Federal Court  Cour fédérale

Date: 20181010

Docket: T-1092-18

Citation: 2018 FC 1016

Ottawa, Ontario, October 10, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HARLEY FRANK, COLIN FRANK, MEAGAN FRANK, ROBERT FRANK, ANNETTE RUSSELL-FRANK, KELLY FRANK, SHARON FRANK, RENITA FRANK, COLINDA FRANK, DANIEL FRANK, CINDY TAILFEATHERS

Applicants

and

CHIEF AND COUNCIL OF THE BAND OF THE BLOOD INDIANS ON THE BLOOD INDIAN RESERVE #148, DARYL THREE PERSONS, SHELDON THREE PERSONS, EMERY ROY THREE PERSONS, WENDALL THREE PERSONS

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Land Dispute Resolution Appeal Tribunal [Appeal Tribunal] of the Blood Tribe Chief and Council, dated April 9, 2018 [the Appeal Decision]. The Appeal Decision upheld the decision of Council, dated January 3, 2018 [the Decision], which transferred certain Lands from the Applicants to some of the Respondents.

II. Background

[2] The Respondent, the Chief and Council [Council] of the Blood Band of Indians on the Blood Indian Reserve #148 [the Blood Tribe], is the body responsible for managing lands on the Blood Reserve.

[3] The Applicants, Harley Frank, Colin Frank, Meagan Frank, Robert Frank, Annette Russell-Frank, Kelly Frank, Sharon Frank, Renita Frank, Colinda Frank, Daniel Frank, and Cindy Tailfeathers, are members of the Blood Tribe.

[4] Prior to June 2017, the Applicants were the registered occupants of the following lands at the Blood Tribe Land Registry [the Land Registry]:

i. Part North East ¼ Section 11 TWP 5 RANGE 24 W4M (24.3 cultivated + 11 grassland acres);

ii. Section 12 TWP 5 RANGE 24 W4M (319.44 acres);

iii. Section 13 TWP 5 RANGE 24 W4M (342.4 cultivated + 245.2 grassland acres);

iv. Part East ½ Section 14 TWP 5 RANGE 24 W4M (100.9 cultivated acres);

v. Part West ½ Section 18 TWP 5 RANGE 23 W4M (75.0 cultivated + 165.9 grassland acres); and

vi. Part West ½ Section 7 TWP 5 RANGE 23 W4M (198.2 acres).

[collectively, the Lands]

[5] The Respondents, Wendall Three Persons, Sheldon Three Persons, Daryl Three Persons, and Emery Roy Three Persons [collectively, the Three Persons] are all members of the Blood Tribe.

A. *Blood Tribe Land Holding System*

[6] The Blood Tribe is a Band duly established pursuant to the *Indian Act*, RSC 1985, c I-6. The Blood Tribe occupies and administers the Blood Reserve No. 148 and 148A [the Reserve] in the province of Alberta.

[7] Blood Tribe members are not allocated lawful possession of land pursuant to section 20 of the *Indian Act*, and no Blood Tribe members have Certificates of Possession or Occupation. Instead, the Blood Tribe employs a land regime that is based on custom, traditional land use, and occupation.

[8] The Blood Tribe enacted the *Kanai Land Use & Occupation Dispute Resolution Policy* [the Policy], which governs land ownership, occupation, and possession by members of the Blood Tribe. The Policy establishes a Land Registry, which is maintained by the Blood Tribe Land Management Department [the Lands Department] as the authoritative document that identifies the existing use and occupation of individual Blood Tribe members on Reserve lands.

[9] Individual members of the Blood Tribe have occupational privileges, not title, over Reserve lands.

[10] Subsection 3.1(2) of the Policy establishes that the Land Registry is deemed to be correct unless clearly proven otherwise:

> 3.1 LAND REGISTER
>
> 1) The Blood Tribe Land Register shall be the official registry evidencing land use and occupation privileges for lands on the Reserve.
>
> 2) The Land Register is deemed to be correct unless clearly proven otherwise.

B. *Dispute Resolution Levels under the Policy*

[11] There are three levels to the process for resolving Blood Tribe land disputes.

[12] At the first level, the Land Dispute Resolution Panel [the Panel] hears land disputes between Blood Tribe members and makes recommendations to Council.

