Federal Court Cour fédérale

Date: 20240207

Docket: T-1562-22

Citation: 2024 FC 192

Ottawa, Ontario, February 7, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

JEANNIE MARIE-JEWELL

Applicant

and

SALT RIVER FIRST NATION #195

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Jeannie Marie-Jewell [Applicant], self-represented, seeks judicial review of a June 30, 2022 decision [Decision] of the Chief and Council [Band Council] of the Salt River First Nation #195 [SRFN] that she was ineligible to be a candidate for Chief in the September 19, 2022 election [Election].

[2] The application for judicial review is allowed. The Decision is unreasonable. Accordingly, there is no need to address the parties' submissions concerning any alleged breaches of procedural fairness.

II. Background

[3] SRFN is a First Nation signatory to Treaty 8 in the Northwest Territories and it is a band within the meaning of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. SRFN is governed by a Band Council consisting of one Chief and six Councillors. Its elections are governed by a custom election law [Election Law] first enacted in 2010, amended in 2015 and further amended in 2017. The 2017 Election Law is the current law applicable to the Election.

[4] The Applicant had previously served as a Councillor from 2000-2001 and from 2010-2012.

[5] The various versions of the Election Law addressed eligibility for positions of Chief and Council. The 2017 Election Law was amended to change the terms of office from two to three years and to provide that, if a SRFN member is indebted to the SRFN according to certain criteria, that member is ineligible to be a candidate for the positions of Chief and Councillor (s 39).

[6] After an investigation by the MNP LLP accounting firm [MNP], resulting in an MNP report in May 2014 [MNP Report], the SRFN had determined that the Applicant was indebted to the SRFN for overpayments related to travel expenses and remuneration. In July 2014, the

Applicant received an invoice for $73,493.32 and a further June 30, 2019 invoice reflects that the amount has increased to $131,897.60 due to interest [Alleged Indebtedness]. The Applicant disputes the Alleged Indebtedness to SRFN.

[7] In a December 5, 2019 letter, then-Chief David Poitras [Chief David Poitras] advised certain individuals, including the Applicant, that "SRFN would not be pursuing this matter any further at this time. Consequently, invoices will no longer be issued and you are deemed to not be indebted to SRFN." This letter was copied to the Band Council members.

[8] In December 2021, the Band Council then in office sought legal advice concerning the December 5, 2019 letter to ascertain if the people mentioned in the letter were indebted to SRFN or whether they were eligible to run in the September 19, 2022 Election. The Band Council received a January 31, 2023 letter from their lawyers stating:

> …these 4 individuals are still not eligible to run in the 2022 elections because they remain "indebted" to SRFN for the purposes of the *Election Code* under section 39(b) of the *Election Code* and also … under section 39(a) of the Election Code.
>
> [emphasis in original.]

[9] The Applicant was given a copy of the letter. She made a presentation to the Band Council on June 30, 2022, submitting that she was not indebted to SRFN. The Band Council disagreed and passed the June 30, 2022 motion explaining that it was their position that the Applicant remained indebted to SRFN and was therefore ineligible to run as a candidate for Chief in the Election.

III. Applicable Provisions

[10] The relevant provision of the 2017 Election Law is section 39:

> Any Elector who, on the day the notice of nomination is posted under Section 31, is indebted to the First Nation or to a First Nation Business Entity as:
>
> a) shown on the books and records of the First Nation, or
>
> b) found by an independent forensic accounting firm retained by the First Nation, in a forensic report prepared after investigation, or
>
> c) found by a civil or criminal court of competent jurisdiction, is not eligible for nomination as a Candidate.

IV. Issues and Standard of Review

[11] After considering the submissions of the parties, the issues are best characterized as:

(1) Does the Court have jurisdiction to hear and determine this matter?

(2) Is the Decision reasonable?

(3) Was the Applicant denied procedural fairness?

[12] The Applicant makes no submissions on the standard of review for these issues.

[13] It is settled that there is no standard of review for a Court ascertaining whether it has jurisdiction over a matter.

