Federal Court Cour fédérale

Date: 20230601

Docket: T-1144-22

Citation: 2023 FC 767

Ottawa, Ontario, June 01, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

DENISE BEESWAX

Applicant

and

CHIPPEWAS OF THE THAMES FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Denise Beeswax, has brought an application for judicial review of the decision by the Chief and Council of the Chippewas of the Thames First Nation [COTTFN Council] removing her from her position as an elected Councillor of the Chippewas of the Thames First Nation [COTTFN], the Respondent.

[2] For the reasons that follow, I am allowing this judicial review of COTTFN Council's decision because it was effected without jurisdiction or authority.

I. Background

[3] The Applicant is a member of COTTFN. She has been elected as a Councillor for three consecutive terms, most recently by way of an election held on July 28, 2021.

[4] It is undisputed that COTTFN's elections are governed by the *Indian Act,* RSC 1985, c I-5 [*Indian Act*].

[5] At a May 3, 2022 special council meeting, a motion was passed by the other members of the COTTFN Council directing that the Applicant be removed from elected office for the remainder of the 2021-2023 council term. By letter dated May 4, 2022, those members of COTTFN Council advised the Applicant of their decision, which was stated to have been made having considered workplace violence complaints received from staff members and the Applicant's aggressive, disrespectful and even violent conduct at Council table, contravening the COTTFN Council's Code of Conduct and Oath of Office, and impacting Council's ability to govern.

[6] By letter of the same date, Chief Jacqueline French, on behalf of COTTFN Council also advised the staff of the COTTFN that in April 2022, Council had received a complaint of workplace violence by Councillor Beeswax against a staff member and described COTTFN Council's response to this, which included causing an independent investigation to be conducted.

As a result of the findings of the investigator, COTTFN Council concluded that the Applicant posed a danger to the staff of the COTTFN. COTTFN Council stated that it had also reviewed concerns with the Applicant's conduct over a lengthy period of time at COTTFN Council meetings and concluded that her ongoing conduct constituted significant violations of COTTFN Council's Code of Conduct. COTTFN Council stated that it had decided that the Applicant would be removed from office for the remainder of her term, effective May 3, 2022. Further, that until suitable safety procedures were effected, the Applicant would continue to be banned from all administrative buildings where COTTFN staff work and deliver services.

[7] The Applicant states that she disputes the allegations against her and does not accept the conclusions of COTTFN Council. However, her application for judicial review is not concerned with the merits of the decision. Rather, it is premised solely on her assertion that the COTTFN Council lacks jurisdiction and authority to remove her from elected office.

II. Preliminary Point

[8] The minutes of the COTTFN special council meeting held on May 3, 2022 indicate that Council addressed the allegations by staff of workplace violence. These allegations pertained to events occurring on April 5, 2022 and are described in the resultant "Investigation of Workplace Violence Concerning COTTFN Denise Beeswax" dated May 2, 2022 prepared by Jim St. Germain, a part time human resources consultant engaged by COTTFN [Workplace Violence Report]. Specifically, that on April 5, 2022, the Applicant is alleged to have: inappropriately attended a meeting of senior administrative personnel and to have exhibited aggressive, bullying and intimidating behaviour; made an inappropriate demand for money to be deposited in her

account on behalf of another family, contrary to policies and procedures, and to have done so in a way that was intimidating and harassing to staff who felt threatened by the Applicant's actions; falsely accused the acting executive administrator of assault; and made Facebook posts about the alleged assault which were allegedly inflammatory and potentially defamatory.

[9] The meeting minutes acknowledge that there were two decisions to be made, one of which was how to protect staff in light of the Workplace Violence Report. COTTFN Council addressed this by banning the Applicant from all administrative buildings where staff work or delivery of programs and activities take place until suitable safety procedures were effected. That decision is not challenged by the Applicant.

[10] The other decision made by COTTFN Council, to remove the Applicant from office, is the only decision that is the subject of this judicial review.

III. Decision Under Review

[11] The May 4, 2002, letter states as follows:

> Dear Denise,
>
> It is with a heavy heart that we write to inform you of Council's decision to remove you from your position as a Councillor.
>
> This decision has not been made lightly. Council has reviewed and deliberated based on our leadership responsibilities and the Seven Nokomis/Mishoomis teachings.
>
> Having received several complaints of workplace violence from several staff members; Council as employer was obligated to investigate these claims. A fair and transparent process was established, and an independent investigator was retained. You were provided with a summary of the complaints and an opportunity to respond to them. You elected not to participate in

this process. Based on an objective review of the evidence before him, the investigator found all complaints to be substantiated.

Council provided you with notice of our intention to review the findings of the investigator and you were offered the opportunity to speak to these findings at a Council meeting on May 2, 2022. You did not attend.

Council acknowledges its responsibility to ensure our staff are safe and are not subjected to violence in the workplace. We cannot tolerate or condone aggressive and threatening behaviour by a Councilor toward employees who serve our nation. Council was obligated to consider the risks your actions posed and to take action in response.

Council was also required to consider your conduct at the Council table given its impact on our ability to govern. Over the past several years, we have witnessed aggressive, disrespectful, and even violent conduct in contravention of our Code of Conduct and Oath of Office. As you peers, we have tried to address the harm this has caused including through open discussions at the Council table, through one-on-one discussions and through talking circles. You have also been previously suspended from your committee work and the receipt of honoraria as a result of aggressive and violent conduct.

Although you have acknowledged your conduct is not becoming of your office and have undertaken to change, such change has not occurred. What we have witnessed instead, particularly through recent social media posts, is a continuation of conduct in violation of our Codes and an effort to escalate division and within our community.

The cumulative impact of your conduct has not only threatened the sanctity of the Council office and the safety of staff, but it has interfered with Council's ability to govern and carry out our responsibilities to our members.

We have made this decision on what we, as leaders believe is in the best interest for the Nation.

We acknowledge your significant and valuable contributions to Council. We respect your passion, your insight, and your perspectives. Unfortunately, Council cannot continue to tolerate conduct which poses both a risk to the safety of our staff and community members and undermines Council's ability to govern.

We are mindful of the impact of this heavy decision and Council will continue to offer you support through the process.

IV. Relevant Legislation

Indian Act, RSC 1985 c I-5

Definitions

2(1) in this Act,

… ***council of the band*** means

(a) in the case of a band to which section 74 applies, the council established pursuant to that section,

(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 band)*

Elections of Chief and Band Councils

Elected councils

74 (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

…..

Tenure of Office

78 (1) Subject to this section, the chief and councillors of a band hold office for two years.

> **Vacancy**
>
> **(2)** The office of chief or councillor of a band becomes vacant when
>
> > **(a)** the person who holds that office
> >
> > > **(i)** is convicted of an indictable offence,
> > >
> > > **(ii)** dies or resigns his office, or
> > >
> > > **(iii)** is or becomes ineligible to hold office by virtue of this Act; or
> >
> > **(b)** the Minister declares that in his opinion the person who holds that office
> >
> > > **(i)** is unfit to continue in office by reason of his having been convicted of an offence,
> > >
> > > **(ii)** has been absent from three consecutive meetings of the council without being authorized to do so, or
> > >
> > > **(iii)** was guilty, in connection with an election, of corrupt practice, accepting a bribe, dishonesty or malfeasance.

Issues and Standard of Review

[12] There is a preliminary issue raised by the Applicant as to the admissibility of the seven affidavits filed by COTTFN in response to her application for judicial review.

[13] In my view, the issues on the merits of the decision can be addressed as follows:

1. Did COTTFN Council have jurisdiction/authority to remove the Applicant from her elected position as Councillor?
2. If so, was the decision to remove the Applicant reasonable?

[14] In assessing the merits of the COTTFN Council's decision, there is a presumption that the reviewing court will apply the reasonableness standard, this includes where the jurisdiction of a decision-maker is raised (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25, 65-68; *Turner-Lienaux v Canada (Attorney General)*, 2022 FCA 213 at para 7; *Shirt v Saddle Lake Cree Nation*, 2022 FC 321 at paras 30-31 [*Shirt*]). The circumstances of this matter do not warrant a departure from that presumption.

Preliminary Issue: Admissibility of Affidavit Evidence

[15] The Respondent has submitted seven affidavits in support of its response to this application for judicial review. Three of the ten COTTFN Council members that attended the May 3, 2022 meeting provided affidavits: the affidavit of Chief Jacqueline French who also served in that office in the immediate prior term, sworn on December 5, 2022 [French Affidavit]; the affidavit of Myeengun Henry, elder, former Chief and current Councillor of COTTFN, sworn on December 3, 2022 [Henry Affidavit]; and, the affidavit of Evelyn Young, current Council member who also served in the immediate prior term, sworn on December 6, 2022 [Young Affidavit]. Additionally, the Respondent has filed: the affidavit of Candace Doxtator, COTTFN Council Secretary/Policy Analysist, sworn on December 8, 2022 [Doxtator Affidavit]; affidavit of Joan Riggs, Catalyst Research and Communications who has worked with COTTFN Council since 2019, sworn on December 6, 2022 [Riggs Affidavit]; affidavit of Jim St. Germain, part-time human resources consultant to COTTFN since March 23, 2022, sworn on December 2, 2022 [St. Germain Affidavit]; and, affidavit of Sheila Jaggard, President of Ultimate Potential Inc and interim Executive Administrator with COTTFN since August 2021, sworn on December 4, 2022 [Jaggard Affidavit].

Applicant's Position

[16] The Applicant submits that the affidavits contained in the Respondent's motion record are largely inadmissible on three grounds.

[17] First, the affidavit evidence relates to the merits of the decision and purported basis for the removal of the Applicant from office. The affidavits were not before the decision maker, COTTFN Council, when the decision was made and it is well-established that, absent narrowly defined exceptions which the Applicant says do not apply here, judicial review is limited to material that was before the decision-maker (citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 20 [*Access Copyright*] and *Halcrow v Kapawe'no First Nation*, 2021 FC 219 at paras 37-39). Accordingly, virtually all of the Respondent's affidavit evidence is inadmissible and should either be struck or disregarded.

[18] Second, the affidavits contain extensive statements of opinion regarding the subjective views of the affiants about the Applicant, which the Applicant asserts is subjective opinion evidence from the COTTFN Council and their employees/contractors submitted in an attempt to justify the decision. This evidence is both inflammatory and constitutes opinion evidence. Therefore, much of the affidavit evidence is also inadmissible on that basis.

