Federal Court  Cour fédérale

Date: 20171221

Docket: T-2135-16

Citation: 2017 FC 1179

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 21, 2017

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

JÉRÔME BACON ST-ONGE

Applicant

and

THE CONSEIL DES INNUS DE PESSAMIT, RENÉ SIMON, ÉRIC CANAPÉ, GÉRALD HERVIEUX, DIANE RIVERIN, JEAN-NOËL RIVERIN RAYMOND ROUSSELOT, MARIELLE VACHON

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The Pessamit Innu Nation [the Band] is a First Nation located on the North Shore of Quebec. It is subject to the *Indian Act* (R.S.C. (1985), c. I-5) [*Indian Act*] and governed by the Conseil des Innus de Pessamit [the Council], formerly known as the Betsiamites Band Council.

[2] The applicant, Mr. Bacon St-Onge, a member of the Band, is challenging three related decisions, namely (1) the Council's resolution from March 8, 2016, adopting a new customary code, the "Conseil des Innus de Pessamit Election Code" [2015 Code], (2) the Council member elections held on August 17, 2016, under the aegis of the 2015 Code and (3) the decision by Kenneth Gauthier on September 2, 2016, dismissing his objection to the elections held on August 17, 2016.

[3] Mr. Bacon St-Onge essentially argues that the 2015 Code is invalid because the amending procedure provided for under Chapter 9 of the initial customary code, the "Betsiamites Elections Code" [1994 Code], is the only procedure allowing it to be amended and that this procedure was not followed in this case. He also claims that the Council does not possess the inherent power to amend a customary code by way of a resolution and that the proposed amendments do not reflect the broad consensus of the Band. Mr. Bacon St-Onge also submits that the elections held on August 17, 2016, should also be declared invalid because they were held under the aegis of the 2015 Code, which itself is invalid, and because, even if the 2015 Code was valid, numerous irregularities in the election process vitiated the outcome. Finally, he argues that the challenge to the elections that he presented to the review committee [the Committee] was not dealt with according to the established procedure or to the appropriate principles of fairness.

[4] The respondents include the Council, as well as each person elected in the elections held on August 17, 2016, namely Mr. Simon, as Chief, and Mr. Canapé, Mr. Hervieux, Mr. Riverin, Mr. Rousselot and Ms. Riverin and Ms. Vachon as councillors.

[5] The respondents essentially respond that the 2015 Code is valid since the amending procedure set out in the 1994 Code comes into play only if [TRANSLATION] “one or more electors” wish to propose an amendment and not if it is the Council that proposes the amendment. They argue that the Council has the inherent power, including the power to amend the customary code written by simple resolution, inherent powers of which the Council can only be deprived if they are expressly restricted, which is not the case in this case. Furthermore, the respondents submit that the amendments to the 1994 Code were validly adopted given that they were subject to consultations, that they reflected a broad consensus within the Band and that, in any event, they did not significantly amend it. The respondents also consider that the elections held on August 17, 2016, are valid because it was justified not to comply with all of the provisions during the transition period and because the irregularities raised did not affect the outcome of the elections. Finally, the respondents submit that the decision by Mr. Gauthier dated September 2, 2016, was warranted, given that Mr. Bacon St-Onge's complaint was inadmissible.

[6] For the reasons that follow, the Court finds that the 2015 Code was not validly adopted and, therefore, is invalid. The Court will allow Mr. Bacon St-Onge’s application on this ground and will invalidate the 2015 Code as well as the elections held on August 17, 2016, held under its aegis.

[7] However, considering that elections are scheduled for August 2018 under the 1994 Code, and considering the time limits set out in Chapter 9 to implement the amendment mechanism, as appropriate, the Court will suspend the execution of this judgment in order to help preserve the political and administrative stability of the Band.

II. FACTUAL BACKGROUND

A. *The 1994 Code and its amending procedure*

[8] Until 1994, the election of the Chief and council members was governed by sections 74 to 80 of the *Indian Act*; however, in 1994, a written customary code was developed and presented to the community. It is not disputed, then, that the provisions of the 1994 Code reflect the broad consensus of the Band.

[9] On May 24, 1994, the customary code was adopted at the regular meeting of the Council, and it was subsequently submitted to the Minister of Indian Affairs & Northern Development at the time. On July 19, 1994, the Minister amended the Indian Bands Council Elections Order made on December 14, 1989, and exempted the Band from the electoral process provided for under the *Indian Act.* The 1994 Code then came into force (Chapter 10), and henceforth the Chief and councillors comprising the Council had to be chosen via elections held in accordance with this code.

[10] Chapter 9 of the 1994 Code sets out its "internal amendment mechanism." This mechanism provides that "if one or more electors" wants an amendment to be made, they must obtain the written support of half of the electors registered on the electoral list and present this support at a Council meeting at least six months before the elections. If the required number is reached and if the amendment complies with the laws in force, the Council calls a general meeting of the electors in order to submit the proposed amendment. Notice of the general meeting must be posted, and the proposed amendment must be discussed during the meeting.

