

Federal Court



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**Dockets: T-221-19
T-1192-19**

Citation: 2022 FC 531

Ottawa, Ontario, April 21, 2022

PRESENT: Mr. Justice Sébastien Grammond

Docket: T-221-19

BETWEEN:

OJIBWAY NATION OF SAUGEEN

Applicant

and

**HILDA DEROSE, JOHN MACHIMITY,
RON MACHIMITY SR., JOYCE
MEDICINE, BETTY NECAN, DARLENE
NECAN AND DESIREE JACKO**

Respondents

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AND BETWEEN:

**RON MACHIMITY SR., JOYCE
MEDICINE, BETTY NECAN, DARLENE
NECAN AND DESIREE JACKO**

Applicants

and

**OJIBWAY NATION OF SAUGEEN, AS
REPRESENTED BY EDWARD
MACHIMITY, VIOLET MACHIMITY,
EILEEN KEESIC AND JOHN SAPAY**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Since at least 1997, the Ojibway Nation of Saugeen [ONS] has operated under a system whereby its Chief and Headmen are chosen for life. In recent years, a number of ONS citizens have insisted that, according to this system, citizens have the power to remove the Chief and Headmen. The incumbent Chief and Headmen have denied that the citizens have such power.

[2] At a traditional gathering of ONS's citizens held on June 20 and 21, 2019, resolutions were adopted to remove the incumbent Chief, Edward Machimity, and the incumbent Headmen, Eileen Keesic and John Sapay. Resolutions were also adopted to appoint Ron Machimity Sr. as Chief, and Joyce Medicine, Betty Necan, Darlene Necan and Desiree Jacko as Headmen.

[3] Both sides have applied to the Court to determine who the lawful Chief and Headmen are. The Court decides that the resolutions adopted at the traditional gathering are valid and that the council led by Ron Machimity Sr. is the lawful one.

[4] The Court's conclusion is based on the interpretation of the Convention that embodies the rules governing the selection of ONS's Chief and Headmen. A holistic reading of this document reveals that ONS's supreme political authority resides with ONS citizens, assembled in a traditional gathering. Therefore, the leadership review provisions of the Convention must be interpreted as giving citizens the power to remove the Chief and Headmen. It would be illogical to give the Chief and Headmen the final say over their own removal.

[5] The Court also concludes that the June 2019 resolutions are a valid exercise of this power and dismisses the procedural objections made by the council led by Edward Machimity.

Sufficient notice of the traditional gathering was given. Moreover, Edward Machimity and his Headmen could not purport to terminate the traditional gathering and leave the meeting before the citizens had an opportunity to discuss their removal. Lastly, there was no specific quorum requirement for the traditional gathering. The 29 members of voting age who signed the unanimous resolutions constituted a substantial proportion of ONS's voters.

II. Factual Background

[6] ONS was recognized in 1985 as an "Indian band" pursuant to the *Indian Act*, RSC 1985, c I-5. Prior to that date, most of its members belonged to the Lac Seul First Nation and resided in the community of Savant Lake in northwestern Ontario. In 1997, the federal government set apart lands near Kashawagama Lake, about 20 kilometers from Savant Lake, as a reserve for ONS. A number of members have now established their residence on the reserve, while some remain in Savant Lake. Many other members reside elsewhere.

[7] ONS is a small First Nation. According to March 2019 statistics, it has 242 members or citizens, 83 of whom reside on the reserve. The voting age set by the Convention described below is 21. There is conflicting evidence regarding the precise number of citizens who are 21 years of age or older. One party compiled a list showing 150 citizens of voting age, while the other party repeatedly states that they number 100. Both parties agree that approximately 40 citizens of voting age reside on the reserve. Off-reserve citizens reside in nearby communities

such as Dryden or Sioux Lookout, in more distant cities such as Thunder Bay or Winnipeg, and elsewhere in Canada and the United States.

[8] ONS was never named in an order made pursuant to section 74 of the *Indian Act*. Therefore, its council is selected “according to the custom of the band,” as indicated in the definition of “council of the band” in section 2. There is no dispute that until the events described below, Edward Machimity is the only chief ONS has known. The parties disagree as to how Edward Machimity became Chief in 1985, but it is not necessary to resolve this issue. Neither is it in dispute that Gilbert Machimity and David Necan became Headmen in 1985.

[9] In 1997, ONS’s Chief and Headmen proclaimed the *Ojibway Nation of Saugeen Indian Tribe Custom and Usage Convention* [the Convention]. This document is not always easy to understand. It will be analyzed more fully below. At this juncture, it is sufficient to highlight the following aspects. The Convention establishes ONS’s government, composed of a Chief and up to four Headmen, appointed by the citizens of the Nation. Their positions are said to be for life, but a review must be held every 21 years. Another provision of the Convention states that every ONS citizen “is entitled to voice a right of principle opinion” for the appointment of the Chief and Headmen. There is also a “review procedure,” pursuant to which a traditional gathering, that is, an open meeting of the citizens, can review the conduct of the Chief and Headmen.

[10] References to custom abound in the Convention. In particular, the definitions of “chieftainship” and “headmen,” in the interpretation section, mention that the positions are to be “administered according to Customary practice and Hereditary Law.”

[11] The Convention mentions that it was made “under a traditional gathering,” “by consent of all parties concerned and present.” The only evidence before me regarding the attendance at this gathering is that of Ron Machimity, who states that about 20 persons were present. Ron Machimity also suggested that this meeting was not a genuine traditional gathering and that the Convention was not validly adopted. For the purposes of this case, however, I will assume that the Convention is valid.

