Federal Court  Cour fédérale

Date: 20110208

Docket: T-2128-10

Citation: 2011 FC 147

Ottawa, Ontario, February 8, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

LOWER NICOLA INDIAN BAND

Applicant

and

**CHARLENE JOE, MARCY GARCIA,
DAVID CLAYTON, STUART JACKSON,
ROBERT STERLING JR. and
MARY JUNE COUTLEE**

Respondents

and

**COUNCIL OF ELDERS OF THE
LOWER NICOLA INDIAN BAND**

Intervener

REASONS FOR ORDER AND ORDER

[1] This motion by the Lower Nicola Indian Band ("the LNIB") is for interim relief pending the hearing and determination of the within application for judicial review ("the Application") of the

December 1, 2010 Decision and Order of the Lower Nicola Indian Band Elders Council ("the Elders Council") deciding election appeals under the Custom Rules of the Lower Nicola Indian Band ("the decision"), the said decision declares three seats occupied by Mary June Coutlee, Stuart Jackson and Robert Sterling Jr. on the Council of the Lower Nicola Indian Band ("the Band Council") following an election held October 2, 2010, vacant and appoints three (3) of the three (3) other respondents, namely Charlene Joe, Marcy Garcia and David Clayton retroactively to October 2, 2010. It is argued that the decision was made contrary to the Custom Election Rules of the Lower Nicola Indian Band ("the Rules"). To deal with this interim request, the Court held two hearings via teleconference, as well as a public hearing.

[2] The applicant is seeking, pursuant to Rule 398 of the *Federal Courts Rules*, SOR/2004-282 ("the Rules of the Court") and the inherent jurisdiction of the Court, an order staying or suspending the operation of the decision made by the Elders Council pending the hearing and determination of the within Application and, furthermore, pursuant to Rule 373 of the same Rules and the inherent jurisdiction of the Court, preserve the status quo of the October 2, 2010 election by enjoining and prohibiting the respondents Charlene Joe, Marcy Garcia and David Clayton from holding themselves out and acting as councillors of the Band Council pending the hearing and determination of the within Application and thereby "declaring" that the other respondents, Mary June Coutlee, Stuart Jackson and Robert Sterling Jr. are and shall continue to act as councillors of the Band Council pending the determination of the within Application.

[3] On January 31, 2011, the Elders Council was given limited status to intervene.

[4] The Chief of the Band, Victor York, did submit his own documentation which could be understood as a motion to intervene. It was refused since the documentation as filed did not justify granting intervener status. During one of the hearings, the Court noted that the applicant's record clearly indicated that the Chief of the Band duly elected was not in agreement with the decision of the Band Council made up of the elected Councillors as a result of the October 2, 2010 election. It was also understood that the self-represented respondents, David Clayton and Charlene Joe, were taking, in their motion, record the same position as the Chief, something that was made clearer during the oral arguments.

[5] The applicant, the respondent Mary Jane Coutlee and the Elders Council as interveners are represented by counsel. The respondents, David Clayton and Charlene Joe represented themselves and have filed their respective motion record as well as a number of letters opposing the interim measure made and the within Application. The other respondents, Marcy Garcia, Stuart Jackson and Robert Sterling Jr., elected October 2, 2010 are not represented except that their interest is represented by one of the respective position taken by the parties.

The Issues at Bar

[6] The Lower Nicola Indian Band is a band that is exempt from section 74 of the *Indian Act*, R.S. 1985, c. I-5 ("*Indian Act*"), as its Custom Elections Rules trump the application of the *Indian Act* in regards to elections held.

[7] In essence, the Band Council made up of the Chief and seven (7) councillors is in a power struggle. Three (3) councillor seats are at play. Who shall fill them as a result of the within

Application is unknown. Will it be the three (3) elected councillors of the October 2, 2010 election (the "elected "Councillors"") or the three (3) councillors appointed by the Elders Council's decision of December 1, 2010 (the "named "Councillors"")? Which status quo should be recognized: the election results or the Elders Council decision if one has to be identified or is there another route to follow that will not advantage one set of councillors versus another?