[13] In advance of a hearing, the Lands Department will produce a dispute file, which includes information relevant to the dispute that is in the possession or control of the Lands Department.

[14] The Panel is responsible for facilitating, scheduling, and overseeing dispute hearings. Section 6.3 of the Policy sets out the procedures to be followed by the Panel in conducting a hearing, including paragraph 6.3(5)(d):

> Representations
>
> All interested or affected parties, including Lands Department, shall be allowed an opportunity to speak to the issue/Dispute and any possible resolutions. Any evidence to support the disputing party's position must be presented by the party prior to the hearing of the Dispute by the Panel and the Lands Department and the Panel shall not make independent investigations or research beyond what is on file at the Lands Department or presented by the parties.
>
> [Emphasis added]

[15] Pursuant to the Kainai Land Use & Occupation Policy: Land Dispute Resolution Hearing Procedures [the Procedures], subsection 7(g), parties at a hearing before the Panel may not retain counsel:

> Legal representation will not be recognized because the Blood Tribe currently operate under a land regime of Kainai Customary and/or Traditional Land Use and Occupation.

[16] Section 5 of the Procedures mandates that each party is required to prepare a written submission 14 days prior to a hearing before the Panel and provide copies to a representative of

the Lands Department, and that a representative of the Lands Department will provide a copy of each party's written submission to the other parties and to the Panel:

> 5. WRITTEN SUBMISSIONS
>
> a. The Panel requires the parties to prepare a written brief or submission. The brief or narrative should provide information regarding their case including all pertinent facts. Each party, including Land Management, shall disclose their case or position by providing two (2) copies of their written submission fourteen (14) days prior to the hearing to the Land Disputes Resolution Technician.
>
> …
>
> b. The land [*sic*] Disputes Resolution Technician shall provide a copy of each party's written submission to the other parties and to the Panel immediately upon receiving it.

[17] Based on the hearing, the Panel makes recommendations to Council with respect to the allocation or reallocation of the disputed land.

[18] At the second level of the dispute resolution process, Council makes a decision based on the Panel's recommendations and other factors enumerated in the Policy. Council must provide written reasons for the decision which include the items detailed in subsection 6.4(6) of the Policy:

> Council shall provide written reasons for the decision including:
>
> (a) A summary of the facts upon which the decision was based;
>
> (b) A summary of the evidence that was considered;
>
> (c) The rationale for the decision that was made.

[19] The third level of the dispute resolution process is the appeal process. A party may appeal a decision of Council to the Appeal Tribunal. An appeal must be based on one of the grounds enumerated in subsection 6.5(1) of the Policy:

> A decision of Council pertaining to the Dispute is subject to appeal by a party to the Dispute only on the following grounds:
>
> (a) Council's decision was based on a mistake of law or a mistake of fact;
>
> (b) Council did not have the authority to make the decision that it made;
>
> (c) Council did not follow the procedures set forth in this Policy;
>
> (d) Council failed to exercise its discretionary powers in a fair and equitable manner; or
>
> (e) The appeal is based on new evidence that may have affected the outcome of the decision that could not have been produced and was unavailable at the time of the decision.

[20] Pursuant to subsection 6.5(9) of the Policy, after an appeal is filed and the grounds for an appeal are adequately set out, the Appeal Tribunal can "generally conduct the proceedings in any way in which the Appeal Tribunal, in its sole discretion, deems appropriate in order to decide the appeal." However, there are requirements in the Policy that the Appeal Tribunal must follow:

i. the Appeal Tribunal must meet to determine if a hearing should be held or if the appeal can be determined on the basis of the record (ss. 6.5(a));

ii. if the Appeal Tribunal finds one of the appeal grounds to be valid, the decision of Council is invalid, and the matter should be referred back to Council for further consideration (ss. 6.5(12) and (13));

iii. the Appeal Tribunal must render a decision within 30 days of the receipt of the appeal or the hearing date, if one is required:

> The decision of the Appeal Tribunal shall be rendered within thirty (30) calendar days of the receipt of the appeal or the hearing date, if one is required, and shall be final and binding on all parties and not subject to further review by Council, the Appeal Tribunal or any Court of Law. Copies of the decision shall be provided to the parties and to Council within five (5) calendar days of the date of the decision.
>
> (ss. 6.5(11))

[21] There is no requirement in the Policy that the Appeal Tribunal produce written reasons or disclose evidence to the parties.

