Federal Court  Cour fédérale

Date: 20200131

Dockets: T-1605-18
T-1607-18

Citation: 2020 FC 184

Ottawa, Ontario, January 31, 2020

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

JOHN TOURANGEAU

Applicant

and

SMITH'S LANDING FIRST NATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a consolidated application for judicial review of two decisions made by a quorum of the elected Band Council [Council] of Smith's Landing First Nation [SLFN, Respondent] and involving John Tourangeau [Applicant], the then-elected Chief of SLFN. On April 17, 2018, a quorum of the Council decided to reduce the Applicant's salary from $96,000 to $32,000 [Salary

Decision]. This resulted in T-1605-18. On August 13, 2018, the Council suspended the Applicant for 30 days [Suspension Decision]. This resulted in T-1607-18.

[2] The Applicant claims that both decisions lacked procedural fairness. He further claims that the Council did not have the jurisdiction or authority to reduce his salary, and that the decisions are otherwise unreasonable.

[3] The Applicant requests: (1) an Order of *certiorari*, setting aside the Salary Decision and all subsequent decisions therefrom; (2) an Order of *certiorari* setting aside the Suspension Decision; (3) an Order that the SLFN repay all of his lost salaries flowing from the Salary Decision and Suspension Decision; (4) an Order for Costs to the Applicant; and (5) any other just and appropriate relief that the Court allows.

[4] The application for judicial review concerning the Salary Decision is dismissed. The application for judicial review of the Suspension Decision is allowed. These are my reasons.

II. Background

A. *Context*

[5] SLFN is governed by a Council consisting of one Chief and four Councillors. It holds its elections pursuant to the SLFN's Customary Election Regulations of the Smith's Landing First Nation [Election Code]. The term of office for the Council is three years. In July 2016, there was

a general election; however, the previous Chief resigned at some point and the Applicant was elected as Chief in a June 2017 by-election.

[6] A general election was held in June 2019. The Council for the relevant times comprised the Applicant as Chief and Fred Daniels, Geronimo Paulette, Thaidene Paulette, and Tony Vermillion as Councillors. Maurice Evans is the SLFN's Chief Executive Officer and Christine Seabrook is the Council's Executive Assistant.

[7] The Applicant provided an affidavit and was cross-examined. The Respondent's evidence comes in the form of an affidavit of Ms. Seabrook, who was also cross-examined. Both affidavits contain documentary evidence such as the Election Code and minutes of meetings, band council resolutions and copies of text message conversations.

B. *The Salary Decision— April 17, 2018*

[8] The overall timeline below is not in dispute, although the parties differ on the details of the events that occurred.

[9] On April 10, 2018, Councillor Thaidene Paulette sent an email to the Council, including the Applicant, listing numerous complaints about the Applicant's performance as Chief, particularly about the amount of out-of-area meetings that the Applicant was attending and his community involvement [April 10 Email]. This email was sent in advance of an upcoming April 17, 2018 Council meeting. Councillor Thaidene Paulette concluded his email as follows: "…until things start to change, I suggest we take a look at section 3.6) of our election code."

[10] Section 3.6 of the Election Code reads:

> **3.6) Remuneration for Chief and Councillors**
>
> The remuneration, travel cost and other expenses to be paid to each of the Chief and Councillors shall be set by motion of the Council from time to time, and reported in the First Nation's annual financial audit.

[11] The Applicant claims that since he is 69 years old and has a grade 6 education, he does not use email regularly and prefers that the Council call him if they need to contact him. He claims that he did not view the April 10 Email until the next day.

[12] On April 17, 2018, the Council had a meeting where the April 10 Email was added to the agenda. Salary matters were not on the initial meeting agenda. At the meeting, the Applicant was asked about the nature of his duties and told that it was an "important" issue. The Applicant left the room and when he returned, the Councillors advised him that his salary was reduced to $32,000. A Band Council Resolution [BCR] was prepared and was signed on April 18, 2018. He did not receive a copy of the BCR at the meeting. The parties differ on the precise date the Applicant received the BCR but, in any event, he did receive the BCR.