[19] Finally, the three of the seven affidavits are those of the decision-makers and purport to provide explanations for their decision. The Applicant asserts that this is a clear attempt to bootstrap the decision and add after-the-fact explanations to justify their decisions to this Court.

As such, these affidavits must be struck or given no weight (citing *Stemijon Investments Ltd v Canada (Attorney General),* 2011 FCA 299 at paras 41-42).

[20] The Applicant submits that the reasons for the decision are contained in COTTFN Council's decision letter and cannot be supplemented.

[21] When appearing before me, counsel for the Applicant indicated that to the extent that the affidavit evidence addresses what is recorded in the minutes of COTTFN Council meetings that were considered by Council when making the decision, as found in the certified tribunal record [CTR], this is not problematic, but it cannot go further. In any event, this is a secondary issue as this matter turns on jurisdiction, not on the merits of the removal, which is what the affidavit evidence primarily addresses.

Respondent's Position

[22] The Respondent submits that the affidavit evidence is necessary for the Court to conduct a meaningful judicial review.

[23] The Respondent submits that the Court should not ignore or disregard the affiants' evidence in circumstances where the Applicant has not specifically identified the portions of the affidavits containing the extrinsic evidence allegedly not before the Council (citing *Peguis First Nation v Canada (Attorney General)*, 2021 FC 990 at para 92).

[24] And, although none of the affidavits were before Council when it made its decision and three of the seven affidavits are from Councillors who made the decision, this does not constitute an improper attempt to bootstrap the decision or supplementing the evidence that was before the Council. The Respondent submits that the Applicant holds an impractically narrow view of admissibility which is not supported by the case law. Further, that the unduly technical objection that the affidavits were not before Council ignores that the information contained in the affidavits was before Council when it made the decision because the Councillors lived and shared their experiences pertaining to the Applicant's conduct Council meetings. And, although the minutes of the May 3, 2022 Council meeting are provided by the Applicant in her record, these only summarize the discussions, they are not a complete evidentiary record. The Respondent submits that the affidavits are the equivalent of a transcript of Council's deliberations. The Applicant herself includes in her record the May 3, 2022 minutes of the special Council meeting held to discuss the Applicant's conduct. Moreover, the CTR contains documents referenced in the affidavits currently before this Court (with the exception of Exhibits A, B and F to the Riggs Affidavit, and Exhibit A of the Doxtator Affidavit).

[25] The Respondent submits that to the extent that any portions of the Respondent's affidavits contain extrinsic evidence not before the Council, such evidence provides "background information concerning the issues to be addressed in judicial review" and/or "concerns the jurisdiction of the decision-maker", including "violations of natural justice or procedural fairness by the decision-maker" (citing *State Farm Mutual Automobile Insurance Company v Privacy Commissioner of Canada*, 2010 FC 736 at para 54).

[26] Finally, with respect to the Applicant's concern about the admissibility of opinion evidence, the Respondent states that it is well-established that "lay witnesses" may give opinion evidence if "the conclusions are ones that a person of ordinary experience can make" which include opinions on "the emotional state of a person" (citing *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 at para 78 [*Toronto Real Estate Board*] and *Graat v The Queen*, 1982 SCC 33 at p 835-836 [*Graat*]).

Analysis

[27] Pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 [*Rules*], an applicant may request material relevant to an application that is in possession of the decision maker and not in the possession of the applicant by serving on the decision-maker a written request identifying the material requested. In this matter, in her Notice of Application the Applicant made such a request:

> The Applicant requests, pursuant to Rule 317 of the Federal Court Rules, that the Respondent CTFN send a certified copy of the following material that is not in the possession of the Applicant, but is in the possession of the Respondent to the Applicant and to the Registry:
>
> All material considered by the CTFN Council in coming to the Decision, including but not limited to:
>
> - All evidence or information relied upon in coming to the Decision;
> - All correspondence to and from the CTFN Chief and Council regarding the removal proceeding that led to the Decision;
> - All correspondence with third parties regarding the investigation of the complaint, including any engagement letter, correspondence regarding the scope of the investigation, and other communications between the investigator and CTFN or its legal counsel. (To the extent the CTFN asserts privilege over these materials, the CTFN has

> waived privilege by relying on this investigation in support of the Applicant's removal).
>
> • Records from meetings where the Decision was made or was discussed (the "Meetings");
>
> • Records regarding notice of the Meetings, minutes of the Meetings, the agenda for the Meetings, notes from any participants in the Meetings and any other record of the Meetings (including audio or video recordings);
>
> • Any CTFN Laws, Bylaws or resolutions that were relied upon in relation to the Decision;
>
> • Any internal communications amongst the CTFN Council relating to the Decision or the investigation, including text messages, emails, and other communications between the Council members; and
>
> • Any other materials that are relevant to the decision.

[28] In response, on August 3, 2022, Candace Doxtator, Council Secretary for COTTFN, certified that the documents contained in the attached CTR were true copies of the original materials described in Rule 317. This includes documents such as the Chi-Inaakonigewin (the supreme law of Deshkan Ziibing Anishinaabe Aki (COTTFN)), the COTTFN Leadership Manual, various policy documents, as well as documents understood to have been before COTTFN Council when it made its decision, including minutes of Council meetings from March 21, 2018 to May 3, 2022.

[29] The jurisprudence is clear that, as a general rule, the evidentiary record before a Court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible. The recognized exceptions are when an affidavit:

provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, but does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker; brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker so that the Court can fulfill its role of reviewing for procedural unfairness; and, highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding (*Access Copyright* at para 20; see also *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-25; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45 [*Delios*]; *Tsleil-Waututh Nation v Canada*, 2017 FCA 128 at para 86 [*Tsleil-Waututh Nation*]).

[30] Accordingly, I do not agree with the Respondent that the Applicant's position on admissibility of the affidavit evidence is an impractically narrow view or that the Applicant's objection is unduly technical.

[31] To the extent that the affidavit evidence, such as the affidavit of Chief French, serve to place some of the same documentation as contained in the CTR before the Court, the affidavit evidence is unnecessary but does not offend the above general rule. It is also of note that portions of the affidavit evidence describe events that are also described in the Council meeting minutes and notes found in the CTR. Again, while it is unnecessary, this does not offend the general rule.

[32] More problematic, however, is when the affidavits serve to supplement the events and discussions described in the CTR documents or contain opinion evidence. Efforts to supplement

or justify the decision making process or the decision, or opinion evidence, do not fall within the general background exception. As stated by the Federal Court of Appeal in *Delios*:

> [44] Under this exception, a party can file an affidavit providing "general background in circumstances where that information might assist [the review court to understand] the issues relevant to the judicial review": *Access Copyright*, above at paragraph 20(a).
>
> [45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.
>
> [46] But "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20(a).

[33] Nor can a decision maker improve upon the reasons given to an applicant by means of affidavit evidence filed in a judicial review proceeding (*Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255 at para 46).

[34] The Respondent refers to *Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227, where the Federal Court of Appeal also addressed the content of affidavits in judicial review:

> [145] In this regard, counsel should be mindful of the limitations of supporting affidavits on judicial review. They cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision maker. They may point out factual and contextual matters that are not evident elsewhere in the record that were obviously known to the decision maker. They can also provide the reviewing court with general orienting information, such as how the request for information was handled, how the documents were gathered, and how the task of assessment was conducted. See generally *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, [2009] 2 F.C.R. 576, at paragraphs 45 to 47; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 341 D.L.R. (4th) 710, at paragraphs 40 to 42; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297.

[35] It is significant to note at the outset that the purpose of the general rule holding that only the evidence that was before the decision-maker is admissible on judicial review is to respect the distinctive roles of the administrative decision-maker and the Court. The administrative decision-maker determines the matter on its merits. The Court reviews the decision-maker's decision against the evidence and information they took into account.

[36] In this matter, however, the Applicant is not challenging the merits of the reasons for her removal from office. She is also not asserting that the decision was unreasonable or procedurally unfair. She is exclusively challenging the jurisdiction of COTTFN Council to remove her from her elected office as Councillor.

[37] Accordingly, the issue of the admissibility of the affidavit evidence which pertains to the substantive reasons of COTTFN Council for removing the Applicant from office has limited relevance to the issue of jurisdiction that is before me.

[38] That said, I appreciate that the Respondent takes the position, discussed below, that COTTFN Council had jurisdiction to remove the Applicant from office based on necessary implication and that the affidavit evidence is required for the Court to conduct a meaningful judicial review. However, if the Applicant's conduct was the reason for – or necessitated – her removal, then her conduct, as considered by COTTFN Council when it made the subject decision, should form a part of and be discernable the record. It should not be necessary to supplement that evidence by way of the subject affidavits.

[39] In my view, portions of these affidavits go beyond describing events that the affiants personally witnessed and which events are otherwise described in the CTR documents. And, in some instances, the affiants provide their opinions as to the Applicant's mental state, and its impact, which serves to further justify, or bootstrap, the decision to remove her from office. That is, the affidavit evidence goes to the merits of the decision and also adds the affiants' "gloss" to the events documented in the CTR.

[40] For example, as the Applicant points out, the French Affidavit includes opinion evidence as to the Applicant's behaviour, including that: the Applicant "is simply unable to function within the collective of Council"; the Applicant's behaviour "is erratic, unpredictable, threatening and unsafe"; "the Applicant was unhinged"; there is "an overhanging threat at our Council table that the Applicant will lose control and become physically violent"; her behaviour is erratic; emails posted by the Applicant were "in my view, incendiary and dangerous" and "fomented division and created a potential for violence in our community". The Riggs Affidavit similarly states the opinion that the Applicant's conduct is disruptive and contrary to the Code of

Conduct and "that there was an overhanging threat that her conduct would escalate into physical violence as the Applicant is erratic and unpredictable". The Henry Affidavit states that the Applicant "is erratic, disrespectful, abusive and, on occasion, has been violent"; the Applicant's "erratic conduct was embarrassing and humiliating to the Nation"; and "was erratic, unpredictable and I believe, prejudicial to the interests of the Nation"; her behaviour is "very erratic and unpredictable"; and, expresses the view that the "applicant appears not to be able to control her anger or to understand the impact of her actions on others". The Jaggard Affidavit includes the opinion that the Applicant "seemed unhinged". The Young Affidavit states that the affiant has "always known the Applicant to be difficult and disruptive" including referencing an incident in 2000 which is not found in the CTR and is unrelated to the Applicant's actions while a Councillor and that while she has always tried to be patient with the Applicant, "her behaviour is not stable". The Doxtator Affidavit also describes the affiant's view that Applicant's behaviour as erratic and "exceptionally bizarre" and states the opinion that "the Applicant is not stable".

