Federal Court Cour fédérale

Date: 20180528

Docket: T-498-17

Citation: 2018 FC 550

Ottawa, Ontario, May 28, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

WAYNE LOUIE, IN HIS INDIVIDUAL CAPACITY AND AS A MEMBER OF THE LOWER KOOTENAY INDIAN BAND

Applicant

and

M. JASON LOUIE, IN HIS CAPACITY AS CHIEF COUNCILLOR OF THE LOWER KOOTENAY INDIAN BAND, AND SANDRA LUKE, IN HER CAPACITY AS COUNCILLOR OF THE LOWER KOOTENAY INDIAN BAND

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of an Arbitrator's decision to not remove the Respondents from their positions

as Chief and Councillor for the Lower Kootenay Indian Band (the "Band"), pursuant to paragraph 31(p) of the *Lower Kootenay Band Custom Election By-Law*, dated April 17, 2012 [*By-Law*].

II. Background

[2] The Applicant, Wayne Louie, is a member of the Band. The Respondent, M. Jason Louie, is the Chief of the Band, and the Respondent, Sandra Luke, is a Councillor for the Band.

[3] In June 2015, the British Columbia Court of Appeal ("BC Court of Appeal") held that five members of the Band Council, including the Respondents, had breached their fiduciary duty to the Band (*Louie v Louie,* 2015 BCCA 247 [*Louie v Louie*]). The Band had received $125,000 from a regional district for the use of a road on their reserve. From those funds, the Council members paid themselves $5,000 each, in lieu of their past services to the Band. The BC Court of Appeal found that the Council members had personally profited from their position without express authority to do so and to the detriment of the Band members. It ordered them to disgorge $5,000 each.

[4] Subsequently, the Applicant made several demands that the Respondents comply with the court order by disgorging the money owing. As well, he demanded the Respondents remove themselves from Council. The Respondents did neither.

[5] On August 3, 2016, the Applicant filed a Notice of Application in this Court seeking an order removing the Respondents from their positions. A dispute resolution conference was held

and the parties were ordered to follow the arbitration process provided for in the *By-Law*. Relevant portions of the *By-Law* are attached hereto as an Annex.

[6] In January 2017, the Applicant filed a petition under paragraph 29(b) of the *By-Law*, seeking the removal of the Respondents from their respective offices of Chief and Councillor. The Band's Chief Operating Officer appointed an Arbitrator, under section 31 of the *By-Law*, to determine whether the Respondents should be removed from office.

[7] An arbitration hearing was held on February 21, 2017. The Applicant argued that, in light of the events described in *Louie v Louie*, the Respondents had lost the confidence of the Band, violated the Band's customary laws, and/or breached their Oath of Office, and therefore should be removed from office pursuant to paragraph 29(a) of the *By-Law*.

[8] On March 7, 2017, the Arbitrator released his decision. He concluded that the Respondents should not be removed from their positions: the Respondents had not lost the confidence of the Band, had not violated customary law and had not breached the Oath of Office. The Arbitrator also found that that the procedural requirements for a petition had not been satisfied, but preferred to dismiss the petition on its merits.

[9] On April 4, 2017, the Applicant filed this application for judicial review of the Arbitrator's decision.

[10] The Respondents submit that various documents and affidavits submitted by the Applicant are inadmissible because they contain information that was not before the Arbitrator.

[11] I find that the Applicant's affidavit and accompanying exhibits are admissible. That affidavit briefly describes the events leading up to the arbitration and judicial review. The exhibits are a copy of the Arbitrator's decision as well as evidence that was submitted at the arbitration hearing.

III. Standard of Review

[12] The Arbitrator's interpretation and application of the *By-Law* is reviewable on a reasonableness standard (*Orr v Peerless Trout First Nation*, 2015 FC 1053 at paras 40-46).

IV. Issues

[13] The issues are:

A. Is the *By-Law* valid?

B. Was the Arbitrator's decision reasonable, with respect to:

(1) His finding that the Respondents had not lost the confidence of the Band?

(2) His finding that the Respondents had not violated customary law?

(3) His finding that the Respondents had not breached their Oath of Office?

(4) His finding that the procedural requirements for a petition had not been satisfied?

V. Analysis

A. *Is the By-Law valid?*

[14] The Applicant submits that the *By-Law* is invalid because it was never registered with Indigenous and Northern Affairs Canada ("INAC"). The proper question is whether the *By-Law* fits the definition of a customary law, and the limited evidence before me indicates that it does.

