Federal Court  Cour fédérale

Date: 20100217

Docket: T-654-09

Citation: 2010 FC 160

Ottawa, Ontario, February 17, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

CASEY RATT, RICKEY DECOURSAY, ROGER JEROME, WAYNE PAPATIE and DONAT THUSKY IN THEIR CAPACITY AS CHIEF AND BAND COUNCIL and THE ELDERS OF MITCHIKINABIKOK INIK (ALGONQUIN OF BARRIERE LAKE) and the PEOPLE

Applicants

and

JEAN MAURICE MATCHEWAN, BENJAMIN NOTTAWAY, EUGENE NOTTAWAY, JOEY DECOURSAY and DAVID WAWATIE IN THEIR CAPACITY AS THE PURPORTED NEW CHIEF AND BAND COUNCIL OF THE ALGONQUINS OF BARRIERE LAKE CUSTOMARY COUNCIL and EDDY NOTAWAY, MICHEL THUSKY, JEANNINE MATCHEWAN and LOUISA PAPATIE, IN THEIR CAPACITY AS THE PURPORTED MEMBERS OF THE MITCHIKANIBIKOK INIK ELDERS COUNCIL

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This concerns an application for judicial review challenging the validity of a customary leadership selection process concluded on June 24, 2009, and culminating in the selection of

Respondents Jean Maurice Matchewan, Benjamin Nottaway, Eugene Nottaway, Joey Decoursay and David Wawatie as purported Chief and council of the Algonquin of Barriere Lake.

[2] The Applicants set out as follows the relief they are seeking:

1. a judicial review pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of a purported leadership selection held on June 24, 2009 and its process;
2. a writ of *quo warranto* pursuant to s. 18 of the *Federal Courts Act*, questioning the authority of Jean Maurice Matchewan, Benjamin Nottaway, Eugene Nottaway, Joey Decoursay, and David Wawatie to act on behalf of the office of Chief and council of the Algonquin of Barriere Lake;
3. a writ of *quo warranto* pursuant to s. 18 of the *Federal Courts Act* questioning the authority of Eddy Nottaway, Michel Thusky, Jeannine Matchewan, and Louisa Papatie to act as an Elders Council in connection with the leadership selection process of June 24, 2009; and
4. a declaration pursuant to s. 18 of the *Federal Courts Act* that Jean Maurice Matchewan, Benjamin Nottaway, Eugene Nottaway, Joey Decoursay, and David Wawatie have no authority to act on behalf of the office of Chief and council of the Algonquin of Barriere Lake due to an invalid leadership selection and process.

[3] Various grounds are raised in support of this Application, including that the Applicants Casey Ratt, Rickey Decoursay, Roger Jerome, Wayne Papatie and Donat Thusky were selected as customary Chief and council of the Algonquin of Barriere Lake on January 30, 2008 in an allegedly

unchallenged process, and were acknowledged as such by the Department of Indian and Northern Affairs Canada ("INAC").

The General Context

[4] The Algonquin of Barriere Lake claim a traditional territory which includes a large section of North-Western Quebec. A small reserve in that traditional territory know as Rapid Lake has been set aside for them, and a community has been established on this reserve located some 120 kilometres North-West of Maniwaki. A registered population of some 600 to 700 individuals is associated with this reserve, some of which are living off-reserve in the traditional territory or in urban centers.

[5] The socio-economic conditions on the reserve are difficult. It is isolated and deprived and unemployment is high. A substantial part of the livelihood of the community is derived from the pursuit of traditional activities and is dependent on government transfer payments.

[6] The community is governed by a customary Chief and council, which, under normal circumstances, would manage the affairs of the community and represent the community in on-going negotiations with government. However, normal circumstances no longer prevail within this community.

[7] The Algonquin of Barriere Lake are themselves part of the larger Algonquin Nation, which comprises various aboriginal communities of Algonquin ancestry principally located in the province of Quebec. These communities have grouped into two tribal associations. One of these is the Algonquin Nation Secretariat to which the Algonquin of Barriere Lake have adhered to until recent events placed into question that community's participation in this organization.

[8] The Algonquin of Barriere Lake appear to be fiercely attached to their traditional system of government, and are one of the few Indian bands in Canada that has never been subject to the band elections process under the *Indian Act*, R.S.C., c. I-5 (the "Act"). This entails important legal consequences which require some explanation.

[9] Indeed, under subsection 74(1) of the Act, the Minister of Indian and Northern Affairs (the "Minister") has statutory authority to declare that the council of an Indian band is to be selected according to election procedures outlined in the Act. The *Indian Bands Council Election Order* SOR/97-138 lists the bands that are subject to a ministerial declaration. Most of the Indian bands in Canada have, at one time or another, been subject to such a declaration. However, in recent years, the Minister has set up a process under which Indian bands can seek and obtain a revocation of a subsection 74(1) order and revert to a customary form of selection for Chief and council. The conditions set out by the Minister for such a revocation include requirements which may, in some cases, be at odds with traditional leadership selection processes.