[41] Further, virtually all of the affidavits add information about past events and add that at that time, the affiants were afraid of what the Applicant might do, that others who they spoke to at the time told them they were afraid, or that they interpreted the Applicant's behaviour as threatening. The French Affidavit describes the November 2020 incident at a leadership meeting when the Applicant lost her temper and flipped over a table (one of two acts of physical aggression, the other occurred in 2018, when the Applicant is said to have thrown a chair). The affidavit adds that another Councillor at the time (who has not provided affidavit evidence) told Ms. French, who was a Councillor at the time, that she was afraid, and the French Affidavit states that the affiant was afraid and further, while the Applicant left the meeting, she remained

in her vehicle in the parking lot, which Chief French says she interpreted as threatening. While this may all be so, there is simply no way of knowing whether these feelings and interpretations were expressed when Council was making its decision to remove the Applicant from office. Accordingly, this type of evidence serves to justify the decision but is not found in the record that was before Council when it made that decision.

[42] The French Affidavit also speaks to the Applicant's Facebook posts, which are found in the CTR, in which the Applicant asserted that she had been assaulted by the interim executive administrator (Ms. Jaggard) on April 5, 2022. Chief French opines that the posts were incendiary and dangerous, undermined Council, implied that Council was corrupt and misappropriating funds, were threatening and abusive to staff, insinuated that the police were incompetent and racist, fomented and created the potential of violence. However, the emails are found in the CTR and what Chief French is expressing is her opinion and interpretation of the content of the posts – which speak for themselves.

[43] Another example is the Riggs Affidavit. This states that, after the Applicant was removed from office, in a three-day political strategy session, Council moved through a substantive agenda and made decisions on items had not been completed or resolved because of the disruptive behaviour of the Applicant at earlier meetings. First, it is obvious that COTTFN Council could not have considered events that occurred after the Applicant's removal from office when making the decision to remove her from office. Further, the Riggs Affidavit makes this general statement with no reference to any prior documentation, whether found in the CTR or at all. Most significantly, the purpose of this statement, and much of the Riggs Affidavit, would

appear to be to provide after the fact justification for Council's decision. It also expresses various opinions as to why and how Council reached its decision.

[44] My point is, beyond factual evidence that was before the Council when it made its decision (such as the minutes of past council meetings), much of the affidavit evidence is based on opinion or personal interpretation of events. There is no way of knowing from the record how much of this was expressed at the Council meetings - beyond what is reflected on the record. My concern is that such evidence, if admitted, could supplement the record upon which the decision was based and serve to justify the decision.

[45] For these reasons, I agree with the Applicant that much of the content of the affidavits appears to exceed the information that was in the record before COTTFN Council when it made its decision. I do not agree with the Respondent that the affidavits can be treated as a "transcript" of the meetings – indeed two of the seven affiants (Mr. St. Germain and Ms. Jaggard) were not even attendees at the May 3, 2022 meeting when the decision to remove the Applicant was made. And, while three Councillors have provided affidavits, the remaining seven councillors have not. I would also note that there is no explanation for why the meeting was not recorded (the record includes a recording of a special council budget meeting held on March 31, 2022). More significantly, nothing in any of the affidavits indicates what was actually discussed at the May 3, 2022 council meeting.

[46] Finally, I also do not agree with the COTTFN Council's submission that the opinion evidence of the affiants is admissible because it is well established that "lay witnesses" may give

opinion evidence if their conclusions are ones that a person of ordinary experience can make. COTTFN relies on *Toronto Real Estate Board* to support this position, however, that matter was a statutory appeal from two decisions of the Competition Tribunal, not a judicial review, and it was concerned with witness statements– the admissibility of which were not challenged. Nor does *Graat*, also relied upon by COTTFN, assist COTTFN in this administrative law context as it concerns admissibility of non-expert witnesses in the trial of a criminal matter.

[47] In conclusion, because it is impossible to know what aspects of the affidavit evidence were discussed at the May 3, 2022 COTTFN Council meeting, to the extent that the affidavit evidence goes beyond the content of the documentation contained in the CTR and the events addressed therein and speaks to the merits of the decision or provides opinion evidence or justification for the decision, I will afford it no weight.

The COTTFN Council lacked jurisdiction/authority to remove the Applicant from her elected position as Councillor

Applicant's Position

[48] The Applicant submits that the application raises one discrete issue – whether COTTFN Council lacked jurisdiction or authority to remove the Applicant from her elected position as Councillor. The Applicant submits that the COTTFN Council had no authority to do so.

[49] COTTFN holds its elections pursuant to the *Indian Act*. Section 78(2)(b) of the *Indian Act* expressly addresses removal of an elected member of council before their two-year term of office is complete. That process requires assessment of the factual circumstances and a declaration by

the Minister. While the COTTFN Council purported to remove the Applicant by passing a motion at a Council meeting, it had no jurisdiction or power to do so (citing *Owen v Little Grand Rapids First Nation*, 2020 FC 1092 at paras 2, 6 [*Owen*]; *Fort McKay First Nation v Orr*, 2012 FCA 269 [*Orr*]; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 [*Whalen*]; *Shirt* at para 36 citing *Bell Canada v 7265921 Canada Ltd*, 2018 FCA 174 at para 46; *Shirt* at para 40; *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 [*Mckenzie*]). As COTTFN Council exceeded its authority, the decision must be set aside.

[50] The Applicant submits that there is no authority to ignore the *Indian Act* provisions or, for example, to treat a councillor like an employee subject to discipline as governed by employment law principles (citing *Whalen* at para 54). Further, that COTTFN Council has deprived COTTFN members of their democratically elected choice of Councillor (citing *Morin v Enoch Cree Nation*, 2019 FC 368 [*Morin*]).

Respondent's Position

[51] The Respondent acknowledges that COTTFN has not yet developed its own custom election code, and therefore, elections take place every two years under the *Indian Act*. It also acknowledges that the *Indian Act* has express provisions for the Minister to remove an elected member of council before their two-year term of office is up and that neither the *Indian Act* or the *Indian Band Council Procedure Regulations*, CRC, c 950 [*IBCP Regulations*] expressly grant First Nations councils the ability to remove a councillor for misconduct. The Respondent submits, however, that band councils are not limited to the powers expressly granted under the *Indian Act*.

[52] The Respondent submits that the Applicant conducted herself in an unruly, disrespectful and sometimes physically violent manner and that despite efforts by Council to address these behaviours, the misconduct continued and even escalated. The Respondent submits that the exercise of power to remove a Councillor, in the exceptional circumstances of this case, was a practical necessity for the COTTFN Council to fulfil its mandate to govern. Denying the existence of this power would lead to absurd and unjust results, incompatible with the principles of reconciliation and Canada's recognition of the inherent rights of Indigenous peoples to self-govern.

[53] The Respondent submits that the COTTFN has developed other laws, including a Chi-Inaakonigewin (supreme law) and a Leadership Manual. The Respondent submits and that the Leadership Manual "supplements" the obligations of leadership found in the *Indian Act* and the *IBCP Regulations*, pending the adoption of a custom election code. Reading together the statutory framework and the ancillary powers doctrine in the context of Parliament's current policies regarding Indigenous peoples, the COTTFN Council must be able to take the necessary measures to govern themselves when their statutory mandate to govern their citizens is threatened.

[54] In essence, the Respondent submits that the COTTFN Council was permitted to remove the Applicant pursuant to the doctrines of ancillary powers and necessary implication. More specifically, that there is a longstanding statutorily enshrined principle that the powers conferred by an enabling statute include not only those that are expressly granted, but also, by implication, all powers that are practically necessary for the decision-maker to carry out its mandate (citing

ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board), 2006 SCC 4 at paras 50-51; *Interpretation Act*, RSC 1985, c I-21 at s 31(2)). COTTFN Council had authority to remove the Applicant given that: the *Indian Act* and *IBCP Regulations* provide for good governance; the *IBCP Regulations* are not a comprehensive framework and permit band councils to make such rules of procedure that are not inconsistent with those regulations in respect of matters not specifically provided for therein (citing *IBCP Regulations* at s 23(1) and (2)); and the Leadership Manual supplements the statutory provisions outlining expectations of COTTFN Council and its duty to promote good governance. Moreover, the Respondent asserts that it was not the intention of Parliament to "sit idly by" when a council member consistently acts contrary to their statutory obligations and in a manner that threatens the mandate of council to govern.

Analysis

[55] Section 2 of the *Indian Act* defines "council of the band" and, as such, acknowledges that First Nations can choose how they wish to select their chief and council.

[56] Council can be "chosen according to the custom of the band", which generally entails the First Nation adopting and ratifying a written custom election code – the governance and election law of that First Nation – in accordance with which elections are held. The custom election code may also address the circumstances and manner in which chief or a councillor can be removed from elected office (see, for example, *Orr* at para 19; *Hall v Kwikwetlem First Nation*, 2020 FC 994 at para 7, Schedule A; *Shirt* at para 38).

[57] First Nations can also request that they be added to the schedule of the *First Nations Election Act,* SC 2014 c 5 [*FNEA*], identifying those First Nations who have chosen to participate in the *FNEA* and to conduct their elections in accordance with that act. *FNEA* also contemplates removal from office of a chief of councillor by way of petition (*FNEA*, s 36).

[58] When a First Nation has not taken steps to adopt a custom election code or to participate in the *FNEA*, then the election of the chief and council will remain under the *Indian Act*. It is not in dispute that this is the case with the COTTFN.

[59] As set out above, s 78 of the *Indian Act* sets the two-year term of office of elected chief and council. It also includes express provisions for removing an elected member before their term of office is finished. That is, the office becomes vacant if the person who holds that office is convicted of an indictable offence; dies or resigns his office, or is or becomes ineligible to hold office by virtue of the Act (s 78(2)(a)), or, where the Minister declares that in their opinion the person who holds that office is unfit to continue in office by reason of his having been convicted of an offence, has been absent from three consecutive meetings of the council without being authorized to do so, or was guilty, in connection with an election, of corrupt practice, accepting a bribe, dishonesty or malfeasance (s 78(2)(b)).

