

Federal Court



Cour fédérale

Date: 20091207

**Docket: T-1868-07
T-2054-07**

Citation: 2009 FC 1250

Ottawa, Ontario, December 7, 2009

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-1868-07

BETWEEN:

ELTON MITCHELL DIABO

Applicant

and

**WHITESAND FIRST NATION
BAND COUNCIL,
CHIEF ALLAN GUSTAFSON
AND COUNCILLORS
ANGELA NODIN,
RENE WILSON SR.,
NORMAN MATINET,
JAMES NAYANOOKEESIC,
DOUGLAS SINOWAY JR.
and FRANCIS NODIN**

Respondents

Docket: T-2054-07

BETWEEN:

CHIEF ALLAN GUSTAFSON,

**as representative of the
band council of
Whitesand First Nation, and
WHITESAND FIRST NATION**

Applicants

and

**ELTON MITCHELL DIABO,
and HER MAJESTY
THE QUEEN IN RIGHT OF CANADA
as represented by
THE ATTORNEY GENERAL OF CANADA
and THE MINISTER OF INDIAN &
NORTHERN AFFAIRS CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] In the first of these proceedings (docket number T-1868-07), Elton Mitchell Diabo seeks declaratory and other prerogative relief in connection with a decision taken by the Respondents to remove him from the list of members of the Whitesand First Nation (Whitesand)¹.

[2] In the corresponding proceeding (docket number T-2054-07), Whitesand and Chief Allan Gustafson seek declaratory relief to invalidate earlier Band Council Resolutions (BCR) which purportedly granted membership status in Whitesand to Mr. Diabo. Because these

¹ Whitesand is an Ojibway First Nation with a registered population of more than 1,000 members, most of whom reside at Armstrong Settlement, Ontario.

proceedings have a common factual history and involve overlapping legal issues, they were consolidated by Order of Prothonotary Roza Aronovitch issued on December 11, 2008.

a. Background

[3] The precise historical background to this dispute is difficult to unravel from the records produced by the parties. This can be explained, in part, by the passage of time but, in some measure, it is the result of poor or absent record keeping by Whitesand. What is clear from the documentary and affidavit evidence produced is that Mr. Diabo sought to become a member of Whitesand in 1995 on the strength of his 1992 marriage to a member of Whitesand, Esther Rita Lachinette-Diabo. The couple have two children, the older of whom is a member of Whitesand. Their younger child is a member of the Mohawks of Kahnawake, which is the First Nation of Mr. Diabo's birth.

[4] The Respondents' record contains a BCR dated August 4, 1995 signed by the then Chief and two Band Councillors by which Mr. Diabo was accepted into membership of Whitesand. This evidence is confirmed by a BCR of the Mohawk Council of Kahnawake dated September 18, 1995 noting Mr. Diabo's acceptance as a member of Whitesand and removing him from its membership registry. Mr. Diabo's affidavit states that in 2001 he was asked to resubmit an application for membership to Whitesand ostensibly because the earlier records of the transfer of membership from the Mohawks of Kahnawake had been misplaced.

[5] Mr. Diabo's membership in Whitesand is again reflected in a BCR dated November 20, 2004 signed by the then Chief and three Band Councillors. That BCR stated in part:

WHEREAS: Elton Mitchell Diabo was accepted by the Whitesand First Nation as a member effective August 4, 1995; and

WHEREAS: the Chief and Council of the Whitesand First Nation executed a Band Council Resolution dated August 4, 1995 confirming acceptance; and

WHEREAS: Elton Mitchell Diabo was subsequently released by the Mohawks of Kahnawake; and

WHEREAS: the documentation was received by the Membership Administrator of the Whitesand First Nation in order to process the membership transfer with the Indian Register maintained by the Department of Indian Affairs & Northern Development; and

WHEREAS: the transfer remains incomplete due to the misplacement of documentation;

THEREFORE BE IT RESOLVED THAT:

The Chief & Council of the Whitesand First Nation hereby reaffirm the acceptance of Elton Mitchell Diabo as a member of the Whitesand First Nation; and

FURTHER BE IT RESOLVED THAT:

The Chief and Council of the Whitesand First Nation request the Department of Indian Affairs & Northern Development to execute the transfer in the Indian Register forthwith.

