Federal Court  Cour fédérale

Date: 20140429

Docket: T-1922-12

Citation: 2014 FC 396

Ottawa, Ontario, April 29, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

THEODORE TSETTA

Applicant

and

THE BAND COUNCIL OF THE YELLOWKNIVES DENE FIRST NATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a resolution adopted by the Yellowknives Dene First Nation (YKDFN) Band Council on June 8, 2012, whereby it was decided that Chief Theodore Tsetta (the Applicant) was not to represent the views of the Band Council, that his pay and allowance be suspended, and that he was denied access to offices, equipment, email and phones.

[2] The reason for these sanctions was alleged to have been a letter sent by Chief Tsetta to the Prime Minister and the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) without the approval of the Band Council. The letter highlighted, among other things, mishandling of money by the Band Council.

[3] For the reasons that follow, the Court has come to the conclusion that this application for judicial review ought to be granted, and that the impugned resolution must be quashed.

I. Background

[4] The YKDFN is an Indian band within the meaning of the *Indian Act*, RSC 1985, c I-5, as amended. The two primary communities of the YKDFN are the Dettah and the Ndilo and they are located in close proximity to the city of Yellowknife, Northwest Territories. The YKDFN is governed by a Band Council which consists of two Chiefs elected for staggered four year terms, and ten Band Councillors, five of whom represent the Ndilo and five others represent the Dettah. The elections of Chiefs and Councillors are conducted in accordance with the YKDFN Election Policy dated April 27, 2009.

[5] Chief Tsetta was elected as the Ndilo Chief of YKDFN in June 2009 for a four year term. His term expired on June 15, 2013. Chief Tsetta was previously a Councillor for a four year term. During his tenure as Chief, Chief Tsetta was entitled to remuneration, authority and powers pursuant to his position, unless he was lawfully removed or suspended from his position in accordance with the YKDFN Election Policy.

[6] Throughout Chief Tsetta's terms on the Council, concern has apparently been expressed by various members of the YKDFN with respect to the Band Council's participation in an

Impact Benefit Agreement involving the diamond industry and the use of resources coming to the YKDFN from that agreement.

[7] In April of 2011, the YKDFN Band Council passed a motion which approved spending up to $100,000.00 to perform a review of the Det'on Cho's involvement in the diamond industry. The purpose of the review was to achieve transparency for members about the debt incurred when Det'on Cho was involved in the diamond business. Det'on Cho is a corporation that was set up by the Band Council at least 20 years ago for the purpose of furthering their economic opportunities.

[8] On May 21, 2012, Ms. Barbara Powless-Labelle, a former Councillor, wrote to the Prime Minister and the Governor General alleging financial mismanagement, among other things. On May 29, 2012, the Band Council issued an Immediate Release attacking Ms. Powless-Labelle.

[9] On June 5, 2012, Chief Tsetta and a former Councillor signed a letter, in cooperation with other members of the Band, addressed to the Prime Minister and the Minister of AANDC, requesting their assistance in performing an audit of the YKDFN's finances due to a shared concern that certain Impact Benefit Agreement funds had been improperly handled or misappropriated.

[10] The June 5, 2012 letter stated, among other things, that "95% of issues raised in Ms. Barbara Powless-Labelle…are true and accurate", that the "Government of Canada should be seriously concerned about the abuse and corruption by this current Chief [Chief of Dettah] and Council with AANDC Taxpayers Dollars", that "there are no legal audited financial statements for all the un-accounted rough and cut diamonds that have gone missing, or sold … without the

proper written consent of the Yellowknives Dene First Nation Chief & Council", and that "this is fraud and the RCMP should be called in to investigate the tens of millions of dollars of missing or stolen diamonds immediately".

[11] The letter further requested the "immediate and (URGENT ASSISTANCE)" from the AANDC Minister to take the following actions:

a) Appoint a third party management team;

b) Terminate the existing Dettah Chief and Band Council and to call for an urgent election for replacement; and

c) Conduct an urgent forensic financial audit.

