

CANADA / JUDGMENT

Ross v. Mohawk Council of Kanesatake

2003 FCT 531

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Ross v. Mohawk Council of Kanesatake

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Decision Content

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Ottawa, Ontario, this 29th day of April, 2003

Present: The Honourable Madam Justice Heneghan

BETWEEN:

LARRY ROSS

Applicant

and

MOHAWK COUNCIL OF KANESATAKE

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

- [1] Mr. Larry Ross (the "Applicant") seeks judicial review of the decision made by the Mohawk Council of Kanesatake (the "Respondent") on September 28, 2001. That decision terminated the Applicant's employment as Assistant Chief of Police and Acting Chief of Police for the Kanesatake First Nation of Oka, Quebec.
- [2] The Applicant now seeks an order declaring that decision invalid and setting it aside. He also seeks reinstatement to his former position.

BACKGROUND

- [3] The Applicant, a member of the Akwesasne Mohawk Band, was hired by the Respondent in April 1997 as a Police Constable. In May 1999 he was promoted to Assistant Chief of Police. On December 11, 2000 he was named Acting Chief of Police.
- [4] By Resolution number 046/9900/0069 the then Chief of Police, Joseph Montour, and the Applicant, then Acting Chief of Police, became permanent employees of the Respondent Council.
- [5] The Kanesatake Mohawk Police Force, (the "Police Force") initially known as the "Kanesatake Peacekeepers Commission" was established in 1997 pursuant to a tripartite agreement entered into by the Respondent Council, the Government of Canada and the Government of Quebec. This agreement, titled "Interim Agreement Respecting Peacekeeping at Kanesatake", was followed by another tripartite agreement, among the same parties, in 1999 (the "1999 Agreement"). The 1999 Agreement entitled "Agreement Concerning the Establishment and the Maintenance of a Police Force in Kanesatake" was a continuation of the first agreement with some variations.
- [6] The 1999 Agreement provides for the establishment and maintenance of a police force in Kanesatake. Sections 4.1 and 4.6 are relevant and provide as follows:

4.1 The Kanesatake Mohawk Police Force is hereby established and maintained as the police force in Kanesatake responsible for maintaining peace, order and public security within the patrol zone, for preventing crime and offenses pursuant to applicable laws and to seek out alleged offenders.

4.6 It is agreed that the Mohawk Council of Kanesatake shall be solely responsible for the recruitment and selection of the Kanesatake Mohawk police officers in accordance with the following standards: ...

[7] In addition to establishing a police force, the 1997 and 1999 Agreements provided for the creation of the Kanesatake Mohawk Police Commission (the "Police Commission") to ensure the independence of the police. Section 5.1 of the 1999 Agreement provides as follows:

It is agreed that, in order to ensure the independence of the Kanesatake Mohawk Police Force, the Mohawk Council of Kanesatake will maintain the Kanesatake Mohawk Police Commission (the "Commission") accountable to the Mohawks of Kanesatake for the orientation of the Kanesatake Mohawk Police Force and responsible for establishing its goals, objectives, priorities and management policies and for overseeing its administration.

[8] Sections 5.2 and 5.3 detail the responsibilities of the Kanesatake Mohawk Police Commission. The following provisions are relevant:

5.2 It is agreed that the responsibilities of the Kanesatake Mohawk Police Commission shall be the following:

- a) Consult with and advise the Mohawk Council of Kanesatake on policing and related matters;
...
- e) ensure that Kanesatake Mohawk Police Force objectives, to protect life and property, enforce the law and implement preventative policing services, are met in an efficient, effective and professional manner;
- f) establish policies and standards for the effective management and administration of the Kanesatake Mohawk Police Force, including performance standards for the Chief of police;
- g) establish a Code of Discipline and ensure that the Kanesatake Mohawk Police Force has mechanisms for the impartial and independent appeal of grievances and redress on matters related to discipline and dismissal;
- ...

5.3 The Kanesatake Mohawk Police Commission is responsible for establishing and maintaining the objectives and priorities of the Kanesatake Mohawk Police Force. Such responsibilities shall include all decisions relating to hiring and dismissal of members of the police force, as well as ultimate responsibility for disciplinary measures against members of the police force.

[9] Section 6.1 of the 1999 Agreement adopts the Code of Ethics for Quebec Police Officers to regulate the professional conduct of members of the Police Force. Section 6.2 provides the Police Commission shall develop a Code of Discipline for the Police Force.