[15] The *Indian Act,* RSC 1985, c I-5 [*Indian Act*] does not set out guidelines as to how an election custom is to be identified (*Bigstone v Big Eagle*, [1992] FCJ No 16 (TD) [*Bigstone*] at para 19). This Court has held that band custom is not "frozen in time" but it must be generally acceptable to members of the band, upon which there is broad consensus (*McLeod Lake Indian Band v Chingee,* [1998] FCJ No 1185 (TD); *Bigstone* at para 20).

[16] That definition of custom has two components. The first involves practices that are established through repetitive acts in time, or through a single act such as the adoption of an electoral code. The second involves a subjective element, which refers to the manifestation of the will of those interested in rules for determining the electoral process of band council membership to be bound by a given rule or practice (*Francis v Mohawk Council of Kanesatake*, [2003] 4 FC 1133 (TD) at paras 24 and 26).

[17] Limited evidence was submitted with respect to whether the *By-Law* is customary law, as this does not appear to be in dispute. All of the parties refer to a Band meeting in April or May of 2012 to revise the election code.

[18] The background facts show that the Band conducts the election and removal of its Band Council members in accordance with its customary law as codified in the *By-Law*. So long as the *By-Law* is acceptable to the Band members and represents their will, it is not invalid merely for not having been filed with INAC. Customary election laws are not "by-laws" as that term is used in sections 81-86 of the *Indian Act*. Generally, INAC is not involved in custom elections and disputes are resolved according to the custom or by the courts.

[19] Given that several elections have been held in accordance with the *By-Law,* that the Applicant consented to arbitration in accordance with the *By-Law,* and that the arbitration is complete and both parties have made full submissions with respect to the Arbitrator's decision, I find the *By-law* valid and will proceed with reviewing the reasonableness of that decision.

B. *Was the Arbitrator's decision reasonable?*

[20] While the main focus at the hearing centered on the Arbitrator's decision concerning the Oath of Office and breach of fiduciary duty, I will consider the four issues raised by the Applicant related to the reasonableness of the decision.

(1) The finding that the Respondents had not lost the confidence of the Band

[21] The Applicant does not challenge the finding of the Arbitrator on this point. The Arbitrator gave three reasons for finding that the Respondents had not lost the confidence of the Band. First, several Band members who signed the Petition failed to attend the hearing despite the requirement to do so under subparagraph 29(d)(iii) of the *By-Law*. Second, when the

Respondents were elected in 2014, it was well-known that they had used the Band's funds to pay themselves $5,000 each. Third, after the BC Court of Appeal's decision in *Louie v Louie*, a community meeting was held to get direction from the community as to how they wanted the five defendants in that case to move forward. Only eleven community members attended, and the unanimous decision of those present was to forgive the debt owing. As well, the Applicant had not provided evidence as to why he or his supporters did not attend this meeting. The decision was reasonable.

(2) The finding that the Respondents had not violated customary law

[22] The Applicant submits that a customary law exists against elected officials personally profiting from the Band's money. He claims that this law was established in 1991 when the Band discovered that their Chief was taking lease money for herself and then asked her to resign, which she did. As such, the Arbitrator should have removed the Respondents from office because they violated this "other Lower Kootenay Law" pursuant to section 29(a)(i) of the *By-Law*.

[23] The Arbitrator articulated the asserted custom as: "elected officials who are found to have taken money for personal gain, if asked to resign, shall resign."

[24] The Arbitrator then gave three reasons why the Applicant had not established a custom law that would apply to justify the removal of the Respondents from office. First, it was unclear whether in 1991 the Chief had an honest but mistaken belief that her actions were legitimate, as was the case with the Respondents. Second, it appeared the Band unanimously requested the

resignation of the Chief in 1991, which was not the case with the Respondents. Third, the *By-Law* was intended to be a complete code governing the removal of Council members and it differs from the asserted custom.

[25] I find it was reasonable for the Arbitrator to find that custom law was not such that it would justify the removal of the Respondents from office.

