Federal Court Cour fédérale

Date: 20190524

Docket: T-146-19

Citation: 2019 FC 732

Ottawa, Ontario, May 24, 2019

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

SAMANTHA WHALEN

Applicant

and

FORT MCMURRAY NO. 468 FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] The Council of the Fort McMurray No. 468 First Nation [FMFN] decided to suspend one of its members, Councillor Samantha Whalen. Councillor Whalen now seeks judicial review of that decision. I am allowing her application, as FMFN's Council has no power, under its Election Regulations, to suspend a councillor except in limited circumstances, which do not apply to this case.

[2] FMFN also sought to anchor its decision in an unwritten "custom," in the by-law making provisions of the *Indian Act* or in an "inherent" power. I reject those arguments. FMFN's Election Regulations, which were adopted by FMFN's membership, are meant to be an exhaustive statement of the rules governing the election, removal and suspension of its leaders. FMFN did not prove a practice of suspending councillors that reflects a broad consensus of its membership and that would amount to a "custom." The other proposed sources of the alleged power cannot overturn the deliberate choice of FMFN's members not to empower their Council to suspend councillors.

I. Background and Decision Challenged

[3] FMFN adopted its current Customary Election Regulations in May 2014 [the Election Regulations]. Pursuant to the Election Regulations, FMFN's Council is composed of a chief and two councillors. Ms. Whalen, the applicant in these proceedings, was elected councillor in June 2018. Mr. Ron Kreutzer Sr. is the chief and Mr. Ron Kreutzer Jr., who is Chief Kreutzer's son, is the other councillor.

[4] Soon after her election, Councillor Whalen began asking questions about FMFN's finances. What she learned, or what was kept from her, led her to file an action in the Alberta Court of Queen's Bench, alleging that Chief Kreutzer, Councillor Kreutzer, and FMFN's chief executive officer, Mr. Bradley Callihoo, breached their fiduciary duty towards FMFN and asking them to reimburse sums of money that they allegedly appropriated.

[5] It is not necessary to give a full account of the escalating conflict between Councillor Whalen, on the one hand, and Chief Kreutzer, Councillor Kreutzer and Mr. Callihoo, on the other hand, with FMFN members supporting each side.

[6] It is enough to mention the culminating event: a blockade of the FMFN premises that took place on January 7–9, 2019. It is not disputed that the directing mind behind the blockade was Ms. Velma Whittington, who unsuccessfully ran for chief in June 2018 and whose political views are closely aligned with Councillor Whalen's. What is very much in dispute was Councillor Whalen's role in those events. Councillor Whalen says that she did not take any part in the organization of the blockade, but that she acted as a mediator, attempting to persuade the blockaders to allow for the provision of certain essential services. Chief and Councillor Kreutzer, however, have alleged that Councillor Whalen organized and supported the blockade.

[7] Thus, on January 9, 2019, FMFN obtained an interim *ex parte* injunction from Justice Mah of the Alberta Court of Queen's Bench, against a number of named individuals, including Councillor Whalen. Upon learning of the injunction, however, Councillor Whalen sought to have it set aside with respect to her, on the basis that it had been obtained on the basis of incomplete or misleading information. On January 17, 2019, Justice Mah varied his order and dismissed the application for an injunction against Councillor Whalen.

[8] In the meantime, a meeting of FMFN's council was held on January 10, 2019. At that meeting, Councillor Whalen was presented with a draft band council resolution [BCR] suspending her temporarily with pay, for reasons that I will describe later. The BCR mentioned

that a further hearing would take place on January 25, 2019. A discussion ensued, in which Councillor Whalen tried to refute certain allegations made in the BCR and asked for details with respect to others. Chief Kreutzer, Councillor Kreutzer and Mr. Callihoo did not answer her questions and insisted that she would learn about the allegations on January 25. Councillor Whalen then left the meeting. The BCR was then signed by Chief Kreutzer and Councillor Kreutzer. It should also be noted that the agenda that was circulated to Councillor Whalen did not mention anything that would alert her to the fact that her suspension was contemplated.

[9] The BCR states that it is made pursuant to "the inherent authority, rooted in FMFN custom, to suspend members of Council in circumstances where it is justified to ensure harmony in the community." It alleges that Councillor Whalen engaged in "wrongful conduct," including the disclosure of bonuses of FMFN employees and other sensitive personal information, "holding herself out as speaking on behalf of Chief and Council," harassing FMFN staff and interfering with their tasks, and, "most recently and most seriously," organizing and lending support to the blockade. The BCR then provides that Councillor Whalen is suspended with pay on an interim basis and that a disciplinary hearing would be convened no later than January 25, 2019.

[10] Councillor Whalen initiated this application for judicial review on January 21, 2019. While she initially sought interim relief, a prothonotary ordered instead that this application be heard on an expedited basis.

II. Issues and Parties' Positions

[11] Councillor Whalen raises three main arguments in support of her application. First, she argues that FMFN's Council did not have the power to suspend her. Second, she complains that the process leading to the adoption of the January 10, 2019 BCR was unfair. Third, she asserts that the decision to suspend her was unreasonable in light of the evidence that was or should have been considered by the Council.

[12] On its part, FMFN argues that Councillor Whalen's application is premature. It says that the suspension was an interim decision that this Court should not review. Instead, Councillor Whalen should have waited for the definitive decision that the Council was supposed to make on January 25, 2019. FMFN also asserts that it has the power to suspend a councillor, that the decision made on January 10, 2019 complied with the requirements of procedural fairness and that it was reasonable on the merits.

III. Analysis

[13] I am of opinion that Councillor Whalen's application is not premature and that FMFN's Council did not have the power to suspend her. As a result, I need not address the other issues raised by the parties.

