Federal Court  Cour fédérale

Date: 20161220

Docket: T-883-16

Citation: 2016 FC 1399

Toronto, Ontario, December 20, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

COUNCILLOR DORIS JOHNNY

Applicant

and

ADAMS LAKE INDIAN BAND

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review made pursuant to s 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 ("*Federal Courts Act*") of a decision of the Community Panel of the Adams Lake Indian Band, dated on or about December 9, 2015, to remove the Applicant, Ms. Doris Johnny, from elected office as a Band Councillor. The Applicant seeks to have that decision quashed, the by-election held to replace her as Councillor declared to be null and void, and other relief as set out in the Notice of Application.

Background

[2] The Applicant is a member of the Adams Lake Indian Band ("Band"). She was elected as Councillor on March 1, 2015. On or about November 13, 2015, a petition was presented by 10 members of the Band to the Community Panel seeking to have the Applicant removed as Councillor on the basis that she had breached the Oath of Office ("Petition"). The Petition was brought in accordance with Rule 24 of the 2014 Adams Lake Secwepemc Election Rules ("Election Rules") and included a sworn affidavit of Joyce Kenoras setting out the facts alleged to substantiate the grounds for removal from office.

[3] One of the grounds set out in the Petition, and the ground upon which the Applicant was eventually found to have breached her Oath of Office, was her alleged unprofessional conduct at a September 9, 2015 general Band meeting.

[4] The facts surrounding the conduct of the Community Panel's investigation into the allegations are not agreed. Ultimately, on December 8, 2015, the Community Panel determined that the Applicant had breached her Oath of Office and, therefore, in accordance with the Election Rules, removed her from office and declared the office vacant. A by-election was held within 60 days of the office becoming vacant, pursuant to Rule 27 of the Election Rules, which resulted in the election (by acclamation), on February 13, 2016, of another Band member to fill the seat which had been vacated by the Community Panel.

Decision Under Review

[5] The Community Panel addressed all of the incidents that were raised in the Petition but found that there was a lack of evidence suggesting any wrong-doing on the part of the Applicant for these, with the exception of the incident on September 9, 2015. The Community Panel found that the Applicant had breached two provisions of her Oath of Office as a result of her conduct at the meeting held on that date and should be removed from office. The decision inserted into the wording of the affidavit filed in support of the Petition, following each discrete allegation described by date, the Community Panel's finding concerning that allegation. With respect to the September 9, 2015 incident, the decision reads as follows:

> Sept. 9, 2015 - I attended a taxation meeting at Pierre's Point Hall, I arrived late excusing myself for this due to being quite ill. I was asked by the Kenoras family to attend these meetings to hear the tax implications on CP property. Once given the floor and during my questions, Doris Johnny interrupted me three times with rude comments saying, "We don't want to hear of your illness." "We don't need to hear of your problems." and another comment. On the last comment I said, "What is wrong with you? Stop this."
>
> After the meeting I said, "Hey Doris, please don't be getting lippy to me in public." Words were said and Carolyn Johnny stepped in. I told Carolyn, "You have not heard what rude things your daughter said to me and you are only sticking up because she is your daughter, maybe my mom should be here." Carolyn Johnny pushed me and said, "Get out of here." I did not engage with her. I was urged by my elders to go to the police so I went the next day and there is a file on this. RCMP File #2015-4798.
> Constable McLean. I should have pressed charges but instead the officer talked to Carolyn Johnny who turned the story around and said I pushed her and I was drunk at the taxation meeting. This is not true. I have witnesses who saw Carolyn push me. Doris Johnny instigated this situation. This is not proper professional conduct of a Council member. This situation was very abusive by both Doris Johnny and Carolyn Johnny. Breach of Oath of Office 2,3,4,5,6,8,10

- **The Community Panel has completed their investigation and find Doris Johnny bas breached**
    - **Oath of Office #2 -I will honestly, impartially and fully perform the duties of my office with dignity and respect and,**
    - **Oath of Office #5 - I will uphold the Adams Lake Indian Band Community Vision.**
- **Investigations consisted of witness statements and correspondence related to the incident.**
- **As a result of the investigation the Community Panel has determined Doris Johnny did not fully perform the duties of office with dignity and respect and did not uphold the Adams Lake Indian Band Vision Statement by "ensuring that we live in a safe, healthy, self-sufficient community where cultural values and identity are consistently valued promoted and embraced by all."**
- **Our leaders are required to conduct themselves at a higher level of standard at all times.**

Issues

[6] In my view, the issues arising in this matter can be framed as follows:

i. Did the Community Panel breach the duty of fairness owed to the Applicant?

ii. Was the Community Panel's decision reasonable?

