Federal Court  Cour fédérale

Date: 20240507

Dockets: T-2546-22, T-2536-22

Citation: 2024 FC 699

Ottawa, Ontario, May 7, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

TERRINA BELLEGARDE and JOELLEN HAYWAHE

Applicants

and

SCOTT EASHAPPIE, SHAWN SPENCER, TAMARA THOMSON and CARRY THE KETTLE FIRST NATION

Respondents

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JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Ms. Terrina Bellegarde and Ms. Joellen Haywahe [Applicants], were elected as councillors on the Carry the Kettle First Nation [CTKFN] Council. Within less than seven months, they were removed for misconduct following a vote of two other elected councillors of the First Nation, as well as the elected Chief.

[2] The Applicants brought separate applications for judicial review of their removals from CTKFN Council pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*FC Act*]. The Applicants also sought a stay of their removal, as well as a stay of an incoming by-election purported to be held to replace them as elected members of Council.

[3] On January 27, 2023, Justice Grammond of this Court granted the stay requested by the Applicants. Justice Grammond held that, on the evidence available before him, there was a serious question as to whether Council, in the presence of only the two elected councillors as well as the elected Chief, constituted the quorum necessary to hold meetings and vote in favour of resolutions removing the elected Applicants out of office (*Bellegarde v Carry the Kettle First Nation*, 2023 FC 129 [*Bellegarde Injunction Decision*]).

[4] In defiance of the stay order, the Respondents, including the two elected councillors and the elected Chief, continued the by-election process. On January 15, 2024, Justice Favel of this Court found the two elected councillors as well as the elected Chief in contempt of Court for having failed to comply with this Court's order (*Bellegarde v Carry the Kettle First Nation*, 2024 FC 48 [*Bellegarde Contempt Decision*]).

[5] For the following reasons, the Applications are granted. The CTKFN Band Council Resolutions [BCR], removing the Applicants from their positions as elected members of CTKFN Council, are invalid. Council did not have the quorum nor the qualified majority required by the CTKFN *Cega-Kin Nakoda Oyate Custom Election Act* [*Election Act*] to adopt the BCRs and remove the Applicants from elected office. Moreover, the Tribunal that is required to be established pursuant to paragraph 12(7)(i) of the *Election Act* to provide a recommendation to a Council to remove an elected official from office was improperly constituted.

[6] The Applicants are, and remain, elected councillors of CTKFN Council. The Applicants are entitled to all remuneration that would have been payable to them as councillors from the

date of their removal until the next CTKFN Council election (unless new and valid removal processes are triggered and result in Council vacating their positions). The election of Mr. Brady O'Watch and Mr. Morris Pasap, following the by-election of February 2, 2023, is void *ab initio*.

II. Facts

[7] The *Indian Act*, RSC 1985, c I-5 [the "I*ndian Act"* or the "*Act"*] provides various ways through which First Nations may determine their leadership. Section 74 of the *Act* provides a procedure for a First Nation to conduct elections. In the case of First Nations named in the schedule to the *First Nations Elections Act*, SC 2014, c 5 [*First Nations Elections Act*], a different procedure may be followed. Alternatively, the *Act* also recognizes that First Nations may conduct elections following a community election code or according to the custom of the First Nation.

[8] CTKFN is a Nakota Nation in Treaty 4 Territory in south-east Saskatchewan. CTKFN has followed the procedure set out in section 74 of the *Act*. However, following a federal policy allowing First Nations to opt out of the *Act* and implement their own election procedure, CTKFN chose to adopt its community election code, the *Cega-Kin Nakoda Oyate Custom Election Act*.

[9] On December 14 and 15, 2017, CTKFN enacted the *Election Act* through a membership vote. The *Election Act* came into effect on January 29, 2018, when a Ministerial Order was adopted through order in council, removing CTKFN from the application of section 74 of the *Act* (*Saulteaux v Carry the Kettle First Nation*, 2022 FC 1435 at para 5 [*Saulteaux*]).

[10] The *Election Act* provides that CTKFN be governed by one Chief and up to six councillors. The *Election Act* establishes the procedure to be followed during elections, and rules relating to the conduct of Chief and Council, the suspension and removal of members from office, and establishes the *Cega-Kin Nakoda Oyate Tribunal* [Tribunal] to make determinations in relation to issues arising out of elections and conduct of Council members.

[11] An election was held on April 7, 2022. The Applicants, Terrina Bellegarde (in file T-2536-22) and Joellen Haywahe (in file T-2546-22), were elected as councillors. Chief Scott Eashappie and councillors Shawn Spencer, Tamara Thomson (the three named Respondents), were also elected, along with councillors Dwayne Thomson and Lucy Musqua.

A. *The Election Act*

[12] Section 12 of the *Election Act* establishes the Tribunal. Section 12 provides that the Chief and councillors must appoint five individuals to the Tribunal to accept, hear, and decide appeals. It must be comprised of four CTKFN members and one non-member of the First Nation. The Tribunal also plays a role in the removal of a Chief or councillor from office. The Tribunal must examine any complaint, conduct an examination to allow the affected official an opportunity to respond, and then make a recommendation to Council as to whether the elected official should be removed from office.

[13] Section 19 of the *Election Act* provides that Chief and Council may remove a councillor for unacceptable behaviour, including “misconduct.” Subsections 19(5) and (6) provide that Council must convene a Special Meeting in conjunction with the Tribunal, to allow an elected

official to “show cause” that their position on Council should not be vacated, and to allow the Tribunal to consider their cause and make a recommendation to Council. The remaining Council members “shall then vote on whether the affected Councillor position has been vacated for contravention […].” A two-thirds majority vote of the remaining Council members is required for removal, pursuant to paragraph 19(6)(a) of the *Election Act*.

[14] Section 20 of the *Election Act* provides for the suspension of a Chief or a councillor. The process for doing so is to be established by regulations. To this day, no regulations have been adopted for the suspension of an elected official.

B. *Events following the Election and leading to the Special Meeting*

[15] The events leading to the removal of the Applicants from Council have been aptly summarized in the *Bellegarde Injunction Decision* and the *Bellegarde Contempt Decision*.

[16] As held by Justice Grammond at paragraph 5 of the *Bellegarde Injunction Decision*, increasing distrust grew between the Applicants and the individual Respondents Chief and councillors following the election.

[17] On August 15, 2022, the Tribunal notified CTKFN members that it had been made aware of situations that might constitute grounds for removal of councillors, and invited any person who wished to make submissions to do so.

[18] On August 24, 2022, the Chairperson of the Tribunal resigned, leaving the Tribunal without its mandatory non-CTKFN member. That member was not replaced.

[19] On August 28, 2022, the Tribunal ordered, pursuant to section 20 of the *Election Act* and even if no regulations determining a process to do so had been adopted, that councillor Haywahe be suspended with pay. The Tribunal also recommended that a Special Meeting be held to review councillor Bellegarde's misconduct pursuant to section 19 of the *Election Act*.

[20] On or about September 14, 2022, Chief Eashappie and councillors Spencer and T. Thomson voted to remove councillor Bellegarde from office. Councillors Musqua and D. Thomson refused to attend the meetings and did not sign the resolution removing councillor Bellegarde from office. They refused to attend because they disputed the process and the Chief's authority to call a Special Meeting (in the case of councillor D. Thomson), or did not receive a change of location on time, required legal advice, or were on medical leave (for councillor Musqua). Councillor Bellegarde also did not attend the Special Meeting because she did not accept that the Tribunal was properly constituted, as it was missing the non-CTKFN member, and because it was biased against her. The removal of councillor Bellegarde was therefore adopted by 3 out of 5 members of CTKFN Council who are eligible to vote (councillor Bellegarde being ineligible to vote on her own removal, and councillor Haywahe being suspended).

[21] A second Special Meeting was later held regarding the conduct of councillor Haywahe. On or about November 5, 2022, the same three individual Respondents' Chief and councillors

voted to remove councillor Haywahe from office. Councillors Musqua and D. Thomson again refused to attend the meetings and did not sign the resolution removing councillor Haywahe from office. Councillor Haywahe did not attend the meeting because the Tribunal was not properly constituted and was in her view biased. The removal of councillor Haywahe was again adopted by 3 out of 5 members of CTKFN Council eligible to vote (councillor Bellegarde having been removed prior to the vote, and councillor Haywahe being ineligible to vote on her own removal).

[22] Councillors Bellegarde and Haywahe were therefore removed from Council, each receiving written reasons on November 1, 2022 and November 5, 2022, respectively. The reasons state that councillors Musqua and D. Thomson refused to attend the meetings and therefore are deemed, under subsection 24(16) of the *Election Act*, to have voted in favour of the BCRs removing the Applicants from office, even if they did not sign the resolutions.

[23] On December 2, 2022, CTKFN Council adopted a BCR to set a by-election on February 3, 2023.

[24] On January 27, 2023, Justice Grammond issued an injunction (*Bellegarde Injunction Decision*) staying the Applicants' removal from their positions as councillors of CTKFN and the by-election scheduled for February 3, 2023. The Respondents defied the Order and the election was held on February 3, 2023. Morris Pasap and Brady O'Watch were elected.

[25] The Applicants sought an Order finding the Respondents in contempt of Court. On January 15, 2024, Justice Favel found the Respondents in contempt (*Bellegarde Contempt Decision*).

III. Issues and standard of review

[26] The issues in this case are :

A. whether this Court has jurisdiction to review the decisions of a First Nation elected council regarding its leadership selection process;

B. if the Court has jurisdiction to hear the following issues:

i. whether the removals were contrary to the *Election Act*?

ii. whether the removals were procedurally unfair?

iii. whether the removals were unreasonable?

[27] On the procedural fairness issue, as recently stated in *Caron v Canada (Attorney General)*, 2022 FCA 196 at paragraph 5, no standard of review is applied, but the review of allegations of breaches of procedural fairness is best reflected in the standard of correctness: "When engaging in a procedural fairness analysis, [the] Court must assess the procedures and safeguards required, and, if they have not been met, the Court must intervene" (see also *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 33–34, 54 [*Canadian Pacific*]; *Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57). As reiterated in *Canadian Pacific*, the role of the reviewing court on procedural fairness issues is simply to determine whether the procedure that was followed was fair, having regard to the

particular circumstances of the case: “The ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond” (at paras 54, 56).

[28] On the substantive issue, the standard of review is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7, 39–44 [*Mason*]). To withstand judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99; *Mason* at para 59). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125–126; *Mason* at para 73). Reasonableness review is not a “rubber-stamping” exercise, it is a robust form of review (*Vavilov* at para 13; *Mason* at para 63). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

IV. Analysis

A. *The Federal Court has jurisdiction to review decisions of a First Nation council regarding its leadership selection process*

[29] The Federal Court of Appeal and this Court have held on numerous occasions that the Federal Court has jurisdiction to review decisions of a First Nation council where the issue is over a matter that is “public” in nature, and where a source of the jurisdiction or power originates from an Act of Parliament such as the *Indian Act*, including where the power also involves the application of Indigenous law, custom or practice of the First Nation. As such, First Nation councils and bodies created by them or by First Nations as a whole (through custom or otherwise), such as election appeal tribunals or election committees, have historically been

recognized as a "federal board, commission or other tribunal" for the purposes of the *FC Act* when making decisions under those powers. The Court's jurisdiction also extends to the individual Chief and councillors acting, or purporting to act, in their official capacity under those powers (*Canatonquin v Gabriel*, 1980 2 FC 729, 1980 CanLII 4125 (FCA) [*Canatonquin*]; *Lake Babine Indian Band v Williams*, [1996] FCJ No 173 at para 4, 19 NR 44 (FCA) at para 4 [*Lake Babine*]; *Sebastian v Saugeen First Nation No 29*, 2003 FCA 28 at para 51 [*Saugeen*]; *Horseman v Horse Lake First Nation*, 2013 FCA 159 at para 6 [*Horseman*]; *Shanks v Salt River First Nation #195*, 2023 FC 690 at paras 29–36 [*Shanks*]; *Ratt v Matchewan*, 2010 FC 160 at paras 96–106 [*Ratt*]; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paras 29–63 [*Gamblin*]; *Opaskwayak Cree Nation v Cook*, 2023 FC 505 at paras 28, 30; *Saulteaux* at para 59; *Bellegarde v Carry the Kettle First Nation*, 2023 FC 86 at para 15; *Marie v Wanderingspirit*, 2003 FCA 385 at para 4; *Sparvier v Cowessess Indian Band No 73*, [1993] 3 FC 142, 1993 CanLII 2958 (FC); *Beardy v Beardy*, 2016 FC 383 at paras 38–39; *Francis v Mohawk Council of Kanesatake (TD)*, 2003 FCT 115 at paras 11–18 [*Francis*]; *Thomas v One Arrow First Nation*, 2019 FC 1663 at para 14 [*One Arrow*]; *Kennedy v Carry the Kettle First Nation*, 2020 SKCA 32 [*Kennedy SKCA*]; *Bastien v Jackson*, 2022 FC 591 at para 22 [*Bastien*]; *Crowchild v Tsuut'ina Nation*, 2017 FC 861 at paras 27–28 [*Crowchild*]; *Vollant v Sioui*, 2006 FC 487 at para 25; *Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796 at paras 37–38, 69 [*Hill*]; *Ermineskin First Nation v Minde*, 2008 FCA 52 at para 33 [*Minde*]; *Ballantyne v Nasikapow*, 197 FTR 184 at paras 5–6, 2000 CanLII 16594 (FC) [*Ballantyne*]; *Dakota Plains First Nation v Smoke*, 2022 FC 911 at para 15; *Marie-Jewell v Salt River First Nation #195*, 2024 FC 192 at paras 17, 22–24 [*Marie-Jewell*]; *George v Heiltsuk First Nation*, 2023 FC 1705 at para 39 [*George*]).