- [10] The Police Commission developed the Kanesatake Mohawk Police Services Code of Ethics and Discipline (the "Code") in November 1998. The Code also establishes a procedure for disciplinary matters. The Code outlines the role of the Police Commission to conduct a hearing, provides a procedure for the hearing and guarantees the affected person the opportunity to present a full and complete defence. The Code also provides for the sanction of dismissal.
- [11] The Police Commission drafted a statement of policies and procedures concerning its role. This draft policy statement was submitted to the Council in October 1997 for consideration. Pursuant to Council Resolution number 038/9798/0069 dated October 7, 1997, the Council adopted the policy statement "in principle" and "subject to final review and approval". There is no evidence that the policy statement was ever finally approved. There is conflicting evidence that the Respondent Council and the Police Commission acted in accordance with the policy statement relative to the hiring and dismissal of members of the Police Force.
- [12] The policy statement addresses the respective responsibilities of the Police Commission and the Respondent in employment matters. The section dealing with the authority of the Commission includes the following:

RESPONSIBILITIES

The Commission shall have the general authority to promote and provide Police service for the Kanesatake Mohawk residents and territory, without limiting the generality of the foregoing

...

- To ensure that sufficient persons are employed for the purpose of carrying out functions of the police service;

...

The Mohawk Council of Kanesatake or any of its members shall not, except as permitted by this schedule;

- a. Perform any function or exercise any control over the police service that the Police commission is empowered to exercise or,
- b. Issue any instruction to the Chief of Police or a Police Officer or a member of the Police service ...

- [13] The policy statement limits the role of the Respondent in policing matters as follows:

For greater certainty, where members of the Kanesatake Mohawk Police are to be laid off for reasons other than for cause, the layoffs shall be made by the Police Commission and not by the respective Mohawk Council of Kanesatake.

- [14] The 1999 Agreement, the Code of Ethics and Discipline, and the draft policy statement are part of the institutional background to the decision of September 28, 2001. The particular facts relative to that decision are set out in the affidavits of the Applicant, Louise Bonspille, James Gabriel and Steven Bonspille that were filed in this proceeding.
- [15] As noted above, on September 28, 2001 the Applicant was Acting Chief of Police of the Kanesatake Mohawk Police Force. Louise Bonspille was the Chairperson of the Police Commission; James Gabriel was the Grand Chief of the Kanesatake First Nation at Kanesatake, and Steven Bonspille was a Chief of the Respondent Council with responsibility for Justice and Public Security, including matters concerning the police.
- [16] A meeting of the Respondent Council was scheduled for September 28, 2001. One of the agenda items was a review of the Applicant's role as Acting Chief of Police. According to Chief Bonspille, the Council had received many complaints about the manner in which the Applicant was discharging his duties. Some of those complaints alleged that he engaged in aggressive policing methods, and the complaints were not limited to members of the Kanesatake community. However, the biggest concern on that day related to the manner in which the Applicant had executed a search warrant in the community on September 26, 2001, and it is not clear whether the other complaints were formally before the Council.
- [17] On that day, the Applicant, together with members of the Sûreté du Québec, executed a search warrant at the houses of some members of the band. The search warrant was executed as part of a criminal investigation into illegal drug activities in the community. The house of Robert Gabriel, a band member, was searched in this policing operation.
- [18] The search of Mr. Gabriel's property yielded evidence of an internal hydroponic operation that was discovered in a bunker underneath the house, as well as in an outbuilding on the property. No marijuana was discovered but a large sum of American money, approximately \$47,000.00, was discovered in a safe inside the home. Certain other property was seized from the home of Mr. Gabriel who was not at home when the search warrant was executed.
- [19] When Mr. Gabriel became aware of the search of his premises and removal of certain property, he complained to the Council. He also went to the police station and remonstrated with an officer.
- [20] On the following day, that is September 27, 2001, certain associates and family members of Robert Gabriel gathered outside the police station on motorcycles and other vehicles, and vocally expressed their displeasure.
- [21] According to a statement prepared by Mr. Terry Isaac, who was appointed as Acting Chief of Police on September 28, 2001 following the dismissal of the Applicant, the police were notified of a number of incidents in the community involving members of the Gabriel family.

