Federal Court Cour fédérale

Date: 20221021

Docket: T-1695-21

Citation: 2022 FC 1435

Ottawa, Ontario, October 21, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ORLEEN SAULTEAUX

Applicant

and

CARRY THE KETTLE FIRST NATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Orleen Saulteaux [Applicant] seeks judicial review of a November 3, 2021 Band Council decision of Carry the Kettle First Nation [CKFN or Respondent] to remove the Applicant from her position as Councillor [Decision].

[2] The Applicant seeks an Order setting aside the Decision, an Order declaring that the Applicant is entitled to all remuneration that would have been payable to her as Councillor from the date of her removal until the next CKFN election, and an Order for costs on an elevated lump sum basis.

[3] The application for judicial review is allowed. The Applicant was denied procedural fairness. The Decision is also unreasonable because the Respondent fettered its discretion.

II. Background

[4] CKFN is a Nakota Nation in Treaty 4 Territory in south-east Saskatchewan. CKFN is governed by one Chief and up to six Councillors.

A. *The Election Act*

[5] On December 14 and 15, 2017, CKFN enacted the *Cega-kin Nakoda Oyate Custom Election Act* [*Election Act*] through a membership vote. The *Election Act* came into effect on January 28, 2018.

[6] Section 19 of the *Election* Act enables Chief and Council to remove a Councillor for unacceptable behaviour, including “misconduct”. Subsection 19(3) further sets out ten grounds for removal.

[7] Section 12 of the *Election Act* provides for the creation of the Cega-kin Nakoda Oyate Tribunal, composed of four CKFN members and one non-member [Tribunal]. In removal proceedings, the Tribunal provides a recommendation to the Band Council, rather than making a decision. Subsection 19(6) states that the remaining Council members "shall then vote on whether the affected Councillor position has been vacated for contravention". Paragraph 19(6)(a) requires a two-third majority vote of the Band Council members for removal.

[8] This present matter constitutes the first time CKFN was required to utilize the removal procedures under section 19 of the *Election Act*.

B. *Events Leading to the Special Meeting*

[9] In January and February 2020, two CKFN employees, Fayth Runns and Patrick Chopik [Complainants], filed complaints against the Applicant for threatening and bullying the Complainants, engaging in political interference, and breaching the conflict of interest policy [Complaints]. The Applicant suggests that the Complaints were filed because the Applicant raised earlier concerns about financial management issues. She also states that other CKFN employees made complaints about other Councillors, including Councillor Eashappie, but those complaints were never investigated. The Respondent suggests that the Applicant targeted Patrick Chopik because he replaced the Applicant's mother as Financial Director of CKFN.

[10] On February 7, 2020, following the Complaints, the Band Council passed a band council resolution suspending the Applicant with pay [February 2020 BCR]. The BCR recognized "the

misconduct by a CKFN Councillor breaching Section 19(1)(2) of the [Election Act], and to enforce Section 20(1)".

[11] On February 19, 2020, the Applicant was notified about the Complaints, provided with copies, and invited to share her perspective with the Band Council at a meeting scheduled for February 28, 2020. On February 27, 2020, CKFN legal counsel wrote to the Applicant's counsel reiterating the contents of the February 19, 2020 letter, but confirmed that the Applicant had "not been suspended as a Councillor".

[12] Following the February 28, 2020 meeting, at which the Applicant attended, CKFN appointed an independent investigator to examine the Complaints [Investigation]. Dirk Silversides, a member of the Saskatchewan bar, was hired to conduct the Investigation. The Investigation involved interviews, wherein interviewees were provided with the opportunity to summarize their evidence and confirm its accuracy. Complaints made against other Council members were not considered during the Investigation.

[13] On March 3, 2020, the Applicant objected to the Investigation, alleging, among other concerns, that Councillor Eashappie orchestrated the Complaints and that four formal complaints against Councillor Eashappie had not been investigated.

[14] On July 7, 2020, a meeting was held with members of CKFN. At the meeting, the Applicant discussed complaints against other Councillors that had not been investigated. She also made accusations that the Band Council was corrupt and taking bribes, and disclosed details

of an *in camera* meeting. The Band Council sent a cease and desist letter to the Applicant, threatening legal proceedings for defamation.

[15] On July 24, 2020, Mr. Silversides completed his report [Report], finding that the Complaints were substantiated. The Report summarizes the Complaints, the Applicant's response, and Mr. Silversides' findings. The Applicant received a copy of the Report on August 26, 2020. That same day, CKFN notified the Applicant that a special meeting before the Tribunal would be held on September 2, 2020 to decide if she would be removed from office [2020 Notice]. The 2020 Notice contained five allegations, including those addressed in the cease and desist letter.

[16] The September 2, 2020 meeting was adjourned because the Applicant's children were involved in a tragic accident. One of the Applicant's children died and the other was permanently injured.

[17] Close to nine months passed after the September 2020 meeting was adjourned. The Applicant never made a formal request to CKFN to resume her duties. In April 2021, the Applicant requested that her work cell phone be upgraded. Questions were then raised about whether expenses should be approved when the Applicant was not fulfilling Councillor duties. On April 28, 2021, Chief O'Watch sent a Notice of Removal to the Applicant, advising that she would no longer receive a salary as of May 1, 2021. The Applicant states that she received the letter on May 21, 2021.

