Date: 20060216

Docket: T-588-04

Citation: 2006 FC 213

Ottawa, Ontario, February 16, 2006

PRESENT: The Honourable Mr. Justice Blais

BETWEEN:

MARCEL LUKE HERTLEIN BALFOUR

Applicant

and

NORWAY HOUSE CREE NATION CHIEF AND COUNCIL AND RON EVANS, ERIC APETAGON, ELIZA CLARKE, FRED MUSKEGO, MIKE MUSWAGON, AND LANGFORD SAUNDERS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act,* R.S.C. 1985, C. F-7 (the Act) of the ongoing course of conduct and state of affairs created by the actions of some and/or all of the individual respondents purporting to act in the name and on behalf of the respondent Norway House Cree Nation (NHCN) Band Council.

RELEVANT FACTS

[2] The applicant is an elected councillor of the NHCN Band Council. The respondents are the NHCN Chief and Council as well as the individually elected Band councillors.

[3] On January 23, 1998, the Minister of Indian and Northern Affairs Canada (the Minister) issued an order to exclude the NHCN from the electoral provisions of the *Indian Act*, R.S.C. 1985, c. I-5 (*Indian Act*). As such, the NHCN became a "custom band" and the *Indian Council Regulations* under the *Indian Act* no longer applied to the NHCN Council meetings. The NHCN Chief and Council adopted a replacement for the said regulations, being the NHCN Policy and Procedural Guidelines Manual (the guidelines). The Norway House election code also referred to as the *Election Procedures Act* is part of the said guidelines.

[4] On March 14, 2002, after a Band Council election, the three re-elected respondent parties, Muskego, Muswagon and Clarke together with the re-elected respondent party Evans met with the three defeated councillors at a special Council meeting between the election day and the convened meeting of March 22, 2002. At this meeting the aforementioned group of individuals purported in the name of the NHCN Band Council to award a four year job to a defeated councillor. They also ratified 53 NHCN Band Council Resolutions (BCRs) forms which purported to reflect earlier decisions of Council.

[5] The “quorum of Council” is a sub-group of the Band Council councillors that operates separately from the rest of the Band Council. It does not follow the rules laid out in the guidelines for conducting convened meetings of Council. This sub-group of councillors should not be confused with what constitutes the quorum of the Band councillors at a convened Council meeting that is subject to the guidelines and paragraph 2(3)(b) of the *Indian Act.*

[6] On or about March 17, 2004, three members of the sub-group of the NHCN councillors signed a resolution directing their solicitor to pursue a claim against Don Godwin for misrepresentation and sought an injunction against him. On March 22, 2004, the aforementioned resolution, called NHCN BCR form N.H./2003-04 #128, was submitted by NHCN Band Council into the Court of Queen’s Bench in Thompson, Manitoba, as evidence of an official decision of the respondent Band Council. However, that resolution which was drafted by the sub-group was never ratified by the Band Council before it was submitted to Court. The resolution was eventually ratified at a duly convened special Council meeting on April 1, 2004.

[7] On March 22, 2004, the applicant filed a notice of application for a writ of *quo warranto.* On the very next day, March 23, 2004, the applicant was locked out of the NHCN Chief and Council building and his councillor’s office therein.

[8] The applicant is paid a councillor’s honorarium of $60,000 per year. After initiating the present judicial review proceedings, two of the applicant’s honorarium remuneration payments were

withheld. The subsequent honorarium remuneration payments were reduced to about $189 every two weeks, or about $5,000 per year.

ISSUES

1. Does the Federal Court have jurisdiction in the present matter?
2. Have the elected Chief and all councillors vacated their positions?
3. Should the sub-group of Band councillors be allowed to exist?
4. Should the Band Council Resolution dated March 17, 2004 be declared void?
5. Should the applicant's honorarium be changed?

ANALYSIS

[9] Prior to beginning my analysis, I would like to stress two specific events which occurred regarding the present matter. On March 14, 2002, after a Band Council election, the three re-elected respondent parties, Muskego, Muswagon and Clarke together with the re-elected respondent party Evans met with the three defeated councillors at a special Council meeting. At this meeting the aforementioned group of individuals purported in the name of the NHCN Band Council to award a four year job to a defeated councillor. Clearly, those members did not respect the outcome of the election and attempted to reinstate a losing candidate into his former job by awarding him a contract for the duration of an elected Band councillor's four year mandate. Upon my analysis of the evidence, this is but one example among many, in which members of the NHCN Band Council have failed to respect the notion of representative democracy regarding their activities. When a Band Council fails to respect the results of an election, or attempts to circumvent the outcome of an election, then democracy is at risk.

[10] The second event I would like to mention concerns the attempted blackmail of the applicant. The applicant was often in disagreement with other Band Council members regarding NHCN matters. As such, he wrote letters that were critical of Band Council procedures and decisions. In a letter dated July 23, 2003, Chief Evans informed the applicant that he was unilaterally removing the latter's portfolios and reducing his honorarium (see applicant's record volume II at pages 27 and Tab 18). The respondent Muswagon, as noted in the minutes of a regular Council meeting dated December 2, 2003, acknowledged that the applicant's honorarium was reduced for purportedly acting to discredit the efforts made by the Chief and Band Council. In the said meeting, a motion was passed to ratify the decision taken by Chief Evans to reduce the applicant's honorarium for not complying with the wishes of Council. It was made clear to the applicant that such a decision could have been reversed if he had just complied with the Chief's wishes and was not openly critical of the Band Council's actions (see the minutes of the NHCN Band Council meeting at page 15, Tab M of the applicant's record, volume III). This is a clear indication of influence peddling and blackmail directed towards the applicant. Such behaviour is deplorable and has no place in democratic institutions, which the NHCN Band Council purports to be.