[13] The BCR provided that the Applicant's salary was reduced for his failure to hold a planning session with the SLFN Council since the by-election, his failure to prepare an agenda or meet with the SLFN Council regularly, and his out-of-town meeting priorities.

[14] On July 25, 2018, the SLFN met and voted to maintain the Applicant's salary at $32,000. At this time, the Council discussed allegations against the Applicant being brought by an

employee of SLFN. The circumstances relating to this allegation will be referred to later in this decision.

[15] By BCR dated October 11, 2018, SLFN Council subsequently decided to reinstate the Applicant's salary back to its original amount effective September 26, 2018 for the remainder of the term. That BCR did not address the outstanding salary that the Applicant asserts should be paid to him.

C. *The Suspension Decision – August 13, 2018*

[16] Although the Applicant has mentioned two instances where he was suspended without pay, only the August 13, 2018 decision, crystalized in an August 14, 2018 BCR, is under review. He was suspended for 30 days.

[17] Leading up to the August 13, 2018 meeting, there were a number of correspondences:

- **July 18, 2018:**
    - A SLFN employee emails all Council (except the Applicant), Christine Seabrook, and Maurice Evans about some concerns she had with the Applicant's conduct. The Applicant never received a copy of this email.
    - Councillor Tony Vermillion replies to the employee's email, stating that her concerns would be addressed at the next Council meeting. The Applicant never received a copy of this email.
- **July 23, 2018:**

- The employee sends out a further email about the Applicant's conduct, calling it "unprofessional and uncalled for" to the Council (except the Applicant), Christine Seabrook, and Maurice Evans. The Applicant never received a copy of this email.
- The employee sends an email to the Applicant, wherein she voices some of her concerns about his conduct toward her.

- **July 25, 2018:**
  - The Applicant responds to the employee's email by letter, where he responds to the concerns she raised in her July 23 email to him.
  - The employee forwards the Applicant's letter response to the Council (except the Chief), Christine Seabrook, and Maurice Evans. The Applicant never received a copy of this email.
- **August 2, 2018:** The employee emails Maurice Evans and Christine Seabrook with further complaints about the Applicant's conduct. The Applicant never received a copy of this email.
- **August 3, 2018:** Maurice Evans sends an email to Councillor Geronimo Paulette, the Council (except the Applicant) and Christine Seabrook with an attached copy of Ms. Kosta's August 2 email. He requests that everyone read it. He accuses the Applicant and another employee of conspiring against him. The Applicant never received a copy of this email.

[18] On August 13, 2018, the Applicant notified the SLFN Council (via text message) that he would be absent for a number of days on medical leave. The SLFN Council "denied" this leave—it is contested whether they had the authority to do so—and notified him that there would

be a meeting that evening, but did not give details of the meeting agenda. The Applicant replied that he was taking his leave anyway and he was not present at the meeting.

[19] At the August 13, 2018 meeting, without the Applicant in attendance, a BCR was passed that suspended him for thirty (30) days without pay. He obtained a copy of the BCR the following day, August 14, 2018. The basis for the suspension was for the allegations in the various correspondences above, with which the Applicant was never provided.

III. Issues and Standard of Review

A. *Issues*

[20] I have reviewed both the Applicant's and Respondent's submissions, and the central issues to this review are:

1. Can the Salary Decision be reviewed given the 30-day application limit imposed by the *Federal Courts Act*?
2. If so, did the SLFN have the authority or jurisdiction to reduce the Applicant's salary?
3. Was the Salary Decision reasonable?
4. Were the Salary Decision and/or the Suspension Decision made in a procedurally fair manner?

[21] Although the Applicant has pre-emptively argued that both of the decisions are not moot, the Respondent has not contested this point other than by requesting that this Court use its discretion to decline a remedy.