[12] Headmen Gilbert Machimity and David Necan passed away in the early 2000s. In 2006, a traditional gathering was held to replace them. In his affidavit, Edward Machimity states that he chose Eileen Keesic (who is his daughter), John Sapay and Gladys Oombash as new Headmen, and that all the citizens present at the traditional gathering spoke in their favour. A resolution of ONS’s council memorializes the outcome of this traditional gathering. It states that the citizens put forward the names of the three new Headmen and that forty-one citizens were present at the gathering. Since then, Gladys Oombash resigned from her position and is no longer a Headman. In these reasons, I will refer to Edward Machimity, Eileen Keesic and John Sapay as the Chief and Headmen, even though their right to hold their positions is in dispute.

[13] It is obvious that many ONS citizens are dissatisfied with Chief Edward Machimity’s administration. The precise causes of this dissatisfaction are not relevant for our purposes. As the 21st anniversary of the Convention approached, a number of ONS citizens, whom I will refer to as the Conduct Review Proponents, began to insist that the leadership review provided by the Convention take place.

[14] A meeting of about 30 citizens took place on December 9, 2018, on the 21st anniversary of the Convention. Chief Edward Machimity and Headman Eileen Keesic were absent, but Headmen John Sapay and Gladys Oombash were present, as was a lawyer sent by the Chief. The members present, including the Conduct Review Proponents, adopted two resolutions. First, they decided to select a new Chief and Headmen at a meeting to be held on February 3, 2019. Second, they created a “technical unit body” to assist in the preparation of the February 3 meeting.

[15] On January 30, 2019, the Chief and Headmen wrote a letter to all community members denouncing the Conduct Review Proponents and asserting that the February 3, 2019 meeting was unlawful. They acknowledged that they were “accountable to all Citizens of our Nation.” They also convened a traditional gathering for June 20 and 21, 2019.

[16] At the February 3, 2019 meeting, 31 citizens signed a resolution appointing some of the Conduct Review Proponents, namely Ron Machimity Sr., Joyce Medicine, Betty Necan and Darlene Necan, as Headmen and leaving the position of Chief open until the traditional gathering to be held on June 20 and 21.

[17] On May 16, 2019, Edward Machimity wrote a letter to all ONS members, in which he announced his succession plan. He asserted that it was his responsibility to appoint his successor. He appointed his wife, Violet Machimity, to succeed him upon his death. He also stated that his son-in-law, Darrell Keesic, would “take on a long-term leadership role” when he retires from the police force. He attached a document entitled “History of the Ojibway Nation of Saugeen

Governing System,” which chronicles the creation of ONS and adoption of the Convention and offers the following interpretation:

The Convention provides that adult Citizens of Ojibway Nation of Saugeen are “eligible to voice a right of principle opinion” with respect to the appointment of a Customary Chief and the Headmen. The Convention does not provide for the removal of the Customary Chief or Headmen. However, the Convention does provide for a review every 21 years.

On January 30, 2019, I, as Customary Chief and Headmen, called for a Traditional Gathering to take place on June 20 and 21, 2019, for the purposes of such review.

The customary practice and hereditary law of Ojibway Nation of Saugeen is that the Customary Chief, in consultation with the members, chooses the successors to the position of Customary Chief and Headmen, which are presented to a Traditional Gathering of members, at which time, any adult member is eligible to voice a right of principle opinion concerning the appointment.

The Convention further provides that “approval and final decision making will rest with the Customary Chief and Headmen.”

[18] The traditional gathering began on June 20, 2019. It is common ground that about 40 persons were present at the traditional gathering, including a few children. Chief Edward Machimity and Headmen Eileen Keesic and John Sapay were present.

[19] The meeting was scheduled for two days. The first day began with remarks from the Chief, followed by a period during which citizens could voice their opinion about the current leadership. However, at the end of the first day, a decision was made to terminate the meeting. It is unclear who, beyond Chief Edward Machimity, made this decision. It is also unclear whether this decision was communicated to the persons present. I will return to this issue later in these reasons.

[20] The next day, about 30 persons attended the community hall where the meeting was taking place, but could not gain access. Some of them already knew about the purported termination of the traditional gathering, but others did not. These persons, among whom were the Conduct Review Proponents, decided to continue the traditional gathering outdoors, near the community hall. They adopted written resolutions removing Edward Machimity from his position as chief, rejecting his succession plan, accepting Ron Machimity, Joyce Medicine, Betty Necan and Darlene Necan as Headmen, selecting Ron Machimity as chief for one year and appointing Desiree Jacko as an additional Headman, presumably in replacement of Ron Machimity.

[21] Chief Edward Machimity and his Headmen have refused to recognize the validity of these resolutions and to let Chief Ron Machimity and his Headmen assume their positions. As a practical matter, Chief Edward Machimity and his Headmen have stayed in power since the traditional gathering, even though some regional First Nations organizations recognize Ron Machimity as the legitimate chief.

III. Procedural Background and Role of the Court

[22] These events led to two applications for judicial review.

[23] The first application was filed by ONS a few days before the February 3, 2019 meeting. The respondents were the members of the “technical unit body” appointed at the December 9, 2018 meeting, who are a subset of the Conduct Review Proponents. ONS sought declarations that these persons had no power to constitute themselves as a “technical unit body” or, in the

alternative, a writ of *quo warranto*. The application was later amended to seek a declaration that the respondents have no authority to appoint themselves as Chief and Headmen.

[24] The second application was filed by Chief Ron Machimity and his Headmen (who are also a subset of the Conduct Review Proponents) against ONS, as represented by Chief Edward Machimity and his Headmen. The applicants sought declarations that the traditional gathering was unlawfully terminated by Edward Machimity on June 20, 2019 and that the applicants are ONS's legitimate Chief and Headmen. They also sought an injunction preventing Edward Machimity and his Headmen from exercising any authority.

