Federal Court of Appeal  Cour d'appel fédérale

Date: 20151211

Docket: A-425-14

Citation: 2015 FCA 284

CORAM: **PELLETIER J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

CHIEF DELBERT WAPASS AND THUNDERCHILD FIRST NATION BAND COUNCIL

Appellants

and

IVAN WEEKUSK

Respondent

Heard at Regina, Saskatchewan, on November 9, 2015.

Judgment delivered at Ottawa, Ontario, on December 11, 2015.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NEAR J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Weekusk was suspended as a Headman (or Councillor) of the Thunderchild First Nation ("the Thunderchild F.N.") on the basis of a complaint which he had not seen and following a meeting of the Thunderchild F.N. Council (the Council) of which he had no notice. At the same time, the Council resolved to make application to the Appeal Tribunal, constituted under the *Thunderchild First Nation Appeal Tribunal Act* as enacted by the Thunderchild F.N. Government, to have Mr. Weekusk removed as a Headman. The Notice of Application was filed shortly thereafter. Mr. Weekusk filed a Notice of Dispute with the Appeal Tribunal in response

to the Council's application but took no further steps to challenge the action taken against him until he made an application for judicial review in October 2013, almost two years to the day after his suspension. As of that date, the Appeal Tribunal had not considered the Council's application and, to this date, it still has not done so.

[2] Mr. Weekusk's application for judicial review was challenged on the basis that it was made outside the 30-day time limit set out in subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985 c. F-7 and that no motion for an extension of time had been made or granted before the hearing of the application. The Federal Court found that the 30-day time limit applied but, on the basis of the application itself, found an implicit request for an extension of time which it granted. The Federal Court went on to conclude that the decision to suspend Mr. Weekusk and to request his removal from office was made in breach of the requirements of procedural fairness and set it aside. While the Court's finding as to the extension of time was not the subject of an explicit term in the Court's judgment allowing the application for judicial review, it is the only ground of appeal raised by Chief Wapass and the Thunderchild First Nation Band Council (the Chief and Council).

[3] For the reasons which follow, I would allow the appeal, set aside the decision of the Federal Court and, rendering the decision which the Federal Court should have given, I would dismiss the application for judicial review.

I. BACKGROUND:

[4] On October 14, 2011, a member of the Thunderchild F.N. wrote to the Council alleging that Mr. Weekusk had breached his oath of office by failing to work as a collective with other

members of the Council and by failing to attend Council meetings and various Thunderchild F.N. community events. By letter dated October 20, 2011, Chief Wapass wrote to Mr. Weekusk to advise him that, after considerable deliberation, the Council decided to take disciplinary action against him, specifically suspending him as a Headman without pay and applying to the Appeal Tribunal to have him removed as a Headman.

[5] On December 2, 2011, Chief Wapass filed a Notice of Application with the Appeal Tribunal seeking an order that Mr. Weekusk be removed as a Headman of the Thunderchild F.N. On December 23, 2011, Mr. Weekusk filed a Notice of Dispute with the Appeal Tribunal asking that the application to have him removed from office be dismissed and that he be paid "the entire amount owed to him": Appeal Book, at p. 142. Mr. Weekusk contacted the Registrar of the Appeal Tribunal on several occasions, inquiring as to the status of this matter. In spring 2013, he specifically asked that a hearing of his matter be held but was advised that the Appeal Tribunal had chosen to deal with certain other matters before dealing with his.

[6] On October 25, 2013, Mr. Weekusk commenced his application for judicial review seeking the following relief:

1- An order pursuant to section 18.1(3) of the *Federal Courts Act* in the nature of certiorari quashing the decision of Chief Delbert Wapass and the Thunderchild First Nation Council to suspend Councillor Weekusk without pay and apply to the Appeal Tribunal for his removal.

2- A Declaration pursuant to Section 18.1(3) of the *Federal Courts Act* that the Decision of the Chief and Council to suspend Councillor Weekusk without pay is invalid or unlawful.

3- A Declaration pursuant to Section 18.1(3) of the *Federal Courts Act* that the Appeal Tribunal be prohibited from hearing the application to remove Councillor Weekusk from elected office.

4- A Declaration that Councillor Weekusk is restated [sic] to office and continues to be a lawfully elected Councillor of Thunderchild.

5- A Declaration that this application be allowed to proceed at the present time.

6- Such other orders as the Honourable Court see just.

