Federal Court  Cour fédérale

Date: 20240725

Docket: T-2277-23

Citation: 2024 FC 1171

Ottawa, Ontario, July 25, 2024

PRESENT: Madam Justice Go

BETWEEN:

BRYAN TOOTOOSIS

Applicant

and

DUANE ANTOINE, BRANDON FAVEL, MARLENE CHICKENESS AND POUNDMAKER CREE NATION #345 CHIEF AND COUNCIL

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Mr. Bryan Tootoosis [Applicant] is a member of the Poundmaker Cree Nation [PCN]. The PCN is a self-governing First Nation located in the province of Saskatchewan. The Applicant was elected as Councillor of the Council of PCN on September 20, 2020 for a four-year term.

[2] On July 12, 2023, the Chief – known as *Okimaw* in Cree – and PCN Council [Chief and Council] issued a Band Council Resolution [BCR] putting the Applicant on indefinite suspension. On November 24, 2023, Chief and Council issued a BCR removing the Applicant as Councillor.

[3] The Applicant seeks a judicial review of the decision of Chief and Council to suspend and then remove him from PCN Council [Decision], naming Chief Duane Antoine, two Council members and PCN Council as the Respondents. The Applicant also seeks an order of retroactive remuneration asserting that his salary was cut off without notice in April 2023.

[4] In granting this judicial review, I disagree with the Applicant that the Respondents acted contrary to PCN custom to enforce his removal. I find there is insufficient evidence to support the Applicant's claim that the custom for removal is based only on a membership vote, and not by a quorum of Chief and Council alone. However, I find that the decision to remove the Applicant was procedurally unfair because the Respondents failed to provide the Applicant with an opportunity to respond prior to putting him on indefinite suspension.

II. Preliminary Issues

[5] Both parties raise preliminary issues.

A. *Preliminary issues raised by the Applicant*

[6] The Applicant raises two preliminary issues.

[7] First, the Applicant initially sought a judicial review of his suspension. When the Respondents issued a second BCR to remove the Applicant in November 2023, the Applicant amended his judicial review application accordingly. The Applicant submits that the two decisions – the indefinite suspension and the removal – form a continuing course of conduct under Rule 302 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. The Respondents take no position on this issue other than reaffirming that the July 12, 2023 suspension was an interim suspension pending an internal investigation into the Applicant's conduct.

[8] Rule 302 of the *Rules* states that, "[u]nless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought." I agree with the Applicant's characterization of the two related decisions made by Chief and Council and will assess the Decision with that submission in mind.

[9] Second, the Applicant questions the credibility and reliability of the Respondents' evidence, asserting that he reserves the right to make arguments where the Respondents rely on evidence concerning "determinative, controversial issues in dispute between the parties." Rather than addressing it as a preliminary issue, I will address this issue as part of my analysis of the main issues, where appropriate.

B. *Preliminary issues raised by the Respondents*

(i) Is the matter moot?

[10] Three days before the hearing, the Respondents wrote to inform the Court that PCN held a general election on May 22, 2024. As a result, the term of the last Council has expired and there is no possibility of reinstatement. The Respondents also wrote that the Applicant was paid his salary. The Respondents therefore argued that the matter should not be heard on the ground of mootness, citing several decisions from this Court including *Beeswax v Chippewas of Thames First Nation*, 2023 FC 767 [*Beeswax*], *Chambaud v Dene Tha' First Nation*, 2022 FC 970 [*Chambaud*], and *Salt River First Nation v Martselos*, 2014 FC 981 [*Martselos*].

[11] In his post-hearing submission, the Applicant submits that the matter is not moot, arguing this Court has concluded that where an election follows a removal, it does not render an application challenging that removal moot: *McKenzie v Mikisew Cree First Nation* 2020 FC 1184 [*McKenzie*]. The Applicant denies he was paid his remuneration while noting that he is seeking a declaration regarding the remuneration, not the amount to be paid, and that the quantum of remuneration is not at issue.

[12] I conclude that this matter is not moot as I find the Applicant's request for retroactive remuneration is a live issue.