B. *Standard of Review*

[22] The first issue does not attract a standard of review, as it concerns whether this Court should review the Salary Decision at all according to the 30-day limit imposed by the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*].

[23] For the second issue, the Applicant and Respondent take different positions. On the one hand, the Applicant argues that it is either a question of a tribunal interpreting their home statute, as spoken of in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 124 [*Dunsmuir*], or a question of true jurisdiction as envisioned by the Supreme Court in *Dunsmuir* at para 59. On the other hand, the Respondent argues that it is a simple question of law; as such, they submit that the standard of review ought to be correctness, citing *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*].

[24] I pause to note that I am not persuaded by the Respondent's arguments based on *Housen*. That case concerned applicable standards of review for appellate courts reviewing the decisions of lower courts. It is irrelevant toward judicial review of a tribunal's decision.

[25] On the second and third issues, this matter was argued prior to the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The Court did not direct further submissions on the standard of review and counsel did not request such an opportunity. I have reviewed the Supreme Court's recent review of the Canadian administrative law framework and find that both of these questions ought to be assessed under a reasonableness standard of review. I can see no reason to rebut the now-presumed presumption

of reasonableness here, as this is not an appeal, there are no competing jurisdictional claims, nor are there general questions of law (*Vavilov*, at paras 16–17, 65–68). I further note that I would have decided the same under either the *Vavilov* or *Dunsmuir* frameworks.

[26] For the fourth issue, the Court agrees with both parties that the applicable standard of review for questions of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79).

IV. Submissions and Analysis

[27] An Indian Band Council constitutes a "federal board, commission or other tribunal" under the *FCA* (*Balfour v Norway House Cree Nation*, 2006 FC 213 at para 20 [*Balfour*]). Accordingly, the Council's decisions are reviewable by this Court pursuant to *FCA* s. 18.1.

[28] I am dismissing the application in T-1605-18 concerning the Salary Decision because I find that it is out of time and I decline to grant an extension. However, I am allowing the application in T-1607-18 concerning the Suspension Decision because it was not procedurally fair.

A. *Can the Salary Decision be subjected to judicial review, given the 30-day application limit imposed by the Federal Courts Act?*

[29] The Salary Decision occurred at a SLFN Council meeting on April 17, 2018. The salary reduction from the decision was not changed at a SLFN Council meeting on July 25, 2018. The

notice of application for judicial review was filed on September 4, 2018. On the face of it, the application is time-barred.

(1) Applicant's Position

[30] The Applicant asks this Court to apply the "ongoing course of conduct" principle to the instant case, citing *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 [Tsetta] and other cases for the proposition that the salary reduction qualifies because it was "maintained well after the judicial review was filed." Therefore, the Applicant argues that the judicial review is timely.

(2) Respondent's Position

[31] The Respondent simply argues that the original Salary Decision was well outside of the 30-day window. As such, time has expired and this judicial review ought to be dismissed.

(3) Analysis

[32] It is settled law that the need for finality and certainty underlies the thirty-day deadline in s 18.1(2) of the *FCA*. The jurisprudence is also clear that the underlying consideration in an application to extend time is to ensure that justice is done between the parties (*Grewal v Canada (Minister of Employment & Immigration)*, [1985] 2 FC 263, 63 NR 106 (CA)).

[33] Subsection 18.1(2) of the *FCA* requires an application for judicial review to take place within 30 days of a decision unless an extension is granted:

> An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.
>
> Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[34] Before proceeding, it is useful to make a few remarks about the nature of this matter—specifically, the procedural ramifications of consolidating proceedings. Prothonotary Ring consolidated these claims under Rule 105 of the *Federal Courts Rules*, SOR/98-106, on February 7, 2019. The effect of consolidating these applications is that they, "progress as if they were one proceeding governed by one set of procedures. But in law each retains its character as a distinct substantive proceeding seeking distinct relief, governed by separate substantive rules governing the availability of that relief" (*Brake v Canada (Attorney General)*, 2019 FCA 274 at para 29).

