, the Court agrees with the applicant that the December 1, 2008 letter could be construed as a confirmation in writing that the Chief authorized (granted leave) the applicant not to attend meetings (J.1 of the Policy).

[52] Second, most of the grounds mentioned by the respondent are not invoked in the removal letter sent to the applicant on October 30, 2009.

[53] Finally, in the absence of a proven accepted Band custom, the Code does not appear to provide that a Councillor can be removed if he moves after his election. Pursuant to section 6 of the Code, to be eligible for office (Councillor or Chief), one only needs to be an “elector”, not disqualified and to be nominated by a person eligible to nominate. The term “elector” is in turn defined as “a person who is registered on the Little Red River Cree Nation membership list and is the full age of eighteen (18) years” (section 1). As mentioned, the Code can only be amended in accordance with the procedure set out in section 23.

[54] In light of the foregoing, the decision of the LRRCN dated October 19, 2009 is declared null and of no effect whatsoever. The Court has no jurisdiction to award damages. Having discussed the matter during the hearing, the Court is satisfied that the respondent understands that as the decision is quashed, the applicant should be put in the same position he would have been back in October 2009.

Costs

[55] The applicant sought solicitor client costs or alternatively a lump sum of $10,000. This amount has been granted in similar proceedings: *Prince* at para. 63 and in *Dene Tha' First Nation v. Didzena***,** 2005 FC 1292, 142 A.C.W.S. (3d) 709 at para. 32 (*Dene Tha' First Nation*).

[56] In *Prince*, the Court had expressed in its reasons its surprise that the Nation band pursued litigation which was clearly without merit and where the impugned decision of the band was obviously contrary to the Custom Election Code (paras. 3-4, 58, 62). These same comments would apply here. Counsel for the respondent, who was also acting for one of the respondents in *Prince*, noted that, in that case, there were two applications heard at the same time. However, she acknowledged that in *Dene Tha' First Nation*, which dealt with a single application, the same amount was granted.

[57] Having considered all the circumstances, the Court is satisfied that, although this lump sum will clearly not compensate fully the applicant for his legal costs, it is sufficient and appropriate here.

ORDER

THIS COURT ORDERS THAT:

1. The decision is quashed; and

2. The applicant is entitled to costs fixed at a lump sum of $10,000 (all inclusive).

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2003-09
STYLE OF CAUSE:	JOHN M. LABOUCAN v. LITTLE RED RIVER CREE NATION #447
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APPEARANCES:

Janet L. Hutchison	FOR THE APPLICANT
Priscilla Kennedy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chamberlain Hutchison Edmonton, Alberta	FOR THE APPLICANT
Davis LLP Edmonton, Alberta	FOR THE RESPONDENT