

Federal Court



Cour fédérale

Date: 20170213

Docket: T-1055-16

Citation: 2017 FC 179

Ottawa, Ontario, February 13, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**CYNTHIA SPENCE IN HER CAPACITY AS
CHIEF OF PEGUIS FIRST NATION AND
GLENNIS SUTHERLAND IN HER
CAPACITY AS COUNCILLOR OF PEGUIS
FIRST NATION**

Applicants

and

**MARY TYLER BEAR, DARLENE BIRD AND
WADE SUTHERLAND, EACH IN THEIR
CAPACITY AS COUNCILLORS OF PEGUIS
FIRST NATION**

Respondents

JUDGMENT AND REASONS

[1] The Applicants, Chief Cynthia Spence and Councillor Glennis Sutherland, seek judicial review of the Peguis First Nation Band Council Resolution FY 2016/17-38 (BCR 38).

The Applicants submit that BCR 38 was passed by the Respondents purporting to act as Chief and Council and is invalid.

I. Overview

[2] BCR 38 purports to vest the responsibility for the Peguis School Board (PSB) in the Chief and Council and to invalidate decisions made by the PSB that are not supported by a quorum of Council and/or require ratification of such decisions by a majority of Council. This could include invalidating the May 20, 2016 decision of the PSB to restructure the PSB and to dismiss the Director of Education.

[3] The Applicants argue that BCR 38 is not valid as it was passed at a meeting of Council that was not duly convened and without notice to the Chief and Council, as required by the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] and the *Indian Band Council Procedure Regulations*, CRC, c 950 [*Band Council Procedure Regulations*]. The Applicants also submit that BCR 38 is beyond the jurisdiction of the Chief and Council. The PSB is a separate entity with the exclusive right to manage and operate all programs on behalf of the Peguis First Nation and is accountable to the Band through the election process, not to the Chief and Council.

[4] The Applicants seek an order to quash BCR 38 and declare that Council does not have the jurisdiction to assume the authority of the PSB. In addition, the Applicants seek specific Orders to direct Council to discuss and vote on proposed amendments to the 2008 *PSB Election Procedures* for approval by Band members in accordance with Article 11.1 of the *PSB Election*

Procedures, and to propose amendments which would permit the election to be held and the three year election cycle to resume.

[5] As a preliminary issue, the Respondents submit that the Court should exercise its discretion and decline to determine this application for judicial review because BCR 38 is valid, reflects the will of the majority, and the outstanding issues regarding the *PSB Election Procedures* can be resolved by Council. An election of the PSB could then be held.

[6] Alternatively, the Respondents submit that the application be dismissed.

[7] The Court notes the conflict within Council, which has troubling implications for the governance of the Band. At the hearing, in the context of the Respondents' submission that the Court should not determine this application, the Court asked the parties to make efforts to resolve the issues and, if successful, to advise the Court. This has not occurred.

[8] Based on the submissions made in this application and the evidence on the record, including affidavits which reflect conflicting but unsupported allegations against the Chief and the Councillors, it appears doubtful that the Council can easily resolve the outstanding issues to permit an election for the PSB to take place without first resolving the validity of BCR 38. Although both parties have the best interests of the Band at heart, they have differing views and they have not always followed the rules enacted for the governance of the Band or for the election of the PSB. The parties now point to specific provisions of the *PSB Election Procedures* and the *Band Council Procedure Regulations* in support of their respective positions.

[9] The Council does not need an Order from the Court, as proposed by the Applicants, to direct it to pursue any necessary amendments to the *PSB Election Procedures* or to further direct it to then call an election for the PSB. Council has this responsibility and should fulfill it. Moreover, such an Order would not resolve the need for proposals for amendments to be first supported by a majority of Council and then put to the Band membership for a vote. The Court cannot order Council to agree; the democratic process should be observed.

[10] The issue in this application is the validity of BCR 38, which must be addressed to resolve the obstacle to the Council's ability to make progress toward convening an election for the PSB, which is what both parties state that they want.

[11] As explained below, the process that resulted in the passage of BCR 38 breached procedural fairness. The June 10, 2016 meeting was called for one purpose—to discuss the Forensic Audit. It was not a regular meeting of Council. In addition, the Respondents' actions in passing BCR 38, without sufficient notice to the Chief and to all Councillors and without an opportunity for all Councillors to make representations, is a breach of procedural fairness. As a result, BCR 38 is invalid.

[12] In addition, BCR 38 fails to recognize that the PSB is a separate entity that is accountable to the Band and not directly to the Chief and Council, that the *PSB Election Procedures* cannot be unilaterally amended by the Chief and Council, and that the BCRs which established the PSB must be respected.

[13] For the reasons that follow, the application is allowed.

II. Background

[14] The parties agree on most of the facts provided for context.

[15] The first PSB election was held in 2008. Several members later resigned or were disqualified. Between 2008 and 2011, Council appointed replacement members, although there is no authority to do so in the *PSB Election Procedures*.

[16] In August 2009, Band Council Resolution FY 2009/10-36 (BCR 36) confirmed the mandate for the PSB. For example, the PSB has exclusive authority to manage and operate the programs and to determine the employment of the work force. BCR 36 also confirms that the PSB reports to the Band by election and not to the Chief and Council.

[17] In 2011, an election of the PSB was held and five members were elected. However, as a result of an appeal which found procedural irregularities, the results of the election were determined to be void. The Chief and Council advised candidates by letter, dated November 22, 2011, that a date for a new election would be posted.

[18] On December 5, 2011, then Chief Glenn Hudson wrote to the Director of Education advising her that until a new election for the PSB was held, “it is understood that the need to rely on the past board will be necessary from time to time. Chief and Council hereby authorize the

Director of Education to call upon the previous Board members as needed to complete business in a timely manner.”

[19] No election for the PSB has been held since 2008.

[20] Mr. Brian Bear resigned as member of PSB in June 2012, followed by Ms. Tracy Sinclair in August 2012. This left only two members of the PSB, rather than the requisite five and quorum of three members.