[11] In *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, at paragraph 67, the Supreme Court of Canada emphasized the following regarding the notion of democracy:

> Democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the sovereign will is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and

> accountability to, the people, through public institutions created under the Constitution.

[12] In *Long Lake Cree Nation v. Canada (Minister of Indian and Northern Affairs)* [1995] F.C.J. No. 1020, Justice Rothstein, at paragraph 31, emphasized that Band Councils must operate according to the rule of law:

> On occasion, conflicts can become personal between individuals or groups on Council. But Councils must operate according to the rule of law whether that be the written law, custom law, the Indian Act or whatever other law may be applicable. Members of Council and/or members of the Band cannot take the law into their own hands. Otherwise, there is anarchy. The people entrust the Councilors to make decisions on their behalf and Councilors must carry out their responsibilities in a way that has regard for the people whose interest they have been elected to protect and represent. The fundamental point is that Councils must operate according to the rule of law.

[13] In *Assu v. Chickite* [1999] 1 C.N.L.R. 14, Justice Romilly of the British Columbia Supreme Court, discussed the source and the extent of a Band Council's power as it is outlined in the law. He said the following at paragraph 30:

> The Act expressly confers a number of powers on Band Councils. The courts have made it clear that, as an autonomous elected body, a Council is entitled to make decisions as it sees fit on the matters falling within the scope of its powers, provided that the decisions are informed and are reached by majority vote at duly convened meetings. […]It is now generally accepted that a Council holds not only all of these express powers, but also all additional powers necessary to effectively carry out its statutory responsibilities, including the power to bring or defend claims on behalf of the Band […] It would therefore appear that the Band is bound by the decisions of its elected Council unless they act in bad faith.

[14] Justice Romilly recognized that Band Council decisions were binding if derived from powers conferred by the Act, reached by a majority vote at a duly convened meeting and not made in bad faith. Acting in accordance with the rule of law entails the obligation to adhere to the notion of democracy and a commitment to respect the duty of procedural fairness regarding decisions Band councillors take in the interest of those they were elected to protect.

1. Does the Federal Court have jurisdiction in the present matter?

[15] In the present matter, at first glance, the applicant's amended notice of application and the relief sought seems to be contrary to Rule 302 of the *Federal Court Rules*. That is, the applicant is seeking judicial review of more than one of the NHCN Band Council's decisions. Rule 302 states the following:

302. Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.	302. Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

[16] In *Truehope Nutritional Support Ltd. v. Canada (Attorney General)*, [2004] F.C.J. No. 806), Justice Campbell comments on the purpose of Rule 302 as well as its exceptions. He states the following at paragraphs 5, 6 and 7:

> Rule 302 reflects the policy of ensuring an expeditious and focused process for challenging a single decision or order (Badger v. Sturgeon Lake Cree Nation, [2002] F.C.J. No. 172, 2002 FCT 130 (T.D.) at para. 13).

> Continuing acts or decisions may be reviewed under s.18.1 of the Federal Court Act without offending Rule 1602(4) [now Rule 302]; however the acts in question must not involve two different factual situations, two different types of relief sought, and two different decision-making bodies (Mahmood v. Canada (1998), 154 F.T.R. 102 (F.C.T.D.); reconsideration refused [1998] F.C.J. No. 1836). […]
>
> In Puccini v. Canada, [1993] 3 F.C. 557, 65 F.T.R. 127 (T.D.) […] the Court held that s.18.1(2) and Rule 1602(4) contemplated a specific decision or order in respect of which judicial review was sought. They could, however, also encompass a situation, or involve an ongoing situation, where a number of decisions are taken.

[17] In the present matter, the applicant invokes the exception found in Rule 302 in order to seek judicial review of more than one of the NHCN Band Council's decisions. That is, he contests those decisions because they represent an "ongoing course of action" that should not be permitted.

[18] Another way to be in conformity with Rule 302 occurs when the Court orders that an exception can be made. On October 26, 2004, Prothonotary Tabib considered the motion record of the applicant and noted the consent of the respondents to the amended notice of application. She ordered the matter to proceed despite the fact that judicial review was being sought for more than one decision of the NHCN Band Council. As such, I am satisfied that the present matter is in conformity with Rule 302 and it is unnecessary to analyze whether or not the relief sought by the applicant is justified pursuant to the "ongoing course of action" exception to the aforementioned rule.

[19] The respondents argue that this Court does not have jurisdiction in the present matter. As such, they submit that judicial review is not available to the applicant and claim that the request for a declaration in the nature of a writ of *quo warranto* is not warranted. Considering that the present matter was case managed and that the respondents consented to the notice of application as it was before Prothonotary Tabib, I am somewhat reluctant to address the issue of jurisdiction. The respondents had ample opportunity to tackle this issue at an earlier time and I consider it suspect that they failed to do so. With that being said, I will continue with my analysis.