[13] The Supreme Court of Canada set out a two-part test for mootness in *Borowski v Canada (Attorney General)*¸ 1989 CanLII 123 (SCC), [1989] 1 SCR 342:

a. Whether the required tangible and concrete dispute has disappeared and the issues have become academic; and

b. If so, whether the Court should exercise its discretion to hear the matter.

[14] Further, in exercising its discretion under part two of the mootness test, the Court is guided by three factors (*Chambaud* at para 27):

a. The absence or presence of an adversarial context between the parties;

b. Whether there is any practical utility in deciding the matter, thereby justifying the use of scarce judicial resources to hear a matter that is moot; and

c. Whether in hearing the matter, the Court would be intruding into Parliament's role of lawmaking.

[15] In this case, the Respondents' submission that the Applicant was paid his salary was based on their assertion that the Applicant was paid advances, which the Applicant denies having received. I also note that contrary to what he stated in his post-hearing submissions, the Applicant does not merely seek a declaration regarding his remuneration. Rather, in his memorandum of argument, the Applicant seeks an order allowing the application with costs and "awarding his retroactive remuneration in a fixed amount to be provided at the date of the hearing." Similarly, in his amended Notice of Application for Judicial Review, the Applicant sought an interim order, on an emergency basis, directing the Respondents to pay the Applicant his remuneration until the application for judicial review is determined. No such interim order was ever issued by the Court.

[16] The parties clearly disagree on whether the Applicant received his remuneration since April 2023, before his suspension and onwards. The Applicant's entitlement to remuneration is at least in part due to Chief and Council's decision to suspend and later remove him from Council. On this basis alone, I determine there is a live issue between the parties.

[17] I find support for my conclusion in *McKenzie* where Justice Strickland found the issues before her were not resolved at the expiration of the term because there remained a controversial issue, namely, the remuneration during the suspension.

[18] I find the cases the Respondents cite are either distinguishable on the facts or otherwise do not assist them.

[19] The Respondents cite *Beeswax* for this Court's "comprehensive review of the principles governing remuneration and award of damages." In *Beeswax*, Justice Strickland conducted a review of the case law dealing with whether or not the Court has jurisdiction to make an order for remuneration. At para 126, while noting none of the cases explicitly considered the Court's jurisdiction, Justice Strickland concluded that "it is implicit that in each case the Court was of the view that it had jurisdiction to order that the applicants receive the remuneration that they would have received had they not been wrongfully removed from office."

[20] The Respondents cite *Chambaud* at para 51 for their argument that dealing with the issue of remuneration in this case would amount to lawmaking "in the abstract." Unlike *Chambaud*, however, the Applicant in this case is not seeking a declaration with regard to the constitutionality of a legislative provision. His interest in seeking remuneration is not purely jurisdictional, but rather practical.

[21] Finally, the case of *Martselos* is also distinguishable as the applicants in that case sought only reinstatement for the remainder of their term as councillors; they did not seek a remedy for remuneration: *Martselos* at para 24.

[22] I further reject the Respondents' submission that if the Applicant were entitled to remuneration, then PCN Council would be in contempt of the Court if they decide not to provide the Applicant with the retroactive remuneration he seeks due to the advances made. I reject this argument for two reasons. First, the Respondents' argument would lead to an absurd outcome whereby the Court will deny a relief a party seeks because the opposing party may not obey a court's order. Second, any order from this Court directing PCN Council to pay the Applicant remuneration will not prevent PCN from pursuing the Applicant for the advances, if any, it has given him.

[23] In conclusion, I find the matter is not moot.

(ii) Does this Court have jurisdiction over the matter?

[24] The Respondents had previously filed a motion challenging this Court's jurisdiction in hearing this matter, arguing that Chief and Council of PCN is not a "federal board, commission or other tribunal" under subsection 18(1) and section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. No order was made by this Court on the issue of jurisdiction. However, the Respondents did not pursue their jurisdictional argument at the hearing. I further note that the Court recently heard and rejected a similar argument in *Bellegarde v Carry the Kettle First Nation*, 2024 FC

699 [*Bellegarde*]. Assuming that the Respondents continue to challenge the Court's jurisdiction, I adopt the Court's reasoning in *Bellegarde* and reject their position.

