Federal Court  Cour fédérale

Date: 20240305

Docket: T-1982-22

Citation: 2024 FC 367

Ottawa, Ontario, March 5, 2024

PRESENT: THE CHIEF JUSTICE

BETWEEN:

DAVID THOMAS HUNT

Applicant

and

**ELECTED KWAKIUTL BAND CHIEF AND COUNCIL,
NATASHA WILSON, MARGARET WILSON,
ALEX WILSON, BARNEY WILSON,
PARKER HUMCHITT, MICHELLE HUNT, MARC PEELER**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] At its heart, this Application for judicial review concerns a dispute regarding the custom of the Kwakiutl (or Kwagiutl) First Nation ("**KFN**") for selecting its leaders.

[2] The Applicant, who prefers to be called by his traditional name, Humzidi, maintains that, for thousands of years, the Kwakiutl people have appointed their leaders rather than electing them. He asserts that, pursuant to Kwakiutl custom, each Kwakiutl family appoints one member of that family to act as its representative. The Applicant further asserts that he is the eldest descendant of the former Head Chief of the Kwakiutl, and as such, he is the rightful Head Chief of the Kwakiutl. He underscores that this process of selecting leaders does not involve any voting or elections.

[3] The Respondents maintain that since at least 1981, the KFN's custom has been to elect leaders pursuant to a custom Election Code that is based on a democratic voting process.

[4] For the reasons that follow, I find that the evidence corroborates the Respondents' position. Stated differently, the Applicant has not met his onus of demonstrating that the KFN's custom for selecting its leaders is as he describes. This is a determinative issue, and provides a sufficient basis for dismissing this Application.

II. Background

[5] The KFN is an Indigenous Nation comprising approximately 900 registered members. Those members are located near Port Hardy, British Columbia, with traditional territory stretching along the northwest coast of Vancouver Island, across the Queen Charlotte Strait, and onto coastal and inland areas of British Columbia.

[6] KFN is a "band" under section 2(1) of the *Indian Act*, RSC 1985, c I-5 (the "***Act***"). It maintains a band office at 99 Tsakis Way, Port Hardy, BC V0N 2P0.

[7] According to the Applicant, the Kwakiutl of Tsaxis village were forced to amalgamate with two other villages in 1964. It then took them until approximately 1981 to reverse that amalgamation.

[8] On July 31, 1981, the KFN became a "custom election band." The present dispute concerns the nature of the KFN's custom, insofar as the selection of its leaders is concerned.

[9] The Applicant maintains that in 1981, "Kwagiutl Born Kwagiutls" rejected the KFN's process of selecting their leaders through elections, and that they have been trying to "fix" that process ever since. His efforts in that regard included allegedly restarting "Custom Appointments" in 2018, and attempting to enlist the support of Indigenous Services Canada ("**ISC**"), particularly in correspondence exchanged in 2020 and 2021. In addition, he and four other representatives of "Kwakiutl Born" families sent an Eviction Notice, dated October 7, 2021 (the "**Eviction Notice**") to the members of the KFN's band Council.

[10] Among other things, the relief sought in this Application includes Orders (i) enforcing the Eviction Notice, (ii) requiring the KFN's Band Council to cease and desist acting for the KFN until this matter is resolved, (iii) requiring ISC to honour "Kwagiutl Customs", and (iv) setting aside and striking all Kwakiutl band Election Codes that provide for elections, nominations and voting.

III. Relevant Legislation

[11] Under subsection 2(1) of the Act, "council of the band" is defined as follows:

council of the band means	**conseil de la bande**
(a) in the case of a band to which section 74 applies, the council established pursuant to that section,	**a)** Dans le cas d'une bande à laquelle s'applique l'article 74, le conseil constitué conformément à cet article;
(b) in the case of a band that is named in the schedule to the *First Nations Elections Act*, the council elected or in office in accordance with that Act,	**b)** s'agissant d'une bande dont le nom figure à l'annexe de la *Loi sur les élections au sein de premières nations*, le conseil élu ou en place conformément à cette loi;
(c) in the case of a band whose name has been removed from the schedule to the *First Nations Elections Act* in accordance with section 42 of that Act, the council elected or in office in accordance with the community election code referred to in that section, or	**c)** s'agissant d'une bande dont le nom a été radié de l'annexe de la *Loi sur les élections au sein de premières nations* conformément à l'article 42 de cette loi, le conseil élu ou en place conformément au code électoral communautaire visé à cet article;
(d) in the case of any other band, the council chosen according to the custom of the band, or, if there is no council, the chief of the band chosen according to the custom of the band;	**d)** s'agissant de toute autre bande, le conseil choisi selon la coutume de celle-ci ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de celle-ci.

