Federal Court  Cour fédérale

Date: 20170929

Docket: T-239-17

Citation: 2017 FC 868

Ottawa, Ontario, September 29, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

CHIEF GUS LOONSKIN

Applicant

and

COUNCILLOR LORNE TALLCREE AND LITTLE RED RIVER CREE NATION

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Chief Gus Loonskin of the Little Red River Cree Nation [LRRCN] seeks judicial review of a Band Council Resolution dated December 15, 2016 [BCR], which authorized a by-election for the vacant position of Band Councillor. The by-election was held on February 1, 2017, and Alfred Seeseequon was elected by a large margin.

[2] For the reasons that follow, I find that Chief Loonskin should have availed himself of the appeal procedure prescribed by the *Little Red River Cree Nation Custom Election Code 2003* [Election Code] before commencing this application for judicial review. This is sufficient to dispose of the application. Furthermore, Chief Loonskin has not demonstrated that the BCR was invalid, or that members of the LRRCN received insufficient notice of the nomination meeting that took place on January 3, 2017. The application is therefore dismissed.

II. Background

[3] Gus Loonskin is Chief of the LRRCN, a First Nation comprising approximately 5,000 members in Northern Alberta near Wood Buffalo National Park. Approximately 3,530 members live on the reserve.

[4] Solomon St. Arnault was elected Band Councillor on May 14, 2015, but died in May 2016. At the time of his death, the next band election was approximately three years in the future. On November 14, 2016, Councillor St. Arnault's family wrote to the Chief and Council to request that the vacancy be filled. The need for a by-election was discussed at a band council meeting the same day. Chief Loonskin received notice of the meeting, which was described as "Chief & Council Meeting – Finance – 2nd Quarter Financials; Health", by e-mail. However, he did not attend.

[5] On December 2, 2016, Chief Loonskin received an e-mail message which attached calendars for December 2016 and January 2017. The calendars indicated that a meeting was scheduled for December 15, 2016 on the subject of "Ag. Benefits w/ Michael Nanooch". The

calendars also indicated that on January 3, 2017, there would be “By-Election Nominations; 1 Council member for Fox Lake (All Communities)”, and January 17 would be “By-Election Day for 1 Fox Lake, Councilor [*sic*] (All 3 communities)”.

[6] At the band council meeting that took place on December 15, 2016, seven councillors approved the BCR confirming that a nomination meeting would be held on January 3, 2017 and a by-election on January 17, 2017. Chief Loonskin was absent and did not sign the BCR.

[7] The Notice of Nomination Meeting for the by-election was distributed by facsimile on December 16, 2016 at 3:44 p.m. However, most offices of the LRRCN were closed for the Christmas break from December 16, 2016 at 3:00 p.m. until January 3, 2017. According to Chief Loonskin, many members of the community were on their trap-lines at this time, and would not have seen the notice.

[8] At the nomination meeting on January 3, 2017, 16 nominations were received for the vacant position of Band Councillor. The by-election was subsequently postponed by the LRRCN Electoral Officer to February 1, 2017. The by-election took place on February 1, 2017, and Alfred Seeseequon won by a margin of 289 votes (out of 625 ballots cast).

III. Issues

[9] This application for judicial review raises the following issues:

A. Should Chief Loonskin have availed himself of the appeal procedure prescribed by the Election Code?

B. Was the BCR adopted on December 15, 2016 valid?

C. Did members of the LRRCN receive sufficient notice of the nomination meeting?

IV. Analysis

A. *Should Chief Loonskin have availed himself of the appeal procedure prescribed by the Election Code?*

[10] Section 21 of the Election Code provides as follows:

> Within seven (7) days following an election and the posting of the written statement by the electoral officer, a candidate may appeal the outcome of an election.

[11] The Election Code defines "Candidate" as "a person who has been properly nominated for election as Chief or Councillor in accordance with the procedures and regulations as herein provided". The parties agree that Chief Loonskin was not a "Candidate" in the by-election that took place on February 1, 2017. However, they also agree that this would not in itself have precluded him from appealing the outcome. As the Federal Court of Appeal held in *Wolfe v Ermineskin*, 2001 FCA 199 at paragraph 6:

> […] the Regulations do not preclude the Board from properly investigating a complaint in a fair manner, including, where appropriate, by providing an opportunity for a person who was not

> a candidate in the election to put before the Board evidence in support of the complaint.

[12] In *Horseman v Horse Lake First Nation*, 2015 FCA 122, a band's election regulations specified that an appeal could be brought only by candidates and electors who voted in the election. Nevertheless, the Federal Court of Appeal ruled as follows (at para 19):

> […] even if it could have been shown that Mr. Horseman had no appeal right under section 57 of the Election Regulations because he did not vote in the Election, the record contains no evidence that he took any steps to see whether another candidate, or an Elector who did vote in the Election, would have been prepared to file a Notice of Appeal containing his concerns and grounds of appeal. Accordingly, we cannot to [*sic*] accept Mr. Horseman's assertion that access to the appeal mechanism under Election Regulations was unavailable to him.