Source of Authority

i. Indian Act

[60] As I stated in *Shirt*, "all exercises of power by public authority must be authorized by law" (para 36 citing *Bell Canada v 7265921 Canada Ltd*, 2018 FCA 174 at para 46; *Canada*

(Canadian Human Rights Commission) v Canada (Attorney General), 2018 SCC 31 at para 111. See also *Vavilov* at para 109).

[61] The issue in this matter is whether COTTFN Council had authority to remove the Applicant from elected office.

[62] In *Owen*, a decision delivered from the bench (the First Nation and individual respondents did not appear), Justice Grammond considered the circumstance which is now before me, that is, where the First Nation had not adopted its own election code but purported to remove a councillor from office.

[63] Justice Grammond found that the First Nation's elections were governed by ss 74-79 of the *Indian Act*. And while chief and council had passed a resolution to remove the applicant on the basis that he had failed to attend three consecutive council meetings and council had then written to the Minister to request confirmation of the decision (the record did not disclose what, if any, response had been received), Justice Grammond was clear in finding that council did not have the authority to remove the councillor from office, stating:

> [6] The First Nation does not have the power to remove a councillor. Pursuant to section 78(2)(b) of the *Indian Act*, this power is conferred upon the Minister. Thus, the resolution adopted in November 2019 could at most be considered as a request to the Minister to exercise his power. Yet, the First Nation treated it as a legally effective decision and stopped paying Mr. Owen's salary. This was contrary to the provisions of the *Indian Act*. The decision to remove Mr. Owen from council must thus be quashed.

[64] In this matter, the COTTFN has not enacted a custom election code or opted into *FNEA*. Thus, legislative authority for removal of a councillor from office stems from the *Indian Act*. I agree with the finding in *Owen* that that power is conferred upon the Minister. Thus, the COTTFN Council did not have the authority by motion, passed at the May 3, 2022 Council meeting, to "direct" that the Applicant be removed from office for the remainder of the 2021-2023 Council term. In my view, this is determinative.

[65] When appearing before me, counsel for the Respondent argued that because paragraphs 78(2)(a) and (b) of the *Indian Act* are separated by the word "or" that this must indicate that power remains with band councils to remove councillors from office. I fail to see how this assists the Respondent. Section 78(2)(a) states that the office of chief or councillor of a band becomes vacant when the person who holds that office is convicted of an indictable offence; dies or resigns from office; or, is or becomes ineligible to hold office by virtue of the *Indian Act.* There is no evidence before me that the Applicant falls into either of those categories.

ii. Inherent Authority

[66] As to other sources of authority, the Respondent does not directly suggest that COTTFN Council has inherent authority to remove the Applicant from office. Rather, it submits that the COTTFN developed the Chi-Inaakonigewin which recognizes the inherent sovereignty of the First Nation and that this, combined with the *IBCP Regulations* and the Leadership Manual, provide authority in the circumstance of necessity.

[67] However, jurisprudence from this Court and the Federal Court of Appeal has previously addressed assertions of "inherent" power claimed by chief and council to justify the suspension or removal of elected councillors from office.

[68] In *Orr,* council for the First Nation suspended a councillor from office upon learning of a sexual assault charge being laid against him. The councillor argued that the council lacked jurisdiction to suspend him under the First Nation's election code. Chief and council took the position that they had "inherent power" to suspend by way of resolution. They argued that council had to take steps to protect itself against vicarious liability for sexual harassment and to take steps as a proper fiduciary to protect band members. The Federal Court of Appeal found that the election code "covered the field" and ousted any inherent power that existed with respect to the suspension of councillors. Further, that the onus was on chief and council to demonstrate the existence of any custom or inherent power pertaining to the suspending of councillors and that they had failed to do so. Council's power to suspend the councillor by way of resolution alone was not supported by an inherent power.

[69] Similarly, in *Whalen,* the First Nation argued that its election regulations were not a complete code and that there was an unwritten custom allowing council to suspend a councillor. Alternatively, that council's power to suspend derived from s 81 of the *Indian Act* or from "necessity". Justice Grammond rejected each of those arguments.

[70] Referencing *Orr,* Justice Grammond found that the election regulations in *Whalen* were intended to be a complete code, leaving no place for the continuing operation of unwritten

customs regarding the same issues. Although he found that this was sufficient to dispose of the application, Justice Grammond went on to address council's assertion of a custom outside of the regulations, but found that the evidence was not sufficient for the First Nation to discharge its burden of proving the facts that would underpin the alleged customary rule. Justice Grammond then considered the argument that the decision to suspend the councillor from office could be based on s 81 of the *Indian Act,* which grants councils of First Nations a by-law making power over a range of subjects typically related to local governance, and in particular, "'the observance of law and order' (s 81(1)(c)) and the 'prevention of disorderly conduct and nuisances' (s 81(1)(d))". He noted that the subject band council resolution did not refer to s 81 and therefore it was highly probable that raising the issue at judicial review would offend the prohibition on supplementing administrative decisions by offering grounds that the decision-maker chose not to raise (citing *Delta Air Lines In v Lukacs*, 2018 SCC 2 at para 24). But, in any event, the argument was without merit:

> [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.
>
> [Emphasis added.]

[71] Justice Grammond then addressed the argument that the council's power to suspend a councillor was "inherent" and that this power found its source in the principle of necessity, as the lack of such a power would lead to an "intolerable result" or an absurdity. This is essentially the same argument that the Respondent makes before me. Justice Grammond found that 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, the First Nation could not invoke an inherent power of its council to suspend the councillor. While this statement was made in the context of an election code, more broadly I understand this to mean that, absent demonstrated confirmation by the First Nation of the power to remove councillors from office – either by custom code, unwritten custom or otherwise – and the delegation of that power to council on behalf of the First Nation membership, First Nation councils do not have inherent authority to remove elected officers from office.

[72] As to the necessity argument, while recognizing that the resolution of First Nations governance disputes sometimes requires a certain degree to creativity on the part of the Court, Justice Grammond held that "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" and:

> [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.
>
> [Emphasis added.]

[73] As I have indicated above, in my view, the power to remove the Applicant from office is conferred upon the Minister pursuant to s 78(2)(b) of the *Indian Act*. This precludes COTTFN Council from exercising that authority.

[74] In any event, and while I recognize that *Orr* and *Whalen* involved situations where election codes had been adopted by the subject First Nations, to the extent that COTTFN Council is relying on "inherent" authority – alone or in combination with the *IBCP Regulations* and Leadership Manual – to remove the Applicant from office, the onus is on COTTFN Council to

establish that COTTFN custom afforded Council such authority. As I previously stated in *McKenzie*:

> [71] The Respondents bear the burden of proving an established band custom (*Whalen* at para 41; *Samson Indian Band v. Samson Indian Band (Election Appeal Board)*, 2006 FCA 249; *Orr* at para 20; *Gadwa* at para 50). As to what comprises custom, in *Beardy v Beardy*, 2016 FC 383 at paras 93 – 97, I summarized the jurisprudence regarding the proving of custom, and concluded that:
>
> > [97]….in order to determine whether the actions of the Elections Committee were consistent with custom, the Respondents must demonstrate that this type of decision-making was firmly established, generalized, and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus [citations omitted].
>
> [72] In *Whalen*, Justice Grammond stated that a review of this Court's jurisprudence shows custom to mean "the norms that are the result of the exercise of the inherent law-making capacity of a First Nation" (at para 32). Broad consensus can be evidenced by a law enacted by a majority vote of a First Nation or by a course of conduct which expresses the First Nation's membership tacit agreement to a particular rule (at paras 33, 36).
>
> [73] However stated, in my view, the Respondents have failed to demonstrate an established custom as the source of Council's power to suspend duly elected councillors from office. The single example of Ms. McKenzie's November 2017 suspension is insufficient to demonstrate an established practice and broad consensus. Further, the Applicants' November 28, 2017 attempt to remove Councillors Whiteknife and Marten is not evidence of established and accepted custom because the Applicants, in that attempt, followed the process described in section 15 of the Election Code by presenting a petition signed by 100 band members and seeking a legal opinion. In sum, the evidence the Respondents rely on to prove an existing custom does not demonstrate a firmly established course of action which enjoys broad consensus in the MCFN community.

[75] Here, the Respondent offers no evidence of COTTFN custom that would support removal of a councillor from elected office by COTTFN Council. The only reference in the record before me to such a prior action is the prior suspension of the Applicant from Council committee work – not from office. Moreover, the Respondent does not attribute the authority for that prior limited suspension from committee duties to inherent authority. Rather, the Respondent asserts this was authorized pursuant to its "self-policing" under the Leadership Manual as a disciplinary measure. In any event, this one partial suspension from council committee work is insufficient evidence to demonstrate an established practice and broad consensus of removal of councillors from office by COTTFN Council.

iii. Doctrine of jurisdiction by necessary implication

[76] As a preliminary point, the Respondent, in its submissions, refers to both the ancillary powers doctrine as well as the doctrine of necessary implication. The Supreme Court of Canada in *Quebec (Attorney General) v Lacombe,* 2010 SCC 38 at paragraph 32 stated that, "The ancillary powers doctrine may be briefly described. Recognizing that a degree of jurisdictional overlap is inevitable in our constitutional order, the law accepts the validity of measures that lie outside a legislature's competence, if these measures constitute an integral part of a legislative scheme that comes within provincial jurisdiction: *General Motors of Canada Ltd v City National Leasing*, [1989] 1 S.C.R. 641, at pp. 668-70."

[77] Further:

> [35] The ancillary powers doctrine permits one level of government to trench on the jurisdiction of the other in order to enact a comprehensive regulatory scheme. In pith and substance,

> provisions enacted pursuant to the ancillary powers doctrine fall outside the enumerated powers of their enacting body: *General Motors*, at pp. 667-70. Consequently, the invocation of ancillary powers runs contrary to the notion that Parliament and the legislatures have sole authority to legislate within the jurisdiction allocated to them by the *Constitution Act, 1867*. Because of this, the availability of ancillary powers is limited to situations in which the intrusion on the powers of the other level of government is justified by the important role that the extrajurisdictional provision plays in a valid legislative scheme. The relation cannot be insubstantial: *Nykorak v. Attorney General of Canada*, [1962] S.C.R. 331, at p. 335; *Gold Seal Ltd. v. Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424, at p. 460; *Global Securities*, at para. 23.

