Date: 20080612

Docket: T-201-08

Citation: 2008 FC 726

Montréal, Quebec, June 12, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

ALBERT DEAN LAFOND

Applicant

and

MUSKEG LAKE CREE NATION AND CHIEF GILBERT LEDOUX

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review brought by the applicant pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the *Federal Courts Act*), as amended, respecting a decision taken on approximately January 8, 2008 whereby Chief Ledoux of the Muskeg Lake Cree Nation (MLCN) suspended the duties of the applicant, Councillor Lafond, as a councillor of the MLCN.

[2] The applicant asserts that he was improperly removed from office by a procedure created by the Chief and not according to the procedure set out in the *Act Respecting the Government Elections*

and Related Regulations of the Muskeg Lake Cree Nation (the *Election Act*). The respondents submit that this Court does not have jurisdiction to review this decision, and that the Chief was acting according to the authority granted to him by Band custom.

BACKGROUND

[3] On February 13, 2006, the applicant was elected as a councillor to the MLCN Band Council for a term of three years.

[4] The respondent Band is located in the province of Saskatchewan and has reserve land near the town of Marcelin as well as an urban reserve in the city of Saskatoon. The individual respondent, Gilbert Ledoux, is the Chief of the respondent Band and occupies a position on the Band Council along with the applicant.

[5] In 2000, the MLCN was removed from conducting its elections under the *Indian Act*, R.S., c. I-6 (the *Indian Act*), by SOR/2000-409. Elections of the MLCN are now carried out pursuant to the *Election Act*.

[6] In late 2007, Chief Ledoux began receiving complaints concerning Councillor Lafond's behaviour towards Band members and Band employees. In addition, other complaints were made to the Chief to the effect that Councillor Lafond was improperly and illegally using Band members' treaty numbers when selling cigarettes from a store which he owned.

[7] In response to these complaints, Chief Ledoux removed the portfolio of Sports, Culture, and Recreation from the applicant in late 2007. On approximately October 26, 2007, the applicant received a letter from Chief Ledoux expressing his concerns regarding the applicant's behaviour and the welfare of the Band members and employees and warning the applicant that there would be consequences if the behaviour continued. Finally, by way of written notice dated January 8, 2008, Councillor Lafond had his duties as councillor suspended by Chief Ledoux. The Band Council was not involved in any of these actions.

ISSUES:

[8] This application raises the following issues:

- ***Does this Court have jurisdiction over the present application?***
- ***Does the Election Act apply?***

ANALYSIS

Does this Court have jurisdiction over the present application?

[9] In order to determine the jurisdiction of the Federal Court in this matter, it is imperative to properly characterize the action taken by Chief Ledoux in regards to the applicant. In his submissions, the applicant characterizes the action as a removal from office, falling squarely within

the four corners of the *Election Act* which establishes explicit procedures to be followed in such a circumstance. On the other hand, the respondents characterize Chief Ledoux's act as a suspension which does not fall within the *Election Act*, and thus was carried out pursuant to his customary authority as Chief of the MLCN.

[10] The respondents concede that some of the Chief's traditional powers and authority have been replaced by legislation enacted by the Band, and the provisions of the *Indian Act*, but that certain traditional powers and authority remain vested in the Chief such as assigning, moving, and removing portfolios from Band councillors. The Chief thus retains his customary powers and authority where Band legislation has not "covered the field". Indeed this was recognized by the Federal Court of Appeal in *Samson Indian Band v. Samson Indian Band (Election Appeal Board)*, 2006 FCA 249, [2006] F.C.J. No. 1051 (QL), at para. 39, where it held that "(. . .) evidence of prevailing election practice and custom may be relevant in resolving ambiguities or filling gaps in the Election Law".

[11] I agree that the Chief does have inherent powers to encourage harmony in his community which are rooted in Band custom and that while some of these powers may be modified pursuant to Band legislation and the *Indian Act*, others remain intact and exercisable.

[12] Nevertheless, I am of the view that while couched as a suspension from office, and thus qualitatively different from a removal, what has actually occurred in the present case is a removal of the applicant from his elected position.

[13] I note that the respondents cite *Black's Law Dictionary*, 8th Edition, which defines "suspension" as: "[t]he temporary deprivation of a person's powers or privileges, esp. of office or profession". The respondents argue that the Chief was "removing Councillor Lafond's powers and privileges in an emergent situation pending a hearing". However, no evidence was submitted to this effect, nor was there any evidence indicating that the suspension was for a limited period of time. Further, when probed at the hearing, counsel for the respondents conceded that no hearing was actually pending, nor was any type of appeal procedure envisioned. Thus, in essence, the applicant was stripped of all attributes of his elected position as Councillor for an indefinite period of time and without an avenue of recourse.

