Federal Court  Cour fédérale

Date: 20160407

Docket: T-1965-15

Citation: 2016 FC 383

Ottawa, Ontario, April 7, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

GORDON BEARDY, FRANCINE MCKENZIE, JOY BARKMAN

Applicants

and

STAN BEARDY, ROY FIDDLER, CHARLIE L. BEARDY, JOHN L. MORRIS, OLIVIA DUNCAN, LISA BEARDY (AKA LIZA BEARDY), ERNIE HARPER, CLIFF FERRIS, JOB FIDDLER, KATHLEEN BEARDY, IRENE ROSS, AND MARY ANN BEARDY

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of the process leading up to, and the September 15, 2015 election of, the Chief and Band Council of the Muskrat Dam First Nation ("MDFN" or "Band") culminating in a Band Council Resolution ("BCR"), dated September 16, 2015,

declaring Stan Beardy as Chief, Roy Fiddler as Deputy Chief, and Charlie L. Beardy, John L. Morris, and Olivia Duncan as Councillors. The application is brought pursuant to ss 18(1) and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 ("*Federal Courts Act*"). The Applicants are Gordon Beardy, the immediate former Chief of MDFN, and Francine McKenzie and Joy Barkman, MDFN Band members who each filed an appeal of the impugned election.

Background

[2] The MDFN is a remote Oji-Cree First Nation community located north of Sioux Lookout, Ontario. It has an on and off reserve population of approximately 430 to 600 members. The MDFN received Indian Band status in 1976 and in 2005 adopted the Muskrat Dam First Nation Customary Election Code ("2005 Code"). As this met the criteria of the Conversion to Community Election System Policy of the Department of Indian and Northern Affairs ("INAC"), the order previously issued pursuant to s 74 of the *Indian Act*, RSC, 1985, c I-5 ("*Indian Act*") was repealed, thereby permitting the MDFN to conduct its elections in accordance with its own customary election system, as codified in the 2005 Code.

[3] Gordon Beardy was elected Chief of the MDFN in 2009. Most recently he was elected in 2013.

[4] On June 11, 2015 a community meeting was held to voice various concerns, including concerns about Band leadership. Seventeen community members were in attendance as well as three Band Councillors. At the meeting community members questioned whether an amended

election code, dated July 18, 2012 ("2012 Code"), had ever been adopted by BCR. They also mandated Band Council to call a general meeting within two weeks to address all of the issues that had been raised at the community meeting and to begin working on a new election or leadership review. The three attending Councillors, Lewis Morris, Morris Fiddler and Olivia Duncan, were instructed to relay the expressed concerns and expectations of the community members to Chief Gordon Beardy and Deputy Chief Douglas Beardy.

[5] Band Council did not convene the requested general meeting. However, notice of a community meeting, said to be called by the Elders and concerned community members, was posted with its stated purpose being "to begin addressing concerns regarding Our Band Leadership". The meeting was held on August 14, 2015 and was attended by approximately thirty community members. No members of Band Council attended. The minutes of the meeting indicate that the group decided not to undertake a leadership review, which would take too long, but to instead have a referendum. Twenty six people voted in favour of the referendum and to "empower" an election committee to begin the referendum, which was to be held three days later, on August 17, 2015. An Election Committee comprised of Job Fiddler, Kathleen Beardy, Irene Ross, Johnny Morris Senior and Jake Beardy was appointed.

[6] By email of August 14, 2015, Chief Gordon Beardy, who was in Thunder Bay at that time, was advised of the community meeting and that a referendum was to be held. He replied by email of the same date stating that it would serve as his resignation.

[7] The referendum was not held on August 17, 2015.

[8] On that date Morris Fiddler submitted his written resignation as a MDFN Band Councillor, effective immediately. On August 24, 2015, Deputy Chief Douglas Beardy advised by letter that he would remain as Deputy Chief to the day before the "Bi-election for the Band Council positions". On August 31, 2015 he advised that he would not be seeking re-election to any Council position.

[9] On August 28, 2015 the Election Committee posted notice on Facebook that it would be starting the bi-election process on September 1, 2015.

[10] Despite the above described resignations, on September 1, 2015 four members of the then Band Council including, Chief Gordon Beardy, issued BCR150901A. This stated that the vote held at the August 14, 2015 community meeting did not meet the requirements of the 2012 Code as 50% plus one of the total eligible voters were required to support a referendum. It further stated that Chief and Council did not support the referendum process and "do not wish to submit their resignations at this time" and resolved to finish their terms, which they viewed as being of a three year duration concluding in July 2016, pursuant to the 2012 Code.

[11] In response to BCR150901A, on September 2, 2015, the Election Committee, now comprised of Lisa Beardy, Ernie Harper, Cliff Ferris as well as Jake Beardy and John Morris, posted a public notice stating that the BCR was "inconsistent" and that it had been effected without consultation with the Election Committee and the MDFN membership. The notice cites ss 5.1-5.5 of the 2012 Code, and states that the Election Committee had accepted the meeting

minutes of the August 14, 2015 meeting as a petition and that due to the seriousness of the issues raised it concluded that there was a need for a referendum.

[12] Between September 2 and 8, 2015 the Election Committee met on various occasions and on September 4 and 8, 2015 it held radio broadcasts in which the events to date were discussed. Following the latter broadcast, Gordon Beardy spoke to the Election Committee outside the radio station and indicated that he did not support their actions.

[13] On September 10, 2015 the Election Committee ran a referendum asking for a "yes" or "no" response from each voter as to whether they wanted each of the separately named Band Council members to stay on in their stated Council positions. The results of the referendum were not publicly posted but there is some evidence that they were announced. The Election Committee meeting minutes indicate that all positions fell short of the required 50% plus one of eligible voters needed to call an election, however, the affidavit of John Morris states that the criteria was met. The Election Committee announced that nominations for the election would be held on the following day.

[14] On September 11, 2015 the Election Committee held a nomination meeting. The results of the nominations are not stated in the Election Committee minutes of the meeting nor is it clear that they were ever publicly posted. Gordon Beardy received thirty-two nominations for Chief and Stan Beardy received forty-six nominations.

[15] At the end of that meeting the fourteen people then in attendance were asked to vote on the question of whether those candidates who had previously resigned from Band Council should be permitted to run in the upcoming election. Twelve of these people voted that such candidates should not be permitted to run for re-election. Based on this, the Election Committee did not put forward Gordon Beardy's nomination for Chief and, as the only remaining candidate, Stan Beardy assumed that position by acclamation on September 14, 2015.

[16] On that same day, Joy Barkman called the Election Committee and voiced her concern about the election process and that Gordon Beardy was not allowed to stand for election. She was told that she shouldn't question the process in the midst of an election and was encouraged to file an appeal.

[17] The election was scheduled for September 14, 2015 and notice of the election was posted in the community and on Facebook. The election was subsequently scheduled to take place September 15, 2015 rather than September 14, 2015. The election proceeded on that date and the names of the successful candidates were posted by the Elections Committee on Facebook.

[18] On September 16, 2015 the newly elected Band Council issued BCR150916A which indicates the names of the individuals who were nominated and accepted their nominations to Band Council; that Gordon Beardy, Doug Beardy, and Morris Fiddler were disallowed from running due to their resignations; and, resolves that the Chief (by acclamation), Deputy Chief and Councillors were duly elected pursuant to MDFN election practices and were officially recognized as such.

[19] On September 23, 2015 Francine McKenzie submitted a written appeal of the election results citing several procedural irregularities based on the 2012 Code, including that two nominated candidates had been removed from the process.

[20] On September 29, 2015 Joy Barkman wrote to the Election Committee advising that her letter comprised official notice of her appeal of the September 15, 2015 election. She asserted that the Election Committee had failed to conduct themselves in accordance with the Election Committee Code of Ethics, an addendum to the 2012 Code, which she believed to be in effect, and noted that she had previously voiced her concerns about the rejection of Gordon Beardy's nomination for re-election.

[21] Neither of these Applicants received a response from the Election Committee.

[22] Gordon Beardy did not file an appeal. However, through Anthony Carfagnini, who had acted as counsel to the Band prior to the 2015 election, he instructed that a series of communications be sent to financial institutions utilized by the Band suggesting that the election results were in dispute and that the institutions should only communicate with and take instructions from the members of the prior Band Council. These communications are detailed in the various affidavits filed in support of this application and the cross-examinations on those affidavits. For the purposes of this application it is sufficient to say that, faced with conflicting information as to the validity of the election and the authority of Band Council members to instruct them, as well as suggestions of inappropriate diverting of funds, the financial institutions caused the Band's bank accounts to be frozen. This caused serious disruption not only to the

Band's financial affairs at large but also to the day-to-day banking of its members, including being precluded from cashing Ontario Works cheques which were returned as non-sufficient funds.

[23] Ultimately, on December 31, 2015 this Court ordered that the Applicants' counsel write to the banks instructing that the Band's accounts be unfrozen, that all normal course of business transactions be permitted, with the exception of payroll payments to the current Band Council members, and that the banks deal exclusively with the new Band Council pending further order of this Court.

[24] Subsequently, the Respondents sought an urgent case management meeting and requested that the application for judicial review be heard on an urgent basis because of ongoing financial implications. By Order of February 25, 2016 this matter was accordingly set down to be heard on March 15 and 16, 2016.

Decision Under Review

[25] At the heart of this matter is the Election Committee's decision to disallow Gordon Beardy from running in the September 15, 2015 election. Also at issue are other decisions and actions of the Election Committee which the Applicants assert resulted in the election not having been conducted in compliance with the 2012 Code, which they believe to apply. These decisions and actions all culminate in BCR150916A which resolves that the new Band Council of Chief Stan Beardy (by acclamation), Deputy Chief Roy Fiddler and Councillors Charlie L. Beardy,

John Morris and Olivia Duncan were duly elected pursuant to MDFN election practices and are officially recognized and endorsed as such. BCR150916A is signed by a quorum of the newly elected Council.

Issues

[26] The Applicants submit that three issues arise:

1) Was the Election Committee acting as a federal board, commission, or tribunal when it made the series of decisions which led to BCR150916A, if so what is the standard of review?

2) Did the Election Committee have jurisdiction to disallow Gordon Beardy to stand as a candidate?

3) Did the Election Committee owe Gordon Beardy a duty of procedural fairness when they did not allow him to run? Did they discharge that duty?

[27] The Respondents submit eight issues:

1) Was the draft 2012 Code ever ratified and adopted to amend the 2005 Code?

2) Should the Court exercise jurisdiction where the Applicant, Gordon Beardy, did not exhaust his internal recourse?

3) Did Joy Barkman and Francine McKenzie have standing to file appeals to the Election Committee?

4) If the answer to questions 2 and/or 3 is yes, then:

5) Is the appropriate standard of review of the Election Committee's decision to disqualify Gordon Beardy's candidacy that of patent unreasonableness?

