Date: 20090224

Docket: T-396-08

Citation: 2009 FC 196

Ottawa, Ontario, February 24, 2009

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

STANLEY LAURENT

Applicant

and

PAULINE GAUTHIER and the FORT MCKAY FIRST NATION

Respondents

REASONS FOR ORDER AND ORDER

[1] On February 11, 2008, Mr. Laurent filed his nomination papers with Ms. Gauthier, the Returning Officer of the Fort McKay First Nation, as the first step in his bid to be elected Chief in the election scheduled for February 25, 2008. However, Ms. Gauthier rejected Mr. Laurent's papers because, under the *Fort McKay First Nation Election Code* dated December 22, 2004 (*Code*) she was administering, he did not qualify for election. The main focus of the present Application is a challenge to Ms. Gauthier's jurisdiction to reject Mr. Laurent's qualification because the *Code* under which she acted is, itself, of no force and effect because it was not properly approved by the

members of the Fort McKay First Nation. For the reasons which follow I find that Mr. Laurent's jurisdiction challenge is successful.

[2] Mr. Laurent also argues that his equality rights under s. 15 of the *Charter* have been offended by his rejection as a candidate. As a result of my finding on the jurisdiction issue, I find it is unnecessary to address the *Charter* argument.

I. Evidentiary Background

[3] The controversy arising from Mr. Laurent's bid to run as Chief in February 2008, is inextricably linked to his life circumstances as an Aboriginal Person. The key feature of Mr. Laurent's rejection as a candidate is that, by the *Code* which purportedly governed the election, a candidate for office must be a "lifelong member" of the Fort McKay First Nation which means that he or she must have been born to a member of the Fort McKay First Nation; Mr. Laurent does not meet this qualification.

[4] I believe it is important to understand Mr. Laurent's background, which speaks loudly to why he brings the present Application:

> Personal History
>
> 2. I was born in 1965. My father was a member of the Fond Du Lac Denesuline Nation, as I became on birth. Fond Du Lac is 160 miles north-east of Fort McKay. Both communities are comprised of Dene people, and both are in the Treaty 8 territory.
>
> 3. My great-grandfather Doo-Doo Laurent was Chief of Fond Du Lac for 35 years until he passed away in 1972.

4. My great great grandfather Dizedan Laurent signed the Fond Du Lac adhesion to Treaty 8 on July 27, 1889 as a headman.

5. Eligibility for the positions of Chief and Councillor is part of our "traditional mode and way of life" is protected by Treaty 8, which is attached as Tab 1 to Exhibit "A". Attached as Tab 2 to Exhibit "A" is the Report of the Treaty Commissioners that explains some of the oral promises made.

6. There are strong historical and family ties, including intermarriage, that exist between the Fond Du Lac Nation and the Fort McKay First Nation.

7. In 1989, I moved to Fort McMurray for work. Soon after, I met Cheryl McDonald, a member of the Nation. In 1990, I moved to the Ft. McKay Reserve to live with Cheryl and her six month old child at her parents' house. In 1991, Cheryl and I, and her son, moved into our own house and have lived in our own house on the Reserve ever since. I informally adopted Cheryl's young child, and Cheryl and I subsequently had 3 other children- in 1993, 1996 and 1997.

8. When I moved to the Reserve in 1990, I became involved in many aspects of the Nation's community activities. When my children became older, I coached hockey, an activity I still pursue for younger chidren today. In 1990, I was elected chief of the volunteer fire department, a position I held until 2001 when I retired from the post. In my capacity as fire chief, I did extensive training in firefighting and emergency first aid, and responded to over 20 fires on the Reserve. In 2003, Ft. McKay was evacuated due to a nearby forest fire. At that time I was appointed by the Nation as Director of Disaster Services.

9. After I moved to the Ft. McKay Reserve in 1990, I was employed for two years with Golosky Trucking as a heavy equipment operator at the Syncrude site. After that, I worked for three years for Ft. McKay General Contracting, which is owned by the Nation, as supervisor of its Suncor site labour crew. After that, I worked for two years for the Nation as the Employment and Career Development Coordinator. In 1997, I started my own business with my wife Cheryl which we operate from the Reserve, as described in paragraph 7 [sic] below.

> 10. My training in firefighting and first aid led to my formation of a business that provided emergency medical services to the oil and gas sector in Ft. McMurray area, as well as wildland fire suppression throughout Alberta and elsewhere. This business is known as Ft. McKay Enterprises Ltd., which was incorporated in 1997. My wife and I operate the business together, and over the years have employed approximately 50 members of the Nation. Our business presently has 18 employees, which will increase to 50 after freeze-up allows for more construction and drilling activity.
>
> Transfer to the Nation
>
> 11. In 1995, I transferred my Band membership to the Nation. In order to do so, I had first to relinquish my membership in Fond Du Lac, and then post a notice in the Nation's office for 30 days of my wish to transfer. The notice allowed any member to oppose my joining the Nation. No member of Fort McKay First Nation opposed my transfer.
>
> Candidate in Past Elections
>
> 12. In 1999, I ran for and was elected as a Councillor of the Nation. My term was two years.
>
> 13. In 2002 and 2004, I ran for Chief, but in both cases I lost to Jim Boucher. In both Elections, I was the only other candidate for Chief. In 2004, I lost by a margin of 167 to 96.
>
> (Applicant's Application Record, pp. 17 – 19)

[5] The undisputed facts which underlie the present Application are as follows.