[8] The Court has noted that four (4) of the seven (7) councillor seats and the Chief's Office are not in question. What is at play with the present litigation is the balance of power to be exercised at Council's meetings.

[9] It is clear that the underlying application for judicial review stems from the political uncertainty that has nearly paralyzed the governance structures of the LNIB. This is abundantly clear from the parties' pleadings and presentations of the facts. Background information on this struggle can be found in Madam Justice Tremblay-Lamer's reasons in *Basil v Moses*, 2009 FC 741. In short, through this decision, Madam Justice Tremblay-Lamer ruled that the findings of the Elders Investigation Committee were reasonable in regards to the breach of fiduciary duties by then-Councillors Sam, Coutlee and Jackson, whose resignations were validly given and accepted by then-Chief Moses. However, this was only one of the findings made by Justice Tremblay-Lamer. As three Band Council Resolutions were found to be invalid, the underlying questions of these persons' eligibility for electoral office were to be determined by way of referendum.

[10] In order to understand the underlying issues at play, a brief summary review of the applicant's is as follows: it is alleged that the Elders Council in rejecting the October 2, 2010 results

in the case of respondents Stuart Jackson, Robert Sterling Jr. and Mary June Coutlee and appointing respondents Charlene Joe, Marcy Garcia and David Clayton made a decision that should be quashed because of bias and a reasonable apprehension of bias in that some of the members of the Elders Council were family related to some of the respondents or that through past experiences, as member of earlier Elders Investigative Committee were part of a conflict of interest situation in relation to some of the respondents and that the Elders Council had appointed a lawyer that had worked for one of the Elders Investigative Committee in unsuccessfully attempting to approach some of the respondents. It also relies on a proper interpretation to be the Custom Election Rules to support their objective.

[11] Counsel for the respondent Mary June Coutlee, on her behalf, agrees with and supports the submission made by the applicant.

[12] The self-represented respondents David Clayton and Charlene Joe clearly oppose the interim request being sought and the within Application. It is argued, among other matters, in accordance with the Custom Election Rules, that the Elders Council is the forum to deal with election issues and that as such it is the final legal electoral decision made and that their decision of December 1, 2010 should not be stayed.

[13] Thus, the crux of this interim stay motion and interim motion for injunctive relief is one of balancing rival political interests. As will be seen, there is a clear tension between two important elements of the LNIB's governance structure: the election results and the Elders Council's decision.

[14] It is to be noted that other legal procedures also exist, which are the related to the factual matrix of this procedure. The Court is not seized of any of these other procedures.

The Test for Interim Relief

[15] In order to be successful, the present interim request must meet the tripartite test set out by the Supreme Court in *R.J.R. MacDonald Inc. v Canada (Attorney General)*, [1994] 1 S.C.R. 311, whereby it must be shown that there is: 1) a serious issue to be tried; 2) irreparable harm should the interim relief not be granted; and 3) that the balance of convenience favours the applicant. This test has been applied countless times in aboriginal matters (see, *inter alia*, *Basil et al v Council of the Lower Nicola Indian Band*, 2009 FC 1039; *Gabriel v Mohawk Council of Kanesatake*¸2002 FCT 483 (FC) and *Prince et al v Sucker Creek First Nation #150A et al*, 2008 FC 479).

A Serious Issue to be Tried

[16] There is no doubt that serious issues arise from the present litigation. Governance of the LNIB and transparency are at play. Being divided as the respondents are and also the Band Council, the interest of the Band as a whole is not adequately served with the preservation of the *status quo*. Indeed, the *status quo*, as is indicated in the parties' representations of the facts, is one of tension and uncertainty as to who holds valid office.

[17] The underlying application raises serious issues in regards to, among other issues, the scope of the Elders Council's powers as well the validity of the October 2, 2010 election results. This aspect of the test is thus clearly met.

Irreparable Harm

[18] Harm clearly arises from this situation: as Joanne Lafferty's affidavit indicates, at para 45, several important matters of governance and negotiations are to be monitored and decided upon by the LNIB Council. Among these issues are negotiations and activities of a commercial nature that are essential to the interests of the LNIB.