- [22] On September 28, 2001, shortly after 9:00 o'clock in the morning, the police were advised by telephone that Mr. Robert Gabriel was present at the Council offices. He was allegedly shoving people around.
- [23] Chief Pearl Bonspille provided a report about the events in the Council offices on the morning of September 28, 2001. Her report is attached to the affidavit of Chief Steven Bonspille as an exhibit. All members of the Council composed of six Chiefs and Grand Chief James Gabriel, were in attendance. Robert Gabriel, together with his wife Bertha Bonspille, and several members of his family were also present.
- [24] Mr. Gabriel complained about the manner in which his home had been searched. He complained to Grand Chief Gabriel and demanded the return of his property. He grabbed Grand Chief Gabriel by the neck and according to Grand Chief Gabriel, started choking him. Two people intervened to separate the two men. Robert Gabriel threatened to pursue the Grand Chief and his family if anything happened to him or his family.
- [25] Mr. Robert Gabriel then jumped on the boardroom table. Chief Bonspille stepped in front of him to prevent further confrontation. Then Robert Gabriel said he was going home and "digging in".
- [26] Two police officers arrived from the police station to check on the situation. When told that the situation was under control, they stayed outside the meeting room while the meeting continued.
- [27] The meeting continued. Those present continued to express their complaints about the Applicant in his policing role in the community.
- [28] Chief Steven Bonspille was present for these occurrences but he left the meeting room shortly after the departure of Robert Gabriel to try and locate the Applicant, to see if he could attend the meeting. When he called the police station, he was advised by a duty officer that the Applicant was out of the community.
- [29] Chief Steven Bonspille said, in his affidavit, that after he made the call to the police station, he was told by Chief John Harding about information received from Bertha Bonspille about the Applicant. Apparently Bertha Bonspille had been informed by one Mark Delisle that the Applicant had called to say that he knew that Robert Gabriel was armed, and that the Applicant and his team were "coming to get him and we have our guns and he's going down".

According to the affidavit of Chief Steven Bonspille, he was told by Chief John Harding that Bertha Bonspille had relayed this advice to the Council.

- [30] Chief John Harding also told Chief Steven Bonspille that Chief Clarence Simon had presented a motion to immediately dismiss the Applicant and that the motion had been passed by all the other Council members. According to his affidavit, Chief Steven Bonspille agreed that this was an appropriate decision, in these circumstances, and he would support it.

- [31] The Applicant was notified of this decision. He was told to turn over his badge and revolver, and he did so. The Applicant did not ask the Council to reconsider its decision.
- [32] Prior to the Council meeting on September 28, Chief Steven Bonspille had spoken with Louise Bonspille, Chairperson of the Police Commission. They had discussed the situation concerning the Applicant. Louise Bonspille had proposed that the Applicant be placed on leave with pay, pending an investigation. Chief Steven Bonspille had advised Louise Bonspille that he would put that proposal before the Council at the meeting scheduled for September 28. However, according to his cross-examination, he did not put that proposal before the Council. He said he did not have the opportunity to do so.
- [33] In his cross-examination, Chief Steven Bonspille also disputed that this proposal initiated with Louise Bonspille but with him. In any event, the proposal was not placed before the Council. The Council dealt only with a motion to immediately dismiss the Applicant.
- [34] The above facts can be found in the affidavits, including the exhibits, filed by the several deponents identified above and the transcripts of their cross-examination. Only Chief Steven Bonspille and Grand Chief James Gabriel were present for the meeting on September 28, 2001. Chief Steven Bonspille was not present for the entire meeting and some of the matters mentioned in his affidavit are based on hearsay, specifically the reference to the advice from Chief John Harding about the conversation between Mark Delisle and Bertha Bonspille concerning the armed state of the Applicant and his intentions vis-à-vis Robert Gabriel.
- [35] Grand Chief Gabriel was present throughout the meeting. He was cross-examined on his affidavit about the events that occurred at the meeting and the prevailing atmosphere. He described the situation as "extremely wild". He said that people were in a state of shock and in his opinion, rational decisions were not being made.
- [36] Grand Chief Gabriel thought that something had to be done, to defuse the situation in the interest of community safety and for the safety of the Applicant.
- [37] The Grand Chief was not aware at the time of the meeting of the discussion between Chief Steven Bonspille and Louise Bonspille about the option of placing the Applicant on leave with pay. He did not consider, at the time of the meeting, that the Commission should be involved in a decision to terminate the Applicant's employment. He attributed his lack of consideration on that point to the extreme conditions of high tension, raised voices and the assault made upon him by Robert Gabriel.
- [38] Chief Steven Bonspille was not present for the vote on the motion to dismiss the Applicant. However, according to both his affidavit and his cross-examination, he agreed with the decision. He cast it in terms of a reasonable decision, having regard to the welfare of the community. He denied the suggestion that the Police Commission should be involved in that decision and said that the Council made the decisions in hiring and firing members of the Police Force.