[10] In the case of those rare Indian bands, such as the Algonquin of Barriere Lake, that have not been the subject of an order under subsection 74(1) of the Act, they may select their leadership in accordance with their customs unimpeded by any conditions or requirements which the Minister may deem appropriate to allow reversion to customary elections. This is an important distinction.

[11] Under the customs of the Algonquin of Barriere Lake, which are reviewed in greater detail below, leaders are traditionally selected from candidates proposed by the elders of the community, who may take into account heredity as a factor in leadership suitability. Only those members of the community with ties to, and knowledge of, the traditional territory can partake in the selection process. Leadership positions are held for life, but the leaders can be called to account, and even be impeached in exceptional circumstances.

[12] The record before me shows that a history of long and strong leadership was part and parcel of the Algonquin of Barriere Lake tradition until recently. Before 1964, Chief David Makokoose was in charge of the community's affairs for close to 60 years. However, in recent times, the customary selection process has been fraught with difficulties.

[13] The first major leadership selection crisis shown in the record before me occurred in 1996 when INAC recognized an "Interim Band Council" over strong opposition. Traditional Chief Jean Maurice Matchewan and his traditional council had been selected in a customary process some 16 years before in 1980. The leadership of Chief Matchewan (one of the Respondents in this case) was questioned at that time, and this leadership challenge resulted in proceedings before the Federal

Court of Canada filed in December of 1995 by a group calling itself the Interim Band Council. For reasons which are not fully disclosed in the record before me, on January 23, 1996, INAC recognized this Interim Band Council as the legitimate council of the band. This resulted in a major political crisis within the community, with the traditional council and its supporters initiating their own court action challenging INAC's recognition of the Interim Band Council.

[14] However, before this litigation was finally adjudicated, traditional Chief Jean-Maurice Matchewan and some of his councillors resigned on March 18, 1996 to make way for the selection of a new traditional Chief and council, but this time lead by traditional Chief Harry Wawatie. INAC nevertheless refused to recognize this new traditional council and instead, in May of 1996, appointed Justice Réjean Paul of the Quebec Superior Court to act as a mediator.

[15] Justice Réjean Paul concluded his mediation in January of 1997, after having found a consensus in the community on the customary leadership selection process.

[16] As a result of this mediation, and following a request from 19 elders of the community, INAC appointed Mr. André Maltais and Mr. Michel Graton to act as facilitators to assist the community in resolving its leadership issues in accordance with a mandate which included the codification of the customary leadership selection process.

[17] Following a series of meetings, the customary leadership selection process was codified and approved in 1997 as the *Mitchikanibikok Anishinabe Onakinakewin*, or in English, the *Law Codifying the Customary System of Government of the Algonquins of Barriere Lake*.

[18] Moreover, two amendments to the *Mitchikanibikok Anishinabe Onakinakewin* were also approved in 1997. The first amendment modified the custom to allow a female child of a Chief or counsellor to be proposed as a suitable successor, thus ending the tradition of male succession in leadership, and also provided for regular four year reviews of council mandates. The second amendment provided for the election of a Board of Directors in addition to the council. This Board was to be responsible for the administration of programs and services for the community.

[19] The *Mitchikanibikok Anishinabe Onakinakewin* was reviewed in 1997 by professor Peter Douglas Elias, Ph.D. at the request of the facilitators, and he concluded as follows in a lengthy report on the matter (at page 20 of the report reproduced at page 124 to the affidavit of Michel Thusky):

> While *Mitchikanibikok Anishinabe Onakinakewin* is not identical in every respect to what was done in the old days, it is not only consistent with what is known of Algonquins of Barriere Lake traditions, it could probably not have come from any other community. If it is not identical to their ancient traditions, it is a unmistakable, contemporary product of those ancient traditions.

[20] The facilitators further assisted in the selection of a Chief and council in accordance with the *Mitchikanibikok Anishinabe Onakinakewin*, resulting in a general assembly of the community held

on April 9, 1997 which proceeded to the confirmation of Harry Wawatie as customary Chief and to the selection of a customary council.

[21] Chief Wawatie and his council were subsequently formally recognized by INAC. The facilitators however noted that the selection of Chief Wawatie and his council was not supported by all, and that a dissident group still had a voice and followers in the community.

The *Mitchikanibikok Anishinabe Onakinakewin*

[22] The *Mitchikanibikok Anishinabe Onakinakewin* is a fundamental law of the *Mitchikanibikok Inik*, otherwise known as the Algonquin of Barriere Lake, and is intended to prevail over all other laws.