Then, and for a period of time determined by the Council, a registry must be opened so that the electors and record any objections. The amendment is accepted if the number of electors opposed to the amendment is less than half of the electors included on the electoral list.

[11] In 2015, the Band had 2,773 registered electors, and the rounded half of which is 1,387 electors.

[12] The 1994 Code also provides that the elections shall be held around August 17 during an election year (section 3.4), that the Chief and councillors are elected for a two-year mandate (section 3.2) and that the Chief and the councillors assume their duties on the first month following the elections (section 3.3), i.e., on or about September 17 during the election year.

B. *2015 Code*

[13] According to information in the record, following the election held in August 2014, the Council decided to significantly reform the institutions and mechanisms under its jurisdiction. Thus, in 2014 the Council initiated a process to amend Code 1994. Frank Hervieux was then appointed to lead the comprehensive and in-depth reform of the 1994 Code with the aim of improving transparency and oversight of the electoral mechanism.

[14] The 2015 Code was thus developed and proposed. It provides for, among other things, a four-year term instead of a two-year term (section 6.2), the moment of swearing-in of newly elected members (section 6.3), the end of the term of the Chief and the councillors on the second Monday of an election year (section 6.4), an increase in the deposit paid by candidates (section

6.10), the holding of an election on the second Monday of July instead of on or about August 17 (section 6.9), the creation of a committee charged with reviewing election-related complaints and objections and with inquiring into a revocation process (section 6.11), the mandatory support of five individuals in order to submit a candidacy (section 7.5), a more specific provision regarding the revocation process of an elected official (Chapter 12), as well as an amending procedure of the electoral code on the initiative of one or more electors requiring the written support of 200 registered electors instead of [TRANSLATION] "at least half of the electors registered on the electoral list" (section 14.1).

[15] In 2014 and 2015, the proposed new 2015 Code was submitted to councillors and the general population through public information sessions and the publication of the proposed text within as well as outside of the territory of the reserve or the Band. The Council also published the proposed text on the Council's website and through periodicals, public postings, radio messaging and private mail.

[16] On July 21, 2015, the Council passed a resolution to submit a question to the electors by way of a referendum and to schedule the referendum for July 30, 2015. The French version of this question read "Êtes-vous d'accord avec le nouveau code électoral du Conseil des Innus de Pessamit, version 2015, et que celui-ci soit appliqué à partir des élections du 17 août 2016?" [Do you agree with the new 2015 version of the Conseil des Innus de Pessamit electoral code and that it be effective starting from the elections on August 17, 2016?].

[17] The resolution stipulated, among other things, that in respect of recitals the [TRANSLATION] "the new electoral code will only be effective if the majority of the members are in favour of the referendum vote."

[18] In the days following the referendum, the electoral officer prepared two sworn statements confirming the result (Exhibit P-3 of the applicant's record and Exhibit D-2 of the respondents' record). The electoral officer confirmed that the referendum was held on the scheduled date, that the names of the 2,273 electors were on the list of electors, that 572 ballots were cast, of which 278 were marked with "yes," 276 were marked with "no" and 18 ballots were voided. In one of these sworn statements, the electoral officer referred to section 9.1(a) of the 1994 Code and found that [TRANSLATION] "the amendment to the electoral code is rejected because the required number has not been reached," but she did not mention this in the other statement.

[19] On December 17, 2015, the secretary-registrar of the Council sent a memo to Council members regarding the 2015 Code and the amendment referendum. He essentially noted that Council did not have the power to amend the 1994 Code without complying with the mechanism provided for in Chapter 9 of the code, given that the code belongs to the Band, not the Council, and that the initial statement of the referendum results was modified.

[20] In his affidavit, the secretary-registrar, who also drafted the 1994 Code, stated that he met with Council members in January 2016 to remind them that they must follow Chapter 9 to make amendments to the 1994 Code.

[21] On March 8, 2016, the Council adopted the 2015 Code and confirmed its coming into force for the elections on August 17, 2016, by way of a resolution. The Court notes that in respect of recitals, the resolution confirmed that a final draft of the 2015 Code was submitted to members of the community by referendum vote, but that it does not refer to the only condition set out in the resolution from July 21, 2015, requiring that [TRANSLATION] "the majority of members" must be in favour (Exhibit P-5 of the applicant's record).

[22] It should be noted that the front page of the 2015 Code states that it was [TRANSLATION] "adopted on July 30, 2015," the date of the referendum. In their affidavits, the respondents also refer to the fact that the 2015 Code was accepted or adopted by way of a referendum on July 30, 2015 (para 25 of René Simon's affidavit, para 9 of Mr. Canapé's affidavit and para 29 of Mr. Hervieux's affidavit).