[14] For the foregoing reasons, I am of the opinion that the applicant was removed from his elected office and not suspended.

[15] Pursuant to s. 18(1) of the *Federal Courts Act*, in order for this Court to have jurisdiction over an application, the decision-maker or decision-making body in question must be a "federal board, commission or other tribunal". Section 2 of the *Federal Courts Act* defines a "federal board, commission or other tribunal" as:

> (. . .) any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

[16] Jurisprudence of this Court and others has consistently held that Band Councils are federal boards pursuant to s. 2 of the *Federal Courts Act* (*Francis v. Mohawk Council of Kanesatake*, 2003 FCT 115, [2003] F.C.J. No. 156 (QL), at para. 13; *Trotchie v. The Queen et al.*, [1981] 2 C.N.L.R. 147 (F.C.T.D.); *Canatonquin v. Gabriel*, [1980] 2 F.C. 792; [1980] F.C.J. No. 87 (QL); *Rider v. Ear* (1979), 103 D.L.R. (3d) 168 (Alta. S.C. (T.D.)); *Gabriel v. Canatonquin*, [1978] 1 F.C. 124).

[17] The MLCN has been removed from the application of s. 74 of the *Indian Act* pertaining to elections, and has thereby reverted to a local customary electoral system as embodied in the *Election Act*. However, even where elections are carried out pursuant to band custom, this Court has consistently found Councils to be acting as a "federal board[s], commission[s] or other tribunal[s], and thus subject to judicial review (See *Francis*, above, at para. 13; *Canatonquin v. Gabriel*, above). I stress that included within the category of "election by band custom" are matters which are necessarily incidental to elections such as tenure and removal from office (see *Minde v. Ermineskin Cree Nation*, 2006 FC 1311, [2006] F.C.J. No. 1642 (QL), at para. 32; *Crow v. Blood Band*, [1996] F.C.J. No. 119 (QL), at para. 18).

[18] In sum, the action of Chief Ledoux constituted a removal from office. Removals from office are considered ancillary to Band election matters and this Court has consistently held that a Band Council or other body with decision-making power over these matters, even where created or elected according to Band custom, will still qualify as a "federal board, commission or other tribunal".

[19] In the present case, that the Chief was purporting to act on his own initiative as Chief and therefore separate from the Band Council, cannot be used as a pretext to exclude the jurisdiction of the Court. It would be illogical to hold that this Court has no jurisdiction to review an act committed by a Chief acting alone in relation to Band election matters. This would result in precluding the right of applicants to ensure a principled and just process was followed in decisions affecting their rights and privileges when those decisions are made by "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2 of the *Federal Courts Act*).

[20] In the recent decision of *Minde v. Ermineskin Cree Nation*, 2008 FCA 52, [2008] F.C.J. No. 203 (QL), the Federal Court of Appeal, when confronted with a jurisdictional challenge where a Chief had been removed from office, noted that:

> (. . .) the jurisdiction of the Federal Court under section 18 [of the *Federal Courts Act*] does not depend on form, but is based on the authority to decide. To the extent that the Elders Council is empowered to and did terminate Mr. Minde as Chief pursuant to the Band Constitution, its decision can be reviewed pursuant to section 18. (at para. 33) [Emphasis added]

I would add that this jurisdiction extends to those purporting to have authority to decide as well (*Roseau River Anishinabe First Nation v. Roseau River Anishinabe First Nation (Council)*, 2003 FCT 168, [2003] F.C.J. No. 251 (QL), at para. 19; *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142, [1993] F.C.J. No. 446 (QL), at para. 13). This Court has jurisdiction to review removals of Band Council members from office, regardless of who purports to possess the authority to do so.

[21] Accordingly, I conclude that this Court has jurisdiction over the present application.

Does the Election Act apply?

[22] As previously indicated, the Band has been removed from conducting its elections under the *Indian Act* and reverted to customary law governing elections, including incidental issues of tenure and removal from office.

[23] Given that I have concluded, based on the evidence, that Chief Ledoux's action was a removal, I am of the view that the provisions of the *Election Act* relating to removal of elected Council members from office, are applicable.

[24] With respect to removal, the *Election Act* states the following:

> REMOVAL FROM OFFICE
>
> 4. Once duly elected by members of the Muskeg Lake Cree Nation, the Chief and Headmen are politically and financially accountable to all members of the Muskeg Lake Cree Nation and as such they may be removed from office if they:
>
> i. Consistently ignore or abuse the "OATH OF OFFICE";
>
> ii. Are absent from three (3) consecutive Muskeg Lake Cree nation assemblies or duly convened council meetings without justified cause;
>
> iii. Are convicted under the *Criminal Code of Canada* for an indictable offence or a dual offence on which the Crown has elected to proceed by way of indictment, unless such a conviction relates to the exercise of an aboriginal or treaty right which is a matter of legal dispute.