[30] The Respondents argue that this Court should revisit these binding precedents. Notably, the Respondents argue that while the Federal Court of Appeal has ruled in *Canatonquin*, *Lake Babine*, *Saugeen* and *Horseman* that the Federal Court has jurisdiction over decisions made by a First Nation council because it is a "federal board, commission or tribunal", the Federal Court of Appeal never articulated nor provided any explanation as to why and, most importantly, never applied the two-part contextual inquiry set in *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 [*Anisman*]. CTKFN argues that the applicable test to determine whether an entity and its decisions may be subject to judicial review in the Federal Court is the two-step analysis set in *Anisman*, whereby: (1) the Court must first determine what is the jurisdiction or power at issue; and (2) the Court must then identify the source or origin of that jurisdiction or power.

[31] In this case, the power at issue is not contested, and relates to CTKFN's process in selecting its leaders, including its power to remove an elected official for misconduct. It is also not contested that this power is "public" in nature. It is the second step of the analysis, the source or origin of the power, that is at issue. The Respondents argue that it is not the nature of the body exercising that power that is the primary determinant of whether the body falls within the definition of "federal board, commission or tribunal" for the purposes of subsection 2(1) of the *FC Act*, but whether the source or origin of the power is found in an Act of Parliament (*Anisman* at paras 29–40; *Oceanex Inc v Canada (Transport)*, 2019 FCA 250 at para 29; *Innu Nation v Pokue*, 2014 FCA 271 at para 11 [*Pokue*]; *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 47 [*Air Canada*]). As held by Justice Gleason in *Maloney v Shubenacadie First Nation*, 2014 FC 129 at paragraph 24: "many cases turn on the second issue and involve the search for a federal statute or regulation under which the entity is empowered to act. Where there is no such

federal law or regulation, and the issue is not one of royal prerogative, the entity does not meet the definition of a ‘federal board, commission or other tribunal’.”

[32] More specifically, the Respondents argue that this Court does not have jurisdiction to review the CTKFN BCRs to remove the Applicants as councillors because the source of CTKFN’s power to do so originates from Indigenous law, and not federal law. In their view, the power to remove a councillor is found in the *Election Act*, which was adopted under CTKFN’s inherent power to make laws in matters of leadership and governance that is found outside of the Canadian legal system; and not derived from the *Indian Act* (*Gamblin* at para 34; *Pastion v Dene Tha’ First Nation*, 2018 FC 648 at para 7 [*Pastion*]; *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 at para 36 [*Bertrand*]). Therefore, CTKFN Council is not a “federal board, commission or other tribunal” within the meaning of subsection 2(1) of the *FC Act* when deciding to remove a councillor pursuant to Indigenous law (the *Election Act*) that was adopted by the First Nation under its customary powers; because in doing so, it is not a body exercising a statutory power pursuant to an Act of Parliament.

[33] The Respondents argue that while the *Indian Act* recognizes the First Nations’ power to select its leaders, it does not create nor delegate that power. Therefore, Indigenous laws enacted under inherent self-governance, including the *Election Act* in this case, are not made “under an Act of Parliament” as understood under the definition of “federal board, commission or other tribunal” pursuant to subsection 2(1) of the *FC Act*, and in enacting or making decisions pursuant to such laws, First Nation councils are not a “federal board, commission or other tribunal” under

the *FC Act*. CTKFN's decisions and BCRs made under its *Election Act* are therefore not within the Federal Court's jurisdiction, as they fail the second step of the *Anisman* test.

[34] Finally, the Respondents assert that making CTKFN subject to judicial review in the Federal Court in this case would breach their right to self-government, an Aboriginal right protected by section 35 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*], in an unjustifiable manner (see also *Bellegarde Injunction Decision* at para 16). Moreover, recent developments regarding the legal status of First Nations and the sources of their powers, including the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIPA], also call for the reconsideration of previous binding rulings that First Nation councils are subject to judicial review in this Court.

[35] Therefore, according to the Respondents, the threshold established in *Canada (Attorney General) v Bedford*, 2013 SCC 72, *R v Sullivan*, 2022 SCC 19 at paragraph 75, and *R v Comeau*, 2018 SCC 15 at paragraph 29 for a court to overturn or refuse to follow an existing binding precedent is met; consequently this Court should depart from them and all the cases having found that First Nation council decisions relating to the selection of leaders are subject to this Court's jurisdiction.

[36] For the reasons that follow, I cannot accept the Respondents' arguments.

(1) The source of CTKFN's power over the selection of leaders is incorporated by reference in the *Indian Act*

[37] Sections 2 and 18.1 of the *FC Act* provide:

Definitions

2(1) In this Act,

[…]

federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown, other than the Tax Court of Canada or any of its judges or associate judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; (*office fédéral*)

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

[…]

office fédéral Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges et juges adjoints, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*. (*federal board, commission or other tribunal*)

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du

the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	Canada afin d'obtenir réparation de la part d'un office fédéral.
[emphasis added]	[je souligne]

[38] It is trite law that the Federal Court only has the jurisdiction that is conferred upon it by statute and that such statutory jurisdiction must relate to the application of a "law of Canada" within the meaning of section 101 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5. Section 18 of the *FC Act* grants jurisdiction to the Federal Court to hear applications for judicial review of decisions of a "federal board, commission or other tribunal." That term is defined in subsection 2(1) of the *FC Act* as including persons or bodies "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" (see *Bellegarde Injunction Decision* at para 14) [emphasis added].

[39] The "Act of Parliament" that could potentially grant this Court jurisdiction to review the decisions of First Nation councils is the *Indian Act*. At subsection 2(1), the *Indian Act* defines "council of the band" as meaning :

Definitions	**Définitions**
2 (1) In this Act,	**2 (1)** Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
council of the band means	**conseil de la bande**
(a) in the case of a band to which section 74 applies, the council established pursuant to that section,	**a)** Dans le cas d'une bande à laquelle s'applique l'article 74, le conseil constitué conformément à cet article;

(b) in the case of a band that is named in the schedule to the *First Nations Elections Act*, the council elected or in office in accordance with that Act,

(c) in the case of a band whose name has been removed from the schedule to the *First Nations Elections Act* in accordance with section 42 of that Act, the council elected or in office in accordance with the community election code referred to in that section, or

(d) in the case of any other band, the council chosen according to the custom of the band, or, if there is no council, the chief of the band chosen according to the custom of the band; (*conseil de la bande*)

[emphasis added]

b) s'agissant d'une bande dont le nom figure à l'annexe de la *Loi sur les élections au sein de premières nations*, le conseil élu ou en place conformément à cette loi;

c) s'agissant d'une bande dont le nom a été radié de l'annexe de la *Loi sur les élections au sein de premières nations* conformément à l'article 42 de cette loi, le conseil élu ou en place conformément au code électoral communautaire visé à cet article;

d) s'agissant de toute autre bande, le conseil choisi selon la coutume de celle-ci ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de celle-ci. (*council of the band*)

[je souligne]

[40] It is important to note that First Nation councils, in order to be recognized under the *Indian Act*, must be selected through a democratic process. Some First Nations have historically done so through custom. Other First Nations hold elections through the process established under the *First Nations Elections Act*, or under subsection 74(1) of the *Act*. Most First Nations in Canada have, at one time or another, been subject to that electoral procedure (*Ratt* at para 9; *Bertrand* at para 6). However, a process has been established allowing First Nations to revert to a "customary" form of selection for Chief and council.

[41] In *Bertrand*, Justice Grammond explained the interaction of the *Indian Act*, Indigenous laws and custom, and the federal policy to allow a First Nation to "revert to custom" :

> [6] Like most, if not all First Nations in the Northwest Territories, Acho Dene Koe was never brought under the regime of sections 74–80 of the *Indian Act*, R.S.C., 1985, c. I-5 (the Act), for the election of its council. Its name was never listed in the *Indian*

Bands Council Elections Order, SOR/97-138, made pursuant to section 74 of the Act. Thus, according to the definition of "council of the band" in section 2 of the Act, Acho Dene Koe's council is "chosen according to the custom." As I explain below, the term "custom" in the *Indian Act* refers to various forms of Indigenous laws, which are not limited to "custom" in the narrow sense.

[7] Elsewhere in Canada, a policy of the federal government allows First Nations whose elections are governed by the *Indian Act* to "revert to custom" upon showing that their members approved an election code containing certain specified features. For this reason, there is a tendency to equate custom with an election code. This association, however, does not hold for First Nations, like Acho Dene Koe, that were never the subject of an order pursuant to section 74 of the Act: *Ratt v. Matchewan*, 2010 FC 160, 12 Admin. L.R. (5th) 48 (*Ratt*), at paragraphs 8–10. For these First Nations, the custom may be largely unwritten. This has been the source of some confusion in the present case.

[…]

[39] First, a First Nation may enact an election code or similar legislation through the vote of a majority of its members. This combines what Professor John Borrows calls the positivistic and deliberative sources of Indigenous law: Canada's Indigenous Constitution (Toronto: University of Toronto Press, 2010) (Borrows, *Indigenous Constitution*), at pages 35–51. Provided that the conditions in which the vote was taken were satisfactory, this Court has been prepared to consider that codes adopted by a First Nation's membership constitute "custom" in this sense: *Chingee; Taypotat v. Taypotat*, 2012 FC 1036, [2013] 1 C.N.L.R. 349 (*Taypotat*), at paragraphs 29–35.

[40] Second, custom may find its origin in practice. Custom, indeed, need not be written: *Bone*, at paragraph 56. Nevertheless, to be recognized as custom in this sense, a practice must still attract the broad consensus of the community. In *Francis v. Mohawk Council of Kanesatake*, 2003 FCT 115, [2003] 4 F.C. 1133 (*Francis*), at paragraph 36. […]

[41] A court asked to declare the content of a First Nation's custom must, of course, base itself on the evidence before it. In this regard, the party who invokes custom must prove it: *Fort McKay First Nation v. Orr*, 2012 FCA 269, [2013] 1 C.N.L.R. 249, at paragraph 20. It may be relatively easy to deduce custom from practice with respect to the basic parameters of an electoral regime, for example the term of office or the number of councillors. With respect to

> more specific features of the regime, however, a generalized and consistently followed practice may be more difficult to establish. The same is true of rules allowing for the removal or recall of councillors: *Joseph v. Schielke*, 2012 FC 1153, 419 F.T.R. 127, at paragraphs 37–41; *Whalen*, at paragraphs 57–67.
>
> (*Bertrand* at paras 6–7, 39–41)

[42] As stated, CTKFN's elections are not held under the specific procedure set out in an Act of Parliament (see *Gamblin* at para 8; *Bertrand* at paras 7, 39; *Goodtrack v Canada (Attorney General)*, 2006 FC 1297 at para 8 [*Goodtrack*]). Instead, CTKFN followed the process established by the federal government to "revert to custom" and enacted the *Election Act* (as other First Nations have also done: see *Linklater v Thunderchild First Nation*, 2020 FC 1065 at para 16; *Pastion* at paras 9–14; *Chipesia v Blueberry River First Nations*, 2019 FC 41 at paras 11, 16, 23–24 [*Blueberry River First Nations*]). The *Election Act* was then ratified by CTKFN members through a referendum. CTKFN Council then adopted a resolution requesting that the Minister, through a Ministerial Order, terminate the application of the election provisions under section 74 of the *Indian Act* to CTKFN elections. The *Election Act* may represent, in the absence of argument and evidence to the contrary, the "custom" of the First Nation, as discussed by Justice Grammond in *Bertrand*. In that sense, it is also a "custom of the band" as understood under subsection 2(1) of the *Indian Act*.