APPROVED AND PASSED BY THE CHIEF AND COUNCIL OF WHITESAND FIRST NATION ON THE 20TH DAY OF NOVEMBER, 2004 AT THUNDER BAY IN THE PROVINCE OF ONTARIO.

[6] On June 27, 2005, Mr. Diabo received a Certificate of Indian Status from the Department of Indian and Northern Affairs Canada identifying him as a member of Whitesand.

[7] In 2005, Mr. Diabo ran for election as Chief of Whitesand and lost to Chief Gustafson. In May 2006, he was named to a committee mandated to pursue a settlement with Ontario Hydro for losses occasioned by flooding in the Whitesand traditional territory. Mr. Diabo's affidavit states that he was removed from that committee by a decision of the Band Council because of his opposition to the proposed terms of settlement with Ontario Hydro.

[8] On August 21, 2007, Mr. Diabo wrote to Chief Gustafson and the Band Council expressing non-confidence with respect to their handling of a number of issues including the negotiations with Ontario Hydro. It is apparent from the evidence that Mr. Diabo was positioning himself to seek election to Band Council in an upcoming election scheduled for October 2007.

[9] In late August 2007 Chief Gustafson and the Band Council received two letters signed by three members of Whitesand questioning Mr. Diabo's membership status. According to Chief Gustafson's affidavit, this led to a discussion at a meeting of the Band Council on August 28, 2007 during which it was "decided to investigate Mr. Diabo's transfer...". That affidavit further states that "[if] the transfer was not done properly the Band Council's decision was to have Mr. Diabo's name taken off the Band List". Chief Gustafson's affidavit does not state exactly what was done to investigate Mr. Diabo's membership, but it does refer to a Band Council

meeting on September 9, 2007 “where it was decided that Mr. Diabo should be removed from the Band List”. The justification for that decision was, in part, said to be the absence of meeting minutes to support the earlier decision by Band Council to confer membership on Mr. Diabo and because of a supposed historical freeze on membership transfers. Mr. Diabo’s evidence is uncontradicted that he was given no notice of this meeting of the Band Council nor provided with an opportunity to participate in the process leading up to the decision to remove him as a member of Whitesand.

[10] The BCR dated September 24, 2007 which documents Mr. Diabo’s removal as a band member states:

WHEREAS: the Chief and Council are the elected representatives of the Whitesand First Nation; and

WHEREAS: the Whitesand First Nation has a Band Custom Membership Code entitled *The Membership Code of the Anishinabek of the Whitesand Indian Band* (“Code”) that governs who may be a member and on the band list for the Whitesand First Nation and this Code has been passed and accepted by the community and remains in force as of today and is recognized by Indian and Northern Affairs Canada; and

WHEREAS: the Chief and Council have been requested to review the status of Elton Mitchell Diabo’s, born on August 25, 1961, membership; and

WHEREAS: Elton Mitchell Diabo is not entitled to be a member in accordance with the aforementioned Code; and

WHEREAS: the previous Chiefs and Councils were acting outside their jurisdiction by passing Band Council Resolutions supporting the inclusion of Elton

Mitchell Diabo to the Band List without complying with the community's Code; and

WHEREAS: the Code provides in section 8 that "*the band may at any time add to or delete from the band list maintained by it the name of any person who, according to the rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list*".

THEREFORE BE IT RESOLVED THAT: The Chief and Council revoke any previous Band Council Resolutions supporting Elton Mitchell Diabo's membership and addition to the Band List.

BE IT FURTHER RESOLVED THAT: The Chief and Council declare that Elton Mitchell Diabo is to be removed from the band list pursuant to section 8 of the Code, and direct Indian and Northern Affairs Canada to remove his name from the band list forthwith.