[23] The foundation of the *Mitchikanibikok Anishinabe Onakinakewin* is (a) *Nitochkiteaminan* or Our Fire which represents Sun, Earth, and the People as a First Nation (b) *Niteabetomowinan* or Our Belief, representing the knowledge and understanding of the natural law, cultural values, language and respect, and (c) *Nimokichanan* or Our Feast representing the reaffirmation of the connection with the Land and all living things, maintaining an identity in daily lives and ensuring the survival of the First Nation. These are the foundations of the customary law, and need to be fully appreciated in interpreting and understanding the *Mitchikanibikok Anishinabe Onakinakewin*. In the context of this specific litigation, these foundations take on a special importance. As noted by Professor Peter Douglas Elias, there “is no doubt that these are indeed the cornerstones of Algonquins of Barriere Lake political culture.” (reproduced at page 120 to the affidavit of Michel Thusky).

[24] The *Mitchikanibikok Anishinabe Onakinakewin* identifies five institutions of governance with their own respective responsibilities, namely the *Anishinabek*, or the People, *Ode* or the Family, *Ketizijik* or the Elders, *Nikanikabwijik* or the Council, and *Oshibikewini* or the Administrator.

[25] Among these, the highest authority is the *Anishinabek* or the People. Under the *Mitchikanibikok Anishinabe Onakinakewin* all important decisions must be made by the People, who must meet in general assembly at least four times a year, once in each season. A special assembly may be called by the *Nikanikabwijik* or the Council whenever important issues arise which need to be addressed by the People.

[26] The *Ode*, or the Family, is responsible for the care of its members, and especially the care, education and cultural development of the children. The families are also responsible for the stewardship of the traditional family territories and resource use and management over the traditional territory.

[27] The *Ketizijik* or the Elders are the keepers of the knowledge of customs and traditions, and are responsible for ensuring their respect and their transmission to the youth. The elders are also responsible for nominating candidates for the *Nikanikabwijik*, or Council, during a leadership selection process, and they are to preside over leadership reviews, mediate conflicts, and provide guidance and advice.

[28] The *Nikanikabwijik*, or council, comprises the Chief and four counsellors representing the four directions of the traditional territory. The council is the governing authority of the First Nation and is accountable to the People. The primary responsibilities of the council are:

a. the care, stewardship and management of the traditional territory in consultation, coordination and cooperation with the Families;
b. the protection of the Aboriginal and treaty rights of the First Nation; and
c. entering into relations with the Crown, including treaties and agreements, subject to approval of the People.

It is noteworthy that the *Mitchikanibikok Anishinabe Onakinakewin* specifically provides that the council is not responsible for the administration of programs and services, that authority being provided to the administrator, now replaced by a Board of Directors. However the council does retain inherent authority to supervise the Board of Directors in these matters.

[29] Within the council, there is the Chief, who acts as the main spokesperson for the First Nation and leads by example. The Chief carries out ongoing consultations within the community and deals with external relations involving the Crown, other governments and other First Nations. Under the *Mitchikanibikok Anishinabe Onakinakewin*, the Chief has an important role in traditional activities by facilitating and coordinating the assignment of harvesting areas, ensuring that all the members have access to land and resources for subsistence, and ensuring that the lands, wildlife, resources and environment within the traditional territory are cared for and protected. Similar important responsibilities concerning the use of the traditional lands and the carrying out of traditional activities are assigned to the councillors for the areas of the traditional territory that they have been chosen to represent.

[30] The *Oshibikewini* or Administrator is delegated the responsibility for the administration of programs and services for the Algonquin of Barriere Lake. However all major decisions respecting these matters require the approval of the council. The second amendment to the *Mitchikanibikok Anishinabe Onakinakewin* has replaced the Administrator by a Board of Directors comprised of four members elected by secret ballot once every 3 years. This Board is responsible for the administration of almost all programs and services provided in the community, including notably education, health, youth protection, economic development, policing, housing and infrastructure, and finance and personnel.

[31] With the creation of this Board of Directors under the second amendment, two different streams of decision making have been set out in the *Mitchikanibikok Anishinabe Onakinakewin*. The first stream concerns decisions respecting the administration of programs and services, which must be initiated by the Board of Directors, then ratified by the council, but subject to consideration by the community, presumably during one of the regular community assemblies. The second stream concerns decisions respecting lands and resources, traditional pursuits, treaty rights and treaty making, which must only originate from the council after consultation with the affected families, and which are also subject to consideration by the community.

[32] The selection process for the council is set out in sections 8.5 to 8.12 of the codified version of the *Mitchikanibikok Anishinabe Onakinakewin*, as amended through Amendment One, while the selection process for the Board of Directors is set out in sections 3.4 to 3.11 of Amendment Two to

the *Mitchikanibikok Anishinabe Onakinakewin*. For ease of reference, these sections are reproduced in a schedule to this judgment.

