

Federal Court



Cour fédérale

**Date: 20180219**

**Docket: T-1275-17**

**Citation: 2018 FC 190**

**Ottawa, Ontario, February 19, 2018**

**PRESENT: THE CHIEF JUSTICE**

**BETWEEN:**

**WENDY JIMMIE, IN HER INDIVIDUAL  
CAPACITY AS A MEMBER OF THE  
SQUIALA FIRST NATION**

**Applicant**

**and**

**THE COUNCIL OF THE SQUIALA FIRST  
NATION**

**Respondent**

**ORDER AND REASONS**

**I. Introduction**

[1] This application for judicial review concerns a decision of the Council of the Squiala First Nation [the **SFN**] to evict Ms. Wendy Jimmie from a house in which she claims she or her children have lived for approximately 18 years. Ms. Jimmie maintains that she has a substantial equity interest in the home as a result of having made payments against a construction loan that

was advanced to her by the SFN and a third party, for many years. The home is located on a “reserve” that has been set aside for the use and benefit of SFN.

[2] There is a related dispute between the parties as to whether Ms. Jimmie’s father has a valid Certificate of Possession [**CoP**] with respect to the land upon which the home sits.

[3] Ms. Jimmie seeks to have the eviction decision [the **Decision**] set aside on the grounds that it was unreasonable, procedurally unfair and made without jurisdiction.

[4] In response, the Council of the SFN [the **Council**] has raised a preliminary issue regarding this Court’s jurisdiction to grant the relief sought by Ms. Jimmie. In brief, the Council asserts that the Decision was taken pursuant to SFN’s private law rights as a property owner and landlord, rather than pursuant to any federal statute or subordinate legislation. As such, it maintains that the Decision is not amenable to judicial review in this Court.

[5] For the reasons set forth in Part V below, I disagree. In my view, this Court has jurisdiction to deal with this dispute.

[6] However, rather than proceeding to deal with the merits of this application, I have decided that the particular facts of this case are such that it would be in the interests of justice to convert this application into an action, pursuant to subsection 18.4(2) of the *Federal Courts Act*, RSC, 1985, c F-7 [the **Federal Courts Act**]. Among other things, this will facilitate access to justice by providing Ms. Jimmie with the discovery tools that she appears to require to permit

this Court to adjudicate the unique and exceptional substance of her dispute with the Council (*Sivak v. Canada (Citizenship and Immigration)*, 2011 FC 402, at paras 29-32; *Assoc. des crabiers acadiens inc v Canada (Attorney General)*, 2009 FCA 357, at para 39).

[7] In the meantime, an Order will be issued pursuant to Rule 384 of the *Federal Courts Rules*, SOR/98-106, to continue this matter as a specially managed proceeding. The Case Management Judge's mandate will include attempting to mediate this matter.

## II. Background

[8] Ms. Jimmie is a Registered Indian and member of the SFN.

[9] The Council is a band council pursuant to the *Indian Act*, RSC, 1985, c I-5 [the *Indian Act*].

[10] The house from which Ms. Jimmie was ordered evicted [the **House**] is a detached home that SFN claims to own and to have built, in part with funds it borrowed from the Canada Mortgage and Housing Corporation [**CMHC**]. However, Ms. Jimmie asserts that she or members of her immediate family have been paying off a "mortgage" on the home that was advanced to her by the SFN and CMHC in the late 1990s, and that they have less than two years left to pay off that debt. One of the documents that she has submitted in this proceeding suggests that the loan in question may have taken the form of a "rent to purchase" arrangement with the Council.

[11] Ms. Jimmie further asserts that her father, Samuel Jimmie, has a CoP in respect of the lot upon which the House was built. However, the Council states that the CoP was transferred to the SFN in approximately June 1986. Ms. Jimmie maintains that the CoP was not transferred to SFN at that or any other time. Unfortunately, her father has dementia and may not be able to assist the parties to shed further light on this issue.

[12] The address of the lot in question is 44117 Chilliwack Mountain Road.

[13] Ms. Jimmie adduced a copy of a Squiala First Nation Rental Agreement for a single family dwelling on that lot, dated February 16, 1999. The term of that agreement [the **1999 Rental Agreement**] is stated to be two years. The words “Rent to Purchase” are written at the top of that agreement. Ms. Jimmie asserts that those words were written by the band’s Administrator at the time the agreement, which is between Ms. Jimmie (as the “Tenant”) and SFN (as the “Landlord”), was entered into. The occupants of the premises were identified to be Ms. Jimmie’s children and someone named “Danny.” Among other things, the terms of the lease provided: “Except for casual guest [*sic*], no other person shall occupy the premises without written consent of the Landlord.”

[14] The Council adduced a second, one-year, rental agreement pertaining to 44117 Chilliwack Mountain Road, dated April 1, 2013, between it and Ms. Jimmie’s son, Norman Gabriel [the **2013 Rental Agreement**]. The Council also adduced several annual lease extensions to that agreement. The last of those annual extensions was made on April 1, 2017, and expires on March 31, 2018. The tenants identified in the main agreement and in the extensions

thereto do not include Ms. Jimmie. However, unlike the 1999 Rental Agreement, there is no prohibition on other persons occupying the premises without the written consent of the Landlord.

[15] According to an affidavit sworn by Ms. Tammy Bartz, the Administrator of the SFN, Mr. Gabriel has been in default of his obligations under the 2013 Rental Agreement since December 2016. He was notified of this fact in May 2017. The following month, Ms. Bartz learned that he had vacated the House sometime in April of that year, and that Ms. Jimmie had moved back into the premises, together with certain other members of her immediate family.

[16] Shortly afterwards, in a letter dated June 13, 2017, Ms. Bartz advised Ms. Jimmie that she has no right to occupy the House and must vacate it by June 30, 2017. Among other things, that letter stated the following: “We have already spoken with your father, who owns the land, and he has approved the new tenants” (emphasis added).