III. Analysis

[25] The Applicant argues that the Respondents acted contrary to PCN custom to enforce his removal and submits that the Decision was both procedurally unfair and unreasonable. The Respondents, on the other hand, submit that consistent with PCN unwritten custom, Chief and Council had the authority to remove the Applicant due to his conduct. The Respondents further submit that they put the Applicant on notice of his suspension and the Applicant denied himself the right to be heard. Finally, the Respondents submit the Decision was reasonable.

[26] I summarize the issues before me as follows:

a. Did Chief and Council have the jurisdiction to remove the Applicant from his position as Councillor?

b. Was the Decision to suspend and remove the Applicant procedurally fair?

c. Was the Decision to suspend and remove the Applicant reasonable?

d. Is the Applicant entitled to retroactive remuneration?

A. *Did Chief and Council have the jurisdiction to remove the Applicant from his position as Councillor?*

[27] The parties agree that PCN follows its own custom of selecting and removing members of Chief and Council. However, they disagree on the nature of PCN's custom.

[28] In brief, the Applicant submits that PCN custom of selecting and removing members of Chief and Council is both oral and written, and that the custom for removal is based on a membership vote only. The Applicant further submits that since the Respondents did not follow established custom in making the Decision, the Decision was therefore made without jurisdiction, citing *Coutlee v Lower Nicola First Nation*, 2024 FC 47.

[29] The Respondents, on the other hand, argue that PCN band custom is passed down orally, and that PCN had never adopted nor ratified any written regulation or election act that governs PCN custom.

[30] In light of the evidence before me, I find the Applicant has not demonstrated that PCN's custom for removal is based on a membership vote only. I conclude that Chief and Council also have the authority to remove a councillor, based on PCN's unwritten custom.

[31] In coming to my conclusion, I acknowledge that there is a presumption against judicial intervention in Indigenous decision-making in order to respect Indigenous self-government: *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 [*Whalen*] at para 19 and *Pastion v Dene Tha' First Nation*, 2018 FC 648 [*Pastion*] at paras 22-23.

[32] I am also mindful that "Indigenous decision makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue:" *Pastion* at para 22.

[33] With that, I turn to the specific arguments the Applicant advances and my reasons for rejecting them.

[34] First, the Applicant submits custom can be established through the enactment of a codified law, but it can also be established through practice and conduct: *Whalen* at para 36. The Applicant argues that the overwhelming evidence is that removals since the 1990s must be done on the grounds outlined in the Poundmaker Cree Nation Custom Regulations, 1998 [1998 Regulations] and through a band membership meeting. The Applicant submits the written and unwritten custom complement one another, as reflected in PCN's consistent practice.

[35] Second, the Applicant argues that since at least the 1980s, all removals have been done by band membership meeting, and that it is an accepted and established practice that gives rise to an unwritten custom.

[36] I am not persuaded by the Applicant's arguments for four reasons.

[37] First, I agree with the Respondents that since the 1998 Regulations were never ratified by PCN membership, they do not have the force of law. Along the same vein, I reject the Applicant's submission that the Chief had conceded that the 1998 Regulations were binding on PCN during his examination. Instead, I find the Chief acknowledged that the 1998 Regulations were drafted in response to the federal government's demand but that PCN custom remains unwritten.

[38] Second, the undisputed evidence suggests that prior to 1998, some removals were done by a quorum of Chief and Council without involving the membership. In considering what constitutes PCN's unwritten custom, I find it relevant to take into account the full history of removals of councillors by PCN, and not just those that occurred after 1998, particularly since the 1998 Regulations were never ratified.

[39] Third, there was at least one suspension since 1998 effected through a quorum of Chief and Council, and not by a membership vote. According to Chief Antoine, a quorum of Council suspended two councillors in 2011 because they were fighting in the band office. Chief Antoine pointed out that the Applicant was part of the quorum that signed the BCR, as the Applicant was a councillor at the time. The Applicant submits the 2011 case is distinguishable as it involved a suspension and not removal. With respect, the Applicant was also subject to a suspension initially.