[6] Elections of the Fort McKay First Nation are governed by custom. Prior to the development of the *Code*, there was no written code. A Band Council Resolution dated January 16, 2002, with respect to the proposed election to occur on February 15, 2002, speaks to the custom respecting eligibility to run for office at that time:

> Therefore be it resolved that: The Fort McKay First Nation wishes to implement the following in governing the 2002 elections:
>
> 1. The Election date to be set for February 15, 2002, the poll being opened from 12 p.m-10p.m. The polling station is to be located in the Multi-Plax Hall in the community of Fort McKay, Alberta.
> 2. Nomination procedures will be by application form and they are to be submitted to the Electoral Officer between the hours of 2:00 p.m.-4:00 p.m. on February 1, 2002, at the Band Office in the community of Fort McKay, Alberta.
>
> 3. All Fort McKay First Nation members whose names appear in the Fort McKay First Nation members list of Eligible Voters; and who are of eighteen (18) years of age prior to the election date will be eligible to vote, as well as seek nomination for the position of Chief, or Councillor.
>
> 4. The Election Regulations according to the Indian Act will be used as a discretionary guide by the Electoral Officer for conducting the election for the Fort McKay First Nation since the Band Custom does not have their own regulations in place to date.
>
> 5. No advance polls will be required.
>
> 6. The Fort McKay First Nation hereby appoints Pauline Gauthier as the Electoral Officer for this election. [Emphasis added]
>
> (Applicant's Application Record pp. 41 - 42)

Therefore, by custom, age was the only restriction on running for office.

[7] In 2004, the Fort McKay First Nation was under third party administration and, thereby, its leadership was composed of the Chief, two Councillors, and two co-receiver managers. In order to resolve a dispute then under mediation by this Court, a new written custom election code was proposed for approval by the membership by referendum. It is agreed that the leadership had

authority to issue a Notice of Referendum as a preliminary step to gaining the approval for the new code which contained new restrictions on running for office; it reads as follows:

FORT McKAY FIRST NATION
NOTICE OF REFERENDUM

TUESDAY, FEBRUARY 8, 2005

On January 8, 2005, Jim Boucher, Mike Orr and Gerald Gladue agreed to a process for the return of Chief and Council. Under the terms of the agreement, a new election code will be reviewed and voted upon by the Band Members of the Fort McKay First Nation by a referendum on February 8, 2005.

The new election code is available at the Administrative Offices of the Fort McKay First Nation if you have not received your copy in the mail. Every Band Member is strongly encouraged to review the proposed New Election Code as it contains many new provisions which are a departure from what the Band practice has been to prior elections.

TIME and PLACE:

Location:	Administrative Office in the Trailers at the Fort McKay First Nation
Date:	February 8, 2005
Time:	10:00 AM to 8:00 PM

REFERENDUM QUESTION:

DO YOU APPROVE OF THE PROPOSED ELECTION CODE FOR THE FORT MCKAY FIRST NATION FROM THIS DAY FORWARD?

INFORMATION SESSIONS ON ELECTION CODE:

Elders Session

Location :	Fort McKay Elders Centre
Date :	February 1, 2005 (Luncheon Provided)
Time:	12:00 PM (Elders will be picked up at 11:30 AM)

Community Session

> Location: Fort McKay School
> Date: February 1, 2005
> Time: 7:00 PM
>
> The Fort McKay First Nation Election Code, Section 106 states:
>
> 106 Coming into Force
>
> 106.1. This Code is in force and effective as of the date that it has been approved by the electors at a special meeting at which at least (50%) of the electors are in attendance.
>
> [Emphasis added]
> (Applicant's Application Record, p. 43)

[8] During a consultative process with the members of the Fort McKay First Nation a number of drafts of the new code resulted in a final draft proposed for approval by referendum. There is no evidence of which version of the proposed code was sent to the membership or was available for perusal in the administration office. However, it is agreed that the final draft of the new code purportedly put into effect after the referendum, and referred to in these reasons as the *Code*, is found at pages 48 to 84 of the Applicant's Application Record.

[9] It is important to note that the *Code* does not contain the s. 106.1 provision cited in the Notice of Referendum. However, with respect to the conditions of its approval, it contains the following preamble and statement:

> WHEREAS the Fort McKay First Nation has inherent aboriginal and Treaty rights and authority to govern relations among its members and between the Fort McKay First Nation and other governments; and
>
> WHEREAS the aboriginal and Treaty right of the Fort McKay First Nation to self-government was recognized and affirmed in Treaty