[35] I am unable to find that the Salary Decision is an ongoing course of conduct. Ongoing courses of conduct allow the Court to review multiple decisions as one, circumventing the common limitation of only being able to review one decision at a time pursuant to Rule 302 of the *Federal Courts Rules*. Decisions of this Court have interpreted "continuing course of conduct" somewhat broadly in certain circumstances (*Fisher v Canada*, 2013 FC 1108 at para 79).

[36] In this case, however, I am faced with a unique situation: a severe decision that reduced the Applicant's salary, accompanied by a declaration that it will be "reviewed by council to determine a raise in salary" every three months until the end of his term. The decision makes no promises, only requiring council to "review" the matter. This information is from the April 17, 2018 BCR.

[37] Does this mean that, each time the Council "reviews" the matter, a new decision is being made? I cannot think so. Council simply committed to taking a look at the matter every three months and perhaps decide to use their authority to revoke it, nothing more. The moment the decision crystallized, it was final. It was not subject to further implementation.

[38] Undoubtedly, the decision was harsh. Undoubtedly, the decision continued to affect the Applicant for a long time and put him at Council's mercy. But, because of its nature, I am unable to find that it constitutes a continuing course of conduct. A decision is not a continuing course of conduct simply because its effects last a long time.

[39] I find that the Salary Decision was made on April 17, 2018. It was then reviewed in July, but the review was not a decision in itself. In their arguments, both counsel for the Applicant and Respondent appeared to be of the view that the July review was a decision, although neither the Notice of Application nor the arguments of the parties focused on this point. The Applicant then filed an application for judicial review of the Salary Decision on September 4, 2018. Therefore, it is time-barred unless I exercise my discretion to provide an extension of time.

[40] The Court may allow an untimely application where there is (a) a continuing intention to pursue the application, (b) the application has some merit, (c) no prejudice to the Respondent arises from the delay, and (d) a reasonable explanation for the delay exists (*Whitehead v Pelican Lake First Nation*, 2009 FC 1270 at para 46 [*Whitehead*]). This Court has held that the Applicant bears the burden of establishing a reasonable excuse for the delay (*Sander Holdings Ltd. v Canada (Minister of Agriculture)*, 2006 FC 327 at para 34). Not all of these factors need to be resolved in the moving party's favour as the underlying consideration is that the interest of justice be served (*Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 62).

[41] In deciding whether to grant an extension, I am cognizant of Justice de Montigny's remarks in *Anichinapéo v Papatie*, 2014 FC 687 at para 36, where he mentioned that, "recourse to the courts is not to be taken lightly by Aboriginal communities and often constitutes a last resort."

[42] Considering the factors, two of the factors weigh in favor of an extension of time. First, I have no trouble finding that the Applicant has expressed a continuing desire to pursue the application. This application is sufficient evidence of that. Second, even a cursory glance at the issue shows that the application has merit on grounds of procedural fairness.

[43] Both parties have failed to argue that the Respondent would be prejudiced by granting the extension of time. I find that this is a neutral factor that helps neither party.

[44] I am particularly mindful of the last factor. The Applicant has failed to argue any reason why he has delayed bringing the application for judicial review beyond the thirty-day period after the Salary Decision. This is not a case where he has presented weak excuses. This is a case where he has failed to present any at all. I find that this weighs heavily against the Applicant. I note that the Applicant did raise his age and education as reasons for not being able to access emails from the Council, however neither of these reasons were advanced as an excuse for his delay in bringing the application.

[45] In weighing the factors and in also considering that the overarching consideration is whether it is in the interests of justice to grant the application, I decline to exercise my discretion to grant the extension. The Applicant has simply not advanced enough arguments on each of the factors outlined above to be persuasive.

[46] In light of this finding, I will not consider the remaining issues regarding the Salary Decision. My analysis on procedural fairness will only deal with the Suspension Decision in light of my finding related to the Salary Decision.