[23] However, section 15.1 of the 2015 Code actually states that [TRANSLATION] "the 2015 electoral code shall enter into force upon adoption, by the Council, of a resolution to that effect," which was in fact on March 8, 2016.

[24] On May 25, 2016, Mr. Bacon St-Onge learned that the 2015 Code had been adopted.

C. *Objection to the 2015 Code*

[25] On June 3, 2016, Mr. Bacon St-Onge, Mr. Picoutlaigan and Mr. Bacon signed a letter addressed to the Council challenging the process of draft amendments to the electoral code and outlined their reasons. On June 21, 2016, having yet to receive any response, Mr. Bacon St-Onge

sent formal notice to the Council demanding that it reply to the objection from the previous June 3. On June 30, 2015, Mr. Gauthier, the Council's representative, asked Mr. Bacon St-Onge to send him specific reasons for the challenges as well as the case law and legislative provisions on which the challenge was based. On July 14, 2016, Mr. Bacon St-Onge sent the particulars to Mr. Gauthier, and on August 12, having received no response, he sent a reminder letter to Mr. Gauthier.

[26] On August 15, 2016, Mr. Bacon St-Onge received Mr. Gauthier's letter dated August 3, 2016. Mr. Gauthier essentially responded that the process of adopting the 2015 Code was conducted legally and democratically, that the community of Pessamit was duly consulted and informed so that the 2015 Code was representative of the will of the population, that no one had raised any objections and that Mr. Bacon St-Onge's participation as a candidate in the elections now prevented him from challenging the process of adopting the electoral code.

[27] On August 22, 2016, Mr. Bacon St-Onge reiterated his objection in a letter addressed to Mr. Gauthier.

D. *The elections of August 17, 2016*

[28] The minutes from the policy meeting held on June 9, 2016, which was attended by four (4) councillors, note the adoption of a resolution scheduling the elections for August 17, 2016, notwithstanding section 6.9 of the 2015 Code adopted on March 8 of the same year, which states that the election instead takes place on the second Monday of July.

[29] Furthermore, on June 23, 2016, the Council adopted another resolution to the same effect, and in addition appointed the electoral officer.

[30] However, the Council did not take any further action to extend the term of the elected officials, which ended on the second Monday in June (section 6.4 of the 2015 Code), and the elected officials remain in office after this date.

[31] On July 8, 2016, Mr. Bacon St-Onge submitted his candidacy for councillor.

[32] On August 17, 2016, the elections were held, and the respondents were elected Chief and councillors on the Council. On September 4, the elected officials were sworn in.

E. *Complaint submitted to the Committee*

[33] On July 12, 2016, the Council adopted a resolution appointing three individuals to form the Committee provided for in section 6.11 of the 2015 Code.

[34] On August 23, Mr. Bacon St-Onge signed a letter addressed to the electoral officer to file a formal objection against the election held on August 17, 2016, alleging in particular various factual elements that reportedly compromised the integrity of the electoral process.

[35] Mr. Gauthier sent two emails to Mr. Bacon in response. In the first email he stated that the Council's headquarters cannot act on his challenge, and in the second he pointed out that his

complaint was inadmissible under section 11.1 of the 2015 code and that it should not be submitted to the Council.

III. POSITION OF THE PARTIES

A. *The applicant's position*

(1) Evidence before the Court

[36] In addition to his affidavit, the applicant submitted affidavits of four individuals: Ms. Paul, Ms. Crépeau, Mr. Vollant and Ms. Rock.

(2) Time limit

[37] On December 6, 2016, the Honourable Madam Justice Tremblay-Lamer allowed the applicant's motion for an extension of time. Specifically, the applicant argued that the Court was not required to address the issue of non-compliance with the time limit set out in subsection 18.1(2) of the *Federal Courts Act,* RSC 1985, c. F-7.

(3) Standard of review

[38] First, Mr. Bacon St-Onge stated that a Band Council's decisions may be challenged before the Federal Court (*Vollant v Siouis*, 2006 FC 487 at para 25; *Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796 at para 36 [*Hill*] and *Sparvier v Cowessess Indian Band*, [1993] 3 FC 142 (Trial Division) [*Sparvier*]).

[39] Mr. Bacon St-Onge submits that the issues raised in this case should be reviewed on the correctness standard and that no deference is owed by the Court to the decision-makers (*Jackson v Piikani First Nation*, 2008 FC 130; *Joseph v Shielke*, 2012 FC 1153 at para 25 [*Joseph*]). He also submits that the questions of whether the Council exceeded its jurisdiction or whether there is a reasonable apprehension of bias are also subject to the correctness standard (*Prince v Sucker Creek First Nation*, 2008 FC 1268 at para 21; *Hill* at para 45).