[13] Chief Loonskin argues that the grounds for appeal specified in s 21 of the Election Code do not encompass his concerns regarding the validity of the BCR and the alleged lack of sufficient notice of the nomination meeting. The Election Code permits an appeal to be brought only on the following grounds:

- a candidate in the election was not eligible to be a candidate by virtue of these provisions,
- a candidate in the election was nominated by persons not eligible to nominate,
- person(s) who voted were not eligible to vote,
- person(s) eligible to vote were not allowed to vote, or
- a candidate was practicing unfair and unacceptable or corrupt election practices, for example: bribery, threats or intimidation of electors, electoral officer, polling clerks, or other persons assisting in the election.

[14] Challenges to band election results should be dealt with swiftly, so that the community's leadership is not put in doubt for an extended period of time (*D'Or v St Germain*, 2013 FC 223 at paras 24 and 25; aff'd, *D'Or v St Germain*, 2014 FCA 28). Provisions that articulate grounds for appeal should be understood as permissive, rather than exhaustive. In my view, these considerations apply to the present case, and Chief Loonskin was not precluded by the Election Code from bringing an appeal on the grounds that the by-election had been improperly called with insufficient notice.

[15] I am therefore satisfied that Chief Loonskin should, either by himself or in concert with others, have appealed the result of the by-election to the LRRCN Appeal Board before commencing this application for judicial review.

[16] This is sufficient to dispose of the application. However, because the merits were fully argued by the parties, and may be dealt with briefly, they are addressed below.

B. *Was the BCR adopted on December 15, 2016 valid?*

[17] The parties disagree on the standard of review to be applied to the validity of the BCR. Chief Loonskin argues that the validity of the BCR is a true question of jurisdiction, to which the standard of correctness applies (citing *Peguis First Nation v Bear*, 2017 FC 179 at paras 28-30).

[18] In *Fort McKay First Nation v Orr*, 2012 FCA 269, the Federal Court of Appeal said the following regarding the standard of review to be applied to a band council's assessment of its decision-making powers:

> [10] […] The Supreme Court has recently suggested that the characterization of a legislative provision as "jurisdictional" for the purposes of judicial review should be avoided: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paragraph 34. It has also recently queried whether any "true questions of jurisdiction" warranting correctness review exist: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. Our Court has held that so-called "jurisdictional" issues are usually issues of interpreting legislative wording, a matter on which reasonableness is the standard: *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223. Indeed, on issues of interpreting legislative wording, there is a "presumption" that the standard of review is "reasonableness": *Alberta Teachers' Association*, at paragraph 34.

[19] I am therefore satisfied that the validity of the BCR is to be reviewed by this Court against the standard of reasonableness. The Court will intervene only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[20] Questions of procedural fairness are subject to review by this Court against the standard of correctness (*Crawler v Wesley First Nation*, 2016 FC 385 at para 19; *Desnomie v Peepeekisis First Nation*, 2007 FC 426 at para 11; *Weekusk v Wapass*, 2014 FC 845 at para 10).

[21] Chief Loonskin concedes that the meeting which took place on December 15, 2016 was a properly-convened band council meeting. However, he complains that it was not convened for the purpose of calling a by-election. Instead, its stated purpose was to review a settlement proposal concerning agricultural benefits, with the band's legal counsel in attendance.

[22] Chief Loonskin admits that there are no provisions in the Election Code or elsewhere that specify a procedure for adopting band council resolutions to call a by-election. He relies on what he describes as standard practice for corporate governance, and insists that notices of band council meetings must specify the precise subjects to be discussed. He also maintains that band council resolutions may be adopted only after a formal motion, with a mover and seconder.

[23] Holly Laboucan, Director of Nation Programs and Services for the LRRCN, deposes in her affidavit that the band council meeting of December 15, 2016 was convened in accordance with established practices and procedures, which she describes as follows:

> i) Administrative staff identifies when Council meetings are needed based on discussions with Council members, LRRCN Directors and managers, government parties, or corporate parties;
>
> ii) I then direct Administrative staff in relation to the preparation of Council calendars, which serve as notice to Council of their meeting schedule;
>
> iii) When Council calendars are prepared, and when meeting dates or locations are altered, administrative staff email the Council calendars to all members of Council, except any Councillors who prefer to pick up hard copies;
>
> iv) Updated Council calendars are also regularly handed out to Council at Council meetings;
>
> v) When there is an upcoming Council meeting, LRRCN administrative staff take the additional step of following up directly with each Council member by phone or email to confirm they have received the Council calendars, confirm their attendance, and arrange travel expenses if the Councillor plans to attend the meeting.