[33] Under the *Mitchikanibikok Anishinabe Onakinakewin*, the two basic methods of replacing a Chief or councillor are by succession or by removal or resignation.

[34] Thus, in principle, members of the council serve for life, subject to their resignation or removal. When a Chief or Councillor dies, that person is succeeded by his child if that child was proposed as a suitable successor, and if the community does not disapprove of this decision.

[35] However, the leadership of any member of council is open for review at any time, and a leadership review may be initiated when an undefined “sufficient number of members” approach the elders to convene a leadership review meeting. If the elders think that a leadership review is appropriate, then they convene a leadership review assembly and ask the concerned leader to attend. The purpose of a leadership review is not to remove the leader but to attempt to resolve the issues giving rise to the leadership review. If the issues are not resolved through consensus, the elders may request the members of the community, if they wish, to remove the leader. If a consensus for removal exists, then the leader is removed, thus triggering a selection process for his or her replacement.

[36] *Wasakawegan*, translated as “blazing”, is the process for selecting leaders. In this process, leaders are nominated by the elders and selected by the community. To initiate a selection process, the council consults with the elders and asks them to identify a suitable candidate. Only adult members who are married are eligible to be candidates for Chief and councillor; they must use and occupy the traditional territory and have knowledge of and connection with the land; and they must speak the Algonquin language and have knowledge of the customs and institutions.

[37] Once a suitable candidate has been identified, the elders convene a leadership assembly of the People. To participate in the selection of the Chief and council, a candidate must be an adult member of the First Nation, use and occupy the traditional territory, and have knowledge of and connection with the land. At this selection assembly, seats representing the number of positions which are vacant are placed in the centre of the assembly area with an equal number of additional seats for the spouses of the selected candidates. Elders escort both selected candidates and their spouses to the seating area. The nominating elders, the candidate and the spouse address the assembly, and the floor is opened for general discussion. If a consensus is reached amongst the selectors on a candidate, this is announced.

[38] Once a candidate is selected, the person undergoes a training, probation and evaluation period of two years, at which point the elders convene another leadership assembly of the community to consider the confirmation of the candidate.

[39] Thus, the *Mitchikanibikok Anishinabe Onakinakewin* essentially calls for a system of extremely stable government, with leaders appointed for life terms, and a gradual replacement of leaders as positions are slowly vacated. Nevertheless, the custom also allows for the impeachment of leadership and regular leadership reviews.

[40] The selection process for the four members of the Board of Directors is however an innovation to the custom. Elections are to be held at least once every three years. Any member continuously resident in the traditional territory for the preceding 12 months, who is of Algonquin ancestry, speaks the Algonquin language and is at least 18 years of age, is eligible to be nominated as a director. Eligible voters are those members of the First Nation who are 18 years of age and who were continuously resident in the traditional territory in the 12 months preceding the election. Those absent from the traditional territory for reason of education or health can still be eligible as voters, as are those who are absent for six months or less for purposes of work.

[41] The elections are to be supervised by an impartial Election Supervisor appointed by the Council to manage the election. The Election Supervisor prepares a list of voters and ballots for the secret ballot. A nomination meeting is held at least 12 days prior to the vote to allow candidates to present themselves and their platforms. The four candidates who receive the highest number of votes are declared elected to the Board of Directors.

[42] Within 21 days following the election to the Board of Directors, a candidate may appeal the results to a Council of Elders consisting of 4 elders, of whom two are male and two female, and selected by the elders of the community for a three year mandate.

Events Leading to this Application

[43] This is a case were the facts largely speak for themselves; consequently a detailed review of the record submitted to the Court is useful. Though somewhat long, the narrative of the events sheds much light on the deep divisions plaguing this community and on the dysfunction of the political processes of the community which has resulted from these divisions.

[44] Harry Wawatie remained Chief for approximately 10 years, when in the wake of a decision by INAC to appoint a third-party manager for the band, he and his traditional council resigned in protest in July of 2006.

[45] Chief Wawatie was soon thereafter appointed by a group of elders to lead an Elders Council of four members, which was also purportedly empowered to preside over the community leadership selection process resulting from these resignations. For this purpose, former Chief Wawatie and his Elders Council immediately organized a community leadership selection meeting which resulted in the selection of Jean Maurice Matchewan as traditional Chief (the former traditional Chief to whom Chief Wawatie had himself succeeded) and a new traditional council. This Chief and council will be referred to herein as the “Matchewan council.”

[46] Former Chief Wawatie and his Elders Council then filed on August 10, 2006 a judicial review application in the Federal Court under number T-1514-06 challenging the decision of the Minister to appoint a third-party manager to administer the programs and services of the band. This application was subsequently rejected on its merits by Justice Harrington on April 15, 2009; this judgment is currently under appeal.