(4) 2015 Code

[40] Mr. Bacon St-Onge argues that the Council must respect the rule of law, and he refutes the respondents' allegation that the Council is the supreme governing body of the Pessamit Innu Nation (*Nation crie de Long Lake c Canada (Ministre des Affaires indiennes et du Nord)* [1995] ACF no 1020 at para 31 [*Nation crie de Long Lake*], *Balfour v Norway House Cree Nation*, 2006 FC 213 at para 12 [*Balfour*]).

[41] Mr. Bacon St-Onge submits that the 1994 Code belongs to the Band, that the Council does not have inherent powers to amend it by resolution and that paragraph 2(3)(b) of the *Indian Act* invoked by the respondents does not confer any inherent powers on the Council.

[42] Mr. Bacon St-Onge maintains that the 1994 Code was adopted following extensive consultation and reviews, that it codifies that Bands customs, that it belongs to the Band and that the Council must follow the procedure set out in Chapter 9 (*Gabriel v Mohawk Council of Kanesatake*, 2002 FCTD 483 at para 21) to amend it. Consequently, the amendment process may only be initiated by [TRANSLATION] "one or more electors" and amendments can only be adopted

if the proper procedure is followed. According to Mr. Bacon St-Onge, this approach is consistent with the principle that the 1994 Code belongs to the Band and not the Council.

[43] Mr. Bacon St-Onge also submits that the amendments to the 1994 Code have significant consequences for the Band, including extending the term of the elected officials. He argues that when the rights and interests of Band members are affected by a Council's decision, the Band must be notified in a transparent and intelligible manner of the facts justifying the decision, failing which the decision must be set aside (Jack Woodward, *Native Law*, Toronto, Carwell, 2017 at para 7–1211).

[44] Mr. Bacon St-Onge therefore argues that the 2015 Code is invalid because the sole amendment mechanism, that which is provided for in the 1994 Code, was not complied with. He relies on *Joseph,* in which Phelan J. decided that an amendment to the electoral code was invalid because the amendment process set out in the code had not been followed.

[45] Mr. Bacon St-Onge also notes that the respondents cannot invoke the *First Nations Election Act,* S.C. 2014, c. 5 [*First Nations Election Act*] to justify adopting the 2015 Code by resolution, since this law does not apply to the Band

(5) Challenge to the election on August 17, 2016

[46] Mr. Bacon St-Onge submits that the invalidity of the 2015 Code results in the invalidity of the 2016 election held under the aegis of the 2015 Code.

[47] Furthermore, Mr. Bacon St-Onge argues that even if the 2015 Code is valid, the Council's election is still invalid because numerous provisions of the 2015 Code were not respected during the August 17, 2016, there were many irregularities and the results of the election were therefore flawed.

(6) Decision following the complaint submitted to the Committee

[48] Mr. Bacon St-Onge argues that the complaint that he submitted to the Committee regarding the elections on August 17, 2016, was not handled in accordance with the 2015 Code, namely that it was not reviewed and brought before the Committee. He claims that neither Mr. Gauthier nor Council headquarters were able to respond to his complaint. Under the provisions of Chapter 11 of the 2015 Code, only the Committee can make a decision with respect to an objection to the election.

[49] Mr. Bacon St-Onge claims that the Committee never served his complaint to the candidates (section 11.5 of the 2015 Code) and that he was never called to testify as part of an investigation by the review committee (section 11.9 of the 2015 Code). Finally, Mr. Bacon St-Onge submits that his participation as a candidate in the elections held on August 17, 2016, in no way represents a ratification of the 2015 Code, as the respondents argue. He recalls submitting his initial challenge on June 3, 2016, even before the election was confirmed and before he became a candidate.

(7) Harm

[50] Mr. Bacon St-Onge submits that the respondents would not suffer any harm and that it would be the Band members who would suffer significant harm if the application for judicial review is not allowed. He argues that the application for judicial review is in the public interest because it deals with the validity of the 2015 Code and the 2016 elections.

(8) Respondents' affidavits

[51] The applicant submits that several of the allegations in the affidavits do not relate to the facts of which the declarant was personally aware (subsections 81(1) and (2) of the *Federal Courts Rules* SOR/98-106 [the Rules]) and that they could therefore give rise to adverse findings.

B. *Respondents' position*

(1) Evidence submitted by the respondents

[52] Each of the respondents submitted an affidavit, as well as Mr. Bacon, the electoral officer, Ms. Létourneau, councillor and legal support during the 2016 election and Mr. Hervieux, who was in charge of the amendment process of the 1994 Code.

(2) Time limit

[53] First, the respondents submit that Mr. Bacon St-Onge did not file his application for judicial review within the time limit set out in subsection 18.1(2) of the *Federal Courts Act* and that his application should be dismissed. At the hearing, they expressed the belief that the Court

could reconsider this issue despite the order made by Tremblay-Lamer J. allowing the request for an extension of time.