- [39] Louise Bonspille was not present at the Council meeting. Her evidence, in both her affidavit and upon cross-examination, addressed the role of the Commission in another light. According to her, the Commission was involved in decisions to hire and dismiss. She consistently maintained that the Commission should have been involved with the decision to terminate the Applicant's employment, in light of the 1999 Agreement.
- [40] A few key facts emerge from the affidavits and the transcripts of the cross-examinations. First, the Council meeting scheduled for September 28, 2001 was focused on the Applicant and the manner in which he was discharging his policing activities, specifically relative to the execution of the search warrant on September 26, 2001.
- [41] Second, the Applicant was not present at this meeting and limited efforts were made to locate him on that day.
- [42] Third, the meeting deteriorated into mayhem and the Council dealt only with a notice to dismiss the Applicant without giving him the opportunity to respond to the allegations against him.
- [43] Fourth, the Council acted without reference to the Police Commission and did not consider an alternative to dismissal. There was no formal recorded vote and the Council voted in the presence of the complaining community members.
- [44] This is the background to the Applicant's request for judicial intervention in the Council's decision.

APPLICANT'S SUBMISSIONS

- [45] The Applicant says that the Council is a "federal board, commission or other tribunal" as defined in section 2 of the Federal Court Act, R.S.C., 1985, c. F-7. Consequently, this Court has jurisdiction to entertain this application. He also argues that a high degree of fairness applies because the decision affected his right to practice his profession. In this regard, he relies on *Kane v. Board of Governor of U.B.C.*, [1980] 1 S.C.R. 1105 at p. 1113.
- [46] The Applicant submits that there was no bar to the Respondent contacting him prior to making the final decision to dismiss him, despite the existence of a perceived emergency. He acknowledges that a decision-maker may act without a hearing in response to an emergency situation, but that does not completely eliminate his procedural rights. The existence of an emergency may operate to delay the need for a hearing, as discussed in *Cardinal v. Kent Institution (Director)*, [1985] 2 S.C.R. 643.
- [47] Furthermore, since this rule is an exception to the requirements for observance of natural justice, the exception should be applied narrowly, as discussed in *Barrera v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 3 (C.A.). The Applicant argues that it was unnecessary to dismiss him because sending him home or directing him not to arrest Mr. Gabriel would have avoided the potential emergency.

- [48] The Applicant submits that the Council acted in a patently unreasonable manner in determining whether an emergency existed. The Applicant says that the Council responded to unlawful conduct and intimidation and in doing so, relied on improper and irrelevant considerations. Any findings of fact made by the Council in response to intimidation would be vulnerable on the grounds that they were perversely and capriciously made.
- [49] The Applicant further argues that the Council's decision should be set aside because it resulted from the extreme intimidation and violence that occurred at the Council meeting. Consequently, the decision was contrary to the Council's procedure for good government.
- [50] The Applicant also submits that he was terminated without cause, contrary to employment law.
- [51] The Applicant further argues that the Council's establishment of the Police Commission constituted a delegation of authority over policing matters, including discipline and termination of the employment of officers. He argues that the decision of the Council to dismiss him was in excess of its jurisdiction. Here, the Applicant relies on *Griffin v. Canada (Agriculture Canada, Inspection Division)*, [1989] F.C.J. No. 300 (T.D.) (QL).
- [52] The Applicant says that if the decision is set aside without further order, then he should be reinstated to his former position as if he had never been terminated. He would then be entitled to all salary and benefits flowing from his office, subject to mitigation, and recovery of out-of-pocket expenses resulting from his dismissal. He relies on a presumption favouring reinstatement of an employee unless there are reasons to the contrary and says that he should be reinstated. In this regard, the Applicant relies on *Energie Atomique du Canada v. Sheikholeslami*, [1998] 3 F.C. 349 (C.A.); *Chalifoux v. Driftpile First Nation*, [1999] F.C.J. 781 (T.D.) (QL) and *Pitawanakwat v. Canada (Attorney General)*, [1994] 3 F.C. 298 (T.D.).
- [53] The Applicant says that while reinstatement will not completely restore the damage to his character and reputation resulting from the dismissal, a failure to reinstate would destroy his reputation. He says this is a significant factor in favour of his reinstatement and relies on *Johnny v. Tsewultun Police Service Board*, [2000] C.L.A.D. No. 468 (QL) at paragraph 69.
- [54] Finally, the Applicant argues that a failure to reinstate him would undermine respect and authority for police officers in the community and establish a dangerous precedent of putting the employment of police officers at risk, in response to intimidation tactics practised by members of the community.