BE IT FURTHER RESOLVED THAT: the Chief and Council declare that Elton Mitchell Diabo is not to have any involvement concerning the affairs of the Whitesand First Nation and its membership.

[11] Mr. Diabo was only notified of the Band Council's decision to revoke his membership when the BCR was sent to him on September 24, 2007. It is this decision that is the subject of Mr. Diabo's application for relief. The Respondents' competing claim to prerogative relief concerns the validity of the 1995 BCR that conferred membership on Mr. Diabo. The Respondents contend that the unlawful or *ultra vires* conferral of membership could not form the basis of a demand for fairness when that status was later revoked.

II. Issue

[12] Did the Respondents breach the duty of fairness in the process followed to revoke Mr. Diabo's membership in Whitesand and, if so, should relief be denied to him on the basis that he has an adequate alternative remedy?

III. Analysis

[13] No issue is raised in this proceeding with respect to the Court's jurisdiction over this dispute and it is clear that the Court has the legal authority to resolve it: see *Ermineskin v. Ermineskin Band Council* (1995), 96 F.T.R. 181, 55 A.C.W.S. (3d) 888 (F.C.T.D.).

[14] It is apparent that the Band Council made its decision to remove Mr. Diabo as a member of Whitesand by ostensibly acting under the authority of Article 8.1 of the *Membership Code of the Anishinabek of the Whitesand Indian Band* (Membership Code). Article 8.1 of the Membership Code states:

8.1 The band may at any time add to or delete from the band list maintained by it the name of any person who, according to the rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

[15] The Respondents rely upon a BCR dated May 6, 1987 confirming the apparent ratification of the Membership Code by the band on an unspecified earlier date and a confirmation letter dated September 1, 1987 from the Minister of Indian and Northern Affairs Canada.

[16] Mr. Diabo contends that the Membership Code was never properly ratified by the band and the affidavit of former Chief Ernest Wanakamik speaks to that issue. Mr. Diabo's affidavit asserts that the Membership Code was never before used by the band to determine membership issues and he points to another constitutional document titled *The Constitution of Whitesand Reservation* (Constitution) which he believes establishes the conditions for holding band membership and the processes for acquiring or losing it. The Respondents dispute the validity of the Constitution despite the existence of a letter from Whitesand legal counsel at the time, Michael McDonald, to the Department of Indian Affairs and Northern Development (as it was then called) stating that the Constitution "has been filed, accepted and approved by the Department" and "complies fully with the *Indian Act* (Canada) in all respects".

[17] Needless to say, the Membership Code and the Constitution are not compatible on the issue of band membership and the Court was asked to make a determination as to which of these documents was in force at the date of the decision to revoke Mr. Diabo's membership. The central issue raised by these applications is, however, whether that decision was taken in breach of the duty of fairness. This is an issue which must be assessed on the standard of correctness: see *Canadian Union of Public Employee (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539.

[18] For the reasons which follow, I am not in a position to determine whether the Membership Code, the Constitution, both or neither of these documents were lawfully constituted at the time of the Band Council decision to revoke Mr. Diabo's membership. In examining the issue of

procedural fairness, I will proceed on the assumption that the Respondents are correct in their assertion that the Membership Code provided the constitutional basis for that decision.

[19] The BCR that purported to remove Mr. Diabo from the band list is a surprising document. In its recitals, the Band Council claimed to be acting in conformity with Article 8 of the Membership Code which accords to the band a discretion to revoke the membership of any person who is not entitled to be a member of Whitesand². There is nothing in Article 8 of the Membership Code which authorizes the Band Council to make such a decision and, indeed, that Code very deliberately assigns the determination of membership issues to three non-partisan bodies, namely:

- (a) to a membership committee;
- (b) to a membership court; and
- (c) to the band itself.