> No. 8 entered into between Her Majesty the Queen and the Fort McKay First Nation and confirmed by section 35 of the *Constitution Act, 1982*; and
>
> WHEREAS the Election Code is an exercise of the aboriginal and Treaty right to self-government and nothing in the Election Code may be construed as to abrogate or derogate from any aboriginal and Treaty rights of the Fort McKay First Nation; and
>
> WHEREAS the electors of Fort McKay First Nation empower the Chief and Council through democratic elections trusting that the Chief and Council will act lawfully and in the best interest of Fort McKay First Nation; and
>
> WHEREAS the culture, values, and flourishing of the Fort McKay First Nation is best advanced by the values of democracy and the selection and removal of leadership on the basis of democratic principles;
>
> NOW THEREFORE THE FORT MCKAY FIRST NATION, by the consent of the majority of the electors of Fort McKay First Nation pursuant to a vote conducted on January ___, 2005, enact as follows:
>
> [Emphasis added]
> (Applicant's Application Record, p.47)

[10] The *Code* contains the following provision with respect to new limits on who can run for Chief and Council:

> Qualification of candidates
> 9.1 A person may be nominated as a candidate in any election under this Code if, on the nomination day, the person:
> 9.1.1 is a member of the first nation;
> 9.1.2 is at least 18 years of age or older;
> 9.1.3 is not employed by the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
> 9.1.4 has not been convicted of any indictable criminal offenses.
> 9.1.5 has not been found liable in a civil court or pursuant to criminal proceedings in a respect of any matter involving theft, fraud or misuse of property belonging to the first nation or any related

> business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
> 9.1.6 does not have a debt payable for which payment was demanded in writing 90 days prior to the nomination day, including without limitation salary or travel advances, rent, or loans, to the first nation or any related business corporation or other entity which is owned or controlled, in whole or in part, by the first nation;
> 9.1.7 has not been removed from the office of chief or councillor pursuant to s. 101.3 of the Code during the preceding term of office; and
> 9.1.8 is a lifelong member of the first nation who has never held membership with any other first nation.
>
> (Applicant's Application Record, pp. 53 – 54)

[11] In addition to the specific voting provision regarding putting the *Code* into effect, the *Code* also contains specific voting provisions regarding amendment:

> 106 Amendments
> 106.1 This Code may be amended only on the following basis:
> 106.1.1 If within 60 days of a ratification of this Code, a meeting of the membership is held to determine whether s. 9.1.8. of this Code should be struck from this Code, and if, at a secret ballot at that meeting of the membership, 50% plus 1 or more of the voters who cast votes at that meeting vote to strike s. 9.1.8, then s. 9.1.8 stands removed; or,
> 106.1.2 in all other circumstances, if the council has made a resolution including or attaching a copy of the proposed amendment; and if
> 106.1.3 the amendment proposed in the resolution has been approved by at least sixty (60%) percent the electors [sic] in a referendum vote then,
> 106.1.4 such amendments stand.
>
> (Applicant's Application Record, p. 84)

[12] However, with regard to the specific voting provision regarding putting the *Code* into effect, the undated *Referendum Guidelines – Approval of Election Code* applied in relation to the referendum vote, contains the following provision:

> 9 Determination of the Referendum Question
> 9.1 The determination of the Referendum Question shall be by simple majority of the Electors who have participated in the Referendum Vote. [Emphasis added]
>
> (Respondents' Record, pp. 216 – 219)

Thus, a conflict exists between the *Code's* provision regarding putting the *Code* into effect, and the *Referendum Guidelines*.

[13] The referendum vote took place on February 8, 2005. The result was that 90 people voted to approve the *Code* and 69 people opposed the *Code*. The Voter's List as at February 8, 2005 indicates that there were 362 eligible voters, and, according to the Notice of Results, 159 eligible electors voted; therefore, 44% of the eligible electors voted. As a total of all electors, 24.86% approved the *Code*.

[14] The *Code* was put into effect by the leadership following the referendum and governed the election for Chief and Counsellors proposed for February 25, 2008. With respect to the election, nominations for office were required to be filed by February 11, 2008. Mr. Laurent submitted his nomination papers to Ms. Gauthier for the office of Chief but he was advised by her that he was ineligible to run as stated in the following passage from Ms. Gauthier's letter dated February 11, 2008, but received by Mr. Laurent on February 20, 2008:

> Upon reviewing your nomination papers you do not meet the following requirements:
> 1. You are not a lifelong member of the Fort McKay First Nation as required in Section 9.1.1
> 2. You have not provided us with a Criminal Record Check section 9.1.5
> 3. You have not provided us with a letter from the Finance Officer of the Fort McKay Group of Companies
>
> Based on this we are returning your nomination papers and your name will not appear on the ballot the general election [sic] held on February 25, 2008.
>
> (Applicant's Application Record p. 95)

[15] As a result, on February 11, 2008, Ms. Gauthier acclaimed Mr. Jim Boucher, the incumbent Chief, as the successful candidate.

II. The Challenge

[16] In the present Application, Mr. Laurent requests a judicial review in respect of the alleged promulgation of the Fort McKay First Nation Election Code on February 8, 2005, and Ms. Gauthier's February 8, 2008, decision to reject his nomination and acclaim Mr. Jim Boucher as Chief. It is unclear as to which exact provisions of the *Code* are addressed in Ms. Gauthier's rejection, but, as they affect Mr. Laurent's candidacy, I find that Ms. Gauthier's rejection is grounded in sections 9.1.3 to 9.1.6 and section 9.1.8.