[18] In a June 8, 2021 letter, Applicant's counsel wrote to the Band Council, asserting that the Applicant's removal was unlawful for non-compliance with the *Election Act*. The Band Council, by band council resolution dated June 24, 2021, reinstated the Applicant with back pay, but the Applicant remained suspended.

C. *The Special Meeting & the Recommendation*

[19] On August 6, 2021, CKFN notified the Applicant of a special meeting before the Tribunal, scheduled for August 13, 2021 [2021 Notice]. The 2021 Notice included additional allegations in relation to the Applicant's conduct in 2018 (allegation #2, below), which were not included in the 2020 Notice. The 2021 Notice set out the following allegations:

- Allegation #1: the Applicant engaged in inappropriate and unprofessional conduct towards CKFN employees (this allegation concerns the Complaints);
- Allegation #2: in 2018, the Applicant used her position to advance her own financial interests;
- Allegation #3: in July 2020, the Applicant made various "defamatory statements" against the Band Council for the purpose of obstructing the Investigation;
- Allegation #4: the Applicant disclosed the Band Council's *in camera* deliberations pertaining to another Band Council member's criminal charges, complaints against Councillor Eashappie, and conflicts between her and Councillor Eashappie;
- Allegation #5: the Applicant publically questioned the legitimacy of an ongoing investigation into her mother when she referred to the investigation as "bullshit"; and
- Allegation #6: the Applicant spent CKFN money in a manner inconsistent with its purpose.

- CKFN also questioned whether the Applicant had capacity to perform as a Councillor during her time of bereavement, noting that paragraph 19(3)(b) of the *Election Act* states that a Councillor may be removed if they are unable to perform their functions for more than six months due to “illness or incapacity”.

[20] The August 13, 2021 meeting was adjourned to provide the Applicant time to prepare. It was rescheduled for August 15, 2021, but was adjourned again because the Applicant’s counsel was sick. The special meeting eventually took place on October 19, 2021 before three Tribunal members [Special Meeting].

[21] In advance of the Special Meeting, CKFN invited the Applicant to provide written arguments and evidence. The Applicant’s counsel sent written submissions and hundreds of pages of documents the evening before the Special Meeting.

[22] During the Special Meeting, the Applicant was informed of the allegations against her and presented with the opportunity to make submissions. The Applicant asked questions and answered those put to her. However, no witnesses testified and the Complainants did not file affidavits. Rather, the Applicant states that Councillor Eashappie provided hearsay summaries of the evidence against the Applicant.

[23] On October 26, 2021, the Tribunal found that all allegations, excluding allegations #2 and #6, were substantiated. The Tribunal concluded that the Applicant’s actions constituted misconduct and recommended her removal [Recommendation]. The Recommendation was sent

to both CKFN and its legal counsel, but not the Applicant. The Applicant did not learn about the Recommendation until after the Decision was rendered.

III. The Decision

[24] On November 3, 2021, the Band Council attended a regularly convened meeting. At the meeting, which the Applicant was not invited to or given notice of, the Band Council voted to remove the Applicant from office. The meeting minutes state that the "Tribunal recommended to relieve Orleen Saulteaux of her duties as Council of the nation" and that "Chief and Council accept the recommended [sic] by Tribunal".

[25] The Applicant was not notified that she had been removed from office. In the afternoon of November 3, 2021, the Applicant noticed that she had not been paid and that her work phone had stopped working. The Applicant contacted the CKFN finance department, who explained that they were told to stop payments. The Applicant subsequently learned of the Decision through a November 4, 2021 Facebook post, whereby Chief O'Watch stated that the Applicant had been removed from office and that Council "accepted the recommendation" of the Tribunal. The Band Council did not provide further reasons for the Decision.

IV. Preliminary Issue

[26] The Respondent submits that the Federal Court does not have jurisdiction to review removal decisions made by CKFN. Specifically, the Respondent submits that sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 only grant the Federal Court jurisdiction to

judicially review actions of a "federal board, commission or other tribunal." Subsection 2(1) of the *Federal Courts Act* defines a "federal board, commission or other tribunal" as a body exercising statutory powers or powers under an order made pursuant to a prerogative of the Crown (*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 18 [*Mikisew Cree*]).

[27] The Respondent states that CKFN's power to make Indigenous laws is not granted by any Act of Parliament or the Crown. Although such laws are recognized by the *Indian Act*, RSC 1985, c I-5, they are not empowered through, or dependent on, the *Indian Act*. Further, the Respondent submits that sections 18 and 18.1 of the *Federal Courts Act* do not apply to Parliament (*Mikisew Cree* at para 18). Accordingly, these sections should not apply to powers exercised by Indigenous governments, as Indigenous governments are akin to Parliament, not some lesser form of government.

[28] The Respondent acknowledges that the Federal Court has previously found that it has jurisdiction over decisions made pursuant to Indigenous customary law (*Thomas v One Arrow First Nation*, 2019 FC 1663 at para 14 [*One Arrow*]).

[29] The Respondent fails to adequately explain why this Court should depart from established precedent. In *R v Comeau*, 2018 SCC 15, the Supreme Court of Canada elaborated on the circumstances in which a trial court may seek to change the *status quo* (at paras 23-34). The Respondent does not engage with the cases cited by Justice Grammond in *One Arrow* (at para 14), nor do they make submissions on the fundamental shift in both jurisprudence and society

since these cases were decided. Rather, the Respondent baldly asserts that the law now recognizes the inherent nature of Indigenous customary law and that such recognition is required for reconciliation. Respectfully, an assertion that the Respondent disagrees with the holding in *One Arrow* is insufficient. Without further submissions on why this Court should depart from precedent, the Respondent's argument about jurisdiction must fail.