[78] The Respondent does not address how the ancillary powers doctrine has application in this matter and, in my view, appears to conflate that doctrine with the doctrine of jurisdiction by necessity implication. The thrust of the Respondent's submissions pertains to assertion that it had jurisdiction to remove the Applicant from office based on implied authority and necessity which is, essentially, a question of statutory interpretation. Accordingly, in my view, the Respondents' arguments pertain to the doctrine of jurisdiction by necessary implication.

[79] The Respondent asserts that there is a longstanding, statutorily enshrined principle that the powers conferred by an enabling statute include not only those that are expressly granted, but also, by implication, all powers that are practically necessary for the decision-maker to carry out its mandate. I am not persuaded that the doctrine of jurisdiction by necessary implication has application in these circumstances.

[80] In *ATCO*, relied upon by the Respondent, the Supreme Court of Canada considered whether the Alberta Energy and Utilities Board had jurisdiction pursuant to its enabling statutes

to allocate a portion of the net gain on the sale of a utility asset to the rate-paying customers of the utility when approving the sale. If so, then the Court had to consider whether the board's exercise of its jurisdiction was reasonable and within the limits of its jurisdiction.

[81] The Supreme Court noted that "[a]dministrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they must 'adhere to the confines of their statutory authority or "jurisdiction"[; and t]hey cannot trespass in areas where the legislature has not assigned them authority': Mullan, at pp. 9-10 (see also S. Blake, Administrative Law in Canada (3rd ed. 2001), at pp. 183-84)" (at para 35). To determine whether the board's decision that it had jurisdiction was correct, the Court was required to interpret the legislative framework by which it derived it powers and actions (para 36).

[82] In the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of jurisdiction under various statutes (explicit powers); and (2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers).

[83] Because the Supreme Court found that the legislation was silent as to the board's power to deal with the sale of proceeds after the initial stage in the statutory interpretation analysis, given some ambiguity, it went on to consider implicit powers, concluding that a grant of authority to exercise a discretion as found in two provisions of the relevant statues did not confer unlimited discretion to the board. Rather, the board's discretion was to be exercised "within the

confines of the statutory regime and principles generally applicable to regulatory matters, for which he legislature is assumed to have had regard in passing that legislation" (para 50) and held:

> 51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; Bell Canada, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:
>
> > When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.
>
> *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 1982 CanLII 3238 (ON SCDC), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 1983 CanLII 1879 (ON CA), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, 1977 CanLII 3163 (FCA), [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, 1982 CanLII 5204 (FCA), [1983] 1 F.C. 182 (C.A.), aff'd 1985 CanLII 63 (SCC), [1985] 1 S.C.R. 174).

[84] The Supreme Court also noted enumerated circumstances when the doctrine of jurisdiction by necessary implication may be applied (para 73):

> 1. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;

> 2. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
>
> 3. when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
>
> 4. **when the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and**
>
> 5. **when the legislature did not address its mind to the issue and decide against conferring the power to the Board.** (See also Brown, at p. 2-16.3.)
>
> [Emphasis added.]

[85] In *ATCO*, the Supreme Court concluded that in order to impute jurisdiction to a regulatory body, there must be evidence that the exercise of that power is a practical necessity for the regulatory body to accomplish the objects prescribed by the legislature, something that was absent in that case (para 74). Further, had the legislature wished to confer on ratepayers the economic benefits resulting from the sale of utility assets, it could expressly provide for that in the legislation as had been done elsewhere.

[86] I would also note that in *Hershkovitz v Canada (Attorney General)*, 2021 FCA 38, the Federal Court of Appeal held that, "The doctrine may be applied in circumstances where the Court is satisfied that the jurisdiction sought is essential to the administrative body fulfilling its statutory mandate and **is not one to which the legislature has clearly addressed its mind**" (para 9) [emphasis added].

[87] Here, s 78(2) of the *Indian Act* explicitly contemplates circumstances in which the office of a chief or councillor becomes vacant. In other words, the legislature clearly put its mind to the

removal of elected councillors from office, including the circumstances that may warrant that action and who has the authority to make that determination. The authority to remove chief and council from office explicitly lies with the Minister. While COTTFN Council might prefer to hold that authority and to broaden its application, it has no statutory mandate to do so. By restricting the circumstances in which an office will become vacant, the legislature determined the perimeters for removal. The doctrine of jurisdiction by necessary implication has no application in these circumstances.

[88] Further, and significantly, if COTTFN was of the view that the power of removal of elected councillors from office should lie with COTTFN Council and that this power should be expanded to cover allegations of misconduct such as those asserted in this matter, then it was open to COTTFN to effect this by way of its members adopting and ratifying an election code reflecting that intention. The ability of COTTFN to make this choice detracts from the Respondent's assertion of practical necessity.

[89] And, in that regard, it cannot be assumed that the COTTFN membership would choose to authorize COTTFN Council to make such a determination, rather than its members. The Applicant was democratically elected as a Councillor by a majority of the members of the First Nation. The COTTFN membership might well be of the view that a member of Council can only be removed from that office for defined misconduct by, for example, a petition signed by a specified number of the First Nation members, or another procedure reflecting broad consensus of the majority of the First Nation members. It cannot be assumed that, even if a custom code were to be adopted and ratified, Council – as opposed to the First Nation members – would be

granted the authority to remove an elected official from office. That is, that the COTTFN would broadly endorse granting such authority to Council to remove elected councillors from office based on Council's own assertion of necessity, or otherwise. It is for the First Nation's membership to decide what kind of conduct would warrant suspension or removal from office (*Whalen* at para 79).

[90] In my view, the finding that the doctrine of necessary implication has no application in these circumstances is determinative. However, I will address the Respondent's further submissions.

[91] The Respondent also submits that COTTFN Council had authority to remove the Applicant from elected office given that: the *Indian Act* and *IBCP Regulations* provide for good governance; the *IBCP Regulations* are not a comprehensive framework and permit band councils to make such rules of procedure that are not inconsistent with those regulations in respect of matters not specifically provided for therein (citing *IBCP Regulations* at s 23(1) and (2)); and, the Leadership Manual supplements the statutory provisions outlining expectations and the duty of COTTFN Council to promote good governance.

[92] With respect to the *IBCP Regulations*, as their title indicates, these are procedural in nature. Among other things, they address notice and when meetings of the council are to be held; what constitutes a quorum; determining the presiding officer at council meetings who is to maintain order and decide all questions of procedure; the order of business at regular council

meetings; the presentation and passage of motions; and, similar matters. For context, I note below some of the provisions of the *IBCP Regulations*:

> **10** The presiding officer shall maintain order and decide all questions of procedure.
>
> ….
>
> **14** When any member desires to speak, he shall address his remarks to the presiding officer and confine himself to the question then before the meeting.
>
> **15** In the event of more than one member desiring to speak at one time, the presiding officer shall determine who is entitled to speak.
>
> **16** **(1)** The presiding officer or any member may call a member to order while speaking and the debate shall then be suspended and the member shall not speak until the point of order is determined.
>
> **(2)** A member may speak only once on a point of order.
>
> **17** Any member may appeal the decision of the presiding officer to the council and all appeals shall be decided by a majority vote and without debate.
>
> **18** **(1)** All questions before the council shall be decided by a majority vote of the councillors present.
>
> **(2)** The presiding officer shall not be entitled to vote but whenever the votes are equal the presiding officer, other than the superintendent, shall cast the deciding vote.
>
> **19** 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.
>
> **20** A member who refuses to vote shall be deemed to vote in the affirmative.
>
> **21** Whenever a division of the council is taken for any purpose, each member present and voting shall announce his vote upon the question openly and individually to the council and, when so requested by any member, the secretary shall record the same.

> **22** Any member may require the question or resolution under discussion to be read for his information at any period of the debate, but not so as to interrupt a member who is speaking.
>
> **23** **(1)** The regular meetings shall be open to members of the band, and no member shall be excluded therefrom except for improper conduct.
>
> **(2)** The presiding officer may expel or exclude from any meeting any person who causes a disturbance at the meeting.
>
> ……
>
> **31** The council may make such rules of procedure as are not inconsistent with these Regulations in respect of matters not specifically provided for thereby, as it may deem necessary.

[93] The Respondent points to ss 10, 14 and 23 and submits that these "describe enforcement mechanisms" and that s 31 recognizes that the regulations are not a comprehensive framework and councils may make such rules of procedure as are not inconsistent with the *IBCP Regulations* in respect of matters not specifically provided for thereby, as they may deem necessary.

[94] In my view, the *IBCP Regulations* clearly speak to the process by which council meetings shall be conducted by chief and councils. Nothing in these Regulations provides First Nation councils with any jurisdiction or authority to remove chief or councillors from elected office– which, I note, would be inconsistent with s 78(2) of the *Indian Act*. Nor do I agree that these Regulations speak to "enforcement". Rather, they speak to the running of council meetings in good order.

[95] The Respondent also suggests that that COTTFN created the Leadership Manual as further rules of procedure pursuant to s 31 of the *IBCP Regulations* and that the Leadership Manual "supplements the statutory provisions by explicitly outlining the expectations and duties of Council to ensure and promote good governance, among other goals, so they can serve the people fairly and efficiently". The Respondent states that all elected Councillors must agree to the Code of Conduct and associated declarations set out in the Leadership Manual at the beginning of their term of office.

[96] I have a number of concerns with this submission.

[97] First, as in *Whalen* which held that s 81 of the *Indian Act* must be given an interpretation that is compatible with the logic and structure of the *Indian Act*, s 31 of the *IBCP Regulations* must also be considered in the context of the *Indian Act* by which First Nation council elections are governed by ss 74-80. Section 78(2) sets out the grounds for the removal of a chief or councillor. Just as Parliament cannot have intended to allow First Nations councils to make by-laws under s 81 that would deviate from the rules set out in ss 74-80, nor could it have intended that s 31 of the *IBCP Regulations* would permit First Nations to effect rules of procedure that achieve the same end.