6) Was the Election Committee's decision to disqualify Gordon Beardy consistent with the 2005 Code as supplemented by customary practice?

7) Was the Election Committee's decision to disqualify Gordon Beardy done in a manner consistent with procedural fairness?

8) Did any technical non-compliance with the Code materially affect the election results?

9) What is the appropriate relief?

[28] In my view, the issues are as follows:

1) Does this Court have jurisdiction to hear this matter and, if so, should it exercise that jurisdiction and what is the standard of review?

2) Which of the 2005 or 2012 Codes were in effect?

3) Were the actions and decisions of the Election Committee consistent with the applicable Code and customary practice?

4) Was there a breach of procedural fairness which would affect the election results?

5) What are the appropriate remedies?

Customary Election Code

[29] As a preliminary point, it must be noted that there are varying versions of the 2005 Code contained in the record. The version found as Exhibit A of Roy Fiddler's affidavit contained in the Respondents' Record bears an Indian Affairs "received" stamp dated September 14, 2005. However, it differs from the version of the 2005 Code found as Exhibit B of Anthony Carfagnini's affidavit found in the Applicants' Record. For example, in the Respondents' version the section dealing with Removal of Leaders in Office contains five sections while the Applicants' version contains only the first three. The Applicants' version includes copies of Addendums 5 and 6 which are not included with the version found in the Respondents' Record. The evidence does not permit me to reconcile these versions. For the purposes of these reasons I will be referring to the version found in the Respondents' Record.

[30] The most relevant sections of the 2005 Code are set out below:

> ***Guiding Principles***
>
> Guiding principles for the community elections are initiated through a process of prayer facilitated by community elders with the participation of the designated community elections committee.
>
> This initial process is then followed by comments from the participating elders in reference to the election process.
>
> The completion of comments is followed by closing prayer voiced by one of the local community elders.
>
> **Part 1 - Policy Statements**
>
> **…**
>
> ***Eligible Voters***
>
> 2. Registered band members residing both on-reserve and off reserve are eligible to vote in the Muskrat Dam First Nation Election.
>
> **…**
>
> ***Eligible Candidates***
>
> 1. All eligible voters will be eligible to be nominated and stand as candidates for the Muskrat Dam First Nation Election.
>
> 2. The Nomination Procedure for Muskrat Dam First Nation is described in Part 2, Section 1 of this code.
>
> 3. The appointed Electoral Officer and Assistance Electoral Officer will not be eligible to run for office, unless they resign from the Elections Committee.
>
> 4. All eligible voters will be involved in determining who is eligible to run for office through the Nomination Process as identified in part 2, section 1 of this code.
>
> ***Leadership Selection***
>
> 1. Elected leaders are expected to carry out the duties of their positions honestly and with respect and honor.
>
> 2. A vacant position on council may be filled by appointment if the

remaining term of Office is short or can be left open.

3. If the remaining term of office is longer than 90 days, a vacant position on the Council will be filled by a By-election process.

4. The Chief and Council in Office at the time of the vacancy and the elections committee and elders will provide direction on how to handle the elected position vacancy.

Term of Office

1. The term of Office will be (2) two years.

2. Elections will be held every two years in July until 2006 when the elections will be held in late October or before November 15th.

3. Elections will not be held during periods of misfortunes, such as death or a funeral in Muskrat Dam First Nation.

4. Except for situations outlined in 3, an election will be held on the same day and month every two years.

Removal of Leaders in Office

1. Elected member of Muskrat Dam First Nation is convicted of an indictable criminal offence which is contrary to the interests of the Muskrat Dam First Nation.

2. Elected member of the Muskrat Dam First nation is declared mentally incompetent by medical declaration

3. Elected member of the Muskrat Dam First Nation may be asked to resign due to immediate family crisis or in the event of death.

4. Elected members of Muskrat Dam First Nation - Chief and Council may call for a referendum on their positions, then a community Referendum on the sitting Chief and Council will take place, if there is evidence of 50% + 1 recommendation calling for election on any Council member position then an Election will be held.

5. When 1/3 of the Eligible voters have signed a petition calling for a referendum, then the Elections Committee will conduct a Referendum and shall canvass all eligible Voters. If there is evidence from the Referendum 50% + 1 of Voters calling for an Election on any Council member position, then there will be an Election for the Council position.

…

Appeals

1. Any elector who voted in the election can file an appeal within 14 days of the election for the following reasons:

a) There was a violation of the election provisions that may have affected the election results.

b) The appeal procedure is described in Part 2, section 4 of this code.

Approval

The Muskrat Dam First Nation Election Code will be approved by the majority of voters by Community process. The list of those voters approving the Muskrat Dam First Nation Election Code is provided in Addendum Five.

The Muskrat Dam First Nation Election Code will be amended as a resulted of agreement by the majority of voters consulted in a Community process for the purpose of amending the Muskrat Dam First Nation Election Code. A copy of the amendment with the list of the Muskrat Dam Election Code will be kept on file in the First Nation Administration Offices. The amendment procedure is described in Part 2, section 5 of this code.

…

Part 2 - Procedures for Elections

Section 1, Nomination Procedure

…

Section 2, Polling Procedure

…

Section 3, Voting Procedure

…

Section 4

Appeal Procedure

1. An appeal of an election must be voiced orally and submitted in writing within fourteen days of that election. The appeal must provide the reason for the appeal.

2. Election issues can be appealed to the Election Committee.

3. Appeals will be resolved at the local level and can utilize the Election Committee and Elders.

4. The Federal Court of Canada will not be used as an appeal mechanism.

5. Appeals will be resolved according to the traditional customs.

6. The appeal will be addressed by the Election Committee and Elders or other designated body with five days in receipt.

7. The decision of the Election Committee or other designated Appeal Body will be final and binding.

Section 5

Amendment Procedure

1. Proposed changes to this Muskrat Dam First Nation Election Code must be drafted by the purposes and submitted to the Chief and Council.

2. The proposed amendment will be reviewed by the Chief and Council and a copy of such will be distributed to each eligible voter for his/her consideration.

3. Any proposed amendment to the Code will be discussed at a Community Consultation Process called for this purpose.

4. The majority of the Electorate through the Community Consultation Process must agree with the purposed [sic] amendment before it is passed by the Chief and Council.

5. Any amendment of the Muskrat Dam First Nation Election Code that is passed at [sic] through the Community Consultation process will be distributed to the electorate.

Addendums

Addendum One: Chief

Addendum Two: Deputy Chief

Addendum Three: Councillor

Addendum Four: Oath of Office

Addendum Five: Approval List

Addendum Six: Job Description for the Electoral Officer & Assistant Electoral Officer

Remedies Sought

[31] In their Notice of Motion the Applicants' recite twenty three remedies sought, however, in their written submissions these were condensed to an order that: the 2015 bi-election be quashed; a writ in the nature of *quo warranto* be given and a declaration that the Chief and Council elected on September 15, 2015 never properly held office; a writ in the nature of *mandamus* directing that the Respondent members of the Election Committee hold an election pursuant to the 2005 Code as soon as practicable; and, that this Court retain jurisdiction until the results of the new election are accepted by the Department of Indigenous and Northern Affairs and the appeal period and all resultant appeals have been dealt with.

Preliminary Comment

[32] I would note that this matter was heard and decided on an urgent basis. In support of and in response to the application the parties each filed multiple affidavits, many of which were lengthy and attached many exhibits, as well as transcripts of cross-examinations conducted with respect to many of those affidavits. I have read and considered all of the evidence and the

submissions. However, given the desire of the parties to have this matter resolved as quickly as possible, I have kept my reasons as brief as possible and have not specifically referred to each document before me.

Issue 1: Does this Court have jurisdiction to hear this matter and what is the standard of review?

Applicants' Submissions

[33] The Applicants submit that this Court has jurisdiction to review BCR150916A as MDFN is acting as a federal board, commission, or tribunal as contemplated by s 2 of the *Federal Courts Act*. Further, that jurisdiction over custom elections is well-established (*Sparvier v Cowessess Indian Band No 73*, 1993 CarswellNat 1319 at paras 11-15 [*Sparvier*]). As the Court is interpreting the content of the Band custom as well as the provisions of the 2005 or 2012 Codes, it is therefore interpreting the law, and the standard of review for jurisdiction and statutory interpretation is correctness (*Joseph v Yekooche First Nation*, 2012 FC 1153 at para 25 [*Joseph*]). Little to no deference should be shown to the Electoral Officer or Election Committee, as their power came from a meeting of the membership and they have no expertise. Nor was the Election Committee created in accordance with the 2012 Code.

Respondents' Submissions

[34] The Respondents submit that the Court ought to decline to exercise its jurisdiction in this matter as Gordon Beardy failed to exhaust the recourse available to him in the subject administrative process which, absent exceptional circumstances, aggrieved parties are required to

do before coming to Court (*C.B. Powell Ltd v Canada Border Services Agency*, 2010 FCA 61 at paras 30-33 [*C.B. Powell*]; *Sagkeeng First Nation v Canada*, 2015 FC 1113 at paras 69-71 [*Sagkeeng*]; *Taypotat v Taypotat.*, 2012 FC 1036 [*Taypotat*]). The 2005 Code contained a mechanism for appeal to the Election Committee which provided Gordon Beardy with an adequate alternative remedy. It is uncontested that he did not avail himself of the appeal procedure and he has not advanced any exceptional circumstances. Therefore, the Court ought to decline jurisdiction, particularly as the 2005 Code contains a privative clause.

[35] The Respondents also submit that in order to file an appeal under the 2005 Code, the aggrieved parties must have voted in the subject election. However, both Joy Barkman and Francine McKenzie confirmed under cross-examination that they consciously chose not to vote in the election. Accordingly, the Respondents submit that they lack standing to file an appeal. Further, that both Ms. Barkman and Ms. McKenzie filed their appeals pursuant to the 2012 Code, which was not in force. Both appeals were improperly constituted and cannot form the basis of remedial relief before this Court.

[36] The Respondents submit that the standard of review in this case is patent unreasonableness, which attracts a great degree of deference to the Election Committee's decision to disqualify Gordon Beardy as an eligible candidate. The justifications for a high level of deference are: the presence of a full privative clause in the 2005 Code; the expertise of the Election Committee which was comprised of experienced members of past election committees who had specialized expertise with respect to the Band's customary election practices as applied to the Code; the vague nature of the 2005 Code, which required the Election Committee to fill in

gaps to achieve its primary purpose by using their experience and knowledge of MDFN's customary practices; and, the Election Committee made only factual determinations regarding whether or not Gordon Beardy had resigned and what custom dictated in terms of assessing his eligibility. No legal interpretation of the 2005 Code was required because it does not address disqualification factors.