V. Issues and Standard of Review

[30] Having considered the parties' submissions, the issues for determination are:

1. Was the Applicant denied procedural fairness on any of the following grounds:
    a. Failure to consider the Applicant's submissions;
    b. Failure to disclose the Recommendation;
    c. Failure to provide reasons; or
    d. Failure to ensure impartiality/independence.
2. Did CKFN fetter its discretion?
3. Was the Decision otherwise unreasonable?

[31] The Applicant submits that issues of procedural fairness are reviewable on a standard akin to correctness, but the ultimate question is whether the proceedings were fair in all the circumstances (*Shirt v Saddle Lake Cree Nation*, 2022 FC 321 at para 32). The Applicant also submits that the merits of the Decision, including whether CKFN fettered its discretion, are reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23-25 [*Vavilov*]).

[32] The Respondent agrees with the Applicant's submissions on the standard of review. However, the Respondent emphasizes that such standards must be considered in light of "CKFN's inherent rights to self-government" and with the goal of fostering the development and recognition of Indigenous laws protected by section 35 of the *Constitution Act, 1982* (*Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis,* 2022 QCCA 185). The Respondent submits that a high degree of deference is owed to First Nation decision-makers when reviewing a decision made pursuant to custom (*Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796 at para 46). Furthermore, although Indigenous legal traditions appear different from Western legal processes, they are not any less fair. The Respondent submits that this Court risks becoming a tool of oppression if it insists on adherence to Western ideals of procedural fairness.

[33] I agree with the parties that the merits of the Decision are subject to a reasonableness review. None of the exceptions outlined in *Vavilov* arise in this matter (at paras 16-17).

[34] A reasonableness review requires the Court to examine the Decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result, particularly as they relate to the relevant factual and legal constraints (*Vavilov* at paras 87, 99). However, a reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision-maker" (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2018 SCC 31 at para 55). Where the reasons of the decision-maker allow a

reviewing Court to understand why the decision was made and determine whether it falls within a range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86).

[35] Fettering of discretion is a type of substantive error that goes to the merits of a decision. However, regardless of what standard of review is applied, a decision that is the result of fettered discretion will be "*per se* unreasonable" (*Stemijon Investments Ltd v Canada (AG)*, 2011 FCA 299 at paras 20-25 [*Stemijon*]; *Gordon v Canada (AG)*, 2016 FC 643 at para 27; *Canada (Public Safety and Emergency Preparedness) v Keto*, 2020 FC 467 at para 29; *Sheikh v Canada (Citizenship and Immigration)*, 2020 FC 199 at paras 15-16).

[36] I also agree with the parties that issues of procedural fairness are reviewable on a standard akin to correctness. No deference is owed on issues of procedural fairness (*Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57). However, "[t]he duty of procedural fairness in administrative law is 'eminently variable', inherently flexible and context-specific" (*Vavilov* at para 77). In the context of Indigenous laws, the content of the duty of fairness must be "tailored to the particular circumstances and context of the [appeal body]. This context can and should include judicial respect for relevant custom" (*Bruno v Samson Cree Nation*, 2006 FCA 249 at para 20 [*Samson Cree*]; *Labelle v Chiniki First Nation*, 2022 FC 456 at paras 91-92 [*Chiniki*].

VI. Analysis

A. *Was the Applicant denied Procedural Fairness?*

(1) Failure to consider the Applicant's submissions

(a) *Applicant's Position*

[37] CKFN did not consider the Applicant's written submissions, which were provided to Respondent's counsel the night before the Special Meeting. Respondent's counsel inadvertently failed to forward the Applicant's written submissions to CKFN. An administrative decision-maker cannot disregard written submissions on the sole basis that they were delayed (*Caceres v Canada (Citizenship and Immigration)*, 2004 FC 843 at para 23 [*Caceres*]; *Haile v Canada (Citizenship and Immigration)*, 2019 FC 538 at paras 50-62 [*Haile*]). The Decision was made two weeks after the written submissions were provided, yet CKFN does not explain why the Applicant's submissions were never considered.

(b) *Respondent's Position*

[38] Prior to this application for judicial review, the Respondent was unaware that the Applicant had provided written submissions. The Applicant's written submissions were not considered because Applicant's counsel sent the submissions at 9:00 p.m. the night before the Special Meeting, along with hundreds of other pages of documents. At the Special Meeting, the Applicant refused to accept a hearing binder and never referred to her written submissions. The law expects parties to exercise a basic level of responsibility and due diligence to ensure that the materials they seek to rely on are before a decision-maker (*Ahmad v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5958 (FC) at para 6 [*Ahmad*]). The Applicant created a circumstance likely to give rise to human error, hid in the weeds, and is now blaming the decision-maker for failing to consider her submissions.

[39] *Caceres* and *Haile* are distinguishable from the present matter. In those cases, the decision-makers refused to consider late submissions despite being aware of their existence. Here, efforts were made to accommodate the Applicant's late submissions and the Respondent was unaware that those submissions included written arguments. In any event, the substance of the Applicant's written arguments (namely, that the Applicant disputed the allegations) was raised at the Special Meeting and considered accordingly.