RESPONDENT'S SUBMISSIONS

- [55] The Respondent argues that the jurisdiction of the Council with respect to policing arises in part from the Indian Act, R.S.C. 1985, c. I-5, in particular section 81(1)(c) and (d). As well, the Council holds all such ancillary power that is necessary to be exercised of its statutory duties; see *Assu v. Chikite*, [1999] 1 C.N.L.R. 14 at paragraph 30 (B.C.S.C.).

- [56] The Respondent argues that the agreements entered into by the Council concerning policing in Kanesatake recognized the Council as the sole authority on such matters. The delegation of powers referred to by the Applicant would be unlawful because the Council may not delegate that which has been delegated to it by Parliament. Here, the Respondent relies on *Lainey v. Conseil de la Nation Huronne-Wendat*, [2000] 1 C.N.L.R. 155 (Que. S.C.) at paragraph 38.
- [57] The Respondent submits that the agreement in issue, that is the 1999 Agreement, allows the Police Commission to have a role in policing in an advisory or consultative capacity.
- [58] The Respondent argues that its decision merits a deferential standard of review because it is similar to a municipal body exercising discretion in matters affecting the public interest. In support of this argument, the Respondent relies on *Nanaimo (City) v. Rascal Trucking Limited*, [2000] 1 S.C.R. 342 at paragraph 35.
- [59] The Respondent submits that its decision to dismiss the Applicant involved its broad discretion in the exercise of its mandate over policing. Relying on *Assu*, supra, the Respondent argues that it is entitled to make decisions as it sees fit on the matters falling within the scope of its powers, provided that those decisions are informed and are reached by majority vote at duly convened meetings. In the present case, the Respondent relies on its opinion that a crisis was developing in the community and on its knowledge of the past conduct of the Applicant which resulted in complaints against him.
- [60] The Respondent says that no duty of procedural fairness is owed to the Applicant because it, as the decision-maker, is an elected body. The decision was made on broad policy grounds, that is the interests of the safety and welfare of the community. Relying on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, the Respondent says that it owed no duty of procedural fairness to the Applicant.
- [61] Alternatively, the Respondent argues that any procedural fairness owed would be minimal because of the Applicant's status as an office holder at pleasure. The Respondent notes that the Applicant was dismissed from the position of Acting Chief of Police, a temporary assignment. The reduced level of procedural fairness owed to office holders at pleasure need not extend to an oral hearing or the formal provision of reasons. Furthermore, the Respondent argues that it may be sufficient for the statutory body to make itself available for discussion of the reasons for dismissal.
- [62] As well, the Respondent says it was acting in good faith and in the context of an emergency situation, and relies on *Cardinal*, supra. Here, the Applicant did not seek an opportunity to make representations before Council and did not ask for reconsideration of the decision.

- [63] The Respondent argues that office holders at pleasure may be removed without cause and relies on *Ocean Port Hotel Ltd. v. British Columbia (General Manager Liquor Control)* (1999), 174 D.L.R. (4th) 498 at paragraphs 34, 35, 37 and 38 (B.C.C.A.); rev'd. on other grounds [2001] 2 S.C.R. 781. The Respondent relies on the fact that the Applicant's conduct had been the subject of much controversy, to the extent that there was a basis to conclude that he no longer enjoyed the confidence of the community.
- [64] The Respondent says that even where it is established that a public authority breached a duty of fairness owing to an office holder, the office holder may not be entitled to reinstatement. In this regard, the Respondent relies on *Hewat v. Ontario* (1998), 37 O.R. (3d) 161 (C.A.) at page 169 and *Dewar v. Ontario* (1998), 37 O.R. (3d) 170 (C.A.).
- [65] The Respondent relies on the contractual relationship with the Applicant and says that the law of contract should apply where it is not superseded by explicit terms in the 1999 Agreement or any statutes governing the relationship between the parties, relying on *Wells v. Newfoundland*, [1999] 3 S.C.R. 199. The remedy of specific performance is not generally available in the law of contract and consequently, the Applicant is not entitled to reinstatement.