[21] As of March 2015, at time of election of the current Chief and Council, the only members of the PSB were Gerald McCorrister and Carl Bird. Chief Spence states that it was necessary for her to be a member of the PSB to ensure a quorum.

[22] On May 20, 2016, the three PSB members met and passed a motion to restructure the position of Education Director and to replace it with a Superintendent of Education, who would hold a Master’s degree. The PSB advised Ms. Carrie Sutherland, then the Director of Education, that her position was redundant and would be eliminated.

[23] On May 27, 2016, a special meeting was convened by the Chief at the request of Councillor Wade Sutherland. The same Councillor Sutherland proposed Band Council Resolution FY 2017/17-32 (BCR 32) to invalidate all decisions of the unelected PSB, including the May 20, 2016 decision made by PSB, and to have Council assume the responsibilities of the PSB.

[24] BCR 32 states:

Peguis First Nation is presently without a duly elected school board and therefore any decisions made in the name of this organization are invalid and not binding. For clarity, all responsibilities of the former school board are from this date, the responsibility of the Council. The Peguis School Board will resume its responsibilities following adoption of a revised election code and an election. Any decisions purportedly made by the Peguis "School Board" before this date without the support of a quorum of council are subject to review and, where it is determined to be reasonable, ratification by a majority of council....

[25] BCR 32 was not put to a vote.

[26] The Council met on June 10, 2016, to discuss a Forensic Audit Report and to meet with the Auditors and a representative from Indigenous and Northern Affairs Canada (INAC). At the conclusion of the meeting, Councillors asked to deal with a few community member requests. Councillor Wade Sutherland then tabled BCR 38. The Chief indicated that the BCR would have to wait for the next duly convened meeting because the Auditors were waiting on her to provide them with additional documents. Chief Spence adjourned the meeting. BCR 38 was then read by Councillor Darlene Bird and signed by Councillors Bird, Wade Sutherland, and Mary Tyler Bear, in the absence of the Chief.

[27] BCR 38 states:

Peguis First Nation is presently with an interim school board. For clarity, all responsibilities of the former school board are from this date, the responsibility of the Council. The Peguis School Board will resume its responsibilities following adoption of a revised election code and an election or appointment. Any decisions purportedly made by the Peguis "School Board" before this date without the support of a quorum of council are subject to review

and, where it is determined to be reasonable, ratification by a majority of council.

III. Issues

[28] The primary issue is whether BCR 38 was validly made. This turns on whether it was passed at a duly convened meeting in a procedurally fair process and on whether Council had the jurisdiction to pass the BCR.

IV. The Standard of Review

[29] I adopt the analysis of Justice McVeigh in *Spence v Bear*, 2016 FC 1191 at para 17, with respect to the standard of review:

This matter is a mix of procedural fairness and interpretation of governance issues. I must interpret the procedural rules of governance that Council and Chief must follow on a correctness standard to which no deference is owed (*Laboucan v Little Red River Cree Nation No 447*, 2010 FC 722 at paras 20-21 (appeal to FCA dismissed) citing *Martselos v Salt River Nation #195*, 2008 FCA 221 at paras 28-32).

[30] Similar issues arise in the present application and the standard of review is correctness.

V. The Relevant Statutory Provisions and Band Council Resolutions

The Act and Regulations

[31] The *Indian Act* at paragraph 2(3)(b), provides:

Unless the context otherwise requires or this Act otherwise provides,

...

- (b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

[Emphasis added]

[32] The complete *Band Council Procedure Regulations* are set out in Annex A, with excerpts below.

3(1) The first meeting of the council shall be held not later than one month after its election, on a day, hour and place to be stated in a notice given to each member of the council, and meetings shall thereafter be held on such days and at such times as may be necessary for the business of the council or the affairs of the band.

...

4 The chief of the band or superintendent may, at any time, summon a special meeting of the council, and shall summon a special meeting when requested to do so by a majority of the members of the council.

...

11 The order of business at each regular meeting shall be as follows:

- (a) reading (correction, if any) and adoption of the minutes of the previous meeting;
- (b) unfinished business;
- (c) presentation and reading of correspondence and petitions;
- (d) presentation and consideration of reports of committees;
- (e) new business;
- (f) hearing deputations;
- (g) adjournment.

12 Each resolution shall be presented or read by the mover, and when duly moved and seconded and placed before the meeting by the presiding officer, shall be open for consideration.

The 1977 Memorandum of Agreement

[33] The 1977 Memorandum of Agreement (MOA) between Canada and the Peguis Band provides that the Band has responsibility for the administration of education and educational programs and sets out the respective responsibilities of the Band and of the Minister of Indian Affairs and Northern Development. The Schedule to the MOA provides that by virtue of BCR 11-249 (1977-78), the Band created the PSB as the Education Authority to administer education programs and further provides that the Band shall continue this authority throughout the currency of the MOA.

The Peguis First Nation School Board Election Procedures

[34] The 2008 *PSB Election Procedures* includes a preamble which describes its purpose to have an elected school board. The preamble notes, among other things, that the PSB, as of October 14, 2008, is dissolved and is replaced by five elected members for a three year term. As a transitional measure, the first election in 2008 would elect four members and continue the appointment of an existing member. All five members would be elected in 2011.

[35] The *PSB Election Procedures* address the composition of the PSB, the term of membership, and the nomination, election, and appeal process.

[36] Article 10.2 addresses vacancies,

*Where the position of a **School Board** member becomes vacant more than eight (8) months prior to the date when another election would ordinarily be held, a bi- election shall be held, which bi- election shall be held in accordance with these procedures to fill that vacancy or vacancies.*

[37] Article 11.1 governs amendments to the *PSB Election Procedures*,

*These election procedures may be amended from time to time by the **Chief and Council**. Upon receipt of a suggestion for an amendment, the **Chief and Council** may choose to consider the amendments, and if they choose to proceed with same, the amendments shall be prepared in draft form and presented to a public meeting for consideration by all eligible electors. A majority of those present at the public meeting voting in favour of or in opposition to the amendment shall decide the issue. A quorum for this public meeting must total 50 eligible electors in order for the meeting to proceed.*

The Band Council Resolutions

[38] Band Council Resolution 35-08/09 confirmed the *PSB Election Procedures* and noted that Brian Bear would be the reappointed member until 2011.