The letter ended with Chief Tsetta's commitment to remain in his position as Chief for the Ndilo community and to assist the Federal Government Management Team with the management of the YKDFN.

[12] On June 11, 2012, Chief Tsetta received a letter from the YKDFN's Chief Administrative Officer, Terry Testart, stating that on June 8, 2012, the YKDFN Band Council directed him to cease payment of remuneration or benefits to Chief Tsetta, to deny him access to the YKDFN, and to cease taking any direction from Chief Tsetta. The letter stated as well that Council has no authority to remove Chief Tsetta from his elected position as Chief of Ndilo and that he would therefore remain Chief and a sitting member of the Band Council. The letter stated that the Band Council's meeting was open to the public and that repeated attempts were made to inform him of the meeting. Chief Tsetta, on the other hand, claims that he was given insufficient notice of the meeting.

[13] As a result of the stresses and tensions surrounding these issues, Chief Tsetta was assessed by his physician and found unable to work due to his illness. Work Absence Certificates were forwarded to the YKDFN by Chief Tsetta for the period from June 20 to September 1, 2012.

[14] Chief Tsetta requested that the Band Council resume its payments to him in relation to his position and to restore his powers and authority as elected Chief. The Band Council refused to reinstate his salary, allowances, powers or authority as Chief.

[15] On August 25, 2012, a public meeting was held and was attended by members of the Ndilo community, along with the majority of the Band Councillors and both Chiefs. It is alleged that all members of the community were given an opportunity to speak; some spoke in favour of the restoration of the benefits to Chief Tsetta while others spoke in favour of the Band Council resolution. No vote was taken nor a consensus reached.

[16] Following a meeting of the Band Council held on September 26, 2012 which Chief Tsetta attended with a respected Elder, the conditions that Band Council would be prepared to accept for a termination of his suspension were communicated to him. Chief Tsetta alleges that none of these conditions are imposed on other members of the Band Council returning from medical leave, and that none of these conditions are authorized to be imposed upon an elected official pursuant to the YKDFN Election Policy.

[17] In October 2012, Roy Erasmus Sr. assumed the position of Acting Chief of Ndilo, replacing Chief Tsetta, and received a salary for that position. The YKDFN continues to refuse

to restore Chief Tsetta's remuneration, benefits and authority notwithstanding that he has not been formally removed or suspended.

II. Issues

[18] This application for judicial review raises the following four issues:

i) Is the Applicant out of time in bringing this application?

ii) What is the applicable standard of review?

iii) Is the decision of the Band Council reasonable? This question can be split into two sub-questions:

- Did the Band Council have jurisdiction to proceed with the "suspension"?
- If it did, was there a cause for this "suspension"?

iv) Did the Band Council's procedure in suspending the Chief breach procedural fairness?

III. Analysis

i) *Is the Applicant out of time in bringing this application?*

[19] In its memorandum of argument, counsel for the Respondent raised for the first time the timeliness of the notice of application and submitted that it was filed outside the 30-day delay provided at subsection 18.2(2) of the *Federal Courts Act*, RSC 1985, c F-7 (the "*Act*"). Since the Council Resolution that gave rise to these proceedings was communicated to the Applicant on June 11, 2012, the 30-day delay was triggered on that day. However, it was only filed on October 16, 2012. Counsel further submitted that no extension of time should be granted, as any relief would be of no effect since the Applicant's term as Chief expired in June 2013. Counsel added

that this application for judicial review should accordingly be converted into an action, thereby allowing the Applicant to seek damages.