Standard of Review

[7] The Applicant submits that where allegations of a breach of procedural fairness are raised, as they are in this matter, the standard of review is correctness (*Desnomie v Peepeekisis*

First Nation, 2007 FC 426 at para 11 ("*Desnomie*"); *Weekusk v Wapass*, 2014 FC 845 at para 10 ("*Weekusk*")).

[8] The Respondent submits that all of the issues raised by the Applicant are reviewable on the reasonableness standard. While issues of procedural fairness were previously reviewed on the correctness standard, current jurisprudence calls for the reasonableness standard (*Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at para 48 ("*Maritime Broadcasting*"). The Respondent submits that even when applying the correctness standard to issues of procedural fairness, deference is owed to the procedural choices made by the decision-makers, in this case the Community Panel (*Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 37 ("*Re Sound*"); *Maritime Broadcasting* at para 77). Further, that the adequacy of the Community Panel's reasons is not a stand-alone basis on which to quash the decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 21-22. Issues of mixed fact and law that fall within the Community Panel's expertise and function under the Election Rules are also reviewable on the reasonableness standard (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61). The Respondent also notes that the content of duty of fairness that was owed to the Applicant and the spectrum of reasonable outcomes of the Community Panel's consideration of the Petition are highly contextual and cannot be separated from the social context in which the decision was made (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*"); *Maritime Broadcasting* at para 35).

[9] In my view, it is well established that the standard of correctness applies to questions of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 ("*Khosa*"); *Mission Institution v Khela*, 2014 SCC 24 at para 79). Further, prior jurisprudence of this Court has applied that standard to questions of procedural fairness arising from the removal from office of band councillors (*Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 24; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 15; *Gadwa v Kehewin First Nation*, 2016 FC 597 at paras 19-20 ("*Gadwa*")).

[10] The Respondent submits that *Maritime Broadcasting* established that the reasonableness standard applies to issues of procedural fairness. However, it has not pointed to any jurisprudence concerning the removal of a band council member where that case has been applied and this Court has very recently applied the correctness standard in that circumstance (*McCallum v Peter Ballantyne Cree Nation*, 2016 FC 1165 at para 19; *Parenteau v Badger*, 2016 FC 535 at para 36 ("*Parenteau*")).

[11] It is also well established that the interpretation and application of custom election acts by a council of elders, an elections officer or band council is reviewable on the standard of reasonableness. I see no reason why this would not equally apply to the role of the Community Panel in this matter (*Johnson v Tait*, 2015 FCA 247 at para 28; *Mercredi v Mikisew Cree First Nation*, 2015 FC 1374 at para 17; *Coutlee v Lower Nicola First Nation*, 2015 FC 1305 at para 3; *Orr v Peerless Trout First Nation*, 2015 FC 1053 at para 44; *Campre v Fort McKay First Nation*, 2015 FC 1258 at para 32; *D'Or v St Germain*, 2014 FCA 28 at paras 5-6).

[12] Reasonableness is concerned with the existence of justification, transparency and intelligibility, and whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 ("*Dunsmuir*"); *Khosa* at para 59).

Relevant Legislation

Adams Lake Secwepemc Election Rules ratified on June 19, 2014

> **ADAMS LAKE INDIAN BAND – VISION STATEMENT**
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> …
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> "Our Creator placed us on this land to take care of our people, our land, our language, our customs, our knowledge, our culture, our title, to be ours forever and ever. Ensuring that we live in a safe, healthy, self sufficient community where cultural value and identity are consistently valued promoted and embraced by all"
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> **PART 9: COMMUNITY PANEL**
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> 9.1 The roles and responsibilities of the Community Panel are outlined in Appendix "E".
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> 9.2 The Community Panel shall consist of five (5) elected members of which a majority decides all appeals and petitions held to dispute an Election or any petition(s) to remove a Band Council member(s) from the office of Band Council; held in accordance with the ALIB Election Rules.
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> **PART 22: OATH OF OFFICE**
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> 22.1 A Candidate who has been elected to Band Council shall swear an Oath of Office before a duly appointed commissioner on the first Monday following the Election (Appendix "A").
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> …
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> 22.3 No Candidate elected as Band Council shall be permitted to assume office until they have sworn an Oath of Office with the Electoral Officer.
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> **PART 23: ELECTION APPEAL**
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> …

23.6 A copy of the notice of appeal or petition and any documents relied upon shall be delivered:

a) to the Band Council member whose election is being appealed; or

b) to the Band Council member whose removal is sought; or

c) to the elected Band Council member(s) whose office is being declared vacant;

d) to the person subject to the proceeding;

e) no proceedings of a Community Panel shall be invalid due to a party not being available to make a representation to the Community Panel;

f) the Community Panel may permit any interested Electors, or their agents or legal counsel, to make submissions on any issues being considered by the Community Panel;

g) the Community Panel is empowered to conduct its own investigation as to any allegations set out in a notice of appeal or a petition but any such investigations shall be reasonable and in compliance with the Rules but in any event no investigation shall extend the time in which the Community Panel must make its decision. The Community Panel shall notify any person subject to a proceeding that an investigation is being conducted.