[17] The primary argument advanced by Mr. Laurent is all about jurisdiction. He argues that Ms. Gauthier lacked jurisdiction to decide to reject his candidacy, and, consequently, to decide to acclaim Mr. Boucher as Chief because the leadership of the Fort McKay First Nation lacked the

jurisdiction to put the *Code* into effect following the February 8, 2005 referendum. I find that the standard of review with respect to Mr. Laurent's primary argument is correctness.

[18] I find that for the purposes of the present judicial review Ms. Gauthier made one two-part decision. The first part is the decision to reject Mr. Laurent, and the second part is the decision to acclaim Mr. Boucher. The latter could not be made without the former, and the latter had to be made because of the former, because only Mr. Laurent and Mr. Boucher were contenders for the office of Chief. Therefore, the two parts constitute a whole decision with respect to the governance of the Fort McKay First Nation.

[19] Counsel for the Fort McKay First Nation presents two arguments against accepting Mr. Laurent's arguments on judicial review. First, Counsel argues that I do not have jurisdiction to go back in time and make a jurisdictional determination with respect to the leadership's decision to put the *Code* into effect because a judicial review application with respect to this issue was not brought within 30 days of notice of the referendum vote as required by s. 18.1 (2) of the *Federal Courts Act*. Second, Mr. Laurent should have made his complaints according to the appeal provisions of the *Code*.

[20] With respect to the time limitation issue, no request for an extension of time was made in the Notice of Application with respect to the jurisdiction arguments. There is no dispute that the present challenge to Ms. Gauthier's decision was brought well within the required 30-day time limitation. Therefore, I find that my jurisdiction over this decision is complete. And further, because Ms.

Gauthier's jurisdiction to make the challenged decision pursuant to the *Code* is directly linked to the leadership's jurisdiction to put the *Code* into effect, I find I have jurisdiction to review the leadership's jurisdiction to do so. Therefore, I dismiss Counsel for Fort McKay First Nation's limitation argument.

[21] With respect to the argument that Mr. Laurent's complaints about the conduct of Ms. Gauthier should have been taken to appeal under the *Code* rather than by the present Application, in my opinion two critical elements to the appeal process, taken together, exclude such a possibility. The "permitted grounds of appeal" are contained in s. 81.1 of the *Code* as follows:

> 81 Permitted grounds of appeal
>
> 81.1 A candidate or elector who voted in the election, may appeal an election on the basis that:
>
> 81.1.1 the returning officer made an error in the interpretation or application of the Code which affected the outcome of the election;
> 81.1.2 a person voted in the election who was ineligible to vote and provided false information or failed to disclose information relevant to their right to vote and their participation affected the outcome of the election;
> 81.1.3 a candidate who ran in the election was ineligible to run and provided false information or failed to disclose information relevant to the validity of their nomination;
> 81.1.4 a candidate engaged in conduct contrary to section 23 and the candidate's conduct affected the outcome of the election; or
> 81.1.5 a candidate was guilty of a corrupt election practice or benefited from and consented to a corrupt election practice.
>
> (Applicant's Application Record, p. 73)

The authority granted to an appeal arbitrator is contained in sections 88 and 89 of the *Code* as follows:

88 Powers of appeal arbitrator

88.1 The appeal arbitrator has the following powers:

88.1.1 to determine questions of law arising in the course of the appeal hearing;
88.1.2 to rule on any objections made in the appeal hearing;
88.1.3 to order production of documents which are material and relevant to the appeal;
88.1.4 to determine the procedure to be followed having regard for fairness and equality between the parties to the hearing;
88.1.5 to determine the manner in which evidence is to be admitted and the appeal arbitrator is not bound by rules of evidence and, within the limits prescribed by section 84.2, has the power to determine admissibility, relevance and weight of any evidence;
88.1.6 to determine the time, place and date of the appeal hearing; and

88.1.7 to determine whether the appeal hearing is open to members and who may or may not attend the appeal hearing.

88.2 The appeal arbitrator does not have the power:
88.2.1 to subpoena any witness or compel any person to give evidence at an appeal hearing excepting that the returning officer is a compellable witness; and
88.2.2 to order any relief not specifically permitted by this Code

88.3 Neither the *Arbitration Act* of Alberta or the *Commercial Arbitration Act* of Canada or any other like legislations applies to the appeal arbitrator or to appeal hearings under this Code

89 Determination of Appeals

89.1 The appeal arbitrator shall dismiss any appeal which does not meet the requirements of sections 82 and 83.

> 89.2 Within 5 days of the appeal hearing, the appeal arbitrator shall render a decision and provide written reasons in support. The appeal arbitrator may:
> 89.2.1 dismiss the appeal;
> 89.2.2 grant the appeal, but deny any corollary relief on the basis that the grounds established by the appellant did not effect the election result; or
> 89.2.3 grant the appeal and order corollary relief which may include a new election.
> 89.3 If the appeal arbitrator determines that an appeal was so lacking in merit as to constitute an abuse of the appeal process he or she may order the appellant to pay the costs of the appeal hearing or the cost of the affected candidates or both.
>
> (Applicant's Application Record, pp. 74 – 75)

[22] I find that s. 81.1.1 assumes that Ms. Gauthier's actions are made within jurisdiction. Therefore, with respect to Ms. Gauthier's conduct as Returning Officer preceding the February 2008 election, I find that Mr. Laurent's jurisdiction arguments could not be brought under the appeal provisions of the *Code* because the permitted grounds of appeal are very specific and questioning Ms. Gauthier's jurisdiction is not one of them.

