Federal Court  Cour fédérale

Date: 20140905

Docket: T-1776-13

Citation: 2014 FC 845

Ottawa, Ontario, September 5, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

IVAN WEEKUSK

Applicant

and

CHIEF DELBERT WAPASS, THUNDERCHILD FIRST NATION BAND COUNCIL, and THUNDERCHILD FIRST NATION APPEAL TRIBUNAL

Respondents

JUDGMENT AND REASONS

[1] The applicant, Mr Weekusk, seeks judicial review of the decision of Chief Wapass and the Band Council made on October 18, 2011 which suspended Mr Weekusk without pay as a Councillor or Headman of the Thunderchild First Nation and requested that Thunderchild First Nation Appeal Tribunal remove Mr Weekusk from Office. For the reasons that follow, the application is allowed.

I. Background

[2] Mr Weekusk was elected as a Councillor or Headman in the general election of the Thunderchild First Nation and was then sworn in on December 21, 2010 for a four year term.

[3] A complaint was made by Band Member Theresa Horse pursuant to the *Thunderchild First Nation Election Act* [*Election Act*], alleging that the applicant had breached his oath of office. The Chief and Council considered the complaint at their October 18, 2011 meeting and made the decision to suspend Mr Weekusk without pay and to apply to the Appeal Tribunal to have him permanently removed as Councillor (Headman) pursuant to section 15.08 of the *Election Act*.

[4] The Notice of Application by the Chief and Council to the Appeal Tribunal, dated December 2, 2011, was sent to Mr Weekusk. He then filed a Notice of Dispute dated December 23, 2011. The Appeal Tribunal has not yet dealt with the application.

The Complaint

[5] A complaint was made by Theresa Horse on October 14, 2011 alleging that Mr Weekusk had breached his oath of office. Ms Horse described the wrongdoing as follows:

- Councillor Weekusk has failed to faithfully and truly to the best of his ability carry out the duties and obligations of a Headman by failing to attend to the Offices of the Government to work as a collective with the other members of the Government since August 2011;

- Councillor Weekusk has not attended any community events since August 2011, more specifically the Saskatchewan Indian Summer Games hosted by Thunderchild and the Thunderchild First Nation Pow-Wow; and,
- Councillor Weekusk should not be able to collect his remuneration as a member of Council if he does not attend to the offices of Government. The Thunderchild First Nation has implemented a Debt Reduction Strategy which includes cuts to non-essential expenditures and cuts to services. The continued remuneration of Councillor Weekusk contributes to the financial hardship of the Thunderchild First Nation.

[6] The complaint adds that Councillor Weekusk's conduct has caused a division in leadership.

II. The Decision under Review

[7] The decision of the Chief and Council is set out in a letter dated October 20, 2011.

[8] The letter reiterates the complaint, indicates that the complaint was put on the agenda of the October 18, 2011 meeting and that Council determined there was no need to meet with the complainant as the documentation was sufficient and the particulars of the complaint were known to Council. It then states:

> *After considerable deliberation and round table discussion from all seven members of Council, including myself as Chief, a decision was reached through consensus in the action we must take. As it pertains to the complaint, a unanimous motion was passed to take the following disciplinary action, pursuant to s. 16.02 of the Act:*

> 1. *that effective October 18, 2011 you are suspended without pay; and*
>
> 2. *that an application to the Appeal Tribunal will be launched by Council to have you removed as Headman pursuant to s. 15.08 of the Act.*

III. Jurisdiction and Standard of Review

[9] There is no dispute that the Band Council is a "federal board, commission or other tribunal" as defined in section 2 of the *Federal Courts Act* and that decisions made by the Band Council, are subject to judicial review by the Federal Court pursuant to subsection 18(1) of the Act.

[10] The applicable standard of review for issues of procedural fairness and jurisdiction is that of correctness.

[11] If there is no breach of procedural fairness and jurisdiction has been properly exercised, the decision to remove the applicant from office would be reviewed on a standard of reasonableness.

IV. The Issues

[12] Mr Weekusk argues that he was denied natural justice and procedural fairness by the Chief and Band, that the decision to suspend him was not reasonable, and that the application to the Appeal Tribunal should not now proceed because the Appeal Tribunal has not taken any action for almost three years.