[19] There is some harm, is it irreparable? What can be defined as the *status quo*: the election results or the Elders Council's decision? Which situation should prevail? Is it appropriate to favour one side versus another at this stage? The main issues cannot be dealt with without a proper complete analysis and the Court is mindful, by an interim solution, of pre-judging the underlying application.

[20] Irreparable harm is not qualified as "irreparable" because of the scope or importance of the harm caused. Rather, what must be shown is that, but for the injunctive relief sought, the harm caused could not later be compensated through damages (*White v E.B.F. Manufacturing Ltd.*, 2001 FCT 1133 (FC), at para 13). Madam Justice Tremblay-Lamer has noted the particular implications of the loss of elected office and how it differs to the normal employment context in *Gabriel*, above. This was cited approvingly by Mister Justice Kelen in *Prince*, above, in the context of the dismissal of Councillors, a situation not unlike the case at bar. Justice Kelen noted in all clarity at paragraph 32 that:

> Removal from this office means that the applicants cannot speak out on behalf of those policies for which they were elected, either at Council meetings or within the community at large. Such a situation not only irreparably harms not only the applicants themselves, but also those individuals who elected them as their representatives (…)

[21] However, in this case, the Court distinguishes the scope of Justice Kelen's *dicta*, as without proper nuance, the present Interim application may skew the underlying application. Here, the irreparable harm is not to be interpreted as being personal to any named person or the Council in particular. Rather, it is common to all Parties, but more importantly, it is the members of the LNIB who suffer irreparable harm by having such conflict and uncertainty in their power structures.

Balance of Convenience

[22] During the course of the hearing, the Court voiced a clear concern that the interim Order should not favour one party or another. At face-value, the Council or the Respondents seek an interim solution that favours their interests. This concern was voiced and counsel for the LNIB Council, Mr. Rolf, came up with a remedy favouring less markedly one side than the other. The respondents, Clayton and Joe, opposed this proposition: they would like the Chief to assume all administrative powers. However, the Court notes that most of the remedies here would not only favour one faction over the other, but could also be seen as a determination of the underlying application for judicial review.

[23] The evidence provided by way of affidavit is clear: an untenable political situation has befallen the LNIB Council. The three Councillors whose elections were contested to the Elders Council, Robert Stirling Jr., Stuart Jackson and Mary June Coutlee, continued to sit at "Council", while the three "Councillors" appointed by the Elders Council sought to have their "office" recognized. Again, the Court notes, namely through its use of apostrophes, that these are unresolved questions to be determined by the underlying application. At this stage, the very least that can be said is that the situation is unreasonable for the Band as a whole.

[24] The Council calls for action under the Court's inherent and equitable jurisdiction. Case law presents an important corollary to this call for interim relief: that of the "clean hands" doctrine. As aptly noted by Justice Goodman of the High Court of Justice of Ontario in *Peleshok Motors Ltd. v General Motors Ltd.* (1977), [1977] OJ No 810, 2 BLR 56 (Ont. H.C.), at para. 26:

> The principle that "he who comes in equity must come with clean hands" is applicable to proceedings such as this. In Snell's Principles of Equity [27th ed., 1973] it is said, at p. 32:
>
> > This maxim, which seems not unrelated to the *ex turpi causa non oritur actio* of the common law, is very similar to the previous maxim; but it differs from it in looking to the past rather than the future. The plaintiff not only must be prepared now to do what is right and fair, but also must show that his past record in the transaction is clean; for "he who has committed Iniquity ... shall not have Equity" (…)
>
> The maxim must not be taken too widely; "Equity does not demand that its suitors shall have led blameless lives." What bars the claim is not a general depravity but one which has "an immediate and necessary relation to the equity sued for."

[25] Again, a determination of the Applicant's or Respondents' "clean hands" is in and of itself a determination of the underlying application. However, it must be said here that neither party has put forth the ideal case for equitable relief. On one side, the Council, through the conduct of three "Councillors" conduct, has disregarded a ruling of a respected and important institution within the LNIB, the Elders Council. The importance of the institution was confirmed by Madam Justice Tremblay-Lamer in *Basil*, above, at paragraph 52.

