Federal Court  Cour fédérale

Date: 20121109

Docket: T-988-11
T-992-11

Citation: 2012 FC 1307

Ottawa, Ontario, November 9, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ANITA MEMNOOK, RICHARD STARR, BERNARD AWASIS and MARILYN WAPASS	**T-988-11**
Applicants	
and	
DELBERT WAPASS, HAROLD JIMMY, NORMAN MOYAH, DOLORAS THUNDERCHILD, JAMES SNAKESKIN, ARNOLD WAPASS, GERALD OKANEE, BILL (WAPASS) YELLOWHEAD and ERNIE JIMMY	
Respondents	
AND	
RICHARD STARR, BERNARD AWASIS and MARILYN WAPASS	**T-992-11**
Applicants	
and	
DELBERT WAPASS, HAROLD JIMMY, NORMAN MOYAH, DOLORAS THUNDERCHILD, JAMES SNAKESKIN, ARNOLD WAPASS, GERALD OKANEE, BILL (WAPASS) YELLOWHEAD and ERNIE JIMMY	
Respondents	

REASONS FOR JUDGMENT AND JUDGMENT

[1] The parties are members of the Thunderchild First Nation, a band under the *Indian Act*, RSC, 1985, c I-5. The applicants seek judicial review of two decisions of the Thunderchild First Nation Appeal Tribunal (Appeal Tribunal), both dated May 16, 2011, dismissing the applicants' application for a Non-Compliance Order, the import of which will be described later, and dismissing the applicants' appeal of an election result pursuant to section 14.02 of the *Thunderchild First Nation Election Act* (*Election Act*). For the reasons that follow, the applications are granted.

[2] The Appeal Tribunal is established pursuant to the *Thunderchild First Nation Appeal Tribunal Act* (*Tribunal Act*) to hear and resolve conflicts relating to all matters within the band's jurisdiction, including disputes over elections.

Background

[3] The terms of the incumbent Chief and Band Council of the Thunderchild First Nation expired on October 18, 2010. An election for Chief and Council was scheduled for October 18, 2010, but was postponed on October 15, 2010. To prevent a hiatus in governance, the Band Council passed a resolution establishing an Interim Operating Committee (IOC). The legitimacy and authority of the IOC is not in question. The preamble to the resolution establishing the IOC reads provides:

> **And Whereas** the Thunderchild First Nation elects its Chief and Council pursuant to the *Thunderchild First Nation Election Act*;
>
> **And Whereas** the term of the current Chief and Council expires on October 18, 2010 and there will be no Chief and Council between October 19, 2010 and for a minimum of 60 days or until a new Chief and Council is elected ("the Interim Period").

> **And Whereas** it is in the interests of Thunderchild First Nation to insure that during this interim period essential services be provided and contractual obligations be met and require an interim operation committee to be established;

[4] The resolution gave the IOC the authority to maintain the financial and administrative affairs of the Band, including the authority to enter into contracts, institute and maintain legal actions and to discipline, but not to terminate, employees of the Band.

[5] Despite the postponement of the election, the validity of which is also not in issue, the Chief Electoral Officer and her Deputy proceeded to hold an election at a private residence. This putative election resulted in the respondent, Delbert Wapass, being elected Chief and other respondents being elected and declared as Chief and Council members.

[6] The Appeal Tribunal subsequently determined this election to be null and void and issued an Order to this effect on October 19, 2010. The Tribunal also directed that the Thunderchild First Nation election be held on December 20, 2010 and that it be conducted in accordance with the duties and obligations prescribed by the *Election Act*.

[7] The applicants state that Mr. Wapass and other respondents nonetheless purported to act as Chief and Council, executed Council resolutions and sent correspondence in which they held themselves out as Chief and Council. The respondents, for their part, state that they validly acted as Chief and Council during this time, as the Thunderchild First Nations Elders had voted to respect the October 18, 2010 election results.

[8] In response to this situation of what would appear to be dual or competing claims to the leadership of the Band, a member of the Band, Jerry Okanee, submitted a Notice of Application to the Appeal Tribunal pursuant to section 12.01 of the *Tribunal Act*, alleging that the respondents had failed to comply with both the October 19, 2010 Order which rendered the election void and the resolution of the Band vesting interim authority in the IOC. This is the origin of the Non-Compliance Order.

