

Federal Court



Cour fédérale

Date: 20120224

Docket: T-1964-11

Citation: 2012 FC 263

Vancouver, British Columbia, February 24, 2012

PRESENT: Roger R. Lafrenière, Esquire
Case Management Judge

BETWEEN:

**CHIEF VICTOR YORK AND
THE LOWER NICOLA INDIAN BAND AS
REPRESENTED BY CHIEF V. YORK AND
COUNCILLOR HAROLD JOE**

Applicants

and

**“THE COUNCIL” AS REPRESENTED BY
MOLLY TOODLICAN,
LUCINDA SEWARD,
JOANNE LAFFERTY,
MARY JANE COUTLEE,
STUART JACKSON, AND
ROBERT STERLING JR.**

Respondents

REASONS FOR ORDER AND ORDER

Overview

[1] In the underlying proceeding, Chief Victor York is challenging a decision dated November 1, 2011 of “The Council” of the Lower Nicola Indian Band (LNIB Council) to remove him from the office of Chief. The impugned decision was made by the LNIB Council at a meeting

attended by Councillors Molly Toodlican, Lucinda Seward, Joanne Lafferty, Mary Jane Coutlee, Stuart Jackson and Robert Sterling Jr.

[2] The said Councillors, who are named individually as Respondents, and the Lower Nicola Indian Band (LNIB), have moved for an Order correcting the misjoinder and non-joinder of the proper parties to the application for judicial review. In particular, the Respondents seek the removal of the “*Lower Nicola Indian Band as represented by Chief V. York and Councillor Harold Joe*” as a party-Applicant, the removal of the individual Councillors as responding parties and the substitution of the LNIB as the sole Respondent, and consequential amendments to the Notice of Application.

[3] Over the past few years, there have been numerous legal proceedings brought in this Court relating to the governance of the LNIB. Various parties, including Chief Victor York, purported to represent the Band in those proceedings. His right to do so was not challenged in the earlier proceedings.

[4] There is no dispute that Chief Victor York was the political representative and spokesperson for the Council and the Band during his tenure as Chief. While I do not question his sincere belief that he wishes to act in the best interests of the band membership, it remains that, on the facts of this case, Chief Victor York does not have the legal capacity to commence the proceeding in the LNIB’s name.

[5] If an application is commenced in the name of a person without the authority of that person, common sense and logic dictate that the application cannot possibly be sustained or continued in that name. Moreover, if a person is not directly affected by the order sought in the application, that person ought not be named personally as a respondent.

Facts

[6] For the purposes of the present motion, the relevant facts can be summarized as follows.

[7] The members of the LNIB Council who were declared elected and took office on October 2, 2010 under the *Lower Nicola Indian Band Custom Election Rules* (Current Custom Election Rules) were Chief Victor York, Councillor Mary June Coutlee, Councillor Stuart Jackson, Councillor Harold Joe, Councillor Joanne Lafferty, Councillor Lucinda Seward, Councillor Robert Sterling and Councillor Molly Toodlican. The eligibility of certain councillors to run in the election was the subject of applications for judicial review in Court File Nos. T-2127-10 and T-2128-10 and remains in question.

[8] The LNIB Council is required to schedule at least twelve meetings per year, with never more than a one month period between meetings. Since the most recent election, Council met regularly every Tuesday evening in the LNIB Administration Building and in other meetings specifically called by either the Chief or by a quorum of Council. Quorum of the LNIB Council is five. If the Chief does not attend the Council meeting, the Councillors appoint a chairperson.

Decisions of the LNIB Council are made by simple majority vote taken amongst the members of Council present. The Chief and each of the Councillors each have one vote.

[9] The duties and obligations of the Chief and Councillors, including their tenure on Council, are governed by the Current Custom Election Rules and by the *Lower Nicola Indian Band Chief & Council Policy & Guidelines* (Current Policy and Guidelines). The duties of the Chief and Councillors include but are not limited to supporting all Council decisions passed by consensus or majority and not engaging in activity that can reasonably be construed as misrepresenting Council.

[10] According to the Respondents, since December 2010, Chief Victor York consistently refused to support, and instead undermined, the decisions made by Council by writing letters misrepresenting Council to the LNIB membership, staff and government, as well as to various banking and business contacts of the LNIB. They also allege that Chief Victor York consistently failed to attend the weekly Council meetings, to call any other Council meetings so as to discuss and make any decisions to protect and further the interests of the LNIB, or to attend any of the monthly meetings with the LNIB membership to hear the membership's concerns.