[20] Having duly considered the matter, I am not prepared to accede to this last minute argument. First of all, I agree with the Applicant that the June 8, 2012 Band Council Resolution is not the only decision being challenged; there is a second crystallizing decision that was made on October 5, 2012, when the Band Council enunciated a series of conditions to be met by Chief Tsetta before his remuneration, powers and authority could be resumed. There is no record of these conditions, but it is sufficient to know about the existence of these conditions to understand that there is more than one decision being challenged, and that the filing of the notice of application on October 16, 2012 was not outside of the 30-day delay. Nor does Rule 302 of the *Federal Courts Rules*, SOR/98-106, preclude this application to address two decisions, as it is well established that this rule does not apply where there is a continuous course of action. It is beyond dispute that the two decisions that are being challenged were so closely linked as to be properly considered together: they arise under the same legal provisions, they deal with the same factual situation, they involve the same parties, they raise the same legal issues, and they seek the same forms of relief: see, for ex., *Shotclose v Stoney First Nation*, 2011 FC 750; *Whitehead v Pelican Lake First Nation*, 2009 FC 1270 [*Whitehead*].

[21] Alternatively, I have no hesitation to conclude that an extension of time would be in the interest of justice and should be granted. Pursuant to s. 18.1(2) of the *Act*, the Court can grant an extension of time even after the expiration of the 30-day delay if the applicant has shown a continuing intention to pursue the application, if the application has some merit, if no prejudice

to the respondent arises from the delay, and if there is a reasonable explanation for the delay: see, for ex., *Whitehead*. These four requirements are clearly met in the case at bar.

ii) *What is the applicable standard of review?*

[22] Counsel for the Applicant relied on *York v Lower Nicola Indian Band*, 2012 FC 949, at para 16, and on *Martselos v Salt River Nation #195*, 2008 FCA 221, at paras 28-32 for the proposition that the Band Council's interpretation of its jurisdiction under the Election Policy to strip Chief Tsetta of his remuneration, power and authority must be reviewed on a standard of correctness, whereas the actual decision to do so is reviewable on a standard of reasonableness.

[23] The Court of Appeal recently revisited this issue in *Fort McKay First Nation Chief and Council v Orr*, 2012 FCA 269. At issue in that case was the decision of the Band Council to suspend without pay, Mr. Orr, a Band councillor, upon hearing of a sexual assault charge against him. Writing for the Court, Justice Stratas acknowledged that the Court had previously adopted the standard of correctness for decisions of a jurisdictional nature, but opined that such jurisprudence has been displaced by more recent decisions of the Supreme Court of Canada (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61) which have considerably restricted the ambit of the correctness standard. As a result, he came to the conclusion that there is a presumption that the standard of reasonableness will apply on issues of interpreting legislative wording, adding the following *caveat* (at para 12):

> In the circumstances, however, the distinction between the two standards of review is most narrow. If the Council's decision to suspend Mr. Orr as a councillor by way of resolution alone cannot be supported by the words of the *Election Code* or any other source of power, the decision cannot be said to be acceptable or defensible on the law…

[24] As for issues of procedural fairness, both parties agree that the standard of correctness applies: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 42; *Sketchley v Canada (Attorney General)*, 2005 FCA 505.

iii) *Was the decision of the Band Council to suspend Chief Tsetta reasonable?*

[25] The jurisdiction of the Band Council to remove from office or suspend Council members stems from the Election Policy. Section 81 of the Policy sets out the circumstances pursuant to which Council members become ineligible to hold office, while section 83 deals with the removal of Council members by petition. There is no dispute between the parties that neither of these provisions apply in the case at bar. Rather, counsel for the Respondent contends that Chief Tsetta's suspension was authorized by section 84 of the Election Policy, which reads as follows:

> Council may suspend a council member for misconduct listed in Appendix O by a vote of 75% of existing council in favor. The length of each suspension will be determined by Council.