Analysis

i. *Jurisdiction*

[37] As stated in *Shotclose v Stoney First Nation*, 2011 FC 750 [*Shotclose*] it is settled law that this Court has jurisdiction to review the decisions and actions of chiefs and band councils as they constitute a "federal board, commission, or tribunal" as contemplated by s 2 of the *Federal Courts Act*. Such decisions are also subject to the jurisdiction of the Court as set out in s 18.1 of the *Federal Courts Act* to hear applications for judicial review of the matter in respect of which relief is sought (*Sparvier* at para 13; *Angus v Chipewyan Prairie First Nation Tribal Council*, 2008 FC 932 at para 29; *Vollant v Sioui*, 2006 FC 487 at para 48; *Gabriel v Canatonquin*, [1978] 1 FC 124 at para 10, aff'd [1980] 2 FC 792 (FCA)).

[38] And, as stated in *Ratt v Matchewan*, 2010 FC 160 (at para 105-106), the jurisprudence of this Court has consistently upheld its supervisory powers over band elections (*Francis v Mohawk Council of Kanasetake*, [2003] 4 FC 1133 at paras 11 to 18 [*Francis*]; *Ballantyne v Nasikapow*, 197 FTR 184 at paras 5-6). Whether the selection process is carried out by election pursuant to the *Indian Act*, or pursuant to custom, this Court has supervisory jurisdiction over the process,

and over those bodies, such as electoral officers, appeals boards or elders councils, purporting to exercise authority under the process.

[39] In this case, the decision not to permit Gordon Beardy to run for re-election was made by the Election Committee and the election process was effected by that Committee and the Electoral Officer. As discussed below, there is some question as to whether it was open to the Band members to constitute an Election Committee in these circumstances and whether the Election Committee had the authority to take the actions that it did. However, as the Election Committee purported to exercise authority pursuant to an election code that was effected pursuant to the provisions of the *Indian Act*, in my view, for the purposes of this judicial review, it falls within the definition of a "federal board, commission or other tribunal" over which this Court has jurisdiction (*Sparvier* at para 13).

[40] Further, as stated by Justice Tremblay-Lamer in *Lafond v Muskeg Lake Cree Nation*, 2008 FC 726 at para 20 [*Lafond*], in the context of a chief who purported to act alone, separate from band council, and on his own initiative in relation to band election matters, jurisdiction pursuant to s 18 ".. extends to those purporting to have authority to decide as well" (*Roseau River Anishinabe First Nation v Roseau River Anishinabe First Nation (Council),* [2003] FCJ No 251 at para 19; *Sparvier* at para 13). She concluded that this Court has jurisdiction to review removals of band council members from office "regardless of who purports to possess the authority to do so". I see no reason why this same reasoning would not apply to the decisions of the Election Committee in this case (also see *Salt River First Nation 195 (Council) v Salt River*

First Nation, 2003 FCA 385 at paras 18-20; *Chief Pahtayken v Oakes*, 2009 FC 134 at paras 31-32).

ii. *Standard of Review*

[41] As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], in determining the appropriate standard of review a court must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Only if this inquiry proves unfruitful, must the court proceed to an analysis of the factors making it possible to identify the proper standard of review (*Dunsmuir* at para 62).

[42] In this case, the issue of which of the election codes was in effect at the relevant time is, in my view, a question of mixed fact and law and, therefore, the reasonableness standard applies (*Dunsmuir* at para 53; *Lewis v Gitxaala Nation*, 2015 FC 204 at para 15).

[43] This Court has recognized that chiefs and band councils have expertise on matters such as band custom and factual determinations and, therefore, that their decisions should be shown considerable deference. Thus, band council decisions are to be reviewed on the standard of reasonableness and will be upheld if they fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Shotclose* at paras 58-59; *Parker v Okanagan Indian Band Council*, 2010 FC 1218 at paras 38-40 [*Parker*]; *Dunsmuir*).

[44] In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

[45] Jurisprudence has also previously held that the issue of whether a band council breached a duty of procedural fairness is to be reviewed on a correctness standard (*Prince v Sucker Creek First Nation*, 2008 FC 1268 at para 23 [*Sucker Creek*]; *Parker* at para 41; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 24; *Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796; *Taypotat* at para 42). In my view, this standard would be equally applicable to the actions of the Election Committee.

iii. *Should the Court decline to exercise its jurisdiction?*

[46] Putting aside for the moment the question of whether the Election Committee was validly constituted and the alleged election irregularities, the fact remains that Joy Barkman and Francine McKenzie did not vote in the subject election but filed appeals. The Respondents submit that they therefore lack standing in this matter.

[47] Joy Barkman's affidavit states that Olivia Duncan sent her photos of the tallies taken of the nominations made at the September 11, 2015 nomination meeting. These showed that Gordon Beardy received thirty-two nominations for Chief and Stan Beardy received forty-six nominations. Stan Beardy was announced as acclaimed Chief by radio on the evening of September 14, 2015. Joy Barkman called Ernie Harper and voiced her concerns about the

process and, specifically, as to why Gordon Beardy was not permitted to stand for election. Ernie Harper put her on speaker phone, with what she assumed to be the rest of the Election Committee, although she spoke only with him and Mary Ann Beardy. Ernie Harper told her that she should not question the process in the midst of an election and confirmed that the Election Committee had not approached Gordon Beardy regarding his nomination. Ultimately, she was told that she could file an appeal.

[48] She states that she again expressed her concern to Ernie Harper on September 15, 2015. On September 28, 2015 she discussed her appeal with Lisa Beardy who told her that the appeal should be sent to Ernie Harper and that he would process it with her or Mary Ann Beardy. Lisa Beardy later indicated that she would forward the appeal to Steve Beardy, the Band Manager.

[49] The appeal was filed on September 29, 2015. Both the 2005 and 2012 Codes state that any elector who voted in an election can file an appeal within fourteen days of the election if there was a violation of the election provisions that may have affected the election results. Therefore, the appeal was filed within the required time frame. It takes issue with the August 14, 2015 community meeting, as the persons who voted at that time were not representative of the majority of the community pursuant to the 50% plus one requirement set out in both Codes. It also describes Ms. Barkman's prior efforts to raise her concerns with the Election Committee and again at the announcement of the election results and swearing in.

[50] The appeal of Francine McKenzie dated September 23, 2015 was similarly submitted in accordance with the Code requirements and sets out alleged procedural irregularities, including that two candidate nominations had been removed from the election process.

[51] Of the members of the Election Committee, the affidavit of Ernie Harper, co-chair of the Election Committee does not in any way address the appeals. There is no affidavit of Lisa Beardy, the other co-chair. Nor do the affidavits of Jake Beardy, Clifford Ferris or John Morris mention the appeals.

[52] On cross-examination Ernie Harper stated that he had never heard about or seen an election appeal voiced or filed by Francine McKenzie and that he did not know who she was. As to Joy Barkman's appeal, when it was put to him that the Election Committee had not responded to it he stated that he thought that time was a factor and that there were no other factors. On cross-examination Jake Beardy stated that the Election Committee did not meet after the election and that he was not aware of a phone call from Joy Barkman with the Election Committee.

[53] The affidavit of Mary Ann Beardy confirms that Joy Barkman called Ernie Harper after the radio broadcast and that she was put on speaker phone so that Mary Ann Beardy could participate in the call. She confirmed to Joy Barkman that, because Gordon Beardy had resigned, it was determined that he was ineligible for re-election but that Ms. Barkman did not accept that explanation. The affidavit makes no mention of the appeals filed.

[54] The Respondents submit that Joy Barkman and Francine McKenzie lacked standing to file an appeal because, in order to file an appeal under either of the Codes, the aggrieved parties must have voted in the subject election. Both Ms. Barkman and Ms. McKenzie confirmed under cross-examination that they consciously chose not to do so. Furthermore, both Ms. Barkman and Ms. McKenzie filed their appeals pursuant to the 2012 Code, which was not in force. The Respondents submit that, therefore, both appeals were improperly constituted and cannot form the basis of remedial relief before this Court.

[55] At the hearing before me counsel for the Respondents suggested that the reason why the Election Committee failed to respond to the appeals was because they could have determined from the voters list that Joy Barkman and Francine McKenzie had not voted and, therefore, were not entitled to appeal. There is, however, no evidence to support this submission. In fact, the evidence is to the contrary, being that the appeals were simply not addressed.

[56] In this situation both Joy Barkman and Francine McKenzie followed the appeal procedure set out in both the 2005 and 2012 Codes by filing their appeals with the Election Committee within fourteen days of the election. The Codes required the Election Committee and Elders or other designated body to respond to appeals within five days. Because the Election Committee did not respond to the appeals, it cannot be said that Ms. Barkman and Ms. McKenzie failed to exhaust their rights and remedies under the Codes before commencing this application for judicial review. Their circumstances are, therefore, distinguished from those in *Sagkeeng* where the First Nation did not request a dispute resolution mechanism that was available to them.

[57] It is true, as stated in *C.B. Powell* (at para 33), that concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, but this is so only as long as that process allows the issues to be raised and an effective remedy to be granted (see *Harelkin v University of Regina*, [1979] 2 SCR 561; *Okwuobi v Lester B. Pearson School Board*, 2005 SCC 16 at paras 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.):

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[58] In this case, the Election Committee did not follow the appeal requirements as set out in the Codes. It ignored and failed to respond to the appeals and, therefore, did not allow the issues to be raised at all. In these circumstances, as a result of the actions of the Election Committee, the process was not completed and no remedy was available. Put otherwise, because the Election Committee did not consider the appeals, the appeal mechanism offered by the Codes was not an adequate, alternative appeal mechanism to judicial review. Further, as the Codes required the Election Committee to respond within five days of receipt of the appeals, which it

did not do, nor can the appeal process be said to be ongoing. While it may be that if the Election Committee had addressed the appeals it would have been open to it to dispose of them on the basis that Ms. Barkman and Ms. McKenzie had no right of appeal as they had failed to vote, the Election Committee did not consider the appeals and did not make that determination. Therefore, in my view, this does not provide a basis upon which those Applicants should be denied standing in this application, nor do the Respondents refer to any jurisprudence concerning standing in support of that position.

[59] As to whether the appeals of Francine McKenzie and Joy Barkman were invalid as they were framed in terms of the provisions of the 2012 Code, as addressed below, there was significant confusion among the members of MDFN as to which Code was in place. Indeed, in some instances the Election Committee itself referred to the 2012 Code. Accordingly, reference to the 2012 Code in the appeals is far from fatal, nor could it be as the relevant appeal provisions are essentially the same as those found in the 2005 Code.

[60] In my view, as addressed below, it was also a breach of procedural fairness on the part of the Election Committee to fail to respond to the appeals even if, ultimately, it was open to it to have denied the appeals on the basis that the appellants had failed to vote.

[61] This Court has discretion in determining whether judicial review should be undertaken (*Canadian Pacific v Matsqui,* [1996] 1 SCR 3). In my view, given that the appeal process was ignored and that the period within which the Election Committee was required to respond to the appeals as set out in the 2005 Code has expired, this Court should exercise its jurisdiction to hear

the matter on the merits. And, although Gordon Beardy did not file his own appeal, the election issues arising from the ignored appeals of Joy Barkman and Francine McKenzie are common to the assertions of all three of the Applicants in this application for judicial review.