[25] These two applications pertain to a course of conduct that cannot be narrowed down to a discrete decision that would be the subject of judicial review. The real issue is whether the Conduct Review Proponents were successful in removing and replacing Chief Edward Machimity and his Headmen. With respect to the incumbents' removal, this is essentially an application for a writ of *quo warranto*, namely, a "challenge ... to the right of a public office holder to hold office": *Marie v Wanderingspirit*, 2003 FCA 385 at paragraph 20 [*Marie*]. With respect to the appointment of a new Chief and Headmen, this is an application for a declaratory judgment.

[26] One distinctive feature of the writ of *quo warranto* is that it does not target a decision made by a federal board, commission or other tribunal: *Marie*, at paragraph 20. For this reason, it is difficult to speak of a standard of review. The same is true of the declaration sought by the Conduct Review Proponents to the effect that they are the legitimate Chief and Headmen.

[27] Many First Nation election disputes are initially decided by an election appeal tribunal established by the First Nation concerned. Where this is the case, this Court shows deference towards the finding of that tribunal or, in other words, it reviews the tribunal's decision on a standard of reasonableness: *Porter v Boucher-Chicago*, 2021 FCA 102 at paragraphs 26–27 [*Porter*]; *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraphs 18–27, [2018] 4 FCR 467 [*Pastion*].

[28] In contrast, in the present case, the parties do not allege that ONS has any decision-making body that could settle the dispute between them. There is no independent decision-maker to which the Court should defer. Showing deference in this context would give an undue advantage to one party over the other based on arbitrary factors such as the sequence in which the applications for judicial review are brought or which aspect of the parties' conduct is considered the “decision” to be reviewed. Moreover, as a practical matter, there cannot be two persons with an equally reasonable claim to be chief; one must be right and the other, wrong.

[29] I would also add that the role of this Court is not to inquire into allegations of maladministration made by ONS members against Chief Edward Machimity. The Court is called upon to clarify the legal rules concerning the selection of ONS's leadership and to apply them to the situation at hand. In doing so, the Court is not assessing the relative merit of the contenders nor passing judgment on the actions of the incumbent administration: *Gadwa v Joly*, 2018 FC 568 at paragraphs 30–33; *Standingready v Ocean Man First Nation*, 2021 FC 434 at paragraphs 13–14. In spite of this, the Conduct Review Proponents have filed extensive evidence regarding

various grievances with respect to the Chief and Headmen's administration. This evidence is irrelevant to the issue the Court must determine and will not be considered.

IV. Analysis

[30] There are two main issues in this case: whether the Convention allows for the removal of the Chief and Headmen and, if so, whether the resolutions adopted on June 21, 2019 were effective in achieving this result. I will address both issues in turn.

[31] Before I do so, I wish to note that the Conduct Review Proponents make no mystery of their ultimate goal of replacing the Convention with an electoral system. Nonetheless, they have chosen to pursue this goal by availing themselves of the processes established by the Convention. Therefore, even though the Conduct Review Proponents have suggested that the Convention was not validly adopted, it is not necessary to decide this issue. Their actions assumed the validity of the Convention. For the same reasons, it is not necessary to decide whether the citizens assembled in a traditional gathering could repudiate the Convention. This is simply not what they sought to do.

[32] I also wish to emphasize certain specific features of this case, which distinguish it from other cases where the members of a First Nation seek to remove the chief and council. Many First Nations have chosen to select their chief and council by way of periodic elections. In this case, accountability is mainly achieved at the next election. The removal of a chief or councillor between elections is an exceptional remedy, only available for specific grounds enumerated in the election code. For this reason, attempts to remove the leadership by way of a "grassroots

meeting” are usually not effective: see, for example, *Narte v Gladstone*, 2021 FC 433 [*Narte*]; *Standingready v Ocean Man First Nation*, 2021 FC 434 [*Standingready*]. In the present case, as we will see below, there are no elections, so the possibility of removal plays a greater role in ensuring accountability. Moreover, in contrast to what took place in *Narte* and *Standingready*, the Conduct Review Proponents attempted as much as they could to use the mechanisms provided by the Convention to hold their leaders accountable. Therefore, these reasons should not be interpreted as an endorsement of attempts to remove elected leaders without following the process provided by the law of the First Nation concerned.

A. *Interpretation of the Convention*

[33] I am of the view that the Convention allows ONS’s membership to remove the Chief and Headmen at a traditional gathering held for that purpose and to appoint new ones. To explain this finding, I will review the structure and text of the Convention, set out the parties’ contending interpretations and explain why I prefer the interpretation put forward by the Conduct Review Proponents.

[34] As I mentioned above, the Convention is difficult to read and interpret. Its syntax is deficient, many of its provisions are vague, and it uses legal terms inaccurately and obviously lacks systematic organization. It borrows loosely from sources as varied as the American Constitution, the *Indian Non-intercourse Act* and *Black’s Law Dictionary*. In spite of these shortcomings, efforts should be made to understand its meaning by applying the recognized methods of legal interpretation, namely, consideration of the text, context and purpose of the provision at issue: *Boucher v Fitzpatrick*, 2012 FCA 212 at paragraph 25; *Porter*, at paragraph

37. In assessing its purpose, one should assume that it expresses a coherent political vision. One should also be attentive to the fact that Indigenous legislation such as the Convention may seek to combine features of the Western political system with Indigenous traditions: *Pastion*, at paragraph 14; *Porter*, at paragraph 27. Only by paying close attention to these nuances will we respect the agency of the Indigenous community concerned and its self-government.

(1) Structure of the Convention and Relevant Provisions

[35] In this section, I will provide an overview of the general structure and relevant provisions of the Convention. The Convention is made by “We the Customary Chief and Headmen on Behalf of the Citizens” of ONS. Among other things, the preamble affirms faith in the dignity and worth of the human person, asserts ONS’s right to self-determination and states that ONS will never relinquish its treaty rights. Then follow a number of definitions, some of which are relevant to this case:

“Citizens” means any Bonifide [*sic*] Treaty Indian who is under the authority and jurisdiction of the Ojibway Nation of Saugeen Indian Tribe.