(c) *Conclusion*

[40] I find that the Respondent breached the Applicant's right to procedural fairness by failing to consider the Applicant's written submissions.

[41] I agree with the Applicant that this case is similar to *Caceres* and *Haile*. I do not accept that *Caceres* and *Haile* are distinguishable because the decision-makers in those cases knew that the late submissions existed. On the contrary, the record before the Court demonstrates that counsel for CKFN was aware – or at the very least, should have been aware – that the Applicant provided written submissions.

[42] On October 18, 2021 at 8:54 p.m., Applicant's counsel sent Respondent's counsel an email, stating, "I'm attaching a written submission that I have prepared on behalf of Ms. Saulteaux. I will also be sending in a separate email a download link for the documents that Ms. Saulteaux may refer to at the hearing" [emphasis added]. At 9:20 p.m., Respondent's counsel replied thanking the Applicant's counsel. The next morning, Respondent's counsel sent the

Tribunal members an email, stating, "[w]e received written submissions and documents last night from Councillor Orleen Saulteaux for the meeting today…".

[43] The foregoing clearly indicates that Respondent's counsel was aware that the Applicant sent written submissions. It also indicates that Respondent's counsel advised the Tribunal that it had received the written submissions. As such, I cannot accept that the Respondent did not know that the Applicant had provided written submissions until this application for judicial review. The Band Council may have been unaware, but counsel most certainly should have advised them otherwise.

[44] While I accept that parties need to exercise a basic degree of due diligence to ensure that materials are before the decision-maker, I disagree with the Respondent that this case is similar to *Ahmad*. In that case, the materials were never delivered to the decision-maker and the claimant never followed up to confirm receipt (at para 6). Here, it is clear that counsel received the Applicant's written submissions and confirmed receipt on October 18, 2021 at 9:20 p.m. Counsel, not the Applicant, had an obligation to ensure that this material was delivered to their client.

[45] The evidence also indicates that the Respondent never set a deadline for the Applicant's submissions. The 2021 Notice states: "[p]lease submit any documentary evidence and written comments you might have in advance of the meeting; such documents and comments will be forwarded to the [Tribunal] for review". Chief O'Watch, under cross-examination, explained that he could not remember if there was a procedural order setting a deadline for submissions.

[46] On Wednesday, October 13, 2021, Respondent's counsel asked Applicant's counsel if the Applicant would be providing written arguments. Counsel for the Applicant did not respond. Respondent's counsel sent a follow up email on October 17, 2021 at 9:00 p.m., two days before the Special Meeting. The next morning, Applicant's counsel advised that the Applicant would be providing "documents" and "a written submission" later that day [emphasis added]. Respondent's counsel acknowledged these emails and did not raise any concerns about the timing of delivery.

[47] The Respondent submits two reasons as to why it does not make a difference that the Applicant's written submissions were never considered. First, the Respondent submits that there was no time to read the Applicant's submissions. I disagree. The Band Council, as the ultimate decision-maker, had two weeks between the release of the Recommendation and the Decision to review the Applicant's written submissions.

[48] Second, the Respondent submits that the error is inconsequential because the Applicant made oral submissions at the Special Meeting through which the substance of the Applicant's written arguments were considered. I disagree. The Applicant's counsel, who prepared the written submissions, did not appear at the Special Meeting. The Applicant made oral submissions by herself. The Applicant's written submissions explained her position and what she viewed to be her "fiduciary duty" to communicate openly with band members; stated that the removal provisions must be interpreted in accordance with constitutional principles like freedom of expression; objected to the lack of impartiality of the proceeding; and provided a detailed objection to each allegation. In my view, while the Applicant may have denied the allegations

against her, it is far from likely that the Applicant was able to articulate the entirety of her written submissions by herself.

[49] In *Samson Cree*, the Federal Court Appeal held that while a First Nation "should be granted significant latitude to choose its own procedures…basic procedural safeguards must be in place" (at para 22). Likewise, in *Re Therrien*, 2001 SCC 35 [*Therrien*], the Supreme Court of Canada remarked that "the duty to act fairly has two elements: the right to be heard and the right to an impartial hearing" (at para 82; *Balfour v Norway House Cree* Nation, 2006 FC 213 at para 67 [*Balfour*]).

[50] I accept that these principles should only be applied after considering the custom of a First Nation. The Respondent submits that CKFN's custom prioritizes deliberation and discussion. Clearly, the goal of deliberation and discussion is to hear from the affected parties. It is therefore logical that CKFN invited the Applicant to make written submissions. However, due to the inadvertence of counsel, CKFN failed to follow its own custom, and in doing so breached the Applicant's right to procedural fairness. I agree with the Applicant that this alone is enough to dispose of this case.

(2) Failure to disclose the Recommendation

(a) *Applicant's Position*

[51] CKFN breached the Applicant's right to procedural fairness because CKFN never disclosed the Recommendation to the Applicant, thereby preventing her from responding. When

decision-makers fail to provide relevant evidence establishing the case against an applicant, the applicant is deprived of the opportunity to respond in a meaningful way (*Tourangeau v Smith's Landing First Nation*, 2020 FC 184 at para 60). The right to know the case to meet and provide further submissions is "the minimum level of fairness owed to anyone whose rights, privileges or interests are being impacted" (*Gladman v Canada (AG)*, 2017 FCA 109 at para 40 [*Gladman*]).