Issue 2: Which of the 2005 or 2012 Codes were in effect?

Applicants' Submissions

[62] At the hearing of this matter, the Applicants conceded that the 2012 Code was never ratified and that the 2005 Code is still valid. However, they submitted that the 2013 election in which Gordon Beardy was last elected Chief was run pursuant to the 2012 Code due to a belief that the 2012 Code was validly adopted.

Respondents' Submissions

[63] The Respondents submit that the 2005 Code was ratified by the community through a community consultation process. In order for INAC to accept the 2005 Code in place of an Order pursuant to s 74 of the *Indian Act*, MDFN had to satisfy the strict criteria set out in INAC's Policy, including proof that the written code had the support of the people, a BCR adopting it, and an affidavit setting out the consultation and ratification process and results. The onus is on the Applicants to prove that the 2005 Code was amended, via the 2012 draft Election Code, pursuant to the provisions of the 2005 Code. The Applicants must prove that the purported amended code was supported by a broad consensus of the membership through a community consultation process which garnered the support of the majority of the electorate.

[64] The Respondents submit that there is no direct evidence that the draft 2012 Code was ever ratified by a majority of the electorate through a community consultation process, nor has any BCR adopting the amendments been located. Furthermore, no amended 2012 Code has been filed with INAC.

[65] As a result, because the 2005 Code provided for a term of office for Council members of two years, Gordon Beardy's term as Chief should have expired in or around July 2005.

Analysis

[66] As noted above, at the hearing, counsel for the Applicants submitted that although the 2005 Code was technically in effect, the 2013 election was conducted pursuant to the 2012 Code due to a belief that it was valid. This position is related to the effective length of term of those persons elected in 2013. In that regard, reference was made to the cross-examination transcript of Elder Jake Beardy, in which he stated that he believed that Gordon Beardy's term would expire in June 2016. However, no BCRs or other documentary evidence were adduced to show that Gordon Beardy and the other members of Council were elected for a three-year term. And, although the affidavit of Gordon Beardy states that his mandate as Chief came from the 2013 election and that pursuant to the 2012 Code his term is for three years, he refers to no evidence to support that the 2012 Code was in effect. On cross-examination Gordon Beardy confirmed that he had not verified that the 2012 Code had been finalized but stated that he was told that it would be used in the conduct of the 2013 election and that he accepted this.

[67] The affidavit of Charlie Morris states that the draft 2012 Code was taken door to door for signature. He states that one hundred and sixty-seven signatures were collected and that the document was submitted to Chief and Council's executive secretary so that a resolution could be prepared to ratify the 2012 Code by Council. However, a copy of that document was not produced.

[68] The affidavit of Roy Fiddler states that the 2005 Code was ratified by the community through a consultation process held in 2005. He attached as an exhibit to his affidavit a copy of the 2005 Code, or at least a portion of that document, with a stamp indicating that it was received by Indian Affairs on September 14, 2005. His affidavit states that the 2005 Code has been in operation since then. Also attached as an exhibit to his affidavit is a portion of a document entitled "Conversion to Community Election System Policy" which sets out the criteria to be utilized by the department of Indian Affairs to determine if an order pursuant to s 74 of the *Indian Act* should be repealed so that a First Nation may conduct its elections under its own custom election system. Amongst other things, the department was required to review the proposed code and to find it to be satisfactory, the proposed code was required to have received the support of the community and, following the community ratification vote, supporting documents were to be submitted including a final copy of the code, a band council resolution and an affidavit of the person overseeing the process.

[69] In an effort to establish that the 2005 Code remains in effect, Roy Fiddler also attached a copy of an email from Ron Mavin ("Mavin"), Regional Manager, First Nations Governance, Aboriginal Affairs and Northern Development Canada("AANDC") dated September 30, 2015, to

Stan Beardy acknowledging his election as Chief and that of the new Council on September 15, 2015 and attaching a copy of the new listing, per AANDC's computerized Band Governances Management System, that was updated as directed by BCR150916A. The attached printout notes an expiry date for each member of Council as July 31, 2017 which is indicative of a two year term of office, rather than a three year term as specified in the 2012 Code.

[70] Roy Fiddler states that no other election code, and specifically the 2012 Code, has been filed with Indian Affairs. In this regard he refers to an email from Mavin to Gordon Beardy, dated September 29, 2015. In that email Mavin states that in 2012-2013 MDFN was provided with funding to support a community process to revise its custom election code. A requirement of that funding was a commitment by MDFN to submit a draft version of a revised code to AANDC. A draft code was submitted as a part of the final report. Because AANDC has no authority with respect to custom election codes, the submission of the draft did not constitute an "approval" of the code, but rather the completion of a reporting requirement. However, he noted that in the narrative portion of the final report that it was the intention of the MDFN to take the draft to the community for ratification at a later date. Mavin stated that he was not aware that this had been completed.

[71] Roy Fiddler states that to the best of his knowledge, no community consultation or ratification process was completed. Therefore, the 2012 Code remained at the draft stage.

[72] Vernon Morris also filed an affidavit. He states that he is a member of the MDFN and served on the MDFN Council for over 20 years between 1980 and 2009 when he moved to Sioux

Lookout. He states that in the MDFN community it is custom that any new election code or amendment to the election code would be subject to community consultation and ratification before it would be adopted and that he has no knowledge of any such consultation process having been completed. He states that in 2012 Charlie L. Morris approached him with a document to sign for the adoption of the 2012 Code but he declined to do so because he did not agree with the process being followed. He heard nothing further about the ratification and stated that he believed that the 2012 draft code initiative process was never completed nor introduced to the community as having been adopted by them through a ratification process.

[73] Similarly, the affidavit of Mary Ann Beardy, the Chief Electoral Officer for the September 15, 2015 election, states that she does not believe that the 2012 Code was ever formally adopted, which belief was based on her knowledge that any significant changes to the election practices would require meaningful community consultation and ratification and that she had not been made aware of either.

[74] Cyril Beardy also provided an affidavit. In it he states that he has been the office management coordinator for the MDFN for many years and that one of his responsibilities in that position is to maintain the Band's administration files, including files relating to the election codes. He provided as exhibits two BCR's, both dated April 12, 2012. BCR 12-0001 resolves that Chief and Council will implement the "Draft" election Code for use in the April 2012 bi-election for the Head Councillor position and that the Election Committee for the April 2012 bi-election would operate "within the terms contained in this Code". Conversely, BCR 12-0002 resolves to appoint the listed persons to the Election Committee and that it shall, for the April

2012 bi-election, operate "within the terms contained in this Code, dated June 2005". A third BCR, dated April 4, 2012, resolves that the MDFN will submit a funding application to AANDC for purposes of updating the election code. Cyril Beardy states that he did not locate any documentation evidencing community consultation surrounding the draft 2012 Code, its ratification or a petition approving it, nor did he locate a BCR reflecting community ratification or formal adoption of the 2012 Code.

[75] It is apparent from the record that there was considerable confusion as to the status of the 2012 Code. The minutes of the June 11, 2015 meeting indicate that the community members in attendance asked to see the BCR approving the changes contained in the July 18, 2012 election code, minutes adopting that code and asked whether the document was legally binding. The two Councillors in attendance, Morris Fiddler and Olivia Duncan, were unable to produce documentation of the ratification process or supporting BCRs approving the revised code. The request for a general meeting within two weeks was not addressed by Chief and Council and, as a result, the status of the 2012 Code was not addressed in that format.

[76] The 2005 Code states that the term of office for Chief and Councillor is two years. The evidence is consistent that elections were always held on two year terms. The first purported variation from this was following the 2013 election. The 2005 Code also states that it will be amended by agreement of the majority of voters consulted in a community process for that purpose. The amendment procedure is found in Part 2- Section 5 as follows:

> 1) Proposed changes to this Muskrat Dam First Nation Election Code must be drafted by the purposes and submitted to the Chief and Council.

2) The proposed amendment will be reviewed by the Chief and Council and a copy of such will be distributed to each eligible voter for his/her consideration.

3) Any proposed amendment to the Code will be discussed at a Community Consultation Process called for this purpose.

4) The majority of the Electorate through the Community Consultation Process must agree with the purposed amendment before it is passed by the Chief and Council

5) Any amendment of the Muskrat Dam First Nation Election Code that is passed at through the Community Consultation Process will be distributed to the electorate.

[77] Ultimately, the question of whether the 2005 or 2012 Code was in effect has little relevance as the provisions of concern do not significantly vary from one Code to the other. For example, neither Code contains provision for disqualifying a nominated candidate from running for office and both Codes state that all eligible voters may stand as candidates if nominated for any position and, as discussed above, the appeal provisions are also similar.

[78] Regardless, I am satisfied that the evidence does not support a finding that the 2012 Code was ever discussed at a community consultation process, agreed by the majority of the people or ratified by Chief and Council. Accordingly, I find that the 2005 Code was in effect and, in the absence of evidence that the majority of the community agreed otherwise, it governed the 2013 election. This is significant as, in the result, the term of Chief and Council elected in 2013 expired in 2015.

Issue 3: Did the decisions of the Election Committee comply with the 2005 Code or customary election practice?

Applicants' Submissions

[79] The Applicants submit that the Election Committee was not acting pursuant to Band custom, as the only reliable means of establishing this is through the custom election Codes. Without adherence to the Codes, the acts of the Election Committee were *ultra vires* its jurisdiction. Any purported changes to the custom Code, or unwritten custom incorporated into the custom Code, must be done by broad consensus and the genuine will of the Band must be considered (*Joseph* at paras 36-38).

[80] The resolution at the August 14, 2015 community meeting cannot be interpreted as an amendment to the custom Code as it did not occur through broad consensus. It was a meeting without notice or opportunity for non-resident MDFN members to participate. Of three hundred and eight eligible voters, less than ten percent participated.

[81] Further, the vote held on September 11, 2015 disallowing Gordon Beardy from standing as a candidate was made by twelve of fourteen people present at the close of nomination. This cannot be considered broad consensus to displace or add to the customary Code. Neither the 2012 or 2005 Codes include provisions for disallowing candidates to stand for nomination, nor was effective notice of these decisions or meetings meaningfully distributed (*Gadwa v Kehewin Cree Nation*, 1996 CarswellNat 345 at para 5).

[82] Members of a band cannot take the law into their own hands and councils must operate according to the rule of law (*Long Lake Cree Nation v Canada (Minister of Indian and Northern Affairs)*, 1995 CarswellNat 3203 at para 31 [*Long Lake Cree Nation*]). The Applicants submit that in this case members of MDFN took the law into their own hands. The wishes of the minority were never reconciled against the wishes of the Band members who elected Gordon Beardy in 2013 or the thirty-two voters who nominated him in this election. He also had a reasonable expectation that he would be allowed to seek election following his resignation.