[47] The selection process organized by former Chief Wawatie and his Elders Council resulting in the selection of the Matchewan council was not unanimously supported in the community. Another group of elders contemporaneously initiated its own leadership selection and proceeded with the selection of another traditional Chief and council allegedly under the *Mitchikanibikok Anishinabe Onakinakewin.*

[48] Facing with these conflicting leadership selections, INAC refused to recognize either, and rather, offered mediation. Justice Réjean Paul was again called back into service as a mediator, but this time his efforts failed.

[49] In his mediation report, Justice Paul noted that a tense situation existed on the reserve between the concerned groups, with neither willing to make concessions. He also noted that he had lost the confidence of one group during the mediation and therefore had to cease his activities as mediator. He nevertheless reported that, in his opinion, only the Matchewan council could claim legitimacy under the *Mitchikanibikok Anishinabe Onakinakewin*. Consequently, shortly thereafter, on May 29, 2007, INAC formally acknowledge the selection of the Matchewan council.

[50] The choice of words used by Justice Réjean Paul in his mediator's report dated May 15, 2007 shows the depth of the problems affecting the political structures and very cohesiveness of the community (all page references are to the affidavit of Michel Thusky):

> The conflict between the two groups of Algonquins living in this community is not recent… but it is distressing! (at page 186)
>
> […]
> Far from solving the problems as is rightfully expected of them, several Elders are openly in league with two opposing camps that are, for the most part, bitter adversaries. They specialize in insinuation, denunciation, even blackmail and intimidation, if I am to believe what has been reported to me. What a great example for the youth! I have never witnessed such self-destructive confrontation. Instead of solving problems, they are entirely responsible for creating them through their confrontational attitude. In such a climate, the ready-made solution is to blame the others for their misfortune and their wretched existence. Whether it be governments, public servants, managers, or even facilitators and the mediator, those who do not support one group's point of view are disavowed and censured or often publicly denounced. It is a completely unacceptable attitude to hold. (at page 189)
>
> […]
>
> Of course, if we look closely at this community's situation, the old saying "Divide to conquer" takes on all its meaning. Each clan tries to organize to take power and control the finances of the Band. It is completely disastrous and can only engender resentment and abuse. (at page 190)
>
> […]
>
> **Finally, it appears <u>that there is no possible reconciliation between the Elders of the two clans.</u>** (at page 206, emphasis in original).

[51] These deep divisions did not take long to resurface shortly after the confirmation of the Matchewan council by INAC.

[52] A few months after his confirmation, in September of 2007, Chief Matchewan was faced with charges which were laid against him. The Matchewan council, acting in concert with former Chief Wawatie and his Elders Council, decided that one of the councillors, Benjamin Nottaway, would become “acting” Chief pending the resolution of the charges against Chief Matchewan. Chief Matchewan nevertheless continued to sit on the council as the replacement councillor for Benjamin Nottaway’s seat.

[53] The appointment of an “acting” Chief by an Elders Council and the continued participation of Jean-Maurice Matchewan on the council pending the result of the charges laid against him did not sit well with some in the community, and particularly with the former “dissident” group, who insisted that a leadership review be initiated in conformity with the *Mitchikanibikok Anishinabe Onakinakewin*. However, this leadership review was strongly resisted by both the Matchewan council and former Chief Wawatie’s Elders Council.

[54] Moreover, for reasons which are not fully disclosed in the record before me, the Matchewan council (now nominally lead by Chief Benjamin Nottaway) decided sometime in November of 2007 to close the community school and erect barricades to impede access to the reserve by the third-party manager appointed by INAC. The reason given for these dramatic actions was to force concessions from INAC and the third-party manager it had appointed. This was an odd tactic which was not well received by INAC and by some community members.

[55] As a result of these remarkable events, the Minister appointed Mr. Marc Perron to attempt to renew discussions with the Matchewan council.

[56] In his report to the Minister dated December 20, 2007, (reproduced in part at pages 38 and 39 of the affidavit of Casey Ratt) Mr. Perron noted that, in his opinion, no useful dialogue could be sustained in the confrontational atmosphere which prevailed in the reserve. He was also of the opinion that the Matchewan council had no intention of improving relations with INAC short of obtaining each and every one of its demands. In these circumstances, Mr. Perron recommended that his mandate be terminated and that recourse to the judicial process be resumed.

[57] Mr. Perron also noted that the school closure had serious impacts on the children of the community, stating that "[p]our votre information, l'école de Lac Rapide fournit deux repas par jour à près de 70 enfants qui la fréquentent. Depuis plusieurs semaines, je suis convaincu que des enfants ont faim dans cette communauté." (Translation: « for your information, the Rapid Lake School provides two meals a day to the nearly 70 children who attend it. For several weeks, I have been convinced that children are hungry in this community").