[52] Generally, in administrative law, when a body makes a recommendation to the ultimate decision-maker, that recommendation must be disclosed to the affected party so that they know the case to meet. This rule has been applied at the Human Rights Commission, the Parole Board, and within various immigration proceedings. Had CKFN disclosed the Recommendation, the Applicant would have addressed the errors pertaining to allegations #3 and #4 (discussed in more detail below).

(b) *Respondent's Position*

[53] The Applicant was not entitled to disclosure of the Recommendation in order to make further submissions or, in essence, re-argue her case. The *Election Act* provides no such right. Instead, the process set out in the *Election Act* was followed. The Recommendation is not an "undisclosed adverse material fact" (*Gladman* at para 40). Rather, it is a finding of an independent body <u>following</u> the Special Meeting. The examples cited by the Applicant in human rights law, criminal law, and immigration law operate in different statutory and cultural contexts. Many of them can also be distinguished on the basis that materials were not disclosed prior to a substantive hearing or decision. Here, the Recommendation was made <u>as a result</u> of the substantive hearing.

(c) *Conclusion*

[54] The parties disagree about the extent to which principles of procedural fairness ought to apply to Indigenous decision-makers acting pursuant to customary law. Accordingly, a brief examination of the relationship between Indigenous customary law and principles of procedural fairness is in order.

[55] On one hand, the jurisprudence is clear that Indigenous custom does not trump principles of procedural fairness (*Sparvier v Cowessess Indian Band No 73*, [1993] 3 FC 142 at para 47, 40 AWCS (3d) 809; *Felix v Sturgeon Lake First Nation*, 2014 FC 911 at para 76; *Beardy v Beardy*, 2016 FC 383 at para 126; *Shirt v Saddle Lake Cree Nation*, 2017 FC 364 at para 54; *Chiniki* at para 72). On the other hand, the Federal Court of Appeal recently confirmed that clear language within Indigenous customary codes can oust principles of procedural fairness (*Sturgeon Lake Cree Nation v Hamelin*, 2018 FCA 131 at paras 52-56 [*Hamelin*]; *Grey v Whitefish Lake First Nation*, 2020 FC 949 at para 28 [*Whitefish*]).

[56] In my view, regardless of whether Indigenous customary law is written or unwritten, it makes up part of the "statutory scheme" that must be considered when assessing the degree of procedural fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 24, 174 DLR (4th) 193 [*Baker*]). This is consistent with the approach articulated in *Samson Cree*, where the Court held that reviewing courts must account for the relevant custom when assessing the content of the duty of fairness (at para 20).

[57] In the present matter, CKFN's custom is codified in the *Election Act*. The "hierarchy of law" dictates that legislation, including customary codes enacted by Indigenous law-makers, "takes precedence over subordinate legislation and the common law" (*Hamelin* at para 54). However, "where legislation is silent or ambiguous with respect to affected parties' procedural rights, courts will interpret it in a manner that comports with the principles of natural justice", including the right to an impartial decision-maker (*Hamelin* at para 53, citing *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 21-24).

[58] In short, if the *Election Act* is silent or ambiguous on the issues raised by the Applicant, common law principles of procedural fairness will apply and the Court should consider the *Baker* factors to determine the content of the duty of fairness.

[59] I acknowledge the Respondent's conviction that CKFN is akin to Parliament and is not a lesser form of government. I also appreciate that the Respondent takes issue with the fact that this Court has asserted jurisdiction over Indigenous governments that are not commonly thought of as federal boards, tribunals, or commissions. However, this is the current state of the law. So long as First Nations who make decisions under customary law are considered federal boards, tribunals, or commissions, they will be subject to administrative law principles. Nevertheless, the foregoing illustrates that First Nations acting pursuant to customary law may exercise their inherent jurisdiction by enacting customary codes with clear language and through broad consensus of the community; subject, of course, to constitutional restraints.

[60] Turning now to the disclosure of the Recommendation, I agree with the Respondent that the examples relied on by the Applicant arise in different statutory and cultural contexts. How recommendations are dealt with in human rights law, criminal law, and immigration law are of little assistance. The same could be said for how other First Nations handle recommendations under their customary law, as Indigenous laws differ from community to community. This Court is only concerned with the customary laws of CKFN that govern removal proceedings. Therefore, the Court's starting point must be the *Election Act*.

[61] Section 19 of the *Election Act* governs removal proceedings. Subsections 19(5) and 19(6) provide:

> (5) The office of Chief or Councillor shall not be deemed to be vacant for a reason described in subsection 9(3) unless and until:
>
> > (a) the Council convenes a special meeting for the purpose of holding a Council review on the questions of the deemed vacancy, and in conjunction with the Cega-Kin Nakoda Oyate Tribunal's review and recommendations.
> >
> > (b) the Council provides the individual Council member, whose position is subject to being vacant, with particulars of the reason(s) for vacating said position; and
> >
> > (c) the Council gives the individual an opportunity to show cause why that individual's position on the Council should not be vacated.
>
> (6) The remaining Council members shall then vote on whether the affected Councillor position has been vacated for contravention of one or more of the provisions as set forth in subsection 19(3) above.
>
> > (a) The position shall be considered vacant on a grounds enumerated in subsection 19(3) if two-thirds (2/3) of the remaining members of the Council vote to approve the vacating of the individual's position on the Council. The decision of Council shall be final.