[14] The Respondent submits that, if the Court determines that it has the jurisdiction to review the Decision, the standard of review for considering the merits of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). The Court must ask whether the Decision bears the hallmarks of reasonableness: justification, transparency and intelligibility (at para 99). The Court must also bear in mind the expertise and experience of Indigenous decision-makers and their understanding of Indigenous laws, and afford significant deference, particularly when it comes to interpreting and applying custom election codes (*Pastion v Dene Tha' First Nation*, 2018 FC 648 at paras 21-27; *Commanda v Algonquins of Pikwakanagan First Nation*, 2018 FC 616 at para 19).

[15] I agree with the Respondent that the second issue, considering the merits of the Decision, attracts a reasonableness standard of review (*McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220 at para 52; *Beeswax v Chippewas of the Thames First Nation*, 2023 FC 767 at para 14; *Vavilov* at paras 16-17, 23). For a decision to be unreasonable, a reviewing court must be satisfied that there are shortcomings in the decision that are "sufficiently central or significant" (*Vavilov* at para 100). The decision must be justified in light of the facts, and the reasonableness of a decision may be "jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 126). Ultimately, the onus rests with the Applicant to demonstrate that the Decision is unreasonable (*Vavilov* at para 100).

[16] The third issue attracts a standard of review akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CP Railway*]; *Mission Institution v Khela*, 2014 SCC 24 at para 79). When evaluating whether there has been a breach

of procedural fairness, including allegations of bias, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at para 54; *Vavilov* at para 77).

V. Analysis

A. *Jurisdiction*

[17] The Court does have jurisdiction to determine the application for judicial review of the June 30, 2022 Decision. This matter does not deal with a commercial or contractual agreement of a private nature, and thus the cases cited by the Respondent are of limited applicability. The authorities, which I will outline below, confirm that this Court has jurisdiction.

[18] The Respondent submits that the Band Council was exercising SRFN's inherent right of self-governance and its inherent private law powers in applying SRFN's written customary election laws. Only a decision that is public in nature can be subject to judicial review (*Knibb Developments Ltd v Siksika Nation*, 2021 FC 1214 at para 13 [*Knibb*]). I agree with this principle and note that *Knibb* dealt with a private, contract law decision of Siksika Nation. In my view, that is not the case in the present matter.

[19] The Respondent compares the Decision to a private law, internal governance function, such as that exercised by the Department of Indian and Northern Affairs [INAC] in *Goodtrack v Canada (Attorney General)*, 2006 FC 1297 [*Goodtrack*] (paras 1-8). However, *Goodtrack* dealt with an objection to a production rule, regarding a letter from INAC where the INAC

representative acknowledged receipt of the results of a custom election. In this case, the Court is dealing with a Decision rendered by SRFN with respect to election eligibility. The Respondent says that the Decision merely acknowledges the applicability of the Election Law, as compared to a decision of the Electoral Officer deciding who is eligible to run for office.

[20] The Respondent also submits that neither limitations statutes nor equity extinguishes the Alleged Indebtedness – they merely preclude attempts by SRFN to collect. Furthermore, any alleged errors in the MNP Report do not fall within the Court's judicial review jurisdiction. I agree. Finally, the Respondent contends, since the Applicant never filed her nomination package, the Court cannot amend the Election Law and call a new election by adding the Applicant's name to the ballot. I also agree, and focus below on whether the Decision is reasonable.

[21] The Applicant submits that the Court has jurisdiction because SRFN is a public body.

[22] Turning back to the crux of this issue, I find that *Saulteaux v Carry the Kettle First Nation*, 2022 FC 1435 [*Saulteaux*] is a useful authority. Subsection 2(1) of the *Federal Courts Act*, RSC 1985, c F-7 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" (*Saulteaux* at para 26, citing *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 18). In *Saulteaux*, the Respondent acknowledged that the Federal Court has previously determined that it has jurisdiction "over decisions made pursuant to Indigenous customary law" (at para 28, citing *Thomas v One Arrow First Nation*, 2019 FC 1663

at para 14 [*One Arrow*]). Similar to *Saulteaux*, I also find that the Respondent failed to explain why this Court should depart from what is established precedent (at para 29).