[17] A second letter, dated July 20, 2017, was then sent to Ms. Jimmie advising that she was in trespass and was required to vacate the House within 14 days. Among other things, that letter stated that Ms. Jimmie’s father “once had a [CoP] over the land but he transferred that [CoP] to the [SFN] on June 23, 1986” (emphasis added).

[18] On August 31, 2017, Ms. Bartz caused a Notice of Default to be posted on the door of the House. Ms. Bartz states that, to the best of her knowledge, SFN has received no response to that notice.

[19] None of the documentation described above provided Ms. Jimmie with any opportunity to make oral or written representations in connection with the eviction from the House.

[20] In support of her claim that she has a significant equity interest in the House, Ms. Jimmie adduced a copy of an e-mail exchange between her and Ms. Bartz, dated December 3, 2012 [the **December 2012 e-mail**]. Among other things, that message stated that there was a balance of \$307.15 owing on the loan that was advanced by SFN to finance the renovation of an unidentified house. In her affidavit, Ms. Bartz states that she believes that the December 2012 e-mail appears to relate to a different residence located on SFN's reserve.

[21] At the oral hearing of this application, Ms. Jimmie, who is not represented by counsel, was accompanied by her daughter, Melissa Gabriel. Among other things, Ms. Gabriel noted that she has been a member of the SFN's Lands Committee for many years and is named in the eviction letter dated July 20, 2017. She also explained that Ms. Jimmie's father gave Ms. Jimmie permission to build a house on the land in question in 1997, and that Ms. Jimmie's father continues to have a CoP in respect of the land in question. According to her, the band has the relevant documentation in its possession, but has refused to share any of it with her mother. She added that her mother has been attempting to resolve this dispute under the "traditional" process set forth in the *Squiala First Nation Land Code* (10 July 2013) [the **Land Code**], but has received no response from the Council. She therefore maintains that the Council's Decision was not in compliance with the Land Code, which she helped to develop. In addition, she noted that the SFN's "policy" for dealing with arrears in payments by its band members is to deduct such

arrears from annual distributions that are made to those persons. In this regard, arrears have been deducted from Norman Gabriel's distributions for many years.

[22] After Ms. Gabriel made the foregoing observations, Ms. Jimmie stated that this dispute arose after she informed the band's Administrator that she had "reclaimed" the House and wished to have an update regarding the remaining amount of the outstanding mortgage.

[23] Ms. Jimmie also provided a reasonable explanation for why she was not able to gather the evidence that she and her daughter maintain supports their version of the facts, before the hearing of this application on October 4, 2017. In brief, she stated that the hearing had been scheduled on an urgent basis, at the request of the Respondent, during a brief case management teleconference that was presided over by Justice Strickland on September 14, 2017. During that teleconference, the parties agreed to proceed directly to a hearing on the application, to avoid having to deal with the motion for an injunction that Ms. Jimmie had requested. However, Ms. Jimmie then had to attend to previously scheduled travel commitments related to her work for approximately two weeks.

[24] At the end of the oral hearing, and having regard to all of the foregoing, I identified what I considered to be the "next steps" in this proceeding. I stated that I would first make a determination with respect to the jurisdiction of this Court to deal with the issues that have been raised by Ms. Jimmie. I noted that if I made an affirmative determination on that issue, I would place this matter into case management. I added that one of the objectives of the case management process would be to attempt to mediate the dispute between the parties.

### III. The Decision

[25] The Decision that is the subject of this application is Council’s resolution dated July 20, 2017. That document was attached to the above-mentioned letter of the same date. Among other things, the resolution stated that Ms. Jimmie was in trespass and authorized SFN Chief David Jimmie, who I understand is Ms. Jimmie’s cousin, to take certain actions. Those actions included executing and delivering an order that Ms. Jimmie vacate the House within 14 days, for and on behalf of the Council.

### IV. Relevant Legislation

[26] Pursuant to subsection 18(1) of the *Federal Courts Act*, the Federal Court has exclusive original jurisdiction to hear and determine any application or other proceeding for relief sought against any “federal board, commission or other tribunal” (*Air Canada v Toronto Port Authority Et Al*, 2011 FCA 347 [*Port Authority*]).

[27] It is common ground between the parties that the Council is a “federal board, commission or other tribunal” within the meaning of subsection 18(1).

[28] Pursuant to subsection 2(1) of the *Indian Act*, an Indian “band” is defined as follows:

#### **Definitions**

2 (1) In this Act,

**band** means a body of Indians  
(a) for whose use and benefit

#### **Définitions**

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

**bande** Groupe d’Indiens,  
selon le cas :



in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,	a) à l'usage et au profit communs desquels des terres appartenant à Sa Majesté ont été mises de côté avant ou après le 4 septembre 1951;
(b) for whose use and benefit in common, moneys are held by Her Majesty, or	b) à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent;
(c) declared by the Governor in Council to be a band for the purposes of this Act; ( <i>bande</i> )	c) que le gouverneur en conseil a déclaré être une bande pour l'application de la présente loi. ( <i>band</i> )

[29] Once again, it is common ground between the parties that the SFN is such a “band.”

[30] With respect to the land on “reserves,” the most relevant provisions of the *Indian Act* for the present purposes are the following:

### **Reserves**

*Reserves to be held for use and benefit of Indians*

18 (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

[...]

### **Réserves**

*Les réserves sont détenues à l'usage et au profit des Indiens*

18 (1) Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

[...]

### **Possession of Lands in Reserves**

#### *Possession of lands in a reserve*

20 (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

#### *Certificate of Possession*

(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

[...]

### **Control over lands**

60 (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

[...]

### **Legal Rights**

#### *General provincial laws applicable to Indians*

88 Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws

### **Possession de terres dans des réserves**

#### *Possession de terres dans une réserve*

20 (1) Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la bande.