[98] Second, the preamble of the Leadership Manual includes that Chief and Council wish to establish a comprehensive policy to ensure good governance of the First Nation and its members and, therefore, resolved to adopt the policies set out in their Leadership Manual. Nothing in the Leadership Manual indicates that Chief and Council adopted the Leadership Manual as "rules of

procedure" made pursuant to s 31 of the *IBCP Regulations* to address matters not specifically provided for therein.

[99] Further, the Leadership Manual goes far beyond the conduct of council meetings – that is, it exceeds the scope of the *IBCP Regulations*.

[100] The Leadership Manual states its purpose as follows:

> PURPOSE OF POLICIES
>
> The purpose of the policies in this Leadership Manual is to maintain a harmonious and mutually beneficial relationship between Chief and Council and Chippewas of the Thames First Nation Members. These policies describe the political, functional and legal roles and responsibilities of the Chief and Council and staff, particularly the Administrator, and define the operational procedures to ensure and promote good governance.
>
> Chief and Council of the Chippewas of the Thames First Nation desire to serve the people fairly and efficiently; accordingly. Council is determined to establish an effective working relationship with fellow Chief or Councillors and the Chippewas of the Thames First Nation Membership.
>
> By the policies contained herein, the Council hereby affirms the separation of politics and administration while acknowledging they will overlap from time to time. The Council is responsible for the strategic planning and visionary leadership of the First Nation. The day-to-day activity of staff is the job of the Administrator.
>
> The responsibility of the Council in relation to the First Nation owned corporations, Trusts and other entities will be set out in other law, policies and corporate constitutional documents.

[101] Finally, given that s 78 of the *Indian Act* explicitly sets out the circumstances and manner in which a councillor can be removed from elected office and that such authority lies with the Minister, and given that the *IBCP Regulations* do not address that issue, it is difficult to see how

the Leadership Manual can "supplement" this existing legislative regime such that COTTFN Council is afforded authority to remove councillors from elected office by way of the Leadership Manual. Rather, it would seem to usurp that authority.

[102] Regardless, I will briefly address the Respondent's submissions in this regard.

[103] The Leadership Manual indicates that it was last approved on July 23, 2013, however, the record contains no further information as to how the Leadership Code was developed or as to its approval. The French Affidavit states only that it was "adopted by Council July 23, 2013".

[104] Specific provisions of the Leadership Manual referenced by the Respondent include:

- Following the statement of the purpose of the policies, under the heading "Effect", is the statement that "[t]hese policies are enforceable as laws"
- Section 2.1 states the governing style of Council is to focus on leadership that will emphasize the matters set out and in that spirit, Council will, *inter alia*, speak with one voice representing all Council members and "Enforce self-policing when Chief or Councillors stray from good governance and the policies contained in this LM."
- Section 3.3 provides: "Chief and Council have the collective authority to govern the First Nation."
- Section 3.13 provides Chief and Council with the "authority to make and enforce its own rules and penalties for Chief and Councillors who are found negligent in carrying out (or failing to carry out) their duties or are otherwise in contravention with these policies."
- Section 4.1 states that "…Council will abide by all legal obligations established from time to time in relation to the Council and the First Nation and Council [sic] and all non-First Nation Persons that it deals with."
- Section 4.11 states that the Chief is responsible for providing leadership to the Council and ensuring that integrity of Council's internal processes is preserved such that "Council behaves consistently with its own rules and those rules legitimately imposed upon it by Persons having jurisdiction."
- Section 4.2 notes Council's powers and responsibility include, among others, "Approving rules governing Council's own procedure."

[105] The fact that the Respondent submits that the Leadership Manal supplements the obligations of leadership found in the *Indian Act* and *IBCP Regulations* "pending the adoption of a custom election code" does not cloak the Leadership Code with the broad consensus of the COTTFN that would be required to adopt and ratify a custom code and which could, if so desired by the COTTFN membership, authorize COTTFN Council to remove elected officials from office for negligence, alleged misconduct or for other reasons. I would also note that there is no evidence that the COTTFN is even preparing a custom code for potential adoption.

[106] In any event, the Respondent points to no evidence in the record before me by which Council made its own "rules and penalties" pertaining to Chief and Councillors found to be negligent in carrying out their duties or otherwise in contravention with the policies set out in the Leadership Manual. When appearing before me, counsel acknowledged this but suggested that such rules could be made on an *ad hoc* basis. As I understood the suggestion, the removal of the Applicant from elected office could be seen as such an *ad hoc* action because a process, which Council deemed to be procedurally fair, was effected to do so. In my view, regardless of the status of the Leadership Manual, the ability to make rules and penalties that it describes does not support the taking of *ad hoc* actions – particularly those as significant as removing a councillor from elected office (see, more generally, *Sault v LaForme*, [1989] 2 FC 701).

[107] Finally, even if the Leadership Manual were viewed as governing law, not referenced by the Respondent in its written submissions, is section 4.12:

> 4.12 DISQUALIFICATION AND REMOVAL
>
> Notwithstanding policy 3.10, a Chief or Councillor is disqualified from holding his/her office and will immediately relinquish his/her position as Chief or Councillor, if the Chief or Councillor:

> • Is absent from 3 consecutive Council meetings without prior authorization;
>
> • Contravenes applicable conflict of interest rules;
>
> • Accepts gifts in contravention of policy 3.4;
>
> • Uses his/her influence in contravention of policy 3.5;
>
> • Uses confidential information for his/her or other benefit in contravention of policy 3.6;
>
> • Is convicted of an indictable offence (see Appendix D);
>
> • s/he dies or resigns;
>
> • if s/he is found to be a mentally incompetent person or becomes of unsound mind;
>
> • Is disqualified under section 78 of the Indian Act;
>
> A Chief or Councillor may be disqualified if he/she becomes aware that a Chief or Councillor is acting or has acted in a manner that constitutes grounds for disqualifications under this policy 4.11 and he/she fails to notify Council of such actions within a practical period of time.
>
> If it appears that a Chief or Councillor is disqualified under policy 4.11 and is continuing to act in his/her capacity as a Chief or Councillor, in addition to all available remedies, any Member may file a complaint under policy 11.0.

[108] That is, the Leadership Manual deals with disqualification from office in specified circumstances - but it does not authorize Chief and Council to remove a Councillor from office – whether due to misconduct as alleged in this matter, due an alleged breach of the Code of Conduct, an allegation that conduct complained of negatively impacts the ability of Council to govern, or at all. Thus, the Leadership Manual does not "supplement" any purported authority of COTTFN Council in that regard. When appearing before me, counsel for the Respondent

acknowledged that the Leadership Manual "is not perfect" but restated the Respondent's position that in these narrow circumstances it was necessary for Council to be able to remove the Applicant from office. Yet it was COTTFN Council who "approved" the Leadership Manual – and Council dealt directly with the circumstances in which a chief or councillor can be removed from office – however Council did not purport to give itself authority to remove a chief or councillor from office.

[109] That said, I acknowledge that the CTR documentation identifies valid concerns of COTTFN Council pertaining to the Applicant's behaviour.

[110] For example, the minutes of the Special Council Meeting held on May 3, 2022 indicate that Council was provided with the Workplace Violence Report as well as "documentation in relation to the breach of the Council Code of Conduct". The minutes in the CTR do not attach the documentation said to have been provided to Council, however, the Workplace Violence Report is found in the CTR and it concluded that the complaints were substantiated. The other documentation presumably includes a "Timeline", also found in the CTR, which chronicles prior COTTFN Council meetings in which the Applicant's conduct was discussed and attaches the minutes of those many of those meetings.

[111] The minutes themselves indicate that there was a discussion of the "Human Rights Investigation Report" (again presumably the Workplace Violence Report), this discussion is redacted. Further, that an opportunity was then offered to ask questions concerning the report, portions of which are redacted. This was followed by a general discussion by Council about what

to do about the Applicant's conduct (portions of which are redacted). Ultimately, a motion was passed directing that the Applicant be removed from office. The minutes do not speak of specific incidents of alleged misconduct, however, the Timeline identifies:

> During the 2017-2019 term of office:
>
> - Special Council Meeting – Tobacco Project, March 21, 2018. Then Chief Henry raised concerns about the conduct of councillors at negotiation meetings which could hinder that process. He noted that speakers need to be uninterrupted and any necessary conversations with the technical team should be separate from the negotiation table. He read a letter dated March 6, 2018 from staff regarding the Applicant's behaviour during those negotiations (not included in the record). Following debate, a motion was tabled to permit the Applicant to remain on the technical team but not on the negotiation team. The motion was withdrawn when the Applicant advised that she would respect the process. The Confidential notes of the March 21, 2018 meeting are also found in the CTR.
>
> - Council Meeting – September 25, 2018. Council raised concerns with the Applicant's conduct when attending delegated political meetings, Council meetings and her conduct with administrative staff which caused disruptions within the leadership and administration levels. Then Chief Henry noted that every councillor had approached him concerning her conduct. The Applicant took the view that as an elected official she had the right to speak up and carry out the political business of her portfolios. It was noted that the Ontario Grand Chief had asked whether correspondence received from the Applicant reflected the opinion and direction of COTTFN Council. Chief Henry advised the Applicant that she did not have the authority to speak on behalf of the First Nation on matters not approved by the leadership. Concern was also expressed with the Applicant taking to social media to state that leadership was not efficient. It was also expressed that leadership did not have time for outbursts at every meeting. A motion was passed to dismiss the Applicant from committees, external Boards and any political travel for the remained of the term. The Minutes of the September 25, 2018 meeting are found in the CTR and well as the Minutes of the October 15, 2018

meeting which addressed the same point, the Applicant's failure to follow protocols and disruption when others are speaking. A motion was passed approving the September 25, 2018 meeting with this amendment.

- Special Council Meeting – April 15, 2019. The Applicant sought to be re-appointed to Council Committees. She was informed that in a couple of instances her conduct was inappropriate and not befitting of an elected Councillor, while at the committee level she is a benefit and has shown her talents. On motion, the Applicant was reappointed to internal committees. The Minutes of the April 15, 2019 Meeting are found in the CTR.

During the 2019-2021 term:

- November 25, 2020 – Leadership Session, November 23-26, 2020, at the Best Western Stoneridge Inn. The summary states that the Applicant flipped a table during the leadership sessions on November 25, 2020. A sharing circle was held the following day. The CTR does not contains any documentation of this event but it is verified by the affidavit evidence of Chief French, Joan Riggs, and Candace Doxtator who were in attendance at that meeting.