[43] The Respondents argue, however, that the sole reference to "custom of the band" found in subsection 2(1) of the *Indian Act* is in relation to the *Act*'s definition of "council of the band." That definition recognizes elections held under a custom, and authorizes a "council of the band" elected through that recognized "custom" to exercise some federal powers pursuant to the *Indian Act*. However, the power to make laws in relation to governance decisions pursuant to a "custom

of the band," such as for the selection of leaders, is not itself created by the *Indian Act*. The *Indian Act* does not, therefore, apply to the First Nations' processes for selecting their leaders, when that process takes its source in "custom."

[44] In my view, the Court's decision in *Ratt* is responsive to the Respondents' main arguments. In that case, the Court heard a challenge to the validity of a customary leadership selection process, in a context where the Algonquin of Barriere Lake was one of the few First Nations in Canada that had never been subject to the First Nation election process under section 74 of the *Indian Act* (which is now similar to CTKFN in this case, that no longer follows the process established under section 74). Because the First Nation had never been the subject of an order under subsection 74(1) of the *Act*, the First Nation could select its leadership in accordance with its customs unimpeded by any conditions or requirements under the *Indian Act*.

[45] Justice Mainville held that the Federal Court had jurisdiction to hear a challenge to the validity of the selection process. In his view, "[t]he use customary selection processes is one of the few aboriginal governance rights which has been given explicit federal legislative recognition through the *Indian Act* […] That custom is explicitly recognized by [section 2 and the definition of "council of the band"] of the *Indian Act*" (*Ratt* at para 101) [emphasis added]. Then, at paragraph 103, Justice Mainville held that :

> [i]n the absence of an order under subsection 74(1) of the Act, the implementation of the [custom code] is a condition precedent under the *Indian Act* to the recognition of a band council under that Act for the Algonquin of Barriere Lake. The exercise of authority by that band council under that Act is dependent on the [custom code]. Consequently, the traditional council selected pursuant to the [custom code] and the bodies purporting to supervise the proper selection of the Chief and council under that custom, such

> as the Elders Council, fall under the meaning of "federal board, commission or other tribunal" as those terms are defined in the *Federal Courts Act*."
>
> (*Ratt* at para 103) [emphasis added]

[46] Justice Mainville then noted that the Federal Court of Appeal had ruled that an Elders Council exercising authority to remove a Chief under a First Nation constitution can be reviewed in the Federal Court (*Minde* at para 33), and that the Federal Court had ruled that it had jurisdiction over First Nation elections held under custom (paras 104–105, relying on *Francis* at paras 11–18; *Ballantyne* at paras 5–6). Consequently, Justice Mainville held that the Federal Court had jurisdiction, concluding in the following words at paragraph 106:

> [W]hether the selection process is carried out by election pursuant to the *Indian Act*, or pursuant to custom, the Federal Court has supervisory jurisdiction over the process, and over those bodies, such as electoral officers, appeals boards or elders councils, purporting to exercise authority under the process. I find this is so irrespective of whether or not the selection process flows, as in this case, from ancient custom, or from custom developed pursuant to the revocation of an order under section 74 of the Act which must comply with ministerial conditions. In either circumstance, this Court has jurisdiction.
>
> (*Ratt* at para 106)

[47] I agree.

[48] As held by Justice Mainville in *Ratt*, the reason why the process for selecting Indigenous leaders is subject to the Federal Court's jurisdiction is because the process must be "recognized" under the *Indian Act*, and indeed "is a condition precedent under the *Indian Act* to the recognition of a band council under that Act" (*Ratt* at para 103) [emphasis added]. The *Indian*

Act therefore provides for its own process of selection of leaders under section 74, allows First Nations to follow the process established under the *First Nations Elections Act*, or allows First Nations to follow their custom.

[49] In all cases, the process itself is "recognized," "authorized" and "incorporated by reference" in the *Indian Act* itself.

[50] In recognizing "custom" as an eligible leadership selection process, the *Indian Act* incorporates by reference all customs followed by First Nations to democratically select their leaders, and then recognizes those leaders as the "council of the band" for the purposes of subsection 2(1) of the *Indian Act* and the discharge of the powers existing within the *Act*.

[51] The incorporation by reference of the "custom" leadership selection processes "recognizes" those customs as federal law for the purposes of the *Act*, alongside the other election processes under section 74 of the *Act* and the *First Nations Election Act*. By analogy, and even if not as specifically provided under subsection 2(1) of the *Indian Act* and the definition of the term "council of the band," those leadership selection processes are incorporated in the *Act* in a manner similar to laws adopted by Indigenous Nations in relation to child and family services, which have the force of federal law because they have been incorporated by reference under subsection 21(1) of the *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 (*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at paras 122–130 [*Bill C-92 Reference*]).

[52] Consequently, the powers exercised by First Nations in relation to the selection of leaders, even through custom (and including the removal of members from office), are incorporated by reference in the *Indian Act*, are therefore in part conferred by an "Act of Parliament," and fall within the meaning of "federal board, commission or other tribunal" as those terms are defined in subsection 2(1) of the *FC Act* (see by analogy *Ratt*; *Minde* at para 33).

[53] In this case, and as in *Ratt*, the CTKFN *Election Act* is likewise incorporated by reference in the *Act*. The exercise of authority by CTKFN under the *Election Act* constitutes the exercise of a power recognized and in part "conferred by […] an Act of Parliament." The Federal Court therefore has jurisdiction over decisions made pursuant to the *Election Act*, in the same way that the Court had jurisdiction in *Ratt* over decisions made under its custom code.

[54] The Respondents argue that this Court should not follow the reasoning of Justice Mainville in *Ratt*. In their view, the Court erred in: (a) ruling that subsection 2(1) of the *Indian Act* "recognized" a custom leadership process of the First Nation; (b) finding that Aboriginal customary law was an emanation of the federal common law (relying on *Roberts v Canada*, [1989] 1 SCR 322, 1989 CanLII 122 (SCC); see *Ratt* at para 102); (c) finding that the *Indian Act*'s recognition of the First Nation council is dependent on the existence of a customary leadership process; (d) finding that the exercise of leadership is dependent on the customary leadership selection process; and (e) finding that, for those reasons, the decision makers involved in this customary leadership process were bodies included under the meaning of "federal board, commission or other tribunal" (*Ratt* at para 103).

[55] The Respondents argue that this conclusion cannot be reconciled with the Court's decision in *Goodtrack* at paragraph 8, where the Court emphasized "that the reference to band custom elections in the definition of 'council of the band' in section 2 of the [*Indian Act*] does not create authority for custom elections but simply defines them for its own purposes." In the Respondent's view, even if the processes and decisions that flow from Indigenous customary law are "recognized" under the *Indian Act*, this is insufficient to trigger the Court's jurisdiction – such recognition does not constitute a grant of authority as required under subsection 2(1) and section 18 of the *FC Act*. Indigenous Nation's customary laws are therefore not "conferred by […] an Act of Parliament" merely because they are "recognized" by the federal common law or through the *Indian Act*.

[56] I reject the Respondents' argument relating to *Goodtrack*. That decision related to a judicial review of a "letter" of an official within Indian and Northern Affairs Canada [INAC] recording the result of a purported "custom election." Justice Strayer held that, in merely recording the election results, INAC was not exercising jurisdiction or power conferred by or under an Act of Parliament, because the conduct of the election itself was held under custom and not under the authority of an Act of Parliament (see *Marie-Jewell* at para 19).

[57] Moreover, to the extent that Justice Strayer opined that Indigenous elections "are not held under the authority of an Act of Parliament" (*Goodtrack* at para 8), his words must be interpreted in the context within which they were made: in an application for judicial review of INAC recording the results of an election – which Justice Strayer held was not a "decision" subject to judicial review, because INAC was not the "federal board, commission or other tribunal" for the

purposes of that specific election. The statement of Justice Strayer, however, cannot be conclusively interpreted as meaning that custom elections are not "recognized" under the *Indian Act*, nor that the right to proceed according to custom is not "conferred by" or "incorporated by reference" in the *Indian Act*. That question was not before Justice Strayer. Therefore, the decision in *Goodtrack* is distinguishable and not persuasive in support of the Respondents' argument that First Nation decisions made under Indigenous law or custom are never subject to the Court's jurisdiction on judicial review.

[58] Other precedents have eloquently ruled that First Nation council decisions, when acting in a "public" nature, were subject to this Court's jurisdiction when exercising powers under an Act of Parliament (there is no serious dispute that in this case, in removing the Applicants from office, Council was acting in a "public" nature, as opposed to under its inherent power over contracts or otherwise in a manner that is "private" in nature) (see *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band*, 2008 FC 812; *Ballantyne v Bighetty*, 2011 FC 994; *Air Canada*; *George* at paras 41–43).

[59] In *Gamblin*, Justice Mandamin considered the jurisdiction of the Court to hear a judicial review of a decision of a custom elected First Nation council relating to the approval of a lump sum payment of compensation from a settlement agreement. After having considered the criteria in *Anisman*, Justice Mandamin held:

> [40] The jurisprudence holds the Federal Court has jurisdiction to judicially review decisions of custom First Nation councils and related agencies. Case law reveals those decisions usually involve an exercise by the custom First Nation Council of a statutory power under the *Indian Act* or matters concerning the holding of office as either chief or councillor. In the latter instance, since a

> chief or councillors selected under custom may exercise statutory powers under the *Indian Act*, given the definition in section 2 of the "council of the band," it follows that decisions by custom electoral officers or custom election appeal panels affecting custom office holders can be related to an exercise of statutory power.
>
> [41] Members of a custom First Nation council may, for instance, vote to approve a by-law under section 81(1) of the *Indian Act*. Should an unsuccessful candidate for a position on a custom council appeal the election result, the custom election appeal panel hearing the appeal will decide whether the appeal succeeds or not. In doing so, the custom appeal panel will decide whether or not the appellant may have an opportunity to exercise the aforementioned statutory power. While custom electoral officers or custom appeal tribunals stand outside of the *Indian Act*, they can reach out and touch the ability of individuals to exercise authority under the *Indian Act*. Accordingly, such custom election bodies impact, one step removed, on the exercise of federal statutory powers.
>
> […]
>
> [50] In my view, the NHCN Council decisions are not "private law" decisions. They are made by a First Nation entity that is federal in nature. The NHCN derives its jurisdiction from both the federal common law of aboriginal rights and its capacity to exercise federal statutory powers conferred on a council of an Indian band by the federal *Indian Act*. The nature of jurisdiction the NHCN Council is exercising is in relation to First Nation governance and is a matter of public interest given the impugned decisions are part of a series of decisions relating to the provision of potable water for the members of the NHCN.
>
> (*Gamblin* at paras 40, 41 and 50) [emphasis added]

[60] Justice Mandamin then held, at paragraph 53, that the terms "powers conferred by or under an Act of Parliament" found in the definition of "federal board, commission or other tribunal" in subsection 2(1) of the *FC Act* should be given a liberal interpretation, and that subsection 2(1) of the *Indian Act* recognized councils selected by the "custom of the band" as the governing body of the First Nation concerned with the well-being of the Nation.

[61] Justice Mandamin then examined the issue as to whether the Federal Court had jurisdiction to judicially review a decision of a custom First Nation council that did not involve the exercise of a federal statutory power or prerogative order and did not relate to the election or holding of office as chief or councillor. Justice Mandamin relied on Justice Mainville's decision in *Ratt*, in which he held that a custom First Nation council is a federal entity because the common law of Aboriginal title and Aboriginal and treaty rights is federal common law, and includes the Aboriginal right of governance that is part of "public law operating uniformly across the country within the federal sphere of competence" (*Gamblin* at para 59).