[39] Band Council Resolution 38-08/09 (BCR 38-2009) resolved that the 2008 *PSB Election Procedures* shall remain in effect until such time as the membership amends or terminates the procedures. It further resolved that the *PSB Election Procedures* bind the Band Council and future Band Councils.

[40] BCR 36 (above) confirmed the mandate, roles, responsibilities, and reporting relationships of various agencies, including the PSB. It provides that the PSB, among other

things, has the right and responsibility to manage and operate a range of programs, manage human resources, manage its budget, and develop education policy. In addition, the employment, assignment, direction and the determination of employment status of its workforce is vested in the PSB. The PSB's reporting relationship is stated to be "[t]o the community by way of election."

VI. Was the June 10, 2016 Meeting Duly Convened?

The Applicants' Submissions

[41] The Applicants submit that the June 10, 2016 meeting of Council was not a "duly convened" meeting pursuant to paragraph 2(3)(b) of the *Indian Act* and was not a regular meeting. The June 10, 2016 meeting was only for the purpose of the Forensic Audit discussion. Notice was provided to all Councillors of the meeting for that purpose.

[42] The Applicants note that only the Chief can summon a special meeting of Council either on the Chief's own initiative or mandatorily when requested by a majority of members of Council in accordance with section 4 of the *Band Council Procedure Regulations*. No request had been made to the Chief for a special meeting to address BCR 38 and the Chief did not summon the meeting on June 10, 2016, for the purpose of discussing BCR 38.

[43] The Applicants note that the jurisprudence has established the requirements for a "duly convened" meeting, one of which is that notice of a Council meeting be provided to the Chief and all Councillors (*Balfour v Norway House Cree Nation*, 2006 FC 213 [*Balfour*]);

Gamblin v Norway House Cree Nation Band Council, 2012 FC 1536; *Orr v Fort McKay First Nation*, 2011 FC 37 [*Orr*]).

[44] The Applicants note that Councillors Wade Sutherland and Darlene Bird met privately before the June 10, 2016 meeting to draft BCR 38. The Applicants allege that the Respondents purposely detained the Chief from attending to the Auditors under the guise of needing to address a few “quick” community service requests and had planned to “spring” or “ambush” the Chief by raising BCR 38.

[45] The Applicants suggest that the Respondents wish to characterize the June 10, 2016 meeting as a regular meeting to support the argument that unfinished business is always on the agenda of a regular meeting in accordance with section 11 of the *Band Council Procedure Regulations*. The Applicants dispute that BCR 38 was unfinished business. The recording of the May 27, 2016 meeting confirms that BCR 32 was not passed, there was no motion to amend it, and there was no motion to put its consideration over to the next meeting.

The Respondents' Submissions

[46] The Respondents submit that BCR 38 was passed at the duly convened regular meeting of Council on June 10, 2016, as required by subsection 2(3) of the *Indian Act*. The meeting met all the criteria for a duly convened meeting pursuant to sections 3, 4, & 11 of the *Band Council Procedure Regulations*.

[47] The jurisprudence has established the basic requirements for a duly convened meeting. There must be notice of the meeting to all Councillors and the Chief; the date, place, and time must be set out; and there must be an opportunity to make representations (see *Cassidy v Recalma-Clutesi*, 2006 FC 854 at para 43 [*Cassidy*]; *Assu v Chickite* (1998), [1999] 1 CNLR 14 (BC SC) [*Assu*]). Additional indicia of a duly convened meeting are that it is held on a set day and time, notice is provided to all, and a quorum of Council is present.

[48] The Respondents submit that the June 10, 2016 meeting was not a special meeting in accordance with section 4 of the *Band Council Procedure Regulations*, and therefore, it was a regular meeting.

[49] The meeting was called to deal with Band business, in particular the Audit Report. Notice was given to all Councillors by way of the email calendar invitation with the date, place, and time. No specific type of notice is required. For example, the May 27, 2016 special meeting was convened by an exchange of email. Although the notice for the June 10, 2016 meeting did not state that the meeting would deal with other business, Council made other decisions at that meeting with respect to community service requests, which reflects that it was a “duly convened” and regular meeting of Council. The Respondents add that the meeting was scheduled from 10 AM to 2 PM, and there was sufficient time to discuss BCR 38. All Councillors were present and ready to deal with the issue; however, the Chief adjourned the meeting and left.

[50] The Respondent disputes that BCR 38 was sprung on the Chief. The Respondents point to sections 13 and 18 of the *Band Council Procedure Regulations* which provide that a BCR that

is tabled and not withdrawn remains in the possession of Council once duly moved. The Respondents note that BCR 32, tabled on May 27, 2016, was not withdrawn and was required to be decided by a vote. BCR 38 addressed the same issue with only minor refinements. Section 11 of the *Band Council Procedure Regulations* provides that the agenda for regular meetings always includes unfinished business. The Respondents were, therefore, entitled to bring the BCR back for a vote at the June 10, 2016 meeting.

[51] The Respondents argue that the circumstances are analogous to *Salt River First Nation #195 (Salt River Indian Band #759) v Martselos*, 2008 FCA 221, where the Court of Appeal found no breach of procedural fairness because the Chief chose to ignore receipt of notice of a meeting. In this case, the Chief was aware of the issue and that Councillors wanted to discuss it at the next meeting, but chose to ignore this; she cannot now deny that she had notice.

The Meeting of June 10, 2016 was not duly convened.

[52] In *Cassidy* (above), Justice Hughes reviewed the relevant provisions of the *Indian Act* and the *Band Council Procedure Regulations* to determine, among other issues, whether a BCR had been passed at a duly convened special meeting. Although the underlying facts differ, the principles provide guidance.