[11] At the Council meeting on October 18, 2011, the Councillors who attended the meeting concluded that Chief Victor York may have breached his Oath of Office and his fiduciary duties to the LNIB. Council then wrote Chief Victor York to advise him of the allegations and of the supporting evidence, and to request that he respond to the allegations before Council on October 25, 2011. According to the Respondents, Chief Victor York did not respond to Council's letter and failed to attend before Council on October 25, 2011, as requested.

[12] At the Band General Meeting on November 1, 2011, Council considered Chief Victor York's failure to respond to the allegations against him and voted to immediately remove him from office under section 34 of the Current Custom Election Rules. Council again wrote Chief Victor York telling him of his impeachment and providing him with a copy of the Band Council Resolution impeaching him. Council directed that this letter and the Band Council Resolution be delivered to Chief Victor York.

[13] On November 30, 2011, Chief Victor York commenced the present application for judicial review of the decision of Council dated November 1, 2011 removing him from his elected position.

[14] On December 6, 2011 the LNIB Council met again and passed a Band Council Resolution to retain Parlee McLaws LLP in order to bring an application to have the LNIB removed as applicant, to have the six Councillors named removed as Respondents, and to add the Lower Nicola Indian Band as the only Respondent.

[15] Chief Victor York acknowledged on cross-examination that he did not have a band council resolution or band membership approval authorizing him to bring the present application. However, he insisted that as the elected Chief, he has the authority to represent the best interests of the LNIB and didn't need any approval from the LNIB Council or the band membership to bring the present proceeding in the Band's name.

Analysis

[16] In the Notice of Application, Chief Victor York seeks an order declaring the November 1, 2011 Council meeting “unlawful” because he did not call the meeting. He also seeks an order quashing the decision removing him from office because there was an outstanding election appeal and, therefore, no Councillor affected by the election appeal could be counted in the quorum or vote in favour of the impeachment decision.

[17] The relief requested in the application for judicial review is clearly personal to Chief Victor York. Further, it plainly has nothing to do with Councillor Harold Joe, who has instituted his own proceeding in Court File No. 12-T-4. By himself, or even with the support of Councillor Harold Joe, Chief Victor York cannot purport to represent the LNIB.

[18] Only the LNIB Council can represent, make decisions, or otherwise act on behalf of the LNIB membership. The fact that the status of certain councillors is up in the air does not authorize Chief Victor York to usurp Council’s authority.

[19] Chief Victor York has also improperly named the six individuals who were present at the November 1, 2011 Council meeting resulting in the decision removing him from office. The decision in question was not made in favour of any individual member or members of the LNIB. Rather, the decision was made under section 34 of the Current Policy and Guidelines, presumably in the interest of the collective membership of the LNIB.

[20] The individual Councillors have no more interest in either the decision removing Chief Victor York or the relief that Chief Victor York seeks in his judicial review than do each and every individual member of the LNIB. I agree with the Respondents that it is the collective membership of the Band, that is the LNIB itself, that has a direct interest in:

- a. protecting and preserving membership's democratic rights to elect and be represented by the Chief and the Councillors of their choice;
- b. the efficient and proper functioning of the Council that membership elects every three years to exercise the powers of the LNIB in the best interests of the membership;
- c. the correct legal interpretation and application of the Current Custom Election Rules (governing the term of office and removal from office of elected members of Council); and
- d. the correct legal interpretation and application of the Current Policy and Guidelines governing the procedural operation of the elected Council, the duties of members of Council and the discipline available for breach of those duties.

[21] In the end, the relief that Chief Victor York seeks in his judicial review can only directly affect the LNIB membership's collective interests by determining whether individuals, who the membership voted to represent them on Council and who were declared elected by the Electoral Officer, are proper members of Council. The relief requested in the application may

also directly affect the LNIB membership's collective interest by determining whether only the Chief can call a valid Council meeting, despite the Chief's alleged failure and refusal to convene meetings in 2011, and despite the requirements in the Current Policy and Guidelines that meetings be convened on a monthly basis. Further, the relief requested could directly affect the LNIB membership's collective interest by determining whether Council can discipline and remove a member of Council for breach of the duties owed to the LNIB membership.

[22] In the circumstances, I agree with the moving parties that the collective membership, that is the LNIB itself, is the only proper Respondent to Chief Victor York's judicial review.

[23] Being substantially in agreement with the written representations filed on behalf of the moving parties, which I adopt and make mine, I conclude that the relief requested in the Notice of Motion should be granted.