[62] Consequently, Justice Mandamin held that the exercise of authority by a custom First Nation council is an exercise by a federal entity of its powers of governance, because "[t]he evidence demonstrates that the […] Council were exercising their authority as the elected leaders of the [First Nation]. Their positions as elected Chief and Councillors authorized them to make decisions on behalf and for the benefit of the members of the [First Nation and] their decisions in this matter relate to governance of the [First Nation]" (*Gamblin* at para 62).

[63] In other words, because the elected leaders in *Gamblin* were recognized under the *Indian Act*, and it is in that capacity that the leaders convened (under subsection 2(3) of the *Indian Act*) and exercised their authority to approve a lump sum payment from a settlement agreement, Chief and councillors were therefore a "federal board, commission or other tribunal" for the purposes of the *FC Act* in making that decision.

[64] Not surprisingly, the Respondents also argue that *Gamblin* is wrongly decided. At paragraph 55 of *Gamblin*, the issue was framed as "whether the Federal Court has jurisdiction to judicially review a decision of a custom First Nation which does not involve a question of private law, does not involve the exercise of a federal statutory power or prerogative order, and does not relate to the election or holding of office as chief or councillor." The Respondents argue that the Court failed to defer to the Federal Court of Appeal's decision in *Anisman*. Instead, in *Gamblin*, the Court held that it had jurisdiction because of the "federal nature" of First Nations and because First Nation councils are authorized to make decisions on behalf and for the benefit of the members of their respective Nation, while failing to consider and analyze the "source" of the power or jurisdiction that was being exercised (*Gamblin* at para 62). In doing so, the Respondents argue that the Court failed to consider the "source" of customary law and instead relied on *Ratt* and its conclusion that because all decisions made under customary law are either "emanation of federal common law," or "empowered" or "recognized" by the *Indian Act*, the Court must have jurisdiction (*Ratt* at paras 101–104).

[65] In my view, this argument cannot succeed on the facts of this case. As stated above, the *Indian Act* recognizes "custom" as being a valid procedure to select leaders, and those elected leaders will be recognized and conferred the powers set out in the *Act*. The *Indian Act* therefore "confers" to or "authorizes" First Nations the power to choose the way in which they will select their leaders. When First Nations exercise that power and choose to proceed by "custom," that "custom" is recognized under the *Act*, which becomes a "source" of federal law for the purposes of the *Indian Act* and the recognition of the "council of the band" under subsection 2(1) of the *Indian Act*. The "source" of the power of First Nations to select their leaders, as required in

Anisman, and even if originating in custom, is therefore concurrent and also found at least in part in the *Indian Act* (*Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*] at paras 82–86; *Pastion* at para 7; *Kennedy SKCA* at para 7). The entire process leading to the selection of leaders therefore falls within the *Indian Act*. Bodies responsible for the implementation of the electoral process, being council or any other body created by the First Nation, therefore become a "federal board, commission or other tribunal" for the purposes of the *FC Act*, over which this Court has jurisdiction on judicial review.

[66] More recently, in *Shanks*, Justice McDonald analyzed whether the Federal Court had jurisdiction to review a First Nation council resolution dealing with *per capita* distribution payments from a treaty settlement agreement. The First Nation argued that it was not acting as a "federal board, commission or other tribunal," that the impugned First Nation council resolution was a "private matter" that could not be subject to a judicial review, and that the First Nation was exercising its right to self-governance and was entitled to deference.

[67] Applying the *Pokue*/*Anisman* test, and analyzing the First Nation's argument that its BCR did not meet the second branch of the test because council was exercising a power pursuant to its inherent right to self-governance and not "under an Act of Parliament," Justice McDonald reviewed the precedents and held the following at paragraphs 34 to 36:

> [34] Here, however, the BCR enacted by the Council of SRFN was done following a meeting "duly convened within the meaning of Subsection 2(3) of the *Indian Act*" and concerns the payment of net income earned "per the terms of the SRFN Settlement Revenue Account Law." In these circumstances, I conclude the SRFN Council was not acting "privately," but was acting as a federal board within the meaning of section 18.1 of the *Federal Courts Act*.

> [35] Furthermore, the BCR to authorize distribution of PCD payments is inherently a governance issue. It relates to management and dispensation of the funds from a settlement, which was established for the benefit of SRFN. The well-being of the Nation is a core governance function of the SRFN Council. The factual scenario differs from *Ballantyne*, where the decision to settle litigation was held to be contractual. This was not a decision to settle; this was a decision administering a settlement. The situation here is more analogous to *Gamblin*, where the management of the settlement compensation was found to be a public governance issue that was reviewable by the Court.
>
> [36] This Court has jurisdiction to deal with decisions of Chief and Council where the issue concerns a matter of a "public" nature regardless of whether the decision was taken pursuant to the *Indian Act*, a Band by-law, or involves the application of a custom or practice of the First Nation (*Crowchild v Tsuut'ina Nation*, 2017 FC 861 at para 27, citing *Vollant v Sioui*, 2006 FC 487 at para 25; *Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796 at paras 37-38).
>
> (*Shanks* at paras 34–36) [emphasis added]

[68] In my view, the same rationale applies to CTKFN. When CTKFN Council adopted the BCRs to remove the Applicants, it acted as the Council recognized under subsection 2(1) of the *Indian Act* to represent and govern the Nation and manage CTKFN for the well-being of its members. Moreover, as held by Justice McDonald, the Special Meeting in this case was "duly convened within the meaning of Subsection 2(3) of the *Indian Act*," which is further evidence that CTKFN Council was acting as the "council of the band" recognized under subsection 2(1) of the *Indian Act* and therefore purporting to exercise powers of governance originating perhaps in custom, but also under a concurrent "source" found under the *Act*. Indeed, the Special Meeting – and the process followed by CTKFN – aimed at removing elected officials recognized under the *Act*, to later be substituted by other elected officials recognized under the *Act*, following a by-

election. The impacts of the BCRs therefore related to the application of the *Act*. Furthermore, the BCRs to remove elected councillors are inherently a governance issue.

[69] Therefore, all matters related to the "selection of leaders" are encompassed by the *Indian Act*'s provisions dealing with the election of Chief and council, including incorporating by reference the customs under which some First Nations select their leaders. Those selection processes also include any process to remove an elected official, as that process has an impact on those who are "recognized" under the *Indian Act* as members of council. All decisions relating to the selection of leaders take some of their "source" and are therefore authorized under the *Indian Act*, and such decisions are thus made in part under a jurisdiction or power conferred "under an Act of Parliament" for the purposes of the definition of "federal board, commission or other tribunal" pursuant to subsection 2(1) of the *FC Act*.

[70] As also recently held by Justice Grammond in *George* at paragraph 39, and I agree :

> [39] It is trite law that First Nations, their councils or bodies created by them are "federal boards, commissions or other tribunals" where they exercise powers conferred by the *Indian Act* or other federal legislation. This is also the case where they exercise powers conferred by Indigenous law regarding the selection of leaders, including what are often called "custom election codes": *Canatonquin v Gabriel*, 1980 CanLII 4125 (FCA), [1980] 2 FC 792 (CA). While our understanding of Indigenous law has changed considerably since 1980, the better explanation of this holding in today's context seems to be that the *Indian Act*'s recognition of Indigenous laws (or "customs") with respect to the selection of leaders is sufficient to conclude that these laws have been made pursuant to a "jurisdiction or powers conferred by or under an Act of Parliament."
>
> (*George* at para 39)

[71] It is important to note that in *George*, at paragraphs 64–67, Justice Grammond also held that this Court does not have jurisdiction when a First Nation council adopts a resolution relying exclusively on Indigenous law and specifically refraining from resorting to Canadian law. There were also other issues in that case as to whether one of the impugned resolutions was on a "private matter," was not binding on the First Nation, its members or other third parties, and related to the First Nation's traditional territory (and outside the lands reserved for the Nation), all of which could have an impact on the Federal Court's jurisdiction. I agree with Justice Grammond's characterization of the issues in *George*. In this case, however, as discussed above, the BCRs adopted by CTKFN are "public" in nature and binding, relate to the "selection of leaders" and take some of their "source" from the *Indian Act*.

[72] Consequently, when convening as a First Nation council under subsection 2(3) of the *Act* to make decisions that are of a "public" nature and relate to the exercise of powers of governance or of compulsion that impact the First Nation, and where the BCR will be binding on the members and the First Nation as a whole, and against third parties, the council's decisions are "recognized" and "authorized" under the *Indian Act*. Indeed, such decisions relating to governance may take their "source" at least in part within the First Nation council's powers pursuant to sections 81–86 of the *Act* considered as a whole, including to make by-laws for "the observance of law and order" (under paragraph 81(1)(c) of the *Act*) and "arising out of or ancillary to the exercise of powers" (under paragraph 81(1)(q) of the *Act*). In those cases, the First Nation council's decisions constitute the exercise of a "jurisdiction or powers conferred by or under an Act of Parliament" for the purposes of the definition of "federal board, commission

or other tribunal" under subsection 2(1) of the *FC Act*, and are subject to the Federal Court's jurisdiction under section 18 of the *FC Act*.

[73] As recently held by the Supreme Court of Canada in *Dickson*, in making those types of governance decisions, the council may also be subject to the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], because council is exercising powers that are governmental in nature (*Dickson* at paras 57–58, 61, 77–92; see also *Collins v Saddle Lake Cree Nation #462*, 2023 FC 1239 at paras 58–86; *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220 at paras 115–133). In exercising those powers of governance, and when the *Charter* applies, section 25 of the *Charter* may then provide "protection for collective Indigenous interests as a social and constitutional good for all Canadians [and act] as a counterweight" where individual *Charter* rights "conflict with Aboriginal rights, treaty rights, or 'other rights or freedoms' that are shown to protect Indigenous difference" (*Dickson* at para 5).

[74] The *Anisman* test for the Court's jurisdiction is therefore met. The power exercised in this case is in relation to the leadership selection process (which includes the removal of an elected official from office); and its "source" is recognized and concurrently found in the *Indian Act*, which is an Act of Parliament. Moreover, in deciding to remove an elected councillor, CTKFN Council is making a decision of a "public" nature. CTKFN Council is therefore acting as a "federal board, commission or other tribunal" as defined under subsection 2(1) of the *FC Act*, and subject to this Court's jurisdiction.

(2) The right to self-government and the *United Nations Declaration on the Rights of Indigenous Peoples Act*

[75] The Respondents assert that this Court cannot have jurisdiction because the oversight of Canadian courts over the decision-making of First Nations is contrary to CTKFN's inherent right to self-determination and therefore in breach of section 35 of the *Constitution Act, 1982*, but also of the UNDRIPA. They claim that the *Election Act* (in force because of the Ministerial Order terminating the application of section 74 of the *Indian Act* imposing an electoral procedure), when understood within the context of articles 3 and 4 of the *United Nations Declaration on the Rights of Indigenous Nations* [*Declaration*], UNDRIPA and section 35 of the *Constitution Act, 1982*, signify a mutual relationship between Canada and CTKFN that is no longer characterized by the subordination of CTKFN's elections and governance processes to Canada's overarching and unilaterally imposed authority, including judicial review in the Federal Courts. In CTKFN's view, the Ministerial Order removing CTKFN from the list of First Nations having to comply with the electoral procedure set out in section 74 of the *Indian Act* essentially revoked any remaining colonial control over CTKFN election and governance institutions and severed all existing connections between federal grants of authority and CTKFN. The Respondents' argument relying on section 35 of the *Constitution Act, 1982* and the UNDRIPA essentially means that CTKFN's right to self-government renders the First Nation immune from judicial review by any court of Canada.

[76] I cannot accept that argument.