C. *The Lands in Dispute*

[22] The dispute centers on events that took place prior to the establishment of the Land Registry in the 1960s.

[23] At the time the Land Registry was established, or shortly thereafter, the Lands were registered in the name of Wilton Frank. Since that time, the Lands have been registered to Wilton Frank and his descendants (i.e. the Applicants). Wilton Frank transferred portions of the Lands to his descendants by way of quit claims in the 1970s and 1980s.

[24] The Three Persons are the grandchildren of the late Tom Three Persons, who passed away in 1949. When Tom Three Persons passed away, his son Jessie Three Persons was not yet of legal age.

[25] The Three Persons allege that Council granted the land holdings of Tom Three Persons to Wilton Frank on a temporary basis, until Jessie could assume control of the land. On this basis, they argue that the Three Persons retain an entitlement to those lands, and that those lands constitute the Lands registered to the Applicants.

D. *Procedural History*

[26] On or about June 29, 2017, the Land Dispute Resolution Coordinator wrote to the Applicants, advising that a hearing before the Panel had been scheduled for August 2, 2017. The hearing was initiated by the Three Persons.

[27] At this time, the Lands Department sent the Applicants and the Three Persons a Dispute File containing, *inter alia,* Land Registry verification documents, maps, land transfer histories, and Council meeting minutes [the Dispute File].

[28] On August 2, 2017, the Applicants attended the hearing, and made oral and written submissions before the Panel [the Hearing]. The Three Persons did not attend the Hearing.

[29] On or about December 19, 2017, the Panel presented recommendations to Council [the Recommendations], concluding:

> The Panel deliberated and is basing the recommendations on the file contents and the hearings. The Panel took into consideration all policy and custom issues affecting the case. In consideration of all pertinent information available to the Panel, it has reached a conclusion on the case.

> The Panel is required on all cases to respect the validity of current registration unless a claimant can make a strong case with persuasive evidence that the registration is in error.
>
> Three Persons' were able to provide the Panel with persuasive evidence to support their claim to challenge Franks' Family current registration to the Land.

[30] It is unclear on the evidence before me whether the Three Persons presented additional evidence, not contained in the Dispute File, to the Panel at some other time, in violation of paragraph 6.3(5)(d) of the Policy.

[31] At several points, the Recommendations suggest that the Three Persons appeared before the Panel at a separate time and made oral or written submissions. This suggestion is supported by section 5 of the Procedures, which required the Three Persons to make written submissions to the Panel.

[32] In any event, the Applicants were not made aware of any additional evidence, written submissions, or oral submissions put before the Panel by the Three Persons.

[33] The Panel recommended that the Lands be registered in the name of Wendall, Sheldon, Daryl, and Emery Roy Three Persons, each to receive an equal portion of the Lands, and that the Applicants should retain five acre house lots.

[34] On or about December 19, 2017, Council accepted the Recommendations. In a letter dated January 3, 2018, Council wrote to both the Three Persons and the Applicants,

communicating the following decision of Council:

> 1. That the existing Land Registrar [*sic*] be changed and registered to Wendall, Sheldon, Daryl, Emery Roy Three Persons, as there was no official documentation to prove that the land was legally transferred to Wilton Frank.
>
> 2. That Wendall, Sheldon, Daryl, and Emery Roy Three Persons each receive an equal portion of the land. See above Land Descriptions.
>
> 3. That the Frank families retain the five (5) acres house lots and a survey to be completed by the Blood Tribe Land Department.
>
> [the Decision]

[35] The Decision contained the following findings, which formed the basis for the conclusions above:

> a) The land was originally registered to Tom Three Persons and there was a guardian appointed by Chief and Council and the guardian did oversee Jessie Three Persons interests in the land until (Jessie) reached legal age and then the land would be registered to (Jessie).
>
> b) Wendall, Sheldon, Daryl and Emery Three Persons did provide information and evidence to support Tom Three Person registration and Jessie Three Person registration to the lands.
>
> c) There was no documentation to prove that the lands were transferred to Wilton Frank.