Respondents' Submissions

[83] The Respondents submit that when a First Nation sets out its customary practices in the form of a written election code, the election code will govern the propriety of any decision made within the context of an impugned election. However, when there are gaps or ambiguities in the code, the Election Committee is entitled to resort to the First Nation's customary practices in filling the gaps or resolving those ambiguities. This Court has recognized that, notwithstanding the existence of a written customary election code, decision-makers may still retain discretion vested by the written code which should also be informed by the First Nation's customary practices (*Samson Indian Band v Bruno*, 2006 FCA 249 at para 39 [*Samson*]; *Lafond* at paras 9-11).

[84] The Respondents submit that the resignations of Gordon Beardy, Doug Beardy, and Morris Fiddler were valid and binding and that the Election Committee and the community were entitled to, and did, rely on those resignations resulting in the calling for a referendum. Alternatively, those Councillors effectively abandoned their positions. Because the 2005 Code

does not set out a procedure to be followed in the event that Council loses effective quorum due to voluntary resignations, the Election Committee relied on custom to guide them which meant resorting to the Elders for guidance on the leadership issue as supported by the 2005 Code.

[85] The Election Committee had authority to disqualify Gordon Beardy's nomination in a manner consistent with First Nations custom. Because the 2005 Code does not expressly provide a disqualification procedure, the Court must determine whether the Election Committee was nonetheless vested with the requisite power to disqualify that candidate by resort to custom (*Simon v Samson Creek Nation*, 2001 FCT 467 at paras 24-32 [*Simon*]). In determining whether or not there are customary practices which govern leadership selection or removal, it must be established that there are practices in place that are generally acceptable to the members of the Band and upon which there is a broad consensus (*Francis*).

[86] The Respondents submit that there is ample evidence in the record to show that both before and after the adoption of the 2005 Code, the Elders regularly discharged the role of assessing the suitability of a prospective candidate for leadership or the ongoing suitability of an existing leader and that the candidate or leader in question, and the community as a whole, respected that guidance. In *Simon*, the Court held that the general provision in the election code vesting authority in the election officers to conduct the election process was broad enough to vest the requisite authority in the election officers to disqualify candidates, in the absence of a specified disqualification process set out in the code.

[87] The 2005 Code, when taken as a whole, favors a purposeful interpretation which allows the Election Committee, with the support of the Elders and community, to disqualify unsuitable candidates from running for election.

[88] The difference between the case at bar and the fact situation presented in *Simon* is that the Election Committee disqualified Gordon Beardy's candidacy on the basis of custom; namely, by resorting to the customary practice of consulting with the Elders as to the suitability of Gordon Beardy as a potential leader in light of his history of resignations, and the support of the voters who were present at the nomination meeting. The Election Committee was justified in resorting to this customary practice in order to fill in a gap in the 2005 Code.

Analysis

[89] As discussed below, in my view the resignations of Gordon Beardy, Doug Beardy, and Morris Fiddler were valid and, therefore, the issues with respect to the impugned referendum are no longer relevant. It is true that the September 10, 2015 referendum was conducted in violation of the terms of both the 2005 and 2012 Codes, which require one third of eligible voters to sign a petition for a referendum. However, the purpose of the referendum was to determine whether there should be an election. After the resignation of Chief Gordon Beardy and two Councillors, an election was triggered and a referendum was no longer required. In any event, even if the resignations were not valid, because I have found that the 2005 Code was in effect, an election was required as the Chief and Council's term ended in July 2015.

[90] The central issue, therefore, is whether the Election Committee's decision to disallow Gordon Beardy from running in the election was reasonable. In my view, the decision was not based on established Band custom and was not reasonable.

[91] As stated by Justice Strayer in *Bigstone v Big Eagle*, 1992 CarswellNat 721 a band's custom must include practices for the choice of a council which are generally acceptable to members of the band, upon which there is broad consensus (at pp 117-8; *Bone v Sioux*, 1996 CarswellNat 150 at paras 27-28; *Taypotat* at para 25).

[92] In *Francis*, Justice Martineau discussed the general principles applicable to band custom and noted that custom will not always overlap exactly with an election code.

[93] Justice Martineau noted that custom has two components. First, a custom must have practices, which may either be established through repetitive acts in time or through a single act such as the adoption of an electoral code (*McLeod Lake Indian Band v Chingee* (1998), 153 FTR 257 (FCTD) [*McLeod*]. Custom must also have a subjective element, which refers to the manifestation of the will of those interested in rules for determining the electoral process of band council membership to be bound by a given rule or practice.

[94] On the latter element, Justice Martineau referred to *McLeod* stating:

> [30] Finally, one of the clearest articulations of what is the requisite subjective element for the establishment of the custom of a band is found in *McLeod*, *supra*, where Reed J. stated as follows in paragraphs 18-19:
>
> > The question that remains is whether "broad general consensus" equates to a "majority decision of the

> Band members attending a general meeting of the Band convened with notice". In my view, it may do so, or it may not, depending upon a number of factors. If for example, the general meeting was held in a location or at a time when it was difficult for a number of members to attend, and there was no provision for proxy voting, it may not meet the broad consensus test. If the notice was not adequate in not providing sufficient detail of what was proposed, or was not given sufficiently in advance of the meeting to allow people a realistic opportunity to attend then it would not be.
>
> There are also situations in which those who do not vote may be signalling a willingness to abide by the majority decision of those who do. I am of the view that approval by a majority of the adult members of the Band is probably a safe indication of a broad consensus (the age of majority being a matter for the band to determine). Whether a majority decision by the Band members attending a general meeting demonstrates a broad consensus depends on the circumstances of that meeting. (my emphasis)

[95] Justice Martineau concluded that:

> [36] For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a "broad consensus" as to its applicability. This would exclude sporadic behaviours which may tentatively arise to remedy certain exceptional difficulties of implementation at a particular moment in time as well as other practices which are clearly understood within the community as being followed on a trial basis. If present, such a "broad consensus" will evidence the will of the community at a given time not to consider the adopted electoral code as having an exhaustive and exclusive character. Its effect will be to exclude from the equation an insignificant number of band members who persistently objected to the adoption of a particular rule governing band elections as a customary one.

[96] As stated by Justice de Montigny in *Taypotat* at para 30, "In a nutshell, 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".

[97] Accordingly, in order to determine whether the actions of the Elections Committee were consistent with custom, the Respondents must demonstrate that this type of decision-making was firmly established, generalized, and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus (*Francis* at paras 21- 30; *Sucker Creek* at para 28; *Metansinine v Animbiigoo Zaagi'igan Anishnaabek First Nation,* 2011 FC 17 at para 28; *Joseph* at paras 36-39).

[98] In this case, the Respondents assert that there is a custom of taking into consideration the Elders' opinion on the suitability of candidates and disallowing candidates from running if they are found to be unsuitable. The evidence they refer to in support of this includes:

- In his affidavit, Roy Fiddler states that Elders hold a place of respect in MDFN. There are only a few Elders in the community, including Jake Beardy, Roderick Fiddler, and Allan Beardy. The Elders are engaged in the community and reflect the voice of the people. The people, in turn, listen to the Elders. He also states that the Elders' role in the leadership and election process is enshrined through their assignment of an Elders' position within the Election Committee. Further, that the role of the Elders in the election process is reflected in the 2005 Code including in its guiding principles and under leadership selection. Roy Fiddler includes as an exhibit to his affidavit his sworn Oath of Office, which includes the provision: "…I will further accept the direction and advice or [sic] our elders given their knowledge and experience".

- In his affidavit, Elder Jake Beardy states that Elders are respected by Chief and Council and members of MDFN, and that respect is reflected in the Oath of Office and the fact that Elders have a designated position on the election committees. He held that position in the subject election. He states that it is the custom of the MDFN to listen to and seek guidance from its Elders in matters relating to governance and leadership. He states that Gordon Beardy resigned as Chief two or three times in the past, and the people accepted his resignation. Elder Jake Beardy also stated that he accepted Gordon Beardy's

resignation and believed this meant that he would not be running for re-election. It was the people's will that Gordon Beardy not run for re-election and he supported the people in this decision. Therefore, when Gordon Beardy was nominated to run as Chief, the Election Committee did not accept his nomination. This was "consistent with our custom that a member of Council, including Chief, who resigns will not run for re-election in the resulting election. Chief Gordon Beardy had resigned too many times". At the nomination meeting, the Elders voted with the other people to reject Gordon Beardy's nomination.

- Vernon Morris is a former Councillor of MDFN. He states in his affidavit that Elders are an integral part of customary elections. They participate fully to ensure that the election is carried out in accordance with traditions. They look at candidates and consider their competence, capabilities and personal qualities. They generally do not veto candidates but provide principled guidance. When the Elders support a process and how it is being done, that process is generally accepted by the community as appropriate. This is an established customary practice of MDFN. He provides a specific example, an instance in 1980 when there was discussion among the election committee and Elders as to whether he should be allowed to run because he was considered to be too young. The Committee ultimately determined that he was an acceptable candidate. He further states that custom permits the people, the election committee and the Elders to disallow a nominated candidate from running when he has resigned. Gordon Beardy had a habit of resigning repeatedly and putting the community through the time and expense of an election process. On the two occasions that Gordon Beardy previously resigned, the people allowed him to resume his post without the need for a bi-election. In August 2015 the people decided that this was enough and accepted his resignation. He also states that the Elders play a very strong role in determining leadership matters and that it would be against MDFN custom for the Election Committee to disregard or to defy the Elders' guidance in relation to a potential candidate.

- In his affidavit, John Morris states that it has long been a custom and tradition at MDFN to listen to the wisdom of Elders for guidance on community matters. With respect to the nomination meeting, he states that fourteen people attended. For the position of Chief, Stan Beardy received forty-six nominations and Gordon Beardy received thirty-two nominations. Twelve of the fourteen people in attendance confirmed that the resignations of Chief, Deputy Chief, and Councillor Morris Fiddler be accepted and two people abstained. It was affirmed that the letters of resignation had been accepted by the people. Gordon Beardy's nomination was rejected because he had resigned his position. This was in accordance with the will of the people and the Elders.

- In his affidavit, Ernie Harper stated that the Elders give direction, and nothing would happen of significance in the community without their consent. With respect to the nomination meeting, he stated that he asked the Elders present to exercise their inherent right to govern and to advise as to the validity of Gordon Beardy's nomination. The Elders exercised their right by a show of hands, and did not allow him to run.

- In her affidavit, Mary Ann Beardy states that Elders have always played an important role on the election committees. The other committee members, like the community, try to

> follow the wisdom of the Elders. She also states that members of an election committee have the power and responsibility to accept or reject otherwise eligible candidates for the election, even if they have been duly nominated as candidates by eligible voters. While the role of an election committee is not explicitly set out in the Election Code, the process of accepting or rejecting otherwise eligible candidates nominated by the community is an established and respected customary practice of MDFN. She states that when nominations are received the Elders are consulted, through their representative on the election committee, and if the Elders are concerned about the suitability of a potential candidate for office the election committee and the community will listen. She points to three instances in which Chiefs and members of Council were removed from office due to serious concerns raised by the community.