B. *Was the Suspension Decision made in a procedurally fair manner?*

(1) Applicant's Position

[47] The Applicant argues that a high standard of procedural fairness is appropriate where a Chief or Councillor faces a suspension or salary reduction, citing *Balfour* at paras 69-70. He also relies on *Lower Nicola Indian Band v York*, 2013 FCA 26 at para 7 [*Lower Nicola*], where

Justice Stratas noted that, in that context, “article 34(c)” of the Act in that case and “the common law of procedural fairness” only allow for the removal of the Chief with certain procedural protections present, including adequate notice of failed duties, a chance to fulfill those duties, and a chance to explain why the duties have not been fulfilled.

[48] First, the Applicant argues that he was not provided with evidence of the case against him, in breach of the longstanding rule that a decision-maker may only consider evidence that has been made known to the affected party. This extrinsic evidence included the emails that were exchanged without his knowledge prior to the decision. In addition, the Applicant argues that there were conversations between SLFN employees and SLFN Councillors that were not disclosed to him before the decision.

[49] Second, the Applicant argues that proceeding with the Suspension Decision on August 13, 2018 without him present was a violation of procedural fairness, especially as he had no (reasonable) advance notice of the meeting and could not attend the meeting because of a medical appointment. This purportedly violated his right to be heard regarding the suspension.

[50] The Applicant claims that the Council had no authority to “deny” his medical appointment leave request, did not advise him that he would be facing a suspension at the meeting, and had no reason why they could not have waited until he returned to hold the meeting.

(2) Respondent's Position

[51] The Respondent denies that procedural fairness has been violated. For this, ie cites *Whitehead* for the proposition that suspension decisions where the affected party was not in attendance have been upheld by this Court. It cites *Salt River First Nation #195 (Salt River Indian Band #759) v Martselos,* 2008 FCA 221, for the proposition that notice need not take a specific form, and as evidence that the Court has approved notice in the form of: (a) a oral and written notice of the meeting, and (b) a general knowledge of the purpose of the meeting.

[52] Regarding the Suspension Decision on August 13, 2018, the Respondent submits that the Applicant had notice of this meeting via email and received written reasons about his suspension the next day, and that he only missed the meeting due to him taking "unapproved" leave.

[53] The Respondent submits that the Applicant had notice of all meetings and the disciplinary items that would be discussed within them, that he was aware of all concerns the SLFN Council had with him, and that he knew the time and place of all meetings.

[54] The Respondent asks this Court to draw an adverse inference from the Applicant's lack of responses at meetings when faced with the SLFN Council's questions and concerns. It submits that the Applicant cannot complain that he did not get a chance to defend himself when, in fact, he had opportunities to do so and declined.

(3) Analysis

(a) *Procedural Fairness Generally*

[55] Care must be taken when comparing the procedural requirements present in the instant case with cases involving other First Nations and their own Acts, such as in Lower Nicola. As the majority of the Supreme Court of Canada famously said, "the duty of fairness is flexible and variable, and depends on an appreciation of the particular statute and the rights affected […]" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22).

[56] The Applicant's citation of *Lower Nicola* shows that, in the context of First Nation Band Councils, procedural fairness requirements can be high. There, Justice Stratas found that, in order to remove a Chief, a Band Council must provide: notice of failure to fulfill certain responsibilities with particulars, notice that a failure to fulfill them will result in his removal, a chance to make representations before the final decision was made, etc. (*Lower Nicola* at para 7). Of course, I am cognizant of the fact that this procedure was for a Chief's complete removal and carries higher procedural fairness requirements than for most other situations.

[57] There are two key aspects to achieving procedural fairness: the right to be heard and the right to make representations where a decision represents one's interests (*Tsetta* at para 39).

(b) *The Suspension Decision*

[58] The Suspension Decision was not made in accordance with the requirements of procedural fairness.

[59] First, the notice was inadequate. The Applicant was notified of the meeting by text message, but was not notified that he was facing a suspension penalty or given a *specific* list of concerns to which he was to respond.