[12] It appears to be common ground between the parties that paragraphs 2(1)(a)-(c) do not apply in the present circumstances.

[13] Subsection 74(1) of the Act addresses elections held under the Act. It states as follows:

Elected councils	**Conseils élus**
74(1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.	**74(1)** Lorsqu'il le juge utile à la bonne administration d'une bande, le ministre peut déclarer par arrêté qu'à compter d'un jour qu'il désigne le conseil d'une bande, comprenant un chef et des conseillers, sera constitué au moyen d'élections tenues selon la présente loi.

[14] Once again, it appears to be common ground between the parties that no declaration has been made pursuant to subsection 74(1). This is implicitly corroborated by correspondence from ISC, dated October 28, 2020, which states that KFN "conducts its leadership selection in accordance with its own 'custom' election code, outside of the electoral provisions of the *Indian Act*, as it has done since 1981."

[15] Subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7 (the "***FC Act***") provides that an application for judicial review must be brought within a specific period of time:

Time limitation	**Délai de présentation**
(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	**(2)** Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

IV. Issues

[16] In the Notice of Application filed in this proceeding, the Applicant characterizes the principal relief he seeks as "an order of mandamus compelling Indigenous Services Canada to update and recognize our Kwagiutl Custom Code and Appointed Leadership." However, before granting such an order, a determination must first be made as to the KFN's custom for selecting its leadership. For the reasons set forth in part VI.B of these reasons below, that is the determinative issue in this proceeding. Consequently, it is unnecessary to address the

requirements that would typically have to be assessed in determining whether to grant mandatory relief.

[17] For the present purposes, it will suffice to identify the following two issues:

1. Is this application time barred?

2. What is the KFN's custom for selecting its leadership?

V. Standard of Review

[18] The determination of the first of the two issues identified above involves an assessment of whether the time period set forth in subsection 18.1(2) of the *FC Act* applies, and if so, whether it operates as a bar to the present Application.

[19] The second issue raised in this Application concerns the KFN's current practice of electing its leadership. The KFN's continued adherence to that practice in the face of the Applicant's objections is reviewable on a standard of reasonableness: *Taykwa Tagamou Nation v Linklater*, 2020 FC 220 at paras 32-36, applying *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [***Vavilov***] and prior jurisprudence.

[20] When reviewing a decision or practice on a standard of reasonableness, the Court must approach the practice with "respectful attention" and consider "all relevant circumstances in order to determine whether the applicant has met their onus": *Vavilov*, at paras 75 and 84. These

include “the history and context” of the practice: *Vavilov*, at para 94. The Court’s overall focus will be on whether it is able to understand the basis upon which the practice is followed and then to determine whether it “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law”: *Vavilov*, at paras 86 and 97.

[21] In situations in which specific reasons have not been given for adherence to a practice in the face of a challenge to that practice, the Court will consider “the larger context” for the practice, and focus upon the “outcome”: *Vavilov*, at para 138.

[22] It is not the role of the Court to make its own determinations of fact, to substitute its view of the evidence or the appropriate outcome, or to reweigh the evidence. The Court’s function is solely to assess whether the decision-making body’s adherence to the disputed practice is unreasonable: *Vavilov*, at paras 83 and 125.

VI. Analysis

A. *Is this application time barred?*

[23] The Applicant asserts that the 30-day time limit stipulated in subsection 18.1(2) of the *FC Act* does not apply to him because Kwakiutl law, rather than the *FC Act*, applies.

[24] The Respondents maintain that subsection 18.1(2) does in fact apply and operates to bar the current application, because the Applicant is essentially challenging the 1981 decision made by the Kwakiutl people to select their leadership pursuant to a custom election code.

[25] In the alternative, the Respondents state that even if the Applicant is challenging the most recent by-election that occurred on May 13, 2022, when three Councillors were elected, this Application is still time barred because it was not filed until September 28, 2023. Moreover, the Applicant did not seek any extension of time within which to file this Application.