[13] He seeks an order to quash the decision, prohibit the Appeal Tribunal from considering the application to remove him from Office, and declare that he is reinstated as a Councillor.

[14] Mr Weekusk argues that this application for judicial review and is not precluded by the time limits set out in subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 because no final order has been made, given that the Appeal Tribunal has not acted.

[15] The respondent submits that any requirement for procedural fairness was met by the Chief and Band and that the decision made was reasonable. The respondent acknowledges that there is no explanation for the delay of the Appeal Tribunal, but submits that the Appeal Tribunal retains the jurisdiction to resolve conflicts and should be ordered to address the application to remove Mr Weekusk from Office as soon as possible.

[16] The respondent further argues that the application for judicial review cannot proceed because it was made well beyond the statutory time limit prescribed by subsection 18.1(2) of the *Federal Courts Act* and the applicant did not seek an extension of time.

[17] The respondent alternatively argues that if the applicant's submission that there was no final order and that this application should proceed is interpreted as a request for an extension of time, he has not satisfied the test for the Court to grant such an extension.

[18] The parties have identified the following issues:

- Is the application barred by subsection 18.1 (2) of the *Federal Courts Act* because the applicant did not bring his application within the required time period and has not satisfied the criteria to justify an extension of time?
- Are Band Councillors entitled to procedural fairness when they are subject to suspension or removal from Office? If so, did the Chief and Council breach the applicant's rights to procedural fairness?
- Was the decision of the Chief and Council to suspend the applicant and apply to the Appeal Tribunal to order his removal from Office reasonable?
- Does the Appeal Tribunal retain jurisdiction to consider the application of the Chief to remove the applicant from Office? In other words, can the Appeal Tribunal be prohibited from considering the application made in December 2011 to remove the applicant from Office given that it has not taken any action?

[19] I would add the following issue:

- What remedy is appropriate if there is a breach of procedural fairness or if the decision is found not to be reasonable?

Is the application barred by subsection 18.1 (2) of the Federal Courts Act because the applicant did not bring his application within the required time period and has not satisfied the criteria to justify an extension of time?

[20] Mr Weekusk submits that the 30 day time limit to apply for judicial review begins from the date of a final decision and in this case, there was no final decision.

[21] He submits that because the Appeal Tribunal has not held a hearing or made any decision in response to the application made by Chief Wapass in December 2011, the matter is continuing and the time limit is not applicable.

[22] Mr Weekusk submits that the decision to suspend him was a temporary or interim measure pending the decision of the Appeal Tribunal regarding his permanent removal from Office. If the Appeal Tribunal had made a decision, it would have been a final order, but it has done nothing.

[23] He relies on *Bank of Montreal v Payne*, 2012 FC 431, 2012 CLLC 210-036 [*Bank of Montreal*] where the Court noted that the time limit for bringing an application for judicial review runs from the date of the final decision and that the decision was not final until the adjudicator had determined the remedy. The applicant also notes that in *Canadian Association of the Deaf v Canada*, 2006 FC 971, [2007] 2 FC.R 323 [*Canadian Association of the Deaf*] the Court found the issue to be a continuing one and, therefore, the time limit did not apply.

[24] Mr Weekusk submits that the inordinate delay has prejudiced him because he has been deprived of his elected position and he has had no opportunity to contest the decision or respond to the allegations against him. He submits that this is unjust and raises a serious issue that should be addressed by judicial review.

[25] The respondent argues that the decision was indeed final, and that the application for judicial review was made beyond the statutory time limits and that there is no justification to extend the time limits.

[26] The respondent submits that the October 18, 2011 decision of the Chief and Council was a final decision. Alternatively or additionally, the respondent submits that there were two distinct final decisions of the Chief and Council; the decision to suspend the applicant, and the decision to apply to the Appeal Tribunal to remove him from Office.

[27] The respondent argues that the Appeal Tribunal has no role regarding the decision to suspend the applicant because the applicant did not appeal his suspension to the Tribunal. The Tribunal's role is limited to the application by the Chief and Council to remove the applicant from office.