[14] I am well aware that the dispute between the parties goes well beyond the subject-matter of this application. At the hearing, I indicated to the parties that I had no intention of pronouncing upon the facts pleaded in the action before the Alberta Court of Queen's Bench.

Accordingly, these reasons should not be taken as an expression of opinion about those other matters.

A. *Prematurity*

[15] FMFN first argues that Councillor Whalen's application should be dismissed because it is premature, as it challenges what FMFN describes as an interlocutory decision.

[16] Judicial review has a discretionary nature: *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paragraph 37, [2015] 2 SCR 713. That means that an applicant does not have a strict entitlement to a ruling on the merits. The Court has the discretionary power to refuse to hear an application, taking into account a range of factors that have been recognized by case law—for example, where there is an adequate alternative remedy within the administrative process.

[17] Justice David Stratas of the Federal Court of Appeal described this doctrine as follows in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paragraphs 30-31, [2011] 2 FCR 332 [*CB Powell*]:

> The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. […]
>
> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative

> process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[18] These principles were reiterated by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364 [*Halifax*]. In a recent case, the Federal Court of Appeal insisted once again that there is a strong presumption against judicial intervention in administrative proceedings before the administrative recourses provided by legislation have been exhausted: *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2017 FCA 241 at paragraphs 47−56 [*Alexion*].

[19] This presumption against judicial review of interlocutory decisions is particularly relevant in the Indigenous context. As I mentioned in *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraph 23, [2018] 4 FCR 467 [*Pastion*], decision-making is a component of self-government. If Indigenous self-government is to be encouraged, it follows that judicial intervention in Indigenous decision-making processes should be avoided whenever possible. See, in this regard, *Edzerza v Kwanlin Dün First Nation*, 2008 YKCA 8 at paragraph 26 [*Edzerza*]; *Sweetgrass First Nation v Gollan*, 2006 FC 778 at paragraph 53; *Okemow-Clark v Lucky Man Cree First Nation*, 2008 FC 888 at paragraph 24 [*Okemow-Clark*]; *Gadwa v Joly*, 2018 FC 568 at paragraph 71 [*Gadwa*].

[20] The exclusion of judicial review based on the existence of an alternative adequate remedy remains discretionary. The cases cited above recognize that there may be exceptions and that, all

things considered, the judge may nevertheless hear the application. These cases also forbid a categorical approach to those exceptions. In other words, the fact that the arguments raised in a case belong to a particular category (for example, "jurisdictional questions," bias or procedural fairness) does not mean that the application for judicial review will automatically be considered on its merits. For that reason, it is difficult to generalize from decisions that have rejected the prematurity argument: see, for example, *ICBC v Yuan*, 2009 BCCA 279 at paragraph 24; *Bank of Montreal v Sasso*, 2013 FC 584 at paragraph 16; *Almrei v Canada (Citizenship and Immigration)*, 2014 FC 1002 [*Almrei*]; *Shen v Canada (Citizenship and Immigration)*, 2016 FC 70; *Nova Scotia (Attorney General) v MacLean*, 2017 NSCA 24 at paragraph 27; *Canada (Citizenship and Immigration) v Hanjra*, 2018 FC 208 at paragraphs 19–21.

[21] The best approach, it seems, is to consider all the relevant factors in a holistic manner, keeping in mind the reasons that justify the presumption against premature judicial review. In *Almrei*, at paragraph 34, my colleague Justice Richard Mosley summarized the relevant factors as follows: "(1) hardship to the applicant, (2) waste, (3) delay, (4) fragmentation, (5) strength of the case and (6) the statutory context." The reasons for the presumption against premature judicial review were summarized as follows in *Alexion* at paragraph 49:

> … avoidance of multiplicity of proceedings, avoidance of the waste associated with interlocutory judicial review applications when the applicant for judicial review may succeed at the end of the administrative process anyway, ensuring that the court has the benefit of the administrative decision-maker's findings, and judicial respect for the legislative decision to invest administrative agencies with decision-making authority.

[22] A number of features of this case warrant an exception to the prohibition on judicial review of interlocutory rulings.

[23] First, it is not even clear that the decision challenged can properly be said to be interlocutory. The Election Regulations do not provide for the suspension of a councillor in the circumstances of this case. Thus, it is hard to speak of judicial respect for legislative choices. The Council appears to have dealt with Councillor Whalen on an entirely improvised basis. It did not explicitly set out what the process would be, except to say that a further hearing would be held on January 25, 2019. When cross-examined on the subject, Mr. Callihoo was unable to provide much clarification, beyond mentioning that the hearing would be "presided over" by Chief Kreutzer and Councillor Kreutzer (Applicant's record [AR] at 298). A decision-making body that embarks on such a course of conduct cannot shield itself from judicial review simply by announcing that its decision is not definitive and that there will be further proceedings. If that were so, one could imagine that Council, having made a "definitive" decision to suspend Councillor Whalen, would then argue that this is only the prelude to a removal, thus still interlocutory and therefore shielded from immediate judicial review. The prematurity doctrine cannot be allowed to be manipulated in such a way. Indeed, there was, and there is still no written guarantee as to what process would be followed by Council if I were to dismiss this application as premature.

[24] Second, the impugned decision must be replaced in the context of the ongoing dispute between Councillor Whalen and Chief Kreutzer and Councillor Kreutzer. This dispute has led both parties to initiate legal proceedings against the other. In *Almrei* (at paragraph 36), Justice Mosley noted that the leading cases on prematurity arose in the context of a single, discrete proceeding. Here, as in *Almrei*, the parties are engaged in multifaceted litigation and the impugned decision is merely a new battle in an ongoing war. In those exceptional circumstances,

an early review of the validity of this attempt to open a new front may actually reduce delay, cost and the fragmentation of proceedings, rather than increase them.