[77] First, the argument was not fully developed nor supported by any evidence or authorities in the Respondents' memorandum of fact and law, nor in their oral argument. There is no evidence on record, as argued by the Applicants, of any Nakoda traditional laws or CTKFN "custom" supporting the ousting of the rule of law from CTKFN's process leading to the removal of an elected official from office, and there is no alternative tribal court (including the Tribunal) to consider these issues – a competent tribal court ensuring the application of the rule of law could represent an adequate alternate remedy or forum to the Court's initial jurisdiction. There is therefore no evidence of any CTKFN Aboriginal or Treaty right, or custom, suggesting that CTKFN is not subject to any court's jurisdiction, including the Federal Court's jurisdiction. Moreover, from a generic standpoint, case law has affirmed that First Nation councils must act according to the rule of law (*Hill* at paras 60, 69, citing *Prince v Sucker Creek First Nation* 2008 FC 1268 at para 39; *Shotclose v Stoney First Nation*, 2011 FC 750 at para 97 [*Shotclose*]; *Minde v Ermineskin Cree Nation*, 2006 FC 1311 at paras 44–46; *Laboucan v Little Red River Cree Nation # 447*, 2010 FC 722 at paras 36–39; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 39 [*Tsetta*]; see also *Crowchild* at para 28; *Bellegarde Injunction Decision* at para 20; *Simon c Bacon St-Onge*, 2023 FCA 1 at paras 19–22).

[78] Second, as the Supreme Court of Canada recently held in *Dickson* at paragraph 47, although a general inherent right to self-government has not yet been recognized as an Aboriginal right under section 35 of the *Constitution Act, 1982* (relying on *R v Pamajewon*, 1996 CanLII 161 at para 24, [1996] 2 SCR 821 (SCC); *Delgamuukw v British Columbia*, 1997 CanLII 302 at para 171, [1997] 3 SCR 1010 (SCC)), an inherent right to self-government has been

affirmed internationally by article 4 of the *Declaration*, which Canada has committed to implement in accordance with the Canadian Constitution through the UNDRIPA.

[79] However, while recognizing to First Nations the right to self-determination and to access to their own decision-making institutions (see for example articles 3, 4, 18, 27), the *Declaration* also requires at article 34 that any juridical system developed by First Nations must act in accordance with international human rights standards. Indeed, the preamble to the *Declaration* as well as articles 1 and 2 provide that Indigenous individuals are entitled, without discrimination, to the full enjoyment of all human rights and fundamental freedoms recognized in international law. More importantly, articles 38 and 46.1 explain that States are to take appropriate measures to achieve the ends of the *Declaration* in a manner consistent with their respective constitutional frameworks – the *Declaration* does not authorize nor encourage actions that would dismember or impair the territorial integrity or political unity of States. Moreover, article 40 recognizes that State courts have a role to play, and provides that Indigenous Peoples and individuals have the right to obtain decisions through just and fair procedures in the case of disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Articles 46.2 and 46.3 then respectively provide that "[i]n the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected" and the "Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith."

[80] In other words, the *Declaration* does not modify the Canadian constitutional framework in relation to access to justice, and article 40 requires that Indigenous Peoples and individuals must have access to an impartial decision maker, who must "give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights" (see *Flette et al v The Government of Manitoba et al*, 2022 MBQB 104 at paras 143, 153–156). In this case, and in the absence of an alternative Indigenous court providing an adequate alternate forum (created under article 34 of the *Declaration* or otherwise), no evidence was adduced that this Court cannot adjudicate the rights of the parties while giving "due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights" as required under article 40 of the *Declaration*.

(3) The Ministerial order terminating the application of section 74 of the *Act* to CTKFN

[81] The Respondents relied on the Ministerial Order adopted to terminate the application of section 74 of the *Act* and allow CTKFN to adopt its *Election Act* as indicative that Canada completely severed its legal oversight of CTKFN.

[82] I cannot accept that argument. The Ministerial Order must not be interpreted in a vacuum. For the Ministerial Order to be adopted, the *Election Act* had to comply with the *Conversion to Community Election System Policy* in order to have CTKFN elections removed from the *Indian Bands Council Elections Order* and thereby terminating the application of section 74 of the *Indian Act* to CTKFN (see PC 2018-3692, (2018) C Gaz II, 136). In the absence of compliance with this policy and its basic principles, including that the proposed First Nation election system

provides for appeal mechanisms, applies the principles of natural justice, complies with the *Charter*, and follows a federally guided and sanctioned process, the Ministerial Order would not have been adopted (*Blueberry River First Nations* at paras 23–24; *Bertrand* at para 7).

[83] Consequently, the adoption of the Ministerial Order, along with CTKFN's adoption of the *Election Act*, does not mean that Canada no longer has to "recognize" the selected leaders as the "council of the band" under subsection 2(1) of the *Indian Act*. In other words, the Ministerial Order only signals that CTKFN could conduct its elections, because they offered to do it in a manner acceptable to Canada, in exchange for terminating the application of section 74 of the *Indian Act*. In doing so, the Ministerial Order did not make CTKFN entirely self-governing, nor did it remove CTKFN from the *Indian Act*. CTKFN is still a "band" and continues to pass by-laws under the provisions of the *Indian Act*.

(4) The Respondents' jurisdictional challenge is an abuse of process

[84] Finally, I agree with the Applicants' submission that the Respondents' jurisdictional challenge is an abuse of process. CTKFN and the individual Respondents requested the Court's intervention relating to another *Election Act* matter, and defended a case in a second one.

[85] The Respondents sought, and obtained, the intervention of the Court in *Carry The Kettle First Nation v Kennedy*, 2021 FC 462 [*Kennedy*], where the issue related to an appeal of an election under the *Election Act* and the decision made by the Tribunal. Having sought the intervention of the Court, the CTKFN took the position that the Court had jurisdiction over the decision made by the Tribunal established under the *Election Act*, that the Tribunal was a

"federal board, commission or other tribunal" for the purposes of the *FC Act*, and that the decision was made under "powers conferred by or under an Act of Parliament."

[86] The Respondents were also involved in a second matter before the Court where similar issues were decided against CTKFN (see *Saulteaux*). In that case, less than two years following the *Kennedy* case, CTKFN contested the jurisdiction of the Court relating again to the Tribunal and a decision of Council, an argument that was dismissed by the Court, but that the CTKFN failed to appeal.

[87] In my view, it is an abuse of the Court's process to seek the Court's assistance and recognize its jurisdiction in one matter, but to contest the Court's jurisdiction in another matter raising a similar substantive issue (without appealing the decision), and then contest the jurisdiction of the Court in a third case essentially on the same issue, and for the sole reason of escaping a potentially adverse finding (*Canada (Attorney General) v Bri-Chem Supply Ltd*, 2016 FCA 257 at paras 58–62; *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at paras 35–37; Donald J Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto: LexisNexis Canada, 2021) at 199–207).

[88] Nevertheless, the Court prefers to dismiss the Respondents' arguments on substantive grounds, and respond to their request for additional reasons justifying the Court's historical position that First Nation councils, when making "public" decisions in accordance with powers recognized and conferred under the *Indian Act*, are subject to this Court's jurisdiction on judicial review.

(5) Conclusion on the Federal Court's jurisdiction

[89] In closing, the Respondents have failed to adequately demonstrate why this Court should depart from established precedents. The inherent right to self-government, the nature of Indigenous customary law, the necessity for Reconciliation, or the enactment of the UNDRIPA, do not on their own suffice to repudiate past historical decisions. The Respondents did not, with adequate evidence and arguments as to the impact of the "new" legal issues and the consequences of those significant development in the law, demonstrate a fundamental shift in jurisprudence or in society since the existing precedents were decided. Indeed, no evidence was adduced by the Respondents on these issues.

[90] In my view, the *Indian Act* is a concurrent "source" of any First Nation's process to select its leaders (including the removal of elected officials) because the selection process has an impact on the individuals that are recognized under the *Indian Act* as forming the "council of the band." For individuals to be recognized as leaders and be conferred the powers set out in the *Act*, the First Nation may follow its custom, enact its own electoral code (also falling under "custom"), or follow section 74 of the *Indian Act* or the *First Nations Elections Act*. In doing so, the *Indian Act* incorporates by reference all selection processes for Indigenous leaders, for the purposes of the application of the *Indian Act*, recognizing them as federal law for the purposes of the *Act* (see, for example, *Bill C-92 Reference*, at paras 122–130). The *Indian Act* is therefore a "source" identifying the recognized selection process and that process is therefore provided at least in part "under an Act of Parliament" as understood in the definition of "federal board, commission or other tribunal" pursuant to subsection 2(1) of the *FC Act*.

[91] That is in essence why, since the early 1980s, the Federal Court has held that it had jurisdiction over election disputes within First Nations; because Chief and council, even if chosen under a "custom," are elected following a process that is "incorporated by reference" under the definition of "council of the band" pursuant to subsection 2(1) of the *Act*.

B. *The removals from office were contrary to the Election Act*

(1) Principles of interpretation of customary election codes and the standard of review

[92] The courts have recognized the importance of showing deference, to the extent possible, to a First Nation and its membership's attempt to enact rules governing their election processes through "custom"; and find the least intrusive manner in which to oversee election matters in order to minimize the court's impact on Indigenous self-government (*Shirt v Saddle Lake Cree Nation*, 2017 FC 364; *Loonskin v Tallcree*, 2017 FC 868; *Sweetgrass First Nation v Gollan*, 2006 FC 778; *Kennedy*; *Bellegarde Injunction Decision*; *Pastion* at paras 21–27; *Waquan v Mikisew Cree First Nation*, 2021 FC 1063 at paras 13–14; *Whitstone v Onion Lake Cree Nation*, 2021 FC 1228 at para 13).

[93] Indigenous decision makers are particularly well placed to understand the purpose of Indigenous laws, are sensitive to the Indigenous experience and the specific situation of the community affected, and are in a better position than courts to understand their legal traditions (*Pastion* at para 22; *Bacon St-Onge v Conseil des Innus de Pessamit*, 2017 FC 1179 at para 77 [*Bacon St-Onge*]; *Shotclose* at paras 58–59; *Salt River First Nation #195 (Salt River Indian Band #759) v Martselos*, 2008 FCA 221 at para 30; *News v Wahta Mohawks*, 189 FTR 218 at para 20,

2000 CanLII 15425 (FC)). In fact, "[...] decision-making is a component of self-government" (*Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at para 19 [*Whalen*], citing *Pastion* at para 23) and "this Court should be guided by the principle of self-government" (*Gadwa v Joly*, 2018 FC 568 at para 71 citing *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at paras 43–44, 1995 CanLII 145 (SCC); *Awashish v Conseil des Atikamekw d'Opitciwan*, 2019 FC 1131 at para 13).

[94] However, in the case of a "custom," that type of Indigenous law must be the subject of a "broad consensus" within the First Nation (*Bacon St-Onge* at para 8 aff'd by *Innu Council of Pessamit v St-Onge*, 2019 FCA 13 at para 3; *Whalen* at para 32 citing *Bigstone v Big Eagle*, 1992 CarswellNat 721 at 14, [1992] FCJ No 16 (FC)). That "broad consensus" can be demonstrated where the Indigenous law is "[...] firmly established, generalized and followed consistently and conscientiously by a majority of the community" (*Francis* at paras 35–36). Therefore, the power to define the scope of the "custom," and the "broad consensus" that is required to achieve it, rests with the members of the First Nation as a whole, and not solely with the elected council (*Bone v Sioux Valley Indian Band No 290*, 1996 CarswellNat 150 at 11–12, [1996] FCJ No 150 (FC); *Bacon St-Onge* at paras 83, 88; *Whalen* at paras 32–33; *Bertrand* at para 37).

[95] Nevertheless, the Court has recognized that Chief and council have expertise in interpreting First Nation customs and that "considerable deference must be accorded to their decisions" (*Bacon St-Onge* at para 77, citing *Shotclose* at paras 58–59). This reasoning is based on the fact that "[...] the interpretation of the First Nations' election acts or rules must be informed by the customs upon which they are based, a matter of which electoral bodies and

Chief and council are likely to have a better understanding than the Court" (*Johnny v Adams Lake Indian Band*, 2017 FC 156 at para 23; *D'Or v St Germain*, 2014 FCA 28 at para 6 [*D'Or*]).

[96] The standard of reasonableness therefore applies to a First Nation council when the issue involves the interpretation of written Indigenous laws, including a customary electoral code and the power to remove an elected official (*Alexander v Roseau River Anishinabe First Nation Custom Council*, 2019 FC 124 at para 7 [*Alexander*]; *Bacon St-Onge* at para 71; *Mercredi v Fond du Lac Denesuline First Nation*, 2018 FC 1272 at para 36; *Whalen* at para 30; *D'Or* at paras 5–7; *Johnson v Tait*, 2015 FCA 247 at para 28; *Lavallee v Ferguson*, 2016 FCA 11 at para 19; *Coutlee v Lower Nicola Indian Band*, 2016 FCA 239 at para 5; *Cold Lake First Nations v Noel*, 2018 FCA 72 at para 24; *Fort McKay First Nation v Orr*, 2012 FCA 269 at paras 8–12; *Pastion* at paras 16–29; *Porter v Boucher-Chicago*, 2021 FCA 102 at para 27; Jack Woodward, *Native Law*, vol 1 (Toronto: Carswell, 1994) (loose-leaf updated 2023, release 6), ch 7, section 7:19 at paras 7.833, 7.835).