[23] As a result, I find that Mr. Laurent's only access to justice for resolution of his jurisdictional challenge is by bringing the present Application to this Court.

III. The Referendum Vote Irregularities

[24] Counsel for Mr. Laurent argues that because the referendum was not passed by the required vote of the Fort McKay First Nation membership, it could not have, and does not have, force and effect. In response, Counsel for the Fort McKay First Nation argues that any vote irregularities are cured by the election custom of the Fort McKay First Nation.

[25] With respect to the circumstances of the referendum, the evidence tendered by the Fort McKay First Nation is contained in the Affidavit of Mr. Larry Hewko, dated June 27, 2008. Mr. Hewko is a chartered accountant and the Chief Financial Officer of the Fort McKay First Nation, but prior to taking this position he began employment in March 2004 with one of the co-receiver managers which at that time had responsibility for the governance of the Fort McKay First Nation. In 2004 this Court was engaged in mediation with the Fort McKay First Nation. Mr. Hewko's evidence with respect to this engagement and the catalyst for the development of the *Code* is as follows:

> 4. The matters in Federal Court No. T-558-04 came about as a result of a leadership dispute following the 2004 Fort McKay First Nation general election. In 2004, the First Nation was operating under an unwritten election law that generally followed the *Indian Act* as a guideline for rules governing the voting process. The Council was comprised of 3 with 1 Chief and 2 Councillors.
>
> 5. In 2004, Chief Jim Boucher was reelected and Councillors Gerald Gladue and Mike Orr were elected to Council. The particulars of the governance dispute are contained in the records for Federal Court No. T-558-04. To the best of my knowledge, these involved a division in the Council between Councillors Orr and Gladue on the one hand and chief Boucher on the other. Chief Boucher applied to the Court and the Court granted the request of Chief Boucher to have an administrator appointed to run the affairs of the First Nation while this dispute was ongoing.
>
> 6. Late in 2004, following many months under third party administration, the Council addressed a resolution of the governance dispute in order to restore the normal day to day business of the First Nation. The result of those discussions was the Fort McKay First Nation Election Code which is the subject of Stanley Laurent's application to this Court.
>
> 7. My understanding of the Election Code was that it was a document which had been worked on prior to the 2004 election

starting in about 2002. The draft document was brought forward but with some important changes to address the governance dispute and the litigation.

8. Section 92.1 of the Election Code was specifically added to address the issues that had lead to the litigation. This section requires that Council decisions be based on consensus rather than majority rule. Section 92.3 says that where there is no consensus the matters go to membership for a vote. The effect of these sections was to ensure that factions on Council did not frustrate the decision making process.

9. It has been my observation as a senior employee with Fort McKay First Nation, that these sections (92.1 to 92.3) have been effective in ensuring that Council works cooperatively and in the best interests of the First Nation. The day to day operations and business of the Council have been positive, cordial, and effective since the implementation of the Election Code. This was a significant change from the situation which immediately preceded the Election Code.

10. The second major change that was made to the draft Election Code was section 106.1.1. It is my understanding that the nomination requirement of lifelong membership in section 9.1.8 had been in earlier drafts of the Election Code but this new section (106.1.1) was added as a result of the further discussions that led up to the December 22, 2004 draft Election Code.

11. The third major change was the section dealing with ratification of the new Election Code. Older versions of the Election Code had contained provisions requiring a majority. I recall that there was some dispute about what that meant. The receiver managers took the view that a simple majority of those who voted should be sufficient to ratify the Election Code. The receiver managers had an understanding that there were no laws or Indian Affairs policies that determined ratification requirements for passing election laws. The receiver managers decided that if the Council was not in agreement about what version to put forward to the members, then there was already a process in place in terms of the ongoing litigation and they could fight it out there.

12. The Council agreed to remove the section which is referred in the notice which is attached as Exhibit “A” tab 4 to the Affidavit of Stanley Laurent.

13. Based on my work experience since 2004 with Fort McKay First Nation, I would say the general process for passing the Election Code was consistent with the practice of the First Nation for passing other laws or policies. In the normal course, such laws or policies are prepared by the Chief and Council in consultation with administration and legal counsel. There is no community based consultation process at the drafting stage. However, final drafts are reviewed with membership at regular or specially scheduled Band meetings. If necessary, the law or policy is voted on but in most cases the Council will gauge the feedback from members, make decisions on any necessary changes or further revisions, then pass or not pass the law or policy in question.

14. Though I was not in attendance at the community meeting when the proposed Election Code was reviewed I was later told by Elders and Band Member employees that Stanley Laurent did come to the meeting and spoke against the proposed Election Code.

15. I do not know where the ratification officer obtained information respecting the old draft Code and its ratification provisions.

16. The Election Code was voted on and implemented February 8, 2005. Attached and marked as Exhibit "A" to this my Affidavit is a copy of the Referendum Guidelines which were used in relation to the vote.

17. Following the implementation of the new Election Code a by-election was held on April 6, 2005.

18. Councillors Cecilia Fitzpatrick and Raymond Powder were elected in the April 6, 2005 by-election. There were no appeals.