[20] The jurisprudence has established that an Indian Band Council constitutes a "federal board, commission or other tribunal" pursuant to section 18 of the Act (*Rider v. Ear* (1979), 103 D.L.R. (3d) 168 and *Gabriel v. Canatonquin*, [1978] 1 F.C. 124). As such, the Federal Court of Appeal confirmed in *Salt River First Nation 195 (Council) v. Salt River First Nation 195* [2003] F.C.J. No. 1538, at paragraph 18, that this Court has jurisdiction to issue a writ of *quo warranto* or to grant declaratory relief against an Indian Band Council and its constituent members:

> Pursuant to paragraph 18(1)(a) of the Federal Court Act, the Federal Court has jurisdiction to issue a writ of quo warranto or to grant declaratory relief. I see no reason why declaratory relief which, in substance, is in the nature of quo warranto, cannot be granted. That procedure appears to have been approved in Lake Babine Indian Band et al. v. Williams et al. (1996), 194 N.R. 44 (F.C.A.). Robertson J.A. states at paragraphs 3 and 4:
>
> > [3] It is to be noted at the outset that the appellants do not dispute the jurisdiction of the court to address the issues herein. The respondents seek declaratory and injunctive relief, which in these circumstances essentially amounts to

> a request for a writ of quo warranto. Quo warranto allows a challenge of an individual's right to hold a particular office...
>
> [4] There is no doubt therefore that there is jurisdiction per se, an Indian Band Council being a "federal board, commission or other tribunal" within the meaning of ss. 2 and 18 of the Act....Accordingly, this Court has jurisdiction to address the issue but it can do so only in the context of a s. 18 application not the context of an action initiated by way of statement of claim.

[21] Again, in *Salt River First Nation 195 (Council),* above, the Federal Court of Appeal states the following regarding the applicability of the writ of *quo warranto* at paragraph 20:

> While normally judicial review is conducted with respect to a decision of a federal board, commission or tribunal, there will be occasions where relief may be granted in the absence of a decision. An application for a writ of prohibition is an obvious example. Quo warranto or a declaration in the nature of quo warranto where the challenge is to the right of a public office holder to hold office directly is another.

[22] The respondents mention that prior to commencing the present matter, the applicant sent a petition to the Minister of Indian and Northern Affairs Canada requesting the immediate annulment of the NHCN *Election Procedures Act* and that the NCHN be reinstated under sections 74-79 of the *Indian Act* for the purpose of good government of the Band. The Minister denied such a request by stating that he was “not prepared to take the extreme measure of exercising authority under section 74(1) of the *Indian Act*” (see respondent’s record page 127 – affidavit of Fred Muskego).

[23] The respondents submit that the applicant should have commenced an application to judicially review the Minister's decision as opposed to commencing an application requesting a declaration in the nature of a writ of *quo warranto* in this Court. The respondents justify such a response by citing *Charles v. Semiahmoo Band Council* [1998] F.C.J. No. 45, whereby Justice Rouleau found that the proceeding was premature because the avenues of appeal had not been exhausted. In the aforementioned case, the eleven members of the Semiahmoo Band used the appeal procedures contained in section 12 of the *Indian Band Election Regulations* to file an appeal alleging that the election was unfair and had been conducted unlawfully. However, the Minister dismissed the applicants' appeal and decided that the results of the election would stand. As such, the Band members should have appealed the Minister's decision.

[24] I disagree with the respondents' assertions. I am of the opinion that the petition to the Minister constitutes the premature course of action and not the application for judicial review and a writ of *quo warranto* in the present matter. As previously mentioned, the NHCN Band Council is a federal board under the definition of section 18 of the Act. If the applicant wished to challenge the decisions taken by that board, it should have done so in this Court first as opposed to asking the Minister for assistance by means of a petition.

[25] The respondents further mention that the applicant had approached a representative of the Minister regarding similar concerns found in the present matter. The applicant had requested that the redress mechanisms found in the Canadian First Nations Funding Agreement (CFNFA) between

Indian and Northern Affairs Canada (INAC) and the NHCN be used to remedy the disputes. Those disputes related to the failure of the NHCN Council to adhere to its own operating procedures and the issues surrounding the applicant's salary and expense budget (see email sent from Mr. Martin Egan (Minister's representative) to Marcel Luke Hertlein Balfour, dated November 25, 2003, page 316 of the respondent's record – volume III).

[26] The Minister's representative refused the applicant's request for assistance. As such, the respondents submit that the applicant should have instituted an application for judicial review of the Minister's representative's decision as opposed to commencing an application requesting a declaration in the nature of a writ of *quo warranto.*

[27] I disagree with the aforementioned position. Again, the NHCN Band Council constitutes a federal board. If the applicant wished to challenge the decisions of the Band Council for failing to adhere to its own operating procedures, the correct course of action is not to request the assistance of the Minister; it is an application for judicial review in this Court.

[28] I conclude that this Court does have jurisdiction in the present matter. Further, I find that the application for judicial review, brought in this Court, of the NHCN Band Council's conduct and decisions, is the appropriate course of action for the applicant. However, it remains to be seen whether or not a writ of *quo warranto* is warranted. I will now turn my attention to this very matter.

2. Have the elected chief and all councillors vacated their positions?

[29] The applicant is seeking a declaration that the elected Chief and all councillors have each vacated their office because they have missed three consecutive duly constituted regularly scheduled meetings of the Band Council without being excused.

[30] A writ or a declaration *of quo warranto* may be requested from the Federal Court when the office of an elected official is vacated but the official continues to exercise his functions contrary to the law. The question that remains is to determine whether a writ of *quo warranto* is an appropriate course of action given the circumstances in the present case.