[97] The Court will grant significant latitude to First Nations in their choosing of a specific electoral and removal procedure, while ensuring that basic procedural safeguards are in place and that First Nations' governments comply with the rule of law (*Bruno v Samson Cree Nation*, 2006 FCA 249 at para 22 [*Bruno*]; *Balfour v Norway House Cree Nation*, 2006 FC 213 at para 67 [*Balfour*]; *Saulteaux*). In the case of a removal from office, and since this type of decision affects the "rights, privileges or interests of an individual", the Court will ensure that procedural fairness is followed and that the affected individual is able to know the case to meet and defend themselves (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at

para 20, 1999 CanLII 699 (SCC); *Balfour* at para 69; Jack Woodward, *Native Law*, vol 1 (Toronto: Carswell, 1994) (loose-leaf updated 2023, release 6), ch 7, section 7:19 at para 7.832).

[98] Moreover, in the context of the removal of an elected official from office, a First Nation can only proceed pursuant to a specific provision existing in its electoral code or under an established "custom" (and the proof of the existence of such a custom lies with the person relying on it) (see Jack Woodward, *Native Law*, vol 1 (Toronto: Carswell, 1994) (loose-leaf updated 2023, release 6), ch 7, section 7:19 at para 7.831). Where a power has been omitted from an electoral code, the court cannot "[...] recognize broad powers to First Nations councils for the sole reason that those powers appear to be missing from the election codes adopted by the First Nations themselves. […] Acced[ing] to that invitation […] would in effect be crafting a common law of First Nations governance that would override some of the choices made by First Nations" (*Whalen* at para 78). Consequently, when the power and procedure for removal has not been specifically delegated to the Council or to another body in a customary code or the constitution of the First Nation, the power of removal reverts to the First Nation as a whole and removal must be ratified by a "broad consensus," likely requiring "referendum [...] to allow all members of the [First Nation] to vote" (*Alexander* at para 43, referring to *Henry v Roseau River Anishinabe First Nation*, 2014 FC 1215 at para 64 [*Henry*]; *Whalen* at paras 47–48, 78).

[99] This being said, and of particular importance in this case, the interpretation of CTKFN's *Election Act* was considered by Justice Favel in *Kennedy*. In that case, Justice Favel held that the standard of reasonableness required that the normal rules of statutory interpretation apply and that where the words of a provision are clear and unambiguous, the meaning that naturally flows

from them should be given a high degree of weight (*Kennedy* at paras 52–53, relying on *Boucher v Fitzpatrick,* 2012 FCA 212 at para 25; see also *Vavilov* at paras 119–121; *Mason* at para 69). In *Saulteaux* at paragraph 65, Justice Favel also opined that "[l]egislators, including Indigenous law-makers, are presumed to avoid superfluous or meaningless words; every word in a statute is presumed to be intentional" (relying on *Lukács v Canada (Transportation Agency)*, 2014 FCA 76 at para 43).

(2) Council did not have quorum nor the qualified majority to remove the Applicants under the *Election Act*

[100] 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.
>
> [emphasis added]

[101] It is uncontested that the Chief and only two councillors were present at the Special Meetings and adopted the BCRs removing the Applicants from office. It is also uncontested that another two councillors either refused to attend the meeting, or were not able to do so.

[102] The *Election Act* is also ambiguous as to the quorum required for Council to conduct its meetings, suggesting that quorum requires four or five members, including the Chief. Indeed, the provisions of the *Election Act* in this regard are contradictory. Subsection 5(2) states that the quorum is four members of the Council, while subsection 24(5) states that the quorum is five members of Council including the Chief. In the case of both removals, Council consisted of the Chief and only two councillors.

[103] In the reasons for removal, Council stated that three members of Council were present at the meeting, that two councillors were absent and that, in the circumstances: "[t]he Tribunal and Council determined that the knowing refusal to attend a special meeting duly called for a single purpose constitutes a Councillor refusing to vote, therefore under Section 24(16) of the Custom Election Act, they are deemed to vote yes."

[104] The Applicants argue that, from a plain reading of the *Election Act*, Council did not have quorum nor the qualified majority required to remove the Applicants. It is common ground that

councillors Musqua and D. Thomson did not attend the meetings convened for that purpose and that the decision was made by the three individual Respondents.

[105] The Applicants further argue that the Respondents' interpretation that an absent member must be considered to have voted "yes" flaunts the terms of subsection 24(16) of the *Election Act*. Under that section, quorum must be determined at the outset of the meeting, under subsection 24(6), and if quorum is not achieved, the meeting is adjourned. Subsection 24(16), deeming a member to vote "yes," only occurs when the meeting is being held and therefore quorum is maintained throughout the meeting, and then a member refuses to vote on an issue and is not excused from voting, as provided under subsection 24(15).

[106] The Respondents argue that quorum under the *Election Act* for a Special Meeting is a majority of Council members in attendance and eligible to vote. The *Election Act* only speaks to quorum when CTKFN Council is fully constituted with seven elected leaders. It does not address how quorum is to be adjusted when a Council member is missing. If Council is not fully constituted, the Respondents argue, this would leave Chief and Council unable to discharge their governance duties or conduct CTKFN business and would effectively preclude the Nation from making key governance decisions for the benefit of its members—a result that could not have been intended by the drafters of the *Election Act*.

[107] Therefore, since the *Election Act* is silent as to quorum for a Special Meeting when Council is not fully constituted, a purposive interpretation of the quorum requires only a majority of Council members in attendance at a Special Meeting and eligible to vote, relying on *Cardinal*

et al v The Queen, [1982] 1 SCR 508 at 517, 1982 CanLII 173 (SCC) [*Cardinal*], where the Supreme Court of Canada observed that "the common law principle" for a "prescription of quorum" is a simple majority of those attending the meeting (see also *Abenakis of Odanak v Canada (Indian Affairs and Northern Development)*, 2008 FCA 126 at para 42 [*Abenakis*]). The Court of Appeal in *Abenakis* justified the proposition on the basis that it would be unjust to "giv[e] the indifference of those who did not attend a significance that it should not have" (*Abenakis* at para 43, citing *Cardinal* as *Enoch Band of Stony Plain Indian Reserve No 135 v Canada*, [1982] 1 SCR 508, 1982 CanLII 173 (SCC); Respondents' Memorandum of Fact and Law at para 61).

[108] The Respondents argue that in this case, quorum was achieved with only the Chief and two councillors present because quorum under the *Election Act* is set at four or five members (as discussed above) out of a total of seven elected officials. Since the Applicants were either suspended (Haywahe), or subject to the vote (in both cases), they could not participate in the vote. Quorum therefore has to be modified to reflect the maximum of five elected officials that could attend. Since three members are "a majority" of eligible members, quorum was achieved.

[109] The Respondents submit that their proposed interpretation of the quorum requirement fills a "gap" and that the Court should not interfere with Council and the Tribunal's interpretation of the *Election Act*. Indeed, as provided in paragraph 4(1)(l) of the *Election Act*, the Tribunal may "oversee" Council's adherence to the provision of the *Election Act*. In the reasons for removal, it is mentioned that both Council and the Tribunal interpreted the *Election*

Act as meaning that in the case of an absence of a councillor, that councillor was deemed to have voted "yes," as provided under subsection 24(16).

[110] In my view, on the issue of quorum, the Respondents conduct a selective reading of section 24 of the *Election Act* that provides the rules for the conduct of Council meetings. Subsection 24(5) requires a quorum of five members, including the Chief. The Respondents' argument that quorum must be adjusted because otherwise the CTKFN could not operate is not sustained in evidence, nor under the *Election Act*. Contrary to what the Respondents argue, Council would not be paralyzed if one, or even two, Council members cannot attend due to an illness, or for another reason. As provided under subsection 24(6) of the *Election Act*, if there is no quorum within one hour, the secretary shall call the role and take the names of those present, and "council shall stand adjourned until the next meeting" [emphasis added].

[111] While a contextual or purposive interpretation of the *Election Act* may not resolve the issue as to the proper number of councillors required to achieve quorum (the requirement discussed above of four, or five, members of Council in attendance), it is clear that attendance of the Chief and only two councillors does not meet quorum under any circumstance (a total of three elected officials). While councillors Haywahe and Bellegarde may be excluded as they are the subjects of the resolutions (and in the case of councillor Bellegarde, assuming that councillor Haywahe was properly suspended at that time), quorum could perhaps have been achieved with the five remaining councillors.

[112] As for the requirement under the *Election Act* that two thirds (2/3) of the remaining members vote in favour of the removal, the Respondents interpret this as meaning "two thirds of the members present at the meeting." The Respondents argue that since the Special Meeting was properly convened and had quorum of a majority of eligible elected members, the approval of two thirds (2/3) of the remaining councillors was achieved because all three members voted for the removal, achieving a result of 100% of the remaining members

[113] The Respondents also argue that the qualified majority was met because councillors Musqua and D. Thomson are deemed to have attended and approved the resolution. The Respondents argue that because the councillors refused to attend the Special Meeting duly called by the Chief, the "knowing refusals to attend" constitutes a councillor refusing to vote, resulting on a deemed "yes" vote under subsection 24(16) of the *Election Act*.

[114] In my view, the Respondents' arguments do not comply with a reasonable interpretation of the *Election Act*. The arguments were examined by Justice Grammond in the *Bellegarde Injunction Decision*, where he opined, at paragraphs 26–30 that :

> [26] In addition, subsection 19(6) states that a councillor's position becomes vacant only if two thirds of the remaining councillors vote in favour. Assuming that Councillor Haywahe was validly suspended when a vote was taken with respect to Councillor Bellegarde's removal, in both cases there were five remaining councillors. Three positive votes out of five remaining councillors do not amount to two thirds, but only to 60%. This would also hold true if the Chief votes only in case of a tie: there would have been two votes for the removal among the four remaining councillors (excluding the Chief).
>
> [27] Thus, whether one looks at the issue from the perspective of quorum or qualified majority, the respondents simply did not have the votes to remove Councillors Bellegarde and Haywahe. This

> raises a serious issue. In fact, the applicants' case appears particularly strong in this regard.
>
> [28] The respondents seek to justify their actions by a creative reading of certain provisions of the Election Act. Their reasoning is encapsulated in the following excerpt from the reasons for the decision to remove Councillors Bellegarde and Haywahe:
>
> Councillor Dwayne Thomson and Councillor Lucy Musqua refused to attend the special meeting duly called by the Chief. The Tribunal and Council determined that the knowing refusal to attend a special meeting duly called for a single purpose constitutes a Councillor refusing to vote, therefore under Section 24(16) of the Custom Election Act, they are deemed to vote yes.
>
> [29] To place this in context, it is useful to reproduce not only subsection 16, but also subsection 15 of section 24:
>
> 15. Every member present when a question is put shall vote thereon, unless the council excuses him or unless he is personally interested in the question, in which case he shall not be obliged to vote.
>
> 16. A member who refuses to vote shall be deemed to vote yes.
>
> [30] It appears obvious that subsection 16 is the sanction for a councillor who fails to abide with the duty to vote flowing from subsection 15. <u>It is very difficult to imagine how paragraph 16 could apply to members not present or operate so as to displace the requirement for a quorum. This is simply not what it says. In fact, the respondents' interpretation has the potential to render any quorum requirement meaningless</u>.
>
> (*Bellegarde Injunction Decision* at paras 26–30) [emphasis added]

[115] I agree.

[116] The Respondents' reliance on subsection 24(16) is misplaced. When quorum is not achieved, the meeting is adjourned under subsection 24(6). As opined by Justice Grammond, subsection 24(16) only operates in meetings where quorum is achieved and maintained throughout, and when a question is put to a vote to the members present. Subsection 24(16)

exists to force the elected officials to discharge their duties, which is to vote for or against a proposition, and not abstain, unless they are excused by Council under subsection 24(15). Thus, before a member can be "deemed" to have voted "yes," as argued by the Respondents, the meeting itself must be validly held, a quorum must have been achieved and maintained, and the Councillor who's vote is deemed to be "yes" must be present.