23.7 In the case of an appeal/petition under Section 22.7 or Part 24 the notice received by the Band Manager or designate of appeal and supporting documentation shall be delivered to the Community Panel within 48 hours.

23.8 In the case of an appeal by an Elector under Part 24 the notice of appeal and supporting documentation shall be delivered to the Band Council member whose election is being appealed within 48 hours of the Community Panel receiving the appeal.

23.9 The Community Panel shall issue a written decision together with reasons in every appeal or petition within thirty (30) days of the receipt of the appeal or petition.

23.10 The Community Panel will keep a record of proceedings until the decision has been rendered, at which time the records will be destroyed after 6 years within the presence of two witnesses.

…

23.14 If the Petition is for removal of a Band Council member under Part 24 the Community Panel may:

a) confirm the Band Council member retains their office; or

b) remove the Band Council member from office and declare the office vacant.

23.15 The Community Panel shall provide a copy of the decision to the Band Council and to any party to an appeal or petition.

…

Part 24: REMOVAL FROM OFFICE OF BAND COUNCIL MEMBER/S

24.1 Band Council member/s may be removed from office on one or more of the following grounds:

…

b) he/she has breached their Oath of Office.

24.2 Proceedings to remove a Band Council member shall be commenced by a petition filed with the Community Panel and signed by ten (10) Electors determined as of the date the petition is filed.

24.3 The Petition referred to in Section 24.2 shall also set out the facts in an affidavit sworn before a duly appointed commissioner for taking oaths the facts substantiating the grounds for removal from office of a Chief or Councillor and shall be accompanied by any supporting documentation and a non-refundable free of three hundred ($300) dollars to the Band Manager or designate for processing and delivery to the Community Panel.

Part 27: BY-ELECTIONS

27.1 In the event that the office of Chief or Councillor becomes vacant, a By-election shall be held within sixty (60) days on a date set by the Electoral Officer.

APPENDIX “A”: OATH OF OFFICE – ALIB CHIEF & COUNCIL

…

> (2) I will honestly, impartially and fully perform the duties of my office with dignity and respect.
>
> …
>
> (5) I will uphold the Adams Lake Indian Band Community Vision.

Preliminary Issue

[13] The Respondent, in its written submissions, raised a preliminary and potentially determinative issue being that the Applicant was required to file her application for judicial review within 30 days of the date of the decision (*Federal Courts Act*, s 18.1(2); Election Rules, Rule 23.18). The Respondent submitted that not only had she failed to do so, she had not made a request to this Court for an extension of time and, in any event, could not meet the onus of establishing that she had satisfied the test for an extension of time.

[14] The Applicant, in her written submissions, did not address this issue. However, at the hearing she advised that on March 17, 2016 she had filed a written motion, pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 ("*Federal Courts Rules*") seeking an extension of time and, on June 3, 2016, an Order was issued permitting her to file her application within 15 days of the Order, which she did.

[15] It appears that the motion seeking an extension of time was served on the Band, although perhaps not in full accordance with the *Federal Courts Rules* requirements. A March 14, 2016 Affidavit of Doris Johnny states that she served the Rule 369 motion "on Adams Lake Indian Band on March 14, 2016 at 11 a.m.", she does not state with whom she left the motion or where

she served it. The affidavit of service was filed on March 17, 2016. At that point in time, as the motion for an extension of time was the first step in the proceedings there was no counsel of record for the Band.

[16] Although counsel for the Applicant received the Respondent's written submissions on or about September 20, 2016, which submissions raised and addressed the preliminary issue of late filing, she did not alert counsel for the Respondent to the Order permitting the late filing until two days before this hearing. Counsel for the Respondent then made inquiries of the Band and it was determined that a copy of the Rule 369 motion had been received and had been date stamped in March. However, this had not been communicated to the Respondent's counsel. As of the hearing date, counsel for the Respondent had not been able to determine why the motion had not been brought to his attention.

[17] Counsel for the Respondent requested that, based on the deficient affidavit of service, the matter be adjourned. Further, had he known of the Rule 369 motion, he would have contested it and he wished to consider an appeal of that Order. Further, his written submissions were focused on the late filing issue and he was thereby disadvantaged.