[28] The respondent submits that the applicant could have appealed his suspension to the Tribunal and also could have sought judicial review of the suspension decision within the 30 day time period, but he did not.

[29] The respondent asserts that nothing in the *Election Act* states that a decision is not final until the Appeal Tribunal has considered it.

[30] The respondent notes that the decision was rendered on October 18, 2011 and communicated to the applicant on October 20, 2011. The 30 day time limit for the applicant to

launch an application for judicial review therefore started to run on October 20, 2011, yet this application was only made on October 29, 2013 and the applicant has not brought a motion to extend the time limit.

[31] In the event that the applicant has implicitly sought such an extension, the respondent submits that it should not be granted because the applicant has not met the onus to satisfy the Court that the extension is justified in accordance with the factors established by the Court in *Canada (Attorney General) v Larkman*, 2012 FCA 204, [2012] 4 CNLR 87 [*Larkman*].

[32] The respondent argues that the applicant has not demonstrated a continuing intention to pursue his application. Even after the applicant had filed his dispute to the Appeal Tribunal, he could and should have pursued judicial review.

[33] The respondent also argues that the applicant has not provided a reasonable explanation for the lengthy delay. If the applicant had been serious about resuming his role as Councillor, he would have acted sooner. It is not an explanation to suggest that he was awaiting the decision of the Appeal Tribunal

[34] The respondent further submits that the Band Council has been prejudiced by the uncertainty caused by this delay and that there is no potential merit to the application.

The application is not barred

[35] The decision made by the Chief and Council on October 18, 2011 is one decision. That decision has two parts or two consequences; to suspend the applicant from his office as Councillor/Headman without pay *and* to apply to the Appeal Tribunal to permanently remove the applicant from Office.

[36] The two parts of the decision arise from the same grounds or allegations which have their origin primarily in the complaint made by Theresa Horse.

[37] Although the applicant could have sought judicial review of the October 18, 2011 decision at that time, he was justifiably uncertain of the next steps, given that the Chief and Council had suspended him but had also applied to the Appeal Tribunal to have him removed permanently from office. A suspension is, by its nature, generally a temporary measure.

[38] The respondent submits that the applicant could have pursued both a judicial review and an appeal of his suspension to the Appeal Tribunal while the Appeal Tribunal was also seized of the application to remove him from Office.

[39] In my view, a multiplicity of and/or overlapping proceedings arising out of the same circumstances would result if the applicant launched a judicial review of his suspension while the Chief's application to remove him was pending with the Appeal Tribunal.

[40] Moreover, and contrary to the respondent's suggestion, the *Election Act* does not appear to provide for an appeal by the party affected by the decision. Indeed, pursuant to section 16.03, only the complainant may appeal in circumstances where the Council takes no action in response to a complaint.

[41] The *Election Act* provides for appeals of election results in section 14, but these provisions have no application to the present circumstances.

[42] Section 15 governs resignation and removal from Office. Section 15.06 sets out the grounds for removal, including breach of the Oath of Office and, absence from three consecutive meetings without just cause. Section 15.8 provides that the removal or suspension of Chief or Headman is made by application to the Appeal Tribunal or an elector and sets out the procedure for making such application.

[43] Section 16 governs discipline and sets out the procedure for an elector or group of electors to submit a complaint to the Council concerning the conduct of the Chief or a Headman. Upon receipt of a complaint, the Council decides whether a meeting with the complainant is required and if so, a Council meeting is scheduled. The Council may alternatively ask for more particulars or may proceed to render a written decision and describe the action to be taken.

[44] Section 16.02 provides for the consequences following determination of a complaint:

[45] The written decision of the Council in response to a complaint can include any of the following:

> *a) A decision to take no action;*
>
> *b) Institute disciplinary measures as the same relates to the person(s) being the subject of the complaint which may include suspension without pay, change of portfolios, requirement to provide an apology, or such other disciplinary measures that the Council considers as in the best interests of Thunderchild First Nation;*
>
> *c) Launch an application to the Appeal Tribunal for an order to remove the person(s) being the subject of the complaint at the cost of Thunderchild First Nation.*

[46] Section 16.03 provides that the complainant can appeal to the Appeal Tribunal if no action is taken, but surprisingly, the Act does not address whether the person affected by a decision of Council regarding a complaint may appeal to the Appeal Tribunal.