“Chieftainship” is a chief or leader of a clan or tribe and will be administered according to Customary practice and Hereditary Law.

“Headmen” will be a Subordinate Officer and will administer according to Customary practice and Hereditary Law.

“Hereditary Successors Position” will be administered according to Tribal Custom and Usage with the consent of the Citizens of the Ojibway Nation of Saugeen Indian Reserve #258.

“Traditional Gatherings” will be an open meeting of the Citizens of the Ojibway Nation of Saugeen Indian Reserve #258.

[36] The following provisions are key to the parties’ submissions and are reproduced in full:

ELIGIBILITY

For the purpose of this customary practice eligibility will be defined as follows:

- Any Citizen of the Ojibway Nation of Saugeen Indian Tribe is eligible to voice a right of principle opinion for the appointment of Customary Chief.
- Any Citizen of the Ojibway Nation of Saugeen Indian Tribe is eligible to voice a right of principle opinion for the appointment of the Headmen.
- All Citizens of the Ojibway Nation of Saugeen Indian Tribe must meet proper age adulthood and are entitled to voice a right of principle opinion regardless of ordinary place of dwelling.
- The position of Customary Chief of the Ojibway Nation of Saugeen Indian Tribe must be at least twenty-one (21) years of age as of the day of the appointment.
- The position of Headmen for the Ojibway Nation of Saugeen Indian Tribe must be at least twenty-one (21) years of age as of the day of the appointment.
- Any Citizen of the Ojibway Nation of Saugeen Indian Tribe may be eligible for the positions under habitual or customary practice.
- The position for Customary Chief of the Ojibway Nation of Saugeen Indian Tribe will be administered under Tribal, Custom and Usage.
- The position for the Headmen of the Ojibway Nation of Saugeen Indian Tribe will be administered by appointment under Tribal, Custom and Usage.

TERM OF OFFICE

The term of office for the Customary Chief will be a life time position and will administer in accordance with the process and custom of treaty and international law.

The term of office for the Headmen of the Ojibway Nation of Saugeen Indian Tribe will be a life time position and will administer in accordance with the process and custom of treaty and

international law and a review will take place every twenty-one (21) years.

COMPOSITION OF THE INDIAN GOVERNMENT

The Treaty Administration and Indian Government of the Ojibway Nation of Saugeen Indian Tribe will consist of one (1) Customary Chief and each Headmen, not exceeding four (4), for the Ojibway Nation of Saugeen Indian Reserve #258.

CUSTOMARY PROCEDURES

That the Customary Chief and Headmen will be appointed by and with the consent of the Citizens of the Ojibway Nation of Saugeen Indian Tribe and this procedure of customary practice will be in accordance with the process and custom of treaty and international law.

REVIEW PROCEDURES

That under a traditional gathering of the Citizens of the Ojibway Nation of Saugeen Indian Tribe that a review to the conduct of the Customary Chief and Headmen will be in a form of an open discussion and the final decision will be based under the process of customary practice and treaty, and that the Tribal, Custom and Usage shall take precedence on all matters of concern and this will be the final decision.

SEAT OF GOVERNMENT

That the Seat of Government of the Ojibway Nation of Saugeen Indian Tribe will always be at the Treaty Administration level on the Ojibway Nation of Saugeen Indian Reserve #258.

That the approval and final decision making will rest with the Customary Chief and Headmen of the Ojibway Nation of Saugeen Indian Tribe.

That a Technical Unit Body will be set up, under appointment, and will sit under the direction and authority of the Customary Chief and Headmen of the Ojibway Nation of Saugeen Indian Tribe Treaty Administration.

[37] The remainder of the Convention consists of various assertions regarding ONS's right to self-determination and self-government. Some of these are statements that the Crown must fulfil

its treaty promises and that ONS will not consent to any reduction or abridgment of its treaty rights or the Crown's fiduciary obligation.

[38] The closing paragraph states that the Convention was made "under a Traditional Gathering," "by consent of all parties concerned and present," but I have little information as to who these parties were and how many citizens attended the Traditional Gathering, beyond Ron Machimity's evidence that about 20 persons were present.

[39] I note in passing that in an undated "Declaration" apparently issued before the December 9, 2018 meeting, Chief Edward Machimity and his Headmen state that the Convention "was ratified by the original families as represented by Edward Machimity, Gilbert Machimity and David Necan." The Convention itself is silent as to the issue of family representation. The parties have not insisted on this aspect in their submissions.

(2) The Parties' Submissions

[40] To put my analysis in context, it may be useful to set out the parties' competing interpretations of the Convention.

[41] In Edward Machimity's May 2019 history document and in counsel's submissions, the Chief and Headmen put forward the following interpretation. The Convention gives the final decision-making power to the Chief and Headmen in most cases. Citizens may exercise a power only where the Convention expressly provides for it. The provisions allowing for the citizens' input in the appointment of the Chief and Headmen only apply to their initial appointment. The

power to make subsequent appointments is not expressly devolved to citizens and is therefore exercised by the Chief (or possibly the Chief and Headmen).

[42] The Chief and Headmen also submit that the review procedure is merely consultative. The relevant provision speaks of an “open discussion” followed by a “final decision.” However, based on the following provision, under the heading “Seat of Government,” they argue that the final decision is made by them. Moreover, they assert that the Convention does not grant the citizens any power to remove the Chief and Headmen because this is not expressly mentioned.

[43] The Conduct Review Proponents, for their part, essentially submit that the citizens’ power to review the Chief and Headmen necessarily includes the right to remove them and to appoint new ones. This is a continuing power, not limited to the appointment of the first Chief and Headmen.