#### *Certificat de possession*

(2) Le ministre peut délivrer à un Indien légalement en possession d'une terre dans une réserve un certificat, appelé certificat de possession, attestant son droit de posséder la terre y décrite.

[...]

### **Contrôle sur des terres**

60 (1) À la demande d'une bande, le gouverneur en conseil peut lui accorder le droit d'exercer, sur des terres situées dans une réserve qu'elle occupe, le contrôle et l'administration qu'il estime désirables.

[...]

### **Droits légaux**

#### *Lois provinciales d'ordre général applicables aux Indiens*

88 Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et

are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

[...]

**Restriction on mortgage, seizure, etc., of property on reserve**

89 (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

**Exception**

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou la *Loi sur la gestion financière des premières nations* ou quelque arrêté, ordonnance, règle, règlement ou texte législatif d'une bande pris sous leur régime, et sauf dans la mesure où ces lois provinciales contiennent des dispositions sur toute question prévue par la présente loi ou la *Loi sur la gestion financière des premières nations* ou sous leur régime.

[...]

**Inaliénabilité des biens situés sur une réserve**

89 (1) Sous réserve des autres dispositions de la présente loi, les biens d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien ou une bande.

**Dérogation**

(1.1) Par dérogation au paragraphe (1), les droits découlant d'un bail sur une terre désignée peuvent faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution.

[31] In addition to the foregoing, the following provisions from the *First Nations Land Management Act*, SC 1999, c24 [FNLMA] are also relevant to my consideration of the jurisdiction issue that has been raised by the Respondent:

*Definitions*

2 (1) The definitions in this subsection apply in this Act.

**Framework Agreement**  
means the Framework Agreement on First Nation Land Management concluded between Her Majesty in right of Canada and the First Nations on February 12, 1996, and includes any amendments to the Agreement made pursuant to its provisions.  
(*accord-cadre*)

**Land Code and Individual Agreement**

*Adoption of land code*

6 (1) A First Nation that wishes to establish a land management regime in accordance with the Framework Agreement and this Act shall adopt a land code applicable to all land in a reserve of the First Nation, which land code must include the following matters:

(a) a description of the land that is to be subject to the land code that the Surveyor General may prepare or cause to be prepared or any other description that is, in the

*Définitions*

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

**accord-cadre** L'Accord-cadre relatif à la gestion des terres des premières nations signé le 12 février 1996 par les premières nations et Sa Majesté du chef du Canada, ainsi que les modifications qui peuvent lui être apportées conformément à ses dispositions. (*Framework Agreement*)

**Code foncier et accord spécifique**

*Adoption du code foncier*

6 (1) La mise en place d'un régime de gestion des terres, par la première nation, en conformité avec l'accord-cadre et la présente loi est subordonnée à l'adoption d'un code foncier applicable à l'ensemble des terres comprises dans sa réserve et dans lequel figurent les éléments suivants :

a) la description des terres visées que l'arpenteur général prépare ou fait préparer éventuellement ou toute autre description qui, à son avis, est adéquate pour préciser les

Surveyor General's opinion, sufficient to identify those lands;	terres visées;
(b) the general rules and procedures applicable to the use and occupancy of First Nation land, including use and occupancy under	b) les règles générales — de procédure et autres — applicables en matière d'utilisation et d'occupation de ces terres, notamment en vertu d'un permis ou d'un bail ou en vertu d'un droit ou intérêt découlant soit de la possession accordée en conformité avec le paragraphe 20(1) de la <i>Loi sur les Indiens</i> , soit de la coutume de la première nation;
(i) licences and leases, and	
(ii) interests or rights in First Nation land held pursuant to allotments under subsection 20(1) of the <i>Indian Act</i> or pursuant to the custom of the First Nation;	
(c) the procedures that apply to the transfer, by testamentary disposition or succession, of any interest or right in First Nation land;	c) les règles de procédure applicables en matière de transfert, par dévolution successorale, de droits ou intérêts sur ces terres;
[...]	[...]
(f) a community consultation process for the development of general rules and procedures respecting, in cases of breakdown of marriage, the use, occupation and possession of First Nation land and the division of interests or rights in First Nation land;	f) une disposition relative au processus de consultation populaire visant l'établissement de règles applicables, en cas d'échec du mariage, en matière soit d'utilisation, d'occupation ou de possession des terres de la première nation, soit de partage des droits ou intérêts sur celles-ci;
[...]	[...]
(i) the establishment or identification of a forum for the resolution of disputes in relation to interests or rights in First Nation land;	(i) une disposition prévoyant soit la constitution d'un organe chargé de régler les différends concernant les droits ou intérêts sur les terres de la première nation, soit l'attribution de cette fonction à un organe donné;
(j) the general rules and	j) les règles générales — de

procedures that apply in respect of the granting or expropriation by the First Nation of interests or rights in First Nation land;	procédure et autres — applicables en matière d’attribution ou d’expropriation, par la première nation, de droits ou intérêts sur ses terres;
[...]	[...]

[32] Finally, for the present purposes, the most relevant provisions of the Land Code\* are as follows:

### *Definitions*

2.1 In this Land Code:

“**Band Land**” means Squiala First Nation Land in which all Members have a common interest and which is not subject to any individual interest;

“**Certificate of Possession**” means documentary evidence of a Member’s interest in Squiala First Nation Land granted to a Member under section 28.4 of this Land code or if granted prior to this Land Code coming into force, granted pursuant to s. 20(2) of the *Indian Act*, which entitles the Member holding the Certificate to the Rights set out in section 28.2;

“**Framework Agreement**” means the Framework Agreement on First Nations Land Management entered into between the Government of Canada and fourteen First Nations on February 12, 1996, as amended;

“**Interest**” means an interest in Squiala First Nation Land and includes a Residential Allocation, Certificate of Possession, Leasehold, Easement, Right-of-Way, Permit, Licence, Natural Resource Licence, charge and Mortgage;

“**Residential Allocation**” means a parcel of Band Land allocated to a Member under section 29.1;

[...]

