

Federal Court



Cour fédérale

Date: 20210624

Docket: T-1224-20

Citation: 2021 FC 648

Fredericton, New Brunswick, June 24, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

MARY FRANCES DUCKWORTH

Applicant

and

**CALDWELL FIRST NATION AND
CALDWELL FIRST NATION BAND
COUNCIL**

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Mary Frances Duckworth, challenges the September 15, 2020 decision of the Caldwell First Nation (CFN) Band Council to remove her as the elected Chief. For the reasons that follow this judicial review is granted as the decision of the CFN to remove the Chief was done in a manner that was not procedurally fair.

Background

[2] The CFN is a First Nation in Leamington, Ontario, with approximately 360 members. The CFN is governed by a Chief and four Councillors who are elected under the CFN Custom Election Code (the Code). The CFN has also enacted a Governance Policy.

[3] Ms. Duckworth has been elected twice as Chief of the CFN. In January 2018, she was elected Chief during a general election. In November 2018, Council removed her from office for “malfeasance.” She was re-elected as Chief on February 16, 2019.

[4] In June 2019, CFN Council requested a breach of privacy investigation (the investigation) to be undertaken by independent investigator, Sheryl Johnson. The investigation was requested as the result of a complaint filed by a CFN employee against Ms. Duckworth and others in relation to events that took place in 2018. The May 7, 2020 Executive Summary of the Investigation Report (Investigation Report) was included the Court record. The Investigation Report notes that Ms. Duckworth choose not to participate in the investigation.

[5] On February 7, 2020, Ms. Duckworth went on sick leave.

[6] As will be discussed in more detail below, the evidence shows that the relationship between Ms. Duckworth and the Councillors of the CFN is contentious.

[7] In the summer of 2020, Ms. Duckworth and the Council were engaged in without prejudice discussions. On August 14, 2020, Ms. Duckworth's legal counsel submitted a without prejudice proposal to CFN's legal counsel.

[8] On September 8, 2020, Ms. Duckworth's lawyer wrote to CFN's lawyer enclosing a note from Ms. Duckworth's doctor clearing her to return to work and advising that she would be returning to work effective immediately.

[9] On September 9, 2020, during an in-camera meeting, the Council passed a motion to remove Ms. Duckworth as Chief.

[10] On September 15, 2020, Council advised Ms. Duckworth in writing of the decision to removal her as Chief. It is this decision for which Ms. Duckworth seeks judicial review.

Decision Under Review

[11] The removal decision dated September 15, 2020, is comprised of a cover letter, with attachments, on CFN letterhead, signed by four members of the CFN Council. The cover letter refers to Ms. Duckworth's August 14, 2020 correspondence and states: "We fully reject the correspondence."

[12] The letter states: "We are not willing to consider paying the sum of \$470,461.51, or any amount, for you to resign and not seek re-election...the threat to sue the Nation is in direct

violation of our Governance Policy and places you in a direct conflict of interest to hold the position of Chief ... For this, and other reasons outlined below, the Council has determined you are hereby removed from office as elected Chief, effective immediately.”

[13] The “reasons outlined below” are contained in the attached four pages titled “Violations and Breaches of Policies” which lists the violations of the Governance Policy and Code of Conduct attributed to Ms. Duckworth.

[14] On September 15, 2020, the CFN also prepared a Memo addressed to “Members of Caldwell First Nation” stating in part:

Considering all of the above violations and breaches of policies, demand for a high sum of money, and threats of litigation against the Nation, the Council of Caldwell First Nation has had no choice but to exercise its obligations and duty and remove Mary Duckworth as Chief of Caldwell First Nation, effective immediately.

CFN Codes / Policy

[15] The relevant provisions of the CFN *Election Code* are as follows:

12.3 The Council may determine that the office(s) of Chief and/or Council is vacant if:

- (a) The Chief or Councillor fails to perform their fiduciary duties owed to the members (e.g. malfeasance); or
- (b) Is absent from 4 (four) consecutive regularly scheduled meetings of the Council without authorization of the Council, and such authorization may not be unreasonably withheld.

[16] The relevant provision of the CFN *Governance Policy* are as follows:

13. Procedure for Contravention of Governance Policy

1. If a Councillor is found to be in contravention of this Governance Policy in carrying out his or her duties, the Council has the right to make and enforce its own rules and reprimand that individual. In such circumstances, the following guidelines shall be followed:

a) The offending Councillor may be reprimanded by the Council by a letter being sent to the Councillor outlining the circumstances and corrective actions required to be taken by the Councillor;

b) continued contravention can result in a motion of reprimand being brought before the Council. This motion may result in a voluntary withdrawal from Council by the Councillor or upon a vote of the majority of the Council, punitive action may be taken by the Council, including, but not limited to:

i. publishing the motion and letter of reprimand;
and/or

ii. removal of the Councillor from Council
Committees; and/or,

iii. forfeiture of Council honoraria.

Code of Conduct Part C Section 11

Section 11.3

Council shall observe the confidentiality of all-in camera Council meetings and other Council information declared to be confidential

Section 12.1

Councillors shall avoid putting themselves in a position in which their private interests and those of Caldwell First Nation might be perceived to be in conflict.