[40] Fourth, I note that the Applicant himself tried to remove Chief Antoine by way of a BCR and quorum of Chief and Council in March 2023, without going through the membership.

[41] The Applicant points to three additional factors that demonstrate the Respondents' non-compliance with established custom for removals:

a. The Respondents' attempt to remove the Applicant at a band information meeting on April 27, 2023, through the Chief's sister, which was resoundingly rejected; the motion to remove the Applicant was not seconded;

b. In 2014, a custom election act [2014 Custom Election Act] was put to a ratification vote and was passed by band membership. However, Chief and Council refused to ratify the 2014 Custom Election Act although it provides a clearer process for impeachment and non-confidence. The Respondents have refused to provide a copy

of the 2014 Custom Election Act, evidencing Chief Antoine's dictatorship-like leadership; and

c. The Applicant cites the writing by Professor Sylvia McAdams to show that Chief Antoine's leadership runs contrary to Cree law. The Applicant submits that relying on academic knowledge with respect to Indigenous laws is a common practice of the Federal Court.

[42] The first two additional factors do not establish the Applicant's core position that removals from Council must be voted on by membership. As to the last argument, I note that the Applicant does not submit any evidence to illustrate that Professor McAdams' scholarly writing has been adopted by PCN. On the contrary, I note that almost all of the witnesses called by the Respondents who are members of PCN affirmed in their affidavit that to their knowledge, Professor McAdams is not a member of PCN and they have never observed her at any meeting of the membership. Some witnesses testified that they do not know who Professor McAdams is.

[43] In addition to the above, whether or not the minutes of removals are required to be posted, as the Applicant submits, is not relevant in my determination of the jurisdiction of Chief and Council to remove councillors. I further note that the evidence about the requirement to post minutes of removals is mixed, and appears not to be a consistent practice.

[44] Finally, I note the Applicant takes issues with some of the Respondents' evidence, noting the similarities among some of the affidavits, and that one affiant admitted to receiving a nominal fee for affirming his affidavit. The Applicant asks the Court to give such evidence no weight, citing *Labelle v Chiniki First Nation*, 2022 FC 456 [*Labelle*] at para 77.

[45] I find *Labelle* distinguishable. Here, the Respondents submitted to the Court, the affidavits of six individuals – not counting Chief Antoine – including a former chief of PCN, a knowledge keeper, and former councillors. While I have questions about the objectivity of some of the witnesses, the Applicant has failed to convince me that I should give the evidence of all of the witnesses no weight. The fact that their evidence is consistent is not *per se* a reason for rejecting it. Rather, the evidence confirms, consistently, to the unwritten custom of PCN, and the authority of Chief and Council to remove councillors.

[46] In sum, I find the Applicant fails to demonstrate that the established PCN custom only allows removals by a membership vote and that Chief and Council has no authority to remove councillors.

B. *Was the Decision to suspend and remove the Applicant procedurally fair?*

[47] The Applicant raises three issues related to his argument that the Respondents breached the duty of procedural fairness:

a. The Applicant was not put on notice of his suspension in July 2023;

b. The Respondents, in particular Chief Antoine, were biased in their decision to remove the Applicant; and

c. The Respondents removed the Applicant in retaliation to certain actions taken by the Applicant against Chief Antoine; therefore the decision to remove the Applicant was made in bad faith.

[48] Chief and Council issued a BCR dated July 12, 2023 suspending the Applicant from his duties as Councillor “with pay effective immediately” pending the outcome of an internal review into certain conduct-related matters. These conduct-related matters refer to the Applicant posting

statements in April 2023 on social media and distributing “unauthorized, damaging and misleading communications” to PCN members and the public about fellow councillors and PCN staff that Chief and Council considered “false” and “inflammatory.” The Applicant submits that until the Certified Tribunal Record [CTR] – which contains a copy of the July 12, 2023 BCR – the Applicant had no record of this BCR.