(3) Standard of review

[54] The respondents submit that the standard of review that applies to decisions relating to the interpretation of an electoral code and the jurisdiction of a Band Council is the reasonableness standard. They point out that the correctness standard in *Martselos v Salt River First Nation*, 2008 FC 8 is no longer used to conduct a judicial review of decisions relating to the interpretation of election by-laws. They rely on subsequent decisions by the Federal Court of Appeal, including *Fort McKay First Nation v Orr*, 2012 *FCA 269* [*Fort McKay First Nation*] *and D'Or v St. Germain*, 2014 FCA 28 [*D'Or*], as well as on the Federal Court decision in *Testawich v Duncan's First Nation*, 2014 FC 1052 [*Testawich*].

(4) Validity of the 2015 Code

[55] The respondents submit that the wording [TRANSLATION] "If the electors" of section 9.1 of the 1994 Code clearly establishes that the provision refers to the procedure to be followed when *the electors* wish to make an amendment but not to the procedure to be followed when *the Council* wishes to make an amendment. According to the respondents, it is not necessary to have a provision for the process to be followed when the Council would like to amend the 1994 Code because it has an inherent power to do so.

[56] The respondents submit that the Council is sovereign and has the power to amend the 1994 Code by simple resolution since it has not abdicated its inherent power to do so and there is no legislative provision limiting its jurisdiction.

[57] In their memorandum, the respondents refer to the *Indian Act* and the *First Nations Election Act* to support their argument that the Council has inherent power, although they do not specify the relevant provisions. However, during the hearing, the respondents stated that the Council's inherent powers arise from paragraph 2(3)(b) of the *Indian Act*, which is reproduced in the Appendix, and that these inherent powers include the power to amend the 1994 Code by simple resolution, a power that the Council can exercise because it has not been expressly limited.

[58] With respect to the *First Nations Elections Act,* the respondents noted that paragraph 3(1)(a), reproduced in the Appendix, allows a First Nation to become a participating First Nation under this Act by a simple resolution. Thus, this would be an indication that the Council can amend the 1994 Code by resolution.

[59] Furthermore, the respondents submit that the process followed by the Council to adopt the 2015 Code meets the criteria developed in the case law to recognize the Band custom since the process was public and the amendments received a broad consensus within the Band (*Awashish v Opitciwan Atikamekw First Nation*, 2007 FC 765 [*Awashish*] and *Taypotat v Taypotat*, 2012 FC 1036). The respondents point out that the notion of a broad consensus must be interpreted flexibly (*Awashish,* at paras 40, 41 and 44).

[60] In this regard, the respondents allege that the proposed amendments were widely disseminated, that they were submitted to the Band by way of a referendum on July 30, 2015, that the result of the referendum accurately reflects the broad consensus within the Band since the electors who refrained from voting must be considered to have expressed their approval and that the adoption of the code was challenged only by Mr. Bacon St-Onge.

[61] The respondents submit that the applicant did not receive support from other Band members to challenge the 2015 Code, that, moreover, he ratified the 2015 Code by running as a candidate in the elections and that his only objection involved the extension of the elected officials' terms.

[62] The respondents add that, in any event, the amendments made to the 1994 Code did not change democratic principles and that they are intended only to extend the term of elected officials from two to four years and to improve transparency and protect the electoral system. In short, the amendments to not warrant imposing a rigid procedural straitjacket.

(5) Challenge to the election on August 17, 2016

[63] The respondents argue that, in general, the irregularities raised by the applicant are procedural in nature and have no effect on the outcome of the vote.

[64] They state that it was a transitional election between the two codes and that adaptations were necessary but did not compromise the electoral process (*Pahtayken v Oakes*, 2009 FC 134 at para 76–77, and *Poker v Innus Mushuau First Nation*, 2012 FC 1).

[65] They submit that the applicant is challenging the 2015 Code and the 2016 election because he was not elected as a councillor.

(6) Complaint submitted to the Committee

[66] The respondents argue that the complaint submitted to the Committee was indeed inadmissible because it did not refer to a specific candidate and, therefore, did not comply with sections 11.6 and 11.10 of the 2015 Code.

(7) Harm

[67] The respondents submit that they will suffer irreparable harm if the Court allows the applicant's applications. They point out that they were democratically elected and that the applicant did not challenge the outcome of the vote. They state that the applicant is asking the

Court to reject the democratic expression of the electors without any justification or legal ground. They also argue that the deposits paid by the applicant are non-refundable.

(8) The respondents' affidavits

[68] The applicants contend that the applicant's allegations are without merit.