[9] The election was held on December 20, 2010, as directed by the Appeal Tribunal. Mr. Wapass was elected Chief, and some of the same respondents were elected to the Council. Mr. Okanee then filed a Notice of Appeal to the Appeal Tribunal pursuant to section 14 of the *Election Act*, alleging a number of improper and prohibited practices by the respondents in the election.

[10] The applicants, who were not named parties on the appeal to the Appeal Tribunal, state that they were initially kept apprised of the appeal proceedings. They learned, however, that in April 2011 that Mr. Okanee had met with a representative of the respondents and withdrawn the Notice of Application and the Notice of Appeal. The applicants emphasize that this withdrawal was done unilaterally by Mr. Okanee without consulting any of them. As a result, the applicants filed a Notice of Application, virtually identical to that of Mr. Okanee, on April 12, 2011. Importantly, the applicants also filed a Notice of Appeal on April 20, 2011. The Notice of Appeal included a request that the Appeal Tribunal exercise its discretion to extend the time period for filing a Notice of Appeal, pursuant to section 14.04 of the *Tribunal Act*.

[11] By letters dated May 16, 2011, the Appeal Tribunal dismissed the request to extend the period of time within which to appeal and the Notice of Appeal, without costs. The Appeal Tribunal also dismissed the application for the Non-Compliance Order. The letters both stated: "Your application is barred by section 14.02 of the *Thunderchild First Nation Election Act*".

[12] For reasons that will become clear, it is important to note the reference to "s. 14.02", which pertains to the Appeal Tribunal's jurisdiction in respect of election appeals.

Standard of Review and Issues

[13] These applications raise two issues. The first is whether the Tribunal erred in disposing of the non-compliance proceedings commenced by Mr. Okanee in respect of the alleged usurpation of the decision to establish the IOC, and in respect of the decision of the Tribunal to dismiss the appeal lodged in respect of the December 20, 2010 election. Embedded in this second question is whether the Appeal Tribunal properly considered the request to extend the period of time within which an appeal could be filed. The parties agree that true questions of jurisdiction (addressing the wrong statutory provision and procedural fairness) and are reviewed on a standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9; *Shotclose v Stoney First Nation*, 2011 FC 750, at para. 57.

[14] While the parties make several arguments regarding procedural fairness and regarding the underlying disputes about the fairness of the election, the determinative issue in these applications is whether the Appeal Tribunal's erred in determining it had no jurisdiction to consider the application and the appeal because of a limitation period.

[15] While the two applications arise from a common and interrelated set of facts, and their disposition is governed by the same principles, they require separate consideration. I will address each decision separately, since the limitation periods are prescribed in discrete sections of the *Tribunal Act*.

The Evidence

[16] Counsel for the respondent objected to the content of many of the affidavits put in evidence. The affidavits before this Court contain considerable evidence that was not before the Tribunal when it rendered the two decisions in issue. Secondly, the affidavits were also directed to the merits of the arguments of the appeal and non-compliance issues.

[17] As the affidavits contained some uncontested procedural history necessary to frame the issues, they will not be struck in their entirety. Beyond that however, the affidavits will be disregarded by the Court. Both counsel agreed to this approach, to which I add that counsel on the application was not counsel who filed the affidavits.

Application for Non-Compliance Order (T-988-11)

[18] As noted, on April 12, 2011, the applicants filed the Notice of Application to the Appeal Tribunal for a Non-Compliance Order. The applicants allege that the respondents, in holding themselves out as the duly elected Chief and Council, violated the Appeal Tribunal's Order postponing the election from October to December 2010.

[19] A "non-compliance order" is a defined term in the *Tribunal Act*. Section 1.01 provides:

> **"Non-compliance Order"** means an Order on the issue of the refusal without a reasonable explanation of an individual or the Government to comply with a decision of the Appeal Tribunal or Order

[20] Section 12 of the *Tribunal Act* addresses non-compliance proceedings. It is discrete and separate from section 14, which addresses appeals in respect of elections.