[26] The affidavit of Mary Basil, who was the Chief that resigned in 1991, provides the most detail regarding the asserted Band custom. She states:

> **Processes Regarding Removal of Council Members**
>
> A member of council has to resign if:
>
> a. they go away for more than 6 months and are unable to attend and participate in the Council meetings; or
>
> b. they get into trouble with the law. For example, once Wayne Louie shot a mountain sheep and got into trouble for it and there was a band meeting and he had to resign. The band meeting was called by Bobbie Jacobs.
>
> Council has no decision making power over the removal of an individual Council member. The process for the removal of a member of Council is as follows:
>
> a. First, a person has to make an allegation against a member of Council that justifies their removal and call a Band meeting to obtain the membership's vote on removal of that Council member. For example, Wayne Louie called the meeting to remove me, and Bobbie Jacobs called the meeting to remove Wayne Louie.
>
> b. Next, the person who calls the meeting must make a presentation at the meeting to the members. They tell the members their reasons for why the Council member should be removed; and

> c. Last, the members vote on it. If the members vote in favour then the person being asked to resign has to resign.

[27] It was open to the Arbitrator to articulate the custom in the manner that he chose and to not accept that, if such a custom existed, it was a law against personally profiting from Band money. According to Ms. Basil, if a Council member was found to have personally profited from Band money, a meeting was convened and the Band members voted for or against asking that individual to resign. This suggests that an individual could remain in office after having been found to have personally profited, if that outcome was the will of the Band members.

[28] Moreover, whether or not that custom existed, it has been supplanted by the *By-Law*. I agree with the Arbitrator's finding that the *By-Law* "was intended to be a complete code governing the removal of members of Council." It contains a comprehensive procedure for the removal of a Council member, which has similarities to the process described by Ms. Basil but ensures procedural fairness.

(3) The finding that the Respondents had not breached their Oath of Office

[29] The Applicant submits that the Arbitrator's finding on this issue essentially overturns the BC Court of Appeal's decision in *Louie v Louie.* He claims that a Council member's fiduciary duty is incorporated into the Oath of Office, and it was not open to the Arbitrator to depart from the findings of the BC Court of Appeal. I agree.

[30] As noted above, the *By-Law* is a complete code for the election and removal of Council members; a separate oath cannot supplant the terms of the *By-Law*.

[31] The Arbitrator found that the Respondents had not violated the Oath of Office. Although the BC Court of Appeal implied that a fiduciary's subjective motivations – whether he or she acted in good or bad faith – were irrelevant to finding a breach of fiduciary duty, he found that those considerations *were* relevant in determining whether an individual had breached the Oath of Office. In his view, the evidence showed that the Respondents had acted honestly and in good faith.

[32] The Arbitrator provided no justification or reasoning for his finding that subjective motivations are relevant in determining whether an individual violated the Oath of Office. He quotes Edmund HT Snell et al, *Snell's Equity,* 32nd ed (London: Thomson/Sweet & Maxwell, 2010) at 189, as well as *Louie v Louie* at paragraph 26 (citing Leonard I Rotman, *Fiduciary Law,* (Toronto: Thomson Carswell, 2005) at 303) for the principal that a fiduciary will be liable to account even if he or she acted honestly, openly and in good faith. The Arbitrator then stated:

> In contrast, I find that a breach of the Oath <u>does</u> concern itself with the fiduciary's subjective motivations and whether he or she has acted in good or bad faith. In my view, a breach of the Oath requires some conscious or deliberate act by a Councillor that he or she knows, or ought to know, is contrary to what they have sworn to do.

[33] That finding is unreasonable. The fiduciary duty of Council members is incorporated in to the Oath of Office, and there is nothing in the terms of the Oath to suggest that Council members are held to a different standard than that of any other fiduciary.

[34] A Band Council has a fiduciary duty towards their band members (for example, see: *Annapolis Valley First Nations Band v Toney*, 2004 FC 1728 [*Toney*]; and *Basil v Moses*, 2009

FC 741 [*Basil*]). Moreover, in *Toney* and *Basil*, this Court held the Council members to a strict standard where "the central inquiry is not whether the fiduciary has been dishonest or acted in a fraudulent manner, but whether he has acted in the best interests of the beneficiary and without conflict of interest" (*Toney* at para 29; *Basil* at para 99).

[35] There is no doubt that this fiduciary duty is incorporated into the "responsibilities" and "duties" of Council members as those terms are used in the Oath of Office. Indeed, the Band's Chief and Council Manual, dated April 26, 2013, states on page 4 that Chief and Council must fulfill their fiduciary and legal responsibilities, and as trustees have a fiduciary obligation to act in the best interests of all Band members.