[53] Justice Hughes referred to paragraphs 11-14 of *Balfour* (above) and paragraphs 37-40 of *Assu* (above), as well as the relevant jurisprudence in the municipal law context, to guide his analysis of whether a meeting was special or regular (*Cassidy* at paras 34, 38, 40).

[54] At paragraph 43, Justice Hughes summarized his findings:

[43] From all of the decisions set out above, having regard to the *Act* and *Regulations*, it is clear that:

1. A special meeting is different from a regular meeting. There must be some clearly stated purpose for a special meeting.
2. The Chief or superintendent when requested by a majority of the Band Council, must call a special meeting. There is no discretion.
3. The request made to the Chief or superintendent must be provided upon reasonable notice, it cannot simply be “sprung upon” such person. The notice should provide a reasonable indication as to the purpose of the meeting.
4. Once reasonable notice is given, the Chief or superintendent cannot refuse to call a special meeting and must not unreasonably delay in doing so.
5. If the Chief or superintendent refuse or delay unreasonably in calling a special meeting the Councillors cannot take matters into their own hands. Their remedy lies in a *mandamus* application in an appropriate Court.

[55] Justice Hughes found (at para 44), among other things, that:

1. No reasonable notice was given on either of July 7 or July 8 by the Councillors to the Chief as to a request for a special meeting. The Councillors could not attempt to convene a meeting simply by opportunistically springing upon the Chief during a recess in Court proceedings on July 8 to attempt to hold a “special meeting”. For this reason, the six purported Resolutions at issue are not valid Band Council Resolutions as they were not passed at a “duly convened” Band Council meeting.

[56] In my view, the June 10, 2016 meeting was more akin to a special meeting, but it was not called for the purpose of discussing BCR 38, but for the clearly stated purpose of discussing the Audit and meeting with the Auditors. As in *Cassidy*, the Respondents could not

“opportunistically” spring BCR 38 on the Chief at the meeting convened for a different special purpose.

[57] In *Balfour*, the Court emphasized the need for the Band Council to act according to the rule of law and to respect the notion of democracy and the duty of procedural fairness.

Justice Blais referred to the established jurisprudence, noting (at paras 12-14):

[12] In *Long Lake Cree Nation v. Canada (Minister of Indian and Northern Affairs)*, [1995] F.C.J. No. 1020 (T.D.) (QL), Justice Rothstein, at paragraph 31, emphasized that band councils must operate according to the rule of law:

On occasion, conflicts can become personal between individuals or groups on Council. But Councils must operate according to the rule of law whether that be the written law, custom law, the *Indian Act* or whatever other law may be applicable. Members of Council and/or members of the Band cannot take the law into their own hands. Otherwise, there is anarchy. The people entrust the Councillors to make decisions on their behalf and Councillors must carry out their responsibilities in a way that has regard for the people whose interest they have been elected to protect and represent. The fundamental point is that Councils must operate according to the rule of law.

[13] In *Assu v. Chickite*, 1998 CanLII 3974 (BC SC), [1999] 1 C.N.L.R. 14, Justice Romilly of the British Columbia Supreme Court, discussed the source and the extent of a band council’s power as it is outlined in the law. He said the following, at paragraph 30:

The Act expressly confers a number of powers on Band Councils. The courts have made it clear that, as an autonomous elected body, a Council is entitled to make decisions as it sees fit on the matters falling within the scope of its powers, provided that the decisions are informed and are reached by majority vote at duly convened meetings. . . . It is now generally accepted that a Council holds not only all of these express powers,

but also all additional powers necessary to effectively carry out its statutory responsibilities, including the power to bring or defend claims on behalf of the Band. . . . It would therefore appear that the Band is bound by the decisions of its elected Council unless they act in bad faith.

[14] Justice Romilly recognized that band council decisions were binding if derived from powers conferred by the Act, reached by a majority vote at a duly convened meeting and not made in bad faith. Acting in accordance with the rule of law entails the obligation to adhere to the notion of democracy and a commitment to respect the duty of procedural fairness regarding decisions band councillors take in the interest of those they were elected to protect.

[Emphasis added]

[58] Democracy and procedural fairness require more than pointing to provisions of the *Band Council Procedure Regulations* and the *Indian Act* without respecting the spirit and intention of the provisions in their entirety. In the present case, although all Councillors were present at the meeting on June 10, 2016, and the Chief was aware of the outstanding concern of some Councillors regarding the PSB, the Applicants had no advance notice that BCR 38 would be tabled, or of its wording, and no opportunity to prepare and to make representations. In addition, the Chief had adjourned the meeting. Section 12 of the *Band Council Procedure Regulations* provides that the presiding officer—*i.e.* the Chief—shall place the resolution before Council “for consideration.” This did not happen.

[59] As noted by Justice Blais in *Balfour* (at para 52):

[52] Even if band council resolutions are passed with a majority of the councillors and minutes and records of a meeting of the band council were taken, a violation of subsection 2(3) of the *Indian Act* can still occur.

[60] In *Vollant v Sioui*, 2006 FC 487, Justice de Montigny highlighted the need for participation of all elected members—which means more than simply being present at the meeting—noting (at para 36):

[36] It seems to me that there are good reasons why decisions that affect the entire band may only be made in the course of a public meeting duly convened with the participation of all the elected members. In a democracy, ideas expressed within the framework of a forum where all viewpoints are welcome provide the best assurance that everyone's rights are respected and that the interests of the community are protected. This objective may be at times set aside in the interest of expeditiousness and efficiency in the business world, but this should never be the case when the welfare of members of a public body is at stake. The risks are too great to allow the slightest deviation from this rule.

[61] The Respondents' actions to purport to pass BCR 38 without discussion and participation of the Chief and all members of Council impeded the democratic process by preventing all viewpoints from being considered.

[62] In *Orr* (above), Justice Gauthier noted the importance of procedural fairness in the BCR process and highlighted that the basic requirements of procedural fairness are “notice and an opportunity to make representations” (paras 12-13).