[36] In a letter dated January 4, 2018, Council advised both parties of their right to appeal to the Appeal Tribunal.

[37] On January 4, 2018, the Three Persons appealed the Decision, disputing the basis on which the Applicants had been granted five acre house lots.

[38] On January 15, 2018, Harley Frank, on behalf of the Applicants, wrote a letter to Council requesting the necessary information so that they could properly appeal the Decision.

[39] On January 19, 2018, Sharon and Kelly Frank wrote two letters, as well as an appeal form, in which they requested disclosure of the evidence upon which Council made the Decision. These letters and the appeal form clearly raised four grounds of appeal listed under subsection 6.5(1) of the Policy:

i. Council's Decision was based on a mistake of law or a mistake of fact;

ii. Council did not have the authority to make the decision that it made;

iii. Council failed to exercise its discretionary powers in a fair and equitable manner; and

iv. New evidence since Council's Decision.

[40] The Applicants received no further disclosure.

[41] On April 9, 2018, the Appeal Tribunal wrote to the Applicants, advising them that their appeal had no merit and that the Decision would be upheld [the Appeal Decision]:

> Dear Sir/Madam:
>
> We, the Appeal Tribunal, have concluded this matter with respect to the appeals submitted on January 19, 2018. We have reviewed the information of the appeal you submitted. We have made the decision that this Appeal has no merit; the decision of Blood Tribe Chief and Council ("Council") on January 3, 2018 stands. Based on the Kainai Land Use & Occupation Dispute Resolution Policy appeal criteria Section 6.5(1) (a) (b) (d) & (e) we bring the following points to your attention:
>
> The Blood Tribe Chief and Council ("Council") reviewed and deliberated over the recommendations presented by the Land Dispute Resolution Panel ("Panel") on December 19, 2017 with respect to the above subject lands on the Blood Reserve and in

> accordance with section 2.3 of the *Kainai Land Use & Occupation Dispute Resolution Policy.* The Council has accepted the recommendations of the Panel which were based on the information and careful consideration of the evidence by the Panel. No new evidence was produced.
>
> In closing we thank you for your patience in this matter.
>
> Land Dispute Resolution Appeal Tribunal

[42] The Appeal Decision addressed only the raising of new evidence; the other three grounds of appeal were acknowledged only by reference to their respective paragraphs within subsection 6.5(1) of the Policy.

[43] In a letter dated April 17, 2018, Harley Frank wrote to the Lands Management Committee requesting an audience at their next meeting. Mr. Frank asked for reconsideration of the Appeal Decision. On or about May 2, 2018, Kelly Frank and Sharon Frank wrote a letter to Council asking that the Council reconsider the Appeal Decision.

[44] In his affidavit sworn July 4, 2018, Harley Frank gives evidence that the Decision was reconsidered and affirmed, and communicated to him on May 17, 2018. This evidence was confirmed in cross-examination.

[45] The Applicants filed their Notice of Application on June 7, 2018 [the Application].

III. Issues

[46] The issues are:

A. Is the Application barred by Rule 302 of the *Federal Courts Rules*, (SOR/98-106)?

B. Is the Application barred by the 30-day time limit outlined in s. 18.1(2) of the *Federal Courts Act*?

C. What is the applicable standard of review?

D. Were the Applicants denied procedural fairness?

E. Was the decision of the Appeal Tribunal reasonable?

IV. Analysis

[47] As a preliminary comment, I am concerned that Council has improperly taken on the task of defending its own impugned decision.

[48] The role of a tribunal whose decision is under review is limited. It is not the role of such a tribunal to vindicate itself and the merit of its decision (*Bossé v Canada (Attorney General)*, 2015 FC 1142 at para 27). As outlined by the Supreme Court of Canada in *Northwestern Utilities Ltd and al v Edmonton*, [1979] 1 SCR 684 at 710, "to allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions."

[49] In *Canada (Attorney General) v Quadrini*, 2010 FCA 246 at paragraph 16, Justice Stratas outlined the reasoning behind this limited role:

> Submissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later. Further, such submissions by the tribunal can erode the tribunal's reputation for evenhandedness and decrease public confidence in the fairness of our system of administrative justice.