- Council Meeting – February 9, 2021. The minutes of the February 9, 2021 meeting are found in the CTR. Item 5.5 "Councillor, D. Beeswax, behaviour" is redacted. Item 4.1 Briefing Note – Code of Conduct indicates that this needed to be addressed noting that Council had recently invited provincial and federal government officials to a meeting and "behaviours got engaged, and we are now moving towards promoting lateral violence in public. The Code of Conduct had been on the table since the start of the term, had been approved but then the Applicant withdrew her support. A general discussion followed including the implementation of a two minute warning for Councillors to conclude their thoughts, that the Chief needs to start disciplining Councillors "when they go off", there should be a Council meeting to deal with developing COTTFN's own governance system, the need to find a process that works for COTTFN to address negative comments, speaking over others and making comments when another is speaking. A motion was passed whereby Council acknowledged the recommendations contained in the Briefing Note – Code of Conduct as presented. The Briefing Note is not found the CTR.

- In-Camera Session – July 2, 2021. A councillor took issue with the Applicant, stating that she was unworthy to be on Council as she is on welfare and therefore had no business talking about poverty eradication and that the applicant is a disruption and unfit to sit on Council. The Councillor offered an apology. Minutes of the July 6, 2021 meeting are fond in the CTR, any discussion of this appears to have been redacted.

- In-Camera Session – December 14, 2021. The time line describes this as a request for disciplinary action against the Applicant for behaviour at a housing forum. The Minutes of the December 14, 2021 meeting are included in the CTR but are entirely redacted. Special Council Meeting – March 31, 2022 (Zoom). The time line states that the meeting was adjourned because of the Applicant's behaviour. The CTR does not include the minutes of that meeting but does provide a partial recording of that meeting commencing when Chief French decided to place the Applicant in a Zoom waiting room and ending when the Applicant rejoined the meeting, insisting upon being heard, and Chief French decided to adjourn the meeting asserting that work could not be accomplished with the Applicant participating due to interruptions and speaking over others. The French Affidavit states that the Applicant, who was attending remotely, constantly interrupted and spoke over other Councillors and refused to respect time limits. Chief French placed the Applicant in a Zoom waiting room. According to Chief French, the Applicant then stormed into Council Chambers, yelling and demanding that Council listen to her. Following a very heated discussion between Chief French and the Applicant, the meeting was ended prematurely on the basis that Council was unable to finish its agenda.

[112] Additionally, the Minutes of the Special Council Meeting held on April 11, 2022 are found in the CTR (these declared the Applicant to be in conflict and therefore excluded her from the meeting) and describe the purpose of that meeting as being to gather information in light of the March 31, 2022 budget meeting and previous matters. These record a general discussion about the Applicant's conduct including: the fact of the adjournment of the April 31, 2022

budget meeting; the table flipping and chair throwing incidents; failure to follow protocols; speaking over and not allowing others to speak others; use of racial slurs to intimidate staff and guests; disrupting the business of council; waving around the eagle staff; disrupting staff meetings; staff safety; and, feelings of not being safe. No decisions were made at that meeting. The CTR also contains the April 11, 2022 confidential notes. These seem to have been prepared by Joan Riggs of Catalyst Research and Communications. They describe the purpose of the Council meeting of the same date as intended to provide Council with the same information about the Applicant's behaviour to support its decision making about how to move forward. This indicates that Council was asked to identify specific behaviours and incidents that involved the Applicant that they would consider to be behaviours of concern. The notes indicate that the CAO joined the meeting to share her concerns and behaviour she had witnessed in relation to staff. What follows is a list of 22 behaviours (without source and little context), (the remainder of the notes are redacted):

1. Threw a chair at the Chief (of the time) and the AFN Regional Chief in a meeting.
2. Flipped a table at a special meeting of Council.
3. Talks over people and not giving people the space to have their turn to speak.
4. Does not stop talking even when asked to wrap up her comments.
5. Intimidating behaviour.
6. Threatening people.
7. Yelling in Council. Yelling in the Administrative building. Yelling directly at people.

8. Taking the Eagle staff (medicine, sacred object) and using it inappropriately and at times as a potential weapon.
9. Harassing people.
10. Aggressive with staff.
11. Disruptive behaviour with staff – go into staff office with no appointment and stays 2-3 hours and talk to them without any respect for their deadlines and responsibilities.
12. When talking to staff, she directs them to do actions outside of the processes set up by Council to direct staff through the CAO. She is misinforming the staff of her authority.
13. Language she uses in the Administrative office and in Council is inappropriate in a place of business.
14. Using racial slurs to describe people who the Council is meeting with and/or referencing people that Council works with.
15. Using racial slurs to intimidate people.
16. Speaking to the people beside her when other people are speaking in the meeting. Speaking loud enough that others can hear her running comment about what they are saying or what she thinks of them.
17. Almost hit a staff person with her car in the parking lot.
18. Went into the senior management meeting and would not leave, disrupted the meeting.
19. Disrupted the budget meeting to the point where the meeting had to be cancelled and it disrupted the work of the Council.

20. She has been sitting in her car outside of the Administrative office. Police have had to be called to escort staff to their cars because they are afraid she might harm them or interact with them.

21. At community meetings – including budget meetings – she monopolizes the mike and talks for great lengths, even though this is the opportunity for Council to listen to the community.

22. Social media posts that are inaccurate, discrediting of the Nation and volatile.

[113] Some of these alleged behaviours are described in the various affidavits.

[114] In my view, in the context of her interactions with current and prior Council and based on the record before me, there is little doubt that the Applicant has at times been disruptive, disrespectful, unwilling or unable to comply with protocols and has had outbursts of temper that have even included, during a prior term of office, upturning a table and throwing a chair. This, no doubt, has negatively impacted the productivity of this and prior COTTFN Councils and may have also resulted in some Councillors being reluctant to engage in Council matters and even being fearful of her reactions.

[115] However, the fact of this conduct does not, in and of itself, afford COTTFN Council jurisdiction to remove the Applicant from elected office. That is, COTTFN Council has to have jurisdiction to remove her from office – which does not arise based only on Council's view that its needs to address the Applicant's conduct – even if that view is well founded. As discussed above, there must be some authority pursuant to which such a decision can be based.

[116] Counsel for the Respondent emphasised throughout her submissions that it is necessary for COTTFN Council to be able to take this action and that this is an extraordinary circumstance. However, this Court and the Federal Court of Appeal have rejected arguments of necessity in the absence of authority to remove a councillor from office. In *Orr*, the councillor who was suspended had been charged with sexual assault and council had argued that it had to take steps to protect itself against vicarious liability for sexual harassment and as a fiduciary to protect band members – the suspension was found to be without authority despite this submission. And, in *Whalen* the argument was made that the power to suspend a councillor found its source in the principle of necessity and that the lack of such a power would lead to an intolerable result or an absurdity. This too was rejected. Justice Grammond found that necessity was too vague a standard by which to recognize powers such as the power to suspend a councillor.

[117] In conclusion, despite the very able and ardent submissions of counsel for the Respondent, I find that COTTFN Council did not have the authority to remove the Applicant from her elected position as Councillor. In these circumstances, that authority lies exclusively with the Minister pursuant to s 78(2) of the *Indian Act*. Nor has COTTFN Council asserted or demonstrated that it has "inherent" power to remove the Applicant from office. The doctrine of jurisdiction by necessary implication does not assist the Respondent. Jurisdiction over removal of councillors from office was explicitly addressed and delineated by Parliament pursuant to s 78(2) of the *Indian Act.* Accordingly, this is not a circumstance where that jurisdiction is essential to COTTFN Council fulfilling its statutory mandate. And, significantly, if the COTTFN was of the view that COTTFN Council should be afforded the authority to remove councillors from elected office, then it was open to COTTFN to choose to effect this by adopting and

ratifying a custom code to reflect their intent. This undermines the Respondent's necessity argument. Further, and as noted above, even if an election code were adopted, COTTFN could chose to reserve such authority for itself (for example, by requiring a petition by a majority or specified percentage of members in order to remove a councillor from office). Finally, I do not agree that reading together the relevant *Indian Act* provisions, the *IBCP Regulations* and the Leadership Manual – whatever its status may be – afforded COTTFN Council with the authority, due to necessity or otherwise, to remove the Applicant from Office.

V. Remedy

[118] The Applicant seeks an order in the nature of *certiorari*, quashing and setting aside the underlying decision, a declaration that she be reinstated to Council for the remainder of her term, and an order declaring that she is entitled to all remuneration that would have been provided to her had she not been removed from office.

[119] The Respondent submits that the request for remuneration is essentially a request for damages which is outside the jurisdiction of this Court (citing *Morin* at para 56; *Lee v Canada (Attorney General)*, 2012 FCA 241 at para 3; *Meggeson v Canada (Attorney General)*, 2012 FCA 175 at paras 33-37); the *Federal Courts Act*, RSC 1985, c F-7 at s 18.4(2)). And, although the Applicant cites cases where the Court has awarded back pay, none of those cases considered the jurisdiction of the Court to award damages. However, in *Ross v Mohawk Council of Kanesatake*, 2003 FCT 531 at paragraphs 52, 97-101 [*Ross*], the Court considered whether it had jurisdiction to award back pay and concluded that it did not.

[120] It is true, as the Respondent submits, that on judicial review this Court cannot award damages. It is also true, as the Applicant submits, that this Court has previously ordered remuneration, which would have been paid to the removed councillors but for their unlawful removal from office, be retroactively restored. See, for example, *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 at para 99 [*McKenzie*]; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 42 [*Testawich*]; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 43 [*Tsetta*]; *Parenteau v Badger*, 2016 FC 536 [*Parenteau]; Tourangeau v Smith's Landing First Nation*, 2020 FC 184 [*Tourangeau]; Saulteaux v Carry the Kettle First Nation, 2022 FC 1435 at para 92 [Saulteaux]*.

[121] In *McKenzie*, the band council suspended three councillors. I concluded that the relevant election regulations were exhaustive and occupied the field with respect to councillor removals and indefinite suspensions. Further, that there was no residual or continuing band custom authorizing the suspensions. As chief and council acted without authority in suspending the councillors, I quashed the band council resolution that purported to suspend them. I also held that it followed from the quashing of the band council resolution that the applicants were entitled to receive any outstanding remuneration, as they were never properly removed from office.