[63] The most basic requirements of procedural fairness were not met in the present case.

[64] The June 10, 2016 meeting was not duly convened for the purpose of passing BCR 38 in accordance with subsection 2(3) of the *Indian Act*, the *Band Council Procedure Regulations*, or the jurisprudence.

[65] This finding is based on the evidence which demonstrates that the June 10, 2016 meeting was not a regular meeting. The meeting was more akin to a special meeting as it was convened by the Chief for the purpose of discussion the Forensic Audit with the Auditors and the INAC representative.

[66] Notice was provided to all Councillors of the June 10, 2016 meeting, all Councillors attended, and the meeting was held on Band premises during business hours to discuss specific Band business. However, meeting these basic criteria does not turn the special meeting into a regular meeting and does not absolve the Respondents from providing adequate notice to the Applicants of their intention to raise BCR 38.

[67] Nor does the fact that other Band business was dealt with following the discussion with the Auditors transform the meeting into a regular meeting. The Respondents acknowledge that they asked for a few “quick” community matters to be dealt with. There is no evidence that this required any BCRs. In addition, there is no evidence that any of the other hallmarks for a regular meeting, in accordance with section 11 of the *Band Council Procedure Regulations*, were observed (for example, the adoption of the minutes of the previous meeting, tabling of petitions, or consideration of committee reports). As it was not a regular meeting, section 11 of the does not apply, and there is no requirement that unfinished and new business be on the agenda.

[68] Even if the meeting had been a regular meeting, BCR 38 would not necessarily be unfinished business from the May 27, 2016 meeting. The record demonstrates that Councillor Darlene Bird had concerns about the wording of BCR 32, tabled at the May 27, 2016 meeting.

BCR 38 was different in several respects than BCR 32 and reflects revisions made by Councillors Wade Sutherland and Darlene Bird at their private meeting. Regardless, characterizing BCR 38 as unfinished business or otherwise is not determinative of whether the meeting was duly convened or whether all members of Council had adequate notice.

[69] BCR 38 was the product of revisions to BCR 32 made by two Councillors. There was no reason for the two Councillors to not provide notice of their clear intention to bring the issue to Council. Their actions suggest that their intention was to “spring” the BCR on the Chief. The Councillors could have requested a special meeting for the purpose of dealing with BCR 38. The Chief would have then been required to convene a special meeting, just as she did on May 27, 2016.

[70] Although the Applicants may have been aware that the Respondents intended to pursue the issue of the PSB at a future meeting, they did not have notice that BCR 38 would be tabled at the meeting with the Auditors. The Applicants had no opportunity to make representations, including with respect to whether Council had the authority to assume responsibility for the PSB or the legal implications for the PSB, which the Chief attempted to note, and which the Respondents characterised as scare tactics. An informed discussion based on input from all Councillors was required and may have resulted in a different outcome.

[71] The Respondents’ submissions that the Chief unilaterally adjourned the meeting completely ignores the fact that the meeting was convened for the special purpose of discussing the Forensic Audit with the Auditors. The recording of the meeting supports the Applicants’

description of the meeting. The Chief was required to provide additional documents to the Forensic Auditors, who were waiting outside the meeting room, and who had time constraints due to their flights home, and the Chief noted that the issue should be raised at the next duly convened meeting.

VII. Did Council have the authority to pass BCR 38?

The Applicants' Submissions

[72] The Applicants submit that the current PSB, although not elected in accordance with the *PSB Election Procedures*, is the education authority. In accordance with BCR 36 (2009), the PSB is not accountable to the Chief and Council but directly to the band membership through elections. It is essential to maintain an independent PSB in accordance with BCR 11-249 in 1977 and the MOA.

[73] The Applicants note that all Councils since 2011 have failed to comply with the 2008 *PSB Election Procedures* that require an election of PSB members every three years. The appointment of members to the PSB was accepted, although this is contrary to the law and to the BCRs regarding the establishment, election, and authority of the PSB.

[74] The Applicants submit that necessity required the Chief to become a member of the PSB to ensure a quorum and to maintain the PSB as the education authority, as required by the 1977 MOA. Chief Spence states that she attempted to propose changes to the *PSB Election*

Procedures so that an election could be held, but did not garner the support of Council necessary to put the amendments to the Band for a vote, as required by Article 11.1.

[75] The Applicants further submit that there is a tradition for the Chief to hold the education portfolio.

The Respondents' Submissions

[76] The Respondents acknowledge that there has not been a duly elected PSB since 2008 and that there has been some acceptance of non-compliance with the requirement for an elected PSB.

[77] The Respondents submit that the Chief and Council have the authority to dissolve the PSB and assume the authority for its administration.

[78] The Respondents argue that the BCR that dissolved and reconstituted an elected PSB in 2008 is not irrevocable and that one Council cannot bind the next by not making necessary amendments to policies and procedures affecting the Band. The PSB was established by BCR and can be dissolved by BCR.

[79] The Respondents also argue that the Chief and Council have the authority to amend the *PSB Election Procedures* on their own; it is not necessary to bring proposals to the Band at a public meeting for a vote. Nothing prevents Council from making the necessary amendments and then holding an election for the PSB.

[80] The Respondents submit that the doctrine of necessity does not justify the Chief assuming membership on the PSB. If there is any necessity, the Council as a whole should assume responsibility for the PSB because the Council shares the education portfolio.

Council did not have the authority to pass BCR 38; the PSB is Responsible for Education and is Accountable to the Band

[81] As noted by Justice Rothstein in *Long Lake Cree Nation v Canada (Minister of Indian and Northern Affairs)*, [1995] FCJ No 1020 (QL) at para 31 (TD), Band Councils must operate according to the rule of law and cannot take the law into their own hands.

[82] The Respondents' position that a BCR established the PSB and, therefore, a BCR can dissolve it, ignores this principle. It also ignores the 1977 MOA, which confirms that the PSB is the education authority, and BCR 36 (2009), which confirms that the PSB is accountable to the Band through the election process and is a separate entity from the Chief and Council. The BCR that established the elected PSB also provides how the *PSB Election Procedures* can be amended.