IV. ISSUES

[69] According to the parties' submissions, this case raises the following issues:

A. Should the Court consider the respondents' claim that the application for judicial review is out of time?
B. Which standard of review should the Court apply?
C. Does the Council possess the inherent power to amend the 1994 Code by resolution?
D. Does the adoption of the 2015 Code reflect a broad consensus within the Band?
E. Should the elections be cancelled?
F. Is the September 2 decision reasonable?
G. Are the respondents' affidavits valid?
H. If they are allowed, would the applicant's requests cause irreparable harm to the respondents and to the community as a whole?
I. What remedies can the Court grant?

V. ANALYSIS

A. *Time limit*

[70] On December 6, 2016, Madam Justice Tremblay-Lamer allowed the applicant's motion for an extension of time. Therefore, the Court does not have to consider the issue of non-compliance with the time limit set out in subsection 18.1(2) of the *Federal Courts Act*, and the respondents' argument in this regard is without merit.

B. *Standard of review*

[71] The Court agrees with the respondents' position and will apply the reasonableness standard in assessing the issue of interpreting the provisions of an electoral code. Specifically, in the recent Federal Court of Appeal and Federal Court decisions cited by the respondents (*Fort McKay First Nation* and *D'Or*, as well as in the *Testawich* decision made by Mosley J.), the Court established that it was no longer the correctness standard that applied to interpretation of provisions of an electoral code, but rather the reasonableness standard. "However, Justice Stratas in *Fort McKay First Nation v Orr*, 2012 FCA 269 at para 11, noted that the reasonableness standard, in this type of review, is similar to the correctness standard and that the decision must be supported by the words of the election legislation, or another source of power" (*Mckenzie v Lac La Ronge Indian Band*, 2017 FC 559 at para 39).

C. *Does the Council have inherent powers allowing it to amend the 1994 Code by resolution?*

[72] The respondents assert that they are not bound by the amendment mechanism provided for in Chapter 9 of the 1994 Code because they have an inherent power to amend the electoral code, the source of which is found in paragraph 2(3)(b) of the *Indian Act*. In this provision, however, it is a question of powers conferred and not inherent powers. Furthermore, in *Bone v Sioux Valley Indian Band No. 290*, [1996], 107 FTR 133, [1996] 3 CNLR 54 [*Bone*], the Court, although called upon the interpret paragraph 2(3)(a) of the *Indian Act*, nonetheless confirmed that "[section 2] is a "definition" provision rather than an "empowering" provision" and that the Band's power to choose the methods of selecting its Council members is not a conferred power

but rather an inherent power of the Band (*Bone*, at paras 31 to 34). Thus, the inherent power, if any, belongs to the Band, not the Council.

[73] The respondents also rely on the wording of section 3 of the *First Nations Elections Act*, which allows a First Nation to become a participating First Nation within the meaning of that Act by way of a simple resolution. First, it should be noted that the Band is not a participating First Nation and that, consequently, this law does not apply to its elections. Furthermore, to provide the Council with the power to proceed by way of resolution in such a case may instead suggest that the Council does not have inherent power in this respect.

[74] Finally, the Court notes that the respondents did not submit any case law to support their argument.

[75] It seems appropriate to reiterate from the outset that the 1994 Code was adopted following a demanding process and extensive consultations, and it is not disputed that it fully represented at the time of its adoption a broad consensus within the Band with respect to its custom. The Council could not pass, alone and by way of a resolution, the first customary code, in this case the 1994 Code, to exempt the elections from the processes set out in sections 74 to 80 of the of the *Indian Act.* At the very least, it would seem inconsistent to grant the Council the powers to then amend it as it saw fit by way of a simple resolution.

[76] Furthermore, given that the parties have not raised any indications to the contrary, there is every reason to believe that the 1994 Code has been used and followed by the Band for over 20 years.

[77] The Court has certainly recognized that the Chief and the councillors have expertise in interpreting Band Custom and that considerable deference must be accorded to their decisions (*Shotclose v Stoney First Nation,* 2011 FC 750 at paras 58–59). However, it should be noted once again that the power to define custom belongs to the Band and not the Council (*Bone*, at paras 31 to 34).

[78] The respondents also argue that the amending procedure set out in the 1994 Code does not apply to the Council because of its wording, reserving the initiative of the amendment to [TRANSLATION] "one or more electors," and that it is not required to comply with it. Council members must be electors according to section 3.5 of the 1994 Code, which stipulates that an elector means a person on the band list who is eighteen years of age. The provision does not seem to exclude members of the Council, because in order to be a candidate in an election, a person must precisely have standing as an elector (subsection 4.1(a) of the 1994 Code).

[79] The Court agrees with the applicant's position that the Council must respect the rule of law an democracy and, therefore, follow the amending procedure provided for in the 1994 Code, which was validly adopted by the Band (*Long Lake Cree Nation* at para 31, cited by the Court in *Balfour*, at para 12).