[31] The NHCN government has its legal basis in the *Indian Act* even though the Band substituted its own electoral process, as regulated by the NHCN guidelines, for those of the *Indian Act.* Similar to the federal *Indian Band Council Procedures Regulations,* the guidelines specify the dates and times for regularly scheduled Council meetings, notice requirements for special Council meetings, procedure for agenda items and conduct during the meetings. The pertinent provisions of the guidelines are as follows:

> 11.1 Frequency of Meetings Regular Chief and Council meetings shall commence promptly at 9:00 am on the first and third Tuesday of every month. All Managers and Directors must attend these regular Chief and Council meetings.
>
> 11.4 Special Council Meetings. Special Council meetings may be called by the Chief upon provision to each member of Council of twenty-four (24) hours' notice and a specific agenda relating to the special meeting. Special meetings may be called by the Chief on

> his or her own initiative, or by the Chief at the request of a majority of Council. [my emphasis]

[32] The applicant submits that between March 5, 2002 and November 2, 2004, there were approximately 56 officially-scheduled meetings as required by article 11.1 of the NHCN guidelines. However, the applicant mentions that only 16 of these meetings actually took place in the form prescribed by the guidelines. As such, he argues that the councillors have each vacated their office because they have missed three consecutive duly constituted regularly scheduled meetings of the Band Council without being excused. Article 9.1(e) of the NHCN *Election Procedures Act* outlines the criteria of what constitutes a vacated position:

> 9.1 The office of Chief or Councillor becomes vacant when a person who holds that office:
>
> e) Fails to attend three (3) consecutive duly constituted Council meetings without being excused from attendance by a quorum of Council. [my emphasis]

[33] Using the applicant's rationale, if every Band Council member failed to show up to three consecutively scheduled meetings, they would all be guilty of vacating their positions. The respondents submit that the applicant is incorrectly using the terms duly constituted and duly scheduled interchangeably. I agree with the respondents' assertion that the applicant is wrong in believing that just because a meeting is scheduled it is therefore a duly constituted meeting.

[34] The fundamental question regarding the issue of vacancy is what qualifies as a duly constituted meeting. There is no definition of the aforementioned term in the *Indian Act* or in the

NHCN guidelines. In *Assu*, above, Justice Romilly, at paragraph 37, acknowledges that the notion of what constitutes a duly convened meeting is somewhat vague:

> There is very little authority as to what constitutes a "duly convened meeting", as the term is undefined in both the Indian Act and the Indian Band Procedure Regulations (the regulations). However, the regulations do contain some relevant provisions, the most important of which is the requirement that an actual meeting be held at which a quorum of Council members is present. Where a Council consists of nine or more members, s.6 of the regulations states that a quorum shall consist of 5 members: Indian Band Council Procedure Regulations, C.R.C. 1978, c. 950.

[35] Justice Romilly accepts the view that in order for a meeting to be duly convened, it must actually be held and attended by a quorum of Council members. In the NHCN *Election Procedures Act*, article 9.1(e) uses the term duly constituted as opposed to duly convened. However, I believe those two terms are interchangeable in the context of the present matter. I understand that article 11.1 of the NHCN guidelines mandates that Band Council meetings be held on the first and third Tuesday of every month. However, if a meeting does not actually take place, or takes place but is not attended by a quorum of Council members, I find that it cannot be considered duly constituted as required by article 9.1(e). As such, I do not agree with the applicant's suggestion that all the councillors have vacated their position because they failed to attend three consecutive duly constituted meetings.

[36] Although I do not support the applicant's position, his argument raises important questions regarding the process of canceling duly scheduled meetings. In the present matter, the Chief of the

Band systematically cancelled regular scheduled meetings. As will be outlined below, I believe such action constitutes a usurpation of power.

[37] Justice Romilly in *Assu*, above, did not accept the position that the Band Chief has the authority to schedule Council meetings on a given day. He states the following at paragraph 41:

> Moreover, it is my view that the Chief has no power to require Council to accede to his "notification" that Council meetings would be held on Fridays.

[38] In light of the above, I believe a parallel can be drawn between not allowing the Chief to randomly schedule a meeting and not permitting him to randomly cancel one. That is, both acts could be seen as a usurpation of power on the part of the Chief.

[39] The jurisprudence has confirmed the existence of similarities between the administration of a Band Council and the administration of a municipality. In a municipality, much like the Band Council in the present matter, the timing of meetings is prescribed pursuant to rules.

[40] Regarding municipalities, regular scheduled meetings can be cancelled if, upon the opening of a meeting, the chairperson or secretary realizes that a quorum of members is not in attendance. Such a process should be the norm for the cancellation of Band Council meetings. Band Council meetings should not be cancelled as a result of a decision taken by the Chief or as a result of a resolution of the quorum of council prepared in advance of the scheduled meeting. There are no

doubt exceptions to be made periodically for valid reasons; however, the systematic cancellation of two thirds of the regular scheduled meetings is totally unacceptable. Between March 5, 2002 and November 2, 2004, there were approximately 56 officially-scheduled meetings that were required to be attended and convened by the councillors and Chief. However, only 16 of these meetings were duly constituted. Such a situation goes against the spirit and the wording of the rules. Further, the systematic cancellation of meetings makes it exceedingly difficult for the members of the Band to participate in the process.

[41] If the Chief had the ability to cancel and reschedule meetings at will, then he could manipulate the timing of meetings in favour of his own agenda. For example, situations could arise whereby councillors that favour the Chief's positions will be absent from a meeting in which a vote will be taken on a particular matter, leaving only those who oppose him. If the Chief knows this in advance, and cancels the meeting accordingly, he is manipulating the system in order to favour his agenda. Such a scenario is contrary to the notion of democracy and is in violation of the fiduciary obligation the Chief holds towards his Band members and the promotion of their interests.