[36] While one provision in the Oath refers to elected officials carrying out their duties "faithfully, honestly, impartially and to the best of their ability", the Oath has other, standalone provisions that require officials to "fulfill the responsibilities of their office" and "always act in the best interest of the entire [community] when carrying out their duties". There is nothing to suggest that the separate reference to honesty and good faith derogates from these more general responsibilities and duties, of which the fiduciary duty is a part.

[37] The Arbitrator provided no justification for his finding that the Oath of Office holds elected officials to a standard that is different than any other fiduciary. Furthermore, to the extent that the Arbitrator sought to apply a more "flexible" standard to find that the Respondents had not breached their fiduciary duty, such a finding is inconsistent with the BC Court of Appeal's decision in *Louie v Louie*.

[38] The Arbitrator's conclusion on this issue was unreasonable.

(4) The finding that the procedural requirements for a petition had not been satisfied

[39] The Applicant submits that it was unfair to require all 30 petition signatories to attend the arbitration hearing. Every effort was made to have the signatories reaffirm their support at the hearing. However, some of the signatories reside in the USA or Vancouver's downtown eastside. As well, the Chief Operating Officer failed to post a phone number on the Band's website for signatories to call into the hearing. Finally, no direction was provided from the Arbitrator as to who bears the costs of transporting the signatories to the hearing.

[40] At the arbitration hearing on February 21, 2017, 19 of the 30 signatories attended in person, or by telephone or Facebook, to confirm their understanding of the petition. Of those who were absent, seven lived off the reserve (including one or two who lived on Vancouver's downtown east side and were inaccessible by phone), were travelling abroad, or were said to be unwell. The remaining four absentees lived on the reserve, which was near the location of the arbitration hearing, and no explanation was offered for their absence.

[41] Given the failure of all 30 signatories to attend the hearing as well as the lack of explanation, the Arbitrator concluded that the Applicant had not complied with subparagraph 29(d)(iii) of the *By-Law*.

[42] The failure of all 30 signatories to attend the hearing is concerning. Subparagraph 29(d)(iii) of the *By-Law* clearly requires all signatories of a petition to confirm their

understanding of the petition at the ensuing arbitration hearing. As the Arbitrator noted, non-compliance with this provision is "more than a mere procedural irregularity". As well, this Court has held that provisions of a custom election code that deal with the removal of a council member from office should be strictly construed because of their severe impacts (*Bugle v Lameman*, [1997] FCJ No 560 (TD) at para 3; *Basil* at para 64).

[43] Moreover, the Arbitrator was willing to provide latitude on this point. On January 31, 2017, three weeks prior to the arbitration hearing, and at the request of the parties, the Arbitrator providing direction regarding the requirements of subparagraph 29(d)(iii) of the *By-Law*. He found that a failure to have each and every signatory participate at the hearing, particularly if there was a good reason why they could not attend, would not necessarily be fatal to the petition. As such, he directed that some signatories could attend by telephone and then he provided a toll-free number for them to call.

[44] However, the Arbitrator's conclusion on this issue lacks certainty and is tainted by his finding that the Respondents had not breached the Oath of Office. He stated:

> Though some latitude is available to a petitioner, it is not sufficient to have 11 of 30 signatories absent, including four who live nearby with no reason offered for their absence. However, I prefer to dispose of this petition on its merits for the reasons set out below and would dismiss it for non-compliance with section 29(d)(iii) only as an alternative basis.
>
> [Emphasis added]

[45] It is unclear whether the Arbitrator gave this issue his full attention, or whether he would have reached the same conclusion had he found that the Respondents breached their Oath of Office.

[46] In his direction on January 31, 2017, the Arbitrator took the position that the procedural requirements of the *By-Law* should not defeat a meritorious petition. He wrote, “it cannot be intended by the drafters of the Bylaw that the absence at the hearing of just a few signatories, for example, would invalidate the entire process and prevent the granting of relief where the circumstances might be shown to warrant it.” He also noted the costs and burdens associated with having all signatories attend a hearing.

[47] While the final decision on the merits may not turn on this issue, the Arbitrator’s decision lacks justification, transparency and intelligibility and is unreasonable.

[48] Given my decision on the unreasonableness of the Arbitrator’s decision concerning the Oath of Office and breach of fiduciary duty, this matter should be referred back to the Arbitrator for reconsideration in accordance with this decision and reasons for the decision.