[44] They ground their interpretation in the structure of the Convention. The section entitled “Customary Procedures,” which provides for the citizens’ power to appoint the Chief and Headmen, is immediately followed by the “Review Procedures.” They must be read together. Thus, the “final decision” can include removal and must be made by the citizens themselves, like the initial appointment. Otherwise, the review procedures would be meaningless. The statement to the effect that “final decision making” is the purview of the Chief and Headmen is found in a separate section, entitled “Seat of Government.” It applies to ONS’s day-to-day administration, not to a leadership review by the citizens.

(3) Analysis

[45] I agree with the Conduct Review Proponents' interpretation, which is compatible with the purpose, context and text of the provisions of the Convention regarding the selection of the Chief and Headmen.

[46] Let us begin by ascertaining the purpose of the Convention. A holistic reading of the Convention reveals that it aims at establishing a political system that affords accountability to the citizens without recourse to periodic elections. To do so, it relies significantly on Anishinaabe law and, in particular, the concept of traditional gathering. While the parties did not bring evidence as to the role and functioning of traditional gatherings in Anishinaabe law, the Convention refers to it as the manner in which ONS citizens express their collective will. The drafters of the Convention sought to combine the idea that the legitimacy of political institutions derives from the consent of the governed with a method of selecting leaders rooted in Anishinaabe law, although this may not have been expressed in the most felicitous manner. Yet, numerous references to tradition, usage or custom make it obvious that the Convention intends to rely on existing Anishinaabe law, instead of displacing it.

[47] Moreover, the Convention makes it clear that citizens are ONS's supreme authority. The eligibility provisions grant fundamental political rights to all ONS citizens with respect to the selection of the Chief and Headmen. Both the "Customary Procedures" (for the appointment) and the "Review Procedures" give a critical role to citizens in the selection and review of their leaders. The Convention itself was adopted "on behalf of the citizens." Such supreme authority is

also compatible with the dignity and worth of each citizen, which is affirmed by the Convention's preamble. To the extent that subsequent practice sheds light on the meaning of the Convention, I note that the 2006 resolution appointing new Headmen was adopted after the citizens approved the appointments in a traditional gathering.

[48] Anishinaabe conceptions of leadership buttress this description of the Convention's purpose. I approach the issue with caution, as the parties did not provide extensive evidence on the subject. Nonetheless, Ron Machimity states, at paragraph 9 of his first affidavit, that the Anishinaabe term *ogemakan*, often translated as chief, means a spokesperson or negotiator, someone who represents the people's wishes. This evidence, which was not contradicted, tends to show that the Convention must be interpreted as preserving the citizens' power to appoint, review and remove their leaders. This is also compatible with the description of Anishinaabe governance principles given by Justice Patricia C. Hennessy of the Ontario Superior Court of Justice in *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paragraphs 26–30, and confirmed on appeal, 2021 ONCA 779 at paragraphs 13–15. In any event, the parties did not bring any evidence of an Anishinaabe legal principle binding the members of a First Nation forever to follow a leader in which they have lost trust.

[49] This is also consistent with this Court's jurisprudence. Ever since *Bigstone v Big Eagle*, [1993] 1 CNLR 25 (FCTD), this Court has been prepared to recognise "customs" or, in reality, Indigenous laws, that attract the "broad consensus" of a First Nation's membership. The citizens may reach consensus on a wide variety of political systems, including one that does not involve regular elections. However, it is difficult to understand how the citizens could reach a broad

consensus on a system that indefinitely disempowers them or disregards their will. Yet, this is exactly where the Chief and Headmen's interpretation leads.

[50] Thus, to simplify somewhat, the Convention institutes a democracy without elections. To Western ears, this may sound as a contradiction in terms. However, this simply means that the consent of the governed flows from traditional gatherings instead of the ballot box, in a manner rooted in Anishinaabe law. In this system, the citizens' power to remove their leaders plays a crucial role in ensuring accountability, compared to First Nations that conduct periodic elections.

[51] Therefore, the Conduct Review Proponents' interpretation, which preserves the power of the citizens, must be preferred over the Chief and Headmen's, which renders citizens powerless. In other words, the former interpretation is compatible with the Convention's purpose, while the latter would thwart it.

[52] There are also logical and structural reasons to prefer the Conduct Review Proponents' interpretation. A review process where those subject to the review make the decision is an odd thing indeed. It would not provide meaningful accountability. Under the Chief and Headmen's interpretation, the review process would amount to a simple consultation, without any duty to consider the citizens' views. If this were correct, there would be no need to formalize such a process in the Convention.

[53] Moreover, if the citizens' power to appoint the Chief and Headmen were limited to the initial appointment, it is difficult to understand why the Convention, adopted in 1997, would

regulate a process that took place twelve years earlier and is not meant to be repeated. One should normally assume that each section or part of an enactment accomplishes something useful. An interpretation that renders certain provisions redundant or useless is to be avoided.

[54] The Chief and Headmen argue that the review procedures should be interpreted in light of other provisions of the Convention that set substantive limits on their powers. If I understand the argument correctly, these provisions would act as a form of checks and balances that would render a power of removal unnecessary. I disagree. These provisions are framed as statements of ONS's rights as against the Crown and do not address the relationship between leader and citizen. While the Chief and Headmen attempted to draw an analogy with the *Canadian Charter of Rights and Freedoms*, there are no courts to enforce the limits set forth in the Convention. They simply do not provide for any real accountability.

[55] This brings me to the text of the Convention. The Chief and Headmen make certain textual arguments in support of their interpretation of the Convention. These arguments are unfounded.