### *Paramountcy*

[...]

2.4 If there is an inconsistency or conflict between this Land Code and the Framework Agreement, the Framework Agreement will prevail to the extent of the inconsistency or conflict.

[...]

***Source of Authority***

3.1 The Authority of Squiala First Nation to govern its lands and resources flows from:

- a) the Creator to the people of Squiala First Nation;
- b) from the people of Squiala First Nation to the Council according to the culture, traditions, customs and Land Code Laws of Squiala First Nation;
- c) from Squiala First Nation's inherent right of self-government and its other aboriginal rights, including aboriginal title.

***Purpose***

4.1 The purpose of this Land Code is to implement the Framework Agreement and without limiting the generality of the foregoing, to set out the principles, procedures and administrative structures that apply to Squiala First Nation and by which Squiala First Nation will exercise authority over those lands in accordance with the Framework Agreement.

[...]

***Council May Make Land Code Laws***

6.1 Council may, in accordance with this Land Code, make Land Code Laws in respect of:

- (a) development, conservation, protection, management, use and possession of Squiala First Nation Land;
- (b) Interests and Licences in relation to Squiala First Nation Land; ...

[...]

***Interests that May Be Expropriated***

15.1 An Interest in Squiala First Nation Land or in any building or other structure on Squiala First Nation may be expropriated by Squiala First Nation in accordance with the Framework Agreement and a Land Code Law enacted in accordance with section 15.3 of this Land Code.

[...]

***Composition***

21.1 The Land Committee will be comprised of at least five members appointed by Council in accordance with this Section.

[...]

***All Dispositions in Writing***

25.1 An Interest in Squiala First Nation Land may only be created, granted, disposed of, assigned or transferred by an Instrument issued in accordance with this Land Code.

***Standards***

25.2 Council may, after full and fair consideration of any recommendations made by the Lands Committee, establish mandatory standards, criteria and forms for Interests in Squiala First Nation Land.

[...]

***Improper Transactions Void***

25.5 An Instrument by which Squiala First Nation, a Member or any other person purports to create, dispose of, assign or transfer an Interest in Squiala First Nation Land after the date this Land Code comes into effect is void if it contravenes this Land Code.

[...]

***Authority to Make Dispositions***

27.1 Subject to this Land Code, Council may grant:

- (a) Interests in Band Land including but not limited to Certificates of Possession, Leaseholds, Licenses, Permits, Easements and rights-of-way in relation to Band Land; and
- (b) Licences, Natural Resource Licences and Permits in relation to Band Land.

[...]

***Nature of Interest***

28.2 Subject to this Land Code, a Certificate of Possession in respect of a parcel of Squiala First Nation Land is an Interest that entitles the Member holding the interest to:

- a) permanent, exclusive possession of the land;
- b) benefit from the resources arising from the land;
- c) subject to a land use plan or zoning Land Code Law, grant subsidiary Interests in the land, including licenses, Natural Resource Licenses or Permits;
- d) transfer, devise or otherwise dispose of the land to another Member; and
- e) any other rights, consistent with this Land Code, that are attached to Certificates of Possession under the *Indian Act*.



[...]

28.4 Council may allocate a Certificate of Possession to a parcel of Band Land to a Member for residential purposes if:

(a) the subject lands are shown on a land use plan as designated residential;

(b) the subject lands are surveyed; and

(c) the Member provides evidence of being capable of financing and building a residence without financial assistance from Squiala First Nation.

[...]

***Allocation of Residential Lots***

29.1 Council may, by Lease or other disposition, allocate a parcel of Band Land to a Member or Members for residential purposes.

[...]

***Transfer of Certificate of Possession for a Leasehold***

31.2 Where, under a written agreement between Squiala First Nation and a Member, a Certificate of Possession is cancelled for the purpose of granting a Member a Leasehold for no more than 99 years to assist the Member to obtain appropriate financing, Council will by Resolution grant a new Certificate of possession of the subject lands when all the terms of the written agreement have been satisfied provided the Member is not in breach of any of the terms of the agreement.

[...]

***Protections***

32.1 In accordance with the Framework Agreement, sections 29, 87, 89(1) and 89(2) of the *Indian Act* continue to apply on Squiala First Nation Land.

***Mortgage of a Member's Interest***

32.2 Subject to section 32.3, the provisions of section 89(1.1) of the *Indian Act* apply to leaseholds in Squiala First Nation Land permitted under this Land Code.

[...]

***Informal Resolution of Disputes***

36.1 Squiala First Nation intends that wherever possible disputes will be resolved through informal discussion by the parties to the dispute and nothing in this part will be construed to limit the ability of the parties to a dispute to settle the dispute without

recourse to this Part.

36.2 Squiala First Nation intends that whenever possible, a dispute that is not resolved by informal discussion by the parties to the dispute be resolved through voluntary participation of the parties in a tribal or other alternative dispute resolution forum rather than through the traditional court system.

[...]

***Office of Adjudicator Established***

[...]

37.3 The Adjudicator will be appointed by Council on an as needed basis as set out in this Part and in any policies Council may establish with respect to such appointment.

[...]

***Administrative Decisions***

38.2 If a Member or any person with an Interest in Squiala First Nation Land disagrees with an administrative decision made under this Land Code, the person must first attempt to resolve the issue with the decision-maker before requesting a referral of the dispute to the Adjudicator.

38.3 Council must establish policies and procedures for an internal dispute resolution process through which a Member or any person with an Interest in Squiala First Nation Land may attempt to resolve an issue as required by section 38.2.

[...]

***Alternate Forums***

[...]

42.1 Council may establish a Traditional Advisory Council to:

[...]

(b) at the request of a Member, provide a forum for informal dispute resolution discussions for a Member involved in a dispute with respect to Squiala First Nation Land,

based on the Traditional Advisory Council's knowledge and experience with traditional Sto:lo and Ts'elxwéyeqw laws, practices, protocols and values.