[23] *Bellegarde v Carry the Kettle First Nation*, 2023 FC 86 aff'd 2023 FCA 246 is also of assistance:

> [15] … it is generally accepted that First Nations or bodies created by them are "federal boards, commissions or other tribunals" when they are making decisions regarding the composition of their council, even where the source of their authority lies in Indigenous law, or what the *Indian Act*, RSC 1985, c I-5, s 2, calls the "custom of the band." Other frequently cited decisions to the same effect include *Ratt v Matchewan*, 2010 FC 160; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536; *Kennedy v Carry the Kettle First Nation*, 2020 SKCA 32. On this basis, this Court frequently reviews decisions regarding not only elections, but also the removal of chiefs or councillors and selection processes other than elections.

[24] Furthermore, in *One Arrow*, Justice Grammond stated, "[t]here can be no serious dispute that this Court has jurisdiction to review decisions made under a First Nation's election laws, including where these laws are said to be 'customary'" (at para 14). This Court has the jurisdiction to deal with SRFN Chief and Council decisions where the issue concerns a matter of a "public" nature, regardless of whether the Decision was taken pursuant to the *Indian Act*, a by-law, or involves application of a custom or practice (*Shanks v Salt River First Nation #195*, 2023 FC 690 at para 36, citing *Crowchild v Tsuut'ina Nation*, 2017 FC 861 at para 27).

B. *Is the Decision Reasonable?*

(1) Applicant

[25] The Applicant submits that the disputed debt dates back to 2014, there has been no judgment obtained, and SRFN made no effort to collect any funds from the Applicant. Furthermore, she says the alleged debt is no longer enforceable because it is statute barred and equitably barred.

[26] The Applicant cites the December 5, 2019 letter from Chief David Poitras which states that "invoices will no longer be issued and you are deemed to not be indebted to SRFN."

[27] The SRFN Consolidated Financial Statements from March 31, 2020 and March 31, 2021 do not reflect any funds owed by the Applicant to SRFN. The MNP Report also contained many defects. The Alleged Indebtedness was politically motivated.

[28] The Applicant notes that, as stated many times in the MNP Report, the Chief Financial Officer was terminated as he did not give the Band Council the appropriate financial advice, nor did he ensure the timely recording of expenditures. The Applicant says that when new Chief Freda Martselos took office in 2013, she called for the forensic audit conducted by MNP due to the firing of the Chief Financial Officer.

[29] The Applicant submits she was never interviewed for the MNP Report or asked to respond. She did not receive a copy of the MNP Report until December 2022, despite requesting one for many years. The Applicant also submits that she then received an invoice saying she owed more than $70,000.

[30] The Applicant also submits that SRFN will never take any of these former Councillors to Court to collect this debt. She alleges the SRFN administration failed to keep appropriate records. She cites the 2015-2016 RCMP investigation, which found no wrongdoing and exonerated all those involved. In response to the Respondent's claim that she owed money, the Applicant says the 2010 Election Law contained no limitations as to how much a Councillor is paid, except for the stipulated $300 per meeting.

[31] The Applicant also submits that she only served as a Councillor until September 2012, and the MNP Report covered all expenditures until March 2013, when the Applicant had no authority to spend money or authorize any SRFN expenditure since her term was completed.

[32] The Applicant notes that SRFN pays her a Per Capita Distribution on a yearly basis, pursuant to the Treaty Land Entitlement signed in 2002 and the SRFN took no steps to set off any of the Alleged Indebtedness. SRFN also provides an Elders payment to those members who qualify and, again, no attempts were made to set off any of the Alleged Indebtedness. Lastly, SRFN awarded her a contract to assist SRFN with day school settlement applications and paid her without any set-off.

[33] The Applicant contends that, although she was "exonerated", former Chief Martselos wanted to ensure that the former, implicated Councillors would be prevented from running for office. Under Chief Martselos, the Applicant continued to receive invoices or statements of the Alleged Indebtedness.

[34] The Applicant contends that, when former Councillor Kendra Bourke learned the Applicant intended to run for Chief, she raised the legal question to find out if the Applicant was eligible to run for office. She is one of the Councillors to pass the motion in December 2019 stating the former Councillors were no longer indebted to SRFN. The Applicant only learned of the legal opinion in June 2022, which says that she would not be eligible to run because of the Alleged Indebtedness.

[35] Finally, the Applicant submits that the SRFN failed to collect on the debt and, as such, the debt should be statute barred in accordance with limitations statutes. She says the debt continues to be used to treat her poorly. Therefore, she seeks declaratory relief and a series of remedies.