[42] The wording of section 11.1 of the NHCN guidelines seems to be clear regarding the frequency of meetings and who must attend. Equally clear is the wording of section 11.4 of said regulations which outlines the procedure for having special Council meetings. In the present matter, the procedures outlined in sections 11.1 and 11.4 have not been respected. The NHCN Band Council has taken the position that the Chief and his three supporters decide when meetings will be

convened. It is quite obvious upon review of the evidence that meetings are convened when the Chief and his three supporters are available. Such a strategy is taken in order to guarantee that a specific policy agenda is adhered to. If it is evident that dissenting councillors will outnumber those favouring the position of the Chief at a scheduled meeting, the meeting is often cancelled. Further, sometimes the meetings take place in Winnipeg, which is several hours away from where they should ordinarily be held. Such conduct is contrary to the wording and spirit of the NHCN guidelines.

[43] Also, it would seem that the frequency of special meetings, outlined in section 11.4 of the NHCN guidelines, have replaced the frequency of regular scheduled meetings. This in and of itself is contrary to the spirit of the rules. Special meetings cannot become the norm. Further, all meetings should be held in public and ordinary members of the Band should be made aware of the rules and the frequency of the meetings. If a meeting is cancelled, notice should be provided in order to inform members of the Band when a replacement meeting will be held.

[44] As a result of the above analysis, I find that the Band councillors have not vacated their positions and a writ of *quo warranto* is not an appropriate course of action given the circumstances in the present case. However, I do find that there are serious procedural flaws in the way Band Council meetings are cancelled.

3. Should the sub-group of Band councillors be allowed to exist?

[45] The applicant contests the fact that a sub-group has been created. He contends that when decisions are taken by the smaller group of councillors, the rules regarding quorum, notices and the recording of decisions and minutes are not respected.

[46] The respondents claim that it is the "Band custom" for a small group of councillors to conduct sporadic oral meetings amongst themselves, without notice or minutes or any records of decisions. Further, they state that all the decisions taken by the sub-group are properly ratified in conformity with the guidelines and paragraph 2(3)(b) of the *Indian Act* at a duly convened meeting of the Band Council at a later date.

[47] The applicant takes issue with the "Band custom" justification for the creation of a sub-group that does not have to follow NHCN guidelines. The applicant contends that elected band officials have neglected their fiduciary and representative duties. The applicant further submits that the respondents did not provide any evidence that the custom of the NHCN Band has somehow properly and validly been changed to forego providing notice of meetings or the recording of minutes. Also no evidence was submitted to illustrate that Band councillors were to be excluded from participating in NHCN decision-making. Finally, the applicant submits that even if the custom changed, such a change would be disallowed for being contrary to the mandatory requirements pursuant to paragraph 2(3)(b) of the *Indian Act* which states the following.

> *b*) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

[48] Justice Romilly in *Assu*, above, recognized that elected Band Council members have the right to meet outside the context of a Band Council meeting. He states the following at paragraph 62:

> Furthermore, as members of an elected body engaged in purely legislative decision-making, there is nothing to prevent the defendant Councillors from holding meetings among themselves to discuss issues concerning the Band. The courts have recognized that advance discussion by elected members of government in matters coming forward for decision will be inevitable: Old St. Boniface Residents Assn. Inc. v. Winnipeg (City) (1990), 75 D.L.R. (4th) 385 (S.C.C.) at 404 and 409.

[49] In light of the above, I find that it is permissible for a sub-group of Band Council members to meet outside the formal confines of Band Council meeting to discuss issues concerning the Band. However, a distinction must be drawn between the latter and what has occurred in the present matter. That is, it is not permissible for the sub-group of Band councillors to make decisions in secret and subsequently have those decisions rubber stamped at future Band Council meetings without regard to the Band Council guidelines or the provisions of the *Indian Act*.

[50] In *Louie v. Derrickson* [1993] B.C.J No. 1338, Justice Blair, at paragraph 87, makes reference to the comments of Justice Rae in *Leonard v. Gottfriedson* (1981), 21 B.C.L.R. 326,

regarding the need to respect the requirements of subsection 2(3) of the *Indian Act* when a Band Council exercises its powers:

> In Leonard v. Gottfriedson Mr. Justice Rae, commenting on a band council resolution of the Kamloops Indian Band, stated at page 337:
>
> > The [Indian] Act is clearly of a tenor indicating the need and intent to benefit and protect the Indian bands and their individual members coming under its provisions.
> >
> > It is to be read, interpreted and applied in that light. Just as the exercise of a power by a municipality is required to be exercised in strict accord with the statute to protect the interests of the inhabitants, so, it seems to me, and on the same principle, the council's powers under the Indian Act are to be exercised strictly in accord with the Act in the interests of the benefit and protection of the Indians.
>
> In order to satisfy the strict compliance test referred to by Mr. Justice Rae, I must be satisfied that the Band council's powers determining the severance and the payment for it were exercised in accordance with s. 2(3) of the Indian Act.

[51] Not only does the exercise of conferred Band Council powers need to be in conformity with subsection 2(3) of the *Indian Act*, it also must be in the best interest and for the protection of the Band members. Justice Blair goes on to equate a failure to respect the criteria of subsection 2(3) of the *Indian Act* as a breach of a fiduciary and trust obligation owed to the Band Council members by stating the following at paragraphs 88 and 91:

> There is a paucity of evidence upon which I might be so satisfied. There are no minutes or records of a meeting of the Band council which could lead me to conclude that a meeting had been duly convened as required by the Act. There are no Band council

> resolutions which could lead me to conclude that a majority of the councillors of the Band had consented to the severance and the payment.
>
> […]
>
> In summary, the defendant failed to appreciate in any meaningful way the fiduciary and trust obligations imposed on him as Band chief when it came to dealing with the Band council in his capacity as a locatee. He was either oblivious to his obligations or cavalier in his attitude towards them. In either event, the result is the same: he was in breach of the fiduciary and trust obligations imposed upon him by his position and benefited by the breach of those obligations in the amount of $112,500.