[50] I recognize that, as outlined below, it is the Appeal Decision that is properly before this Court, and that the Appeal Tribunal has both a membership and a role which are distinct from Council. However, the underlying basis for the Appeal Decision is a decision of Council, and part of this Court's role in reviewing the Appeal Decision is to examine its underlying basis.

[51] It should have been the role of the Three Persons, not Council, to defend the Appeal Decision. However, as this issue was not argued before me, I will proceed to determine this matter on the issues raised by the parties.

A. *Is the Application barred by Rule 302 of the Federal Courts Rules, (SOR/98-106)?*

[52] Under Rule 302, unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought:

> 302 Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

[53] It is a contravention of Rule 302 for an applicant to challenge two decisions within one application unless it can be shown that the decisions formed part of a "continuing course of conduct" (*Khadr v Canada (Minister of Foreign Affairs)*, 2004 FC 1145 at para 9 [*Khadr*]).

[54] The Respondent argues that the Applicants are improperly seeking judicial review of two distinct decisions made by different administrative bodies at different times.

[55] In their Notice of Application, the Applicants write:

> This is an application for judicial review in respect of the decision of the Land Dispute Resolution Appeal Tribunal ("Appeal Tribunal") of the Blood Tribe Chief and Council ("Band Council") on April 9, 2018 to uphold the decision of the Band Council on January 3, 2018 (the "Decision").

[56] In their Written Representations, the Applicants submit that:

> The issue on this application is whether the Decision of the Chief and Council should be set aside. It is submitted that these proceedings were fundamentally flawed from the outset. The Applicants never received a proper hearing or a proper consideration of the case. The Decision must be set aside because the Panel:
>
> a) failed to observe the principles of natural justice and procedural fairness;
>
> b) denied the Applicants their right to be heard;
>
> c) made errors of fact and law on the face of the record;
>
> d) failed to provide any, or any adequate, reasons for the Decision;
>
> e) made a Decision that is unreasonable in all of the circumstances; and

> f) afforded the Applicants no meaningful or effective appeal.

[57] The Respondent argues that the Applicants conflate three different administrative bodies, and cannot request judicial review of the Panel's Hearing, Council's Decision, and the Appeal Decision under the same Application. The Respondent argues that these decisions were rendered at different times and involve different scopes and areas of focus. They suggest that Council's Decision involved a review of the recommendations of the Panel and involved balancing the interests of individual Blood Tribe members and the Blood Tribe membership as a whole, while the Appeal Tribunal focused on specific lines of inquiry mandated by the Policy.

[58] In *Khadr*, Justice von Fickenstein found that when two sets of decisions were made at different times and involve a different focus they cannot be said to form part of a "continuing course of conduct" (*Khadr,* above at para 10).

[59] The applicants in *Khadr* were challenging two distinct series of decisions; the first series of decisions related to the Minister's failure to provide Mr. Khadr with consular services, while the second series related to interviews of Mr. Khadr conducted by Canadian government officials. These distinct series of decisions were made at different times and involved different focuses. As such, this Court found that the application violated Rule 302.

[60] In contrast, while they were made at different times, the Recommendations of the Panel, the Decision by Council, and the Appeal Decision by the Appeal Tribunal are part of a

continuing course of conduct, and involve a similar focus – the resolution of a property dispute between the Applicants and the Three Persons.

[61] However, where the decision under judicial review results from an administrative appeal, the Court should only review the appellate decision; the original decision is not before the Court (*Pieters v Canada (Attorney General)*, 2004 FC 342 at para 4; *Elson v Canada (Attorney General)*, 2017 FC 459 at paras 28-31).

[62] Therefore, only the Appeal Decision is subject to judicial review in this matter. That being said, the underlying basis for that decision must be considered.

B. *Is the Application barred by the 30-day time limit outlined in s. 18.1(2) of the Federal Courts Act?*

[63] Under subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7, an application for judicial review shall be made within 30 days of the communication of the decision to the parties affected by the decision, or within any further time that this Court may fix or allow before or after the end of those 30 days.