Appeal Book at page 34.

[7] This appeal concerns the 5th head of relief, the declaration that the application be allowed to proceed. Among the grounds for the application for judicial review, Mr. Weekusk included the following:

> Further, as the Appeal Tribunal has not had a hearing or made a decision with respect to the issues forming the basis of the current Application before this Honourable Court, this matter is a continuing one such that the time limits for a judicial review application under section 18.1 of the *Federal Courts Act* do not apply in this case.
>
> Appeal Book, at p. 37

[8] In Mr. Weekusk's memorandum of fact and law before the Federal Court, the only reference to the time limit for bringing an application for judicial review appears under the heading **Chief Wapass's Application to the Appeal Tribunal Cannot Have effect as the Inordinate Delays Have Unduly Prejudiced Councillor Weekusk**. There, Mr. Weekusk argues that "as the Tribunal has not had a hearing or made a decision with respect to the issues forming the basis of the current Application before this Honourable Court, this matter is an ongoing one such that the time limits for a judicial review application under section 18.1 of the Federal Courts Act do not apply to this case."

[9] In the memorandum of fact and law filed on behalf of the Chief and Council, the respondents raise the question of the 30-day time limit. They argue that the decision under

review was made well beyond the 30-day time limit and that no application for an extension of time has been sought. They acknowledge however that the request for a declaration that the application be allowed to proceed at the present time could be interpreted as an application for an extension of time. That said, they rely on the decision in *Canadian Council on Social Development v. Canada (Attorney General)*, 2012 FC 1530, 42 F.T.R. 102, for the proposition that the onus of demonstrating that an extension of time should be granted lies with the applicant. They then review the four-point test set out by this Court in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, [2012] F.C.J. No. 880 (QL) (*Larkman*) and conclude that the test has not been met. In particular, they note that there is no evidence of a continuing intention to pursue an application for judicial review and that the delay in bringing the application has not been satisfactorily explained.

II. THE DECISION UNDER APPEAL

[10] Before considering the merits of Mr. Weekusk's application, the Federal Court addressed the question of the timeliness of the application. In its reasons, reported as 2014 FC 845, the Federal Court noted Mr. Weekusk's argument that the decision to suspend him was a temporary or interim measure pending the decision of the Appeal Tribunal. A decision of the Appeal Tribunal would have been a final decision but since the latter made no decision, the matter is ongoing and the 30-day time limit does not apply.

[11] The Federal Court found that the decision of the Chief and Council was a single decision with two parts: the suspension of Mr. Weekusk and the application to the Appeal Tribunal to have him removed from office. The Court further noted that Mr. Weekusk could have sought judicial review of that decision at the time it was made but recognized that the application to

have him removed from office could have introduced some uncertainty as to the next step to be taken. The Federal Court rejected the proposition that Mr. Weekusk should have sought judicial review of his suspension while pursuing his remedies before the Appeal Tribunal on the grounds that such a course of action would result in a multiplicity of proceedings.

[12] The Federal Court then examined the Thunderchid F.N. statutes and noted that while a complainant had a right of appeal to the Appeal Tribunal if Council decided not to proceed with a complaint, surprisingly, a person affected by Council's decision in response to a complaint had no such right.

[13] At paragraph 50 of its reasons, the Federal Court found that:

> 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.

[14] The Court then went on to find that there was justification to extend the period of time to allow the judicial review to proceed. The Court acknowledged that while Mr. Weekusk did not bring a formal motion to extend the time for bringing his application, nonetheless, by bringing the application and addressing the reasons for not pursuing the application earlier, even though implicitly, he had established through this record that the application should proceed.

[15] The Federal Court then considered the *Larkman* factors. It recalled this Court's admonition that, while the importance of each of the factors depends upon the circumstance of the case, the overriding consideration is that the interests of justice be served.

[16] The Court found that there was an explanation for Mr. Weekusk's delay in bringing his application in that he was awaiting a decision by the Appeal Tribunal and, in fact, had contacted the latter to inquire when it would proceed with his matter. The Court also found that Mr. Weekusk's Notice of Dispute to the Appeal Tribunal was evidence of his intention to pursue at least that part of the Council's decision that sought his removal from office.

[17] On the question of prejudice to the respondents, the Court found that while the Chief and Council argued that they were prejudiced by the delay, there was no evidence of prejudice.