[24] The Election Code does not distinguish between regular band council meetings and special meetings for the purpose of calling by-elections. Nor does the Chief have a particular role in convening band council meetings. The LRRCN notes that assigning a special role to the Chief would be inconsistent with the band's democratic process, as it may allow the Chief to manipulate the timing of meetings to favour his own agenda (citing *Balfour v Norway House Cree Nation*, 2006 FC 213 at para 41).

[25] Procedural fairness is to be assessed in accordance with the factors found in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 23-28. In this case, the duty owed to Chief Loonskin was at the lower end of the spectrum. The band council meeting of December 15, 2016 did not concern the adjudication of his or any other person's rights. Chief Loonskin had no legitimate expectation of a specific procedure for convening a meeting to address the need for a by-election.

[26] Pursuant to s 22 of the Election Code, the Chief and Council were under an obligation to call a by-election if the next election was more than six months in the future. Here, the next election was approximately three years away. Moreover, Councillor St. Arnault's family had written to the Chief and Council asking that the vacancy be filled.

[27] The need for a by-election was first discussed at a band council meeting on November 14, 2016, which Chief Loonskin did not attend. The calendars distributed on December 2, 2016 indicated the dates of the nomination meeting and the by-election. Even if Chief Loonskin understood that the meeting of December 15, 2016 was primarily concerned with agricultural

benefits, he was presumably aware that other matters might arise. He nevertheless chose not to attend.

[28] Nothing in the Election Code or elsewhere required advance notice of all subjects to be discussed at a band council meeting, or for the adoption of a band council resolution to be preceded by a formal motion with a mover and a seconder. A quorum was present at the meeting of December 15, 2016, and all seven Councillors who were present at the meeting signed the BCR.

[29] Courts are reluctant to interfere with a band's autonomous process for electing its government (*Johnny v Adams Lake Indian Band*, 2017 FC 156 at para 28). In this case, I am not persuaded that there are any grounds upon which the Court might set aside the BCR.

C. *Did members of the LRRCN receive sufficient notice of the nomination meeting?*

[30] Chief Loonskin says that members of the LRRCN received insufficient notice of the nomination meeting that took place on January 3, 2017. He argues that notices were posted while LRRCN offices were closed for the Christmas break, and that some band members were out trapping.

[31] Chief Loonskin has offered little in the way of evidence to support his contentions. In his affidavit, he provides only uncorroborated hearsay:

> Early in January, 2017, I was advised by members of the Little Red River Cree Nation that they were not aware of a 'bye-election' [*sic*] taking place at Little Red River Cree Nation and if they had been aware, they would have run for office.

[32] This may be contrasted with the detailed account provided by Ms. Laboucan in her affidavit of the various ways in which members of the LRRCN were apprised of the nomination meeting, and the large number of candidates who sought the position. Evidence was provided regarding the frequency with which LRRCN offices were visited over the Christmas break. Only 29 members of LRRCN hold registered trap-lines. A total of 16 candidates were nominated on January 3, 2017, and no formal complaints or appeals were submitted by band members following the by-election.

[33] The preponderance of the evidence establishes that members of the LRRCN were given sufficient notice of the nomination meeting. The written Notice complied with s 8 of the Election Code, and provided the date, time, duration and location of the meeting. It specified the position that was open for nomination, and provided contact information for the LRRCN Electoral Officer. It informed members of where they could obtain a copy of the Election Code. The Notice of Postponement similarly met the requirements of the Election Code.

[34] I am therefore not persuaded that members of the LRRCN received insufficient notice of the nomination meeting that took place on January 3, 2017.

V. Conclusion

[35] Chief Loonskin should have availed himself of the appeal procedure prescribed by the Election Code before commencing this application for judicial review. This is sufficient to dispose of the application. Furthermore, Chief Loonskin has not demonstrated that the BCR adopted on December 15, 2016 was invalid, or that members of the LRRCN received insufficient

notice of the nomination meeting that took place on January 3, 2017. The application is therefore dismissed.

[36] The LRRCN has requested an opportunity to make written submissions regarding costs. Ordinarily, the Court expects parties to address costs at the hearing of the application for judicial review. In this case, counsel for the LRRCN advised the Court that there are factual circumstances, some of them sensitive, which may favour an enhanced award of costs. The LRRCN did not wish to adduce this information unless it was successful in its defence of the application.

[37] In these unusual circumstances, the Court will grant the parties an opportunity to file written submissions regarding costs not exceeding five (5) pages within fourteen (14) days of the date of this judgment. Responding submissions, not exceeding three (3) pages, may be filed within seven (7) days thereafter.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. The parties may file written submissions regarding costs not exceeding five (5) pages within fourteen (14) days of the date of this judgment. Responding submissions, not exceeding three (3) pages, may be filed within seven (7) days thereafter.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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