[64] The Respondent argues that the decision of the Appeal Tribunal was communicated to the Applicants by April 17, 2018, or May 2 at the latest. The Application was not filed until June 7, 2018, outside of the 30-day time limit.

[65] The Respondent acknowledges the evidence by Harley Frank that there was a reconsideration of the Appeal Decision on or about May 15, 2018, but argues that there is no documentation to support this claim. The Respondent also notes that if a decision of Council has been upheld by the Appeal Tribunal, the Policy does not allow for Council to reconsider that decision.

[66] While I accept that the Appeal Decision was communicated to the Applicants by May 2, 2018 at latest, and the filing of the Applicants' Notice of Application on June 7, 2018 is outside of the 30-day time limit contained in subsection 18.1(2) of the *Federal Courts Act*, nevertheless, the time limit in subsection 18.1(2) can be extended, and the overarching consideration is whether it is in the interests of justice to do so (*Crowchild v Tsuu T'ina Nation*, 2017 FC 861 at para 19 [*Crowchild*]). This Court has ruled that the applicant must demonstrate (i) a continuing intention to pursue the matter; (ii) that the application has some merit; (iii) that the respondent will not be prejudiced by the delay; and (iv) that there is a reasonable explanation for the delay (*Crowchild*, above at para 19).

[67] I find that: (i) the Applicants have a continuing intention to pursue the matter; (ii) the Applicants have put forward a reasonable explanation for the delay; (iii) the application has merit; and (iv) the Respondent has not been taken by surprise or otherwise prejudiced by the passage of time, as they were aware of the Applicants ongoing concerns due to the letters of April 17 and May 2, 2018.

[68] I find that it is in the interests of justice to extend the time period.

C. *What is the applicable standard of review?*

[69] Indigenous administrative bodies are particularly entitled to deference, as they are well-placed to understand the purposes that Indigenous laws pursue and are sensitive to the conditions of the particular community involved in the decision (*Pastion v Dene Tha' First Nation,* 2018 FC 648 at paras 19-28 [*Pastion*]).

[70] The decision of the Appeal Tribunal should be reviewed on a standard of reasonableness (*Crowchild*, above at para 25).

[71] The standard of review for whether there was a breach of procedural fairness is correctness (*Crowchild*, at para 26).

D. *Were the Applicants denied procedural fairness*

[72] The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected (*Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796 at para 71 [*Hill*]).

[73] The Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)* [1999], 2 SCR 817 [*Baker*] set out the following, non-exhaustive factors which are often relevant to deciding the content of the duty of procedural fairness:

A. The nature of the decision being made and the process followed in making it;

B. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
C. The importance of the decision to the individual or individuals affected;
D. The legitimate expectations of the person challenging the decision; and
E. The procedural choices made by the agency itself.

[74] Underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker (*Baker*, above at para 22).

[75] Applying the first *Baker* factor, the nature of the Appeal Decision was the resolution of a property dispute between members of the Blood Tribe and the administration of land held by the Blood Tribe.

[76] The Respondent submits that this process was an informal, community based decision-making format, and analogizes to the decision in *Okemow v Lucky Man Cree Nation*, 2017 FC 46 [*Okemow*], where a low degree of procedural protections were afforded.

[77] However, the dispute process here is more formalistic than the process in *Okemow*, where the appeal process was effected by way of an oral vote and no written reasons were provided.

The appeal process in this case involved consideration of the Policy, which specifically provides that Council, in resolving disputes, shall provide written reasons for any decision, including a summary of the facts upon which the decision is based, a summary of the evidence considered and the rationale for the decision made (ss. 6.4(6)). The Appeal process resembles, in part, a quasi-judicial process, which weighs somewhat in favour of a higher degree of procedural fairness.

[78] Applying the second *Baker* factor, a higher degree of procedural fairness is required where the decision is determinative of the issues and further requests cannot be submitted. Under subsection 6.5(12) of the Policy, when the Appeal Tribunal dismisses a matter this dismissal renders the decision of Council "final and binding and not reviewable on its merits". This factor also supports a higher degree of procedural fairness.

[79] Applying the third *Baker* factor, the importance of the decision to the individuals affected, the Respondent rightly concedes that this matter is important to the Applicants. The Appeal Decision takes away lands from a family that has occupied them, albeit not through title, for well over 50 years. This factor also suggests a higher degree of procedural fairness should be given.