[25] Third, Councillor Whalen takes the position that the Council was biased and did not have the power to make the impugned decision. While raising issues of jurisdiction and bias does not lead to an automatic exception to the prematurity rule, in this case I am convinced that the process that has been deployed is sufficiently problematic to warrant early review by this Court. Moreover, the jurisprudence on prematurity appears to have developed mainly in the context of adjudicative decision-making, where the process and the jurisdiction of the bodies involved are defined by legislation. In the present case, however, there is no legislation providing for the suspension of councillors. The decision was not made by an independent adjudicative body, such as a First Nation's judicial council (as in *Edzerza*), but by Councillor Whalen's political adversaries.

[26] In this regard, I note that this Court has intervened in First Nations governance matters, in spite of the prematurity objection, where the process followed appears to be "completely irregular:" *Okemow-Clark*, at paragraph 27; see also *Beardy v Beardy*, 2016 FC 383 at paragraphs 58–61 [*Beardy*].

[27] Fourth, giving effect to the prematurity objection in this case would be tantamount to insulating from review a category of decisions that have the potential to undermine the good governance of First Nations. It is in the public interest to rule on the powers of First Nations councils in similar circumstances.

[28] Thus, I dismiss FMFN's preliminary objection.

B. *Council's Power to Suspend*

[29] That brings me to the main issue in this case, namely whether FMFN's Council had the power to suspend Councillor Whalen. In this regard, Councillor Whalen argues that the Election Regulations are a "complete code" and that they do not afford the Council any power to suspend a councillor outside certain very specific situations, which are not applicable here. On its part, FMFN does not point to any specific provision of the Election Regulations that would ground the impugned decision. Rather, FMFN argues that the Election Regulations are not an exhaustive statement of its customs and that there is an unwritten custom allowing Council to suspend a councillor. In the alternative, FMFN says that Council's power to suspend derives from section 81 of the *Indian Act*, RSC 1985, c I-5, or from "necessity." For the reasons that follow, I reject FMFN's arguments and find that the Council had no power to suspend Councillor Whalen.

(1) Standard of Review

[30] A first step in assessing the validity of the impugned decision is to identify the applicable standard of review. Councillor Whalen argues that the standard is correctness, because the Council's jurisdiction is in issue. Nevertheless, similar arguments were rejected by the Federal Court of Appeal in *Fort McKay First Nation v Orr*, 2012 FCA 269 at paragraphs 8–11 [*Orr*]. The Court noted that so-called "jurisdictional" questions are best described as statutory interpretation questions, which, according to recent Supreme Court jurisprudence, are reviewed on a standard of reasonableness. Indeed, recent decisions of the Federal Court of Appeal have

uniformly reviewed decisions of First Nations bodies on a standard of reasonableness, even where they raised so-called "jurisdictional" issues: *D'Or v St. Germain*, 2014 FCA 28 at paragraphs 5–7; *Johnson v Tait*, 2015 FCA 247 at para 28 [*Johnson*]; *Lavallee v Ferguson*, 2016 FCA 11 at paragraph 19; *Coutlee v Lower Nicola Indian Band*, 2016 FCA 239 at paragraph 5; *Cold Lake First Nations v Noel*, 2018 FCA 72 at paragraph 24.

(2) "Custom" and the Sources of Indigenous Law

[31] FMFN has invoked several sources of Indigenous law to buttress the challenged BCR. Before reviewing FMFN's arguments, it is useful to explain what these sources are and how they stand in relation to each other.

[32] For a large number of First Nations including FMFN, the *Indian Act* states that the council is chosen according to the "custom" of the First Nation, but does not define what that "custom" is or who has the power to declare it. "Custom," in this sense, does not necessarily mean law rooted in practice or historical tradition. As Professor John Borrows aptly noted, "not all Indigenous laws are customary at their root or in their expression, as people often assume:" *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 24 [Borrows, *Indigenous Constitution*]. A review of this Court's jurisprudence shows that we understand "custom" to mean the norms that are the result of the exercise of the inherent law-making capacity of a First Nation: *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paragraph 34; *Pastion*, at paragraph 13; *Mclean v Tallcree First Nation*, 2018 FC 962 at paragraph 10. In other words, custom "is a consensual and community-based means of producing law that, while not materially constrained by ancestral practices, enables contemporaries to find

their own path between tradition and modernity:" Ghislain Otis, "Elections, Traditional Governance and the Charter" in Gordon Christie, ed, *Aboriginality and Governance: A Multidisciplinary Perspective* (Penticton, BC: Theytus Books, 2006) 217 at 220. Thus, it may be preferable to use the phrase "Indigenous law" instead of "custom." This Court has been prepared to recognize the existence of a rule of Indigenous law when it is shown to reflect the broad consensus of the membership of a First Nation: *Bigstone v Big Eagle*, [1993] 1 CNLR 25 (FCTD) at 34.

[33] There are two main manners in which such a "broad consensus" may arise. First, a law may be enacted by a majority vote of the membership of a First Nation, either at an assembly or in a referendum: *McLeod Lake Indian Band v Chingee* (1998), 165 DLR (4th) 358 (FCTD). Whether a decision of the majority of voting members constitutes a "broad consensus" depends on a number of factors, such as the adequacy of notice and procedure, the rate of participation, the practical possibility of locating members, and so forth: *Taypotat v Taypotat*, 2012 FC 1036 at paragraphs 29–35. In this regard, my colleague Justice Paul Favel recently noted that consensus is a concept that cannot be reduced to mere numbers, in *Alexander v Roseau River Anishinabe First Nation Custom Council*, 2019 FC 124 at paragraph 18:

> The significance and importance of indigenous laws lies in the broad community support for the laws, which are typically drafted with the guidance of respected knowledge keepers, as well as support and adherence to the bodies and the processes established by such laws.