[58] In this charged situation, a group of community elders distinct from those supporting the Elders Council of former Chief Wawatie, and presumably without the support of the Matchewan council and its followers, decided to initiate a leadership review under the *Mitchikanibikok Anishinabe Onakinakewin*. For this purpose, they organized a meeting of some community members on January 30, 2008.

[59] Mr. Laurier Riel, a court worker, prepared a report as an observer to this meeting. This report is dated February 6, 2008 but was corrected on February 10, 2008. According to this report, the January 30^{t}, 2008 meeting involved 20 elders of the community who proceeded to the selection of a new Chief and council by sitting candidates on chairs arranged for this purpose, including Casey Ratt as Chief and the other Applicants in these proceedings as councillors. Mr. Riel reports that 76 persons approved this new council, and that 13 additional votes by proxy were accepted. This new Chief and these councillors will be referred to herein as the "Ratt council."

[60] It is noteworthy that no notices of meeting, no list of participants, and no selectors list were submitted in the record before me to sustain the legitimacy of the selection of the Ratt council. Moreover, Mr. Riel took care to note in the correction to his report dated February 10, 2008 (reproduced at page 251 of the affidavit of Michel Thusky) that he "cannot confirm that the Elder's (sic) Council was advised or that proper notification was carried out according to the regulations or if everyone eligible to vote for Chief and Council had been duly notified."

[61] On January 31, 2008, Mr. Casey Ratt wrote to the Minister informing him of his selection as Chief with a new council. Shortly thereafter, on February 4, 2008 former Chief Wawatie also wrote to the Minister for his Elders Council denouncing the selection process for the Ratt council and noting that his Elders Council had not been involved. Former Chief Wawatie further reiterated his support and that of his Elders Council for the Matchewan council. The Minister was thus again faced, for the third time now, with conflicting claims of Chief and council selection under the custom.

[62] The Algonquin Nation Secretariat also got involved in this leadership dispute and explicitly supported the Matchewan council by a resolution adopted on February 22, 2008 confirmed by letter dated February 25, 2008 sent to Chief Casey Ratt by Grand Chief Norman Young. This formal support for the Matchewan council followed a complaint by Chief Casey Ratt concerning the involvement in the dispute of an advisor of the Algonquin Nation Secretariat, Russell Diabo, who, as we shall see below, became instrumental in subsequent events.

[63] On March 10, 2008, INAC informed both competing groups that it would register the results of the leadership selection process held on January 30, 2008 into the Band Governance Management System, and further advised that it would conduct its relationship with the Ratt council.

[64] Former Chief Wawatie and his Elders Council then challenged these decisions of INAC though legal proceedings initiated in the Federal Court on March 25, 2008 under file T-462-08. These proceedings are still pending.

[65] For its part, the Ratt council started to exercise its newly recognized authority.

[66] It adopted a resolution on March 15, 2008 formally withdrawing the community from the Algonquin Nation Secretariat, with the resulting consequence that INAC reduced the funding to that Secretariat over its objections.

[67] A tense situation thus developed between the Ratt council and the Algonquin Nation Secretariat. On July 11, 2008, Grand Chief Norman Young of the Algonquin Nation Secretariat wrote to the Minister denouncing the process which had resulted in the selection and eventual recognition of the Ratt council, and calling for a new leadership selection process.

[68] In early February 2009, persons closely associated with the Algonquin Nation Secretariat, which staunchly supported the Matchewan council, decided to take concrete actions to ensure that a new leadership selection process would take place in the community. A key advisor to the Algonquin Nation Secretariat, Mr. Russell Diabo, contacted Mr. Keith Penner in the first week of February 2009 informing him that elders were going to take steps to establish a "legitimate" government and whether Mr. Penner would be interested in offering his assistance in the capacity of a facilitator to achieve this goal. Mr. Penner accepted with the understanding that the Algonquin Nation Secretariat would cover his fees and expenses, which it did.

[69] Mr. Keith Penner is a former long standing member of Parliament who chaired the House of Commons Standing Committee on Indian Affairs and Northern Development in the 1980s. He is well known in aboriginal circles for the "Penner Report" of 1983, a report of that Standing Committee which examined First Nations self-government and First Nations governance. At the times material to this Application, he was the head of his own dispute resolution firm which specializes in the areas of transportation, commercial disputes, and disputes within aboriginal communities.

The Impugned Leadership Selection Process

[70] Following the initial contact between Mr. Diabo and Mr. Penner, the Matchewan council submitted a letter dated February 19, 2009 requesting the Elders Council to initiate a new leadership selection process. It is useful to note once again that the Elders Council was a clear supporter of the Matchewan council against the Ratt council, and was involved in legal proceedings contesting the recognition of the Ratt council by INAC.