[26] It is alleged that Chief Tsetta had contravened paragraphs (b) and (j) of section 1 of Appendix O, which state:

> 1. REMOVAL FROM OFFICE
>
> The removal of a Chief or Councillor from office may be determined by the Council on the following grounds:
>
> (…)
>
> b) They engage in drunk, drug related, disorderly, violent or other irresponsible conduct at Council meetings, community meetings, or in other public forums or functions which interferes with the conduct of business or brings the reputation of the Council or the First Nation into disrepute; or
>
> (…)

> j) The Chief does not perform his responsibilities and traditional leadership duties as governed by their job description that was approved by Council.

[27] It is clear from the June 11, 2012 letter that was sent to Chief Tsetta following the Council meeting of June 8, 2012 that he was suspended essentially as a result of the June 5, 2012 letter that he had sent to the Prime Minister and the Minister of the AANDC. Indeed, it is the only allegation both in the June 8, 2012 Resolution and in the June 11, 2012 letter that is mentioned as a basis of Chief Tsetta's suspension. Since it appears that all Council members voted for the suspension of Chief Tsetta at the June 8 meeting, it is not disputed that the requirement of 75% of the existing Band Council voting in favour of the suspension has been met. The real issue, therefore, is whether the sending of that letter constitutes an "irresponsible conduct…which…brings the reputation of the Council or the First Nation into disrepute", or whether it amounts to the Chief "not perform[ing] his responsibilities and traditional leadership duties" as set out by his job description.

[28] In his affidavit and cross-examination, Mr. Erasmus Sr. brought up other issues that he alleged are reasons that lead to the suspension of the Chief. For example, on page 42 of his cross-examination, when asked "whether the council motion reflects the decision of council in why to remove the pay from Chief Tsetta", Mr. Erasmus Sr. responded that "it [the motion that led to the June 11 letter] reflects the last thing that he did, but all the previous stuff is not put in there". In addition, when asked if "the main reason why this decision was made was because of the letter of June 5th", Mr. Erasmus Sr. answered that "that was the final act, yes", he also continued to say that "…they [the other matters in the affidavit] were all looked at…". I agree with the Applicant that these issues (which included credit card mishandling for which he was not suspended and had agreed to repay the monies following a motion, and the late arrival at meetings to which he

had received a letter of reprimand but not a suspension) were neither mentioned in the letter nor in the motion attached to the letter. There was no reference in the letter to the "other matters" that were allegedly discussed in the June 8th meeting which collectively led to his suspension, and these "other matters" have been previously addressed by Band Council and no suspension was warranted at the time.

[29] In her written submissions, counsel for the Applicant submitted that the June 5th letter is written in a way that suggests it represents the view of only the signatories, Chief Tsetta and Nuni Sanspariel. This argument is without merit. The letter used the letterhead of the Band Council, and Chief Tsetta refers to himself on more than one occasion as the "elected Chief for the Community of Yellowknives Dene First Nation". Both Chief Tsetta and Nuni Sanspariel signed respectively as "Chief Ted Tsetta, Yellowknives Dene First Nation, Ndilo" and "Band Councillor, Yellowknives Dene First Nation, Dettah". I think it would be disingenuous to argue that the signatories of the letter were only acting in their personal capacity, and counsel did not forcefully pursue that point at the hearing.

[30] Therefore, can it reasonably be said that the June 5th letter sent to the Prime Minister and to the Minister of the AANDC amounts to one of the situations described in Appendix O of the Election Policy, thereby empowering the Band Council to suspend Chief Tsetta pursuant to section 84 of that same Policy? I do not think so.

[31] First of all, I fail to see how it can be said that the writing of a letter, as offensive as it can be, can be equated to the enumerated conducts outlined in paragraph (b) of Appendix O. It is no doubt true, as suggested by counsel for the Respondent, that this provision speaks of "other irresponsible conduct" and not only of engaging in drunk, drug related, disorderly and violent

conduct. It is a well established principle of statutory interpretation that a general phrase following an enumeration must take its colour from the examples that precede it. This rule, known as the "limited class rule" (*ejusdem* generis), has been summarized in the following way by the Supreme Court of Canada in *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029, at para 12: "Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it". See also: *Consumers' Association of Canada v Canada (Postmaster General)*, [1975] FCJ No 23, (FCA).