[26] However, on that occasion, the Court also nuanced the Elders Council's adjudicative powers (see *Basil*, above, at paragraph 58). As well, despite this apparent uncertainty, the three named "Councillors" sought to act upon the "Office" they were assigned by the Elders Council. It can be stated, without this being adjudicative, that there is a *prima facie* issue with the composition of the Council on this occasion, on the grounds of conflict of interest.

[27] It is also important to state that, all the while, the underlying issue of the eligibility of Council members found guilty of a breach of their fiduciary duties was to be determined by way of referendum, as per Madam Justice Tremblay-Lamer's decision in *Basil*, above. Also, the matter of the candidates' eligibility was to be judicially reviewed in light of Band Council Resolutions barring them from running in a by-election, but the application was subsequently stayed (see T-1531-09, as well as the Interim ruling of Mister Justice Barnes in *Basil et al v The Council of the Lower Nicola Indian Band*, 2009 FC 1039). Also, a serious question is raised in regards to the legal criteria by which the Elders Counsel's judged the matter.

[28] The grounds for this interim motion rely partly on the Court's equitable jurisdiction. Equity, it is clear, calls for remedies that do safeguard the rights of the respective parties. In this respect, remedies must be crafted with due consideration on their effects and how they might skew the underlying application. It would be illogical for "equitable remedies" to be clearly inequitable in their effects and scope by making a determination of the underlying application. Again, most of the remedies available to the Court either favour one party or the other, which would constitute a determination of the underlying application for judicial review.

[29] These considerations guide the Court in crafting what it considers to be an equitable remedy in the circumstance.

[30] The Applicant takes issue with the loss of "office" by three elected Councillors. This proposition is detailed in the following manner:

> It is not only the LNIB Electors who are being irreparably harmed in the present situation but it is *the whole LNIB which is being irreparably harmed* by losing the benefit of the opinions and advice that Mary June Coutlee, Stuart Jackson and Robert Stirling would bring to the Council table and *by the loss of certainty in the authority and legitimacy of Council's decision relating to both its internal dealings with members and staff and to its external dealings with governments and businesses.* (emphasis added)

[31] The fact that apparent and effective authorities are not perfectly in synch is manifest by this application. Three "Councillors" derive their authority from an election that is at face-value valid, despite the underlying issue of their eligibility that was to be determined. The Court cannot dictate if and when the referendum prescribed by Madam Justice Tremblay-Lamer should proceed, and an election was held before this referendum could be held. Three other "Councillors" derive their apparent authority from a respected institution, that of the Elders Council. Which three "Councillors" should prevail is clearly the main issue of the underlying application. In the meantime, two "factions" derive their power from presumably legitimate sources. They are presumed legitimate until the matter at hand is resolved by way of judicial review.

[32] While it remains clear that the Court should thread cautiously in intervening unduly in the political affairs of First Nations (*Sweetgrass First Nation v Gollan*, 2006 FC 778), the remedies sought on an interim basis clearly call for a direct intervention in a difficult political situation. In

light of the best interests of LNIB membership pending determination of the application, the Court orders the following on an interim basis. This Order sufficiently mitigates the "balance of convenience" aspect of the tripartite test.

[33] As the Elders Council's decision is impugned, the effective Council for the following matters is the Council as it was elected on October 2, 2010. These matters are principally: day-to-day administration, the provision of essential services, ordinary payable accounts, management of administrative staff, urgent acts to safeguard the rights of the membership, subscribing of insurance, and like matters. This apparently non-restrictive list is to be interpreted in light of the other matters which the elected Council may not rule upon without the participation of the three "named" Councillors. Quorum and procedural questions for these matters remains the same as prescribed by the *Lower Nicola Indian Band – Chief and Council Policy and Guidelines*.

[34] In order to allow for transparency, the three named "Councillors" shall receive advance notice of every Council meeting and be allowed to be present and free of harassment or persecution in their presence at Council meetings. They shall have a limited right of participation in these matters, but may not cast a vote in the matters noted above in paragraph 33. The aim here is to remedy the potential prejudice the named "Councillors" should their appointment be found to be valid.