[117] Thus, the CTKFN Council neither had the quorum nor the qualified majority to adopt resolutions removing the Applicants from office. The *Election Act* cannot reasonably be interpreted as permitting a Council meeting with less than four elected members (the requirement discussed above of four, or five, members of Council in attendance). Moreover, the absence of a member cannot lead to a deemed "yes" vote, nor be considered as attendance for the purpose of quorum. In other words, the absence of councillors Musqua and D. Thomson cannot result in them having participated in the meeting (to attain quorum) nor to approve the resolution to meet the qualified 2/3 majority.

[118] The power to remove a councillor is of paramount importance, because it is a substantial interference with the intent of the population, as expressed by their right to vote, to choose and to elect specific individuals to represent and protect their interests. A plain reading of section 19 of the *Election Act* endorses an interpretation suggesting that it should be very difficult to remove a councillor from office, and should only be done following a stringent procedure.

[119] In this case, and assuming that councillor Haywahe was properly suspended, there "remained" the Chief and four councillors to evaluate the appropriateness of vacating the

Applicants' positions on Council. Because two members were absent, and as only three members were present, there was no quorum and the Special Meeting stood adjourned under subsection 24(6). Moreover, the reason why the other two councillors could not be present is irrelevant. The meeting could simply not be held in the circumstances. It was incumbent on Council, if it wished to proceed, to schedule another date when the other members could be present, or compromise on the issues and find a resolution.

[120] Finally, I do not accept the Respondents' argument that a different interpretation, such as the one suggested, is required because otherwise the CTKFN Council is paralyzed. There is no evidence that the current Council, even without the Applicants, is incapable to meet and govern. The individual Respondents, along with councillors Musqua and D. Thomson, can attend to the general governance of CTKFN, as submitted during the hearing. On its own, these representations are indicative that contrary to the assertions of the Respondents, there is no requirement to make "adjustments" or "modifications" to the *Election Act* to allow the removal of the Applicants, because otherwise, "Band business and governance would be stalled" or it is necessary "to carry out governance matters despite an incomplete Council" (Respondents' Memorandum of Fact and Law at paras 74–75). There is no evidence that it is necessary to adopt the convoluted interpretation of the *Election Act* proposed by the Respondents to achieve the desired end in these circumstances. The Respondents' proposed interpretation constitutes a usurpation of power and for the Court to "accede to that invitation […] would override some of the choices made by First Nations" (*Whalen* at para 78).

[121] I therefore agree with Justice Grammond in *Bertrand* where he held, at paragraph 62, that "self-government does not translate into unlimited powers for First Nations councils. Rather, where First Nations have not enacted positivistic laws, self-government manifests itself through the broad consensus of the community" (relying on *One Arrow* at paras 29–31). To the extent that the positivistic law – the *Election Act* – explicitly provides a mechanism to remove councillors from office, but fails to provide alternative mechanisms, then any other recourse has not been delegated to Council and reverts to the membership as a whole.

[122] A "broad consensus" of the community must exist to delegate specific powers to the First Nation council. To the extent that an election code is silent on an issue, or the membership did not delegate to the First Nation council or to another body the power to remove an elected official outside of a specific procedure established under that code, then the community retained power over the issue.

[123] In this case, the *Election Act* was adopted by referendum of the members of CTKFN. CTKFN delegated the power to Council to remove a councillor from office, but only under a specific procedure requiring a recommendation by a duly constituted Tribunal (constituted with five members including a non-member of CTKFN as discussed below), followed by a two thirds (2/3) qualified majority vote of the remaining members of Council. When a recommendation from the Tribunal is impossible to obtain, Council does not have the power of removal. To the extent that it was impossible to follow the process established under the *Election Act*, because it was impossible to achieve the quorum and the qualified majority (and to properly constitute a Tribunal), the recourse of CTKFN was not for Council to by-pass the required procedure

pursuant to the *Election Act*, but rather to seek the advice of the Nation as a whole through a referendum after having given the affected elected members the opportunity to defend themselves adequately; or to proceed in conformity with another custom of the First Nation that is consistent with these principles, if it exists.

[124] The CTKFN Council (and Tribunal, as discussed below) arrogated to themselves the power to recommend, and then ratify, the removal of the Applicants, following a procedure that was not contemplated by the *Election Act*. Necessity, in this case, does not support the Respondents' proposed interpretation of the *Election Act*. Rather, the situation in this case represents a usurpation of powers "for the sole reasons that those powers appear to be missing from the election code" in order to "exercise [powers] in violation of the wishes of the majority of electors" as indicated in the *Election Act* (*Whalen* at paras 47–48, 78; *Alexander* at paras 21, 42–43; *Henry* at para 64; *One Arrow* at para 31).

(3) The Tribunal was not properly constituted to make a recommendation to Council

[125] Section 12 of the *Election Act* provides that the Tribunal will be constituted of five members, one of which must be a non-member of CTKFN. On the issue of quorum, the *Election Act* does not provide for a quorum requirement for the Tribunal deliberations, other than to provide that all questions be "settled by a majority of the Tribunal."

[126] Because the Chair of the Tribunal, who was also the required non-member of CTKFN on the Tribunal, had resigned and not been replaced prior to the meeting in which the Tribunal recommended the Applicants' removal, the Applicants argue that the Tribunal was not properly

constituted. The Tribunal's recommendation to the Council to vacate the Applicants' positions on Council is, therefore, in their view, invalid.

[127] The Respondents argue that the requirement of five members for the Tribunal to be properly constituted only exists for election appeals under section 12 of the *Election Act*. As for a Tribunal recommendation that a position on Council be vacated, such recommendations are made by the Tribunal under section 19, and not section 12 of the *Election Act*. The *Election Act* is otherwise silent on the constitution of the Tribunal.

[128] Moreover, in the context of removals, the Tribunal only provides a recommendation, and does not make the final decision. The Respondents argue that in the context of the *Election Act* read as a whole, it is not reasonable to interpret the absence of one member of the Tribunal as precluding it from discharging any of its duties, including from issuing a recommendation on a removal. Therefore, in the Applicants' circumstances, it was not unreasonable for the Respondents to proceed on the advice of the Tribunal, constituted as four members, to remove the Applicants from Council.

[129] In *Kennedy* and in *Saulteaux*, Justice Favel dealt with the CTKFN Tribunal and its required quorum. In *Kennedy*, the Tribunal was fully constituted with its full five-member panel but in that case, because of a divergence of opinion, three members refused to participate in a meeting leaving the other two members to be present at the meeting. Justice Favel analyzed the *Election Act* and the validity of the decision made by only two members of the Tribunal and opined that :

> [50] The above provisions do not indicate much more than there are five Tribunal members to be appointed and that any questions related to an appeal and "all issues in question" are to be settled by a majority decision. There is also no provision for the three-meeting rule as submitted by the Respondents. There is not much guidance from the *Election Act* itself.
>
> (*Kennedy* at para 50)

[130] At paragraphs 54–55, Justice Favel then held that the provisions establishing the Tribunal require that the entire Tribunal be involved in matters before it and that "[t]o complicate matters, the only provision for appointing and/or replacing Tribunal members does not contemplate a situation as in the present matter where Tribunal members' actions, regardless of which vantage point one looks at the current situation, frustrates the ability of the Tribunal to do its work" (*Kennedy* at paras 54–55).

[131] In the end, Justice Favel concluded that applying the principles of statutory interpretation, including section 12 of the *Election Act* providing that five members must sit on the Tribunal, the only reasonable interpretation was that a decision of the Tribunal cannot be made by only two members (*Kennedy* at paras 58, 64–65). As a result, the Order of the Tribunal was quashed (see also para 64).

[132] In *Saulteaux*, however, Justice Favel held that a Special Meeting before three members of the Tribunal (and not five) was valid to remove a councillor. The issue was different than in *Kennedy* and, as in this case, dealt with a Tribunal recommendation to remove a CTKFN councillor. In that case, there was no issue as to whether the Tribunal was properly constituted because it had its full five-member appointed panel. The issue was whether a Special Meeting

could be conducted, and a recommendation be made, with only three members of the Tribunal being present. While the decision to remove a councillor was quashed, it was not quashed because "the entire Tribunal [must] be involved" as held in *Kennedy* at paragraph 54. Justice Favel quashed the Council's decision to remove the councillor because the Tribunal failed to consider written representations that had been submitted a day earlier, and because Council failed to provide reasons for the removal. However, Justice Favel did not rule that the Tribunal was improperly constituted, or did not have quorum, even if only three Tribunal members attended the Special Meeting.

[133] In *Saulteaux*, Justice Favel examined the constitution and powers of the Tribunal and held that the process followed by the Tribunal at the Special Meeting aims at promoting discussion, deliberation, and consensus building within CTKFN; and that the goal of deliberation and discussion is to hear from the affected parties. Justice Favel also held that the *Election Act* provided only one opportunity for an accused councillor to make submissions to the Tribunal and Council at the Special Meeting, and that it was Council, rather than the Tribunal, that ultimately made the decision in removal proceedings (*Saulteaux* at paras 7, 50, 62, 75).

[134] In this case, the issue is different. Applying *Saulteaux*, the four members present could in theory make a recommendation and would have carried a majority of the Tribunal had it been constituted with a fifth member, the non-member of CTKFN (even if that member was not present). However, section 12 of the *Election Act* provides that the Tribunal must have five members, including a non-member of CTKFN.

[135] In my view, section 12 of the *Election Act* does not allow the Tribunal to remain at less than five members. Indeed, the *Election Act* requires five members, including a non-CTKFN member, to ensure that its decisions are made in fairness, free from biases, and are independent. The failure to appoint a new non-CTKFN member to the Tribunal vitiates the Tribunal's recommendations to remove the Applicants in this case.

[136] The Respondents argue that out of necessity, the Tribunal had to continue its work and discharge its responsibilities. The Respondents also argue that because Council must appoint Tribunal members, and given the division within Council and the community, it would have been impossible to appoint a new member of the Tribunal who was not a member of CTKFN and therefore, the current members were able to continue.

[137] There is no evidence to establish that the divisions in the membership of CTKFN, or within Council, is such that it is impossible to appoint a fifth member of the Tribunal who is not a member of CTKFN. There is no evidence of even an attempt to appoint such a non-member to properly reconstitute the Tribunal, nor as to an emergency requiring the Tribunal to act with dispatch. In other words, there was no emergency within CTKFN that required Council to act in contravention of the *Election Act*. It was incumbent on Chief and Council, all duly elected members acting for the good of the entire Nation, to compromise and find a suitable candidate for everyone. There is no evidence of any attempt to do so. In the circumstances, I cannot accept that the Tribunal, out of necessity, had to continue its work without a complete panel of five members, including the non-CTKFN member.

[138] The Tribunal was therefore not properly constituted and could not discharge its responsibilities. As discussed above, the Tribunal (and Council) could not arrogate powers that do not specifically exist under the *Election Act*. Contrary to what was argued by the Respondents, an alternative did exist if, for reasons of emergency, the Applicants had to be removed from office: a general meeting of the membership of the CTKFN in which the Applicants would have been informed of the allegations made against them and be allowed to defend themselves, followed by a vote of the membership as a whole; or through a process that complies with another custom of the First Nation that is consistent with these principles, if it exists.

(4) Procedural fairness and bias

[139] In light of my determination that there was no quorum and that Council did not have the qualified majority votes to remove the Applicants as councillors, it is not necessary to address the issues as to whether there was a breach of procedural fairness or whether the Tribunal and Council were biased against the Applicants. However, the following comments are responsive to some of the parties' arguments.

[140] On the issue of procedural fairness, in the context of Indigenous law, the content of the duty of fairness must also be "tailored to the particular circumstances and context of the [decision maker and that context] should include judicial respect for relevant custom" (*Bruno* at para 20; *Heron v Salt River First Nation No 195*, 2024 FC 413 at para 23 [*Heron*]). Indeed, a First Nation "should be granted significant latitude to choose its own procedures" (*Bruno* at para 22; *Labelle v Chiniki First Nation*, 2022 FC 456 at paras 91–102) and "[j]udicial intervention in

Indigenous decision-making processes should be avoided whenever possible to encourage Indigenous self-government" (*Pastion*; *Whalen*; *Heron* at para 33).