[52] Even if Band Council resolutions are passed with a majority of the councillors and minutes and records of a meeting of the Band Council were taken, a violation of subsection 2(3) of the *Indian Act* can still occur.

[53] In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* (1990), 75 D.L.R. (4th) 385, the Supreme Court outlined a test to be used in illustrating that Municipal Council decisions were pre-determined and therefore not in the best interests of the residents. Justice Romilly, in *Assu*, above, adopts the same test for illustrating that Band Council decisions are predetermined and therefore not in the best interests of Band members. In *Old St. Boniface,* the Supreme Court says the following regarding the aforementioned test:

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of council who are capable of being persuaded. The

> legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. […] In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

[54] The respondents argue that they may ratify their resolutions at a later point in time at a duly convened meeting. I am satisfied, however, that in the present matter, the outcome of the ratification process was pre-determined in many situations. That is, resolutions drafted in secret meetings that did not respect the NHCN guidelines, often represented positions that were incapable of being changed. Further, the content of said resolutions was never circulated to the Band's members and properly debated at duly convened meetings and objectors were not given the opportunity to be heard.

[55] I would like to emphasize that the ratification process mentioned by the respondents is a myth. Resolutions cannot be adopted in secret meetings, and then subsequently ratified at a duly convened meeting without being discussed and debated. The resolution itself must be passed at a duly convened meeting. It cannot be the product of a secret meeting and subsequently rubber stamped at a later date at a duly convened meeting. Resolutions cannot be the product of predetermined decisions. They must be debated and passed in accordance with the rules and

guidelines of the Band and in accordance to the principles of democracy. In the present matter, there are many examples which illustrate that the ratification process of Band Council resolutions was inherently biased. I will now turn my attention to one such example.

4. Should the Band Council resolution dated March 17, 2004 be declared void?

[56] The Federal Court's authority to render a Band Council resolution invalid is found at paragraph 18(1)(3) of the Act, which states the following:

18.1(3) On an application for judicial review, the Federal Court may	18.1 (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
a)order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
b)declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[57] On or about March 17, 2004, three members of the sub-group of the NHCN councillors signed a resolution directing their solicitor to pursue a claim against Don Godwin for

misrepresentation and sought an injunction against him. On March 22, 2004, the aforementioned resolution, called NHCN BCR form N.H./2003-04 #128, was submitted by NHCN Band Council into the Court of Queen's Bench in Thompson, Manitoba, as evidence of an official decision of the respondent Band Council. However, that resolution which was drafted by the sub-group was never ratified by the Band Council before it was submitted to Court. The resolution was eventually ratified at a duly convened special Council meeting dated April 1, 2004, after the injunction was allowed.

[58] The applicant is seeking a declaration from this Court stating that the BCR of March 17, 2004, is void and not binding. The applicant justifies such a position by stating that the BCR was not the product of a duly convened NHCN Band council meeting.

[59] I find that the resolution should not have been submitted into the Court of Queen's Bench in Thompson, Manitoba, as evidence of an official decision of the respondent Band Council because it had yet to be passed by the Band Council. Further, the resolution presented to be passed on April 1, 2004, was in fact a predetermined matter. Councillors were not given a chance to debate or discuss the resolution. Further, copies of the resolution, agreed to in secret by only three council members, were not provided to the councillors for review. It is clear that the matter had been pre-determined. As such, I find that the resolution which was allegedly passed on April 1, 2004, is void.

[60] I also find that the use of BCR forms to adopt the "draft" resolutions by the sub-group of councillors at their secret meeting is somewhat misleading, given that the use of those forms leads

to believe that the resolutions had been adopted at a regular duly convened meeting which was not the case.

[61] In fact, in my view, the only valid resolution is the one passed at the duly convened meeting, which is certified by the official representative of the Band Council. In the present matter, the way in which the BCR was written, and filed, does not mention in any way that it is “draft resolution” that has to be adopted at a subsequent meeting of the Council.

[62] If the BCR had been recognized as draft, in seeking an injunction, the Council would not have been able to file the resolution in Court, before April 1, 2004.

[63] Therefore, we have here a clear demonstration that not only the membership of the Band had been manipulated, but a judge had been provided a motion for injunction by a Council that was not yet authorized to apply for such a remedy. This is but one example among many of the Band Council’s unauthorized activities.

[64] The respondents cannot have it both ways: pretend on one hand that the process is transparent and that the “draft” resolutions adopted by the sub-group of councillors will be discussed and maybe amended before being ratified; and pretend on the other hand, that the BCR “draft” resolution is valid as soon as it is passed by the sub-group.

5. Should the applicant's honorarium be changed?

[65] As previously noted, the NHCN is bound by the decisions of its elected Council unless the latter acted in bad faith (see *Assu,* above, at paragraph 30). Acting in bad faith would breach the duty of procedural fairness the NHCN Band Council owes to its Band members. As will be demonstrated below, there is no doubt that the respondents acted in bad faith on numerous occasions.