[34] Reaching consensus, defined in that manner, may indeed combine the merits of what Professor Borrows calls "deliberative" and "positivistic" sources of Indigenous law: Borrows, *Indigenous Constitution*, at 35–51.

[35] A First Nation may even regulate the manner in which its membership will express its "broad consensus" in the future. Many election codes or other Indigenous laws contain an amending formula that prescribes a specific procedure for their own amendment. Whether these amending formulae are binding or whether a subsequent "broad consensus" can change the law without following the amending formula is an issue I need not resolve for the purposes of this case: see the contrasting perspectives in *Bruno v Samson Cree Nation*, 2006 FCA 249 at paragraph 39; and *Eikland v Johnny*, 2010 FC 854 at paragraphs 25–27.

[36] A second meaning of "custom," however, goes beyond the adoption of a law by majority vote. In that case, the "broad consensus" can be evidenced by a course of conduct which expresses the First Nation's membership's tacit agreement to a particular rule. This is closer to the usual meaning of the concept of "custom," for example in international law, which involves a practice and the recognition, by the persons concerned, that the practice is binding. See also Borrows, *Indigenous Constitution*, at 51–55; Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill LJ 579.

[37] Relying on custom, in that sense, may be necessary where the process of adopting a law by majority vote has not come to its conclusion or where there is confusion as to the outcome: see, for example, *Bone v Sioux Valley Indian Band No 290 Council*, [1996] 3 CNLR 54 (FCTD); *Catholique v Band Council of Lutsel K'e First Nation*, 2005 FC 1430.

[38] A more difficult situation arises where an unwritten custom is alleged to have developed alongside a written Indigenous law. Instead of adopting a fixed rule giving priority to one type of law over another, this Court has adopted a pragmatic approach and looked at which of the two contending sources attracts the consensus of the community. In *Francis v Mohawk Council of*

Kanesatake, 2003 FCT 115, [2003] 4 FC 1133 [*Francis*], my colleague Justice Luc Martineau made the following remarks (at paragraphs 35–36):

> It is quite common that behaviours arising through attitudes, habits, abstentions, shared understandings and tacit acquiescence develop alongside a codified rule and may colour, specify, complement and sometimes even limit the text of a particular rule. Such behaviours may become the new custom of the band which will have an existence of its own and whose content will sometimes not be identical to that of the codified rule pertaining to a particular issue. In such cases, and bearing in mind the evolutionary nature of custom, one will have to ascertain whether there is a broad consensus in the community at a given time as to the content of a particular rule or the way in which it will be implemented.
>
> For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a "broad consensus" as to its applicability. This would exclude sporadic behaviours which may tentatively arise to remedy certain exceptional difficulties of implementation at a particular moment in time as well as other practices which are clearly understood within the community as being followed on a trial basis. If present, such a "broad consensus" will evidence the will of the community at a given time not to consider the adopted electoral code as having an exhaustive and exclusive character.

[39] In that case, Justice Martineau concluded that a draft election code that was purportedly adopted at a meeting of the members of the First Nation and that excluded non-residents from the right to vote did not represent the custom of the First Nation, because of the very low attendance at the meeting. Hence, it could not be said that the provisions of that draft code reflected a broad consensus. Thus, Justice Martineau relied on the consistent practice of allowing non-resident members to vote to determine what the custom was.

[40] In applying the analytical framework laid out by Justice Martineau in *Francis*, one should never lose sight of the difference between a deviation from the rule and the adoption of a new

rule. Justice Martineau himself was alive to the issue when he cautioned that "sporadic behaviours" meant to address unforeseen circumstances do not necessarily change the law. First Nations who deliberately choose to reduce their governance principles to writing should not be deprived of the certainty associated with written law merely because that law is not strictly adhered to. However, there may be circumstances where a First Nation clearly makes a decision to change its ways without taking the trouble of amending its written law. In such a case, this Court would not do justice if it were to insist on strict adherence to written law.

[41] Before turning to the analysis of FMFN's Election Regulations and alleged custom, it bears repeating that custom must be proved by the party who alleges it: *Orr*, at paragraph 20; *Francis*, at paragraph 21; *Beardy*, at paragraph 102; *Gadwa*, at paragraph 50.

(3) The Election Regulations are a Complete Code

[42] Councillor Whalen's basic argument is that the Council did not have the power to suspend her, as that power is not expressly conferred by the Election Regulations. I agree with Councillor Whalen. There are only two instances, in the Election Regulations, where the Council may suspend a councillor: where a councillor fails to attend three Council meetings without a valid excuse, and where a councillor is charged with an indictable offence (section 18.8). Thus, it would be unreasonable for the Council to assume the power to suspend a councillor in any other circumstance.