ANALYSIS

- [66] The primary issue in this application is whether there was a breach of procedural fairness arising from the manner in which the Respondent Council reached its decision on September 28, 2001, to summarily dismiss the Applicant. This broad issue includes the subsidiary issues of whether the Respondent acted in excess of its jurisdiction by failing to involve the Police Commission in this decision, and whether the Applicant was an office holder at pleasure, entitled to little, if any, procedural fairness.
- [67] This application relates to the decision made by the Council on September 28, 2001 to terminate the employment of the Applicant as the Acting Chief of Police. The application for judicial review is brought pursuant to the Federal Court Act, section 18.1. Section 18.1(4) sets out the grounds upon which an application for judicial review may be brought, as follows:
- (4) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
 - (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
 - (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
 - (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
 - (e) acted, or failed to act, by reason of fraud or perjured evidence; or
 - (f) acted in any other way that was contrary to law.
- (4) Les mesures prévues au paragraphe (3) sont prises par la Section de première instance si elle est convaincue que l'office fédéral, selon le cas_:
- a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
 - b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
 - c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
 - d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
 - e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
 - f) a agi de toute autre façon contraire à la loi.

[68] A decision of the Respondent Council is subject to judicial review since the Council is a "federal board, commission or other tribunal" as defined in section 2(1) of the Federal Court Act. As well, see *Coalition to Save Northern Flood v. Canada*, [1995] 9 W.W.R. 457 (Man. C.A.) and *Gabriel v. Canatonquin*, [1980] 2 F.C. 792 (C.A.).

[69] While the decision under review terminated the Applicant's employment as Acting Chief of Police, the focus is not on the employment law aspect of this decision but on the process followed by the Respondent Council in reaching it. This is an application for judicial review, not an action for damages.

[70] The basic elements of procedural fairness were considered by the Supreme Court of Canada in *Therrien (Re)*, [2001] 2 S.C.R. 3 where the Court said that the duty of fairness has two elements, the right to be heard and the right to an impartial hearing. At paragraph 82, the Court said:

Essentially, the duty to act fairly has two components: the right to be heard (the *audi alteram partem* rule) and the right to an impartial hearing (the *nemo iudex in sua causa* rule). The nature and extent of the duty may vary with the specific context and the various fact situations dealt with by the administrative body, as well as the nature of the disputes it must resolve: *Syndicat des employés de production du Québec et de l'Acadie v. Canada* (Canadian Human Rights Commission), [1989] 2 S.C.R. 879, at pp. 895-96, cited with approval in *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)* 3 S.C.R. 919, at para. 22, and *Ruffo*, supra, at para. 88. Thus in *Baker*, supra, at paras. 23-28, *L'Heureux-Dubé J.* Specifically pointed out that several factors have

been recognized in the jurisprudence as relevant to determining what is required by the duty of procedural fairness in a given set of circumstances. While she did not provide a comprehensive list of such factors, she referred to: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the decision; and (5) respect for the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures. It is from this perspective that I will now consider the allegations of breach of the rules of procedural fairness made by the appellant in the instant case.

[71] In this case, the Respondent argues that an emergency situation existed which did not allow it to contact the Applicant and provide him with the opportunity to attend the meeting. It further argues that an attempt was made to locate him but that was unsuccessful and in any event, was overtaken by other events.

[72] Insofar as the emergency situation is concerned, the Respondent relies on the decision in *Cardinal*, supra, to justify its decision to proceed in the absence of the Applicant.

[73] In *Cardinal*, supra, the Supreme Court of Canada dealt with a situation arising from the decision of a prison Director to continue the segregation of certain inmates, after the Segregation Review Board made a recommendation to discontinue the segregation and without giving the affected inmates the opportunity to hear the allegations against them and to make representations.

[74] The Supreme Court of Canada upheld the critical decision of the Director to impose "administrative dissociation" without a hearing, when facing an imminent emergency. The Supreme Court approved of the administrative response at that time, saying at paragraph 16:

...Because of the apparently urgent or emergency nature of the decision to impose segregation in the particular circumstances of the case, there could be no requirement of prior notice and an opportunity to be heard before the decision.

[75] However, the Court did not approve of the administrative decision to continue the segregation without observing the rules of procedural fairness. In this regard the Supreme Court said at paragraph 21:

The issue then is what did procedural fairness require of the Director in exercising his authority, pursuant to s. 40 of the Penitentiary Service Regulations, to continue the administrative dissociation or segregation of the appellants, despite the recommendation of the Board, if he was satisfied that it was necessary or desirable for the maintenance of good order and discipline in the institution. I agree with McEachern C.J.S.C. and Anderson J.A. that because of the serious effect of the Director's decision on the appellants, procedural fairness required that he inform them of the reasons for his intended decision and give them an opportunity, however informal, to make representations to him concerning these reasons and the general question whether it was necessary or desirable to continue their segregation for the maintenance of good order and

discipline in the institution...