[83] It appears that the PSB was appointed up until 2008. In 2008, the PSB was replaced with an elected board, but the PSB remained responsible for education. The requirements for an elected PSB have not been respected, but the PSB has been recognised by the Council, and apparently by the Band, with its appointed members and it has functioned as the education authority.

[84] Although the Respondents wish to portray education as their collective responsibility to support their view that the Council can assume responsibility for the PSB, the PSB is intended to be independent from Council and it is accountable to the Band.

[85] Whether the Chief or the Council collectively is responsible for the education portfolio does not determine whether Council has the authority to dissolve the PSB. The affidavits of the Respondents state only that there were “some” discussions and an intention that all the Councillors would share the major portfolios including education, but there were no BCRs to reflect this intention. The former Chief Hudson states that, in his experience, portfolios were held based on skill set and other factors and that some portfolios had been shared by two members of Council. Chief Hudson notes that he held the education portfolio for five years during his eight years as Chief. There is no evidence to support the Respondents’ contention that the education portfolio was shared by Council.

[86] On the other hand, there is at least a recent precedent, if not a tradition, for the Chief to hold the education portfolio, given that Chief Hudson held it for five of his eight years. However, being responsible for the education portfolio is distinct from being a member of the PSB, which is a separate entity.

[87] The Respondents’ position that the Chief and Council can amend the *PSB Election Procedures* on their own is based on an erroneous interpretation of Article 11.1. The Respondents’ interpretation of Article 11.1 ignores the principles of statutory interpretation and seeks to parse out the first sentence and have it stand alone without regard to the rest of the

paragraph, which elaborates on the amending procedure. The Respondents' proposed interpretation also ignores the clear wording of BCR 38-2009 which states that the *PSB Election Procedures* "shall remain in effect until such time as the Peguis First Nation band membership so desire to amend or terminate this procedure" [emphasis added].

[88] The Chief and Council do not have the power to amend the *PSB Election Procedures* on their own, nor can they ignore other laws, regulations, and procedures they have put in place for the governance of the Band. Although it is clear that Council has not observed the *PSB Election Procedures* and has recognized the PSB with appointed members, this does not mean that they should continue to do so, or that Council can dissolve the PSB and assume this authority.

[89] The first step is for the Chief and Council to make the necessary amendments to the *PSB Election Procedures*. This requires that the Chief and Council agree on proposals and then take those proposals to the Band for majority approval.

[90] The *PSB Election Procedures* can certainly be amended, but the Band must approve any amendments. Council should work together to bring forward amendments. For example, the current *PSB Election Procedures* do not adequately address how vacancies can be filled and provide only for by-elections if the vacancy arises more than eight months prior to the election. Council could consider whether and how appointments to the PSB could be made in the interim and to ensure a quorum to avoid further concerns arising from resignations of elected members while respecting the intention to have an elected PSB.

[91] Until such time as the *PSB Election Procedures* are properly amended, they remain binding on the Council as do the validly passed BCRs that confirm the mandate of the PSB and that the PSB's reporting relationship is to the Band through the election process.

[92] The conflicting allegations, unsupported by evidence, that the Chief has thwarted the democratic process and that the Respondents have thwarted the Chief's efforts, have not assisted the Court in determining this application. However, these allegations highlight the need for Council to observe the rules they have put in place for governance to avoid further conflict.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Application for Judicial Review is allowed.
2. BCR 38 is quashed and is of no force or effect.
3. As agreed by the parties and as ordered at the hearing, the unofficial transcript of the secretly recorded meetings of May 27, 2016, and June 10, 2016, and the audio recording of those meetings, shall be sealed and shall only be made available to the parties and their Counsel. This includes the exhibits to the affidavits of Cynthia Spence and Mary Tyler Bear that purport to be excerpts of the transcripts those meetings.
4. There is no Order for Costs

“Catherine M. Kane”

Judge

ANNEX "A"

Indian Band Council Procedure Regulations, CRC, c 950

1 These Regulations may be cited as the Indian Band Council Procedure Regulations.

1 Le présent règlement peut être cité sous le titre :
Règlement sur le mode de procédure au conseil des bandes d'Indiens.

Interpretation**Interprétation**

2 In these Regulations,

2 Dans le présent règlement,

Assistant Deputy Minister means the Assistant Deputy Minister, Indian and Eskimo Affairs of the Department;

sous-ministre adjoint désigne le sous-ministre adjoint (Affaires indiennes et esquimaudes) du ministère;

council means the council of a Band elected pursuant to section 74 of the *Indian Act*;

conseil s'entend du conseil d'une bande élu conformément à l'article 74 de la *Loi sur les Indiens*;

Department means the Department of Indian Affairs and Northern Development;

ministère signifie le ministère des Affaires indiennes et du Nord canadien;

Minister means the Minister of Indian Affairs and Northern Development;

ministre désigne le ministre des Affaires indiennes et du Nord canadien;

secretary means the person appointed by the council of a band to record the minutes of the council meetings;

secrétaire s'entend de la personne désignée par le conseil d'une bande pour tenir les procès-verbaux des assemblées de Conseil;

superintendent means the Superintendent or Senior Field Officer of the Indian Affairs Branch in charge of the Agency, and includes the Indian Commissioner for British Columbia, all Regional Supervisors, all Assistants Indian Agency, and any other

surintendant signifie le surintendant ou le fonctionnaire local principal de la Division des affaires indiennes qui a la direction de l'agence, et comprend le commissaire des Indiens pour la Colombie-Britannique, tous les surveillants régionaux, tous

officer acting under the instructions of the Minister or the Assistant Deputy Minister.

les aides des agences indiennes et tout autre fonctionnaire agissant sous l'ordre du ministre ou du sous-ministre adjoint.