Under the Membership Code, only the band, presumably acting by majority decision at a duly constituted band meeting, is authorized to revoke the membership of a person whose name has been entered on the band list. A decision by the band to revoke membership may be appealed in succession to the membership committee and to the membership court. The membership committee is defined by Article 10.1 of the Membership Code and consists of two members, one of whom is appointed by the Band Council. Article 12.1 of the Membership Code dictates that the membership court shall be comprised of four members – two of whom must be Elders of the band. Presumably the initial authority over membership revocation was assigned to the entire band because of the

² This provision is identical to ss. 10(10) of the *Indian Act*, R.S.C. 1985, c. I-5.

significance of the decision to the individual and to the band, and as an attempt to isolate such matters from the realm of band politics.

[20] The evidence that the Band Council decision to revoke Mr. Diabo's membership was politically motivated is, as to be expected, circumstantial. Nevertheless, those circumstances suggest that the Chief and Band Council were attempting to silence Mr. Diabo by preventing him from challenging their authority and from running for office. In that regard, it is noteworthy that the September 24, 2007 BCR not only purported to revoke Mr. Diabo's membership, but it also declared that he was "not to have any involvement concerning the affairs of the Whitesand First Nation and its membership". This effectively blacklisted Mr. Diabo from any participation in the affairs of Whitesand and went well beyond the scope of his membership status. The motives of the Chief and Band Council are also rendered highly suspect by the timing of the decision coming only days before a nomination meeting for an upcoming band election in which Mr. Diabo was intending to offer as a candidate. The fact that the Band Council, on the eve of a band election, very deliberately usurped an authority accorded to the band under the Membership Code that it was purporting to apply is highly suspicious and it represents a disturbing conflict of interest.

[21] What is potentially even more disturbing is Mr. Diabo's evidence that upwards of 20 other members of the band acquired membership in circumstances similar to his own. If that is true – and this evidence was not challenged by the Respondents – it indicates that Mr. Diabo was singled-out presumably in response to his opposition to the band leadership. It is not necessary to determine

what may have motivated the Band Council to act as it did, but these concerns prove the wisdom of assigning the authority over the revocation of band membership to the entire band.

[22] Counsel for the Respondents attempted to minimize the legal significance of the Band Council's revocation decision of September 9, 2007 by arguing that the effective decision was made much earlier during a 2004 band meeting. It is noteworthy that this argument was not made in the Respondents' written submissions.

[23] The evidence relied upon by the Respondents about the 2004 band meeting is contained in the affidavits of Deborah Nodin and Douglas Sinoway Jr., where they respectively deposed:

Deborah Nodin

7. Later in December of 2004 we, the Chief and Council, advised the membership at a band meeting that there was a freeze on band membership. I believe this freeze on band membership is still in place. At this same meeting Mr. Diabo was requested to leave the meeting by the membership since he was not a member at that time. Mr. Diabo was requested to produce a Whitesand Status card by band members in session. Mr. Diabo left the meeting because he could not produce a card to which he claimed to have.

Douglas Sinoway Jr.

7. Later in December of 2004 we, the Chief and Council, advised the membership at a band meeting that there was a freeze on band membership transfers. I believe this freeze on band membership transfers is still in place. At this same meeting Mr. Diabo was requested to leave the meeting by the membership since he was not a member at that time and could not produce an Status Card proving he was.

Not one of the Respondents' affidavits referred to the revocation of Mr. Diabo's membership by the band in 2004 and, indeed, the impugned BCR clearly states that the decision was taken by Band Council on September 9, 2007. No evidence was put forward that Mr. Diabo's membership was ever considered by the band at this meeting, let alone voted on. At most, this evidence shows that Mr. Diabo's band membership was challenged by someone at a band meeting and he was told to leave. In argument, counsel for Mr. Diabo made the salient point that even if Mr. Diabo had been given notice that his membership was in issue at this meeting (and there is no evidence of this) his removal would represent an egregious breach of the fairness duty to be told the case against him and to have a meaningful opportunity to respond. The Respondents' argument that the band made a decision to revoke Mr. Diabo's membership in 2004 is disingenuous and it merely serves to highlight the jurisdictional and procedural deficiencies that surrounded the Band Council decision to revoke his membership in 2007.