[49] I find there was a breach of procedural fairness because the Applicant did not have the opportunity to respond prior to his July 12, 2023 suspension.

[50] In submitting that the Applicant denied himself the right to be heard, the Respondents make several arguments stating that the Applicant was put on notice of his suspension and removal.

[51] First, the Respondents submit that the Applicant publicly stated he would not attend meetings. For instance, in one of the April statements dated April 24, 2023, the Applicant and another Councillor claimed that they “[would] not attend meetings without an agenda provided two weeks in advance of the meeting date.” The Respondents also point to the May 4, 2023 press release from PCN stating that the Applicant and another Councillor refused to attend the April 27, 2023 meeting “to address their reckless and public defamatory allegations against Chief Duane Antoine,” and that “[t]hey were provided with several weeks notice of the membership meeting and still refused to attend.”

[52] I reject this argument. The Applicant's statement as noted above does not represent an outright refusal to attend meetings as the Respondents contend. Rather, it signals the Applicant's refusal to attend meetings if there was no advanced agenda provided. Further, the evidence supports the Applicant's claim that no notice was given in advance of the April 27, 2023 meeting that it would address the suspension or removal of the Applicant. This item was introduced by Chief Antoine's sister at the meeting itself and no one seconded it.

[53] Second, the Respondents submit that the Applicant was put on clear notice in the May 5, 2023 cease and desist letter and yet the Applicant persisted with his conduct by issuing a further defamatory statement on July 8, 2023. I do not find the May 5, 2023 letter constitutes a notice of suspension or removal to the Applicant. The relevant portion of the May 5, 2023 letter reads as follows:

> Based on your publication of the False Statements on social media, PMCN and Chief Antoine have sufficient grounds to bring a claim against you for legal actions, including, but not limited to:
>
> - Defamation;
> - Intentional interference with economic relations; and,
> - Online harassment.
>
> Consider this letter a formal demand that you **immediately** cease in making the False Statements or any similar defamatory statements and **take immediate steps to remove your social media postings of this nature.** Further, we demand that you refrain from making any further postings about PMCN (without quorum) on social media platforms, or anywhere else online or in any other public forum.
>
> Should you fail to remove the social media postings and continue making defamatory statements, PMCN and Chief Duane Antoine will commence legal action against you without further notice and aggressively pursue all remedies available at law to repair the damage caused by the False Statements.
>
> [Emphasis original]

[54] In short, the May 5, 2023 cease and desist letter demanded the Applicant remove and cease his allegations and cautioned the Applicant that PCN would seek further legal action against him on the basis of defamation, intentional interference with economic relations and online harassment. The letter did not mention the possibility of the suspension and/or removal of the Applicant from his duties as councillor should his conduct persist.

[55] Third, the Respondents submit that the Applicant was put on notice of his interim suspension by a letter dated July 12, 2023 informing him of the suspension. The Respondents submit that while the Applicant denies seeing the letter, including his denial at his cross-examination, he confirms having seen the documents contained within the CTR at para 27 of his supplemental affidavit.

[56] I disagree. The so-called concession from the Applicant does not confirm that the Applicant was aware of his suspension. In the paragraph the Respondents point the Court to, the Applicant indicates that he saw the documents relating to his removal for the first time when the CTR was filed. In any event, the July 12, 2023 letter itself is not contained in the CTR, only the July 12, 2023 BCR suspending the Applicant is.

[57] Both in his affidavit and during his examination, the Applicant stated that he found out about his indefinite suspension from his sister who said it was on Facebook on or about July 13, 2023 and told the Applicant to check his email. During his examination, the Applicant said he was unable to check his email and did not read the July 12, 2023 letter that day.

[58] With that noted, however, there is a letter dated July 28, 2023 (Exhibit 4 of the Applicant's affidavit) addressed to the Ministers of Crown-Indigenous Relations and Northern Affairs Canada and Indigenous Services Canada, in which the Applicant writes:

> My "Suspension Letter" dated July 12, 2023, is irrelevant as neither Chief Duane Antoine nor Quorum have the power to arbitrarily suspend a fellow elected official.