[26] Ordinarily, Applications filed in this Court are subject to the limitation provisions contained in the *FC Act*: *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 114-116; see also *Watson v Canada*, 2020 FC 129 at paras 349-352. In the absence of a request for an extension of time, the limitation provision in subsection 18.1(2) will typically apply to any discrete decision or order that may be the subject of an Application for judicial review.

[27] However, that limitation does not apply where the "matter" being challenged constitutes a course of conduct: *Key First Nation v Lavallee*, 2021 FCA 123 at paras 34-39. It also does not bar an applicant from seeking relief by way of mandamus, prohibition or declaration: *Krause v. Canada*, [1999] 2 FC 476, at para 23. Nevertheless, unreasonable delay in seeking the discretionary relief contemplated by subsection 18.1(3) may bar an applicant from obtaining such relief: *Friends of Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, at p 77; *Canadian Assn. of the Deaf v Canada*, [2007] 2 FCR 323, at para 73.

[28] These qualifications to the application of subsection 18.1(2) were not addressed by the parties. With that in mind, and given the conclusion I have reached in part VI.B of these reasons below, I will refrain from making a definitive determination with respect to whether this

Application is time barred. In brief, for the purposes of adjudicating this Application, it is unnecessary to further address this issue.

B. *What is the KFN's custom for determining its leadership?*

(1) General Principles

[29] A First Nation's ability to choose its leadership in accordance with band custom is an inherent power that is not derived from the *Act* or other federal legislation: *Pastion v Dene Tha' First Nation*, 2018 FC 648, at para 12, citing *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 34.

[30] Although paragraph 2(1)(d) of the *Act* contemplates that the council of a band is "the council chosen according to the custom of the band," the *Act* does not define what that "custom" is or who has the power to declare it: *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732, at para 32 [***Whalen***].

[31] In *Da'naxda'xw First Nation v Peters*, 2021 FC 360, at para 66-71 [***Da'naxda'xw***], Justice Strickland reviewed the jurisprudence applicable to the determination of "band custom." She then distilled several principles. For the present purposes, the relevant principles are as follows:

1. Custom requires evidence of a practice and the manifestation of the will of the First Nation's members to be bound by that practice.

2. Establishing band custom requires evidence demonstrating that the custom is firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus.

3. The inquiry into whether a custom enjoys broad consensus is fact and context specific and the evidence may demonstrate that there is no consensus.

4. Custom may be demonstrated by a one-time event like a referendum or majority vote, by a series of events, or possibly acquiescence.

5. The existence of a band custom and whether or not it has been changed with the substantial agreement of the band members will always depend on the circumstances.

6. The burden is on the party trying to demonstrate custom to prove that there is a broad consensus: *Da'naxda'xw* at para 72.

[32] An additional relevant principle is that the requisite broad consensus does not require a demonstration of unanimity. A broad consensus may be established notwithstanding evidence of a small number of band members who persistently object to a custom that is followed by the rest of the band: *Francis v Mohawk Council of Kanesatake (T.D.)*, 2003 FCT 115, at para 36.

[33] Moreover, band custom may evolve over time, such that current custom may be compatible with modern institutions and democratic processes: *Macleod Lake Indian Band v Chingee*, 1998 CarswellNat 1629, [1999] 1 C.N.L.R. 106 (Fed. T.D.), at para 16, quoting Woodward, *Native Law* (1994), at page 166.

[34] Finally, the custom of a band "can be evidenced by a course of conduct which expresses the First Nation's membership's tacit agreement to a particular rule": *Whalen* at para 36.

(2) Assessment

[35] Under the *Act*, there are two types of band councils: those selected by band custom and those elected pursuant the *Act*: subsection 2(1). A list of the bands whose elections are governed by the *Act* and the associated regulations is found in the *Indian Bands Council Election Order*, SOR/97-138. The Kwakiutl band is not listed in that Order.

[36] The parties agree that the *Act* does not govern the KFN's elections, although the Applicant asserts that KFN is conducting its elections *pursuant to* the *Act*.

[37] In his Notice of Application, the Applicant states that in 1981, the Kwakiutl Band Election Regulations (the "**KBER**", also referred to in this proceeding as the "**Election Code**") were forced upon the KFN without warning or time to consider them. He further asserts that "Kwagiutl Born leaders know and understand what true Kwagiutl Custom is and [. . .] have demonstrated and enacted our Kwagiutl Custom according to true Kwagiutl Custom. . ." He also states that the current band council was not established pursuant to Kwakiutl Custom, because

four of its members are from one family, two of them are not Kwakiutl-born, and they were all elected, rather than being appointed by Kwakiutl families.