[18] Ultimately, I decided that the matter would proceed on the merits. This was because, regardless of any defects in the form of the affidavit of service, it was received by the Band as confirmed by the date stamp. Thus, service could be validated pursuant to Rule 147 of the *Federal Courts Rules*. Further, as part of its written submissions the Respondent addressed the test for granting an extension of time as set out in *Attorney General (Canada) v Larkman*, 2012

FCA 204, including whether there was some potential merit to the application. In addition, the Respondent also specifically addressed whether the decision was procedurally fair and was reasonable. Accordingly, the request for an adjournment was denied.

Issue 1: Did the Community Panel breach the duty of fairness owed to the Applicant?

Applicant's Position

[19] The Applicant submits that the Community Panel breached its duty of procedural fairness as she was not provided with an opportunity to address statements made against her and because she was not provided with the Community Panel meeting minutes which she requested on or about December 11, 2015 (*Desnomie* at paras 24-30; *Weekusk* at paras 66-70; *Parenteau* at paras 49-51). Further, that the Community Panel failed to provide reasons for its decision and did not explain why it discounted evidence of a witness which supported the Applicant's position.

Respondent's Position

[20] The Respondent submits that the duty of procedural fairness owed to a chief or councillor who is the subject of a petition for removal in accordance with customary law is limited to the basic principles of natural justice, being notice and an opportunity to be heard. The Applicant was provided with adequate notice of the allegations made against her by way of the Petition which provided details of the reasons why the Petitioner sought to have the Applicant removed from office and she was afforded two opportunities to be heard by the Community Panel to respond to the allegations (*Catholique v Band Council of Lutsel K'e First Nation*, 2005 FC 1430

at para 56). Further, the Community Panel had an ongoing concern of protecting the confidentiality of information as informed by the social context of the community and the requirements of the Election Rules. A compelling interest to keep information confidential outweighs the process of full disclosure in some instances (*Cartier v Canada (Attorney General)*, [1998] FCJ No 1211 (FCTD); *Weram Investments Ltd v Ontario (Securities Commission*), [1990] OJ No 918 (Div Ct)) including to avoid harm to ongoing relationships in the community (*Lindenburger v United Church of Canada*, [1985] OJ No 1195 (Div Ct), aff'd 20 OAC 381 (CA)).

Analysis

[21] The content of the duty of procedural fairness "…is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected" (*Baker* at para 22). This Court has previously applied the *Baker* factors in the context of a custom election code and an application for judicial review of an election committee decision to deny an applicant's request for an appeal, concluding that the applicant was entitled to a basic level of procedural fairness before the election committee, such as the right to an unbiased tribunal, the right to notice and an opportunity to make representations which was afforded by the provision of an opportunity to make written submissions (*Polson v Long Point First Nation Committee*, 2007 FC 983 at paras 41-47).

[22] Similarly, the Federal Court of Appeal applied the *Baker* factors in the context of an appeal from an election held pursuant to a custom election code and determined that basic procedural safeguards were required (*Bruno v Samson Cree Nation*, 2006 FCA 249):

> [22] Applying the *Baker* factors, I conclude that the Application Judge did not err in finding that the duty of fairness required at a minimum that the Board provide Mr. Northwest with an opportunity to make submissions. The Board should be granted significant latitude to choose its own procedures; however, given the importance of the decision to Mr. Northwest, basic procedural safeguards must be in place. This does not mean that a full oral hearing was required, but simply that Mr. Northwest should have been given the opportunity to respond to the Soosay complaint, before the Board concluded that he was ineligible for Council under section 4 of the Election Law. By not allowing Mr. Northwest to respond to the Soosay complaint, the Board made its decision on an incomplete factual record. In my view, the Judge correctly found that this constituted reversible error.

[23] And, as stated by Justice Manson in *Parenteau* in a similar context:

> [49] It is well established that the Applicants were entitled to due process and procedural fairness in being dismissed from their positions as Councillors (*Sparvier v. Cowessess Indian Band No. 73*, [1993] F.C.J. No. 446 (Fed. T.D.) at para 57; *Felix 3*, above, at para 76; *Orr v. Fort McKay First Nation*, 2011 FC 37 (F.C.) at para 14). In this context, the Applicants were entitled to know the case against them, and be given an opportunity to be heard (*Duncan v. Behdzi Ahda First Nation*, 2003 FC 1385 (F.C.) at para 20; *Desnomie v. Peepeekisis First Nation*, 2007 FC 426 (F.C.) at paras 33, 34).

[24] In my view, the content of the duty of fairness owed in this case required that the Applicant know the allegations against her, be given an opportunity to be heard and to be provided with reasons for the Community Panel's decision. That content of the duty is also consistent with the procedure contemplated by the Election Rules (see Rules 23.6, 23.7, 23.8, 23.9, 23.15).