(Respondents' Record, pp. 203 – 205)

A. ***The potential effect of the "s. 106.1" statement in the Notice of Referendum***

[26] It is important to note the request stated in the Notice of Referendum that "every Band Member is strongly encouraged to review the proposed New Election Code as it contains many new provisions which are a departure from what the Band practice has been in prior elections".

[27] As mentioned, the *Code* is the final result of a consultative process in which a number of drafts were produced. Relying on Mr. Hewko's evidence, Counsel for the Fort McKay First Nation argues that the inclusion of the s. 106.1 statement in the Notice of Referendum was just a mistake resulting from the consultative process. That is, s. 106.1 was a provision in an early draft of the new custom election code and should not have been quoted in the Notice of Referendum because the *Code* proposed for ratification does not contain that provision. The argument is directed at the point that the mistake is of no real importance.

[28] Whatever the explanation for the discrepancy, it should have been obvious to the leadership that the misleading information could affect the attendance at the referendum meeting. Indeed, Mr. Laurent, who opposed the ratification of the *Code*, did not vote because, since a majority of the electors of the Fort McKay First Nation were required to attend the ratification vote meeting, his failure to attend constituted a negative vote (Applicant's Application Record, p.20, para. 21).

B. ***The decision-making respecting the vote required***

[29] The evidence supplied in paragraph 11 of Mr. Hewko's affidavit is important. Mr. Hewko acknowledges that older versions of the *Code* "contained provisions requiring a majority", which read together with his paragraph 15, can be taken to mean that in those earlier versions at least a majority of the electors of the Fort McKay First Nation was required to approve the new written custom election code. However, by paragraph 11 of Mr. Hewko's affidavit, it appears that there was a dispute between the elected leadership, being the Chief and two Councillors, and the two third-party managers, with respect to the referendum results necessary to give authority to the leadership to put the *Code* into effect. It appears that the managers won the argument: s. 9.1 of the *Referendum Guidelines* produced only requires that "the determination question of the Referendum Question shall be by simple majority of the Electors who have participated in the Referendum Vote"; and paragraph 12 of Mr. Hewko's affidavit confirms that "Council", being the Chief and the two Councillors, agreed to remove the more stringent s. 106.1 provision from the *Code*. However, the terms of the *Code* itself speak to a completely different vote being required.

[30] It must be remembered that the development of the written custom election code was the result of a consultation with the Fort McKay First Nation membership. Thus, regardless of the nature of the internal leadership debate as described, the terms of the *Code* itself must be taken as an expression of the will of the membership of the Fort McKay First Nation that the referendum was required to be passed by a majority of the electors of the Fort McKay First Nation. There is no

evidence that the membership provided the leadership with any authority to deviate from this expression of will.

[31] I find it is fair to say that the creation of s. 106.1 at some time during the consultative process leading up to the referendum vote is evidence of the high importance given by the Fort McKay First Nation electors to the changes to the governance custom of the Fort McKay First Nation, including the qualifications required of candidates running for office. By s. 106.1, a majority of the electors of the Fort McKay First Nation would be required to attend a referendum vote meeting, and the referendum would only be passed by a majority vote of that voting body. Indeed, the statement in the *Code* that a majority vote of the Fort McKay First Nation electors is required to put the *Code* into effect, while not requiring the majority of the electors to attend a referendum vote meeting, is further evidence of the high importance of the proposed changes. In contrast, there is no evidence on the present record of any authority granted by the electors to the issuance of the contrary voting provision stated in the *Referendum Guideline*s that the *Code* can be put into effect merely by a simple majority of the votes cast in a referendum vote.

C. The leadership's jurisdiction to act on the referendum results

[32] In my opinion, the leadership of the Fort McKay First Nation was reckless in its execution of the referendum vote. It knew of the s. 106.1 misleading vote requirement statement in the Notice of Referendum and must have known its potential impact on voter attendance, and the leadership must be taken to have known of the majority of the electors of the Fort McKay First Nation

requirements stated in the *Code* itself, and yet, the approval of only 24.86% of the electors of the Fort McKay First Nation was used to put the *Code* into effect.

[33] As a result, unless an overriding saving provision can be demonstrated based on the custom of the Fort McKay First Nation, there is no question that the leadership had no jurisdiction to put the *Code* into effect, and, as a result, Ms. Gauthier had no jurisdiction to reject Mr. Laurent's nomination papers. The issue now is whether Fort McKay First Nation custom supplies such a saving provision.

IV. Fort McKay First Nation Custom as a Saving Provision

[34] Counsel for the Fort McKay First Nation makes the following legal argument in support of custom as a saving provision:

> *Customary Practices Generally Acceptable To Band Members*
> A number of decisions respecting customary election laws have said that the Court, in endeavouring to ascertain a First Nation's customary law, should consider whether the practices are generally acceptable to the Band Members and upon which there appears to be a broad consensus. [*Bone* v. *Sioux Valley Indian Band No. 290* (1996) 107 F.T.R. 133 at para. 28]
>
> Courts have expressly rejected the notion that changes in customary law must be voted on and passed by a majority of electors [*Bone* v. *Sioux Valley Indian Band No. 290* (1996) 107 F.T.R. 133 at paras. 28 to 33]
>
> Evidence of generally accepted practices and a broad consensus are based on all of the evidence and not just evidence of a referendum process. The conduct of the Band in acquiescing in the use of a customary law is an important indicator of consensus and sufficient evidence to satisfy the Court that there is a broad consensus. [*Bone* v. *Sioux Valley Indian Band No. 290* (1996) 107 F.T.R. 133 at para.