[47] The decision made was triggered by a complaint made pursuant to section 16. Although the application to the Appeal Tribunal was made by the Chief pursuant to section 15.08, it too arose primarily from the same complaint.

[48] The *Thunderchild First Nation Appeal Tribunal Act* provides in section 2.01:

> *The Appeal Tribunal is established and maintained with jurisdiction to hear and resolve any conflicts brought before it relating to all matters within Thunderchild First Nation Territory and Thunderchild First Nation jurisdiction and determined in accordance with the Constitution or any legislation of Thunderchild First Nation based on remedies and processes that are fair, just and equitable and in accordance with the laws of Thunderchild First Nation.*

[49] The *Appeal Tribunal Act* comprehensively addresses the composition, process, procedure and powers of the Appeal Tribunal. It does not, however, prescribe any time limit for the Tribunal to deal with an application. Nor does it provide an appeal route for a person affected by a decision made by Council based on a complaint.

[50] Although I find that the decision made by the Chief and Council on October 18, 2011 was a final decision and that the applicant could have sought judicial review of that decision at that time, I acknowledge that the applicant reasonably assumed that the Appeal Tribunal would address the issue of his permanent removal which was a consequence of the same complaint and which flowed from his suspension.

[51] With respect to the applicant's reliance on *Bank Of Montreal* to support his position that the time to launch a judicial review starts to run only following a final order, in that case the decision was more clearly a two stage order and was not final or complete until the remedy had been determined.

[52] Justice Rennie addressed the issue regarding the time limit as follows:

> [16] In my view, this matter can be quickly disposed of. It is well-settled that the period of time prescribed in subsection 18.1(2) does not begin to run until the final decision in the proceedings has been rendered: *Zündel v Canada (Human Rights Commission)*, [2000] 4 FC 255 at para 17. Were this not the case, this Court would continually have before it multiple applications for judicial review, with the attendant duplication of materials and incursion of unnecessary cost. This fragmented approach would do little to advance the disposition of litigation.
>
> [17] In this case, I find the final decision of the Adjudicator was only rendered on April 26, 2011 and that the two "decisions" were in fact two parts of a whole. Furthermore, I note that this matter

> was not seriously pressed at the hearing before this Court. Additionally, given the misunderstanding between the Adjudicator and counsel as to the status of the matter at the conclusion of the evidence on the merits, leave to extend the period of time would be granted were it required.

[53] Although *Bank of Montreal* can be distinguished, a similar principle is at issue. As in *Bank of Montreal*, I find that there was one decision with two parts. However, in the present case, both parts were final on the same date. I also agree that a fragmented approach which could result in a judicial review of the suspension, while the removal issue was simultaneously pending with the Appeal Tribunal, followed by a potential judicial review of a decision by the Appeal Tribunal, if it rendered any decision, would result in multiple applications for judicial review based on the same underlying facts and unnecessary costs. This would also likely perpetuate the uncertainty and tension in the community.

[54] With respect to the applicant's reliance on *Canadian Association of the Deaf* to support his position that the time period to launch an application for judicial review does not begin to run where the matter to be reviewed is continuing, that case can be distinguished because it dealt with a policy and allegations of continuing systemic discrimination. The Court noted that the remedy sought was only for declaratory relief and not in respect of a tribunal's decision or order, and that, therefore, the 30 day limitation did not apply. In the present case, a decision of the Council is under review, not a policy or systemic issue.

[55] So while my finding that there was one final order made on October 18, 2011 should then lead to a finding that the time for judicial review began to run from that date, I also find that there is justification to extend the period of time to permit the judicial review to proceed.

An Extension of time is allowed

[56] Although the applicant did not bring a formal motion to extend the time limit for his application for judicial review, by bringing this application and by addressing the reason for not pursuing the application earlier, even if this is implicit, he has established through his record that the application should proceed.