[71] In its letter, the Matchewan council announced its intention to resign. It also requested the Elders Council to find successors in accordance with the *Mitchikanibikok Anishinabe Onakinakewin*. The resignations would be effective once the community leadership assembly had taken place. The Matchewan council further set out a detailed process which it suggested be followed by the Elders Council, including the appointment of an outside facilitator, echoing the prior communications between Mr. Diabo and Mr. Penner.

[72] A meeting was held on February 23, 2009 with Mr. Penner in Rapid Lake. This meeting involved the Matchewan council and a group of elders presumably supporting this council. No representatives from the Ratt council or any of its supporters were invited or attended this meeting. A detailed draft of the terms of reference for Mr. Penner was reviewed at the meeting, and it was agreed that a notice would be distributed and posted in the community of Rapid Lake calling for a joint meeting of the elders and community members to be held on March 9, 2009. This meeting was being called for the purpose of adopting the terms of reference for the facilitator, appointing Mr. Penner as the facilitator, appointing the Elders Council to preside over the leadership selection

process, and adopting a schedule of subsequent meetings to finalize the eligibility list and set a date for the leadership selection assembly.

[73] Though convened by pubic notice, and though Mr. Penner travelled to Rapid Lake to attend, the March 9, 2009 joint elders and community meeting never took place. The reasons for which this meeting were cancelled are unknown, and Mr. Penner himself cannot explain these reasons, other that confirming that representatives of the Matchewan Council (specifically "acting" Chief Benjamin Nottaway and Michel Thusky) had informed him that the timing for the meeting was no longer suitable (page 66 of Mr. Penner's cross-examination).

[74] The posting of this meeting had, however, the result of informing the Ratt council that its leadership was being challenged.

[75] Consequently, on March 8, 2009 a group of 24 elders supporting the Ratt council convened to sign a resolution confirming their support for that council, reiterating and confirming the process which resulted in the selection of that council, and denouncing the new selection process initiated by the opposing Elders Council.

[76] With this support, on March 12, 2009 Chief Ratt wrote to Mr. Penner challenging the proposed new leadership selection process on numerous grounds, including the inherent conflict resulting form the involvement of the Algonquin Nation Secretariat and its advisors in the process. Mr. Penner responded by informing Chief Ratt on March 19, 2009 that the process would continue,

and that a meeting for this purpose was to be held in Rapid Lake at which Chief Ratt was invited to attend. Mr. Penner asserted in his response that his role was one of a "neutral facilitator." The Ratt council replied the following day through its legal counsel advising Mr. Penner that he was not neutral and that he should cease and desist from pursuing further his mandate.

[77] An elders and community meeting was nevertheless held in Rapid Lake on March 24, 2009, presumably organized by the Matchewan council supporters and at which Mr. Penner attended. Though the notice called for the meeting to be held in the community school gym, it was moved without notice to another location within the community. A number of elders supporting the Ratt council and lead by elder Hector Jerome had gathered at the school gym and thus found themselves in the wrong location. They finally found the new location and arrived late at the meeting. They decided to attend the meeting in order to both protest the change of venue and to voice their deep opposition to the process. After Elder Jerome spoke to denounce these matters, the Ratt council supporters left the meeting in protest.

[78] The remaining participants in the March 24, 2009 meeting then proceeded to adopt three resolutions signed by a group of 26 elders:

a. resolution bearing number 03-24-09 (A) adopting terms of reference for the facilitator, and appointing Mr. Penner as the facilitator;

b. resolution bearing number 03-24-09 (B) appointing a Council of Elders with a mandate to preside over the leadership selection process, and comprising Matchewan council supporters Eddy Nottaway, Michel Thusky, Jeannine Matchewan and Louise Papatie, and setting the date of April 14, 2009 for finalizing the eligibility list and of April 25, 2009 for holding a leadership assembly;

c. resolution bearing number 03-24-09 (C) approving a provisional selectors eligibility list.

[79] From that point on, it was clear that the Matchewan council supporters would proceed with the new selection process irrespective of the participation or concerns of the Ratt council or its supporters.

[80] Invitations to INAC and others to attend the selection meeting as observers were thus sent out by the Elders Council, and a provisional list of selectors was adopted on April 14, 2009 by the elders supporting the Matchewan council.

[81] Chief Ratt denounced this whole process to INAC through a letter dated April 14, 2009 in which he severely criticized the involvement of the Algonquin Nation Secretariat and of Mr. Penner.

[82] In light of criticism from Chief Ratt concerning alleged manipulations to the selectors list being carried out by the Elders Council, legal counsel for the Algonquin Nation Secretariat had to intervene with the Elders Council to ensure that the previous selectors list was used as a basis for the approval of an updated selectors list.