[43] Councillor Whalen's argument is supported by the decision of the Federal Court of Appeal in *Orr*, which involved an election code that bears substantial similarities with that of FMFN. As in the present case, Council purported to suspend a councillor based on an "inherent"

power or an unwritten custom, in spite of the fact that the election code did not grant such a power. Justice David Stratas held that it was unreasonable to find the source of such a power outside of the election code (at paragraphs 18–19):

> The *Election Code* sets out very detailed, carefully constructed, and precisely worded provisions regulating when and how councillors may be removed or suspended. It would be surprising if such demanding regulation could be so easily circumvented by relying upon an undefined, general, inherent power, as the Chief and Council suggest.
>
> The democratic backdrop of the provisions of the *Election Code* also undermines the suggestion that Council could simply act on its own based on an inherent power. As we shall see, relevant provisions of the *Election Code* require a democratic vote of the electors of the First Nation before a suspension or removal will be effective. These provisions must be interpreted in light of the fact that a councillor holds office on the basis of a majority vote of the electors of the First Nation. A paragraph in the preamble to the *Election Code* stresses that "the culture, values and flourishing of the Fort McKay First Nation [are] best advanced by…the selection and removal of leadership on the basis of democratic principles." The relevant provisions of the *Election Code* and that paragraph in the preamble have been democratically adopted: they came into force only after a majority of the electors of the First Nation ratified the *Election Code*.

[44] As far as I can tell, the election code in *Orr* presents important similarities with FMFN's. The preamble of FMFN's code states that its customs "require democratic, fair and open elections." It also contains a statement to the effect that FMFN's "customs, policies and laws" with respect to "governance and the elections of the Chief and Council" were then contained in a previous version of the regulations, and that it was intended to replace those regulations. Section 23.1 also states that "The Regulations contained herein hereby shall replace any and all prior Election Codes, Regulations and procedures of the First Nation." This suggests that, as in *Orr*,

the Election Regulations were intended to be a "complete code," leaving no place for the continuing operation of unwritten customs regarding the same issues.

[45] Nevertheless, FMFN submits that *Orr* is distinguishable. It says that the Election Regulations do not deal with the issue of suspension with pay, as opposed to suspension without pay, and that the "complete code" provision (section 23.1) refers only to removal, not suspension. It also argues that suspension with pay is a matter of internal discipline of council members, a matter not covered by the Election Regulations.

[46] I am not sure that the distinctions that FMFN attempts to draw with *Orr* are tenable. I reject FMFN's arguments, however, for more fundamental reasons: they are based on an incorrect analogy between employees and holders of public office and they would upend the political structure that the Election Regulations put in place.

[47] The Election Regulations are an expression of FMFN's membership's will to delegate certain powers to the Council, but to remain responsible for the selection of Council members. Not only are councillors elected by the membership, but they can only be removed by a vote of the members (sections 18.6 and 18.7). The Council has no power to remove a councillor without a vote of the membership.

[48] Evident in the Election Regulations is the division between two sources of political authority: FMFN's membership and the Council. The Council is subordinated to the membership. Were it to assume a power not conferred by the Election Regulations, it would

"exercise a power in violation of the wishes of the majority of electors:" *Roseau River*, at paragraph 21. Indeed, this would disregard the hierarchy between laws made by FMFN's membership and those that the Council is empowered to make. This would be unreasonable. Laws made by the membership are analogous to constitutions—they are the supreme law of the First Nation in question, and they must be paramount to the laws and decisions made by the council: see, by analogy, *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paragraphs 72–74 [*Re Secession*]; see also, with respect to First Nations constitutions, *Lafferty v Tlicho Government*, 2009 NWTSC 35.

[49] In this context, the distinction suggested by FMFN between suspension and removal is untenable. Both have the same effect of preventing a councillor from exercising his or her powers and duties, including the right to participate and vote at council meetings. The rationale for withholding from the council the power to suspend (or remove) councillors is obvious. Suspension by the council would deprive FMFN electors of the right to choose their leaders. The suspension of a councillor has the practical effect of overturning the results of the election and of depriving the electors of representation: *Prince v Sucker Creek First Nation*, 2008 FC 1268 at paragraph 31 [*Prince*]. This cannot be reasonably reconciled with the purpose and structure of the Election Regulations.

[50] Moreover, representative democracy is not a "winner-takes-all" affair. While decisions may be made by the majority of a representative body such as FMFN's Council, this must be done within a process that allows for deliberation and the expression of dissenting voices. To quote again from Professor Borrows (*Indigenous Constitution*, at 38–39):

> Fortunately, the fact that many Indigenous laws are based on deliberative processes means that non-aligned or dissenting viewpoints can be taken into account in the law's formulation. When any society identifies, proclaims, and enforces its laws, there is bound to be disagreement. Most legal systems that respect individual freedoms and dignity must find peaceful ways to deal with opposition in their midst. This requires that conflicting viewpoints be processed in a manner that is conducive to orderly and respectful listening, discussion, and resolution.

[51] The Supreme Court of Canada made similar remarks, although not dealing specifically with the situation of Indigenous peoples, in *Re Secession*, at paragraph 68:

> No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solution to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

[52] If the majority of Council had the power to suspend councillors, there would be a risk of transforming deliberation into monologue and excluding dissenting councillors altogether.

[53] In its wisdom, the FMFN membership decided to reserve to itself the power to remove and suspend councillors and to deny the Council the power to act alone in those matters, save in certain specific circumstances that do not apply here. In the Election Regulations, the absence of a provision authorizing suspension in the circumstances of this case may well be a deliberate choice: *Johnson*, at paragraph 31. This deliberate choice does not create a gap to be filled by this Court.