> 65 and *Bigstone* v. *Big Eagle* (1992) 52 F.T.R. 109 at paras. 23 and 24]
>
> (Respondents' Record, p. 1904)

[35] Respecting this argument, in *Bone v. Sioux Valley Indian Band No. 290* at paras. 28 to 33, Justice Heald does not specifically address the majority vote issue but endorses the statement of Justice Strayer in *Bigstone v. Big Eagle* at pages 117 and 118 that "unless otherwise defined in respect of a particular band, 'custom' must I think include practices for the choice of a council which are generally acceptable to members of the band upon which there is a broad consensus". Paragraph 65 of *Bone v. Sioux Valley Indian Band No. 290* expresses the conclusion that, in that case, where a nomination, election, and subsequent appeal was conducted according to the election code, and "approximately 50% of the eligible voters participated in the March 14, 1994 election", and there being "no evidence that at any time before or during the election any Band member objected to the manner in which the election by Band custom was proceeding", there was sufficient evidence to satisfy the test set by Justice Strayer in *Bigstone*.

[36] The evidence of the circumstances in the present case supplied by the affidavit evidence of Mr. Hewko is as follows:

> 19. Since 2005 there have been no governance related disputes within Fort McKay First Nation which have interfered with the normal day to day business of the First Nation. The implementation of the Election Code resolved the earlier governance dispute and established a new direction for the Council. The new Election Code requires that decisions be made on a consensus basis and in my experience the Council has achieved consensus on its decisions. I am not aware of any matters that have had to go to a vote of the membership with the exception of matters which are required to go to a vote under provisions governing the Fort McKay Heritage Trust.

20. The First Nation holds regular Membership meetings as required by the Election Code. Membership have been advised of Mr. Laurent's litigation but the feedback received from Members to date has indicated no general interest in re-opening the Election Code for reconsideration or returning to the Council procedures that applied before the implementation of the Election Code. In fact, I have heard some Elders say that Mr. Laurent should consider seeking office at his own Reserve rather than Fort McKay's.

21. With respect to the history of section 9.1.8 of the Election Code, the information which I have received from Members is that this section was added to the Election Code to address concerns respecting people who did not have a historical connection to Fort McKay. This section has been understood and applied by Fort McKay First Nation as restricting people who have made a deliberate choice to change their membership status and transfer from another First Nation. These individuals may not have a historical connection to the Fort McKay First Nation and would not have been raised within the Fort McKay First Nation's culture and traditions. As such section 9.1.8 is generally regarded as a means to protect and preserve Fort McKay First Nation's culture, traditions, and values.

22. I have been at Fort McKay First Nation for both the elections held under this Election Code and section 9.1.8 has never been used to restrict the candidacy rights of those members who regained their status under the law known as Bill C-31. Those individuals would not have held membership with any other First Nation and were denied their status as a result of laws and policies of Canada and not by their own choice.

23. Mr. Laurent has correctly identified Councillors Cecilla Fitzpatrick and Raymond Powder as individuals who were impacted by Bill C-31. However, both these Councillors have significant roots in the First Nation and a family history that goes back to the origins of the First Nation. It is my understanding that neither of these Councillors were ever members of another First Nation.

24. In addition, section 9.1.8 has never been used to restrict the candidacy rights of persons born before 1954 when Fort McKay was first recognized as a Band. Mr. Laurent's mother in law, Clara Boucher, ran in both the 2005 election and the 2008 election and, I believe, she was born prior to 1954.

(Respondents' Record, pp. 206 – 207)

[37] With respect to Fort McKay First Nation custom, on the basis of Mr. Hewko's evidence quoted from his affidavit, Counsel for Fort McKay First Nation argues as follows:

> In the circumstances of the case at bar, the following facts are relevant:
> a. The process for review and passage of the Election Code was undertaken in accordance with Fort McKay's usual practices.
> b. A significant number of electors participated in the referendum of the Election Code and a majority of these voted to approve the Election Code.
> c. The Election Code has been in force since February 8, 2005 and its implementation was not challenged.
> d. The Election Code was implemented while Federal Court proceedings were ongoing. The Receiver Managers were not discharged until after the April 2005 elections but no one raised any objection in those proceedings.
> e. No one challenged the election held in April 2005 or the election result for two new Council positions though the prior custom of the First Nation only allowed for a Council of three.
> f. The Chief and two Councillors were elected under customary law which allowed for a term of two years. That term was extended to four years under the Election Code. No one challenged the right of these members of Council to continue to hold office.
> g. Fort McKay has been operating on a day to day basis under the governance provisions of the Election Code since its implementation in February 2005. No one has challenged any step or proceeding undertaken by Council in accordance with the Election Code.
> h. Membership has been advised of these proceedings but has demonstrated no interest in setting aside or revising the Election Code. No Member has come forward to participate in or support the Applicant in these proceedings.
>
> (Respondents' Record, pp. 1904 – 1905)

[38] It is clear that custom is conduct from which conclusions can be drawn. It is also clear that the quality of the evidence tendered to prove conduct is critical to determining custom. The import

of the Fort McKay First Nation custom argument is that the evidence of membership conduct after the referendum vote is proof that its passage by only 25% of the electors of the Fort McKay First Nation is acceptance of such a vote.