Meetings of the Council

Assemblées du conseil

3 (1) The first meeting of the council shall be held not later than one month after its election, on a day, hour and place to be stated in a notice given to each member of the council, and meetings shall thereafter be held on such days and at such times as may be necessary for the business of the council or the affairs of the band.

3 (1) La première assemblée du conseil se tiendra dans un délai d'un mois au plus tard après l'élection, au jour, à l'heure et à l'endroit qui seront indiqués à l'avis communiqué à chacun des membres du conseil, et les assemblées subséquentes se tiendront au jour et à l'heure déterminés, selon ce que requièrent les affaires du conseil ou les intérêts de la bande.

(2) No member of a council may be absent from meetings of the council for three consecutive meetings without being authorized to do so by the chief of the band or superintendent, with the consent of the majority of the councillors of the band.

(2) Aucun membre d'un conseil ne peut être absent à trois assemblées consécutives du conseil sans en obtenir l'autorisation du chef de la bande ou du surintendant, moyennant le consentement de la majorité des conseillers de la bande.

4 The chief of the band or superintendent may, at any time, summon a special meeting of the council, and shall summon a special meeting when requested to do so by a majority of the members of the council.

4 Le chef de la bande ou le surintendant peut en tout temps convoquer une assemblée extraordinaire du conseil et doit convoquer une telle assemblée s'il en est requis par la majorité des membres du conseil.

5 The superintendent shall notify each member of the council of the day, hour and place of the meeting.

5 Le surintendant doit notifier à chaque membre du conseil le jour, l'heure et l'endroit de l'assemblée.

Order and Proceedings

6 A majority of the whole council shall constitute a quorum, but where a council consists of nine or more members five members shall constitute a quorum.

7 If no quorum is present within 1 hour after the time appointed for the meeting, the secretary shall call the roll and take the names of the members then present and the council shall stand adjourned until the next meeting.

8 The chief of the band or, with the consent of the majority of the councillors present at the meeting, the superintendent shall be the presiding officer.

9 (1) Upon a quorum being present, the presiding officer shall take the chair and call the meeting to order.

(2) A chairman shall be chosen

(a) in the absence of the chief, or

(b) where the superintendent is not chosen the presiding officer pursuant to section 8,

from among the members present who shall preside during the meeting or until the arrival of the chief or until the superintendent is chosen as the presiding officer.

Conduite des délibérations

6 Une majorité du conseil en son entier constitue quorum, mais lorsque le conseil est de neuf membres ou plus, cinq membres forment quorum.

7 Si au cours des 60 minutes qui suivent le moment indiqué de l'assemblée il n'y a pas quorum, le secrétaire doit procéder à l'appel et prendre les noms des membres alors présents, et le conseil se trouvera ajourné jusqu'à la prochaine séance.

8 Le chef de la bande ou, avec le consentement de la majorité des conseillers présents à l'assemblée, le surintendant doit remplir la fonction de président.

9 (1) Une fois le quorum constaté, le président doit assumer ses fonctions et déclarer la séance ouverte.

(2) Un président sera choisi

a) en l'absence du chef, ou

b) lorsque le Surintendant n'a pas été désigné pour présider ainsi qu'il est prévu à l'article 8,

parmi les membres présents qui dirigera les délibérations soit jusqu'à l'arrivée du chef, soit jusqu'à ce que le surintendant ait été choisi pour présider.

10 The presiding officer shall maintain order and decide all questions of procedure.

10 Le président doit faire régner l'ordre et décider de toute question de procédure.

11 The order of business at each regular meeting shall be as follows:

11 L'ordre du jour de toute réunion régulière doit être le suivant :

(a) reading (correction, if any) and adoption of the minutes of the previous meeting;

a) lecture (correction, s'il y a lieu) et adoption du procès-verbal de la séance précédente;

(b) unfinished business;

b) travaux non terminés;

(c) presentation and reading of correspondence and petitions;

c) présentation et lecture des lettres et des pétitions;

(d) presentation and consideration of reports of committees;

d) présentation et étude des rapports de comités;

(e) new business;

e) questions nouvelles;

(f) hearing deputations;

f) audition de délégations;

(g) adjournment.

g) ajournement.

12 Each resolution shall be presented or read by the mover, and when duly moved and seconded and placed before the meeting by the presiding officer, shall be open for consideration.

12 Toute motion doit être présentée ou lue par son auteur; une fois qu'elle a été proposée et appuyée en bonne et due forme et soumise à l'assemblée par le président, elle devient sujette à débat.

13 After a resolution has been placed before the meeting by the presiding officer it shall be deemed to be in the possession of the council, but it may be withdrawn by consent of the majority of the council members present.

13 Lorsqu'une motion a été soumise à l'assemblée par le président, le Conseil est censé en avoir été saisi, mais elle peut être retirée avec le consentement de la majorité des membres du conseil présents.

14 When any member desires to speak, he shall address his remarks to the presiding

14 Tout membre qui désire prendre la parole doit s'adresser au président et il

officer and confine himself to the question then before the meeting.

15 In the event of more than one member desiring to speak at one time, the presiding officer shall determine who is entitled to speak.

16 (1) The presiding officer or any member may call a member to order while speaking and the debate shall then be suspended and the member shall not speak until the point of order is determined.

(2) A member may speak only once on a point of order.

17 Any member may appeal the decision of the presiding officer to the council and all appeals shall be decided by a majority vote and without debate.

18 (1) All questions before the council shall be decided by a majority vote of the councillors present.

(2) The presiding officer shall not be entitled to vote but whenever the votes are equal the presiding officer, other than the superintendent, shall cast the deciding vote.

19 Every member present when a question is put shall vote thereon unless the council excuses him or unless he is personally interested in the

doit s'en tenir au sujet à l'étude.

15 S'il arrive que plus d'un membre désire parler en même temps le président déterminera qui a droit de parole.

16 (1) Le président ou tout membre peut rappeler à l'ordre le membre qui a la parole, le débat sera alors suspendu et le membre visé ne doit reprendre la parole tant que la question d'ordre n'a pas été décidée.