[54] Framing the issue as one of "discipline" does not assist FMFN. It is true that the power to suspend an employee has been held to be inherent in the contract of employment: *Cabiakman v Industrial Alliance Life Insurance Co*, 2004 SCC 55, [2004] 3 SCR 195. A suspension without pay may be a form of punishment short of firing, where an employee acted wrongfully. A suspension with pay may be imposed for a variety of reasons, including reasons that are "non-judgmental." A person holding public office, however, is not an employee. The flexibility inherent in the employment relationship sits uneasily with the fact that holders of public office are elected (or, in some cases, appointed) to their positions. Election or appointment confers an important degree of independence on holders of public office, which is inconsistent with the subordination inherent in an employment relationship. Put simply, the Council is not "the boss" of the councillors. Thus, as the Federal Court of Appeal once noted, it would "be inappropriate to import into the context of the removal, by the executive branch of government, of persons holding office at pleasure, notions which are generally associated with wrongful dismissal in the context of an employer/employee relationship": *Pelletier v Canada (Attorney General)*, 2007 FCA 6 at paragraph 49, [2007] 4 FCR 81.

[55] Other decisions of this Court have rejected arguments to the effect that First Nations councils have an inherent power to suspend councillors where their election code covers the subject and does not provide for such a power: *Lafond v Muskeg Lake Cree First Nation*, 2008 FC 726; *Laboucan v Little Red River # 447 First Nation*, 2010 FC 722; *Louie v Louie*, 2018 FC 550 at para 28. In *Prince*, the Court concluded that the suspension of a councillor was tantamount to a removal and was not authorized by the election code. Insofar as the Court in that case mentioned an implied power to suspend a councillor, it appears that it was referring to a

suspension of specific responsibilities, not from the office of councillor as such (at paragraph 31).

(4) No Evidence of a Custom Outside the Election Regulations

[56] The foregoing should be sufficient to dispose of this application: the Election Regulations do not empower the Council to suspend Councillor Whalen and constitute a complete code in this regard, leaving no space for other rules. Nevertheless, I will review FMFN's argument that there is an unwritten custom that would provide such a power. In the end, I find that FMFN has not discharged its burden of proving such a custom.

[57] The custom alleged is not based on Indigenous political traditions in any historical sense. Rather, it is based in FMFN's recent practice of democracy. In this regard, FMFN has provided evidence of three cases in its recent history that it described as suspensions of councillors. On her part, Councillor Whalen provided affidavits of FMFN members stating that there was no custom authorizing the Council to suspend councillors. On cross-examination, those witnesses readily acknowledged the existence of the three cases. What remains a matter of contention is the precise process followed in each case, the appropriate characterization to be given to those events and whether any customary rule can be inferred from those events.

[58] It should be noted that the custom alleged by FMFN is in effect an unwritten addition to a written electoral code. It is a custom formulated using concepts, such as power or public office, which emanate from Western legal traditions. It is meant to supplement an electoral code that aims at establishing a democratic system and that describes with precision the rights, powers and

duties of the participants in the system. Hence, the evidence needed to prove such a custom must be precise enough to show that there is a broad consensus as to the manner in which those rights, powers and duties are meant to be altered.

[59] Each party sought to impugn the credibility of the other party's witnesses. From reading the transcripts of their cross-examinations, I find that both parties' witnesses, in particular those mentioned in these reasons, did their best to remember what they learnt about events that took place some time ago. Indeed, some of the events may have occurred more than 25 years ago. Moreover, with one exception, the witnesses were not Council members when those events took place and they do not have first-hand knowledge of the precise nature of the actions taken by Council. The persons allegedly suspended did not testify. With respect to two of the three alleged cases of suspension, there is little written evidence to buttress the witnesses' recollection. No resolution of the Council or BCR was filed in evidence. Indeed, Joann Cheecham, one of FMFN's witnesses, testified that she did not believe that BCRs were ever adopted regarding the three alleged suspensions, but that a more informal process, perhaps involving a "letter of suspension," was followed (AR at 353). No such letters were filed in evidence. As FMFN would presumably be in possession of those documents if they existed, their absence suggests that the Council did not exercise the alleged customary power of suspension.

[60] With this in mind, I can now turn to each of those three incidents.

[61] In the early 1990s, Councillor Ronald Cardinal was involved in a car accident causing serious injuries while impaired. Several witnesses said that he was convicted and sentenced to

jail as a result. We do not know whether the accident happened while the 1993 election code was in force. Section 15.1f) of that code stated that a councillor charged with an indictable offence could be suspended and that upon conviction, the suspension would become "permanent." That section did not clearly set out who could take such actions. The evidence does not clearly reveal whether an election code containing similar provisions was in force before 1993.

[62] All witnesses agree that Councillor Cardinal left his position on Council as a result of the accident and ensuing charges and never came back. How that was accomplished is not entirely clear. Joann Cheecham testified that Councillor Cardinal was suspended on the basis of the provisions of the Election Regulations dealing with councillors who are charged with indictable offences (AR at 360). Doris Charbonneau testified that Councillor Cardinal had told her that he had been suspended (AR at 382). On the other hand, James Woodward testified that Councillor Cardinal was removed (Respondent's Record [RR] at 301−302). Marie (Buffy) Cheecham testified as follows (RR at 348; and 354−355):

> …I believe he got charged, and then but they didn't – they didn't remove him from Council; he just never showed back up. And then when the next election came along, which wasn't that long after, the Band members just voted another person in.

[63] In light of all the evidence, the most likely sequence of events is that the process provided for in section 15.1f) of the 1993 election code was initiated and that Councillor Cardinal was suspended from the Council. As that suspension was made under the provisions of the code then in force, it does not prove the alleged custom of suspending councillors outside of the provisions of the code.