(2) Respondent

[36] The Decision is reasonable.

[37] Given the Band Council's knowledge of the MNP Report naming the Applicant as one of the parties who received overpayments of honoraria, combined with the provisions of the Election Law, the Band Council merely informed the Applicant that she would not be eligible if she were to run. The Band Council did not rule that she was ineligible because only the Electoral Officer can do so under SRFN law.

[38] Furthermore, the Band Council acted reasonably in drawing upon the legal advice it sought and obtained regarding the interpretation of the 2017 Election Law.

[39] The Decision follows an intelligible, transparent, and rational line of reasoning based on the facts and the Election Law. The Band Council deferred to the unequivocal meaning of section 39 of the Election Law and did not usurp the role of the Electoral Officer in determining who is eligible to run as a candidate.

[40] The Band Council considered all of the evidence before it, including that the debt is shown on the books and records of SRFN and in consideration of the MNP's findings. The Applicant clearly did not pay off the debt, even if collecting on the debt is statute-barred or barred by equity. It was still open to her to pay her debt, as the Respondent notes, which would make her eligible within the terms of the Code.

[41] Even if the Applicant filed her nomination papers and the decision came under the review of the Electoral Officer, the decision to deny the Applicant's eligibility would have been reasonable.

(3) Conclusion

[42] Although the parties make submissions that are, in my view, outside the scope of this application, I nevertheless find that the Decision is unreasonable in light of the record.

[43] The determinative error made by SRFN was its failure to consider the December 5, 2019 letter from former Chief David Poitras in its entirety. The Respondent does not challenge Chief David Poitras' authority to author such a letter, nor does the Respondent challenge Chief David Poitras' findings therein.

[44] In my view, the Respondent is selective in highlighting certain sentences in Chief David Poitras' letter. One example of this is when the Respondent points out that the letter stated that SRFN would not be pursuing this matter any further "at this time."

[45] Turning to the substance of the December 5, 2019 letter, I note Chief David Poitras wrote that SRFN "will not be pursuing this matter any further at this time." While the phrase "at this time", by itself, leaves open the possibility that SRFN may pursue future legal action against those named in the MNP Report, I find that the final sentence in that paragraph is the most determinative. That final sentence provides that "invoices will no longer be issued and you are deemed to not be indebted to SRFN" [emphasis added]. This is a plain language assertion by the Chief David Poitras, stating that these individuals were no longer indebted. Nothing could be more direct than this assertion. Despite this, SRFN later retracts this statement and sought a legal opinion all the while re-issuing the additional invoice that contained $58,404.28 of interest charges.

[46] The Decision merely says that, after listening to delegates, including the Applicant and Gloria Villebrun, the Band Council decided to follow the 2017 Election Law (specifically, paragraphs 39(a) and (b)), finding the delegation ineligible to run for Chief or Council in the Election. This is not coherent with the December 5, 2019 letter, nor does SRFN answer whether they considered this letter and why they are emboldened to decide differently given the factual matrix underpinning this decision. Though the Applicant was in possession of the legal opinion, the Band Council itself is required to provide its rationale for the Decision. The Band Council cannot simply rely on the fact that it received a legal opinion and not explain the rationale for its

Decision, taking into account the serious implications of the Decision. This error alone is sufficient to warrant granting the application.

[47] As noted in *Vavilov*, some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible, rational reasoning (at para 86). I find that such is the case with the Decision. It is unreasonable.

C. *Was the Applicant denied procedural fairness?*

[48] My finding on the unreasonableness of the Decision is determinative and there is no need to consider the submissions on procedural fairness. I only note that having this matter re-mitted for re-determination means that it must be considered afresh and in a procedurally fair manner.

VI. Conclusion

[49] As indicated above, the Court has jurisdiction to hear the matter. The Court also finds that the Decision is unreasonable. Though the Applicant seeks declaratory relief and other remedies, the only remedy I am ordering is to have the matter remitted to the Band Council for re-determination in accordance with these reasons.

JUDGMENT in T-1562-22

THIS COURT'S JUDGMENT is that:

1. The Court has jurisdiction to determine the matter.
2. The application for judicial review is allowed. The matter is remitted to the Band Council for re-determination in accordance with these reasons.
3. The Applicant is granted costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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