[76] In the present case, it is clear that the Applicant was not advised that the issue of his continued employment would be considered by the Respondent on September 28, 2001. Having regard to his status as an employee of the Respondent Council, confirmed by the resolution of November 23, 1999, the Applicant was entitled to procedural fairness relating to termination of his employment. That point was considered by the Supreme Court of Canada in *Knight*, *supra*.

[77] In that decision, the Supreme Court held that regardless of whether a person is considered a permanent employee, dismissible for cause, or an office holder at pleasure, a minimal duty of fairness applies. At pages 668-669, the Court said the following:

...It should be noted at this point that the duty to act fairly does not depend on doctrines of employment law, but stems from the fact that the employer is a public body whose powers are derived from statute, powers that must be exercised according to the rules of administrative law.

The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This Court has stated in *Cardinal v. Director of Kent Institution*, *supra*, that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body (Le Dain J. for the Court at p. 653).

[78] It is clear, in my opinion, that the Applicant was at least entitled to the minimal elements of procedural fairness. The next question is whether the observance of procedural fairness, including the right to be advised of allegations against him and the opportunity to make representations, was suspended as the result of the perceived emergency.

[79] According to *Cardinal*, *supra*, the right to procedural fairness may be suspended in an emergency situation. It is not eliminated. It is respected by the provision of an opportunity to be heard, after the emergency situation has been relieved. That did not happen in this case and the Respondent argues that the Applicant did not seek re-consideration of the decision.

[80] In my opinion, that argument is devoid of merit. The decision had been made. Unlike the factual context in *Cardinal*, *supra*, there was no room for a second decision.

[81] The finding by the Respondent concerning an emergency was probably within its jurisdiction, although the evidence about the tumult in the community due to the activities of Robert Gabriel, his family and associates casts doubt on the reasonableness of the Respondent's conclusion in this regard. For example, the Respondent refused the offer of assistance from the police during the meeting of September 28, 2001. However, recognition of the right to be heard is but one of the essential components of the duty of procedural fairness. The second essential element is an impartial hearing and that includes an impartial decision-maker.

- [82] The evidence submitted raises considerable doubt about the impartiality of the decision-maker. The Council meeting scheduled for September 28, 2001 was overtaken by Robert Gabriel and his associates. The Respondent has not provided an agenda or any formal record of what happened at the meeting. The accounts of what happened come from the affidavits of Grand Chief Gabriel and Chief Steven Bonspille, including the statement of Chief Pearl Bonspille which is an exhibit to the latter, and the transcripts of cross-examination.
- [83] The picture that emerges is one of chaos. The Council meeting was commandeered by community members. An assault was made. Grand Chief Gabriel said "everybody was pretty much in a state of shock". He said "I don't think rational decisions were being made".
- [84] In these circumstances, I conclude that the decision was not made in a fair and impartial manner. The Respondent failed to respect the second necessary component of procedural fairness and its decision cannot stand.
- [85] Furthermore, the Respondent acted independently of the Police Commission. Chief Steven Bonspille had spoken with Louise Bonspille prior to the meeting. An alternate solution was proposed, that is to send the Applicant home, with pay. However, that proposal was never submitted to the Council for its consideration, because matters had gotten out of control. The Respondent had lost control of its meeting.
- [86] The Respondent now argues that it was not obliged to consult with the Commission in the matter of dismissing the Applicant because the Commission performed only a consultative role relative to the Police Force. In any event, the Respondent Council, not the Commission, was the Applicant's employer.
- [87] In making this submission, the Respondent is ignoring the 1999 Agreement, particularly those provisions which provide for the creation of the Police Commission. Section 4.6 of the Agreement provides that the Respondent "shall be solely responsible for the recruitment and selection" of members of the Police Force. However, section 5.3 assigns responsibility for hiring and dismissal, as follows:

5.3 The Kanesatake Mohawk Police Commission is responsible for establishing and maintaining the objectives and priorities of the Kanesatake Mohawk Police Force. Such responsibilities shall include all decisions relating to hiring and dismissal of members of the police force, as well as ultimate responsibility for disciplinary measures against members of the police force.

- [88] The Respondent argues that it alone has authority in policing matters, pursuant to the Indian Act sections 81(1(c) and (d) which provide as follows:

81. (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

...