JUDGMENT in T-498-17

THIS COURT'S JUDGMENT is that:

1. The Application is allowed and the matter is referred back to the Arbitrator for reconsideration in accordance with this decision and reasons for the decision.
2. Costs to the Applicant.

"Michael D. Manson"

Judge

ANNEX

Lower Kootenay Band Custom Election By-Law

27) OATH OF OFFICE

a) All candidates who have been elected to office shall sign an oath of office before the Electoral Officer and Lower Kootenay Members, swearing to:

i. uphold and comply with Lower Kootenay by-laws; carry out their duties faithfully, honestly, impartially and to the best of their ability;

ii. fulfill the responsibilities of their office and serve the full term unless they have reasonable cause to vacate the position;

iii. keep confidential, both during and after their term of office, any matter or information which, under regulation or policy, is consider [sic] confidential; and

iv. always act in the best interest of the entire Lower Kootenay Community when carrying out their duties.

29) COUNCIL MEMBERS REMOVAL FROM OFFICE

a) A Council member may be removed from office on one or more of the following grounds:

i. he or she has violated these regulations or other Lower Kootenay Law; or

ii. he or she has breached their oath of office; or

iii. he or she has lost the confidence of the Band as evidenced by the filing of a petition under subsection 29(b); or

iv. he or she has been convicted on an indictable offence since taking office.

b) Proceedings to remove a Council member shall be commenced by a Petition filed with the Arbitrator and signed by a minimum of 30 or more of the Electors determined as of the date the Petition is filed.

c) The Petition referred to in subsection 29(b) shall also set out the facts substantiating the grounds for removal from office of a Chief or Councillor and shall be accompanied by any supporting documentation.

d) Upon receipt of a Petition, the Arbitrator shall request Council to call a hearing meeting at which:

i. the person or persons who initiated the Petition shall explain the reason for the Petition

ii. the Councillor who is the subject of the Petition shall be allowed to present their case

iii. all persons who signed the Petition shall confirm their understanding of the Petition

e) The Arbitrator shall make a decision within 15 days of the meeting.

31) PROCEDURE ON ELECTION APPEALS, PETITIONS FOR REMOVAL FROM OFFICE AND APPEALS FROM VACANCY

a) Where no Arbitrator has been appointed an appeal or Petition shall be filed with the Chief Operating Officer who shall upon receipt, request Council to appoint an Arbitrator.

b) If Council has not appointed an Arbitrator within ten (10) days of the request of the Chief Operating Officer under subsection 31(a) the Chief Operating Officer shall appoint an Arbitrator.

c) The Arbitrator may, at his or her discretion, give directions for:

i. fixing the date, time and place for the hearing of the Petition or appeal;

ii. designating the method of taking evidence, either by sworn declaration or written testimony, or both;

iii. designating what persons are to be notified and how they are to be served; and

iv. dealing with any matter or other thing not otherwise provided for in this section.

d) A copy of the notice of appeal or Petition and any documents relied upon shall be delivered to the Council member whose election is being appealed or the Council member whose removal is sought or the person whose office is being declared vacant.

[…]

j) The Arbitrator shall issue a written decision together with reasons in every appeal or Petition.

[…]

p) If the Petition is for the removal of a Council member under section 29 the Arbitrator may:

i. confirm the Council member in their office; or

ii. remove the Council member from office and declare the office vacant.

q) The Arbitrator may in his or her discretion order by whom, to whom and in what manner costs shall be paid.

r) The Arbitrator shall provide a copy of the decision to the Council and to any party to an

appeal or Petition.

s) The Arbitrator's decision shall be:

i. published in the Lower Kootenay newsletter mailed to Electors or in a separate written notice delivered or mailed to Electors; and

ii. posted in a public area of the Lower Kootenay administration building.

t) The decision of the Arbitrator is final and not subject to appeal.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-498-17
STYLE OF CAUSE:	WAYNE LOUIE v M. JASON LOUIE and SANDRA LUKE
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 22, 2018
JUDGMENT AND REAONS:	MANSON J.
DATED:	MAY 28, 2018

APPEARANCES:

Wayne Louie	FOR THE APPLICANT, ON HIS OWN BEHALF
M. Jason Louie	FOR THE RESPONDENT, M. JASON LOUIE, ON HIS OWN BEHALF