[56] First, the Chief and Headmen submit that under the Convention, citizens have only the powers expressly granted to them. Because the Convention does not explicitly state that the citizens can remove the Chief and Headmen, this power should not be conferred by implication. For this proposition, they rely on my judgment in *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732, [2019] 4 FCR 217 [*Whalen*]. However, the electoral code at issue in *Whalen* was much more precise than the Convention and lent itself much more easily to the kind

of textual argument the Chief and Headmen are trying to make. Moreover, at paragraphs 47–48 of *Whalen*, I emphasized that the electoral code at issue evinced the citizens’ intention to retain power over the selection of their leaders. This supports the Conduct Review Proponents’ interpretation of the Convention. Under the code at issue in *Whalen*, the main accountability mechanism was periodic elections. Giving the council the power to remove duly elected councillors would effectively disempower citizens. In contrast, the main accountability mechanism established by the Convention is the citizens’ power to review and remove their leaders.

[57] Second, the Chief and Headmen point out that according to the Convention, they hold their positions for life. This would be incompatible with the citizens’ power to remove them. I disagree. The two are not incompatible. A chief or headman appointed by the citizens may well retain their positions for their lifetimes, if the citizens do not remove them.

[58] Third, the Chief and Headmen rely on the provision of the Convention that provides that “the approval and final decision making will rest with the Customary Chief and Headmen.” This provision, however, is found in a section of the Convention entitled “Seat of Government,” which is not directly relevant to this case. It apparently relates to day-to-day decision-making. It cannot set aside the explicit provisions conferring on ONS citizens the power to select or remove their leaders. In other words, it cannot apply to what takes place at traditional gatherings.

[59] Fourth, the Chief and Headmen suggest that every citizen’s entitlement to “voice a right of principle opinion” in the selection of the leaders can only refer to a consultative process, in

which the citizens do not make the final decision. However, one must recall that the Convention does not establish an electoral process. Rather, the selection of leaders is to take place at a traditional gathering, hopefully by consensus. This “principle[d] opinion” can thus refer to each citizen’s participation in the discussion aimed at reaching consensus. It does not mean that the citizens’ opinions are merely intended for the consideration of the Chief and Headmen and can be disregarded at will.

[60] Let us return to the text of the “Review Procedures” section of the Convention. For the sake of convenience, I reproduce it again:

That under a traditional gathering of the Citizens of the Ojibway Nation of Saugeen Indian Tribe that a review to the conduct of the Customary Chief and Headmen will be in a form of an open discussion and the final decision will be based under the process of customary practice and treaty [...].

[61] Given the purpose and context of this provision, the “final decision” must include the removal of the Chief and Headmen. This decision is to be made by the citizens, after an open discussion, in a traditional gathering.

[62] Thus, I conclude that the Convention, properly interpreted, recognizes ONS citizens’ power to remove the Chief and Headmen at a traditional gathering, and to appoint new ones.

[63] Given this finding, there is no need to decide whether a custom emerged outside of the Convention, according to the test set out in *Whalen*, at paragraphs 31–41.

B. *Fairness and Lawfulness of the Traditional Gathering*

[64] Having established that the Convention recognizes the power of ONS's citizens to remove the Chief and Headmen and select new ones at a traditional gathering, the next issue is whether the citizens present on the second day of the traditional gathering, on June 21, 2019, were successful in exercising this power.

[65] The Chief and Headmen allege that the process that culminated in their removal breached procedural fairness or was unlawful in several ways. They argue that they did not receive proper notice, that the traditional gathering had been properly closed before resolutions were adopted for their removal and that these resolutions were not adopted by a majority of ONS's citizens.

[66] I disagree with the Chief and Headmen. The process was fair and lawful. Before providing detailed reasons regarding each alleged breach, I wish to emphasize a common theme. All these alleged breaches were situations that directly resulted from the Chief and Headmen's refusal to accept that ONS's citizens could remove them pursuant to the review procedure set forth in the Convention. These situations did not arise because of any unfairness or lack of transparency on the part of the Conduct Review Proponents. Rather, they were a by-product of the Chief and Headmen's avoidance strategy. The Chief and Headmen should not be heard to complain about the consequences of their own conduct.

[67] Moreover, a large portion of the Chief and Headmen's procedural fairness submissions are directed at the December 2018 or the February 2019 meetings. It is not necessary to address

this part of their submissions. In large part, these meetings merely paved the way to the June 2019 traditional gathering. While the Conduct Review Proponents sought to appoint new Headmen in February, a new decision was made in this regard in June. Thus, a review of the fairness of the process leading to the removal and replacement of the Chief and Headmen must focus on the June 2019 traditional gathering.

(1) Adequate Notice

[68] The Chief and Headmen's first objection to the process is that the Conduct Review Proponents gave no adequate notice of their intention to remove them. This argument fails because the Chief and Headmen simply did not want to participate in any process leading to their removal. Giving notice in these circumstances would serve no meaningful purpose.

[69] Participatory rights, such as the right to receive notice, aim at providing the party affected by an administrative decision with the opportunity "to put forward their views and evidence fully and have them considered by the decision-maker": *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 22. They are "personal to those whose substantive rights or interests they protect" and can be waived by those persons: *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 at paragraph 48, [2010] 2 FCR 488; see also Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford: Oxford University Press, 2021) at 86.

[70] It follows that a person who does not wish to participate in a decision-making process or does not recognize the decision-maker's authority cannot complain about the lack of notice. Such

is the situation of the Chief and Headmen, who consistently denied the power of ONS's members to remove them at a traditional gathering, in particular in the January 30, 2019 letter to ONS's members, in the first application for judicial review and in Chief Edward Machimity's "open letter" dated May 2019. In other words, the Chief and Headmen's conduct amounts to a waiver of the right to receive notice.