[25] The Oath of Office includes, *inter alia*, a pledge to respect all laws, policies and traditions of the MLCN, to work for the good of the MLCN, and to respect all other elected officers and employees of the MLCN. Indeed, this is the same Oath of Office referred to by Chief Ledoux in the October 26, 2007 warning letter sent to the applicant.

[26] Further, the section following the provisions relating to removal from office is entitled "Discipline Procedures" which sets out the procedure for making complaints against one or more members of the Council. The respondents submit that the Discipline Procedures are inapplicable in the present case because the provisions explicitly state that "[a]ny member of the [MLCN], 18 years of age or older, either individually or as part of a group, may submit a complaint in writing concerning an alleged violation of section 13 by one or more members of Council". Section 13 deals with "Discontinuation of Authority" and not harassing behavior of a councillor directed to Band members and Band staff.

[27] While I acknowledge that the Discipline Procedures in question do refer to s. 13 of the *Election Act*, on a plain and fair reading this is obviously a typographical error and was meant to refer to s. 3 "Standard of Conduct for the Chief and Headmen". Indeed, the Discipline Procedures in question appear in the section of the *Election Act* relating to removal from office and it would be absurd to construe them as pertaining to "Discontinuation of Authority". They clearly relate to removals from office.

[28] The Discipline Procedures are triggered by submitting a complaint which must be accompanied by a petition signed by 35 electors of MLCN. The complaint shall be received by the Chief Executive Officer of the MLCN who will then submit it to a "Discipline Committee" or a "Family Representatives Committee". Subsequently, the committee will appoint a three person "Discipline Tribunal".

[29] The Discipline Tribunal shall then hold a hearing into the complaint in which the complainants and all Council members who are the subject of the complaint will be provided with written notice of the hearing and given an opportunity to present evidence and argument in support of their position. The individual(s) against whom the complaint is made shall be afforded a reasonable opportunity to know and respond to the allegations made against him or them as the case may be. The Discipline Tribunal will determine if the complaint has been proven on a balance of probabilities and if it has, may decide to dismiss the individual from office or allow the individual to continue in office with or without conditions attached.

CONCLUSION

[30] Given the foregoing, I find that the *Election Act* sets out explicit discipline procedures that must be followed if a councillor is to be removed from his elected position. Chief Ledoux did not follow these procedures and thus could not remove the applicant from his position as Councillor in the manner in which he did. Accordingly, the decision taken by Chief Ledoux shall be quashed; the suspension shall be set aside and declared a nullity. The applicant will continue to occupy his

elected position of Band councillor until, and if removed, according to the procedures set out in the *Election Act*.

[31] The applicant has requested that solicitor-client costs be awarded in the present case. I note that in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, [2002] S.C.J. No. 13 (QL), at para. 86, the Supreme Court of Canada stated the following regarding the awarding of costs on a solicitor-client basis:

> It is established that the question of costs is left to the discretion of the trial judge. The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134). Reasons of public interest may also justify the making of such an order (*Friends of the Oldman River Society v. Canada (Minister of Transport*), [1992] 1 S.C.R. 3, at p. 80).

[32] Further, in *Canada v. Amway Corp.*, [1986] 2 C.T.C. 339, at pages 340-341, the Federal Court of Appeal stated that "[c]osts as between solicitor and client are exceptional and generally to be awarded only on the ground of misconduct connected with the litigation".

[33] The applicant has failed to establish that the respondents have displayed reprehensible, scandalous or outrageous conduct in connection with the present litigation or that reasons of public interest exist capable of justifying the exceptional granting of solicitor-client costs in the present application.

[34] To the contrary, I find Chief Ledoux to have acted with the best of intentions in order to deal with a difficult and contentious situation. Faced with multiple complaints of misconduct on the part

of the applicant, he took the steps which he felt were appropriate at the time, including the removal of the applicant's portfolio, and issuing both a verbal and a written warning. He undertook a course of action which he believed was in the best interests of the Band and that provided a measure of fairness to the applicant. However, the fact remains that the MLCN has created its own *Election Act* to govern exactly the situation of misconduct that the Chief was faced with, and this procedure was not followed in the present case.

ORDER

For these reasons, the application for judicial review of Chief Ledoux's decision will be allowed; the decision is quashed and thereby rendered a nullity. Accordingly, the applicant will continue to occupy his elected position of Band councillor until, and if removed, according to the procedures set out in the *Election Act*. The whole with costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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