[66] The applicant claims that his honorarium and expense payments were unjustly curtailed or withheld. The applicant was often in disagreement with other Band Council members regarding NHCN matters. He also wrote letters that were critical of Band Council procedures and decisions. The respondents admitted that the applicant's honorarium was reduced for purportedly acting to discredit the efforts made by the Chief and Band Council. Chief Evans reduced unilaterally the applicant's honorarium from $60,000 to $5,000 and also denied him the use of his travel budget which was in the amount of $24,000. The applicant was informed by letter dated July 23, 2003, that his duties and responsibilities were being stripped and his salary reduced. Although immediately implemented the aforementioned course of action taken against the applicant was not formally adopted by a duly convened Council meeting until December 2, 2003. Chief Evans usurped his power by unilaterally stripping the applicant of his responsibilities and honorarium. Further, Chief Evans attempted to formalize his usurpation of power by having his actions sanctioned at a duly convened meeting four months after the applicant began to be denied his portfolios and honorarium. No notification or opportunity was provided to the applicant to respond to the disciplinary actions

taken against him regarding the reduction in his salary and duties. Further, once the applicant commenced the present judicial matter before this Court, he was locked out of the Council building and his computer was seized.

[67] The Supreme Court of Canada in *Therrien (Re),* [2001] 2 S.C.R. 3, commented on the basic elements associated with procedural fairness. That is, the right to be heard and the right to an impartial hearing. At paragraph 82, the Court said:

> Essentially, the duty to act fairly has two components: the right to be heard (the audi alteram partem rule) and the right to an impartial hearing (the nemo judex in sua causa rule). The nature and extent of the duty may vary with the specific context and the various fact situations dealt with by the administrative body, as well as the nature of the disputes it must resolve: Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879, at pp. 895-96, cited with approval in 2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool) 3 S.C.R. 919, at para. 22, and Ruffo, supra, at para. 88.

[68] The Supreme Court goes on to outline, at paragraph 83, the factors Justice L'Heureux-Dubé, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, specifically mentioned as being relevant in determining the extent of the duty of procedural fairness in a given set of circumstances:

> Thus in Baker, supra, at paras. 23-28, L'Heureux-Dubé J. specifically pointed out that several factors have been recognized in the jurisprudence as relevant to determining what is required by the duty of procedural fairness in a given set of

> circumstances. While she did not provide a comprehensive list of such factors, she referred to: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the decision; and (5) respect for the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures. It is from this perspective that I will now consider the allegations of breach of the rules of procedural fairness made by the appellant in the instant case.

[69] The nature of the Band's decision entails the reduction of the applicant's salary and his duties and responsibilities as a Band councillor. In my opinion the actions taken against the applicant is akin to a loss of employment. In fact, Chief Evans would have certainly fired the applicant if he had been an employee. Given that the applicant is an elected member of the Band Council and therefore not officially an employee, Chief Evans did everything that he could to limit the applicant's duties, responsibilities and honorarium, even confiscating the computer he used in exercising his responsibilities as a councillor. The actions of Chief Evans were conducted with no respect whatsoever for the applicant's status as an elected member and a peer at the Council table. In *Roseau River Anishinabe First Nation v. Atkinson et al.* [2003] F.C.J. No. 251, Justice Kelen addresses the issue of procedural fairness with regards to the continuation of one's employment by stating the following at paragraph 42:

> Decisions made by legislative bodies of a general nature and based on broad considerations of public policy are considered to be immune from the duty of fairness. In contrast, an administrative decision that is directed at a particular person and affects "the rights, privileges or interests" of that individual will trigger the application

> of the duty of fairness, see Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para. 20. The content of the duty of fairness may also vary in correlation to the significance of the impact upon the individual in question. The Supreme Court has stated that when an individual's right to continue his or her employment is at stake "a high standard of justice is required", see Kane v. University of British Columbia, [1980] 1 S.C.R. 1105 at p. 1113.

[70] Also for a thorough analysis of the jurisprudence regarding the duty of procedural fairness as it relates to the obligation to inform an employee of the disciplinary action taken against him or her, see the decision of Justice Simon Noël in *Pelletier v. Canada (Attorney General)* 2005 FC 1545 at paragraphs 64 and 66.

[71] The actions taken by the Band Council have serious consequences for the applicant. Further, the reasons noted by the Band Council to take such actions are completely unfounded. The respondent Muswagon acknowledged that the applicant's honorarium was reduced for purportedly acting to discredit the efforts made by the Chief and Band Council. It was made clear to the applicant that such a decision could have been reversed if he had just complied with the Chief's wishes and was not openly critical of the Band Council's actions (see the minutes of the NHCN Band Council meeting at page 15, Tab M of the applicant's record, volume III). This is a clear indication of influence peddling and blackmail directed towards the applicant. The respondents clearly acted in bad faith, and have not justified their actions with any valid reasons. The respondents have breached duties of procedural fairness by not providing valid notification and

reasons for the reduction in the applicant's honorarium and responsibilities. Further, even though valid reasons were not provided, the applicant should have still been given an opportunity, to respond to the actions taken against him. In not providing this opportunity the respondents breached a duty of procedural fairness.

[72] The failure to provide the applicant with notification, valid reasons and an opportunity to be heard, are not the only breaches of procedural fairness regarding the present matter. The applicant states that the NHCN guidelines provide a clear and fair procedure in order to reduce a councillor's honorarium. Articles 10.1 to 10.11 of the guidelines state the following regarding said procedure:

> 10.1 In the event that a Councillor fails to perform his or her duties or conducts himself or herself in violation of the above provisions, a quorum of Council, at a duly constituted meeting, may consider suspending the Councillor from office
>
> 10.2 If a suspension is to be considered, a quorum of Council shall provide the Councillor with the following:
>
> 10.2.1 A written notice that the question of the Councillor's suspension will be considered at the next duly constituted meeting.
>
> 10.2.2 An itemization of the reasons for considering suspension.
>
> 10.3 The above written notices shall be provided (ten) 10 clear days in advance of the next duly constituted Council meeting.
>
> 10.4 The proposed suspension of the Councillor shall be the first matter on the agenda at the next duly constituted Council meeting.
>
> 10.5 The Councillor, after hearing the allegations that would give rise to the suspension, which allegations shall be presented by any member of Council so designated, shall have full opportunity to respond to such allegations.