[21] Section 12 provides that the Tribunal may, on a finding of non-compliance, issue the following orders:

> […]
>
> (a) Order that the employment of the individual with Thunderchild First Nation or an Empowered Entity be terminated for cause, or have any contract between the individual and Thunderchild First Nation or an Empowered Entity terminated for cause;
>
> (b) Order that the individual not be hired as an employee or awarded a contact with Thunderchild First Nation or an Empowered Entity for up to ten (10) years;
>
> (c) Order that the individual be disqualified from holding any official position with Thunderchild First Nation or an Empowered Entity for up to ten (10) years;
>
> […]

[22] The Appeal Tribunal's jurisdiction to hear applications in respect of decisions of the "Government" is prescribed by section 7 of the *Tribunal Act*. It prescribes a sixty day appeal period.

> 7.08 Subject to specific provisions in Legislation governing time limitations of an Application against the Government, the Appeal Tribunal has no jurisdiction to hear an Application for a review of a decision of the Government, an Empowered Entity or an Empowered Person unless such appeal is received by the Appeal Tribunal within sixty (60) days after the date that the subject decision of Government, and Empowered Entity or an Empowered Person was made.

[23] In contrast, where the dispute is between persons "not being the Government" the application must be brought within two years.

> 7.09 The Appeal Tribunal has no jurisdiction to hear an Application to resolve a conflict as between persons, not being the Government, an Empowered Entity or an Empowered Person unless the Application is received by the Appeal Tribunal within the time specified in the Legislation and if no time limit is specified then the time limit is two (2) years from the date the cause of action arose.

[24] The thrust of the applicants' case before the Tribunal was that the respondents were illegally purporting to be Chief and Council, and therefore were not the "Government" at the relevant time. Therefore, this was a conflict "as between persons" and the limitation period of two years had not passed. The respondents argue that they clearly were acting as the Government, and in the alternative, even if they were not the "Government", by the time the application was filed they had been properly elected as the Government, and therefore the limitation period (60 days) had passed and the Appeal Tribunal had no jurisdiction.

[25] In my view, this argument is largely beside the point. The Appeal Tribunal found it had no jurisdiction to hear the application pursuant to section 14.02 of the *Election Act*. That provision had no relevance to the application at issue. The application was for a non-compliance order pursuant to

the *Tribunal Act* and governed by Section 12; it was not an appeal of the election. Section 14.02 is of no relevance in considering the Non-Compliance Application.

[26] The respondents argue that this was simply an oversight. The respondents concede that while the reasoning was incorrect, the outcome was correct, and should not result in the decision being quashed. However, without any additional reasons from the Appeal Tribunal, the Court has no basis to infer, as the respondents would like, that the Appeal Tribunal properly understood its jurisdiction and the question before it. At no point did the Appeal Tribunal consider, in the face of the IOC and invalidity of the putative election, whether the respondents constituted or purported to constitute the "Government" at the relevant time, and therefore it never identified the relevant limitation period under the *Tribunal Act*. There is a compelling argument to be made that the respondents were not, in light of the order declaring the election void either "the government" as defined, or an "empowered person" as defined. If that is the case, the dispute is between persons and governed by the two year limitation period.

[27] A determination on this question was an essential precondition to the exercise of jurisdiction by the Tribunal. It could not make a legally informed decision to dismiss the application for non-compliance by the respondents on the basis of the limitation period unless it considered the questions of section 7.08 and section 7.09. Indeed, given that the respondents purported to exercise electoral power during the hiatus between elections during which the governance authority was unequivocally, vested in the IOC, it was an error of law for the Tribunal to fail to consider the applicability of section 7.09.

[28] The respondents note that the standard by which the adequacy of reasons is assessed is not perfection, and must take into account the nature of the decision maker and the decision itself. This is not disputed by the applicants. However generously the Court reads the decision, it cannot save the decision in question. In referring to section 14.02 the Tribunal addressed the wrong provision, and there is no indication that it turned its mind to the correct provision, section 7.09. The latitude in assessing the reasoning to which the case law refers is directed to those situations where, in an effort to support the reasons, the Court examines the record to better assess, whether when read in context, they meet the reasonableness standard: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 12; and *Dunsmuir*, para. 48

[29] This case law has no application where the Tribunal simply did not address the very issue before it. No amount of reading in, rounding out or contextualization can save the decision. Thus, the Appeal Tribunal erred in this decision, and the application must be granted.