\* Une version française du Land Code n'existe pas.

[33] According to the affidavit evidence provided by Ms. Bartz, the Land Code came into force in accordance with the FNLMA on July 29, 2008.

V. Assessment

A. *Does this Court have the jurisdiction to deal with this dispute?*

[34] The Respondent submits that this Court does not have jurisdiction to review the Council's Decision to evict Ms. Jimmie. While it acknowledges that the Council is a "federal board, commission or other tribunal" within the meaning of s. 18(1) of the *Federal Courts Act*, it maintains that the Council was not acting as "a federal board, commission or other tribunal" when it made that Decision. Rather, the Council was simply enforcing its private law rights as a property owner and landlord.

[35] I disagree.

[36] In support of its position, the Respondent relies on *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B (Wauzhushk Onigum Nation)*, 2008 FC 812 [**Devil's Gap**] and *Port Authority*, above.

[37] *Devil's Gap*, above, concerned a decision by the Chief and Council of the Wauzhushk Onigum Nation [the **WON**] to refuse to extend a lease or to enter into a new lease with the applicant corporation, whose 33 shareholders each owned a cottage located on the WON's reserve. The applicant maintained that the decision constituted a breach of a pre-existing

contractual obligation owed to it to extend the term of the lease to the end of 2020. It appears that the cottagers in question were not members of the WON.

[38] In the course of dismissing the application, Justice Dawson (as she then was) noted that no grant had been made to the WON under s. 60 of the *Indian Act* to exercise control and management over the WON's reserve lands. Accordingly, she found that it followed that a decision not to extend the disputed lease did not fall within any aspect of the control or management of reserve lands dealt with by the *Indian Act* (*Devil's Gap*, above, at para 41). In addition, she found that pursuant to Treaty No. 3, the WON retained the inherent right to consent to any lease of reserve lands. In this regard, she underlined, among other things, language in that treaty which ceded the land in question to the WON. Based on these considerations, she concluded that the Chief and council of the WON were not acting as a "federal board, commission or other tribunal" when they refused to consent to an extension of the applicant's lease (*Devil's Gap*, above, at para 45, and 64-66).

[39] In my view, the above considerations upon which Justice Dawson relied in reaching that conclusion can be distinguished from the factual matrix that underlies the dispute in the present proceeding. As will be further discussed below, the SFN has been granted the right to exercise control and management over its reserve lands pursuant to the FNLMA. Pursuant to s. 6 of the FNLMA and the Framework Agreement on First Nation Land Management [the **Framework Agreement**] concluded on February 12, 1996, between Her Majesty in Right of Canada and various First Nations, including SFN, the SFN then established the Land Code. The foregoing scheme, which is rooted in federal law, provided an important source for the Decision (*Anisman*

*v Canada (Border Services Agency)*, 2010 FCA 52, at paras 29-31) and is very relevant to an assessment of whether the Council was acting as “a federal board, commission or other tribunal” when it made the Decision.

[40] In *Port Authority*, above, the Federal Court of Appeal explained that not all conduct of “a federal board, commission or other tribunal” is amenable to review under the *Federal Courts Act*. The determination turns on whether the conduct in question is best characterized as having been public or private in nature (*Port Authority*, above, at paras 50-55). The Court identified “renting and managing premises,” as well as “hiring support staff,” as examples of acting in private ways (*Port Authority*, above, at para 52). After observing that it can be “tricky” to ascertain what is a public law power and what is private law power, the Court identified the following eight factors to be considered in making that assessment:

- i. The character of the matter for which review is sought;
- ii. The nature of the decision-maker and its responsibilities;
- iii. The extent to which a decision is founded in and shaped by law as opposed to private discretion;
- iv. The body’s relationship to other statutory schemes or other parts of government;
- v. The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
- vi. The suitability of public law remedies;
- vii. The existence of compulsory power; and
- viii. An “exceptional” category of cases where the conduct has attained a serious public dimension.

(*Port Authority*, above, at para 60. Citations omitted.)

[41] I will turn now to an assessment of those factors:

- i. The character of the matter for which review is sought

[42] In assessing this issue, a key focus is upon whether the Decision concerned a private, commercial matter, or is of broader import to members of the public. In this regard, I consider the Decision itself to be of considerable assistance.

[43] Specifically, a recital to the Council's resolution states that "the Band Council has an obligation to all Squiala Band Members to manage SFN Land and housing needs in a fair manner and in the best interests of the Band, including following housing policy and providing the Residence to a Squiala Band member already on the waiting list." This consideration was reinforced in the letter, dated July 20, 2017, that was sent to Ms. Jimmie to inform her of the Decision. In particular, the letter drew Ms. Jimmie's attention to the fact that SFN "has an obligation to all Squiala Band Members to manage our Lands and housing needs on our Land in a fair manner and in the best interests of the Band."

[44] The statements quoted above reflect that the Decision had an important public character or dimension, namely, Council's obligation to manage SFN land and housing in the best interests of the band. In light of that obligation, which is also contemplated by subsections 2(1) and 18(1) of the *Indian Act*, it cannot be said that the Council was acting "no differently" than a party to an

agreement entered into in the private sector (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 103).

[45] Moreover, in communicating the Decision to Ms. Jimmie, the letter dated July 20, 2017, stated that the House “is located on Band-owned Land and not on land subject to a [CoP]” in favour of Ms. Jimmie’s father. This suggests that the Decision involved a determination that Ms. Jimmie had no interest in the land upon which the House sits. This is an important fact that is contested by Ms. Jimmie, and serves to further distinguish the present circumstances from those faced by a landlord operating in the private sector.