[62] The *Election Act* does not clearly state whether the Recommendation must be disclosed. However, it is clear from the above provisions that the *Election Act* does not provide a second opportunity for an accused Councillor to make submissions after the Special Meeting. To this end, the parties seem to agree that the Band Council, rather than the Tribunal, are the ultimate decision-makers in removal proceedings. As a result, it is unclear what purpose disclosure of the Recommendation would even serve. Given these circumstances, I find that neither procedural fairness nor CKFN custom demanded that the Recommendation be disclosed to the Applicant. The Applicant had an opportunity to make her submissions at the Special Meeting, which the Band Council attended.

(3) Failure to provide reasons

(a) *Applicant's Position*

[63] The Applicant's right to procedural fairness was breached because neither the Tribunal nor the Band Council provided written reasons (*Vavilov* at para 136). Written reasons were required because the consequences of the Decision had a serious impact on the Applicant and the Applicant was given participatory rights (*Duckworth v Caldwell First Nation*, 2021 FC 648 at para 40; *McCallum v Peter Ballantyne Cree Nation*, 2016 FC 1165 at para 45; *Vavilov* at para 77). This Court and the Federal Court of Appeal have consistently set aside removal decisions where some element of the decision is not explained in the reasons (*Louie v Louie*, 2018 FC 550 at para 37 [*Louie*]; *Johnny v Adams Lake Indian Band*, 2017 FCA 147 at para 23 [*Adams Lake*]). Here, no aspect of the Decision is explained at all.

[64] Contrary to the Respondents submissions, reasons may still be required when elected leaders vote on a decision (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at paras 12-13 [*Lafontaine*]).

(b) *Respondent's Position*

[65] Some statutory schemes do not require formal reasons (*Vavilov* at para 136). Here, the *Election Act* and the Indigenous laws of CKFN do not require formal reasons for removal proceedings. Unlike the *Election Act* provisions governing election appeals (s 12(7)(j)-(k)), the provisions governing removal proceedings (s 19) do not mention formal reasons. Instead, they require a two-thirds majority "vote". Legislators, including Indigenous law-makers, are presumed to avoid superfluous or meaningless words; every word in a statute is presumed to be intentional. The inclusion of express language in some sections of the *Election Act* indicates an intention that formal reasons are not required where they are not expressly stated (*Lukács v Canada (Transportation Agency)*, 2014 FCA 76 at para 43 [*Lukács*]). Furthermore, given that the Decision was reached by a vote, a single set of formal reasons would not have been possible (*Vavilov* at paras 136-37).

[66] Finally, *Lafontaine* is distinguishable from the present case because it concerned a municipality. That municipality had an established process of providing reasons. Also, unlike a First Nation, a municipality is a creature of statute subject to administrative law principles. In contrast, the law now recognizes the inherent authority of Indigenous governance structures.

(c) *Conclusion*

[67] In my view, the Applicant was entitled to reasons and the Band Council's failure to provide reasons was procedurally unfair (*Vavilov* at para 136).

[68] The Applicant points to *Louie* and *Adams Lake* to show that Courts have set aside removal decisions where some element of the decision is not explained in the reasons. The Courts' comments in both *Louie* and *Adams Lake* concern the reasonableness of the decisions, not procedural fairness. As such, neither *Louie* nor *Adams Lake* assist the Applicant's procedural fairness argument.

[69] Subsections 19(5) and 19(6) of the *Election Act* do not specifically address whether the Band Council is required to provide reasons for removal proceedings. I take the Respondent's point that, unlike paragraphs 12(7)(j) and 12(7)(k) of the *Election Act*, which pertain to election appeals, section 19 does not specifically refer to "reasons". I agree that generally, some legislative silences should be considered deliberate and interpreted as implied exclusions (*Lukács* at para 43). However, the Respondent invites this Court to infer that the implied exclusion in the *Election Act* should be applied to avoid common law principles of procedural fairness. The same argument was rejected by the Saskatchewan Court of Appeal in *Mercredi v Saskatoon Provincial Correctional Centre*, 2019 SKCA 86 at paras 46-51 [*Mercredi*]. I agree with the Saskatchewan Court of Appeal that statutory derogation from principles of procedural fairness must actually be expressed (*Mercredi* at para 50). There is no express language in the *Election Act* that the Band Council does not have to provide reasons.

[70] The *Election Act* does expressly refer to the Band Council's "vote" to reach a decision. In *Vavilov*, the Supreme Court of Canada noted that formal reasons may not be given "where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote" (*Vavilov* at para 137). In my opinion, the fact that the *Election Act* refers to a vote is not the equivalent of clear statutory language that derogates from principles of procedural fairness. While the *Election Act* sets out a process for the Band Council to reach a decision, it falls short of doing away with principles of procedural fairness.

[71] Accordingly, the ultimate question is whether common law principles of procedural fairness required the Band Council to issue reasons. As far as the common law is concerned, reasons are required where the decision has a significant impact on the person affected and that person has participatory rights in the proceeding (*Vavilov* at para 77). Both these criteria are satisfied. Given the significance of the Decision, the Applicant had the right to understand how and why the Decision was reached (*Vavilov* at para 79). I note that this right appears consistent with the values underpinning discussion, deliberation, and consensus building.

[72] In my view, the reasons of the Band Council did not have to be elaborate or formal. Such reasons could even be oral rather than written. Nevertheless, where a Councillor is removed, reasons will almost always be required absent express statutory language indicating otherwise.