Issues

[17] Based upon the submissions of the parties, I would frame the issues as follows:

- a) Was the removal of Ms. Duckworth as the Chief done in a procedurally fair manner?
- b) If the removal decision was procedurally fair, was the removal decision reasonable?
- c) What is the appropriate remedy?

Standard of Review

[18] Procedural fairness issues are considered on the correctness standard of review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107).

[19] The Court will assess if the procedure adopted by the Council was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34 to 56).

[20] The reasonableness of the Council's decision is assessed on whether the decision "bears the hallmarks of reasonableness - justification, transparency and intelligibility - and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99).

Analysis

- a) *Was the removal of Ms. Duckworth as the Chief done in a procedurally fair manner?*

[21] Ms. Duckworth argues that she had no prior notice of her removal and had no opportunity to make submissions to Council on the allegations against her before Council made the removal decision. CFN concedes that Ms. Duckworth did not have notice of the meeting of September 9, 2020, during which Council made the decision to have her removed as Chief.

[22] In considering if the process followed in this case was fair, the Court considers the factors outlined in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 at para 46 [*Baker*] which were reaffirmed in *Vavilov* as follows at para 77:

Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: [citations omitted].

[23] The *Baker* factors are applied while taking into consideration the factual context and have been applied in the context of disputes arising from removals of First Nation Chiefs or Councillors in *Okemow v Lucky Man Cree Nation*, 2017 FC 46 at paras 11 and 30; *McCallum v Peter Ballantyne Cree Nation*, 2016 FC 1165 at para 28; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 32 and *Cardinal v Bigstone Cree Nation*, 2018 FC 822 at para 29.

[24] As noted by Justice Strickland in *Morin v Enoch Cree First Nation*, 2020 FC 696 at para 34 [*Morin*]:

Significantly, notice and an opportunity to make representations have been characterized as the most basic requirements of the duty of fairness (*Orr v Fort McKay First Nation*, 2011 FC37 at para 12 (“*Orr*”); *Gadwa* at paras 48-53). Further, the Federal Court of Appeal has stated that, “No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond” (*Canadian Pacific* at para 56).

[25] The CFN *Election Code* gives Council authority under section 12.3 (above) to remove a Chief for failing to perform their fiduciary duties. The parties acknowledge that the phrase “fiduciary duties” is not defined anywhere in the *Election Code*. According to the CFN, this affords the Council a wide discretion in considering conduct that amounts to a breach of fiduciary duties and merits removal as Chief. The *Election Code* also does not define the word “malfeasance”. The CFN suggests that the dictionary meaning of malfeasance of “wrongdoing or misconduct” would be applicable.

[26] CFN argues that Ms. Duckworth had knowledge of the removal process under the *Election Code* as she was herself previously removed as Chief. Likewise, she was on Council when Chief Hillier was removed in September 2017.

[27] The CFN argues that Ms. Duckworth had full knowledge and therefore notice of the issues with her conduct as well as opportunity to respond to the concerns raised by Council. Furthermore, the CFN argues that because of the investigation, Ms. Duckworth knew of the issues that lead to her removal. The CFN characterises Ms. Duckworth’s refusal to participate in the investigation as Ms. Duckworth failing to avail herself of the opportunities to respond to Council’s concern.

[28] The CFN points to a letter of January 14, 2020 to Ms. Duckworth where the Councillors advised Ms. Duckworth of their position that her communications to Indigenous Services Canada was in breach of the CFN's *Governance Policy*.

[29] The CFN also relies upon the findings outlined in the Investigation Report as justification for the removal of Ms. Duckworth. The Investigation Report references Ms. Duckworth's post-complaint conduct and characterizes it as attempts to "(a) control, delay, derail, undermine or halt the investigation, dictate the Investigation's process and/or outcome and/or interfere with it process; (b) retaliate against the Complainant for filing the Complaint; and (c) deceive" (page 6).

[30] On June 11, 2020, Ms. Duckworth's legal counsel sent a letter to CFN's legal counsel challenging the Investigative Report, and stating "Any attempt by Council to impose punitive measures against Chief Duckworth on the basis of this report will be vehemently contested. In that respect, Chief Duckworth is considering a number of remedies, including but not limited to an injunction."

[31] The CFN argues that considering this response, Ms. Duckworth clearly had "notice" that Council was going to take action.

[32] It is clear from the record that the parties have a contentious relationship. However, the only issue on this judicial review is the CFN Council's decision to remove Ms. Duckworth and whether the Council afforded Ms. Duckworth a procedurally fair process.

[33] Contrary to the submissions of CFN's legal counsel, the Removal Decision does not overtly rely upon the findings of the Investigation Report. The only document referenced in the Removal Decision is Ms. Duckworth's "without prejudice" settlement proposal of August 14, 2020. Likewise, the pages that accompany the Removal Decision list numerous violations and breaches of policies attributed to Ms. Duckworth, however, there is no direct reference to the Investigation Report. There are two references to an "investigation" in relation to sections 11.13 and 12.1 of the *Code of Conduct*. In contrast, there are ten references to Ms. Duckworth's "without prejudice" settlement offer.