Appeal over election results (T-992-11)

[30] The applicants filed the Notice of Appeal on April 20, 2011. The election occurred on December 20, 2010. The applicants acknowledged that their appeal was filed outside the limitation period of 30 days, as prescribed by section 14.02 of the *Election Act*. In filing the appeal, they specifically asked that the Appeal Tribunal exercise its discretion to extend the time period for filing the appeal, pursuant to section 14.04 of the *Tribunal Act*. That provision states:

> **14.04** The Appeal Tribunal Panel and if no panel, then the Registrar, may extend or shorten a period provided by Legislation or fixed by an Order.

[31] "Legislation" is defined in section 1.01 of the *Tribunal Act* as "legislation of Thunderchild First Nation, as amended from time to time, and passed under the *Constitution*, and includes the *Constitution* itself". Thus, it includes, on the plain and obvious reading of its terms, the *Election Act*. The respondents argue however that this provision should not be interpreted as applying to the time period in the *Election Act*, because that statute also requires that the Notice of Appeal be filed with the Chief Electoral Officer. Since the Chief Electoral Officer ceases to hold office 30 days after an election, the respondents assert, the legislators must not have intended for appeals to be considered past the deadline.

[32] In my view, this is an overly formalistic interpretation and runs contrary to the requirement that statutes are to be read together in a harmonious manner that is consistent with their purpose and object. Section 14.04 of the *Tribunal Act* grants the Appeal Tribunal a broad discretion to extend time periods in all legislation of Thunderchild First Nation. The provision contains no exceptions or limitations. Secondly, it would be absurd to read this provision down based on a procedural provision in the *Election Act*, or the provisions directed to the tenure of the Chief Electoral Officer. On this interpretation, there would be no recourse to appeal or set aside an election result in circumstances where the fraud or unfair practices were discovered after the 30-day period. The preferred interpretation of this provision, consistent with the purpose and object of the legislation, is that it is intended to ensure the timely administration of the election process itself and to ensure the Chief Electoral Officer completes his or her responsibilities with dispatch.

[33] As to the merits of the request that the time be extended, there is no discussion in the decision whether section 14.04 of the *Tribunal Act* applies, or any recognition that section 14.04

exists at all. Thus, I find that the Appeal Tribunal failed to exercise its jurisdiction, and the application can be granted on this basis alone.

[34] I also set aside the decision on the basis of procedural fairness. The Tribunal received a letter dated April 28, 2011 from counsel for the respondents, urging that the Tribunal dismiss the appeal as being beyond the 30-day period. Counsel made the following objections:

- Mr. Gerald Okanee, the original appellant, had withdrawn his appeal. The "new" appellants, who treated Mr. Okanee's appeal as "their" appeal, had no right to appeal.
- In relying on the appeal of Mr. Okanee, the applicants may run afoul of the rules of champerty and maintenance.
- "Outsiders" are identified and said to be meddling in the affairs of Thunderchild, and that it is "absolutely outrageous" that this has occurred.
- The situation is "ridiculous and offensive" "…and the entire Thunderchild First Nation is being held for ransom by a handful of disgruntled persons…"

[35] Counsel did not send a copy of this letter to the applicants, though their identity and residence was evidently known to him. The Tribunal did not circulate a copy of the letter to the applicants. In consequence, the applicants had no knowledge of the arguments that were considered by the Tribunal and put against them by the respondents.

[36] On May 16, 2011, the applicants were advised by counsel that their appeal application was dismissed. The decision letter provided:

> In consultation with the Appeal Tribunal on May 16, 2011, I advise that your Appeal Application dated April 20, 2011 is dismissed without costs. Your application is barred by section 14.02 of the *Thunderchild First Nation Election Act*.

[37] The jurisprudence is unequivocal as to the fundamental importance of natural justice and procedural fairness in band governance issues: *Bruno v Samson Cree Nation*, 2006 FCA 249. This principle is imbedded, although unnecessarily so, in the *Tribunal Act*. Section 5.05 provides:

> The Appeal Tribunal in the course of exercising its power under the Act shall:
>
> (a) Observe all principals of natural justice, procedural fairness or other procedure that it is required by Legislation to observe;
>
> […]

[38] It is readily apparent to any fair minded observer that the respondents ought to have been given an opportunity to make submissions in respect of why they could maintain the existing appeal, or, in the alternative, be allowed an extension of time within which to file a new appeal responding to the allegations set forth in counsel's letter. The record shows that they have *bona fide* arguments to make in response to some of the assertions.