(4) Failure to ensure impartiality/independence

(a) *Applicant's Position*

[73] The Applicant's right to procedural fairness was breached because the Band Council acted as the decision-maker, complainant, prosecutor, and witness. There was no separation of these various functions, resulting in a reasonable apprehension of bias (*2747-3174 Québec Inc v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919, 140 DLR (4th) 577 [*Québec Inc*]; *MacBain v Lederman*, [1985] 1 FC 856, 22 DLR (4th) 119 (CA) [*Lederman*]). While the *Election Act* requires the Band Council to act as the decision-maker, their role as complainant, prosecutor, and witness is incompatible with independent and impartial decision-making. The Applicant essentially had to persuade the decision-maker to reject evidence and allegations that the decision-maker advanced. Band Council members should have recused themselves from the decision-making function. Instead, they chose to be a judge in their own cause, contrary to the *nemo judex* principle (*Canadian Union of Public Employees, Local 301 v Montreal (City)*, [1997] 1 SCR 793 at para 73, 144 DLR (4th) 577 [*Canadian Union*], citing Renée Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed (Toronto: Carswell, 1990) vol 4 at 244-45).

[74] A reasonable apprehension of bias also arose because CKFN's counsel advised on the prosecution and adjudication processes (*Québec Inc* at paras 54-56). The same counsel threatened legal proceedings for defamation against the Applicant. Approaching a matter with a duty of loyalty and zealous advocacy to one party of the dispute is fundamentally incompatible with a neutral, independent, adjudicative function. Essentially, the Tribunal was advised by legal counsel that was also duty bound to advance the Band Council's personal interests in a separate potential dispute against the Applicant.

(b) *Respondent's Position*

[75] The Band Council is not subject to administrative law principles such as Western notions of independence and impartiality. CKFN's removal proceedings are not "administrative" in nature. They are made pursuant to CKFN's Indigenous laws and inherent jurisdiction. Within CKFN's Indigenous legal processes, there is no formal "prosecution" followed by a "defence". Rather, the processes employed at the Special Meeting promote discussion, deliberation, and consensus building. In the context of First Nation removal proceedings, it is not possible to expect court-like objectivity (*Hall v Kwikwetlem First Nation*, 2020 FC 994 at paras 47-48 [*Hall*]). The degree of independence required by a decision-maker is determined by its enabling statute, including First Nation election regulations (*Whitefish* at para 28). Under the *Election Act*, the Band Council cannot refuse to participate in, or administer, a Special Meeting. There are no "prosecutors" on staff at CKFN, and any employee or contractor would ultimately report to the Band Council. It is not realistic for Band Council members to "recuse" themselves as the Applicant suggests – to do so would permit the Applicant's actions to be immune from review.

(c) *Conclusion*

[76] I find that the Band Council did not breach the Applicant's right to procedural fairness because they lacked impartiality or independence.

[77] A basic element associated with procedural fairness is the right to an impartial hearing (*Therrien* at para 82; *Balfour* at para 67). This principle is reflected in the *nemo judex* principle, which stands for the proposition that an individual cannot be the judge of their own cause (*Therrien* at para 82; *Canadian Union* at para 73). However, a legislature may authorize a breach of the *nemo judex* principle through statute (*Québec Inc* at para 47, citing *Brosseau v Alberta*

Securities Commission, [1989] 1 SCR 301 at 309-10, 57 DLR (4th) 458; *Whitefish* at para 28). In my view, the *Election Act* engages the exception to the *nemo judex* principle because section 19 expressly permits the Band Council to make the final decision regarding removals. The only decision-making body is the Band Council. Accordingly, I disagree with the Applicant that Band Council members were required to recuse themselves before making the Decision. If the Band Council members were part of a larger decision-making body, it may be feasible and appropriate for them to recuse themselves. However, that is not what the *Election Act* provides for.

[78] I am also persuaded by the Respondent's submissions that, in the context of small First Nations, it is not realistic to expect the same degree of impartiality that one would expect from the judiciary. As noted by Justice Phelan in *Hall*, "[g]iven the nature of a small community, a small council structure and the personal interplay within a small community, one cannot expect the objectivity and unbiased nature of a court. It is not always procedurally unfair for Councillors to have an opinion on a matter such as this so long as they remain open to having their minds changed and approach the issues in good faith" (at para 48).

[79] The Applicant claims that she had to persuade the Band Council to reject their own evidence. However, this mischaracterizes who the complainants are in this case. I think it is important to recall that the Applicant was originally suspended because two employees, both of whom are not Band Council members, filed the Complaints against her. Following this, the Applicant made various accusations against the Band Council. The Applicant claims that this is what led to the alleged conflict. In my view, it would be contrary to the intent of the *Election Act* if a person subject to removal proceedings could conflict Band Council members out by making

subsequent claims against them. Indeed, had Band Council members recused themselves because of this alleged conflict, no one would be left to make the Decision. This cannot be the intent of CKFN membership.

[80] Ultimately, taking into account the statutory scheme and the specific context of small First Nations and Band Councils (*Baker* at paras 21, 24), I do not find that the Applicant's right to procedural fairness was breached.