[35] As indicated, the Council elected on October 2, 2010 may act as the effective Council for the LNIB in the above mentioned matters. As indicated by the affidavit of Joanne Lafferty, several other important matters need to be resolved. These are:

- Employing a full time Executive Director for the Council term 2010-2013;
- Preparation of budgets for fiscal year 2011-2012 prior to end of fiscal year at the end of March 2011;
- Referendum of Custom Election Rules;
- Negotiations with BC Hydro – ILM Project and MAT Project;
- Negotiations with Highland Valley Copper Mine;
- Economic Development Project – Gateway 286 project;
- Lands, Rights and Title – Kwioek Creek Project;
- NAIK Development Corporation – Accountability to Membership;
- Shulus Cattle Company – Accountability to Membership;
- Spayum Development – Insurance settlements and negotiations.

[36] These are important matters that go well beyond the interest of Council Members, staff and the Council itself: these are determinative matters that impact the whole LNIB membership. As the Applicant noted, "the whole LNIB which is being irreparably harmed (…) by the loss of certainty in the authority and legitimacy of Council's decision relating to both its internal dealings with members and staff and to its external dealings with governments and businesses". To remedy this loss of certainty in the authority and legitimacy of Council's decisions, the important matters noted above and decisions of similar scope are to be resolved in the following manner. Effective Council for these matters will be constituted of the Council elected on October 2, 2010, as well as the three "Councillors" named by the Elders Council. As these decisions and like matters clearly transcend the punctual nature of this application, it is clear that these decisions must be made with the utmost legitimacy. This equitable remedy prevents these important decisions to be later impugned for want

of valid office, should the elected "Councillors" later be found to be ineligible for office. More importantly, by imposing a consensus-based decision-making for important decisions, the Court wishes to see the higher interests of the LNIB membership recognized by all parties involved.

[37] Also, the matters that were determined between October 2, 2010 and the present date are to be redetermined accordingly with the present Order. In the interests of dispelling any ambiguity, matters that fall into the acts described at paragraph 33 still stand if they were made in conformity with the *Lower Nicola Indian Band – Chief and Council Policy and Guidelines*. Other matters need to be resolved with the participation of the named "Councillors", in light of the LNIB membership's higher interests.

[38] Without commenting further to the nature of the resolutions passed between October 2, 2010 and the present date, it is clear that the meetings need to have been "duly convened" in light of the LNIB's rules and applicable case law. Also, any resolution pertaining to privileges or advantages of any Councillor or the Chief need to be determined with the larger, consensus-based decision-making process.

[39] It is clear that Chief York will need to fully assume the leadership responsibilities entrusted to him by the LNIB membership, who undoubtedly expect no less than an effective and proactive resolution of the present issues. The *Lower Nicola Indian Band – Chief and Council Policy and Guidelines* clearly recognize leadership functions to the Chief, for example to convene Council, act as spokesperson, act in a supervisory capacity to other Council member's activities, as well as making decisions as necessary for good government.

[40] Respect for Chief York's functions and role is mandatory. He will have to manoeuvre a difficult political situation. However, his Office is not debated or at issue in the present application for judicial review. As such, his authority and functions are not contested, as are the three elected "Councillors" and three named "Councillors" hypothetical functions are. As such, his legitimacy is manifest, but needs to be exercised with proper consideration of the LNIB's membership's interests. These interests go above and beyond the resolution of the present matter. Surely, no one will be satisfied by the present Order and its consequences. However, the Order transcends the Parties wishes in order to fully address the needs of the LNIB membership in terms of good governance and transparency during the resolution of the application.

[41] Recognizing the difficulties of the present political situation, the Court will order the underlying matter to proceed on an expedited basis with a precise schedule for perfecting the application. Furthermore, the matter will proceed as a specially managed proceeding, pursuant to the authority derived from Rule 384 of the Rules of the Court.

[42] Also, in the interests of justice and good governance, the Court shall order the present Reasons for Order to be publicized widely, in any matter deemed appropriate.

[43] Also, the Court will order that the Respondent Charlene Joe and Respondent David Clayton be served through their e-mail addresses, as they appear in a letter from Mr. Rolf, dated February 2, 2011.