> 10.6 After hearing the Councillor's response to the allegations, discussion shall take place following which a vote shall be called. The Councillor whose suspension is being considered shall not be eligible to vote.
>
> 10.7 In the event that the subject Councillor is not in attendance at the meeting despite being provided with the appropriate notice as specified in 10.2.1 and 10.3, the vote shall proceed in his or her absence.
>
> 10.8 In order for a vote to be called and for a suspension to stand, the Chief and all other Councillors must be present at the subject Council meeting; the Chief and a minimum of four Councillors must vote in favour of suspension.
>
> 10.9 Suspensions shall be a period from one to thirty (30) days.
>
> 10.10 Suspensions may be with or without pay, as determined by Council and depending on the severity of the violation.
>
> 10.11 Any decision to suspend pursuant to these provisions shall be subject to ratification at a general Cree Nation meeting, at which the matter of that suspension shall be an agenda item. The decision to suspend shall be ratified, if a majority of the members present at the general Cree Nation meeting vote in favour of the suspension.

[73] Pursuant to articles 10.1 to 10.11 of the NHCN guidelines, a councillor must first be suspended from his or her duties before the optional suspension of an honorarium can be considered. However, in the present matter, it would seem that the Band Council did not follow their own procedure in order to reduce the Band councillor's honorarium. This was evident in the fact that he was not actually suspended before his honorarium was reduced. I find that the applicant, at the very least, could have expected that the Band's policy for the suspension of a councillor's honorarium would have been followed. Therefore, in ignoring their own processes in a manner that

suggests a lack of good faith, the respondents breached a duty of procedural fairness (see *Ross v. Mohawk of Kanesatake* [2003] F.C.J. No. 683, at paragraph 95).

[74] The respondent Eric Apetagon decided to be represented by a solicitor, Don Knight, as of August 10, 2005.

[75] Counsel for Mr. Apetagon provided no written submissions but nevertheless, commented on his client's attitude at Council meetings. The respondent Apetagon demonstrated that he was mostly supportive of the applicant but was regularly outnumbered. His counsel suggests that he is somewhat between a rock and a hard place. That is, he supported the respondents' position that Council members did not vacate their positions, but also abstained on resolution No. N.H./2003-04#128 of March 17, 2004, regarding the mandate for an injunction. Regarding the resolution passed on December 2, 2003, to "ratify" the unilateral decision taken by the Chief on July 23, 2003, it is not clear whether he voted against or abstained. Nevertheless, it seems that the respondent Apetagon has not demonstrated the same bad faith attitude towards the applicant and often supported him.

[76] Members of the Band have no obligation whatsoever to support each other; they are free to discuss and to vote. Nonetheless, when members vote in bad faith, as was the case when councillor Muswagon moved the resolution on December 2, 2004, to ratify the decision of Chief Evans, on the

basis that the applicant should somehow be punished for not wanting to conform with the majority, such a course of action is contrary to the rules and the principles of democracy.

[77] I find that respondent Apetagon was not acting in bad faith and should not have to pay the costs of this case.

JUDGMENT

THIS COURT:

- **ORDERS THAT** this application for judicial review be granted in part;
- **DECLARES THAT** the Federal Court has jurisdiction in this case;
- **DECLARES THAT** the Chief and all councillors did not vacate their positions;
- **ORDERS THAT** the Band Council resolution No N.H./2003-04-#128 of March 17, 2004 be quashed and the resolution be therefore without force and effect;
- **ORDERS THAT** the decision made by the NHCN Band Council to withhold all or part of the applicant's honorarium remuneration and his expense payments arising out of his status and required work as an elected NHCN councillor equivalent to those paid to other elected NHCN councillors and commensurate with applicable regulations and policies, be quashed; and the resolution and the letter regarding that decision be without force and effect;
- **DECLARES THAT** the applicant be re-established in his previous responsibilities with all honorarium remuneration and expenses payments arising out of his status and required work as an elected NHCN councillor equivalent to those paid to other elected NHCN councillors and commensurate with applicable regulations and policies;
- **ALSO ORDERS THAT**, given that the NHCN's Council decision to deprive the applicant of his duties, responsibilities, honorarium and expenses being now quashed, the applicant shall be paid forthwith all his honorarium and expenses that were withhold, since the decision was made, notwithstanding any appeal;
- The applicant shall file and serve written submissions regarding costs no later than February 28, 2006. The respondents shall file and serve their written submissions in response, no later than March 13, 2006 and the applicant shall file and serve his reply, if necessary, no later than March 20, 2006.

"Pierre Blais"

Judge

FEDERAL COURT
NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-588-04
STYLE OF CAUSE:	Marcel Luke Hertlein Balfour v. Norway House Cree Nation Chief and Council and Ron Evans, Eric Apetagon, Eliza Clarke, Fred Muskego, Mike Muswagon, and Langford Saunders
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	December 13, 2005 and January 17, 2006, in part by videoconference
REASONS FOR JUDGMENT AND JUDGMENT:	BLAIS J.
DATED:	February 16, 2006

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