B. *Did the CKFN fetter its discretion?*

(1) Applicant's Position

[81] The Decision is unreasonable and must be set aside because CKFN fettered its discretion (*Stemijon* at para 24). In cross-examination, Chief O'Watch confirmed that he thought the Tribunal was the decision-maker and that he was "required to follow" the Recommendation. As a result of this mistaken belief, the Band Council simply rubber-stamped the Tribunal's Recommendation (*Carroll v Canada (AG)*, 2015 FC 287 at para 127 [*Carroll*]; *Therrien* at para 93). When CKFN members ratified the *Election Act*, they granted the power to remove a Councillor to the Band Council, not the Tribunal. The Band Council's failure to make a decision is contrary to the *Election Act* and the will of CKFN membership. Band Council members should have recused themselves and then exercised the power granted to them under the *Election Act*.

(2) Respondent's Position

[82] The Applicant's arguments surrounding impartiality and fettered discretion are contradictory. On one hand, the Applicant states that if Band Council members are the decision-makers, they are biased. On the other hand, if the Tribunal is the decision-maker, the Band Council fettered its discretion. Additionally, the Applicant always advocated for the Tribunal to be the decision-maker. It is an abuse of process to now advance a different argument on judicial review (*Re Carlson*, 2010 ABQB 701 at paras 11, 25, rev'd on other grounds 2012 ABCA 173). Regardless, Chief O'Watch can only speak to why he voted a certain way. Even disregarding Chief O'Watch's vote, the result would have been the same. It is CKFN's "process" to respect the recommendation of the Tribunal.

(3) Conclusion

[83] I agree with the Applicant that CKFN fettered its discretion by inappropriately binding itself to the Recommendation. As put by this Court in *Carroll*, "even if the substance of a complaint has been appropriately addressed in another process, the [ultimate decision-maker] must exercise its discretion under [the statute]" (at para 126).

[84] In *Stemijon*, the Federal Court of Appeal explained the rational behind fettering of discretion in the following terms at paragraphs 22 and 24:

> …For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decision-making… The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.
>
> […]

> *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.
>
> [Citations omitted.]

[85] Likewise, in *Therrien*, the Supreme Court of Canada wrote that "[i]t is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members or to a minority of those members without the express or implicit authority of the legislation" (at para 93).

[86] The parties agree that CKFN members empowered the Band Council, not the Tribunal, to be the final decision-makers in removal proceedings. The *Election Act* does not delegate the Band Council's authority to the Tribunal. Rather, the *Election Act* provides that the Tribunal only makes a "recommendation". In cross-examination, Chief O'Watch admitted that he thought he had to follow the Tribunal's Recommendation. I agree with the Applicant that this statement establishes that Chief O'Watch fettered his discretion.

[87] The Respondent states that it does not matter if Chief O'Watch fettered his discretion because he cannot speak on behalf of the entire Band Council and there is no way of knowing why other Council members voted to remove the Applicant. Ironically, the Respondent's submission on this point illustrates the *prima facie* unreasonableness of the Decision. In the absence of any meeting minutes or justification explaining why other members voted a certain

way, I think it is reasonable to assume that, under the leadership of Chief O'Watch, Council members similarly thought they had to adopt the Recommendation.

[88] The Respondent claims the Applicant's argument about fettering of discretion amounts to an abuse of process. I disagree. During the removal proceeding, the Applicant asked that the Tribunal make the ultimate decision because she had concerns about the impartiality of the Band Council. There was nothing impermissible about raising these concerns during the Special Meeting. The Applicant knew that on judicial review, this Court may find that the *Election Act* empowers the Band Council to make the final decision. Within the present application, both parties agree that the Band Council is the ultimate decision-maker. Accordingly, I do not find that the Applicant's position renders the proceeding "unfair to the point that [it is] contrary to the interest of justice" (*R v Power*, [1994] 1 SCR 601 at 616, 165 NR 241). The Applicant's actions are not irreconcilable to the community's sense of fair play and decency, nor are they oppressive or vexatious (*Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at paras 35-37). The Applicant has also not misused court procedure such that it would bring the administration of justice into disrepute (*Canam Enterprises Inc v Coles*, [2000] OJ No 4607 at para 55, 194 DLR (4th) 648 (CA), Goudge JA, dissenting, rev'd 2002 SCC 63).

[89] There is no abuse of process. The Decision is *per se* unreasonable because the Band Council fettered its discretion by rubber-stamping the Recommendation (*Stemijon* at para 24).

C. *Was the Decision otherwise unreasonable?*

[90] In light of my determinations that the Respondent breached the Applicant's right to procedural fairness and fettered its discretion, it is not necessary to address the merits of the Decision.

VII. Conclusion

[91] The application for judicial review is allowed. The Respondent breached the Applicant's right to procedural fairness by failing to consider her written submissions and provide reasons. The Decision is also unreasonable because the Respondent fettered its discretion by rubber-stamping the Recommendation.

[92] CKFN is ordered to pay all remuneration to the Applicant that she would have been entitled to as Councillor from the date of her removal (*McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 at para 99; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 42; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 43).

[93] The Applicant is also entitled to costs. Since neither party made fulsome costs submissions, the Court orders that the parties file their cost submissions as set out in the Order.

JUDGMENT in T-1695-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted to the Band Council for redetermination. The Band Council shall render its decision within thirty days of this Order and advise the Applicant of its decision forthwith.
2. The Applicant is entitled to receive her remuneration from the date of her removal.
3. The Applicant will file her costs submissions with the Court by November 11, 2022. The Respondent will file its costs submissions with the Court by December 2, 2022.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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