[46] In my view, the foregoing considerations weigh in favour of concluding that the Decision had an important public dimension, namely, the management of SFN land and housing in a fair manner and in the best interests of the Band. In this regard, I will simply add in passing that Ms. Jimmie stated during the oral hearing of this application that this matter is “impacting the entire community.”

ii. The nature of the decision-maker and its responsibilities

[47] This factor contemplates an assessment of whether the decision-maker, in this case the Council, has a public mandate or is charged with public responsibilities. In addition, it requires a consideration of whether the Decision was closely related to those responsibilities.

[48] In contrast to a private sector landlord or property manager, the Council has a strong public mandate and exercises extensive public responsibilities, including in relation to land and

housing. Pursuant to the Land Code, Council has the authority to make Land Code Laws in respect of a broad range of matters, including the management, use and possession of SFN land (s. 6.1). It can also expropriate SFN land in accordance with the Framework Agreement and a Land Code Law (s. 15.1). In addition, it appoints the members of the Lands Committee (s. 21.1), and may establish mandatory standards, criteria and forms for establishing interests in SFN lands (s. 25.2). Moreover, it can grant interests in SFN land, including through CoPs, leaseholds, licences, permits, easements and rights-of-way in relation to band land (ss. 27.1, 28.4 and 29.1). It is also responsible for appointing adjudicators to resolve disputes under the Land Code (s. 37.3), and for establishing a Traditional Advisory Council to provide advice and guidance with respect to, among other things, disputes concerning SFN Land (s. 42.1). In addition, it is required to establish policies and procedures for an internal dispute resolution process through which a band member or any person with an interest in SFN land may attempt to resolve an issue under the Land Code (s. 38.3). Significantly, “Band Land” is defined under s. 2.1 to mean SFN “land in which all Members have a common interest and which is not subject to any individual interest” (emphasis added).

[49] As discussed at paragraph 43 above, the Decision was explicitly taken by Council in furtherance of its public mandate to manage the SFN’s lands and the housing needs of the band’s members “in a fair manner and in the best interests of the Band.”

[50] Once again, the foregoing considerations weigh in favour of concluding that the Decision had an important public dimension.



- iii. The extent to which the Decision is founded in and shaped by law as opposed to private discretion

[51] If a challenged decision was authorized by or emanated directly from a public source of law, such as statute, regulation or order, a court will be more willing to find that the matter is public (*Port Authority*, above, at para 60).

[52] The Respondent maintains that its decision to evict Ms. Jimmie simply represented the exercise of Council discretion to enforce its common law right as a landlord to evict her from a residence in which she had no right to reside. The Respondent characterizes the related decision to evict Ms. Jimmie's son (Norman Gabriel), and the other members of her immediate family, as being rooted in the same exercise of discretion, following Mr. Gabriel's default of "rental" payments. In addition, the Respondent asserts that the resolution that comprises the Decision simply served to confirm the Decision, and that SFN resolutions do not have the status of a by-law or other type of "subordinate legislation."

[53] However, the first two recitals to the Decision/resolution note that pursuant to the Land Code, the Council "has full authority to control use and occupation of [SFN] Land," and that "an interest in SFN Land, including a residential allocation, can only be granted in writing and requires the authorization of the Band Council under s. 25.1 of the [Land Code]." Moreover, in communicating the Decision to Ms. Jimmie, the SFN's Chief referenced s. 25.1, as well as s. 25.5, the latter of which provides that an assignment or transfer of an interest in SFN land is void if it contravenes the Land Code. The Chief added that this includes "a residential allocation."

[54] The foregoing references to the Land Code reflect that the Decision was either grounded in, supplemented by, or shaped by the Land Code in an important way. For greater certainty, I do not accept the Respondent's submission that the references in the Decision to the Land Code were simply made for the purposes of addressing Ms. Jimmie's position that her father has a CoP in respect of the land under the House. It is readily apparent that those references served the broader purpose of grounding the Decision in the Land Code, at least in part.

[55] Just as a regulation can be considered to be an important part of the statutory context (*Canada (Attorney General) v Mavi*, 2011 SCC 30, at para 58) [*Mavi*]), so too can the Land Code, particularly given its relationship to the FNLMA, the Framework Agreement and the *Indian Act*.

[56] I consider that the foregoing considerations weigh in favour of concluding that the Decision had an important public dimension.

iv. The body's relationship to other statutory schemes or other parts of government

[57] If an administrative body "is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter" (*Port Authority*, above, at para 60).

[58] As noted above, the Council's mandate and responsibilities in relation to SFN land and, to a certain degree, housing are comprehensively set forth in the Land Code, which in turn is intimately linked to the FNLMA, the Framework Agreement and the *Indian Act*. In addition to

the provisions of the Land Code that I have already discussed, s. 2.4 of the Land Code states: “If there is an inconsistency or conflict between this Land Code and the Framework Agreement, the Framework Agreement will prevail to the extent of the inconsistency or conflict.” Moreover, s. 4.1 states that “[t]he purpose of the Land Code is to implement the Framework Agreement” and s. 15.1 states that an interest in SFN land or in any building or other structure on SFN land “may be expropriated by [SFN] in accordance with the Framework Agreement and a Land Code Law enacted in accordance with section 15.3 of this Land Code.”

[59] Furthermore, pursuant to ss. 32.1 and 32.2, various provisions of the *Indian Act* continue to apply on SFN land, including s. 89(1.1), which deals with charges, pledges and mortgages of leasehold interests. I mention this simply because the Chief of the SFN informed Ms. Jimmie that the CoP she claims is still held by her father was transferred to the band in 1986. There is some suggestion in the record that such transfer may have been a condition for obtaining the disputed loan or mortgage from the band. Indeed, transfers of CoPs for this purpose are addressed in s. 31.2 of the Land Code, which provides that a new CoP will be granted when all of the terms of the agreement in question have been satisfied, provided that the band member is not in breach of any of the terms of the agreement.