[25] The Applicant's supporting affidavit states that the Community Panel found on December 8, 2015 that she had breached her Oath of Office "with me receiving a letter, attached as Exhibit "A"", that stated:

> On November 71 [*sic*], 2015 the community panel has provided notice of the business that is being considered. After investigating the Community Panel has removed Doris Johnny from office of Band council and declare the position vacant. In accordance with the 2014 Secwepemc Election Rules.

[26] Further, that she was in a serious car accident and had an operation on her spine on November 18, 2015 with a lengthy recovery period. She states that she had some contact with the Community Panel who asked her questions but that she did not have an opportunity to address matters raised by Joyce Kenoras at a time when she was present before the Community Panel. Additionally, she has "now learned on June 24, 2016 that the Community Panel found that in relation to the complaint raised by Joyce Kenoras, that on September 9, 2015 that I did not fully perform the duties of office with dignity and respect and did not uphold the Adams Lake Band Vision Statement."

[27] The Respondent filed an affidavit of Ms. Maryann Yarama, the Chairperson of the Community Panel which made the decision. Ms. Yarama states that on November 13, 2015 the Community Panel received the November 10, 2015 Petition seeking the removal of the Applicant as Councillor. Further, that the Petition, a copy of which is attached as Exhibit "A" of her affidavit, set out the details of a series of events, including dates and parties involved, that were alleged to constitute breaches of specific provisions of the Oath of Office. Ms. Yarama deposes that she hand delivered the Petition to the Applicant on November 14, 2015 and believes that she provided another copy, at the Applicant's request, on November 17, 2015.

[28] Indeed, receipt of the Petition appears to have been endorsed by hand by the Applicant as received on November 14 at 11:52 a.m. as seen from a document found in the Certified Tribunal Record ("CTR"). Further, a November 15-16, 2015 email chain between the Applicant and Ms. Yarama and others indicates that Ms. Yarama provided "a copy" to the Applicant by hand on November 14, 2015, the Applicant acknowledged having previously received a copy but requested another as she had misplaced the first pages and her children had scribbled on others.

[29] Ms. Yarama stated in her affidavit that during the 30 days from the receipt of the Petition to when a decision was required to be made, the Community Panel conducted 12 meetings and 13 interviews of the 10 witnesses to the allegations. With respect to the September 9, 2015 incident, 6 witnesses were interviewed, including the Applicant. I note that the meeting minutes were attached as exhibits to her affidavit. The minutes are detailed and include descriptions of the interviews conducted.

[30] Ms. Yarama states that on November 17, 2015, the Community Panel met with the Applicant to discuss the process that would be undertaken to decide the Petition and to give her an opportunity to respond to the allegations, 1.5 hours were allocated for the Applicant to speak as well as time for questions from the Community Panel. On December 1, 2015 the Community Panel again met with the Applicant to give her another opportunity to address the allegations in the Petition and to respond to questions at which time the Applicant identified a witness to the September 9, 2015 incident, this person was subsequently interviewed on December 7, 2015. Further, that on December 9, 2015 Ms. Yarama and another member of the Community Panel hand delivered the decision to the Applicant at the Band Office. I note that a copy of the

decision attached to her affidavit as an exhibit has a hand written notation “Dec 9/15 - Hand delivered to Doris Johnny, Council & Joyce Kenoras” initialed MY and signed by Hilda Jensen.

[31] Ms. Yarama further deposed that on December 16, 2015 the Community Panel wrote to the Applicant advising her of her right to apply for judicial review of the decision within 30 days of the decision, a copy of that letter is attached as an exhibit to her affidavit. I note that the letter also has a hand written notation “Left w Ren Johnny Dec 17/15 @ 3:48 pm” initialed MY and signed Ren Johnny. That letter also states that the Community Panel is bound by the Election Rules and was protecting the confidential rights of the individuals interviewed in the investigation and, therefore, it would not provide copies of the meeting minutes as requested by the Applicant by letter received on December 14, 2015.

[32] I find no reason to doubt and I accept the affidavit evidence of Ms. Yarama and, given the process followed as described above, I am satisfied that the Applicant was not denied procedural fairness. She was given notice of the proceeding and a copy of the Petition which contained the allegations against her. Despite the statement in her affidavit that she suffered an accident, had surgery on her back on November 18, 2015 with a lengthy recovery period, she attended two interviews with the Community Panel, on November 17, 2015 and December 1, 2015, and thereby was provided with two opportunities to respond to the allegations. The substance of the Applicant’s complaint is that she was not afforded an opportunity to cross-examine the Petitioner, however, I am not convinced that in these circumstances the right of cross-examination formed a part of the content of the duty of fairness owed and, the Applicant provides no authority in support of her position in this regard.