[24] It is undisputed that the decision by the Band Council to revoke Mr. Diabo's membership was made without notice to him, thereby depriving Mr. Diabo of the opportunity to be heard. The Respondents argued that there was nothing legally wrong with this because the evidence established that his membership had been acquired illegitimately and because, under the terms of membership established by the Membership Code, he had no legal right to membership in the first place.

[25] The evidence in the records concerning the means by which Mr. Diabo obtained band membership is not particularly clear. The affidavits relied upon by the Respondents do suggest that there may have been irregularities in the process that was followed. On the other hand, it appears

from the Applicant's Record that the process for dealing with Mr. Diabo's application for membership may have been consistent with other membership transfers at that time. Indeed, Mr. Diabo's affidavit attested to this and this evidence was not directly challenged by the Respondents.

[26] Much of the Respondents' evidence on this point is couched in language that attests only to a lack of recollection or to the absence of corroborating records. This is not particularly persuasive evidence particularly in the context of lax band governance practices and poor record keeping. It is not entirely obvious that Mr. Diabo did not qualify for band membership because not only is it unclear whether the Membership Code applied at that time, but the conditions of membership under the Membership Code are open to interpretation. There is also considerable doubt raised on the evidence before me about whether the provisions relied upon by the Respondents were ever applied in this way to any person other than Mr. Diabo. Nevertheless, whether there were deficiencies in the process of Mr. Diabo acquiring membership is not an answer to whether he was treated fairly when that membership was subsequently revoked.

[27] Mr. Diabo resigned his membership in the Mohawk Council of Kahnawake in order to acquire membership in Whitesand and his name was added to the Whitesand's membership list. His membership could not be revoked by the whim of his political adversaries acting without apparent authority and without notice. The means by which Mr. Diabo acquired his membership in Whitesand was a matter that he had a right to address and the denial of that right represents a profound breach of the duty of fairness. This is not a case like *Sandberg v. Norway House Cree*

Nation Band (2005), 2005 FC 656, 272 F.T.R. 221 where the applicant produced no evidence that his name was on the band list or that he was ever a member of the band. Even at that Justice Judith Snider made the explicit point at paragraph 12 that “[m]embership should neither be granted nor taken away randomly on the whim of a few but, rather, should be subject to systematic and fair assessment”. See also *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142, [1993] F.C.J. No. 446 (QL) (F.C.T.D.) at paragraph 47.

[28] The Respondents argue that any deficiencies in the decision-making process are properly remedied through the appeal mechanisms available to Mr. Diabo under the Membership Code. Even if the Band Council did not have the authority to revoke Mr. Diabo’s band membership and breached a duty of fairness by failing to provide him with the right to be heard, these problems, they say, can be fully addressed by the membership committee acting under Article 8.3 of the Membership Code.

[29] The Respondents are correct that the existence of an adequate alternative remedy may be a bar to an application for prerogative relief, but this is a matter of discretion. In determining whether Mr. Diabo should be required to pursue an appeal from the Band Council decision, several factors must be considered including the nature of the alleged error, the scope of the right of appeal, the convenience of the alternative remedy, and the nature of the appellate body: see *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1 (QL) (S.C.C.) at paragraph 37.

[30] Here there are at least two compelling reasons why an appeal to the membership committee is not an adequate alternative remedy. The first of these is that if the Membership Code applied to the revocation decision, Mr. Diabo was deprived of the right to have his membership status fairly determined by the band. The second is that under the Membership Code the membership committee does not undertake an appeal unfettered by the first decision. Article 8.3 of the Membership Code requires Mr. Diabo to prove that there are grounds for reinstatement. The result is that Mr. Diabo is faced on appeal with the burden of overturning a first-instance decision which was made unfairly and without any lawful authority. I would add that there is no evidence that a membership committee has ever been struck by Whitesand and, in these circumstances, I am concerned that the authority to now do so rests, in part, on the authority of the Band Council. What Mr. Diabo thus faces is the substitution of a two-member appeal committee (one member of whom is appointed by the Band Council) not sitting *de novo* for a first-instance hearing that presumably should have involved the entire band. This is a situation very similar to that described by Justice Yves de Montigny in *Okemow-Clark v. Lucky Man Cree Nation* (2008), 2008 FC 888, 169 A.C.W.S. (3d) 1, where he dealt with the issue of a potential appeal at paragraph 27 in the following way:

[...] One cannot help but being left with the impression that the applicants had no other option than to resort to the courts; either the membership list was drawn by a committee which had no proper legal existence, or it was made by the Review Committee established by the *Membership Code* without prior input from the Chief and Council. In both cases, the procedure was a nullity and the applicants were totally justified in coming to the Court for relief.