Costs

[24] The Respondents seek one set of costs as against Chief Victor York for refusing to consent to the motion. In my view, this was a proper housekeeping motion that should not have been opposed by the Applicants.

[25] Counsel for the Applicants conceded that costs of the motion should follow the event. In the circumstances, I conclude that costs of the motion, hereby fixed in the amount of the \$750.00, inclusive of disbursements and taxes, should be paid by the Applicant, Chief Victor York, to the Respondent, the Lower Nicola Indian Band.

ORDER

THIS COURT ORDERS that:

1. The Lower Nicola Indian Band, as represented by Chief V. York and Councillor Harold Joe, shall cease to be an Applicant or a party to the within Application for Judicial Review.

2. Molly Toodlican, Lucinda Seward, Joanne Lafferty, Mary June Coutlee, Stuart Jackson and Robert Sterling Jr. shall cease to be Respondents or parties to the within Application for Judicial Review.

3. The Lower Nicola Indian Band shall be joined as the sole Respondent and a party to the within Judicial Review Application.

4. Pursuant to Rule 104(2), the style of cause on all future documents filed in the within Application for Judicial Review shall be:

BETWEEN:

CHIEF VICTOR YORK

APPLICANT

AND

THE LOWER NICOLA INDIAN BAND

RESPONDENT

5. Pursuant to Rule 104(2), and within 10 days of this Order, the Applicant Chief Victor York shall serve and file on the Respondent, The Lower Nicola Indian Band, the Notice of Application that he filed on November 10, 2011, amended as follows by:

(a) using the style of cause set out in paragraph 4 of this Order, identifying the proper parties to this Application;

(b) by changing the name of the document, both on page 1 and page 6 of the Notice filed on November 30, 2011 to:

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*
AMENDED NOTICE OF APPLICATION

(c) by removing the words “as represented by Molly Toodlican, Lucinda Seward, Joanne Lafferty, Mary June Coutlee, Stuart Jackson and Robert Sterling Jr.” in the first paragraph on page 3 of the Notice filed November 30, 2011;

(d) by replacing the word “respondents” with the word “Council” in the paragraph that starts with “The applicants made...” in the middle on page 3 of the Notice filed November 30, 2011;

(e) by replacing the word “respondents” with the word “Council” in subparagraph (1) on page 3 of the Notice filed November 30, 2011;

- (f) by replacing the word “respondents” with the word “Councillors” in subparagraph (2) on page 3 of the Notice filed November 30, 2011;
- (g) by replacing the word “respondents” with the word “council” from subparagraph (3) on page 3 of the Notice filed November 30, 2011;
- (h) by replacing the word “respondents” with the word “Council” in subparagraph (4) on page 3 of the Notice filed November 30, 2011;
- (i) by replacing the word “respondents” with the word “Council” in subparagraph (5) on page 3 of the Notice filed November 30, 2011;
- (j) by replacing the word “Respondents” with the word “Council” in subparagraph (6) on page 4 of the Notice filed November 30, 2011;
- (k) by replacing the word “Respondents” with the word “Council” in subparagraph (7) on page 4 of the Notice filed November 30, 2011;
- (l) by replacing the word “Respondents” with the word “Council” in subparagraph (9) on page 4 of the Notice filed November 30, 2011;
- (m) by replacing the word “Respondents” with the word “Council” in subparagraph (10) on page 4 of the Notice filed November 30, 2011;

- (n) by replacing the word “Respondents” with the word “Council” in subparagraph (11) on page 4 of the Notice filed November 30, 2011; and
 - (o) replacing the words “Respondents” and “respondents” with the word “Council” in paragraph that starts with “The applicant requests...” in the middle of page 4 of the Notice filed November 30, 2011.
6. The Lower Nicola Indian Band shall have its costs of this motion against Chief Victor York, hereby fixed in the amount of the \$750.00, inclusive of disbursements and taxes.

“Roger R. Lafrenière”
Case Management Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1964-11

STYLE OF CAUSE: CHIEF VICTOR YORK ET AL v. "THE COUNCIL"
AS REPRESENTED BY MOLLY TOODLICAN

**PLACE OF HEARING:
(MOTION HELD BY
TELECONFERENCE)** Vancouver, British Columbia

DATE OF HEARING: February 20, 2012

**REASONS FOR ORDER
AND ORDER:** LAFRENIÈRE P.

DATED: February 24, 2012

ORAL REPRESENTATIONS BY:

Teressa Nahanee FOR THE APPLICANTS

David C. Rolf FOR THE LOWER NICOLA INDIAN BAND
Paul D. Anderson AND
FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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