[38] In his affidavit evidence, the Applicant adds that the Kwakiutl people were "tricked" and "deceived" to use the KBER in 1981, and that they have been forced to live with the KBER ever since. He also maintains that the "Kwagiutl have always spoke [*sic*] up against having Elections as we know what BandCustom [*sic*] means, and it literally means that weKwagiutl [*sic*] families appoint a family member who is in good standing and will best represent the family as leader."

[39] In addition, the Applicant states that he witnessed "Kwagiutl Custom" when he was approximately nine years old, when he and his cousin "watched the men one by one going to the big house across the river [. . .] and we went to peek around and listen. . ."

[40] Moreover, the Applicant maintains that newcomers to the band who are not "Kwagiutl Born" took control of the band membership list and started adding their names to that list. As a consequence, "we now have 90% non Kwagiutl Born and have been over run, and these members are at best guests, not even entitled to be Appointed under Kwagiutl Custom."

[41] In support of his assertions, the Applicant adduced an undated "Special Invitation" to Kwakiutl Band Custom Members. Among other things, that document notes that "the Kwagiutl have been under Kwagkutl [sic] Band Custom since we chose to go under Band Custom for Leadership Selection Processes under the guise of the Indian Act." The document proceeds to state the following:

> "However we have been doing this all wrong and need to start by doing what Band Custom means. It means that we do not nominate, vote, or elect our Leaders, we Appoint them and only Kwakiutl, families can appoint a leader. Therfore [*sic*] in this new beginning we shall start with 7 families to appoint our Kwakiutl Band Custom Leadership."

[42] The document further states:

> It is our wish to have one family member from each family affiliation to be appointed at this very special meeting. *And it would be great* if there is some family members from each Family to attend and witness this very special occasion . . . a new beginning and a step in the right direction as we bring our Kwakiutl one step closer to regaining our full 100% Kwakiutl Sovereignty. [Emphasis added.]

[43] The minutes of the aforementioned meeting, dated August 20, 2021, indicate that it was attended by "Kwagiutl Born Custom Families," and that the following statement of "Kwagiutl Band Custom" was passed unanimously by acclamation, without any questions:

> Must be Kwagiutl Born and Kwagiutl Family.
> Each Kwagiutl Family must appoint one trusted member from their family to be a Band Custom Leader. Each Leader remains in place until removed by same process as appointed. There is [*sic*] no nominations, no voting, no elections. The Kwagiutl Custom Appointments are oral and spoken, there is no writing. We have documented only for Court purposes. We must have Kwagiutl Custom Leadership, On and for the record.

[44] With the greatest respect to the Applicant, his evidence falls short of establishing the requisite broad consensus in support of his version of the KFN's band custom.

[45] At best, that evidence is evidence of what (i) may have been the KFN's band custom prior to 1981, (ii) the Applicant baldly asserts is the KFN's current band custom, and (iii) a small number of people in August 2021 decided ought to be the band's custom.

[46] The Applicant has not provided evidence of any broad consensus among the KFN's members to follow his version of the band's custom. Likewise, he has not provided evidence of a firmly established practice within the band to follow the custom to which he and a small number of other band members subscribe. He has also failed to adduce evidence of a course of conduct that reflects the KFN's tacit acceptance or adoption of the hereditary custom that he would like them to follow.

[47] It was the Applicant's burden to adduce sufficient evidence with respect to these matters. He failed to do so.

[48] I acknowledge that the statement reproduced at paragraph 43 above was passed unanimously, by acclamation, at a meeting on August 21, 2020. However, it appears that the attendees were limited to some members of "Kwagiutl Born Custom Families." According to the Applicant, "Kwagiutl Born" members of the KFN account for only approximately 10% of the KFN's membership.

[49] Moreover, there is no indication of how many band members were present, or how many participated in the "acclamation" process. Indeed, it is also not apparent how many people were invited to participate in that meeting, and there is no evidence that the invitation was

disseminated to the full membership of the KFN. In fact, although it was stylized as a Special Invitation, it simply states that "*it would be great* if there is some family members from each Family to attend and witness this very special occasion …" (emphasis added).