[33] The Applicant was also provided with written reasons. While she submits that she was denied procedural fairness because the reasons were not adequate, they explain that she had breached two provisions of the Oath of Office and identified those provisions. The reasons also state that the Community Panel's investigations consisted of witness statements and correspondence related to the incident, and, as a result of the investigation, that the Community Panel determined that the Applicant did not fully perform the duties of office with dignity and respect and did not uphold the Adams Lake Indian Band Vision Statement. This was sufficient to allow the Applicant to understand why the Community Panel decided as it did.

[34] As to the evidence of the witness whose version of events supported that of the Applicant, Ms. Yarama's affidavit evidence was that, subsequent to the Applicant identifying this witness at the December 1, 2015 interview, the Community Panel interviewed that witness on December 7, 2015. This is confirmed by the minutes of that date found in the record. In total, the Community Panel conducted interviews of 6 witnesses and, in my view, on this point the Applicant is really taking issue with the weighing of the evidence. It is not, however, the role of this Court to reweigh the evidence (*Gadwa* at para 82; *Dedam v Canada (Attorney General)*, 2012 FC 1073 at para 59; *Khosa* at para 61).

[35] Finally, although by letter of December 11, 2015 which was received by the Community Panel on December 14, 2015, the Applicant requested copies of the meeting minutes held between November 11 and December 9, 2015 and the Community Panel declined this request, they provided their reasons for doing so. That is, the protection of the confidentiality rights of individuals interviewed for the investigation. The Election Rules do not contemplate

the release of the Community Panel meeting minutes, but also do not explicitly state that they are confidential. The Community Panel's Terms of Reference, Appendix E, Confidentiality, include that the Community Panel shall swear an Oath of Office to always act in the best interests of the Band in carrying out their duties. Further, that transcription of the proceedings and decision of the Community Panel shall be kept for 6 years, stored in a locker cabinet and only accessed by quorum of panel. In this regard, it is of note that in her affidavit Ms. Yarama stated that during the November 17, 2015 meeting of the Community Panel with the Applicant, the Applicant herself raised concerns about the recording of the interview. Ms. Yarama stated that for a small community like Adams Lake that already suffers from some social tensions, confidentiality of information provided by members is considered very important.

[36] In my view, deference is to be afforded to the Community Panel's choice of procedure to withhold the minutes in order to protect the rights of community members who were interviewed (*Baker* at para 27; *Re Sound* at paras 37-42). And, in any event, the request was made only after the decision was rendered. On June 3, 2016 when the Applicant filed the Notice of Application, including the *Federal Courts Rules*, Rule 317 request for a CTR, the minutes were provided. Prior to this, by way of the two interviews with the Community Panel, the Applicant was afforded the opportunity to inquire, beyond the allegations as set out in the Petition, as to the case to be met. That case was purely fact based and she had submitted her version of the events of September 9, 2015. Further, the Applicant does not submit what aspect of the case against her she was unaware of until she received the minutes, other than her submission that she did not learn that the Community Panel had found that she had not fully performed the duties of office with dignity and respect and did not uphold the Vision Statement. However, I have addressed

this above and found that the decision was provided to her on December 9, 2015 and included this finding of the Community Panel.

[37] For these reasons I find that the Community Panel did not breach its duty of procedural fairness.

Issue 2: Was the Community Panel's decision reasonable?

Applicant's Position

[38] As to the reasonableness of the finding of fact made by the Community Panel that her conduct was in breach of the Oath of Office, the Applicant submits only that none of the material from the Community Panel establishes the grounds for the breach of her Oath of Office. Further, that the Community Panel did not provide reasons for its decision which was perverse as they had the evidence from the witness supporting the Applicant's position. Even when the decision was provided by way of the record, no explanation was given as to why that evidence was ignored.

[39] The main thrust of the Applicant's reasonableness argument concerns the role of a councillor. The Applicant asserts that no oath of office can be contrary to the role of a councillor elected to democratically represent the voters who elected them and that personal animosity does not disqualify band council from decision-making (*Sayers v Batchewana First Nation*, 2013 FC 825 at para 53 ("*Sayers*"). Further, that meetings on taxation matters may not always be operated in a calm and dignified manner but that this is not a ground for removal from office

and does not breach the Oath of Office. Councillors are required to act in the best interests of their constituents and for the band and will not be personally liable for their actions unless they were fraudulent or grossly negligent, councillors are also entitled to "qualified privilege" (*Prud'homme v Prud'homme*, [2002] 4 SCR 663 at paras 49-60 ("*Prud'Homme*")). The Applicant submits that remarks made during the September 9, 2015 meeting were not fraudulent or grossly negligent and that her removal from office was contrary to her position as an elected representative, improper and undemocratic.