[141] As discussed above, Justice Favel examined the CTKFN Tribunal's procedure in *Kennedy* and in *Saulteaux*. In *Kennedy*, Justice Favel opined at paragraph 68 that "[t]he Tribunal would be well advised to adopt principles of procedural fairness in the hearing of the appeals. There are two key aspects to achieving procedural fairness; the right to be heard and the right to make representations where a decision represents one's interests" (citing *Tsetta* at para 39). Justice Favel also opined that the decision had to be intelligible and provide sufficient reasons to demonstrate how Council engaged with the evidence.

[142] In *Saulteaux*, the Tribunal heeded this call in relation to the Tribunal's recommendation to remove a councillor from office. The Tribunal provided the affected councillor with notice of the allegations made against her and allowed her to defend herself during a Special Meeting of the Tribunal and which the CTKFN Council attended, and *before* the Tribunal made a recommendation to the Council (*Saulteaux* at para 62). Justice Favel held that a single Special Meeting of the Tribunal and Council complies with paragraph 19(5)(a) and with an affected councillor's right to procedural fairness. The Tribunal's recommendation did not need to be disclosed to the affected councillor after the Tribunal's consideration but before the Council's vote, because the *Election Act* does not provide a second opportunity to make submissions to Council alone, after the Special Meeting (*Saulteaux* at paras 54–62).

[143] Indeed, paragraph 19(5)(a) of the *Election Act* calls for a Special Meeting of Council "in conjunction with the Cega-Kin Nakoda Oyate Tribunal's review and recommendations." The term "in conjunction" means "together with." Therefore, the practice in *Saulteaux* (and followed for councillor Haywahe in this case) allowing the councillor to "show cause" why their positions on Council should not be vacated before both Council and the Tribunal together was appropriate. The *Election Act* does not require a second meeting where the councillor may defend their case before Council alone, and be notified with the Tribunal's recommendation before the second meeting with Council.

[144] This being said, paragraph 19(5)(a) allows for another interpretation, one suggesting that the Tribunal may conduct its own independent process and issue a recommendation to Council thereafter, in a meeting where the CTKFN Council is *not* in attendance. Because paragraph 19(5)(c) requires the councillor to be able to "show cause" to the Council why their position should not be vacated, a second Special Meeting would be required in those circumstances. This appears to have been the process followed in councillor Bellegarde's case, as discussed below. Indeed, while an opportunity to "show cause" must be granted to the affected councillor, the *Election Act* does not prohibit a second "show cause," depending on how the Tribunal wishes to proceed. In the end, regardless of the procedure chosen (one joint Special Meeting or two independent meetings), the affected councillor must simply be able to receive the particulars of the allegations against them and have an opportunity to respond adequately before both the Tribunal and Council, in one or in independent meetings.

[145] In this case, for councillor Haywahe, first, she was never offered an opportunity to respond to the allegations made against her before the Tribunal decided to suspend her on August 28, 2022. However, the procedure followed for her removal is different from the process followed for councillor Bellegarde. Councillor Haywahe was notified on October 20, 2022 that a Special Meeting would be held on October 27, 2022, together "with the Tribunal who will review the Record, your conduct and submissions and provide a recommendation to Chief and Council regarding your removal" (Haywahe Affidavit at Exhibit 3, Applicant's Record, at p 54). Councillor Haywahe was at that time provided with the particulars regarding her conduct, so that she be able to respond. Following the meeting, which councillor Haywahe did not attend, the Tribunal made its recommendation to Council on November 3, 2022 (Haywahe Affidavit at Exhibit 6, Applicant's Record, at p 215), and Council voted to remove councillor Haywahe and provided their reasons on November 5, 2022 (Haywahe Affidavit at Exhibit 7, Applicant's Record, at p 222). The procedure followed for councillor Haywahe appears to mirror the one in *Saulteaux*.

[146] The Tribunal and Council did not appear to follow the procedure endorsed by Justice Favel in *Saulteaux* in the case of councillor Bellegarde. The Affidavit of councillor Bellegarde states that she was not invited by the Tribunal to defend herself prior to the Tribunal's recommendation on August 31, 2022 that she be removed from Council. Indeed, a notice was sent to Chief and Council by the Tribunal on August 28, 2022, stating that it recommended that a Special Meeting be held to review councillor Bellegarde's conduct (Bellegarde Affidavit at Exhibit 10, Applicant's Record, at p 884). On August 31, 2022, the Tribunal made its recommendation to Council that councillor Bellegarde should be removed. There is no evidence

that councillor Bellegarde was provided with the particulars of the reasons why her position should be vacated so that she be able to defend herself at that August 31, 2022 Special Meeting of the Tribunal.

[147] Councillor Bellegarde was then notified by CTKFN, on September 7, 2022, of a Special Meeting of Council to be held on September 14, 2022 to allow her to "show cause" why her position should not be vacated. That letter stated that CTKFN "received a recommendation from the […] Tribunal." The letter continued and stated that: "[t]he recommendation is attached to this letter. The Tribunal found that you have committed four violations of the Custom Election Act and recommended that a special meeting be held to determine if you have committed the alleged misconduct and if so, whether you should be removed […]" (Bellegarde Affidavit at Exhibit 11, Applicant's Record, at p 889). In that letter, councillor Bellegarde was provided, for the first time, with the particulars of the reasons for vacating her position. It is important to note that in the same letter of September 7, 2022, it is also stated that "the meeting will be held with the Tribunal who will review the conduct and provide a recommendation to Chief and Council regarding removal." However, the Tribunal had already given its recommendation for removal in a letter to Council dated August 31, 2022, and that recommendation was attached to the September 7, 2022 notice sent to councillor Bellegarde (Bellegarde Affidavit at Exhibit 11, Applicant's Record, at p 890). No further "recommendation" needed to be made thereafter by the Tribunal following the Special Meeting of September 14, 2022. The reasons for Council's decision were eventually ratified on November 1, 2022 (Bellegarde Affidavit at Exhibit 23, Applicant's Record, at p 1029).

[148] While Council is the ultimate decision maker, councillor Bellegarde was never notified of the case to meet, nor offered the opportunity to address and defend herself *before* the Tribunal issued its initial recommendation to Council on August 31, 2022. That process is in breach of the procedure endorsed in *Saulteaux*. This being said, as explained above, the Tribunal could have elected to proceed alone without Council in attendance. If the Tribunal had chosen that procedure, it would have had to disclose to councillor Bellegarde the particulars of the reasons why her position on Council should be vacated so that councillor Bellegarde be able to defend herself before the Tribunal, and a "second" opportunity would then arise before Council, as required under paragraph 19(5)(c). However, the Tribunal failed to do so. The procedure followed in the case of councillor Bellegarde may therefore have breached her right to procedural fairness.

[149] However, as held by Justice Grammond in *Bastien* at paragraph 50, issues of procedural fairness must be "raised at first opportunity." In this case, it is clear that the Applicants decided not to participate in the process and instead ignored it completely. Even if the Applicants' position for refusing to participate may have been valid, the Applicants ought to have raised their grievances at that time, including for any breach of procedural fairness or for apprehension of bias. The Tribunal and the Council would have been able to respond to the allegations, or perhaps amended their procedure. Consequently, as held numerous times by this Court, the Applicants cannot raise for the first time an issue of procedural fairness that could have been raised, and addressed, before the decision maker (*Bastien* at para 50 relying on *Canadian Tire Corporation, Limited v Koolatron Corporation*, 2016 FCA 2 at para 33; see also *Johnson v Canada (Attorney General)*, 2011 FCA 76 at para 25; *Canadian Pacific* at para 90).

[150] On the issue of bias, a similar issue was discussed in *Saulteaux*, again in relation to the *Election Act* of CTKFN. In that case, Justice Favel held at paragraphs 73–80 that section 19 of the *Election Act* provided an exception to the normal applicable rule of *nemo judex in sua causa* and the right to an impartial and independent decision maker, because the *Election Act* specifically authorized the other elected members of CTKFN to decide on the removal of a fellow elected official. Therefore, under the *Election Act*, no other decision maker had the power to decide on the removal of an individual from Council. Moreover, in the context of a small First Nation, it is not realistic to expect the same degree of objectivity and impartiality that one would expect from the judiciary and one cannot expect the objectivity and unbiased nature of a court (*Saulteaux* at para 78, relying on *Hall v Kwikwetlem First Nation*, 2020 FC 994 at para 48). Finally, again in the context of a small First Nation, it is impossible to require that Council members recuse themselves, because that could undermine the *Election Act*'s requirements for quorum and qualified majority to approve the vacating of an individual's position on Council.

[151] In this case, the Applicants assert that the three members of Council that voted for their removal did not have an open mind and did not approach the issues in good faith. They argue that the Council's vote was purely for retribution, and not objective nor impartial. In my view, while there is evidence to support this position, the evidence on record also demonstrates that the Applicants are not beyond reproach.

[152] The remaining members of Council were therefore able to vote on the Applicants' removals, as provided under section 19 of the *Election Act*. The Applicants' argument that the remaining members did not have an open mind and did not approach the issues in good faith is

undermined by their failure to attend the meeting and defend themselves. Had they done so and provided a vigorous defence, the Court could have been in a better position to assess the reasons for removal and determine if the remaining councillors had a closed mind and were in bad faith. The Court cannot make such conclusion on the basis of the actual record. In this particular case, the issue of bias does not rise to a conflict of interest, as could exist if concurrent removal procedures had been brought against other members of Council such as was the case, for example, in *Heron* at paragraphs 63–65.

(5) Was the Decision otherwise unreasonable?

[153] In light of my conclusion that there was no quorum and the two thirds (2/3) qualified majority votes of the remaining members of Council was not achieved, it is not necessary to address the issue as to whether the decisions are unreasonable.

[154] It is sufficient to state that the Applicants refused to participate and defend their case before Council. Council therefore made a decision on the basis of a recommendation as well as evidence that was not contested. The Applicants have now filed additional evidence and arguments justifying why they refused to participate, and provided other evidence on the social context existing in CTKFN. The Applicants rely on this new evidence in support of their arguments that the Council decisions to remove them from Council are unreasonable.

[155] While the Applicants' evidence does demonstrate that governance issues do exist in relation to CTKFN Council, the Court cannot assess the reasonableness of Council's decisions on the basis of evidence that ought to have been brought in due course, before the decision

maker. While the evidence adduced by the Applicants may have been relevant and persuasive before the Tribunal and Council, or could have led a court to a determination that the decisions are unreasonable, the evidence cannot be relied upon to quash the decisions for unreasonableness in the context of this case.

V. Conclusion

[156] The applications for judicial review are granted. The quorum and the qualified majority of Council required to remove the Applicants from office were not achieved under the *Election Act*; and the Tribunal was improperly constituted to discharge its responsibilities.

[157] The Applicants request that they receive all outstanding remuneration owed to them from the day of their unlawful removal from office. This Court has jurisdiction to order the payment of remuneration on judicial review (*Saulteaux* at para 92; *Beeswax v Chippewas of the Thames First Nation*, 2023 FC 767 at para 130; *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 at para 99; *Tsetta* at para 43; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 42; *Heron* at para 85). CTKFN is therefore ordered to pay all remuneration that the Applicants would have earned and been entitled to as councillors from the date of their removal.

[158] In this case, all parties agree that the interests of the CTKFN as a Nation are paramount. If all parties invest their energy towards those common interests, the Court is confident that they will be able to compromise for the greater good of the CTKFN Nation, until the next election.

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

JUDGMENT in T-2546-22, T-2536-22

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in T-2546-22 and T-2536-22 are granted.
2. The Applicants are, and remain, elected councillors of CTKFN Council.
3. The Respondent CTKFN is ordered to pay all remuneration that the Applicants would have earned and been entitled to as councillors from the date of their removal, payable within 45 days.
4. The Court directs further submissions on costs. The Applicants will serve and file their submissions on costs by May 21, 2024. The Respondents will serve and file their submissions on costs by June 4, 2024. The submissions will not exceed 10 pages.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2546-22, T-2536-22
STYLE OF CAUSE:	TERRINA BELLEGARDE and JOELLEN HAYWAHE v SCOTT EASHAPPIE, SHAWN SPENCER, TAMARA THOMSON and CARRY THE KETTLE FIRST NATION
PLACE OF HEARING:	REGINA, SASKATCHEWAN
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DATED:	MAY 7, 2024

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