- (c) the observance of law and order;
- (d) the prevention of disorderly conduct and nuisances;

81. (1) Le conseil d'une bande peut prendre des règlements administratifs, non incompatibles avec la présente loi ou avec un règlement pris par le gouverneur en conseil ou par le ministre, pour l'une ou l'ensemble des fins suivantes_:

...

- c) l'observation de la loi et le maintien de l'ordre;
- d) la répression de l'inconduite et des inconvénients;

[89] There is no challenge to the authority of the Respondent to enact by-laws pursuant to section 81(1)(c) and (d). However, in this case, there is no evidence that it did so. The 1999 Agreement is not a by-law.

[90] Rather, that agreement is a contract and according to the Alberta Court of Queen's Bench in *Siksika Nation v. Canada (Solicitor-General)*, [2002] A.J. No. 798 (QL), it is to be interpreted as such. In that case, the Court dealt with the interpretation of transitional clauses in a similar agreement concerning police services on a reserve. The Court interpreted the agreement as it would a contract and found that the rules of contractual interpretation require that the terms of the agreement are to be given their plain meaning.

[91] I agree with this approach. In the present case, the 1999 Agreement provides for the establishment of the Commission. The Agreement also provides that the Respondent shall be solely responsible for recruitment and selection of members of the Police Force, and that the Police Commission, created under the Agreement, shall be responsible for "all decisions relating to hiring and dismissal" of those members. In my opinion, the Council did not have the option of ignoring the Commission when deciding to terminate the Applicant's employment. The Commission is a product of the 1999 Agreement.

[92] The Commission drafted a Policy Statement that addressed its role in terminating employment of Police Force members, except for cause. The draft Policy Statement was accepted in principle by the Respondent, subject to final review and approval. There is no evidence to show that it was ever finally accepted but there is evidence, from Grand Chief Gabriel and Louise Bonspille, that the Respondent Council acted together with the Commission in dealing with dismissals.

[93] There may be some inconsistency between sections 4.6 and 5.3 of the 1999 Agreement but the fact remains that as a signatory to the Agreement, the Respondent acknowledged a role for the Commission in dealing with the firing of members of the Police Force. The two provisions can reasonably be interpreted to mean that the Commission will have some involvement in decisions to terminate other than for cause.

- [94] The Respondent here side-stepped the Commission. All that happened was a conversation between the Council Chief responsible for policing and the Chairperson of the Commission, Louise Bonspille. There is no evidence that she spoke for the Commission as a whole.
- [95] This behaviour is another manifestation of breach of the duty to act fairly. The Respondent ignored its own processes in a manner that suggests a lack of good faith.
- [96] For these reasons, the application for judicial review is allowed. The sole remaining question is the remedy.
- [97] The Applicant seeks an order for reinstatement and his back wages. The Respondent says that the remedy is beyond the jurisdiction of this Court on an application for judicial review.
- [98] Section 18.1(3) of the Federal Court Act, describes the remedies that are available upon an application for judicial review, as follows:
- (3) On an application for judicial review, the Trial Division may
 - (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
 - (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
 - (3) Sur présentation d'une demande de contrôle judiciaire, la Section de première instance peut_:
 - a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou don't il a retardé l'exécution de manière déraisonnable;
- [99] The remedy of reinstatement is not available nor is the remedy of damages; see *Tench v. Canada (Attorney General)*, 179 F.T.R. 126.
- [100] The question of the applicability of the Canada Labour Code, R.S.C. 1985, c. L-2 to this situation was raised at the beginning of the hearing of this application. Both parties maintained that it was not applicable. I note that the remedies of reinstatement and compensation for lost wages are available when an aggrieved person resorts to that Code, and refer to *Johnny v. Tsewultun Police Service Board*, supra, a decision of a Canada Labour Arbitration Adjudicator, pursuant to the Canada Labour Code.
- [101] In the result, the application for judicial review is allowed, the decision of September 28, 2001 made by the Respondent Council is quashed, and the matter is remitted for redetermination in accordance with these reasons. The Applicant shall have his costs of this proceeding.

ORDER

The application for judicial review is allowed, the decision of September 28, 2001 made by the Respondent Council is quashed and the matter is remitted for redetermination in accordance with these reasons. The Applicant shall have his costs of this proceeding.

"E. Heneghan"

J.F.C.C.

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-1915-01

STYLE OF CAUSE: LARRY ROSS

v.

MOHAWK COUNCIL OF KANESATAKE

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 11, 2002

REASONS FOR ORDER AND

ORDER: THE HONOURABLE MADAM JUSTICE HENEGHAN

DATED: APRIL 29, 2003

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