[80] The respondents did not submit any authority or decision to support their position, and they have not satisfied the Court of the merits of their arguments. The Court cannot find that the Council has inherent powers, including the power to amend the 1994 Code by way of a resolution.

[81] The amendments should have instead been made in accordance with the amending process set out in the 1994 Code. In *Joseph,* at paras 28, 34, 44 and 45, the Court determined that if a custom election code provides for an amending procedure for this code, then it must be followed.

[82] The Council's decision to adopt a new Code by a resolution therefore seems unreasonable and incorrect.

D. *Does the adoption of the 2015 Code reflect a broad consensus within the Band?*

[83] If the Court found that the Council held the inherent powers that it claimed and that it was not subject to Chapter 9 of the 1994 Code, the amendments to the 1994 Code would have had to have been subject to a "broad consensus" as defined in the case law, because it is an amendment to custom. The Court must therefore verify whether the amended proposals were subject to broad consensus, as the respondents argue: *Bigstone v Big Eagle* [1992] FCJ No. 16, [1993] 1 CNLR 25 (FCTD), *McLeod Lake Indian Band v Chingee,* [1998] FCJ No 1185, [1999] 1 CNLR 106 (Fed. T.D.) at paras 12 and 13 [*McLeod Lake Indian Band*].

[84] Specifically, the respondents submit that the Council followed an acceptable democratic process, that the proposed amendments were the subject of a broad consensus within the Band, that only the applicant objected and that the electors who refrained from voting in the election should be counted as those who approved the amendments. Thus, the criterion allowing for the adoption of a new custom was allegedly met.

[85] In this case, the amendment mechanism provided for in the 1994 Code required *a priori* written support of half of the Band members in order to made an amendment. In addition, the very wording of the resolution passed on July 21, 2015, to submit the referendum question required that [TRANSLATION] "the new electoral code will only come into force if the majority of the members are in favour of the referendum vote."

[86] However, as mentioned above, only 572 members of the 2,273 persons on the electoral list participated in the referendum, which represents a turnout of 25%, well below the required 50%, and only two votes separated the members in favour of the amendments from those against the amendments, i.e., 278 in agreement and 276 in disagreement, with 18 ballots rejected.

[87] In addition, the applicant and two other electors challenged the elections, and the referendum's electoral officer as well as the secretary-registrar stated that the proposed amendments could not be adopted because there was not enough support. The Council did not put in place a formal objection process and did not notify the Band of the adoption of the 2015 Code after the resolution from March 8, 2016, was passed.

[88] In light of these facts, the Court cannot agree with the respondents' position that the electors who refrained from voting in the referendum should be considered as having supported the proposed amendments. This general statement was certainly endorsed, for example, in *McLeod Lake Indian Band*, but in that case, the Band did not have an amendment processes for the electoral system, as is the case here. Furthermore, at paragraph 30 of *Francis v Mohawk Council of Kanesatake* FCTD 115, the Court noted that "approval by a majority of the adult members of the Band is probably a safe indication of a broad consensus" and that "[w]hether a majority decision by the Band members attending a general meeting demonstrates a broad consensus depends on the circumstances of that meeting."

[89] Thus, the current circumstances do not support the conclusion that the individuals who refrained from voting should be considered to have approved the amendments.

[90] The Court cannot agree with the respondents' position that the 2015 Code does not significantly change the 1994 Code. A change in the term of office of the elected official is not minor or insignificant, and this change alone is sufficient to refute the respondents' argument.

E. *Should the elections be cancelled?*

[91] Having found that the 2015 Code is invalid, the elections held on August 17, 2016, under this code must be invalidated and cancelled.

F. *Is the September 2 decision reasonable?*

[92] The Court is not required to consider this subsidiary issue given that it allowed the applicant's application to set aside the elections as a result of the invalid adoption of the 2015 Code.

G. *Are the respondents' affidavits valid?*

[93] The applicant argues that many of the allegations in the respondents' affidavits are based on their opinions and deal with questions of law that should be decided by the Court, but he did not identify specific paragraphs and did not ask to have them struck. Therefore, the Court will not invalidate these affidavits.

H. *Harm*

[94] The Court is of the opinion that it does not have to decide this question because the harm test is usually included in an application for an injunction. Furthermore, neither the applicant nor the respondents submitted arguments in this regard.

I. *Remedies*

[95] Under section 18 of the *Federal Courts Act*, "the Federal Court has exclusive original jurisdiction to issue an injunction, writ of *certiorari*, writ of *prohibition*, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal."

[96] In particular, the applicant sought injunctions. However, he did not submit arguments regarding the tripartite and conjunctive test requiring an applicant to establish that there is a serious issue for trial, that denial of the relief sought would cause irreparable harm and that the balance of convenience favour the granting of the relief sought (*RJR Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311).