[32] It is clear from a careful reading of paragraph (b) that the removal will be warranted when a Chief or Councillor engages in a type of conduct that will disrupt the proper functioning of a meeting or will reflect badly on the institutions of the First Nation or on the First Nation itself. Indeed, paragraph (b) spells out explicitly that the reprehensible conduct will be cause for removal if it "interferes with the conduct of business or brings the reputation of the Council or the First Nation into disrepute". The drafting and transmittal of a letter to the Prime Minister and to the Minister of AANDC to denounce what Chief Tsetta perceived to be abuse, corruption, mismanagement and election rigging clearly does not fall within the conduct contemplated by paragraph (b) of the Election Policy.

[33] I do not think that paragraph (j) can be of any help to the Respondent either, for several reasons. First of all, I note that no job description as approved by Band Council has been filed as part of the record. Counsel for the Applicant suggested that the reason why a job description was not provided may be that paragraph (j) of Appendix O was only thought of as a possible basis for

the removal after the fact, and that it was not originally envisaged as a basis or a rationale for the reasonableness of the decision. Be that as it may (without speculating as to why the job description is not part of the evidence), it would be unwarranted for the Court to rely on a document about which we know nothing, to conclude that the Chief did not perform his responsibilities and traditional leadership duties.

[34] Counsel for the Respondent contended that whatever the policy may say, the Chief clearly did not perform his responsibilities and brought the Council into disrepute by discrediting the Press Release dated May 26, 2012, by alleging corruption and fraud, and by admonishing the Band Council publicly whenever he disagrees with decisions made by the majority, all of this on the basis of hearsay and half truths. With all due respect, I disagree with that submission.

[35] It is obviously not for this Court, in the context of this application for judicial review, to determine whether the allegations made by Chief Tsetta are with or without merit. It is sufficient to determine, for the limited purpose of this proceeding, that Chief Tsetta's claims are not totally unsubstantiated and deserve at the very least to be investigated. The allegations of mismanagement, fraud and corruption and fraud levelled against the YKDFN and Band Council in their dealings with the Det'on Cho Corporation are not new and date back many years. Most recently, a Band Councillor resigned from his position and wrote a public letter dated May 21, 2012 addressed to the Governor General and to the Prime Minister detailing in no uncertain terms huge amounts of unaccounted loans from the Band Council to the Det'on Cho Corporation. A review of the Det'on Cho Corporation in the diamond industry was commissioned by the Band Council in April of 2011, but it appears that the review has not yet been undertaken and certainly has not been tabled to the Band Council. Millions of dollars could

be at stake, and were it to be established that there have been irregularities or, worse, criminal offences committed by Band Council members or affiliates, this would clearly be susceptible to bring the reputation of the Council or the First Nation into disrepute.

[36] In a context where the Chief was clearly in minority and where tensions were running high among Band Council members, what was the Chief to do? It would clearly have been preferable to have these matters openly debated and resolved within the confines of Band Council meetings, but that was apparently not an option due to internal infighting and conflict among Band Council members. Indeed, this avenue appears to have been tried in the past, to no avail. In those circumstances, Chief Tsetta was left with very few options. He could have reluctantly bowed to the pressure and resigned, which would obviously not have contributed to the resolution of the matter. He could also have surreptitiously leaked the information in his possession to the media or to third parties, which would most probably be more damaging for the Band Council without any assurance that the truth would come out. In the alternative, he could call for a police investigation, which was in fact what he did.