[59] I take from the July 28, 2023 letter that the Applicant at some point became aware of the July 12, 2023 letter.

[60] However, I do not find the July 12, 2023 letter provided the Applicant with an opportunity to respond prior to his suspension. Rather, the contents of the July 12, 2023 letter mirror the BCR of the same date. Both documents advised the Applicant of Council's concerns regarding "conduct-related matters" and that "effective immediately" the Applicant was suspended with pay, pending an internal investigation. The letter did not refer to any mechanism with which the Applicant could respond to Council's concerns prior to the suspension, nor did it provide a timeframe for the internal investigation, thus rendering it indefinite.

[61] Fourth, the Respondents submit that the Applicant was put on notice of his removal in the November 6, 2023 disclosure letter, where he was also provided with the opportunity to respond. The Respondents also note that the letter informed the Applicant that Chief and Council would proceed in the absence of the Applicant's response if he fails to respond.

[62] The Respondents rely on *Salt River Nation #195 (Salt River Indian Band #759) v Martselos*, 2008 FCA 221 [*Martselos 2008*] and *Bighetty v Barren Lands First Nation*, 2014 FC 171 [*Bighetty*] in support.

[63] I reject this argument.

[64] *Martselos 2008* is distinguishable as the evidence there indicated that members of Council for the River Nation #195 signed a document to notify the Chief Elect that Council was considering her immediate removal from office. Council attempted twice to deliver the document, but the Chief Elect refused delivery and later refused to open the envelope. The Federal Court of Appeal found that the Chief Elect's refusal amounted to willful blindness, precluding her from pleading lack of notice or procedural fairness: *Martselos 2008* at paras 34-36. Here, the Applicant did not receive notice in advance of Chief and Council's decision to put him on suspension.

[65] Similarly, in *Bighetty* the factual circumstances are quite different. In that case, the removal of the applicant as Chief was discussed at a staff meeting and at a regular band meeting. Members of the band circulated a petition asking the Election Appeal Committee to remove the applicant as Chief. The Electoral Officer confirmed that the required number of signatures was present and gave the petition to the applicant. The applicant refused to accept the petition, rejected the Committee's authority to deal with the petition, and attempted to set up a parallel structure to address the actions and legitimacy of the incumbent Committee. In light of the

applicant's refusal to accept the petition, the Court found the applicant could not claim that she was denied the opportunity to be heard: *Bighetty* at paras 50-53.

[66] The Respondents make additional submissions with respect to the removal of the Applicant on November 24, 2023, stating that by notifying counsel for the Applicant about their preliminary investigative findings, and providing the Applicant with an opportunity to make a written response, the Applicant was thus given the opportunity to respond prior to his removal.

[67] I find that the process taken by the Respondents in November 2023 does not cure the breach of procedural fairness that had already occurred at the start of the Applicant's indefinite suspension. I find support for this conclusion in *McKenzie* where the Court concluded that a suspension that was, in effect, indefinite amounted to a removal: *McKenzie* at para 50. The Court went on to consider the respondent's position that the applicants had an ongoing opportunity to be heard. The Court rejected this argument in part because the decision to suspend had already been made, before the applicants were afforded an opportunity to be heard: *McKenzie* at para 95. I draw the same conclusion in this case.

[68] At the hearing, the Respondents further submitted that PCN custom does not always require notice to be given in advance of the suspension or removal of councillors, and that the removal can take place on the spot. With all due respect, the Court's recognition of PCN's right to self-governance does not mean that PCN council, "whether chosen according to 'custom' or elected pursuant to the Indian Act, now have unlimited power:" *Thomas v One Arrow First*

Nation, 2019 FC 1663 [*Thomas*] at para 30, cited in *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 at para 62. As Justice Grammond continued to explain in *Thomas* at para 30:

> …. This Court recognizes that First Nations may create or maintain their own governance systems, provided that there is a "broad consensus" among their members: *Bigstone v Big Eagle*, [1993] 1 CNLR 25 (FCTD) at 34; *McLeod Lake Indian Band v Chingee* (1998), 165 DLR (4th) 358 (FCTD). There are several ways of proving such a broad consensus, thus allowing for the continuity of traditional systems while preserving the possibility of transformation: *Whalen*, at paragraphs 33-40. Absent such evidence, however, we should not presume that a First Nation's membership intended to confer unlimited powers to its council. Indeed, the concept of unlimited power can hardly be uncoupled from the Western concept of sovereignty and is unlikely to be appropriate to understand the governance systems of Indigenous peoples: see, in this regard, Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847.