[50] A document attached to the minutes of the above-mentioned meeting, purporting to endorse the new "Kwakiutl Band Custom Leadership Rules to follow," is only signed by four people and witnessed by another three individuals. This is not sufficient to establish a decision of the KFN to change from the democratic, election-based process that has been followed since 1981. The members of the KFN "must not only agree as a community to the new custom, the community must know they have agreed": *Shirt v Saddle Lake Cree Nation*, 2017 FC 364, at para 32.

[51] I find the evidence adduced by the Respondents regarding the KFN's band custom to be much more persuasive than the evidence adduced by the Applicant. That evidence demonstrates a firmly established practice, dating back to 1981, to follow a democratic process. This practice has been consistently followed since that time and reflects a tacit acceptance or adoption by a broad consensus of the KFN's membership.

[52] To begin, it is common ground between the parties that the Applicant served as an elected band Councillor on the KFN's band Council for approximately two years, beginning in May or June 2002. In and of itself, this is compelling evidence that is inconsistent with the Applicant's position that "Kwagiutl Custom. . . has *always* been to appoint our leaders via heads of families. . ." and that "us Kwagiutl have always spoke up [*sic*] against having Elections"

(emphasis added). The Applicant's statement that he participated in voting out the band's Council in 2000 is similarly inconsistent with the position he now advances.

[53] According to an affidavit affirmed by Natasha Grace Wilson, Chief Councillor for the Council of the KFN ("**Chief Wilson**"), the band has followed a custom democratic election procedure for the selection of the band's Councillors since 1981. Chief Wilson also states that the band does not follow a hierarchical hereditary system for selecting its leadership, and that she has never seen the family-based leadership appointment system described by the Applicant utilized by the Kwakiutl people.

[54] Chief Wilson attached to her affidavit copies of the current band Election Regulations that were adopted on August 19, 2020 (also known as the "**2020 Election Code**"), as well as the prior code that it replaced. She also attached the results of the vote that was taken to effect that change, together with copies of the Electoral Officer's Summary of Results for the general election held on December 3, 2021, and the general election held on May 13, 2022, for three Councillor positions.

[55] A second affidavit adduced by the Respondents was sworn by Helen Wilson. She has been the Housing Administrator of the KFN since 1990, and the Indian Registration Administrator since 2007. She attached to her affidavit the official results of the band's elections dating back to 1991, as well as copies of the KFN's Election Regulations dating back to 1985. She attests that she was present in 1981 when the KFN adopted its custom Election Regulations, and that since that time "it has been the custom of our First Nation to elect the Band Council

pursuant to the custom Election Regulations." She adds that, to her knowledge, "the KFN membership has not proposed any significant change to the Election Regulations until the recent application made by" the Applicant. She further states that she has been present for each election since 2007, and that the band's members have voted in accordance with the KFN's Election Regulations since that time.

[56] In addition, Ms. Wilson attests that she is unaware of the Special Invitation described at paragraph 41 above. She states that, to her knowledge, it was not distributed to the KFN membership. She concludes by stating that the Applicant has made no application to the KFN to amend the band's Election Regulations to include any representation in governance by a hereditary family head.

[57] I will pause to observe for the record that Ms. Wilson also attests that, to her knowledge, the Applicant is not a family head, is not a hereditary Chief and has no authority to speak for any family of the KFN.

[58] A third affidavit tendered on behalf of the Respondents was sworn by Donna Gault. She attests that she was the Electoral Officer for the KFN from approximately 1990 to 2019, and that she continued to provide training and assistance to her successors through 2020. She was also present at the general election that took place on December 3, 2021. She attached to her affidavit a copy of the same general election results, dated December 3, 2021, that were attached to Chief Wilson's affidavit. She also attached the notice of that election that was sent to the KFN's band members, as well as a copy of the KFN's 2020 Election Code. That is the same document that is

attached at Exhibit C to Ms. Wilson's affidavit and at Exhibit A to Sherri Wenman's Affidavit, discussed below. Consistent with Ms. Wilson's testimony, Ms. Gault states that no application to amend that document to include leadership or authority for family heads or hereditary chiefs has been made since her employment with the band began in 1990.