[71] Moreover, someone who actually knew about the decision to be made, or was wilfully blind, cannot complain about the lack of notice. For example, in *Salt River First Nation #195 (Salt River Indian Band #759) v Martselos*, 2008 FCA 221 at paragraphs 35–36, the Federal Court of Appeal held that a person who refuses to accept service of a notice cannot complain that the ensuing meeting was held in breach of procedural fairness. The January 30, 2019 letter, the first application for judicial review and the May 2019 "open letter" all make it abundantly clear that the Chief and Headmen were aware of the Conduct Review Proponents' intention to seek their removal.

[72] Adequacy of notice may also be assessed from the perspective of ONS citizens who might want to attend the traditional gathering. The irony of the matter is that the notice for the June 2019 traditional gathering was given by the Chief and Headmen. Edward Machimity also mentioned the gathering in his May 2019 letter to all citizens. Both documents state that the purpose of the June meeting is to hold a review according to the Convention. Citizens who received these documents must have understood that the Conduct Review Proponents would seek the removal of the Chief and Headmen, even though the latter disagreed. The Conduct Review Proponents' plans were explicitly mentioned in the January 30, 2019 letter to all citizens. The

Chief and Headmen cannot invoke any alleged ambiguity in the notice they themselves drafted. There is no evidence that any ONS citizen failed to understand what was to take place at the traditional gathering. Likewise, if the notice was not distributed to all ONS citizens, the Chief and Headmen have only themselves to blame. Again, the Chief and Headmen did not bring any evidence that any ONS citizen failed to attend the traditional gathering because they had not received notice.

(2) Conduct and Purported Termination of Traditional Gathering

[73] The Chief and Headmen deny that what took place on June 21, 2019 was a valid part of the traditional gathering. Rather, they argue that they alone have the power to call a traditional gathering, determine its agenda and end it. They assert that they closed the traditional gathering at the end of the first day, on June 20, 2019. From that perspective, the proceedings on June 21, 2019 would have constituted a separate meeting, convened without authority and proper notice.

[74] I am unable to agree with these submissions.

[75] Most fundamentally, the Chief and Headmen's position is at odds with the concept of a traditional gathering held for the purposes of a leadership review. The leaders subject to the review cannot act in a way that frustrates the purpose of the review. Yet, this is exactly what they did. They consistently denied the membership's power to review their leadership and to remove them if necessary. They set an agenda for the traditional gathering that excluded any genuine review of their leadership. They then purported to end the meeting after one day, before the

citizens present had an opportunity to debate their removal. As Headman John Sapay said in cross-examination, the traditional gathering was “cut short.”

[76] Having tried to deprive ONS’s citizens of the power to review their leadership, the Chief and Headmen can hardly complain that a large majority of the citizens present on the first day reconvened on the second day and continued the meeting.

[77] In addition, it is unclear from the evidence how the purported termination of the traditional gathering was communicated, if at all, to the citizens present on the first day. In her affidavit dated March 22, 2021, Eileen Keesic states that she does not “recall if an announcement was made that the second day of the traditional gathering was cancelled.” Roger Bouvier, who was hired by the Chief and Headmen to facilitate the meeting, states:

After I called the meeting adjourned, someone in the audience asked if we would be meeting again tomorrow. That is when we indicated that the second day of the Traditional Gathering was not proceeding.

[78] This suggests that the manner in which the meeting was initially adjourned conveyed the impression that it would continue the next day. Mr. Bouvier, however, does not mention if the subsequent exchange could be heard by everyone in attendance. On cross-examination, Hilda Derosé admitted that the cancellation of the second day was announced, although she did not explain in which context.

[79] In his affidavit, Ron Machimity states that no announcement was made. Desiree Jacko and Betty Necan agree with this, but Desiree Jacko adds that, during a break immediately before

the end of the first day, she overheard Eileen Keesic telling Roger Bouvier that the second day would not proceed. She was shocked to learn this and told other ONS citizens about it. Both Eileen Keesic and Roger Bouvier deny this conversation.

[80] In her affidavit, Betty Necan states that she drove to the community centre on June 21, together with other citizens, thinking that the second day of the traditional gathering would take place as announced and that she was shocked to learn that the Chief and Headmen were not there.

[81] On a balance of probabilities, I find that the Chief and Headmen, with the help of Mr. Bouvier, attempted to end the traditional gathering after the first day without explicitly saying to the citizens present that the second day would not take place. The Chief and Headmen must have known that, in all likelihood, an explicit announcement would have been openly challenged by the Conduct Review Proponents. It is only after the meeting was adjourned that some citizens were told that the second day would not take place and that the news began to disseminate.

[82] To the extent that the Chief and Headmen argue lack of notice regarding the second day of the traditional gathering, I note that Eileen Keesic, in her affidavit dated March 22, 2021, at paragraph 55, states that she was aware that a meeting was taking place and sent her husband to inquire. Nothing prevented the Chief and Headmen from attending.

[83] In these circumstances, I find that the traditional gathering was not validly terminated at the end of the first day and that the citizens were entitled to reconvene on the second day and to conduct the meeting themselves in the absence of the Chief and Headmen and the facilitator.

(3) A sufficient majority

[84] The Chief and Headmen also suggest that the resolutions adopted on June 21, 2019 did not receive the assent of a sufficient majority of ONS's citizens. As I mentioned above, the evidence is not entirely clear regarding the number of ONS citizens of voting age. Depending on whether there are 100 or 150 adult citizens, the 29 citizens who signed the resolutions would amount to 20% to 30% of ONS's membership.

[85] In assessing this argument, one must not lose sight that we are dealing with a process set forth in the Convention. ONS citizens did not seek to enact a new constitution from scratch. The latter process may warrant a more probing assessment: see, for example, *Pahtayken v Oakes*, 2009 FC 134, aff'd 2010 FCA 169 [*Pahtayken*]; *Taypotat v Taypotat*, 2012 FC 1036, rev'd 2013 FCA 192, rev'd 2015 SCC 30, [2015] 2 SCR 548 [*Taypotat*]. The June 21, 2019 resolutions were not, to use the language of constitutional theory, the result of the exercise of constituent power.