[69] While the issue in *Thomas* involved the process to call an election outside the regular cycle, the same principle should apply in assessing the process adopted by PCN to remove or suspend councillors. The Court has consistently applied the principle of procedural fairness to band council decision-making processes: *Thomas* at para 35 citing *Sparvier v Cowesses Indian Band*, [1993] 3 FC 142 (TD). The right to know the case to be met and to be given an opportunity to respond are all part of the basic tenets of procedural fairness.

[70] PCN may well have reasons to suspend and remove the Applicant. However, this does not give Chief and Council unlimited power to deprive the Applicant of his right to due process. This is particularly so given there is no appeal process in place at PCN to deal with decisions of suspension and removal. Indeed, the lack of an internal appeal mechanism was what compelled the Applicant to seek recourse from this Court in the first place.

[71] I appreciate that there may well be circumstances where removal on the spot is necessary. However, the Respondents have not demonstrated that the Applicant's case is one of them. On the contrary, the Respondents' repeated assertions that the Applicant has been given ample opportunities to respond runs counter to their assertion that Chief and Council has the authority to remove the Applicant "on the spot."

[72] For all the above stated reasons, I find there was a breach of procedural fairness and on this basis alone I grant the application.

C. *Was the decision to suspend and remove the Applicant reasonable?*

[73] As I find the issue of procedural fairness to be determinative, I need not consider the issue of reasonableness of the Decision.

D. *Is the Applicant entitled to retroactive remuneration?*

[74] This Court has jurisdiction to order the payment of remuneration on judicial review, as recently confirmed in ***Bellegarde*** at para 157 citing *Saulteaux v Carry the Kettle First Nation*, 2022 FC 1435 at para 92; *Beeswax* at para 130; *McKenzie* at para 99; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 43; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 42; *Heron v Salt River First Nation No. 195*, 2024 FC 413 at para 85.

[75] In all of these cases, the Court ordered the band council to pay outstanding remuneration to the applicant from the date of their suspension or removal, until the end their term or until the date of the next election.

[76] In this case, there is an additional wrinkle. The Applicant claims that his pay has been suspended since April 2023, before he was suspended from Council. The Respondents do not dispute the pay suspension *per se*, rather they argue the Applicant owes PCN a debt due to the advances he received. As I have noted above, my decision does not affect in any way the right of PCN to pursue the Applicant for any outstanding debts. Having determined that the Applicant was not properly suspended and then removed from office, I find the Applicant entitled to receive any outstanding remuneration, including any remuneration that was withheld prior to his indefinite suspension, until the end of his term as councillor.

[77] On a final note, all parties before me assert that their actions are motivated by a desire to protect the interests of PCN and its people. The Court encourages the parties to continue to keep those interests in mind as they move forward in a mutually respectful manner that fully reflects the honour of their nation’s rich and remarkable history.

IV. Conclusion

[78] The application for judicial review is granted with costs. The Applicant is entitled to retroactive remuneration from the day of the suspension of his pay as councillor until the end of his term.

[79] The Court directs counsel to provide additional submissions on the matter of costs as set forth in the Judgment below.

JUDGMENT in T-2277-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted with costs.
2. The Respondent PCN is ordered to pay all remuneration that the Applicant would have earned and been entitled to as councillor from the date of the suspension of his remuneration, until the end of his term as councillor, payable within 45 days.
3. The Court directs further submissions on costs. The Applicant will serve and file his submissions on costs by August 15, 2024. The Respondents will serve and file their submissions on costs by September 5, 2024. The submissions will not exceed 10 pages.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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