(2) Un membre ne peut parler qu'une fois sur une question d'ordre.

17 Tout membre peut en appeler au conseil de la décision du président, et tous les appels se décident à la majorité des voix et sans débat.

18 (1) Toute question soumise au conseil se décidera à la majorité des voix des conseillers présents.

(2) Le président n'aura pas droit de vote; néanmoins, lorsque le vote est également partagé, le président, sauf si c'est le surintendant, doit donner un vote prépondérant.

19 Tout membre présent lorsqu'une question est mise aux voix doit se prononcer, à moins que le conseil ne l'en dispense ou qu'il ne soit

question, in which case he shall not be obliged to vote.

personnellement intéressé en la matière, auquel cas il n'est pas tenu de voter.

20 A member who refuses to vote shall be deemed to vote in the affirmative.

20 Lorsqu'un membre s'abstient de voter, il est réputé donner un vote affirmatif.

21 Whenever a division of the council is taken for any purpose, each member present and voting shall announce his vote upon the question openly and individually to the council and, when so requested by any member, the secretary shall record the same.

21 Lorsqu'une question est mise aux voix au conseil, tout membre présent qui vote doit publiquement et individuellement, devant le conseil, faire connaître quel est son vote sur cette question; à la demande de tout membre, le secrétaire doit consigner le tout au procès-verbal.

22 Any member may require the question or resolution under discussion to be read for his information at any period of the debate, but not so as to interrupt a member who is speaking.

22 Tout membre peut exiger, en aucun moment du débat, que la proposition ou motion à l'examen soit lue pour son bénéfice, mais on doit veiller à ne pas interrompre le membre qui a la parole.

23 (1) The regular meetings shall be open to members of the band, and no member shall be excluded therefrom except for improper conduct.

23 (1) Les assemblées régulières seront accessibles aux membres de la bande, et aucun membre n'en sera exclu, sauf dans le cas de conduite malséante.

(2) The presiding officer may expel or exclude from any meeting any person who causes a disturbance at the meeting.

(2) Le président peut expulser ou exclure de toute réunion une personne qui est cause de désordre à l'assemblée.

24 The council may at the first meeting thereof appoint in lieu of the committee of the whole council the following standing committees:

24 Le conseil peut à sa première réunion constituer à la place du comité plénier du conseil les comités permanents suivants :

(a) Finance;

a) finances;

(b) Roads and Bridges; and

(c) Welfare.

25 The council may appoint special committees on any matters as the interests of the band may require.

26 A majority of the members of a committee shall be a quorum.

27 The chief of the band shall *ex officio* be a member of all committees and be entitled to vote at all meetings thereof, and other members of the council may attend meetings of a committee and may with the consent of the committee take part in the discussion but shall not be entitled to vote.

28 The general duties of standing and special committees are,

(a) to report to the council from time to time as often as the interests of the band may require, all matters connected with the duties imposed on them respectively and to recommend such action by the council in relation thereto as they may deem necessary and expedient; and

(b) to consider and report upon all matters referred to them by the council or by the chief of the band.

b) chemins et ponts; et

c) bien-être.

25 Le conseil peut instituer des comités spéciaux pour examiner toute question, selon ce qu'exigent les intérêts de la bande.

26 La majorité des membres d'un comité constitue quorum.

27 Le chef de la bande sera *ex officio* membre de tous les comités et aura droit de vote à toutes les réunions de ceux-ci; les autres membres du Conseil peuvent assister aux réunions d'un comité et, avec l'assentiment de ce dernier, peuvent prendre part aux délibérations mais n'ont pas droit de vote.

28 D'une façon générale, les attributions des comités permanents ou spéciaux sont

a) de faire rapport au conseil, de temps à autre et aussi souvent que l'exigent les intérêts de la bande sur toute question se rattachant aux attributions qui leur sont respectivement imposées et de recommander que le conseil prenne à ce sujet toute mesure jugée nécessaire et avantageuse; et

b) d'examiner toute question qui leur est soumise par le conseil ou par le chef de la bande et d'en faire rapport.

29 Special meetings of committees shall be called at the request of the chairman or a majority of the committee or, in the absence of the chairman on request of the chief of the band or the superintendent.

30 Any representative of the Minister present at a council meeting may

(a) address the council, and explain to and advise the members thereof upon their powers and duties;

(b) explain to and advise the members thereof upon any question of procedure; and

(c) give such information as may be requested by any member of the council relating to the administration of the affairs of the band.

31 The council may make such rules of procedure as are not inconsistent with these Regulations in respect of matters not specifically provided for thereby, as it may deem necessary.

29 Les réunions extraordinaires de comités seront convoquées sur requête du président ou de la majorité des membres du comité ou, en l'absence du président, à la demande du chef de la bande ou du surintendant.

30 Tout représentant du ministre présent à une assemblée de conseil peut

a) prendre la parole devant le conseil, renseigner et guider ses membres en ce qui concerne leurs attributions et fonctions;

b) renseigner et guider les membres du conseil sur toute question de procédure; et

c) fournir les renseignements qui peuvent lui être demandés par tout membre du conseil en ce qui concerne la gestion des affaires de la bande.

31 Le conseil peut, s'il l'estime nécessaire, établir tout règlement interne, qui ne soit pas en contradiction au présent règlement, en ce qui concerne des points qui n'y sont pas spécifiquement prévus.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1055-16

STYLE OF CAUSE: CYNTHIA SPENCE IN HER CAPACITY AS CHIEF OF PEGUIS FIRST NATION AND GLENNIS SUTHERLAND IN HER CAPACITY AS COUNCILLOR OF PEGUIS FIRST NATION v MARY TYLER BEAR, DARLENE BIRD AND WADE SUTHERLAND, EACH IN THEIR CAPACITY AS COUNCILLORS OF PEGUIS FIRST NATION

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: NOVEMBER 8, 2016

JUDGMENT AND REASONS: KANE J.

DATED: FEBRUARY 13, 2017

APPEARANCES:

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