[57] In *Larkman* the Court of Appeal [CA] considered the test for an extension of time at para 61, noting that the parties agreed that the relevant questions for the Court to exercise its discretion to allow an extension of time are:

> (1) Did the moving party have a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?

[58] The CA noted at para 62 that these questions guide the Court in determining whether the extension is in the interests of justice. The CA explained that the importance of each question will depend on the circumstances, with some questions possibly counterbalancing or outweighing others and additional considerations being relevant. The CA emphasized that, "The overriding consideration is that the interests of justice be served."

[59] The CA considered that the 30 day time limit is important for finality so that parties can assume that, at the expiration of the time period, the decision will stand. However, on the facts of

the case, finality and certainty were not of prominent importance. The overall consideration was that it was in the interests of justice that the judicial review proceed.

[60] In *Belgarde v Poitras*, 2009 FC 968, 2009 FCJ No 1179, Justice Zinn dealt with a similar issue and noted:

> [35] Generally, this Court has permitted extensions when necessary to ensure that justice is done between the parties taking into consideration whether the applicant has an arguable case, whether the applicant had a continuing intention to challenge the decision, whether the applicant offered a reasonable explanation for the delay in initiating the application, and whether there will be undue prejudice to the responding party.

[61] Mr Weekusk has established that there was a reason for his delay given that he was expecting and awaiting a hearing by the Appeal Tribunal. His affidavit notes that he had contacted the chair of the Appeal Tribunal to inquire when it would consider the application to remove him and had not had any response.

[62] His Notice of Dispute to the Appeal Tribunal is evidence of his intention to pursue at least the part of the decision regarding his possible removal. As noted above, the *Election Act* does not provide for an appeal of the decision to suspend him arising from a complaint made under section 16.

[63] Although the respondent argues that it was prejudiced by the delay, it has not provided any evidence of prejudice.

[64] I also find that there is potential merit to the application and it is in the interests of justice that the application be heard.

[65] Therefore, the Court exercises the discretion provided in the *Federal Courts Act* and extends the time for filing the within application for judicial review.

Are Band Councillors entitled to procedural fairness when they are subject to suspension or removal from Office? If so, did the Chief and Council breach the applicant's rights to procedural fairness?

[66] The applicant submits that a duty of procedural fairness arises in all cases where a tribunal makes a decision affecting the rights, privileges or interests of a person, and acknowledges that the scope of the duty varies depending upon the context. At minimum, procedural fairness requires that the persons affected have an opportunity to participate; i.e., to have notice, an opportunity to hear the allegations and to respond to those allegations (*Sparvier v Cowesses Indian Band No 73*, [1993] 3 FC 142 (TD), [1994] 1 CNLR 182; *Laboucan v Little Red River # 447 Cree Nation*, 2010 FC 722, [2010] 4 CNLR 84, aff'd 2011 FCA 87, 199 ACWS (3d) 3; *Desnomie v Peepeekisis First Nation*, 2007 FC 426, 157 ACWS (3d) 231; *Ballantyne v Nasikapow*, [2001] 3 CNLR 47).

[67] The applicant submits that the Chief and Band breached their duty of procedural fairness when they considered the complaint of Theresa Horse and decided to suspend him and to apply to the Appeal Tribunal to have him removed. This decision affected both his income and his reputation in the community.

[68] The applicant argues that no real attempt was made to notify him other than by text message, which he did not receive because his cell phone was not functioning. He notes that he has lived at the same residence for decades, but no effort was made to deliver notice to him at his residence or to contact him by land line. He adds that even if he had been aware of the agenda of the October 18, 2011 Council meeting, the agenda was not sufficient to notify him of what was at stake.

[69] The respondent's position is that it met its duty of procedural fairness. The Chief and Council followed the process in the *Election Act*. The Act does not provide for notice to the person named in the complaint.

[70] The respondent submits that Council meetings are regularly held on the third Thursday of the month and the usual practice is to provide the notice and the agenda to Council members by text message and this was well-known to the applicant. The applicant's excuse of a broken cell phone is not credible.

[71] The respondent suggests that the applicant did not fulfill his duties as an elected official; his oath of office includes the obligation to make some effort to attend meetings and to keep himself informed of meeting dates and agendas.