I agree with the above views and reject the Respondents' argument that Mr. Diabo's appeal option is a form of adequate recourse that should be exhausted before judicial relief is available.

[31] Because the breach of fairness is determinative of these applications, I need not decide whether the Membership Code or the Constitution governed the decision to revoke Mr. Diabo's membership in Whitesand. On the deficient record before the Court, it would also be unwise to do so because the Department of Indian and Northern Affairs Canada may have better and perhaps irrefutable evidence concerning this point in its records. It is enough to say that the inability of the Respondents to easily and conclusively prove the validity of the Membership Code under which the Band Council purported to revoke Mr. Diabo's membership does not engender confidence in Whitesand's administrative or record keeping practices.

[32] As noted above, I am satisfied that whatever the rules of membership in Whitesand may have been, the process followed here by the Respondents was deeply flawed. In the result, the Band Council decision to revoke Mr. Diabo's membership in Whitesand as recorded in the BCR dated September 24, 2007 must be set aside and Mr. Diabo must be reinstated as a full member of Whitesand.

[33] I am in no position on the evidence presented to determine whether Mr. Diabo acquired his membership in Whitesand in accordance with its rules or practices at that time and, indeed, the Respondents' challenge to the legality of a decision made more than 12 years earlier cannot now be entertained by the Court. It follows that the Respondents' claim for declaratory relief in connection

with those earlier decisions must be denied. I would only add that any decision to revoke Mr. Diabo's membership on the basis of alleged irregularities in the process followed at the time he acquired it would require considerably better evidence than the Respondents have produced in this proceeding.

[34] It may well be the case that no single valid membership code exists for Whitesand or that the membership rules are uncertain or inconsistent with past band practices. In light of this, it may be prudent for the band to revisit the conditions for band membership by way of a fresh consultation and vote. That, however, is a matter for the band and not for the Court to decide.

[35] Both parties requested that the matter of costs be dealt with by way of written submissions. I will allow Mr. Diabo 10 days to make his submission on costs not to exceed 10 pages in length. The Respondents will have 10 days thereafter to make their submission not to exceed 10 pages in length.

JUDGMENT

THIS COURT ADJUDGES that the application of Elton Mitchell Diabo in docket number T-1868-07 is allowed and the decision of the Band Council of Whitesand First Nation to revoke Mr. Diabo's membership made on September 9, 2007 and recorded in a Band Council Resolution dated September 24, 2007 is set aside.

THIS COURT FURTHER ADJUDGES AND ORDERS that the Respondents forthwith reinstate Elton Mitchell Diabo to full membership in Whitesand First Nation and take all steps required to confirm that status with the Department of Indian and Northern Affairs Canada.

THIS COURT FURTHER ADJUDGES that the application of Chief Allan Gustafson acting as a representative of the Band Council of Whitesand First Nation and Whitesand First Nation is dismissed.

THIS COURT FURTHER ADJUDGES that the issue of costs is reserved pending further written submissions from the parties.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1868-07

STYLE OF CAUSE: Diabo
v.
Whitesand First Nation Band Council, et al

PLACE OF HEARING: Thunder Bay, ON

DATE OF HEARING: October 20, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

DATED: December 7, 2009

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FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2054-07

STYLE OF CAUSE: Gustafson
v.
Diabo, et al.

PLACE OF HEARING: Thunder Bay, ON

DATE OF HEARING: October 20, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

DATED: December 7, 2009

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