[64] Nancy Cree was elected to the Council in 2008 but was not able to retain her residence on reserve, as required by the 1993 election code, largely because she had to abandon her house in the community after discovering that it was affected by mould. The evidence shows that a petition for her removal was signed by a large proportion of FMFN's membership (AR at 435−438). A letter from a lawyer acting for FMFN states that Councillor Cree was "removed" from Council on March 24, 2011 (AR at 368). That decision was made by the Council, as section 15.2 of the 1993 election code did not require a further vote of the membership once a petition had been completed. Councillor Cree then initiated an application for judicial review in this Court, but it was settled. Albert Cree, who was chief at the time and a political opponent of Councillor Cree, testified regarding those events (RR at 326). While he used the word "suspension," he insisted that the actions taken were in compliance with the Election Regulations, which then provided only for removal in such circumstances. Thus, it is more likely than not that Councillor Cree was removed according to the provisions of the code then in force. Once again, this does not prove the custom alleged by FMFN.

[65] Marilyn Cree (also known as Marilyn Cardinal) experienced drug abuse problems while she was a member of Council in the 1990s. Councillor Cree absented herself from Council while undergoing rehabilitation treatment. FMFN argues that this was a suspension. The evidence reveals, however, that this was likely the result of an agreement. Joann Cheecham, for one, testified that Councillor Cree agreed to seek treatment (AR at 354−355). Marie (Buffy) Cheecham said that "it was more voluntary than anything" (RR at 351). If Councillor Cree's withdrawal from Council is the result of agreement, it cannot constitute evidence of a custom to the effect that Council has the power to suspend councillors. As Justice Martineau said in

Francis, "sporadic behaviour" does not a custom make. This is not, as FMFN contends, privileging form over substance. FMFN asserts that there is a precise rule empowering its Council to suspend councillors against their will. To prove such a custom, it must bring evidence of practices that fit that description. It is entirely possible for a councillor to agree to step aside temporarily from Council without the Council having the power to force the councillor to do so.

[66] To summarize, while it appears that the three individuals involved stepped aside from Council, the evidence fails to show that this was the result of the alleged customary power of the Council to suspend councillors. In two of the three cases, the evidence suggests that the suspension or removal was made according to processes expressly provided for in the Election Regulations or their 1993 predecessor. In one of those cases, a challenge was brought before this Court, but was settled, which makes it difficult to infer any consensus about the propriety of what took place. The third event was, in all likelihood, a voluntary withdrawal from Council while the individual concerned underwent treatment.

[67] Hence, FMFN failed to discharge its burden of proving the facts that would underpin the alleged customary rule.

(5) Section 81 of the *Indian Act*

[68] FMFN argues that the impugned decision could, in addition to inherent or customary powers, be based on section 81 of the *Indian Act*. Section 81 grants the council of Indian bands (or First Nations) a by-law making power over a range of subjects that are typically related to local governance. FMFN highlights, in particular, "the observance of law and order" (s 81(1)(c))

and "the prevention of disorderly conduct and nuisances" (s 81(1)(d)). As the January 10, 2019 BCR did not refer to section 81 of the *Indian Act*, it is highly probable that raising this issue at this stage would offend the prohibition on supplementing administrative decisions by offering grounds that the decision-maker chose not to raise: *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 24, [2018] 1 SCR 6. In any event, I will show why this argument is without merit.

[69] The origins of section 81 may be traced to early versions of the *Indian Act* adopted in the 19th century. At that time, one of the policies of the Act was gradually to induce Indigenous peoples to embrace democratic forms of government. Thus, *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6, s 10, enabled the federal government to mandate the holding of elections for the council of a particular Indian band. That council would then have the power to enact by-laws regarding certain matters of a local or "municipal" nature, such as "the prevention of trespass by cattle," or "the maintenance of roads." That list was enlarged over the years to extend to subjects such as the regulation of traffic or the residence of band members. In mentioning this, I am not suggesting that a First Nation would not have inherent powers over the same issues, but simply that the *Indian Act* provided a channel for giving the force of a federal regulation to a certain type of Indigenous legislation: *R v Jimmy*, [1987] 3 CNLR 77 (BCCA) at paragraph 12. While the section 81 powers have sometimes been interpreted narrowly (*R v Lewis*, [1996] 1 SCR 921; *St. Mary's Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, [1995] 3 FC 461 (TD), aff'd (1996), 136 DLR (4th) 767 (FCA); *Laforme v Mississaugas of The New Credit First Nation Band Council*, [2000] 4 CNLR 118 (FCA)), the Supreme Court of Canada appears to have taken a broader view in

Canadian Pacific Ltd v Matsqui Indian Band, [1995] 1 SCR 3. See also, in this regard, Naiomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and not Later" (2016) 67 UNBLJ 211.

[70] Section 81 must nevertheless be given an interpretation that is compatible with the logic and structure of the *Indian Act*. First Nation council elections are governed by sections 74–80. In particular, subsection 78(2) sets forth grounds for the removal of a chief or councillor. Parliament cannot have intended to allow First Nation councils to make by-laws under section 81 that would deviate from the rules set out in sections 74–80, for example by providing alternative grounds for removal or suspension.

[71] The same result obtains where a First Nation is not subject to sections 74–80 and has adopted its own election laws. It should be borne in mind, in this regard, that "Customary election laws are not "by-laws" as that term is used in sections 81–86 of the *Indian Act*": *Louie v Louie*, 2018 FC 550 at para 18. Their validity and legal force does not flow from the *Indian Act*. Thus, by-laws made under section 81 cannot contradict or change a First Nation's election laws, as they are not enacted pursuant to the same source of authority.

[72] As our jurisprudence has made clear, First Nations election laws must be adopted by the membership or reflect the "broad consensus" of the membership. In contrast, by-laws made under section 81 do not need to be approved by a First Nation's members, nor reflect their broad consensus. Allowing by-laws made under section 81 to do something that a First Nation's

members deliberately chose not to authorize the Council to do would upend this relationship between those two sources of authority, the membership and the Council.