[44] Determination of costs shall be resolved with the underlying application for judicial review.

ORDER

THIS COURT ORDERS that:

1. Matters such as day-to-day administration, the provision of essential services, ordinary payable accounts, management of administrative staff, urgent acts to safeguard the rights of the membership, subscribing of insurance, and like matters, shall be decided upon by the Council, as elected on October 2, 2010 and in accordance with the *Lower Nicola Indian Band – Chief and Council Policy and Guidelines*;

2. The three (3) named "Councillors" shall receive advance notice of every Council meeting and be allowed to be present and free of harassment or persecution in their presence at Council meetings. They shall have a limited right of participation in these matters, but may not cast a vote in the matters noted above in paragraph 33 and like matters;

3. Important matters that address the LNIB membership's long-term interests are to be decided by a Special Council constituted of the Council elected on October 2, 2010, as well as the three (3) "Councillors" named by the Elders Council;

4. The matters that were determined by Council between October 2, 2010 and the present date are to be redetermined accordingly with the present Order;

5. The Respondents Charlene Joe and David Clayton be served through their e-mail addresses, as they appear on a letter from Mr. Rolf, dated February 2, 2011;

6. The present Reasons for Order and Order are to be publicized widely, in any matter deemed appropriate;

7. The proceeding shall continue as a specially managed proceeding;

8. The following schedule shall apply:

   (a) The Application for Judicial Review is to be heard in Vancouver, British Columbia, on March 22 and March 23, 2011, on an expedited basis;

   (b) The evidence filed in the motion for the interim stay and injunction shall be evidence applicable to the application for judicial review;

   (c) The Applicant's shall perfect their Rule 306 record by serving any further affidavits or documentary exhibits by Friday, February 11, 2011;

   (d) The Intervener shall serve any affidavits or documentary exhibits in explanation of the Council of Elders' record by Wednesday, February 16, 2011;

   (e) The Respondents shall each perfect their Rule 307 records by serving any further affidavits or documentary exhibits by Friday, February 18, 2011;

   (f) Without further order of the Court, there shall be no cross-examinations on affidavits;

   (g) The Applicant shall serve and file their Rule 309 record by Tuesday, February 22, 2011;

   (h) The Respondent Coutlee shall serve and file her Rule 310 record by Wednesday, March 2, 2011, which record shall contain their written representations and any

affidavits or documentary exhibits relied upon that are not already contained in the Applicant's record;

(i) The Respondents Clayton and Joe shall serve and file their Rule 310 records by Wednesday, March 9, 2011;

(j) The Intervener may serve and file an Intervener's record by Wednesday, March 16, 2011, which record shall contain its written representations in accordance with this Court's Order granting intervener status and any affidavits or documentary exhibits that it relies upon not already contained in the Applicant's or Respondent's records;

9. This Order may be amended by a judge of this Court or the person selected by the Chief Justice to case manage this proceeding; and

10. Costs to follow.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2128-10
STYLE OF CAUSE:	LOWER NICOLA INDIAN BAND V CHARLENE JOE, MARCY GARCIA, DAVID CLAYTON, STUART JACKSON, ROBERT STERLING JR. and MARY JUNE COUTLEE
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	January 27, 2011
REASONS FOR ORDER:	NOËL S. J.
DATED:	February 8, 2011

APPEARANCES:

David C. Rolf	FOR THE APPLICANT
Charlene Joe	FOR THE RESPONDENT CHARLENE JOE ON HER BEHALF
David Clayton	FOR THE RESPONDENT DAVID CLAYTON ON HIS BEHALF
John M. Drayton	FOR THE RESPONDENT MARY JUNE COUTLEE
David E. Gruber	FOR THE INTERVENER COUNCIL OF ELDERS OF THE LOWER NICOLA INDIAN BAND

SOLICITORS OF RECORD:

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Charlene Joe	FOR THE RESPONDENT CHARLENE JOE ON HER BEHALF
David Clayton	FOR THE RESPONDENT DAVID CLAYTON ON HIS BEHALF
Gibraltar Law Group Kamloops, BC	FOR THE RESPONDENT MARY JUNE COUTLEE
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