[86] Therefore, the validity of the resolutions must be determined according to the Convention itself. The Convention, however, does not set any explicit quorum for a traditional gathering. There does not seem to be any basis for implying a requirement for a specific level of participation either.

[87] In this regard, no one argues that the first day of the traditional gathering lacked quorum. Approximately 40 citizens attended. A similar number of citizens attended the 2006 traditional gathering, and only 20 citizens were present for the adoption of the Convention in the 1997 traditional gathering. These facts make it very difficult to impose any higher requirement. Thus, I find that the Chief and Headmen failed to prove that the June 21, 2019 resolutions were unlawful for lack of quorum.

[88] Even if I needed to review all the circumstances, as in *Pahtayken* and *Taypotat*, I would conclude that the June 21, 2019 resolutions constitute a lawful expression of the will of ONS's membership. As I mentioned above, the participation in the second day of the traditional gathering is in line with the participation in past political events at ONS. By way of comparison, if about 30% of the membership assented to the resolutions, this corresponds to the proportion of citizens who approved a new election code in a referendum in *Pahtayken*. Given the geography and the fact that a traditional gathering is held in person, it would not be reasonable to expect more. In addition, the removal of the Chief and Headmen was a matter of discussion at ONS for several months. The matter was the subject of at least two detailed written communications to all citizens. A CBC news article regarding the situation must have alerted a large number of citizens to the issues at stake. This is far from the situation in *Marie*, where a group of members of a First Nation spontaneously decided, without notice, to remove councillors and appoint new ones. Lastly, the evidence does not show the Chief and Headmen have the support of anyone beyond themselves and their immediate family. Even if the low rate of participation were the result of a deliberate boycott, this would not invalidate the decisions made by those who participated in the traditional gathering: *Pahtayken*, at paragraph 65.

[89] In the end, I find that the resolutions adopted on June 21, 2019 constituted a lawful decision made by ONS's membership at a traditional gathering and were effective in removing Edward Machimity, Eileen Keesic and John Sapay and in appointing Ron Machimity, Joyce Medicine, Betty Necan, Darlene Necan and Desiree Jacko in their stead.

V. Remedies

[90] For the foregoing reasons, the Conduct Review Proponents' application for judicial review will be granted and ONS's application for judicial review will be dismissed.

[91] This brings me to the issue of remedies. The logical conclusion of the reasoning set out above is that Ron Machimity, Joyce Medicine, Betty Necan, Darlene Necan and Desiree Jacko have been the legitimate Chief and Headmen since June 21, 2019. The reality, however, is that Edward Machimity, Eileen Keesic and John Sapay have remained in power despite their removal by ONS's citizens. What is needed, then, is an order in the nature of *quo warranto* removing the latter as well as a declaration that the former are the legitimate office holders.

[92] The Conduct Review Proponents also seek an order quashing or setting aside all decisions made by the Chief and Headmen since June 20, 2019. I have no indication as to what these decisions are. It may well be that these decisions affect third parties, who should be heard before they are quashed. Given the indeterminate scope of this request and the reliance interest of third parties, I decline to make such an order. This means that in practice, my decision will not have retroactive effect.

[93] The Conduct Review Proponents also seek other orders or declarations, but I find that they are unnecessary, given that the two main orders I am issuing should be self-explanatory.

[94] At the hearing, the Conduct Review Proponents stated that their goal was not to remain in power indefinitely. Rather, they intend to put an election code to the membership for adoption quickly, and then call an election. They invited me to show creativity in crafting orders that would give effect to this intention. I was informed that the draft election code was almost ready to be submitted to a referendum. Accordingly, I will order ONS to call a referendum for the adoption of an election code no later than October 31, 2022. If the code is adopted, I will order ONS to call an election no later than October 31, 2023.

[95] The parties have asked me to postpone the awarding of costs. Accordingly, they will be given an opportunity to file written submissions in this regard.

JUDGMENT in T-221-19 and T-1192-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in file T-221-19 is dismissed.
2. The application for judicial review in file T-1192-19 is granted.
3. Edward Machimity, Eileen Keesic and John Sapay are removed from their respective positions of Chief and Headmen of Ojibway Nation of Saugeen.
4. Ron Machimity Sr. is the lawful Chief, and Joyce Medicine, Betty Necan, Darlene Necan and Desiree Jacko are the lawful Headmen of Ojibway Nation of Saugeen.
5. Ojibway Nation of Saugeen will hold a referendum for the adoption of an election code no later than October 31, 2022.
6. If an election code is adopted, Ojibway Nation of Saugeen will hold elections for the positions of Chief and Headmen no later than October 31, 2023.
7. The applicants in file T-1192-19 will serve and file their submissions regarding costs, not to exceed 10 pages in length, no later than 15 days from the date of this judgment.
8. The respondents in file T-1192-19 will serve and file their submissions regarding costs, not to exceed 10 pages in length, no later than 10 days from the date of service of the applicants' costs submissions.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-221-19

STYLE OF CAUSE: OJIBWAY NATION OF SAUGEEN v HILDA DEROSE, JOHN MACHIMITY, RON MACHIMITY SR., JOYCE MEDICINE, BETTY NECAN, DARLENE NECAN AND DESIREE JACKO

AND DOCKET: T-1192-19

STYLE OF CAUSE: RON MACHIMITY SR., JOYCE MEDICINE, BETTY NECAN, DARLENE NECAN AND DESIREE JACKO v OJIBWAY NATION OF SAUGEEN, AS REPRESENTED BY EDWARD MACHIMITY, VIOLET MACHIMITY, EILEEN KEESIC AND JOHN SAPAY

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 23, 2022

JUDGMENT AND REASONS: GRAMMOND J.

DATED: APRIL 21, 2022

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