Respondent's Position

[40] The Respondent submits that the Applicant is incorrect in saying that the Community Panel did not provide her with reasons for the decision. The reasons were found in the decision which was hand delivered to her on December 9, 2015 and explained that there had been a breach of her Oath of Office.

[41] The Respondent submits that while the Applicant claims the decision was undemocratic, neither the Election Rules or the *Federal Courts Act* permit the decision to be reviewed on that basis. Further, that the Applicant's arguments made with respect to the civil liability of councillors and qualified privilege are irrelevant to the application. The September 9, 2015 meeting was not a council meeting to which qualified privilege could apply and the Community Panel was not charged with determining if the Applicant was liable for a civil action.

[42] The Community Panel's mandate arises from the Election Rules, this is to enforce the Election Rules, including the Vision Statement, and to provide oversight of the conduct of the

chief and council. This public interest mandate incorporates broad factors in the Community Panel's decision-making. Its interpretation of the requirements necessary to meet the objectives of the Election Rules, the Vision Statement, the Oath of Office and whether the Applicant's actions of September 9, 2015 breached those requirements are owed deference by this Court. It was reasonable to expect a higher standard for a Councillor who takes the Oath of Office.

Analysis

[43] I have already found above that the Applicant was provided with copies of the Petition prior to the investigation commencing and with the decision prior to obtaining the CTR in response to the *Federal Courts Rules*, Rule 317 request and addressed the adequacy of the reasons. I would add to this only that the minutes provided in the record include summaries of the interviews of the Applicant, the Petitioner and others at the meeting which describe the incident, there is no question that it occurred. In her affidavit filed in support of this application for judicial review the Applicant does not deny this or otherwise address the incident. Given this, it was the role of the Community Panel to assess that information and determine if it amounted to a breach of the Applicant's Oath of Office.

[44] It is not disputed that the Community Panel is authorized to decide petitions seeking to remove a band councillor and Rule 9.2 of the Election Rules explicitly provides for this although the Applicant in her submissions before me seemed to suggest that this was undemocratic.

[45] I agree with the Respondent that the Applicant's submissions concerning democratic rights, the civil liability of councillors and qualified privilege are not relevant to this application. The Applicant refers to paragraph 53 of *Sayers* in support of the proposition that personal animosity cannot disqualify band council from decision-making. Her reasoning being, therefore, that the Community Panel could not remove her from her decision-making role as a member of the Band Council as a result of personal animosity.

[46] I would note first that paragraph 53 of *Sayers* forms part of a contextual analysis of an allegation of bias and the obligation of councillors to adhere to the principles of procedural fairness. The issue before the Community Panel was not one of whether the Applicant was biased or had not treated the Petitioner in a procedurally fair manner; it was whether by her behaviour she had breached her Oath of Office. Pursuant to Rules 24.1 and 23.14(b) of the Election Rules, a band council member can be removed from office on that basis by the Community Panel. This is not challenged by the Applicant other than to say, in effect, that the Community Panel is somehow of a lesser status of elected office than that of elected Band Council members and that the role of the latter cannot be infringed upon by the Oath of Office as enforced by the former.

[47] As to *Prud'homme*, there the respondent, who was at the time a municipal councillor, had tried unsuccessfully to convince the other councillors to appeal a judgment that had quashed a by-law. He then criticised publically, at a regular council meeting, the fact that no public debate had been held as to whether the judgment should be appealed. The appellants were offended by his statements which they felt included malicious insinuations about them, making them out to

be bad citizens. They brought an action against the respondent in damages for interfering with their reputations, honour and dignity. The Supreme Court of Canada found that, overall, the respondent acted in good faith, with the aim of performing his duties as an elected municipal official. While his comments were sometimes harsh, they were made in the public interest and remained within the bounds of his right of comment, opinion and expression, as a municipal officer about the affairs of his municipality that were matters of public interest.

[48] The Supreme Court of Canada addressed the question of what rules of civil liability applied to the wrongful individual act of an elected municipal official in Quebec. It describes the role of councillors in the context of their dual role as representatives of the municipality and their constituents. In that context the Supreme Court of Canada stated in paragraph 21 that:

> 21 Generally speaking, elected municipal officials are officials of the municipal corporation (s. 47 of the *Cities and Towns Act*, R.S.Q., c. C-19, and s. 79 of the *Municipal Code of Québec*, R.S.Q., c. C-27.1). In that capacity, their rights and duties are those of a mandatary. As well, in the course of their participation in the legislative or administrative activities of the council, they are not personally liable for the council's acts, unless they acted fraudulently or with gross negligence amounting to gross fault. Nor are they liable for the *ultra vires* acts of the municipality, unless they acted maliciously or in bad faith (Jean, *supra*, at p. 211; I. MacF. Rogers, *The Law of Canadian Municipal Corporations* (2nd ed. (loose-leaf)), at p. 214.16). However, in the case of the collegial acts of the council, elected municipal officials are, as a rule, personally liable for their wrongful individual acts.