[18] Finally, the Court found that the Mr. Weekusk's application had potential merit so that it was in the interests of justice that the application be allowed to proceed.

III. DISCUSSION

[19] As usual, the first question to be addressed is the standard of review.

[20] This case is unique in that, in the absence of a request for an extension of time, the Court found that certain conduct nonetheless was capable of being construed as such a request.

[21] The Federal Court was not misled by the contents of Mr. Weekusk's written materials:

> 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.
>
> Federal Court Reasons at paragraph 56

[22] While acknowledging that Mr. Weekusk had not made an application for an extension of time, the Federal Court nonetheless construed certain elements as an implicit request for an extension of time. On any standard of review, this is an error which justifies our intervention.

[23] The fact that Mr. Weekusk did not apply for an extension of time does not mean that he did not address his mind to the issue. He considered the matter and decided that no extension of time was required because the subject of his application was a continuing matter. Consistently with this position, he did not address the factors to be considered in a motion for an extension of time, either in his affidavit or in his memorandum of fact and law, other than to state his legal conclusion that the time limit did not apply to him.

[24] It is true that one of the heads of relief in Mr. Weekusk's notice of application is for a declaration that "this application be allowed to proceed at the present time". However, this must be read in the light of the balance of his pleadings. On a fair reading of those pleadings, I believe that this request for a declaration is simply a request for confirmation that the 30-day time limit does not apply to Mr. Weekusk's application for judicial review.

[25] The Chief and Council, in their memorandum of fact and law, took issue with Mr. Weekusk's legal conclusion that the 30-day time limit did not apply to his application. The matter was debated before the Federal Court. As that debate is reported in the Federal Court's reasons, it appears that Mr. Weekusk maintained his original position: see paragraphs 20 to 24 of the Federal Court's reasons. The question of an implicit request for an extension is raised by the Chief and Council in their representations, not by Mr. Weekusk. To the extent that the *Larkman*

factors were raised, they were raised by the Chief and Council: see paragraphs 31-34 of the Federal Court's decision.

[26] As noted earlier in these reasons, the Federal Court found that Mr. Weekusk was wrong in law, that the 30-day time limit applied to him, and that he could have applied for judicial review at the time the decision under review was made. The Court went on to find that "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": see the Federal Court's reasons at paragraph 56.

[27] With respect, I am unable to agree with the Federal Court's conclusions. The fact of bringing the application cannot be taken as a request for an extension of time when Mr. Weekusk's position throughout was that the 30-day time limit did not apply to him. To do so would be to put into Mr. Weekusk's mouth words which he chose not to speak.

[28] As for Mr. Weekusk's "addressing the reason for not pursuing the application earlier, even if this is implicit", I can find no evidence in the record that Mr. Weekusk addressed the reasons for not pursuing his application earlier. He did not do so in his affidavit nor in his memorandum of fact and law. If he addressed the subject in any way, it must have been through counsel's representations which, of course, are not evidence. In any event, Mr. Weekusk's explanation as to why he did not proceed earlier would be relevant to the granting of an extension; it is not relevant to the question of whether a request for an extension was made.

[29] Given the circumstances of Mr. Weekusk's suspension, one can see why it might be thought that the interests of justice require that he be given a remedy. But justice must be done to both parties. There was an onus on Mr. Weekusk to ask for and to show that he should be granted an extension of time. The respondents had the right to challenge his claim by cross-examining him on his affidavit. For their part, the respondents had the right to show that the delay had prejudiced them. It is unfair to reproach them for having failed to show prejudice when there was no application for an extension of time before the Court.

[30] Mr. Weekusk might have prevailed if he had made an application for an extension of time before bringing his application for judicial review. He chose to proceed on the basis that he did not need an extension. It is not inconsistent with the interests of justice to hold him to his choice.

[31] I would therefore allow the appeal with costs in this Court and in the Federal Court, set aside the order of the Federal Court, and rendering the order which the Federal Court should have made, I would dismiss the application for judicial review.

"J.D. Denis Pelletier"

J.A.

"I agree
Near J.A.

"I agree
Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	CHIEF DELBERT WAPASS AND THUNDERCHILD FIRST NATION BAND, COUNCIL v. IVAN WEEKUSK
PLACE OF HEARING:	REGINA, SASKATCHEWAN
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CONCURRED IN BY:	NEAR J.A. GLEASON J.A.
DATED:	DECEMBER 11, 2015

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