[73] Indeed, as First Nations develop governance frameworks outside the *Indian Act*, a First Nation's council cannot use the section 81 powers to alter those frameworks in a manner that was not contemplated when those frameworks were established.

[74] An additional hurdle facing FMFN's argument is that the impugned decision was simply not a by-law purported to be made under section 81 of the *Indian Act*. A Council resolution or BCR is not necessarily a by-law made under section 81. Resolutions may be adopted for a variety of purposes other than making a by-law. FMFN submits that *Berens River First Nation v Gibson-Peron*, 2015 FC 614 at paragraph 95, is authority for the proposition that a BCR is always a by-law. That is simply not what my colleague Justice Cecily Strickland said in that judgment. However, in *Gamblin v Norway House Cree Nation*, [2001] 2 CNLR 57 (FCTD), it was held that a BCR is not a by-law if the procedure set out in sections 81–85.1 is not followed. In this case, on its plain reading, the impugned BCR does not purport to enact a by-law. Moreover, it was not published according to section 86 of the *Indian Act*. A press release announcing the suspension of Councillor Whalen and a memorandum to FMFN employees to the same effect do not satisfy the requirements of section 86.

(6) Necessity or Inherent Power

[75] FMFN also argues that the Council's power to suspend a councillor is "inherent." It also asserts that this power finds its source in the principle of necessity, as the lack of such a power would lead to an "intolerable result" or an absurdity.

[76] The adjective "inherent" is generally used, in this context, to describe powers that do not find their source in the usual categories of Canadian law, but rather in Indigenous legal systems quite apart from Canadian law. For example, as I explained above, the power to enact election laws is not conferred by the *Indian Act*. It flows from the inherent authority of First Nations communities, although its outcome is recognized by the *Indian Act*.

[77] Determining who can exercise an inherent power is a difficult issue. In principle, this should be determined by the relevant Indigenous legal system: see, by way of analogy, *William v British Columbia*, 2012 BCCA 285 at paragraphs 149–156, reversed on other grounds, *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257. In the elections context, this Court has held that election laws must reflect the broad consensus of the membership of the First Nation concerned. In doing so, this Court determined who has the inherent power to make such laws or, at least, whom it would recognize as having that power. Unless we contradict ourselves, we cannot recognize another source of power. Thus, FMFN cannot invoke an inherent power of its Council to suspend Councillor Whalen.

[78] Insofar as FMFN invokes a separate concept of necessity to support a power that was deliberately omitted in the Election Regulations, the same considerations apply. To be sure, resolving First Nations governance disputes sometimes requires a certain degree of creativity on the part of this Court: *Mercredi v Fond du Lac Denesuline First Nation*, 2018 FC 1272 at paragraphs 50–56. However, this does not mean that we can, as a general rule, 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. That is not our role. If we were to accede to that invitation, we would in effect be crafting a common law of First Nations governance that would override some of the choices made by First Nations.

[79] Moreover, necessity is too vague a standard by which to recognize powers such as the power to suspend a councillor. In this regard, FMFN argues that it is absurd or intolerable for the Council not to have the power to discipline its members, for example where a councillor breaches ethical standards. But the line between what is necessary and what is merely desirable is not easy to draw. It is not for me to draw that line. Rather, it is for FMFN's membership to decide what kinds of breaches of ethics warrant suspension or removal. Indeed, some of the grounds for removal that are expressly mentioned in the Election Regulations may be said to convey ethical standards.

[80] FMFN relies on *Whitehead v Pelican Lake First Nation*, 2009 FC 1270, in which my colleague Justice Michel Shore recognized the "inherent" power of the council of a First Nation to suspend a councillor. If I understand his reasons correctly, he relied on cases that dealt with necessity as a defence to allegations of bias and with necessity as a synonym for the ancillary

power to create offences and to provide for sanctions. With respect for my colleague, I cannot agree that an unwritten or inherent power to suspend councillors can be based on such principles, largely for the reasons that I have articulated above. In any event, insofar as it is invoked as authority for the proposition that the council of a First Nation has powers of suspension or removal that are not provided in an exhaustive election code, *Whitehead* has been overtaken by the Federal Court of Appeal's decision in *Orr*.

IV. Disposition

[81] As FMFN's Council did not have the power to suspend Councillor Whalen in the circumstances of this case, the application for judicial review will be allowed and the Council's decision dated January 10, 2019 will be quashed. It follows that Councillor Whalen will be reinstated in her position.

[82] Councillor Whalen also seeks an order of prohibition, preventing FMFN from pursuing suspension proceedings against her or beginning new proceedings that are not authorized by the Election Regulations. On judicial review, however, our usual practice is simply to quash the offending decision and let the decision-maker render a new decision, if needed: *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at paragraph 15. I do not see any reason to depart from our usual practice. It is obvious from these reasons that the Council did not have the power to suspend Councillor Whalen and cannot resume the same proceedings. As to an order prohibiting Council from initiating procedures not in compliance with the Election Regulations, it is merely an order to obey the law and would not be useful.

[83] At the hearing, both parties asked to be allowed to make submissions as to costs after judgment is rendered. I agreed to that request. Thus, Councillor Whalen will have 30 days from the date of this judgment to make submissions, and FMFN will have 10 days from the date Councillor Whalen's submissions are filed to respond.

JUDGMENT in T-146-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The respondent's decision to suspend the applicant is quashed;

3. The issue of costs is reserved.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-146-19
STYLE OF CAUSE:	SAMANTHA WHALEN v FORT MCMURRAY NO. 468 FIRST NATION
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	APRIL 16, 2019
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	MAY 24, 2019

APPEARANCES:

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