[49] It is difficult, however, to see how a finding that municipal officers, in the course of their participation in the legislative or administrative activities of the council, are not personally liable for the council's acts, unless they acted fraudulently or with gross negligence amounting to gross fault, is relevant to the issue that was before the Community Panel. Moreover, while the

Supreme Court of Canada also noted that elected municipal officers must promote both the subjective interests of their constituents and safeguard the objective interests of the municipality and, in that regard, their right or obligation to speak is an important aspect of the performance of their duties of office (para 23), this was again in the context of the limits of such speech in a defamation action. The discussion of qualified privilege was in that same context:

> 49 Elected municipal officials do not enjoy the parliamentary privilege enjoyed by members of the National Assembly of Quebec or of the federal Parliament (R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 2, at pp. 12-20 and 12-21; J. Hétu, Y. Duplessis and D. Pakenham, *Droit municipal: principes généraux et contentieux* (1998), at p. 177). The English and Canadian courts, however, have held that words spoken at a meeting of a municipal council are protected by qualified privilege (J. P. S. McLaren, "The Defamation Action and Municipal Politics" (1980), 29 *U.N.B.L.J.* 123, at pp. 134-35). Accordingly, the fact that words spoken at a meeting are defamatory does not, in itself, mean that a municipal councillor will be liable therefor. In order to succeed in his or her action, the plaintiff must prove malicious intent or intent to harm on the part of the councillor (Brown, *supra*, at p. 13-4). The reason for that qualified privilege was eloquently stated by Diplock L.J. in *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 152…:
>
> > My Lords, what is said by members of a local council at meetings of the council or of any of its committees is spoken on a privileged occasion. The reason for the privilege is that those who represent the local government electors should be able to speak freely and frankly, boldly and bluntly, on any matter which they believe affects the interests or welfare of the inhabitants. They may be swayed by strong political prejudice, they may be obstinate and pig-headed, stupid and obtuse; but they were chosen by the electors to speak their minds on matters of local concern and so long as they do so honestly they run no risk of liability for defamation of those who are the subjects of their criticism.

[50] Neither questions of civil liability for comments made as a Band Council member or the defence of qualified privilege have application in this matter.

[51] The Community Panel was required to interpret the Oath of Office and apply it to the September 9, 2015 incident. I note that the Election Rules set out the Band's Vision Statement and require that an elected candidate shall swear the Oath of Office and shall not be permitted to assume office until they have done so (Rules 22.1 and 22.3). The Oath of Office is attached as Appendix A of the Election Rules. It includes that the deponent will honestly, impartially, and fully perform the duties of Officers with dignity and respect; will always consider the best interests of the Band and uphold the Band's Community Vision; will not engage in conduct determined to be of a serious nature that removal from council will be deemed necessary; and, the deponent will comply with the Community Panel's decision for removal from office and will promote unity.

[52] In my view, the question of whether the Applicant conducted herself with dignity and respect and upheld the Community Vision is one that the Community Panel was uniquely able to assess. The Community Panel had an understanding of Band society and dynamics that is not available to this Court and, in my view, it was best positioned to determine if the September 9, 2015 incident resulted in the breach of the Oath of Office. This Court has previously recognized the expertise of band councils on matters such as band custom and factual determinations and found that their decisions are therefore owed deference (*Crawler v Wesley First Nation*, 2016 FC 385 at para 18; *Shotclose v Stoney First Nation*, 2011 FC 750 at para 58;

Beardy v Beardy, 2016 FC 383 at para 43). It is also trite law that deference is to be afforded to a decision-maker with special expertise (*Dunsmuir* at paras 54-55; *Khosa* at para 25).

[53] When appearing before me the Applicant submitted that her comments could be seen as merely an attempt at maintaining order at the meeting, in my view it was open to the Community Panel not to reach that conclusion. Similarly, that it was reasonably open to it to conclude, as it did, that the Applicant had not conducted herself with dignity and respect and did not uphold the Community Vision. As noted above, reasonableness is concerned with the existence of justification, transparency and intelligibility, and whether the decision falls within a range of possible, acceptable outcomes. As I have concluded that it did, interference by this Court with the decision is not warranted.

[54] In these circumstances, I find that this application must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. The Respondent shall have its costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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