[60] Second, the Applicant has noted a wide variety of extrinsic evidence that was not provided to him by the SLFN Council, yet was against his case. This includes accusations against him via email and other means. Although I am not so quick as to impose the legal rules suggested by the Applicant in their memorandum on a Band Council, failing to provide relevant evidence to the Applicant establishing the case against him effectively denied him of the opportunity to respond meaningfully.

[61] Further, as the Applicant notes, Council's decision to proceed without the Applicant present is yet another violation. There was no notice given to him that he was faced with a suspension, and there was further no notice given to him that he may have the matter decided in his absence if he chose not to attend the meeting.

[62] I would note that the Respondent does not appear to contest that the Applicant did not know that he was facing a suspension at the August 13 meeting. It only acknowledges that the Applicant knew about the meeting itself.

[63] I note that I make no comment on the form that should have been used in conveying this information. In these cases, lengthy, formal documents are not required. Whether the information that allows the Applicant to meet his case and respond is communicated by text message, letter, or email, the focus is whether he was provided with sufficient information and opportunities to meet the case before him. I find that he was provided neither.

[64] It may well be advisable for the Council to develop rules and procedures for how meetings are to be convened which may assist the parties going forward and which may also avoid further recourse to the Courts.

V. Conclusions

[65] For the reasons above, the judicial review concerning the Salary Decision, in file T-1605-19, is dismissed.

[66] For the reasons above, the judicial review of the Suspension Decision, in file T-1607-19, is allowed. The Suspension Decision was not made in accordance with procedural fairness requirements because the Council, for many reasons, did not sufficiently provide the Applicant with a chance to know and respond to the case against him.

[67] The Applicant requests: (1) an Order of *certiorari*, setting aside the Salary Decision and all subsequent decisions therefrom, (2) an Order of *certiorari* setting aside the Suspension Decision, (3) an Order that the SLFN repay all of the Applicant's lost salaries flowing from the Salary Decision and Suspension Decision, (4) an Order for Costs to the Applicant, and (5) any other just and appropriate relief as this Court sees fit to provide.

[68] This Court hereby grants an order of *certiorari* setting aside the Suspension Decision. It flows that the Applicant is entitled to receive any outstanding salary arising from the quashing and setting aside the Suspension Decision.

VI. Costs

[69] In *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119, my colleague Justice Grammond, after summarizing the various categories of costs, outlined the applicable principles for the granting of costs as follows, at para 27:

> In First Nations governance cases, as in other cases, an award of costs is in the [trial judge's] discretion, which must be exercised after taking all relevant factors [into consideration];
>
> The imbalance between the financial resources of an applicant and those of the [First Nation], or a party whose legal fees are paid by the First Nation, is a relevant factor;
>
> Taken in isolation, however, the resource imbalance is not a sufficient factor to justify an award of costs on a solicitor-client basis;
>
> The fact that an application contributed to clarify the interpretation of a First Nation's laws or governance framework may be taken into account when making a costs award[;]but not every application falls in that category.

[70] Neither party strenuously argued for or against costs. The Applicant had mixed success in these applications. In light of the principles summarized above, I note that the successful application for judicial review perhaps provided clarity on procedural aspects of decision making going forward. As the Respondent is the First Nation, I find that there is a resource imbalance present that is a relevant factor. As a result, I am exercising my discretion pursuant to Rule 400(3) to award nominal costs in the amount of $2500.00.

JUDGMENT: T-1605-18 & T-1607-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review concerning the Salary Decision, in file T-1605-18, is dismissed.
2. The Application for judicial review of the Suspension Decision, in file T-1607-18, is allowed.
3. An order in the nature of certiorari is granted and the Suspension Decision is quashed and set aside.
4. The Applicant is awarded costs in the amount of $2,500.00.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1605-18 AND T-1607-18
STYLE OF CAUSE:	JOHN TOURANGEAU v SMITH'S LANDING FIRST NATION
PLACE OF HEARING:	EDMONTON, ALBERTA
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