[99] In my view, the above evidence is not sufficient to establish the existence of a custom which had broad consensus permitting the Election Committee, on the advice of Elders, to disallow a nominated candidate from running in an election. In the alternative, even if such a custom were established, I do not believe that the custom was followed in this situation as the evidence does not establish that the Elders played a significant role in the decision to disallow Gordon Beardy's nomination.

[100] In this regard, I note that Elder Jake Beardy stated that he did not believe that Gordon Beardy should run again because he had resigned too many times, and that it is custom that chief and council who resign should not be allowed to run again. However, if Gordon Beardy had resigned two or three times in the past and had been allowed to run again, this is not supportive of the existence of a widely accepted custom that a chief cannot run again after resigning. Further, in Vernon Morris' affidavit, he stated that Elders generally do not veto candidates, but provide principled guidance. He confirmed this when cross-examined on his affidavit and stated that he had never known an election committee or the Elders to have rejected an eligible candidate. He then stated that he had seen a situation where a nomination had been set aside on the basis of a resignation but this was before the actual process was initiated and that he had not

heard anyone say that a person had to be rejected. He was able to give only one example, stating that in the late 1990's:

> … without my actual having visually confirmed my own participation in the leadership, leadership selection process, there were there were a number of times when mid term I myself was set aside and instructed not to serve anymore and during the election process I was informed that I had been nominated to run again but I was never informed, I was never asked because I know this process exists there.

[101] Other than this description by Vernon Morris, and his affidavit evidence that in 1980 there had been discussion amongst an election committee and the Elders as to whether he should be permitted to run for office because of his youth, there is no clear or further evidence of candidates being disallowed from running because they had resigned from council positions. In all of the evidence from experienced past and present members of council and election committees, no one was able to point to a previous example in which an election committee and/or Elders have disallowed someone nominated to run in an election because of a prior resignation. While Mary Ann Beardy pointed to instances in which chief or council have been removed from office due to serious concerns, as is discussed below, this differs from being disallowed to run in an election.

[102] The 2005 Code serves to codify Band custom and the processes upon which, by its adoption, there is broad consensus. Thus, it is much more than a mere guidance document as suggested by some of the affidavit evidence filed by the Respondents. As to the eligibility of Band members who wish to run for office, this is set out in the 2005 Code which states that any eligible voter can run in an election. The 2005 Code is silent on the disqualification of nominated candidates. Accordingly, in order to show that the decision of the Election

Committee to disallow Gordon Beardy from running for office was valid, the Respondents were required to demonstrate that there is broad consensus that the custom is that the Elders will assess the suitability of candidates and, based on their advice, unsuitable candidates who have been nominated for election, which would include those who had previously resigned their council positions, are then prevented from running for council by an election committee. In my view, the absence of clear evidence that this has consistently been done in the past and is accepted by the majority of the Band, is indicative that it does not reach the threshold of a customary practice.

[103] The Respondents submit that the fact that the evidence is limited as to a prior practice on disqualification of nominated candidates based on Elder recommendation is not significant. They submit that this is because the broad role of the Elders, as respected advisors to the Band, demonstrates a general prevailing custom to accede to their advice which would encompass disqualification of nominated candidates for election by an election committee. However, I cannot agree. In my view, it is the practice pertaining to a particular issue or situation that must be established to demonstrate accepted custom.

[104] Further, and in any event, while I fully accept that the evidence supports that Elders play an important advisory role, which can include providing advice to the Election Committee and Band Council on leadership matters, it is unclear that in these circumstances the decision of the Election Committee was based on such advice.

[105] In this regard, the Election Committee minutes of the September 11, 2015 nomination meeting are limited. They state:

> Question: those that handed in the resignation letter should not be asked to run?
>
> - question by the public (posed) Lisa [Beardy] asking the people to raise their hands

The minutes then go on to address a question asked by Roy Fiddler as to whether the resignation letters should be accepted and the ensuing vote appears to pertain to that question. The minutes contain nothing that indicates that the guidance of the Elders was sought on the question of the rejection of Gordon Beardy's nomination.

[106] Further, in his affidavit, Elder Jake Beardy indicated that he held the customarily designated position for the Elders on the Election Committee and stated: "It was the people's will that Gordon Beardy not run for re-election and he supported the people in this decision". He did not state that this was an issue raised or decided by the Elders. Ernie Harper's affidavit evidence was that at the nomination meeting he asked the Elders present to exercise their inherent right to govern and advise as to the validity of Gordon Beardy's nomination. They exercised this right by a show of hands. However, when cross-examined on his affidavit, he stated that it was not him who had posed the question, that it was Lisa Beardy and that direction was obtained from the Elders and the people.

[107] Thus, based on the evidence, it seems likely that at the nomination meeting it was Lisa Beardy, a member of the Election Committee, who raised the issue and called for a vote to

determine if Gordon Beardy should be disallowed from running and that the Elders present, along with the other community members, voted on that question.

[108] Thus, rather than the Elders conducting an assessment of Gordon Beardy's suitability as a candidate and advising the Election Committee, as the suggested custom dictates, the evidence indicates that the Elders simply voted with the other community members on the general question of whether the nomination should be accepted. In this regard I would note that if, as the Respondents submit, it was a broadly accepted custom that the Elders could assess and cause a candidate to be disqualified from running in an election, then that would be a decision of the Elders, which, the Respondents suggest, would be accepted by the Election Committee and the Band members as governing the matter. However, if that were so, then a general vote at the nomination meeting would not have been necessary.

[109] In my view, it is also important to note that the decision to vote on the issue was made at the end of the nomination meeting, at 9:00 p.m., when only fourteen people remained in attendance. And, while twelve of the fourteen people in attendance voted against Gordon Beardy being allowed to run, thirty-two people nominated him and, in total, approximately one hundred and eight nominations were made both in person and by phone. None of the people who attended or called to nominate candidates were advised that the acceptance of Gordon Beardy's nomination, or any nomination, was to be voted on later that evening. Had they known, perhaps they would have stayed at the meeting and cast a vote. Similarly, had the community been given notice that there would be a vote held to decide if the nominations of those who had resigned should be disallowed, a more significant and representative group may have attended and voted.

As it was, I am unable to conclude that the votes of twelve of fourteen people are representative of a broad consensus of the community.

[110] In short, the process described by the evidence is not consistent with a firmly established, generalized custom that was followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus.

[111] The Respondents refer to the Federal Court of Appeal's decision in *Samson* and I agree that it is relevant in that it confirms that custom may be relied upon in filling gaps in codified election law. As stated by Justice Nadon:

> [39] I am thus satisfied that the only customs and traditions which governed the election of the Band Council on May 19, 2005, are those which are set out in the Election Law. Customs and traditions which may come into existence and which may differ from those appearing in the Election Law are, in my view, of no relevance unless the Election Law is modified in accordance with section 109 thereof. However, evidence of prevailing election practice and custom may be relevant in resolving ambiguities or filling gaps in the Election Law.

[112] However, as noted above, in this case I am not satisfied that a custom having broad consensus whereby the Elders may veto a nominated candidate for band council has been established. Therefore, it is not available, in these circumstances, to fill gaps in the 2005 Code. *Samson* can be also distinguished as, in that case, the electoral supervisor had exercised her discretion in a way that was in accordance with the applicable election law. Therefore, the Court of Appeal upheld the finding of the trial level judge that the appeal board had erred in ordering a new election. Thus, in that complaint, the issue was interpretation of the election law, which is not the situation in this case where the 2005 Code is silent on disqualification of nominated

candidates. Here the issue is whether custom exists that can be used to fill in the gaps in the Code.

[113] Perhaps more on point is *Joseph*. There, based on the nature and content of the affidavit evidence, this Court found that there was no broad consensus that recall rules were a part of band custom. The respondents had argued that the existing election code did not "cover the field" with respect to removal from office. Therefore, there was room for customary practices of the band to develop a recall regime not written in the custom election code. Justice Phalen stated:

> [43] The Respondents are correct that the current removal provisions (failure to attend meetings/conviction of indictable offence) do not "cover the field" for loss of elected position. The removal provision is sparse. It does not cover other areas of disqualification often seen in election codes. Moreover, there is no evidence that the Band considered these other areas and rejected them. Absent such evidence, the Court concludes that the Band did not purport to "cover the field" for removal.
>
> [44] However, even with that limited removal provision, the Respondents' argument that a modern custom can arise, to alter the Election Code provision, cannot be sustained. Such an argument flies in the face of the notion of a "custom" and in the face of the amendment provisions of the Election Code.
>
> [45] The Election Code provision on amendments is well developed. It best reflects the will of the Band where changes to the electoral process are to be implemented.
>
> [46] There is insufficient evidence of a Band custom of recall in the past and there is insufficient evidence that there is a broad consensus that one has developed as the Respondents have suggested.

[114] In my view, although in this case the affidavit evidence is not as clear as it appears to have been in *Joseph*, it is still similar in circumstance and outcome. Hence, like that case, here there is insufficient evidence that there is a custom of disqualification of candidates nominated

for election based on an assessment of suitability by the Elders and insufficient evidence that there is broad consensus that such a custom has developed.

[115] The Respondents also refer to *Simon*. There, the applicant was nominated to stand for election to council. Before her nomination was accepted, the electoral supervisor notified her of complaints received as to her residency status, and her name was not included on the list of candidates for the election. The applicant argued that the electoral supervisor had no authority to remove her name from the list. The applicable election law did not provide a procedure for removal of a candidate. Faced with competing interpretations of other provisions of the election law, the Court accepted the electoral supervisor's submission. Specifically, that a provision which acknowledged the electoral officer as the person with authority to conduct the entire administration and process of the election, together with a purposeful interpretation of the election law to limit candidacy to those who met the residency requirements, as well as a provision that permitted the disqualification of a chief or member of council, together provided the requisite authority. The Court found that this view was most consistent with the purpose of the election law whose drafters could not have intended that a person who did not meet the requirements should be permitted to be a candidate. Further, that the proposed interpretation of the applicant would have meant that another election would probably have to be held as the election in which she ran would be challenged on the basis of her ineligibility as a candidate.

[116] I would note that in that case the disqualification related to a specific provision contained in the election law, pertaining to residency requirements, and was not a disqualification based on a claim of custom.

[117] At the hearing before me, based on *Simon*, the Respondents sought to analogize the disqualification of a candidate with the provisions of the 2005 Code dealing with the Removal of Leaders in Office. The Respondents argued that if a prospective Chief or Councillor attempted to run and had a known criminal record or mental incapacity, then the Election Committee should be able to disqualify such a candidate before the election in order to avoid the waste of time and resources involved with electing a candidate and then having to remove them. However, in my view, this position is grounded in the provisions of the 2005 Code which specifically speak to removal from office in those circumstances. Unlike the situation at hand, those circumstances would not require the use of custom in the face of a complete absence of a provision for disqualification of a candidate due to prior resignations. In other words, in interpreting the 2005 Code, it is clear that its purpose is to preclude persons convicted of indictable offences or suffering from mental incompetency from holding office and, by extension, from running for office. Such an interpretive approach is not available in this circumstance.