[72] The respondent acknowledges that the notice of the October 18, 2011 meeting and the agenda did not specifically refer to the complaint by Theresa Horse against the applicant and only generally referred to a complaint under the *Election Act*. However, the respondent argues

that there is no evidence that, if the applicant had attended the meeting, he would have been prevented from making submissions in response.

[73] The respondent further submits that despite the inadequate notice, and presumably despite the lack of any opportunity for the applicant to respond to the allegations, the Court should defer to the decision of Council.

The applicant's rights to procedural fairness were breached

[74] The applicant did not receive any meaningful notice of the meeting at which the complaint against him was considered and which resulted in the decision to suspend him and to apply to the Appeal Tribunal to permanently remove him from Office.

[75] Although the *Election Act* does not address the need for notice or the participation of the person named in a complaint or whose interests are at stake, basic rights of procedural fairness cannot be trumped by the silence of the governing statute.

[76] The respondent acknowledges that no meaningful notice was provided. The agenda which simply noted "*Election Act* complaint" would not put the applicant on notice that the complaint was about him. Even if he had been more diligent in taking note of regular Council meetings or making reasonable inquiries about the next Council meeting, he did not have notice of what was at stake, he did not know the particular allegations made against him and he did not have any opportunity to respond to or challenge those allegations. The Council proceeded to

address the complaint, which was made merely four days earlier, in the absence of Mr Weekusk and to impose sanctions against him.

[77] The *Election Act* does not provide a way for the applicant to appeal the decision. The pending application by the Chief and Council to the Appeal Tribunal to have the applicant permanently removed from Office perpetuates the situation the applicant finds himself, with no opportunity to challenge the decision or respond to the allegations of the complaint.

[78] The minimum requirements of procedural fairness require meaningful notice so that the person whose rights or interests are at stake is aware of the specific allegations made and has a reasonable opportunity to respond to those allegations and to be heard by the decision-maker before a final decision is made.

[79] The respondent did not meet even the most minimal requirements of procedural fairness. Contrary to the submission of the respondent, the Court cannot defer to the decision of Council where that decision is made in the absence of procedural fairness. The standard of review for issues of procedural fairness is correctness. The decision cannot stand.

Was the decision of the Chief and Council to suspend the applicant and apply to the Appeal Tribunal to order his removal from Office reasonable?

[80] The applicant submits that if the Court were to consider the reasonableness of the decision, there were insufficient grounds to warrant his suspension. The complaint made by Ms

Horse alleged that he breached his oath of office. However, the specific acts complained of, including his non-attendance at community events, have nothing to do with the Oath of Office

[81] The applicant notes that section 16.02 of the Act provides for several options for discipline, with suspension being the most severe His indefinite suspension was tantamount to a removal from Office. The Act, at section 15, sets out a procedure for notice and a hearing before a Councillor may be removed from office and this procedure was not followed.

[82] The respondent submits that the decision made to suspend the applicant falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

[83] The respondent contends that the decision to suspend the applicant was based on both the complaint from Ms Horse and the applicant's pattern of non-attendance at Council meetings. The respondent also argues that the Oath of Office should be interpreted broadly and that it is implicit in the Oath that Councillors attend meetings and act as community leaders at cultural and community events. The respondent submits that Council had three options in accordance with section 16.02 of the *Election Act* and it followed the necessary steps, reasonably choosing the options of suspension and referral to the Appeal Tribunal.

No need to address reasonableness

[84] I agree with the applicant that the reasonableness of the decision is only an issue if the decision had been made in accordance with the principles of procedural fairness.

[85] Given my finding that the Chief and Council breached its duty of procedural fairness to the applicant, the decision is quashed and there is no need to consider the reasonableness of the decision.

[86] Although the respondent suggests that the decision would otherwise be reasonable, I note that there is insufficient information on the record that would permit the Court to consider whether the decision falls within the range of possible acceptable outcomes.

[87] The record indicates only the decision reached, the complaint upon which it is based, and a brief record of the outcome in the minutes of the meeting. The complainant was not called upon to support her allegations and the decision indicates that Council discussed the matter among themselves and reached a decision based on their own knowledge. It would not be possible to determine what evidence Council relied on to reach its decision or whether the decision was reasonable.

