Federal Court of Appeal | Cour d'appel fédérale

Date: 20130205

Docket: A-376-12

Citation: 2013 FCA 26

CORAM: **EVANS J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

THE LOWER NICOLA INDIAN BAND

Appellant

and

CHIEF VICTOR YORK

Respondent

Heard at Vancouver, British Columbia, on February 4, 2013.

Judgment delivered at Vancouver, British Columbia, on February 5, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: EVANS J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Chief Victor York appeals from the judgment of the Federal Court (*per* Justice Near) dated July 31, 2012: 2012 FC 949. The Federal Court set aside a resolution of the Council of the Lower Nicola Indian Band, passed on November 1, 2011. That resolution purported to remove the Chief from office.

[2] Although the Federal Court had concerns about whether Council provided the Chief with procedural fairness, it chose to base its ruling upon the reasonableness of Council's decision. It found that it was impossible to assess reasonableness because the basis upon which Council made its decision was unknown.

[3] I would dismiss the appeal but for different reasons from those of the Federal Court.

[4] The removal of the Chief from office is governed by the *Custom Election Rules*, article 34(c). That article provides:

> **34.** Should a Member of Council
>
> (c) fail to fulfil his responsibilities as a member of Council for a period of more than 30 days after having received written notice to that effect from the Council, then that member of Council may be immediately removed from office by the passing of a Band Council Resolution to that effect and a by-election shall be called immediately thereafter pursuant to Section 24 above.

[5] This article is the only way in which a Chief can be removed. It is precise and clear. No provisions in the *Custom Election Rules* allow for a relaxation of the mandatory 30 day notice period set out in article 34(c). Another governing document, the *Policy and Procedures of Chief and Councillors* (1997), provides for the suspension of a Chief, but not removal.

[6] There is no indication that Council attempted to interpret article 34(c) and discern its requirements and so the reasonableness standard that normally applies to Band interpretations of provisions in election codes (*e.g.*, *Fort McKay First Nation v. Orr*, 2012 FCA 269) does not apply

here. Simply put, there is no interpretation to which this Court can defer. Further, decisions concerning the content of procedural fairness are subject to correctness review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at paragraph 100. In my view, on either standard of review, Council's resolution cannot be sustained in light of article 34(c) and the common law of procedural fairness.

[7] In my view, article 34(c) and the common law of procedural fairness mean that Council can only remove a Chief in the following manner:

- Council must give written notice of the failure to fulfil responsibilities, with particulars.

- The notice must state that a failure to fulfil responsibilities over the next 30 days could result in a resolution for removal. While I consider this to be implied in the wording of article 34(c) and consistent with its purpose, it is also a common law procedural fairness requirement in cases where, as here, the consequences are high and the common law standard has not been legislatively excluded: see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 25; *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311 at page 328.

- After the Chief has had 30 days' opportunity to fulfil his responsibilities, the Chief is given a meaningful opportunity to make representations in some form to Council

(see *Nicholson*, *supra*), and Council has considered the facts and representations made, Council can pass a resolution for removal, if, in its view, it is warranted and appropriate.

- If Council passes a resolution for removal, immediately thereafter it must consider whether to call a by-election under article 24 of the *Custom Election Rules*.

[8] These requirements are similar to those advanced by the Chief in the Federal Court and in this Court. The appellant did not seriously contest these requirements.

[9] The appellant submitted that Council gave the Chief many written notices about his conduct throughout 2011 and these notices sufficed. However, in my view, none of these notices complied with the above requirements.

[10] In argument before us, the appellant confirmed that only two notices to the Chief mentioned the possibility of removal: a letter dated March 9, 2011 and a letter dated October 18, 2011. I shall offer observations concerning these. Then I shall offer observations concerning another letter – stressed by the appellant in argument to be proper notice – a letter dated September 28, 2011.

[11] The letter dated March 9, 2011 alluded to the possibility of the Chief's removal, but it did not provide that a failure to fulfil responsibilities over the next 30 days could result in removal. Instead, it notified the Chief that Council had passed a motion to investigate his conduct, it set out a number of concerns including breach of fiduciary duty – the only " breach" mentioned – and warned

that if the investigation found "breaches", Council would "follow through with steps required to suspend or impeach as *per* the LNIB *Custom Election Rules*". On a fair construction, the letter of March 9, 2011 did no more than threaten that, following completion of the investigation, Council might begin the article 34(c) process.

[12] As for the October 18, 2011 letter – the only other letter to have discussed the Chief's removal – Council seems to have regarded it as the primary instrument of notice to the Chief. This is evident from the wording of the November 1, 2011 resolution:

> WHEREAS the duly elected Council of the Lower Nicola Band ("the Council") has sent correspondence, dated October 18, 2011 (attached), to Victor York, Chief;
>
> AND WHEREAS Victor York, Chief, did not respond to the October 18, 2011, correspondence; nor did he attend the meeting scheduled on October 25, 2011 to address the allegations contained in the October 18, 2011 correspondence;
>
> AND WHEREAS the Council have met in a duly convened special meeting to conclude its investigation of the potential breaches and transgressions by Victor York, in his capacity as the duly elected Chief of the Lower Nicola Band – those potential breaches and transgressions as listed in the previous mentioned October 18, 2011 correspondence;
>
> …
>
> THEREFORE BE IT RESOLVED, effective on the below noted date [November 1, 2011], the Council do impeach, resign, and remove Victor York as Chief of the Lower Nicola Indian Band, based on the evidence in the October 18, 2011 correspondence.

[13] However, the October 18, 2011 letter falls short of the requirements set out above. It did not place the Chief on notice that his failure to fulfil responsibilities over the next 30 days could result in a resolution for removal. Also it is dated 14 days before the November 1, 2011 resolution: the

Chief was not given 30 days to cure his alleged default. I would add that for much of the 14 days period, Council had suspended the Chief and so he could not cure his alleged default.

[14] As mentioned above, in argument the appellant also relied heavily upon another letter, the September 28, 2011 letter Council sent to the Chief. This letter is dated 34 days before the November 1, 2011 resolution. However, this letter falls well short of the requirements set out above. It said nothing about removing the Chief from office. Nor did it place the Chief on notice that a failure to fulfil responsibilities during the next 30 days would result in a possible resolution for removal. Instead, the September 28, 2011 letter informed the Chief that he had been suspended for 30 days and warned that a "further investig[ation]" would take place.

[15] Therefore, for the foregoing reasons, I conclude that Council failed to follow the procedures required to remove a Chief from office. Accordingly, the November 1, 2011 resolution cannot stand.

[16] In the circumstances, it is unnecessary to consider whether Council's decision to remove the Chief was reasonable, *i.e.*, within a range of acceptability and defensibility on the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47. I express no comment on the Federal Court's reasons on this point.

[17] These reasons deal only with the procedural shortcomings in the case. Nothing in these reasons should be taken as expressing any view concerning the conduct of the Chief leading up to Council's passage of the resolution.

[18] For these reasons, I would dismiss the appeal. The Chief seeks solicitor and client costs here and below. There is no conduct on the part of the appellant warranting such an award. Nevertheless, costs should follow the event. Accordingly, I would grant the Chief his costs on the normal scale here and below.

"David Stratas"

J.A.

“I agree
Eleanor R. Dawson J.A.”

“I agree
John M. Evans J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-376-12
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE NEAR DATED JULY 31, 2012, DOCKET NO. T-1964-11)	
STYLE OF CAUSE:	The Lower Nicola Indian Band v. Chief Victor York
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 4, 2013
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Evans, Dawson JJ.A.
DATED:	February 5, 2013

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