[80] With regard to the fourth *Baker* factor, the legitimate expectations of the persons challenging the decision, if a claimant has a legitimate expectation that a certain procedure will be followed or a certain outcome will be reached, such a procedure or outcome may be required by the duty of fairness.

[81] The Applicants do not address this factor in relation to the Appeal Decision. In relation to the Hearing before the Panel and the Decision of Council, the Applicants submit that they had a legitimate expectation that they would be heard, which included the opportunity to present their case fully, challenge contrary evidence, and the right to counsel. The Applicants argue that these expectations were not met as they were unaware of the case put before the Panel by the Three Persons and they were denied counsel, both of which inhibited their ability to present their case fully. Additionally, the Applicants argue that they had a legitimate expectation that they would receive meaningful reasons for the Decision, and that Council failed to provide sufficiently intelligible reasons.

[82] The Respondent submits that the Applicants could only reasonably expect for the Policy to be followed, and it was.

[83] While I accept that the Applicants had a legitimate expectation that they would be heard, I do not find that this expectation would include a right to counsel or to an oral hearing before the Appeal Tribunal; the Policy outlines that the Appeal Tribunal has discretion as to whether to hold a hearing.

[84] However, the issues in this matter are complex, involving the interpretation of documents dating back to the 1950s, and resolving conflicts between a complicated land registry system and a pre-existing Indigenous customary land holding system. The issues are also significant, in that they threaten to extinguish the Applicants' claim to hundreds of acres of land. Given the significance and complexity of the issues, the Applicants should have received disclosure of the

full evidential record that was before the Panel and the Panel's Recommendations when preparing their appeal.

[85] The Applicants should have had the opportunity to present their case fully. This weighs in favour of a higher degree of procedural fairness.

[86] Turning to the last *Baker* factor, the choice of procedure made by the agency, Council chose the procedure in this matter by enacting the Policy and the Procedures. This favours a higher degree of procedural fairness (*Hill*, above at para 76).

[87] I also note the notion of participatory rights underlying the duty of procedural fairness, and the importance of having a procedure appropriate to the decision being made and its social context. I recognize that the Appeal Decision was made in the context of an Indigenous communal land holdings system, and that significant deference is owed to the members of the Appeal Tribunal.

[88] However, given the facts of this case, the Applicants should be afforded more than the minimal procedural fairness rights. In cases where only minimal procedural fairness rights are required, those rights include notice, the opportunity to be heard and to have one's submissions considered, and notice of the decision (*Hill*, at para 77). I find that the duty of procedural fairness owed to the Applicants in this matter also includes the right to have full disclosure of the evidence being put forward by the other side.

[89] While there is no requirement in the Policy that the Appeal Tribunal offer disclosure to parties, under subsection 6.4(6) of the Policy, Council must provide written reasons for its decision, including a summary of the facts upon which the decision was based and a summary of the evidence that was considered. The Decision's only attempt at this, outlined above, is woefully insufficient, and offers no basis upon which the Applicants could ground a meaningful appeal before the Appeal Tribunal.

[90] The Applicants were not provided with the Recommendations, which would likely have satisfied the requirements of subsection 6.4(6) and offered justification for Council's Decision. To compound matters, the Applicants requested disclosure in their letters of January 15 and January 19, 2018, but this request was neither granted nor acknowledged. The lack of disclosure ensured that the Applicants could not prepare meaningful submissions before the Appeal Tribunal. This effectively denied their right to be heard by the Appeal Tribunal, as well as their right to have their submissions considered by the Appeal Tribunal.

[91] I also note that the Appeal Tribunal failed to follow the Policy in other respects which, while perhaps insignificant in isolation, had the effect of compounding the errors outlined above. First, under subsection 6.5(9), the Appeal Tribunal must meet to determine if a hearing should be held or if the appeal can be determined on the basis of the record. There is no evidence that the Appeal Tribunal ever made this determination of whether the Applicants were entitled to a hearing.

[92] Second, subsection 6.5(11) dictates that the Appeal Tribunal must render a decision within 30 calendar days of the receipt of the appeal. The Applicants wrote to the Appeal Tribunal at latest on January 19, 2018, and the Appeal Decision was not released until April 9, 2018, far outside of the 30 day limit.