[59] Ms. Gault also swore another affidavit in which she attests to, among other things, having carried out and overseen the 2020 referendum that resulted in amendments to the KFN's Election Regulations. She added that she carried out and oversaw that referendum in accordance with the former KFN Election Code.

[60] A further affidavit tendered on behalf of the Respondents was affirmed by Lawrence Lewis. He is the founder of OneFeather Mobile Technologies Ltd., an Indigenous technology company that assisted the KFN with its elections in 2018, 2020, 2021 and 2022. He attached to his affidavit the results of the latter three elections, in which the total number of voters was 68, 228 and 242, respectively.

[61] An additional affidavit tendered on behalf of the Respondents was affirmed by Sherri Wenman. She was retained by the KFN as the Electoral Officer for the general election that was held on December 3, 2021. She attests that she carried out and oversaw that election in accordance with the KFN's 2020 Election Code.

[62] A final affidavit tendered on behalf of the Respondents was sworn by John Tidbury. He attests that he was retained by the KFN as the Electoral Officer for the general election that was

held in May 2022, and that this election was conducted in accordance with the band's 2020 Election Code.

[63] The affidavit evidence summarized at paragraphs 53-62 above belies the Applicant's assertions that the Kwakiutl custom "has always been to appoint our leaders via heads of families," and that the "Kwagiutl have always spoke up [sic] against having elections."

[64] I find that this affidavit evidence demonstrates that the KFN adopted a custom band election code in approximately 1981, and that it has consistently operated in accordance with various versions of that code since that time. Although Mr. Lewis' evidence indicates that fewer than a majority of the band's approximately 900 members voted in the last three elections, the fact remains that the evidence persuasively demonstrates that the band has operated in accordance with its custom election code since approximately 1981. The evidence also demonstrates that, apart from the Applicant's recent opposition to the manner in which the KFN has been selecting its leaders, there has not been any significant opposition to the band's practice in this regard. This reflects the tacit acceptance of the band's custom election code (*Awashish v Opitciwan Atikamekw Band Council*, 2007 FC 765, at para 41), and the democratic process of selecting the band's leaders, by a broad consensus of the band's members. It also reflects that this democratic process is firmly established and generalized within the KFN.

[65] The respondents' position that the KFN's band custom since 1981 has been to elect its members pursuant to a custom election code is corroborated in an exchange of correspondence between the Applicant and representatives of ISC.

[66] Specifically, in a letter dated October 28, 2020, a Governance Officer advised the Applicant as follows:

> Kwakiutl First Nation conducts its leadership selection in accordance with its own "custom" election code, outside of the electoral provisions of the Indian Act, as it has done since 1981. Indigenous Services Canada (ISC, formerly INAC) does not have the jurisdiction to be involved in the council matters of custom First Nations, including the conduct of elections. With respect to the governance of custom First Nations, the primary function of ISC is to record relevant decisions made by the First Nation's council, including election results.
>
> [. . .]
>
> Since ISC has no role to play in the community's customary leadership selection process, it cannot intervene and make any decisions or determinations with respect to any claims you may have regarding the legitimacy of the Kwakiutl Chief & Council as elected. Only the community or the court of law may make such determinations. This being said, I encourage you to continue to engage your leadership and community in a dialogue regarding your concerns with a view of resolving these issues internally through community discussion. If these issues are not addressed to your satisfaction, you may wish to consult further independent legal counsel as to possible avenues of recourse. . .

[67] In a subsequent letter dated December 6, 2020, the Applicant essentially reiterated the position that he advances in this proceeding. However, in a response, dated March 1, 2021, a second Governance Officer of ISC advised that ISC "has no role or authority to interpret the Kwakiutl custom election code, its procedures and the results of leadership selection." The Governance Officer added:

> ISC encourages the resolution of governance disputes through dialogue. If a First Nation is unable to resolve a dispute internally, a First Nation may wish to refer a dispute to the Court for resolution. As noted above, ISC has no authority to intervene or make decisions regarding disputes associated with the selection of Kwakiutl leadership.

[68] In an e-mail from Mr. James Moxon at ISC, dated November 29, 2021, the Applicant was advised that "since Kwakiutl became a custom election band on July 31, 1981, ISC has no role in interpreting how the community's leadership is selected, or how governance disputes are resolved."