[118] In conclusion, in my view the evidence has not demonstrated that this type of decision-making by the Electoral Committee was firmly established, generalized, and was followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus. For this reason, I find that the decision of the Election Committee to disallow Gordon Beardy from running was unreasonable and, for the reasons set out below, that it also violated his right to procedural fairness.

[119] As to the undated petition submitted by the Respondents, this purports to contain the signatures of one hundred and nine MDFN members and states that they support the September 15, 2015 election. In my view, this is not relevant to the actions and decision under review. The petition was not before the Election Committee when it decided to disallow Gordon Beardy's nomination for office. It is well established that the general rule in applications for judicial review is, subject to certain exceptions, that the evidentiary record before the Court is restricted to the evidentiary record that was before the administrative decision-maker whose decision is the subject of the review (*Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 19-20; *Sagkeeng*). Accordingly, the petition is not relevant. Nor can it be used to ratify the September 15, 2015 election results.

Issue 4: Was there a breach of procedural fairness which would affect the election results?

Applicants' Submissions

[120] The Applicants submit that Gordon Beardy was owed a duty of procedural fairness by the Election Committee. His established voting rights, privileges as Chief, and ability to run for office were curbed by the Election Committee's actions. This duty has been recognized by the Court in *Shotclose* (at paras 92 and 93) where the Court held that band members had reason to expect that any changes to their electoral practices would be preceded by fair notice, an opportunity to be heard and to vote on the changes. Gordon Beardy was not provided with any notice that his nomination would be disallowed due to his resignation. He had resigned in the past and was subsequently permitted run in the bi-election triggered by his own resignation. However, in the 2015 election process he was given no meaningful opportunity to be heard and

present his case. He had a reasonable expectation that he would be able to do the same after this resignation. And, because his name was not placed on the ballot at the election, it is not possible to establish that the conduct of the election did not substantially affect its outcome.

[121] No procedural fairness was shown to Joy Barkman or Francine McKenzie. Both formally appealed the results of the election. The Codes contain appeal provisions with timelines included and they had a legitimate expectation that their appeals would, at minimum, be heard.

[122] With respect to the procedural irregularities raised throughout the application, the Applicants submit that the burden of proof rests on the Respondents to demonstrate that the election was performed legally once the Applicants have demonstrated sufficient evidence to show that the alleged irregularities are serious enough to cast doubt on the results of the election. The Court held in *Laboucan v Loonskin*, 2008 FC 193 at para 13 that this shifting burden exists in the context of specific provisions of local election law, however, the reasoning remains "it makes sense to put the respondent … to this burden as it is the body responsible for organizing elections and ensuring that the legal requirements have been met".

Respondents' Submissions

[123] The Respondents submit that, in the context of custom band elections, the content of the duty of fairness must take into account and respect the relevant custom of the band in question. Other non-exhaustive contextual factors include: (i) the closeness of the decision/administrative process to a judicial process; (ii) the nature of the statutory scheme; (iii) the importance of the decision; (iv) the legitimate expectations of the individual(s) affected; and (v) the choice of

procedure made by the decision makers (*Samson* at paras 20-21; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CarswellNat 1124 (SCC) at paras 21-28).

[124] In this matter Gordon Beardy was entitled to only the most basic level of procedural fairness because: the Election Committee's process was not similar to the judicial process, it had to choose a solution that furthered the stated goal of MDFN, not select between alternatives; the Code provided for an appeal procedure which Gordon Beardy ignored; in terms of the importance of the decision, Gordon Beardy had resigned and in light of the established custom of MDFN, the potential consequence of being disallowed to run for re-election was, or ought to have been in his contemplation following his resignation; and, the procedures chosen by the Election Committee consisted of filling the gaps in the 2005 Code with Band custom. The Election Committee has expertise in this area, and the ability to choose their own procedures to achieve the goals of MDFN, confirmed by the 2005 Code.

[125] Gordon Beardy was entitled to notice, an opportunity to make submissions and an unbiased trial. The Respondents submit that they satisfied their duty of procedural fairness to Gordon Beardy. He received actual notice from Charlie L. Morris that the people wanted a new Chief and Council. He ought to have been aware of the logical consequences of his resignation, as this was a well-known practice and established custom of MDFN. He was provided with two opportunities to meet with the Election Committee, but refused to meet both times, saying he was too busy. He did, however, make representations to the Election Committee on September 8, 2015. Therefore, prior to the decision to disqualify his candidacy, the Election

Committee was presented with all of the relevant evidence of Gordon Beardy and there was nothing left to consider.

Analysis

[126] The law is well established that custom cannot ignore or trump principles of natural justice and procedural fairness (*Felix v Sturgeon Lake First Nation*, 2014 FC 911 at para 76). In *Sparvier*, Justice Rothstein noted at paragraph 47:

> 47 While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

[127] As stated by Justice Dawson (as she then was) in *Giroux v Swan River First Nation*, 2006 FC 285:

> [32] The content of the duty of fairness is not constant or absolute, but varies from situation to situation and must be decided in the specific context of each case. All of the circumstances must be considered in order to ascertain what the duty of procedural fairness requires in any particular case. As the majority of the Supreme Court of Canada observed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 22, the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made, so that those affected by a decision are able to put forward their position and evidence fully and have them considered by the decision-maker.

> [33] In order to determine what in any case the duty of fairness requires, one must consider a number of factors, including:
>
> (a) the nature of the decision being made and the process followed in making it;
>
> (b) the nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates;
>
> (c) the importance of the decision to the individual or individuals affected by the decision;
>
> (d) the legitimate expectations of the person challenging the decision; and
>
> (e) the choices of procedure made by the decision-maker.
>
> See: *Baker*, cited above, at paragraphs 23 through 27.

[128] The concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. This context can and should include judicial respect for relevant custom (*Samson* at para 20). In *Samson*, in one of the two complaints being dealt with, the trial judge concluded that the applicant, who had been disqualified from running for a council seat, had been denied natural justice as the appeal board had failed to provide him with an opportunity to be heard.

[129] On appeal, the Federal Court of Appeal applied the *Baker* factors and concluded:

> [22] Applying the Baker factors, I conclude that the Application Judge did not err in finding that the duty of fairness required at a minimum that the Board provide Mr. Northwest with an opportunity to make submissions. The Board should be granted significant latitude to choose its own procedures; however, given the importance of the decision to Mr. Northwest, basic procedural safeguards must be in place. This does not mean that a full oral hearing was required, but simply that Mr. Northwest should have been given the opportunity to respond to the Soosay complaint, before the Board concluded that he was ineligible for Council

> under section 4 of the Election Law. By not allowing Mr. Northwest to respond to the Soosay complaint, the Board made its decision on an incomplete factual record. In my view, the Judge correctly found that this constituted reversible error.

[130] The Federal Court of Appeal went on to find that the judge had erred in proceeding to determine the issue of qualification and should have simply set the appeal board's decision aside and referred the matter back for redetermination.

[131] In my view, the fact that an appeal process was available to Gordon Beardy pursuant to the 2005 Code, which he declined to avail of, is a significant factor that mitigates against his claim that he was denied procedure fairness. However, as described above, the Election Committee simply failed to address the appeals that were filed, therefore, there is no reason to think they would have dealt with an appeal by Gordon Beardy, whether well founded or not, any differently.

[132] And, while it is true that Gordon Beardy had resigned his position, the evidence is undisputed that this is not the first time that he had done so. It is generally agreed that on two prior occasions he submitted his resignation without consequence. That is, either he was permitted to revoke his resignation and resume his position or he was permitted to run in the bi-election triggered by his own resignation. Thus, the Respondents' position that Gordon Beardy knew or ought to have known that he would not be permitted to run in the next election if he resigned his nomination is not supported by the evidence. Indeed, Gordon Beardy more likely had a legitimate expectation that he would be able to run again in the upcoming election. And while the Respondents submit that it was the Elders who decided that Gordon Beardy's

nomination should not be accepted and that the Elder's views are to be respected, there is no clear evidence in the record that any nominated candidate has ever been previously been disallowed from running for any reason by the Elders. Therefore, I do not agree with the Respondent that Gordon Beardy ought to have contemplated that he would not be able to run in this election.

[133] Further, while he received notice by way of email from Charlie Morris on August 14, 2015 that there was going to be a referendum, this is not the equivalent of notice that if he resigned then he could potentially be denied the opportunity to run for office in the election. Particularly as he had not been precluded from doing so in the past.

[134] As to the Respondents' submission that Gordon Beardy's representations made to the Election Committee on September 8, 2015 discharged the duty of procedural fairness, in my view, this cannot succeed. This was not a planned meeting convened for the purpose of permitting representations to be made on the question of whether a nomination of Gordon Beardy to stand for election would be disallowed. Rather, it was more of a confrontation by Gordon Beardy of the Election Committee as they left the radio station at which he took issue with the planned referendum. Further, the record indicates that it was not until 9 p.m. on the night of the September 11, 2015 at the nomination meeting that the question of whether his nomination would be put on the ballot or not, because of his resignation, was raised. Therefore, he could not have known the case against him when he spoke to the Election Committee on September 8, 2015 and was not able to make submissions on that issue.

[135] Further, although there is some evidence that the Election Committee intended to meet with the then Chief and Band Council, and extended a request to meet on September 7, 2015 but that Chief and Council did not attend, this again pre-dates the September 11, 2015 nomination meeting and does not serve as notice that those councillors who resigned but may subsequently be nominated for re-election may have their nominations disqualified.

[136] Further, no notice was provided to Gordon Beardy, or any member of the MDFN, that this issue would be decided at the September 11, 2015 nomination meeting. Gordon Beardy's affidavit states that he had no knowledge of the Election Committee's intention to disallow him from running until the public notice of the decision and the affidavit of John Morris confirms that Gordon Beardy was not at the nomination meeting.

[137] Thus, even if the content of the duty of fairness is, as the Respondents submit, limited to an entitlement to notice and to make submissions, that duty was not discharged. At the hearing, I asked counsel for the Respondents whether Gordon Beardy was provided with notice that his disqualification was being considered by the Election Committee or an opportunity to speak to the issue. The Respondents were not able to point to any evidence in the record to establish this. However, it was submitted that because he had refused to meet with the Election Committee on a previous occasion, he had lost these procedural rights. In my view, without notice that his right under the 2005 Code to run in the election was in jeopardy, he could not have known that his failure to meet with the Election Committee could have this outcome and he did not forfeit his procedural rights in that regard.