[122] In *Testawich*, Justice Mosley held that orders quashing an appeal committee's decision removing a councillor from office and re-instating the applicant to the position of councillor were appropriate. Further, the fact that the applicant sought and obtained alternative employment was immaterial to his request to receive retroactive pay for the time he had been removed from

office, stating that "[t]his is not an action in which the plaintiff would have an obligation to mitigate his damages" (para 42).

[123] In *Tsetta*, Justice Montigny held that the decision of the band council to suspend the chief and to strip him of his remuneration, his powers and access to his office was unreasonable and went beyond the powers granted to the council by the relevant election policy. The band council resolution suspending him was quashed, and the respondent was ordered to pay the chief "the remuneration and other benefits he should have been allowed."

Similarly, in *Parenteau,* Justice Manson quashed a decision to remove the applicants from their positions as councillors and ordered that they be paid for their positions from the date of their wrongful dismissal until the end of their previous term.

[124] In *Tourangeau,* Justice Favel granted an order of *certiorari* setting aside the decision of a quorum of the band council suspending the applicant from his position as chief. He held that "[i]t flows that the Applicant is entitled to receive any outstanding salary arising from the quashing and setting aside of the Suspension Decision" (para 68).

[125] In *Saulteaux*, Justice Favel found that the band council had unlawfully removed the applicant from her position as councillor by denying her of procedural fairness and also fettering its discretion (paras 1, 91). Accordingly, and citing many of the cases outlined above, he ordered the respondent to pay all remuneration to the applicant that she would have been entitled to as a councillor from the date of her removal.

[126] As the Respondent submits, none of these cases explicitly considered the Court's jurisdiction to make such an order. However, in my view, it is implicit that in each case the Court was of the view that it had jurisdiction to order that the applicants receive the remuneration that they would have received had they not been wrongfully removed from office.

[127] Further, the 2003 decision in *Ross* is distinguishable on its facts. There, Justice Heneghan found that the band council's decision to terminate the employment of the applicant as assistant chief and acting chief of police was in breach of its duty of procedural fairness. She did state that the remedies of reinstatement or damages were not available on judicial review (para 100). However, unlike most of the cases referenced above, in that matter Justice Heneghan found that the decision-maker in the matter before her likely *had* the authority to make the decision under review and, accordingly, she ordered that the matter be remitted for redetermination (paras 81, 101). She did not further address the issue of jurisdiction and she was not considering a situation where an elected member of council was removed from office without jurisdiction to do so and the removal decision was accordingly quashed.

[128] *Morin*, also relied upon by the Respondent, can also be distinguished on its facts. There, in his notice of application, the applicant sought relief that included a declaration that he was the 10th elected councillor of the First Nation and that he be paid as a councillor from the date of the election until the matter was resolved by this Court. In his written submissions, he additionally sought an order for general, special, and aggravated damages in addition to punitive and exemplary damages against the election appeals board. I acknowledged the submission of counsel for the applicant that approximately one third of the election term had passed and the

applicant had been deprived of the councillor position during that time. I found, however, given a one vote differential, the absence of evidence from the electoral officer, and based on the record that was before me, that I was unable to determine with certainty if the applicant was duly elected, as he claimed. In other words, reinstatement of his position and remuneration were not available remedies in those circumstances. And, as to his additional claim for damages:

> [56] As to damages, s 18(1) of the Federal Courts Act describes the remedies available to this Court. These are administrative law remedies, including certiorari, prohibition and mandamus, available as against an administrative tribunal. Section 18(3) states that these remedies may only be obtained on application for judicial review made under s 18.1 of the Federal Courts Act. Thus, while this Court may set aside the Election Appeal Board's decision, monetary relief such as the general, special and aggravated damages in addition to punitive and exemplary damages sought by the Applicant, are normally not available in an application for judicial review. The Applicant did not propose that the application should be treated as an action, pursuant to s 18.4(2), or consolidated with an action, pursuant to Rule 105 of the Federal Courts Rules, SOR/98-106 (see Lee v Canada (Attorney General), 2012 FCA 241; Meggeson v Canada (Attorney General), 2012 FCA 175 at paras 33-34; and, Brake at paras 23, 26). Indeed, at the hearing of this application for judicial review, the Applicant conceded that the Court lacked jurisdiction to award monetary damages in this matter.

[129] Here, unlike *Morin*, the Applicant has been found to have been unlawfully removed from elected office and she is not seeking monetary relief by way of general, special, and aggravated damages, or, punitive and exemplary damages.

[130] Given that the COTTFN Council decision removing the Applicant from office was made without jurisdiction, and therefore will be quashed, it flows from this that the Applicant is entitled to receive any remuneration that she would have received but for the unlawful removal

from office. In my view, this is not an award of damages, but retroactive reinstatement of the Applicant to office and the benefits of office that flow from this determination.

VI. Costs

Applicant's Position

[131] The Applicant seeks a lump sum costs award in the amount of $25,000 or, alternatively, taxable costs in accordance with column V of Tariff B. The Applicant submits that the following issues/principles support a costs award above the standard tariff amount:

- The Court has recognized that a relevant consideration in determining costs is the power/resource imbalance between an individual councillor that has to use their own funds to pursue litigation against their band, who would be using band funds to defend the proceeding (citing *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at para 29 [*Whalen II*]).
- When a proceeding results in clarification of governance issues for the First Nation, this warrants a higher level of costs for the individual applicant (citing *Shirt* at para 105);
- The Respondent tendered 400 pages of affidavit evidence, the vast majority of which is inadmissible—this unnecessarily increased the costs of this matter by requiring the applicant to respond regarding the admissibility issues (citing *Federal Court Rules*, Rule 400(3)(i) and *Eshraghian v Canada (MCI)*, 2013 FC 828); and

- The Applicant reasonably tried to resolve this matter by letter from her counsel identifying the jurisdiction issue, the litigation resulted from the Respondent's rejection of the Applicant's resolution proposal.

[132] The Applicant submits that the lump sum figure is supported by this Court's decisions in *Whalen II* at paragraph 49, a councillor suspension case, where an award of $40,000, being 40% of full indemnity, was made; *Garner v Union Bar First Nation*, 2021 FC 657, where an award of over $50,000, which was 50% of full indemnity, was made; *Shirt* where the Court ordered $20,000 in costs; and, *Engstrom v Peters First Nation*, 2020 FC 394, where the Court ordered costs of $39,000 after rejecting the applicant's request for full indemnity.

Respondent's Position

[133] The Respondent submits that the Applicant has not met her burden of establishing the facts of this case warrant enhanced costs.

[134] The Applicant has brought no evidence that a tariff rate would be unsatisfactory in meeting the goals of indemnification, settlement, or facilitating access to justice nor has she filed any supporting materials to justify her claimed lump sum costs of $25,000. The Respondent also submits that the cases cited by the Applicant to support the lump sum award are distinguishable as they concern carelessness or bad faith. The Applicant has also provided little, if any, evidence to support the application of the general cost principles upon which she relies.

[135] The Respondent further submits that the affidavits merely reflect the evidentiary record before the decision-maker, and some of the lengthier exhibits, like meeting minutes, social media posts and the LM were produced in more than one affidavit. Moreover, the Applicant unnecessarily lengthened submissions in this proceeding by raising the admissibility issue at the final hour. Nor do the affidavits "detract from the fact that, per the Applicant, this judicial review only concerns one relatively straight forward issue" thereby meriting a lower default tariff rate. Finally, the Respondent submits that the Applicant's misconduct must have a bearing when considering the relief she requests. Even if COTTFN Council did not have jurisdiction to remove the Applicant from office, the Court should not legitimize her behaviours by an enhanced cost award.

Analysis

[136] *Pursuant* to Rule 400(1), this Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. Factors that can be considered in awarding costs are set out in Rule 400(3) and include the result of the proceeding, the amount of work involved and, the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding. The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, and assessed costs (Rule 400(4)).

[137] I have considered the submissions of both parties. Here, the Applicant has from the start identified one discrete issue: the jurisdiction of COTTFN Council to remove her from elected office. She addressed this succinctly in her written submissions and by way of her counsel's

submission before me and has been successful. I also appreciate that there is an imbalance of financial means between COTTFN Council and the Applicant, particularly after the Applicant was removed from office and was no longer being remunerated. Further, that the Applicant raised a legitimate issue of COTTFN governance.

[138] However, the Applicant has not provided a bill of costs or other record of the actual costs she has incurred to pursue this litigation. It is therefore impossible for the Court to know if usual tariff rate is inadequate compensation or if the proposed lump sum is reflective of a reasonable contribution to her legal costs. Such figures cannot be "plucked from thin air" and have been found to usually fall within a range of 25%- 50% of the actual legal costs of the successful party (*Whalen II* at para 33 citing *Nova Chemicals v Dow Chemical Co,* 2017 FCA 25 at para 17).

[139] As to the Applicant's conduct, it must first be noted that nothing in her conduct of this litigation could possibly warrant adverse costs consideration. Her conduct as a Councillor, on the other hand, was very far from acceptable and is not condoned by this Court. However, these are discrete issues. The Respondent points to no jurisprudence from this Court suggesting that the poor conduct of a successful applicant, which conduct precipitated the making of the decision under review, is a factor that would militate against the applicant's claim for enhanced costs. On balance, given the straightforward argument of the Applicant, who elected not to cross-examine on any of the affidavits filed by the Respondent, and the absence of any documentation supporting her claim for enhanced costs on a lump sum basis, I am of the view that it is appropriate to award the Applicant costs based on Column III of Tariff B.

JUDGMENT IN T-1144-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. The May 3, 2022 decision of the COTTFN Council removing the Applicant from elected office as a Councillor is quashed;
3. The Applicant is reinstated as a Councillor of COTTFN in accordance with her election to that office on July 28, 2021;
4. COTTFN shall pay to the Applicant the remuneration that would have been payable to her as a Councillor from the date of her removal on May 3, 2022; and
5. The Applicant shall have her costs based on Column III of Tariff B.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1144-22
STYLE OF CAUSE:	DENISE BEESWAX v CHIPPEWAS OF THE THAMES FIRST NATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 25, 2023
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JUNE 1, 2023

APPEARANCES:

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Carol Godby	FOR THE RESPONDENT

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