[97] The applicant did not satisfy the Court regarding the refund of the sureties deposited for the Court. It should also be noted that the Court cannot award damages in an application for judicial review (*Canada (Citizenship and Immigration) v Hinton*, 2008 FCA 215 at para 45).

[98] The Court refers to the comments by Madam Justice Strickland in *Beardy v Beardy*, 2016 FC 383 at para 153, who, citing *Ballantyne v Nasikapow*, [2000] FCJ No.1896 at para 79, stated that jurisprudence demonstrates that this Court may fashion a remedy appropriate to the circumstances. This exercise of discretion contemplates that a Court deciding upon the timing of the effect of its quashing order to ensure, as far as possible, that the effect of its order does not cause unnecessary disruption to the administration of the band (*Sparvier*, at para 101).

[99] Thus, the Court will suspend the judgment in order to allow, if necessary, an amendment to the 1994 Code in accordance with the process provided for in Chapter 9 of the 1994 Code. Otherwise, the elections shall be held on or about August 17, 2018, under the aegis of the 1994 Code and as provided for therein.

J. *Costs*

[100] Within 30 days following the judgment, the parties shall submit their written submissions with respect to costs. The submissions shall not exceed five pages.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The application for an order of *certiorari* is allowed. The Council's resolution from March 8, 2016, is cancelled; the 2015 Code is declared invalid; the election held on August 17, 2016, is cancelled.
3. It is hereby declared that the 1994 Code remains in force.
4. However, the order of *certiorari* is hereby suspended until the next elections in order to allow the Pessamit Innu Nation to amend the 1994 Code, if such is the consensus, and that these amendments shall be implemented in accordance with the amendment requirements of the 1994 Code.
5. If the 1994 Code is not amended, the elections shall be held on the scheduled date, i.e., on or around August 17, 2018; if the 1994 Code is amended, then the elections shall be held on the date set out in the new Code.
6. The current Chief and Council shall continue to carry out their duties and administer the affairs of the Pessamit Innu Nation normally until the next elections.
7. The parties shall make submissions with respect to costs within 30 days in accordance with the aforementioned reasons.

"Martine St-Louis"

Judge

APPENDIX

***Indian Act* (RSC, 1985, c I-5)**	***Loi sur les Indiens*, LRC (1985), ch I-5**
2(3)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.	2(3)b) un pouvoir conféré au conseil d'une bande est censé ne pas être exercé à moins de l'être en vertu du consentement donné par une majorité des conseillers de la bande présents à une réunion du conseil dûment convoquée.
***First Nations Elections Act* (S.C. 2014, c. 5)**	***Loi sur les élections au sein de premières nations* (LC 2014, ch 5)**
3(1) The Minister may, by order, add the name of a First Nation to the schedule if	3(1) Le ministre peut, par arrêté, ajouter le nom d'une première nation à l'annexe dans les cas suivants :
(a) that First Nation's council has provided to the Minister a resolution requesting that the First Nation be added to the schedule;	a) le conseil de la première nation visée lui fournit une résolution dans laquelle il lui en fait la demande;

[TRANSLATION]

***The Betsiamites Band Council Electoral Code* (1994 Code)**

Chapter 9 Internal amendment mechanism

9.1 If one or more electors wishes to amend this code, the following procedure shall be followed:

a) An elector seeking an amendment must have the written support of at least half of the electors registered on the electoral list;

b) At least six months before the next election the elector shall present this support at a meeting of the Betsiamites Band Council, which shall convene a general meeting of electors in order to

present this amendment to them subject to the following conditions:

1- If the required number is reached; and

2- If the amendment complies with the laws in force;

c) The Director General of the Council must then post at least two weeks before a notice of the general meeting in at least two public locations within the community. This notice must indicate the date, location, time and purpose of the meeting;

d) Following the general meeting at which the amendment has been discussed, a register kept by an individual appointed by the Council shall be opened for a period of time determined by the Council in order to record any objections to the amendment. The details regarding this register will be communicated to the general population.

e) Unless more electors record their objection as outlined in paragraph (a) of this section, the amendment shall be made to the code and will take effect on the first Monday after the register is closed.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2135-16
STYLE OF CAUSE:	JÉRÔME BACON ST-ONGE v THE CONSEIL DES INNUS DE PESSAMIT, RENÉ SIMON, ÉRIC CANAPÉ, GÉRALD HERVIEUX, DIANE RIVERIN, JEAN-NOËL RIVERIN, RAYMOND ROUSSELOT, MARIELLE VACHON
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	OCTOBER 16, 2017
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	DECEMBER 21, 2017

APPEARANCES:

François Boulianne	FOR THE APPLICANT
Kenneth Gauthier	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Neashish & Champoux Québec, Quebec	FOR THE APPLICANT
Kenneth Gauthier Québec, Quebec	FOR THE RESPONDENTS