[39] The affidavits suggest that the appeal was understood by the applicants as being representative and that they had relied on Mr. Okanee to proceed. Whether this is established at the end of the day or not, and, if so, whether it is compelling in the weighing of factors whether or not to exercise their discretion to extend the period of time is not material at this point; rather what is material is that the applicants had a right, under the *Tribunal Act* and the rules of procedural fairness, to make submissions, to notice of what was put against them and an opportunity to reply. They were also entitled, as a matter of natural justice, to have the Tribunal consider their request to extend the time within which their appeal could be filed. The Tribunal did not address the question

before it, and if it did, provided no reasons in support of its exercise of discretion, if it in fact directed its mind to the request. In either case, the decision cannot stand.

[40] There remains the issue of bias. While I have concerns arising from the precipitous manner in which the Tribunal rendered its decision, from the failure to provide an opportunity to respond to counsel's letter, and for failing to provide an opportunity for a hearing on the merits of the request it is unnecessary, in light of my findings, to address this issue.

Costs

[41] The parties were invited to make submissions on costs. In those submissions, the applicants indicated that they sought costs against the Thunderchild First Nation, which was not a party to the application. The Court directed that the submissions be served on the Thunderchild First Nation and that it be provided an opportunity to respond (by October 12, 2012). No submissions were received.

[42] The respondents object to the payment of costs, contending that each party should bear its own costs. The respondents say that there are no broad issues of band governance or important issues of law, which would warrant the award of costs.

[43] In the ordinary event, costs follow the event, unless special reasons can be shown, in the conduct of the successful party, or in the conduct of the case, to warrant departing. No such rationale has been identified here. The respondents contend that the decision in question was that of the Appeal Tribunal and they should not bear the consequence of the Tribunal error. This argument has no merit. To avoid costs by suggesting that it was the error or responsibility of the Appeal

Tribunal or court would, in effect, insulate unsuccessful parties to a proceeding. With respect to the argument that the applicants are, in effect, the cause of the problem as they were late in filing their appeal, it is sufficient to note the role of the respondents in the underlying facts which gave rise to the proceedings before the Appeal Tribunal. Moreover, the respondents opposed the applicants' request for an extension of time, when they could have consented. Presumably, their counsel's letter to the Appeal Tribunal was not copied to the applicants, precipitating the breach of procedural fairness. Finally, the respondents' position on costs is inconsistent with their pleading on the merits of the judicial review application, wherein they argue that even if there were issues in the putative election, they were regularized by the December 18 election, at which time they became "the government". The respondents cannot at the same time argue that they are not part of the government, and seek to displace the presumption that, as government, they will be indemnified by the Band: *Bellegarde v Poitras*, 2009 FC 1212.

[44] To conclude, I am satisfied, for the reasons advanced by the applicants, that this is an appropriate case to award costs against the third party. The issues raised address important questions of band governance, touching interests beyond those of the immediate case. I am also satisfied, given the length of the pre-trial proceedings, the award of costs requested at Column III is justified. Indeed, the respondents concede that the request is not excessive.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are granted.

2. The decision of the Thunderchild First Nation Appeal Tribunal, dated May 16, 2011 to reject the non-compliance application is quashed.

3. The non-compliance application is remitted to the Thunderchild First Nation Appeal Tribunal requiring that Tribunal to accept the non-compliance application and to set a hearing date as provided in the *Thunderchild First Nation Election Act*.

4. The decision of the Thunderchild First Nation Appeal Tribunal, dated May 16, 2011 to reject the Notice of Appeal from the applicants is quashed.

5. The pre-existing Notice of Appeal reinstated and the Tribunal directed to proceed with consideration of the applicants' request for leave to extend the period of time within which a Notice of Appeal might be filed under the *Thunderchild First Nation Election Act*.

6. Costs to the applicants in the amount of $8,923.00, payable by Thunderchild First Nation.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-988-11
STYLE OF CAUSE:	**ANITA MEMNOOK, et al v DELBERT WAPASS, et al**
DOCKET:	T-992-11
STYLE OF CAUSE:	**RICHARD STARR, et al v DELBERT WAPASS, et al**
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	August 23, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	November 9, 2012

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Mr. Christopher Boychuk	FOR THE RESPONDENTS

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