Does the Appeal Tribunal retain jurisdiction to consider the application of the Chief to remove the applicant from Office? In other words, can the Appeal Tribunal be prohibited from considering the application made in December 2011 to remove the applicant from Office given that it has not taken any action?

[88] The respondent submits that, given the applicant's argument that he was denied the opportunity to respond to the allegations and make submissions to the Chief and Council, the proper remedy would be a direction to the Appeal Tribunal to hear the Notice of Application for Removal forthwith in order to provide such an opportunity.

[89] The respondent submits that an order to prohibit the Appeal Tribunal from proceeding would not be appropriate because the Tribunal has not exceeded or misused its power and its delay would not prevent it from fulfilling its mandate in accordance with the requirements of natural justice (*Canadian Airlines International Ltd v Canada (Human Rights Commission)*, [1996] 1 FC 638, 192 NR 74 (CA)).

The application to the Appeal Tribunal is part of the decision which has been set aside

[90] Having found that there was only one decision – the suspension and the application to the Appeal Tribunal to remove the applicant from Office – and that this decision is quashed due to the breach of procedural fairness, the application to the Appeal Tribunal cannot proceed.

[91] Although the *Appeal Tribunal Act* suggests that it has broad power to resolve conflicts, and resolutions reached by the Appeal Tribunal may be accepted more readily by the community, there is no role for the Appeal Tribunal to deal with an application which arises from a decision made in breach of procedural fairness.

What remedy is appropriate?

[92] The decision of the Chief and Council dated October 18, 2011 is quashed, i.e., it must be set aside.

[93] The complaint made by Theresa Horse must be re-determined by the Chief and Council and in this re-determination the Chief and Council must ensure that the applicant is afforded

procedural fairness. Although procedural fairness is a legal term and there is extensive jurisprudence about the scope of the duty which varies depending on the context, its meaning is simple and boils down to basic fairness. At minimum, the applicant must be given notice of the particular allegations against him, reasonable advance notice of the Council meeting when the allegations will be considered, and an opportunity to attend that meeting and respond to the allegations, including an opportunity to question Ms Horse about the allegations she has made. The Chief and Council must hear and consider the complaint and Mr Weekusk's submissions before making a decision

[94] In addition, the Chief and Council must consider the provisions of the *Election Act* and whether and how the specific allegations made by Ms Horse relate to a breach of the applicant's Oath of Office.

[95] Any other ground for disciplinary action against Mr Weekusk, for example, based on his non-attendance at Council meetings should be pursued in accordance with the relevant provisions of the *Election Act* and in accordance with the duty of procedural fairness.

[96] The Chief and Council may also consider how to document the evidence or information considered in response to a complaint in the event that the reasonableness of such decisions are the subject of judicial review in the future.

[97] Although these directions apply specifically to the complaint made by Ms Horse against Mr Weekusk, the Band and Council should also ensure that the basic duty of procedural fairness

be provided to all persons whose rights and interests are implicated by complaints made in accordance with the *Election Act*.

V. Conclusion

[98] The application for judicial review is allowed and the decision is remitted to the Chief and Council for re-determination.

[99] The applicant shall have his reasonable costs of the application which will be of a fixed amount. The applicant may make submissions regarding costs within 21 days of this judgment and the respondents shall have 15 days to respond.

[100] The respondents submit that the applicant made allegations which are not supported by the evidence regarding the tension or split in the community and that sanctions by way of costs are appropriate.

[101] I do not agree that any unfounded allegations have been made. It appears to be accepted that there is tension in the community. The October 18, 2011 decision of the Chief and Council refers to the fact that the community has been fractured since the election. The complaint of Theresa Horse also noted the "division in leadership and the community".

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The applicant shall have his reasonable costs of the application.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1776-13
STYLE OF CAUSE:	IVAN WEEKUSK v CHIEF DELBERT WAPASS, THUNDERCHILD FIRST NATION BAND COUNCIL, and THUNDERCHILD FIRST NATION APPEAL TRIBUNAL
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