[34] It is clear from the wording of the Removal Decision that the "without prejudice" settlement offer heavily informed CFN Council's decision. The reliance of CFN on the "without prejudice" settlement offer is troubling. As noted by the Federal Court of Appeal in *Paul v Canadian Broadcasting Corporation*, 2001 FCA 93 at para 28, "in short, what parties say against their interest during negotiation is without prejudice in the sense that it cannot subsequently be used against them."

[35] During oral submissions, Counsel for the CFN claimed that the grounds for Ms. Duckworth's removal were her behaviour and the findings in the Investigation Report. However, the Removal Decision letter is written as a strong repudiation of the "without prejudice" offer, and uses the offer as grounds to justify her removal as Chief. This was confirmed by Ms. Perkins, the CFN Acting Chief, who stated during her examination that Council interpreted Ms. Duckworth's without prejudice letter as "bribery" and "extortion."

[36] Here, the settlement discussions, however contentious, cannot be said to be tantamount to bribery or extortion. That said, it is undeniable that CFN nonetheless relied upon the without prejudice offer as grounds to remove Ms. Duckworth as Chief.

[37] The reliance of CFN on the “without prejudice” offer as grounds, in whole or in part, to remove Ms. Duckworth as Chief is even more troubling considering that CFN was acting with the benefit of legal counsel. The Minutes from the September 9, 2020 meeting when Council made the decision to have Ms. Duckworth removed notes their legal counsel as being in attendance.

[38] Although CFN says it relied upon the *Election Code* as grounds to remove Ms. Duckworth, the Removal decision refers to breaches of the *Governance Policy*. The language of the *Governance Policy* only refers to Councillors, however accepting that it would also apply to the Chief, the *Governance Policy* only notes reprimands and removals from Committees. It does not refer to removal from office. Therefore, the *Governance Policy* itself does not provide grounds for the removal of a Chief.

[39] Overall, and despite the troubled history between the parties, I am not satisfied that Ms. Duckworth had sufficient notice of her removal as Chief. Basic procedural fairness rights were due to Ms. Duckworth. As noted in *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 (*Mikisew Cree First Nation*) at para 94:

...they failed to provide the Applicants with notice of their intention to discuss their suspension, to permit the Applicants the opportunity to know the case against them and to make submissions responding to the allegations. These requirements are

the most basic tenants of procedural fairness. They cannot be ignored simply because an administrative decision maker is of the view that its position is the correct one.

[40] The decision to remove a Chief elected by the community is a serious decision. Basic procedural fairness required that the CFN provide Ms. Duckworth with notice and an opportunity to make submissions on the decision to remove her as Chief.

[41] Further, as the *Election Code* does not provide any mechanism for an appeal or reconsideration of the Council's decision this tends toward requiring yet a higher degree of procedural fairness (*Lecoq v Peter Ballantyne Cree Nation*, 2020 FC 1144 at para 46).

[42] The *Baker* factors required, at a minimum, that CFN Council provide Ms. Duckworth with an opportunity to be heard before Council made its decision to remove her as Chief. In *Baker* at para 25, the Court notes that the more important the decision and the greater the impact of the decision, the higher the procedural fairness protections that should be afforded (see also *Ledoux v Gambler First Nation*, 2019 FC 1465 at para 25). The fact that Ms. Duckworth was the duly elected Chief increases the degree of fairness owed to her.

[43] The process undertaken by the CFN breached Ms. Duckworth's procedural fairness rights.

b). If the removal decision was procedurally fair, was the removal decision reasonable?

[44] As I have concluded that the process undertaken by the CFN Council was not procedurally fair to Ms. Duckworth, any decision arising from that process is also unreasonable.

c). What is the appropriate remedy?

[45] Ms. Duckworth asks to be reinstated as the Chief of CFN, however in my view, the appropriate remedy is to set aside the September 15, 2020 decision of the CFN Council and refer the matter back to Council for redetermination by providing Ms. Duckworth with the appropriate procedural fairness rights.

[46] Ms. Duckworth is entitled to costs. She requested elevated costs because of the conduct of CFN. However as noted above, Ms. Duckworth's own conduct has contributed to the circumstances that unfolded, accordingly, in the exercise of my discretion, I award Ms. Duckworth costs in the all-inclusive sum of \$3,000.00.

JUDGMENT IN T-1224-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The September 15, 2020 decision of the CFN Council is set aside and the matter is referred back to Council for redetermination after affording Ms. Duckworth appropriate procedural fairness rights.
2. Ms. Duckworth is awarded costs in the all inclusive amount of \$3,000.00.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1224-20

STYLE OF CAUSE: MARY FRANCES DUCKWORTH v CALDWELL
FIRST NATION ET AL

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE

DATE OF HEARING: JUNE 2, 2021

JUDGMENT AND REASONS: MCDONALD J.

DATED: JUNE 24, 2021

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