[37] It may be that he would have been well advised to choose his words more carefully. It can certainly not be presumed, before a full investigation is completed, that corruption, mismanagement, fraud or election rigging took place. This was not sufficient, in and of itself, for the Band Council to suspend and, in effect, to remove him from office. While one may disagree with the tone of his letter, it cannot reasonably be said that Chief Tsetta did not perform his responsibilities and leadership by calling for a police investigation. There were certainly enough credible allegations of wrongdoing to raise legitimate concerns, and it was in the best interest of

the First Nation and of its political institutions to clear the air and to deal with these issues in a fair and orderly manner.

[38] For all of the foregoing reasons, I am of the view that the decision of the Band Council to suspend Chief Tsetta and to strip him of his remuneration, his powers and access to his office until he accepts the conditions imposed upon him was unreasonable and went beyond the powers granted to the Council by section 84 of the Election Policy.

iv) *Did the Band Council's procedure in suspending the Chief breach procedural fairness?*

[39] It is trite law that band councils must act according to the rule of law. One of the cornerstones of procedural fairness is the right to be heard and to make representations before a decision affecting one's rights or interests is made: *Prince and Campiou v Sucker Creek First Nation #150A et al*, 2008 FC 1268, at para 39; *Minde v Ermineskin Cree Nation*, 2006 FC 1311, at paras 44-46; *Laboucan v Little Red River Cree Nation #447*, 2010 FC 722, at paras 36-39.

[40] In the case at bar, counsel for the Respondent admitted that there is no direct evidence to show that Chief Tsetta received notice of the meeting of Council of June 8, 2012. Nor was he made aware of the basis upon which his suspension would be sought. It was only on June 11, 2012 that he was told of the decision made by the Band Council, apparently as a result of the letter that he and former Band Councillor Nuni Sanspariel had sent to the Prime Minister and the Minister of AANDC. Chief Tsetta was not provided with any meaningful opportunity to address the concerns of the Band Council before his suspension was decided, and indeed it is only when the Respondent filed its record and written submissions on August 30, 2013 that he was apprised of the specific provisions of the Election Policy which he was deemed to have breached.

[41] It is true that Chief Tsetta was given various opportunities by the Band Council to deal with his suspension after June 8, 2012. He eventually attended at a Council meeting called for that purpose on September 26, 2012, at which time he was advised of the conditions that Council would be prepared to accept for a termination of his suspension. This was clearly far from sufficient, not only because these opportunities were afforded to him after the decision was made, but also because the Band Council effectively removed him on September 26, 2012 by making the suspension indefinite unless he was prepared to retract his letter.

[42] Chief Tsetta, like any other Canadian, was entitled to due process and procedural fairness. Band councils, like any other elected representative bodies, must act within the confines of their delegated authority or traditional norms and traditions. If Chief Tsetta had lost the confidence of the Band Council or of the Band members, a petition to remove him from office could have been initiated pursuant to section 83 of the Election Policy. He could also be voted out at the next scheduled election. However, he could not simply be removed from his position because he was stating opinions that were at odds with the rest of the Band Council or because he was calling for an investigation into alleged wrongdoings, and the Court would be setting a dangerous precedent if it were to condone such a course of action.

IV. Conclusion

[43] For all of the foregoing reasons, the June 8, 2012 Band Council resolution suspending Chief Tsetta is quashed, and the Respondent is ordered to pay Chief Tsetta the remuneration and other benefits he should have been allowed for the period between June 11, 2012 and the end of his term of elected office. The Applicant shall also be entitled to his costs, to be assessed at the upper scale of Column IV of Tariff B.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted. The Band Council Resolution of June 8, 2012 is quashed and shall therefore be of no force and effect. The Respondent shall pay the Applicant the remuneration and benefits to which he was entitled between June 11, 2012 and the end of his term of elected office. The Applicant shall be entitled to his costs, to be assessed at the upper scale of Column IV of Tariff B.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1922-12
STYLE OF CAUSE:	THEODORE TSETTA v THE BAND COUNCIL OF THE YELLOWKNIVES DENE FIRST NATION
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	DECEMBER 17, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	DE MONTIGNY J.
DATED:	APRIL 29, 2014

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