[138] I conclude that the duty of fairness was breached in this case. That is because Gordon Beardy did not know that his nomination was in jeopardy, he was given no notice of this or the fact that the persons remaining in attendance at the conclusion of the nominating meeting would be asked to vote on this issue. The decision has a significant impact on his employment and to the Band as a whole as he was removed as a candidate in the election, despite receiving thirty-two nominations. This indicates that more of the MDFN community sought to have him run for election than voted that he be disqualified from doing so. Given his past resignations without consequence, he had no reason to think that this resignation would be treated differently. While the fact remains that he failed to make use of his right of appeal, given that the appeals that were filed were ignored, on balance, I find that the duty was breached.

[139] I agree with the Applicants that because Gordon Beardy's name was not placed on the election ballot for Chief, it cannot be established that the breach of procedural fairness did not significantly impact the outcome of the election. This is sufficient to cause the election results to be quashed.

[140] There are other procedural fairness concerns. One of these is that at the August 14, 2015 community meeting, twenty-six of the thirty people in attendance voted to hold a leadership referendum to be held on August 17, 2015. An Election Committee was also struck at that meeting. Nothing in the 2005 Code speaks to the striking of an Election Committee and its stated role is defined as dealing with election appeals. However, in addressing removal of leaders in office, the 2005 Code states that when one third of the eligible voters have signed a petition calling for a referendum, then the Election Committee will conduct one and shall canvas

all eligible voters. If 50% plus one of the voters call for an election on any Council member position, then there would be an election for that position.

[141] Thus, it would appear that an Election Committee could be struck in that circumstance. Here, however, there was no petition when the committee was struck and therefore, the authority to appoint an Election Committee by community meeting is not established.

[142] The August 14, 2015 meeting and follow up prompted the resignations of Gordon Beardy, Doug Beardy and Morris Fiddler. Gordon Beardy resigned by email of August 14, 2015. Morris Fiddler's resignation was submitted in writing on August 17, 2015 and is stated to be effective immediately. Doug Beardy resigned by letter of August 24, 2015, however, he stated that he would remain Deputy Chief until the day before the bi-election of the Band Council positions. He confirmed on August 31, 2015 that he would not be seeking election for any purpose. Thus, as a quorum of three Councillors still were in office, it would also have been possible for those elected members to call for a referendum, if there was evidence of 50% plus one voters recommending the calling of an election.

[143] As to the validity of the resignations, as neither Doug Beardy nor Morris Fiddler sought re-election and are not applicants in this matter, it is not necessary to address the validity of their resignations. Gordon Beardy stated in his affidavit that in August 2015 his daughter, Daven Linklater, was undergoing brain surgery and at the time of the August 14, 2015 meeting the prognosis was that she may end up in a coma. Therefore, he was under immense stress and anxiety and his reply to the email advising him of the meeting was "spurious" and that he did not

mean to resign. However, on cross-examination he confirmed on August 8, 2015 his daughter-in-law had been able to leave the hospital on day passes and had attended a wedding. Further, there is no evidence that he subsequently attempted to revoke his resignation. On September 1, 2015 Gordon Beardy and three Councillors issued BCR150901A wherein they stated that did not support the referendum process, that they did not wish to resign at that time and resolved to finish their term of office which they stated would be to July 2016. However, at that time Gordon Beardy and Morris Fiddler had already resigned. And, in any event, as the 2012 Code was not in effect, a resolution to continue the term of office until 2016 could not be valid, and, the resignations were moot as the term had expired.

[144] The Election Committee responded to BCR150901A by memo of September 2, 2015. This stated that neither it nor the MDFN membership had been consulted with respect to the BCR, quoted a portion of the 2012 Code and stated that the Election Committee accepted the minutes of the August 14, 2015 meeting as a petition. Further, due to the seriousness of the issues raised, the Election Committee determined that there was a need for a referendum on all Council positions.

[145] However, as noted above, the 2012 Code was not in effect. Further, the quoted portion of it states that elected members of Chief and Council "may call for a referendum on their positions, then the community referendum the sitting Chief and Council". Thus, it makes no reference to a petition nor is it clear in what circumstances a community referendum would be held. The July 18, 2012 version of the 2012 Code, which appears to be in draft form, and which was attached as an exhibit to the Carfagnini affidavit, section 5.6, contains the same wording as the

version of the 2005 Code permitting a referendum to be called when one third of the eligible voters have signed a petition.

[146] It is quite clear from the Election Committee minutes that they had doubts as to whether they had the authority to call for a referendum without a BCR and as to the extent of their powers. This is likely why they sought to treat the vote held at the August 14, 2015 meeting as a petition. However, in my view, it did not have that effect. Eligible voters are described in the 2005 Code. These are all registered Band members, residing on and off reserve, who are eighteen years of age and older. Thus, a petition calling for a referendum required one third of all eligible voters, not one third of voters attending a general community meeting, particularly where notice of that meeting described its purpose as to "begin addressing concerns regarding our band leadership" and made no reference to deciding whether a referendum on leadership should be held.

[147] That said, once the Chief and two Councillors resigned, an election was required. Thus, the procedural issues concerning the holding of a referendum calling for the election are largely moot and the striking of an election committee was likely necessitated in that event.

[148] Of greater concern is the conduct of the nomination meeting. As previously stated, while notice was provided of the September 11, 2015 nomination meeting, this notice did not include the fact that a vote on the eligibility of nominees who had previously resigned would be held. There is no evidence in the meeting minutes that those who attended the nomination meeting were advised that there would be a vote on this issue at the end of the meeting. Neither the

fourteen people who attended this meeting nor the twelve people who voted against Gordon Beardy running in the election are representative of the majority of the community. Therefore, this process lacked procedural fairness.

[149] I believe that the following oft-cited quote from Justice Rothstein (as he then was) in *Long Lake Cree Nation* at para 31 is relevant and applies equally to election committees:

> 31 On occasion, conflicts can become personal between individuals or groups on Council. But Councils must operate according to the rule of law whether that be the written law, custom law, the *Indian Act* or whatever other law may be applicable. Members of Council and/or members of the Band cannot take the law into their own hands. Otherwise, there is anarchy. The people entrust the Councillors to make decisions on their behalf and Councillors must carry out their responsibilities in a way that has regard for the people whose interest they have been elected to protect and represent. The fundamental point is that Councils must operate according to the rule of law.

[150] In conclusion, for the reasons set out above, I am of the view that the Election Committee's decision to preclude Gordon Beardy from running for office despite his nomination was both procedurally unfair and unreasonable.

Issue 5: What are the appropriate remedies?

[151] This is a very unfortunate situation. The frustration of the Election Committee arising from repeatedly being placed in a position where the resignation of a council member forced a bi-election or an election, only to have the same person who triggered the election seek nomination and re-election to the same position is understandable. There is significant cost and disruption to the community resulting from any election, let alone needless ones. Further,

Gordon Beardy's subsequent actions in failing to pursue an appeal but then, without Court order, causing the banking institutions to freeze the MDFN's bank accounts putting its finances in disarray and causing hardship to individual community members cannot be condoned. This was done with the intent of forcing the community to accede to his demands for a new election in which he would be permitted to run, and was not intended to protect any financial interests of that community.

[152] However, as discussed above, regardless of its frustration, the Election Committee was required to exercise procedural fairness, and it failed to do so. As a result, the outcome of that election was potentially significantly compromised. Thus, I have concluded that the September 15, 2015 election results are to be quashed.

[153] However, as stated in *Ballantyne v Nasikapow,* [2000] FCJ No 1896, jurisprudence demonstrates that this Court may fashion a remedy appropriate to the circumstances (at para 79). 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 paras 103-104).

[154] Considering that, pursuant to the 2005 Code, the term of office for the prior Chief and Council had run its course in July 2015. And further considering that the MDFN requires time to effect necessary amendments to the 2005 Code, including, if deemed advisable, the role of Elders on the election committees and the disqualification of persons nominated for elected office. The MDFN also requires time to convene the new election. I have concluded, therefore,

that it is appropriate in these circumstances to stay my order quashing the September 15, 2015 election for a period of six months from the date of this decision. The new election is to be overseen by a differently constituted election committee. In the interim, the current Chief and Council will continue to run the affairs of the MDFN in the normal course. Current Chief and Council shall be paid for their positions from September 15, 2015 until the new election has been conducted. In the event of any interim resignations, payment for the position resigned will cease as of the effective date of the resignation, which shall not exceed a period of thirty days. I will remain seized of the matter until the results of the new election and any resultant appeals have been concluded.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. An Order in the nature of *certiorari* is granted and the September 11, 2015 decision of the Election Committee to disqualify Gordon Beardy as a candidate nominated for election, the election held on September 15, 2015, and BCR150916A are quashed and set aside;

3. It is declared that the 2005 Code remains in force;

4. My Order of *certiorari* is hereby stayed for six months from the date of this decision to permit the MDFN time to make any amendments to the 2005 Code concerning the role of Elders on election committees and the disqualification of nominated candidates and such other amendments as may be deemed necessary and to have such amendments effected by the MDFN in accordance with the amending requirements of the 2005 Code;

5. An Order in the nature of *mandamus* is granted and the MDFN shall hold an election to select a Chief and Councillors six months from the date of this decision. The new election committee effected for that purpose shall be constituted of Band members other than those, who, at any time, were Election Committee members in connection with the September 15, 2015 election;

6. The current Chief and Council comprised of Stan Beardy, Roy Fiddler, Charlie L. Beardy, John L. Morris, and Olivia Duncan shall continue to hold office

and shall continue to run the affairs of the MDFN in the normal course. Current Chief and Council shall be paid for their positions from September 15, 2015 until the new election has been conducted. In the event of any interim resignations, payment for the position resigned will cease as of the effective date of resignation, which shall not exceed a period of thirty days from the date of resignation;

7. I will remain seized of this matter until the results of the new election and any resulting appeals have been concluded;

8. As to costs, at the hearing of this matter it was agreed that submissions on costs, jointly agreed if possible, would be made subsequent to the issuance of this decision. However, in the circumstances and given my decision, I have determined that it is appropriate that each party shall bear its own costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1965-15
STYLE OF CAUSE:	GORDON BEARDY, FRANCINE MCKENZIE, JOY BARKMAN v STAN BEARDY, ROY FIDDLER, CHARLIE L. BEARDY, JOHN L. MORRIS, OLIVIA DUNCAN, LISA BEARDY (AKA LIZA BEARDY), ERNIE HARPER, CLIFF FERRIS, JOB FIDDLER, KATHLEEN BEARDY, IRENE ROSS, AND MARY ANN BEARDY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 15-16, 2016
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	APRIL 7, 2016

APPEARANCES:

Mike Maher	FOR THE APPLICANTS
Susan Vella Michael Wilchesky	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Buset & Partners LLP Barristers and Solicitors Thunder Bay, Ontario	FOR THE APPLICANTS
Rochon Genova LLP Toronto, Ontario	FOR THE RESPONDENTS