[93] Both of these failures compounded the effects of the lack of disclosure on the Applicants' rights to procedural fairness.

[94] I have concerns that the Applicants were also denied procedural fairness before the Panel. As outlined above, it appears likely that the Applicants were not given disclosure of either evidence, written submissions, oral submissions, or some combination thereof, put before the Panel by the Three Persons. If it occurred, this lack of disclosure violated the Applicants' rights to procedural fairness before the Panel.

[95] The Applicants were denied procedural fairness.

E. *Was the decision of the Appeal Tribunal reasonable?*

[96] Given my decision that the Appeal Tribunal's decision was procedurally unfair, it is not necessary to consider whether the decision was reasonable or not – it would be wrong to go on to speculate what the outcome would otherwise have been (*Ghanoum v Canada (Citizenship and Immigration)*, 2011 FC 947 at para 5, citing *Cardinal v Kent Institution*, [1985] 1 SCR 643).

V. Conclusions

[97] As I have found that the Applicants were denied procedural fairness, I will remit the matter to the Appeal Tribunal in accordance with certain directions outlined below.

[98] In reconsidering this matter, the Appeal Tribunal, Council, and the Panel all have a duty to act impartially. This duty requires not only an appearance of impartiality, but actual impartiality that is both meaningful and intelligible.

[99] The importance of impartiality is heightened by the role Council played in defending the Appeal Decision in this judicial review, which, as outlined above, exceeded the proper boundaries of an administrative tribunal participating in a judicial review of its own decision.

[100] Were it possible, I would remit this matter for reconsideration by a decision-maker consisting of individuals who took no part in the initial consideration of this matter. However, given the unique context of First Nations self-governance and the importance of respecting the Blood Tribe's governance procedures, that is not possible. Therefore, it is particularly important that the Appeal Tribunal, Council, and the Panel engage in a meaningful and impartial reconsideration.

JUDGMENT in T-1092-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the decision of the Appeal Tribunal is set aside. The matter is remitted to the Appeal Tribunal for reconsideration in accordance with these reasons and the following directions:

    a. The Appeal Tribunal shall, in accordance with subsection 6.5(13) of the Policy, refer the matter back to Council for further consideration;

    b. The Appeal Tribunal shall direct Council, in accordance with subsection 6.5(14) of the Policy, to refer this matter back to the Panel to hold a *de novo* hearing before the full membership of the Panel;

    c. The Appeal Tribunal shall ensure that the Applicants are fully accorded the procedural protections outlined in both the Kainai Land Use & Occupation Dispute Resolution Policy and the Land Dispute Resolution Hearing Procedures, including in particular:

        i. The right to full disclosure of all evidence put before the Panel, in accordance with sections 5 and 8 of the Procedures;

        ii. The right to disclosure of the written submissions prepared by the other side, in accordance with section 5 of the Procedures;

        iii. The right to respond to the submissions of the other side, in accordance with section 5 of the Procedures;

    d. In the event the decision of Council is appealed, and the matter returns before the Appeal Tribunal, the Appeal Tribunal shall:

i. ensure that the Applicants have disclosure of all evidence that was before Council, including the Panel's recommendations and any additional evidence put before the Appeal Tribunal;

ii. ensure that the Applicants have the opportunity to address such evidence in their submissions before the Appeal Tribunal; and

iii. offer written reasons that address each ground of appeal raised by the Applicants.

2. Costs against the Respondent Council in accordance with Column III of Tariff B.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1092-18
STYLE OF CAUSE:	HARLEY FRANK ET AL V CHIEF AND COUNCIL OF THE BLOOD INDIANS ET AL
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	SEPTEMBER 25, 2018
JUDGMENT AND REASONS:	MANSON J.
DATED:	OCTOBER 10, 2018

APPEARANCES:

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Mr. Paul Reid Ms. Joanne F. Crook	FOR THE RESPONDENTS, CHIEF AND COUNCIL OF THE BAND OF THE BLOOD INDIANS ON THE BLOOD INDIAN RESERVE #148

SOLICITORS OF RECORD:

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