[39] In the analysis of this argument a primary question to ask is: is there direct evidence that it is a Fort McKay First Nation custom to act on a referendum vote passed by only 25% of the electors of the Fort McKay First Nation? The answer is “no”.

[40] A second question is: is there any cogent evidence from which to infer that there is a consensus of acceptance of the leadership’s failure to follow the standard for referendum approval stated in the *Code* as above described? It is important to remember that the *Code* is an expression of Fort McKay First Nation custom, and, by that custom, there are clear provisions regarding putting the *Code* into force and effect, and for amending it. In the present case, the custom election consensus of the membership of the Fort McKay First Nation, as expressed in the *Code* itself, is to have the *Code* passed by a majority of the electors; this consensus was apparently disregarded by the leadership. Thus the question becomes: is this disregard acceptable by custom? Finding an answer to the question is all about the quality of the evidence.

[41] Therefore, in my opinion, the application of the *Bigstone* principle to the “acquiescence” observed in *Bone v. Sioux Valley Indian Band No. 290* has no value as precedent in the circumstances of the present case because the facts in that case are very different from the facts in the present case. Therefore, the answer to the question depends on the weight to be given to Mr.

Hewko's evidence concerning conduct of the members after the *Code* was purportedly put into effect by the leadership.

[42] I do not give Mr. Hewko's evidence sufficient weight to prove the existence of a Fort McKay First Nation custom to accept the fact that the *Code* was validly put into effect contrary to its own terms. In particular, Mr. Hewko's statement in paragraph 20 of his affidavit concerning "feedback received from Members" and "some Elders say" gives no basis upon which a conclusion can be drawn of any consensus of the membership. The statements are hearsay evidence coming from a direct participant in the decision-making presently under review, and, to my observation, are only directed to generating support for the contentious decision-making of the leadership. In particular, there are no dates, names, or numbers provided in the statement to give any basis for arriving at a conclusion on membership consensus. The fact that, as stated in paragraph 19, there have been "no governance related disputes" proves nothing with respect to membership consensus because this statement does not directly refer to the contentious referendum vote question. And further, given the time, trouble, and expense of taking legal action to challenge the leadership decision to disregard the consensus respecting voting practices, to have no such action taken does not prove that the disregard has achieved acceptance in the post-referendum period. In my opinion, the evidence relied upon to prove that, by custom, the disregard has been accepted is so weak as to be of no value.

[43] It is important to note that the *Code* expresses that democratic values must govern. The evidence goes to show only that there has been no objection to the terms under which the *Code* went

into effect, and there is no movement to change it. The question is: can this evidence be accepted as some form of custom to save an obvious failure to follow what must be considered election custom which was merged into and expressed in the *Code*? That is, can it be said that this inaction is a retroactive consensus expressed by the membership condoning the actions of the leadership not to follow the voting terms of the *Code*? If the answer is yes, one can see a situation arising where the leadership simply makes a decision not to follow the *Code*, and if there is inaction by the membership after the action is taken, it can be assumed that there is a consensus that breaching the *Code* creates a new custom code. This form of practice would be in sharp conflict with democratic principles accepted in the Code as governing features of the Fort McKay First Nation. My answer to the question is "no".

[44] I find there is no cogent evidence of consensus to condone by custom the failure of the leadership to follow the terms of the *Code* which they so carefully prepared. In my opinion, it is unfair to all members of the Fort McKay First Nation to allow those in control to simply change the rules as they consider expedient. On the evidence, this is what occurred here.

V. Conclusion

[45] Because the leadership had no jurisdiction to put the *Code* into effect following the referendum vote, I find that all actions taken under the *Code* with respect to the February 25, 2008 election were taken without jurisdiction. Specifically with respect to Mr. Laurent's challenge to the actions taken by Ms. Gauthier, I find that she had no jurisdiction to reject his nomination papers, and had no jurisdiction to declare Mr. Boucher as Chief of the Fort McKay First Nation.

ORDER

For the reasons provided, pursuant to s. 18.1 (3) (b) of the *Federal Courts Act*, I declare that the *Fort McKay First Nation Election Code* dated December 22, 2004 is invalid. As a result, I further declare that, for want of jurisdiction, Ms. Gauthier's decision of February 11, 2008 rejecting the nomination of Mr. Laurent and acclaiming Mr. Boucher as Chief of the Fort McKay First Nation is invalid.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Calgary, Alberta
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APPEARANCES:

Mr. Jeffrey Rath Ms. Natalie Whyte	FOR THE APPLICANT
Ms. Trina Kondro	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Rath & Company Priddis, Alberta	FOR THE APPLICANT
Ackroyd LLP Edmonton , Alberta	FOR THE RESPONDENTS