[69] The Applicant also included, as an exhibit to one of his affidavits, an excerpt from a 1990 Workshop Discussion Paper, entitled "Indian Governance," that was prepared by the law firm of Vina A. Starr on behalf of the Department of Indian Affairs and Northern Development. The Applicant places particular significance on a passage from page 9 of that document, which states as follows:

> Councils may be chosen according to the election regulations under the Act, or according to the custom of the Band. If a Band elects its Council under the Act, section 74 and the Indian Band Election Regulations must be followed. In custom elections, DIA is not involved in any way and the Council is either appointed or chosen according to the tradition of the Band. This effectively leaves the Band without an election appeal mechanism.

[70] However, this passage does not assist the Court to resolve the question of which of the two competing versions of the KFN's custom or tradition is the one that should be recognized.

[71] In addition, the Applicant maintains that Article 9 of the *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res., 61/95, U.N. Doc. A/RES/61/295 (2007) supports his position that the KFN's band custom is the traditional custom that he alleges the band has had for thousands of years. Article 9 states as follows:

> Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No

> discrimination of any kind may arise from the exercise of such a right.

[72] However, once again, and leaving aside the question of the legal status of Article 9 in Canada, that provision does not assist the Applicant to establish that his version of the KFN's band custom ought to be recognized over the version advanced by the Respondents.

[73] In summary, the Applicant has failed to meet his burden to establish that the custom of the KFN is to select its leaders based on a hereditary system of appointment, rather than elections.

[74] Having regard to all of the relevant circumstances, including the history and context underlying this proceeding, I find that the evidence adduced by the Respondents demonstrates that the KFN adopted a custom band election code in approximately 1981, and that it has consistently operated in accordance with various versions of that code since that time. This reflects the tacit acceptance of the band's custom election code, and the democratic process of selecting the band's leaders, by a broad consensus of the band's members. It also reflects that this democratic process is firmly established and generalized within the KFN.

[75] Given this finding, it would not be appropriate to grant the relief requested by the Applicant. That is to say, it would not be appropriate to issue an Order (i) enforcing the Eviction Notice, dated October 7, 2021, that was sent to the KFN's Band Council, (ii) requiring the KFN's Band Council to cease and desist acting for the KFN until this matter is resolved, (iii)

requiring ISC to honour "Kwagiutl Customs," and (iv) setting aside and striking all Kwagiutl Band Election Codes that provide for elections, nominations and voting.

[76] The KFN's adherence to its Election Code, including its 2020 Election Code, "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Vavilov*, at para 86.

[77] Considering the foregoing, it is unnecessary to address the other issues raised in this proceeding. Similarly, it is not necessary to address the factors that must be established in order to obtain an Order of *mandamus*. I note for the record that the parties did not make any submissions in relation to those factors.

[78] I will also note for the record that, subsequent to the hearing of this Application on October 30, 2023, the Applicant sent several follow up letters to the Court. For the most part, those letters essentially reiterate the written and oral submissions previously made by the Applicant, or that were set forth in his Notice of Application and his affidavit evidence. However, they also make some additional submissions, refer to additional documents and offer to provide other documents. Those materials are not admissible. Nothing turns on this because, having reviewed the Applicant's letters and his descriptions of the additional documentation, I am satisfied that they would not change the findings I have made or my ultimate decision to dismiss this Application, for the reasons summarized at paragraphs 73-74 above.

VII. Conclusion

[79] For the reasons set forth above, this Application will be dismissed.

[80] Costs determined in accordance with the mid-point of Column III of Tariff B of the *Federal Courts Rules* will be awarded to the Respondents.

JUDGMENT in T-1982-22

THIS COURT'S JUDGMENT is that:

1. This Application is dismissed.

2. The Applicant shall pay costs to the Respondents, determined in accordance with the mid-point of Column III of Tariff B of the *Federal Courts Rules*.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1982-22
STYLE OF CAUSE:	DAVID THOMAS HUNT v. ELECTED KWAKIUTL BAND COUNCIL ET AL.
PLACE OF HEARING:	VANCOUVER, BC
DATE OF HEARING:	OCTOBER 30, 2023
JUDGMENT AND REASONS:	CRAMPTON C.J.
DATED:	MARCH 5, 2024

APPEARANCES:

David Thomas Hunt	FOR HIMSELF
Morgan Camley Mélanie Power	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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Dentons Vancouver, British Columbia	FOR THE RESPONDENTS ELECTED KWAKIUTL BAND COUNCIL ET AL