[60] Taken together, the foregoing links between the Council, the Land Code, the Framework Agreement, the FNLMA and the *Indian Act*, weigh in favour of a conclusion that the Decision was public in nature, particularly insofar as those links relate to the SFN’s land, leasehold interests on the land, and residential allocations on the land for band members.

[61] I pause to observe that, in addition to the foregoing, the parties referred to a “housing policy” issued by the SFN that was not filed with the Court. The Respondent maintains that this policy is not a by-law or other type of “subordinate legislation,” and simply serves to “guide” the Council in making its housing decisions.

- v. The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity

[62] There is nothing on the record to suggest that the Council is in any way an agent of the federal government or is directed, controlled or significantly influenced by a public entity.

[63] On the particular facts of this case, I am prepared to find that this factor weighs somewhat in favour of concluding that the Decision is not public in nature. In so finding, I should not be taken as suggesting or implying that a similar conclusion should follow in respect of decisions made by similarly independent “federal boards, commissions or other tribunals,” in other circumstances. In brief, taken alone, an administrative decision-maker’s independence from the federal government and from public entities does not necessarily provide a sound basis for concluding that all of its decisions constitute the exercise of a private power.

- vi. The suitability of public law remedies

[64] If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature (*Port Authority*, above, at para 60).

[65] In my view, the remedy that Ms. Jimmie has sought in this Court, namely, an order setting aside the Decision on one or more of the grounds that she has raised, has some potential to address the dispute between her and the Council. Indeed, there is a very real prospect that this outcome can be achieved in a much more expeditious, and less costly, manner than seeking remedies available at common law, before another Court, as the Respondent prefers.

[66] This factor therefore weighs in favour of a conclusion that the Decision should be considered to have a meaningful public dimension.

vii. The existence of compulsory power

[67] This factor may be relevant in relation to the assessment of the exercise of a compulsory power over the public at large or over a defined group, such as a profession. In my view, this factor is not relevant in the present context.

viii. Exceptional cases where the conduct has attained a serious public dimension

[68] This factor may contemplate cases “where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment” (*Port Authority*, above, at para 60).

[69] In my view, this factor does not apply in the present context.

ix. Summary

[70] In summary, for the reasons that I have set forth, several of the factors discussed above weigh in favour of a conclusion that the Decision should be viewed as having constituted the exercise of a public law power, rather than a private law power. Those factors are: (i) the character of the matter for which review is sought, (ii) the nature of the Council and its responsibilities, (iii) the extent to which the Decision is founded in and shaped by law as opposed to private discretion, (iv) Council's relationship to other statutory schemes or other parts of government, and (v) the suitability of public law remedies. However, one of the *Port Authority* factors weighs in favour of a conclusion that the Decision should be viewed as having constituted the exercise of a private law power. That factor is the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity. Another consideration that favours a conclusion that the Decision should be viewed as having simply been the exercise of a private law power is that it concerned a power to evict, which has sometimes been viewed as having constituted the exercise of a private law power. I have taken this fact into account in considering the "character of the matter for which review has been sought," and have reduced the positive weighting that I would otherwise have given to this factor.

[71] Balancing all of the foregoing, I conclude that the Decision represented the exercise of a public law power.

[72] Although the 2013 Rental Agreement may appear to be similar to rental agreements reached in the private sector, it was supplemented in important ways by the Land Code, which was relied upon by the Council in making the Decision, and by the Chief in communicating the

Decision. This opened the door to the requirements of procedural fairness and the jurisdiction of this Court (*Mavi*, above, at paras 49-50).

[73] My conclusion that this Court has jurisdiction to deal with this dispute is further reinforced by the other factors summarized immediately above (*Maloney v Shubenacadie First Nation*, 2014 FC 129, at paras 32-42; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536, at paras 50-54).

[74] Collectively, those factors distinguish the Decision from cases where this Court has decided that it did not have the jurisdiction to grant the relief that had been requested in respect of a decision by a band council (see, for instance, *Des Roches v Wasauksing First Nation*, 2014 FC 1126, at paras 54-67; *Cottrell v Chippewas of Rama Mnjikaning First Nation*, 2009 FC 261, at paras 81 and 91-93; *Peace Hills Trust Co v Moccasin*, 2005 FC 1364, at paras 60-62).

B. *Should this Court exercise its discretion to deal with this dispute?*

[75] My conclusion that this Court has jurisdiction to deal with this dispute does not necessarily imply that the Court should exercise that jurisdiction.

[76] Even if a court has the jurisdiction to grant the relief sought in an application for judicial review, it has broad discretion to refuse to exercise that jurisdiction (*Strickland v Canada (Attorney General)*, 2015 SCC 37 [*Strickland*]). For example, it may decline jurisdiction on the ground that another court is better placed to adjudicate the matter.

[77] This is an issue in this case because the Respondent maintains that this dispute should be dealt with in the Supreme Court of British Columbia [SCBC].

[78] In support of that position, the Respondent asserts that tenancy matters on Indian reserve land are governed by the common law, which falls within the jurisdiction of the SCBC.

[79] It is common ground between the parties that the *Residential Tenancy Act*, SBC 2002, c 78, does not apply to residential tenancies on the SFN's reserve (*Strange v Maple Meadows Mobile Home Park Ltd*, 1996 CanLII 504, at para 4 (BC SC) [*Maple Meadows*]).

[80] In support of its position that the present dispute should be dealt with before the SCBC, the Respondent relies on *Matsqui Indian Band v Bird*, 1992 CanLII 1255 (BC SC) [*Matsqui*] and *Maple Meadows*, above.

[81] However, those cases are distinguishable on the basis that they involved disputes that focused upon the interpretation of lease agreements, and the consequential rights of the parties to those agreements. In *Maple Meadows*, above, the central issue was whether the disputed tenancy was monthly or of longer duration, such that it could only be terminated by the landlord in particular circumstances that had not been established. In *Matsqui*, the relevant issue for the present purposes was upon whether the petitioner landlord was entitled to evict the respondent for failing to pay a rent increase that the Court found had been within the landlord's power to impose.



[82] In contrast, the dispute in the present proceeding is not focused upon the interpretation of a lease agreement. Rather, it is rooted in Ms. Jimmie's claim that she was unlawfully evicted from her home on a reserve and that the eviction Decision is unreasonable in the circumstances (which include her alleged substantial equity interest in the House), was made in a manner that breached her procedural fairness rights, and was made without jurisdiction.

[83] I will simply add in passing that in *Matsqui*, above, at page 6, Justice Leggatt applied the common law of landlord and tenant after what he characterized as being "[a] cursory review of history." In turn, that finding was relied upon in *Maple Meadows*, above, at para 38, where it was noted that "the common law of landlord and tenant prevails when interpreting lease contracts."

[84] To the extent that the present dispute appears to involve much more than the interpretation of a lease agreement, it is not apparent from any of the authorities that have been drawn to my attention that I should decline to exercise this Court's jurisdiction to hear the dispute on its merits. Indeed, there is at least some basis for believing that the SCBC may take the position that "the federal government has occupied the field respecting the creation of any exclusive interest on land on reserves, whether that interest be temporary or permanent" (*Kwikwetlem Indian Band v Cunningham*, (, 2009 BCSC 1032, at para 33).

[85] In *Strickland*, above, the Supreme Court of Canada identified a number of considerations that are relevant to a court's determination of whether to exercise its discretion to refuse to hear a judicial review application. Those considerations are:

- i. The purposes and policy considerations underpinning the legislative scheme in issue;

- ii. The nature of the other forum which could deal with the issue, including its remedial capacity;
- iii. The relative expertise of the alternative decision-maker;
- iv. The nature of the error alleged;
- v. The existence of adequate and effective recourse in the forum in which litigation is already taking place;
- vi. Expeditionousness;
- vii. The convenience of the alternative remedy;
- viii. The economic use of judicial resources; and
- ix. Cost.

(*Strickland*, above, at para 42.)

[86] The Court emphasized that the categories of relevant factors are not limited, and that it is for the courts to identify and balance the relevant factors in the context of a particular case.

Elaborating, the Court stated:

The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis.

(*Strickland*, above, at para 43.)

[87] In the absence of submissions from the parties regarding the factors listed at paragraph 85 above, I will refrain from discussing them in any detail. For the present purpose, I will simply observe that I have not been persuaded that I should decline to exercise this Court's jurisdiction to address the parties' dispute on its merits. Indeed, a cursory review of several of the *Strickland* factors would suggest otherwise.

[88] In particular, exercising my discretion to proceed to deal with this dispute on its merits would likely lead to a more expeditious and less costly determination of those merits, than if an action were commenced at this point in time in the SCBC. In addition, Ms. Jimmie has expressed the view that it would be much more convenient for her to have this dispute resolved in this Court. It is not apparent to me why that would not also be the case for the Respondent. Moreover, given that this Court now has a certain degree of understanding of the dispute, considerations of judicial economy would appear to weigh in favour of exercising my discretion to have the merits of this dispute dealt with in this Court.

[89] As to the nature of the SCBC, its remedial capacity and its relative expertise, I will simply observe that it is not obvious to me that it is better situated than this Court to deal with the issues that have been raised by Ms. Jimmie in the present proceeding. In some cases, including *Strickland*, above, this Court has declined to exercise jurisdiction on the ground that the subject matter expertise of the provincial superior courts was obviously much greater than that of this Court. However, it is not readily apparent that the same is true with respect to the issues that Ms. Jimmie has raised in relation to the Decision, particularly given the links between the Decision and the elaborate federal scheme created by the *Indian Act*, the FNLMA, the Framework Agreement and the Land Code. Indeed, in contrast to the minor role played by this Court in relation to the *Divorce Act*, RSC, 1985, c 3 (2nd Supp) – issues that were at play in *Strickland*, above – this Court is routinely called upon to assess the types of issues that Ms. Jimmie has raised, in connection with decisions made by Indian band councils. Although the Court may not often deal with decisions made by such councils in relation to housing, it frequently is requested to assess the reasonableness of band council decisions, whether they were

made in accordance with procedural fairness, and whether they were within the jurisdiction of the band council to make.

[90] Based on the foregoing, I consider that it would be appropriate to exercise my discretion to allow this application to be heard on its merits in this Court.

## **VI. Conclusion**

[91] For the reasons that I have provided in Part V.A. above, I find that this Court has the jurisdiction to deal with Ms. Jimmie's application on its merits.

[92] For the reasons that I have provided in Part V.B. above, I will exercise my discretion to allow those merits to be dealt with in this Court.

**ORDER in T-1275-17**

**THIS COURT ORDERS** that:

1. The Federal Court has the jurisdiction to deal with this Application on its merits.
2. The Court hereby exercises its discretion to deal with this Application on its merits.
3. Pursuant to subsection 18.4(2) of the *Federal Courts Act*, RSC, 1985, c F-7, this Application will be treated and proceeded with as an action.
4. Pursuant to Rule 384 of the *Federal Courts Rules*, SOR/98-106, this proceeding shall continue as a specially managed proceeding.
5. The Respondent shall not take any action to evict the Applicant until at least 60 days after this Application has been either finally determined on its merits, or the subject of a resolution in writing between the parties.
6. Costs will be in the cause.

“Paul S. Crampton”  
\_\_\_\_\_  
Chief Justice

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1275-17

**STYLE OF CAUSE:** WENDY JIMMIE, IN HER INDIVIDUAL CAPACITY  
AS A MEMBER OF THE SQUIALA FIRST NATION v  
THE COUNCIL OF THE SQUIALA FIRST NATION

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** OCTOBER 4, 2017

**ORDER AND REASONS:** CRAMPTON C.J.

**DATED:** FEBRUARY 19, 2018

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