[83] For reasons which remain obscure, the Elders Council wrote to Chief Ratt on April 16, 2009 proposing that he appoint his own co-facilitator to work with Mr. Penner, and that a reconciliation

process be set up between the rival camps to resolve all issues related to the leadership selection process. This offer was however rejected by Chief Ratt on April 21, 2009.

[84] Rather, on April 23, 2009, the Ratt council initiated these legal proceedings in this file T-654-09 before the Federal Court, which proceedings considerably morphed as events unfolded.

[85] On May 8, 2009, the Ratt Council then brought a motion for an interim injunction to enjoin the Elders Council from conducting a meeting scheduled for May 13, 2009. This motion was dismissed by Justice Harrington on May 12, 2009.

[86] At the May 13, 2009 meeting, the Elders Council decided to renew its proposal for reconciliation, and offered to suspend its leadership selection process for 10 days to allow the Ratt council an opportunity to appoint a co-facilitator and engage in a reconciliation process. On that same day, Chief Ratt wrote to Mr. Penner informing him that his council "agrees to appoint a co-facilitator to assist in a reconciliation process to possibly compliment the work we have been doing thus far" (page 296 to the affidavit of Michel Thusky). This was an ambiguous response to the reconciliation proposal, but was nevertheless taken positively by the Elders Council.

[87] Chief Ratt never proceeded with the appointment of a co-facilitator, arguing that not enough time was available to find the right person, and that budgetary issues had to be resolved in order to secure funds for this purpose.

[88] The Elders Council soon questioned the commitment of Chief Ratt to the reconciliation process, and informed him on June 3, 2009 that it would resume the new selection process and call a meeting for June 10, 2009 in order to approve a selector's eligibility list, which it duly proceeded to do.

[89] On June 24, 2009, a leadership selection assembly organized by the Elders Council was held at Barriere Lake, which is located outside the community of Rapid Lake and accessible from that community by approximately 45 minutes of travel time. Over 100 selectors of the community participated, and the result was the selection of Jean Maurice Matchewan as Chief, and of four others as councillors, including Benjamin Nottaway.

[90] Mr. Penner prepared a report on this selection assembly which concluded that the *Mitchikanibikok Anishinabe Onakinakewin* had been followed and that the new Chief and council were the legitimate and properly constituted leaders of the community. The Elders Council then wrote to the Minister on July 2, 2009 informing him of the results.

[91] The Minister took a long time to respond, being again faced, for the fourth time, with conflicting leadership legitimacy claims from the Algonquin of Barriere Lake. The last correspondence from the Minister is dated October 30, 2009 and speaks for itself. In a nutshell, the Minister attributed many of the problems plaguing the community to internal dissension among members and to a leadership selection process that he believes fuels the difficult governance

situation. Consequently, the Minister decided to take important and far reaching actions (pages 336 and 337 to the affidavit of Michel Thusky):

> At this point, I see the establishment of a transparent, democratic and accessible leadership selection process as the only viable option available to address the long-standing governance disputes in the community and to ensure the well-being of the residents and members of Barriere Lake. I have decided, therefore, to invoke the powers conferred upon me by the *Indian Act* to bring the Algonquins of Barriere Lake under the election provisions of the Act, effective April 1, 2010.
>
> I take this action very seriously, with the best interests of the community being foremost in mind. Over the next several months, I am offering the community the opportunity to develop and ratify a clear leadership selection process that includes secret ballot voting, and that respects the principles set out in the Department's Conversion to Community Election System Policy. Should the community be successful in developing and ratifying a new leadership selection code by March 31, 2010, I will not pursue the authority described above. To this end, should there be a consensus within the community to embark on the development of an election code, the Department is prepared to discuss appropriate financial assistance and technical support, based on what is provided to other First Nations. Departmental staff can also be made available to assist the community with the development of a leadership selection code.
>
> In the meantime, I have instructed departmental officials to cease, as of October 30, 2009, our official relationship with any group claiming to be the council and to work with all the leaders and members of the community concerning a new election code. The delivery of essential programs and services to the community will continue through the third-party manager in place. Current housing projects will continue and other measures will be taken to enhance the living conditions in the community.

The Positions of the Parties

[92] Both the Applicants and the Respondents have submitted detailed arguments supporting their respective positions. Their positions are straightforward.

[93] The Applicants argue that under the *Mitchikanibikok Anishinabe Onakinakewin*, an Elders Council has no authority to preside over the customary leadership selection process. The Applicant further asserts that the entire process leading to the leadership selection of June 24, 2009 was tainted by bias and conflict of interest. Finally, the Applicants argue that a large number of community members living off reserve were excluded from the eligibility list in contravention of the principles set out in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 ("*Corbiere*") and in *Esquega v. Canada (Attorney General)*, 2008 FCA 182, [2009] 1 F.C.R. 448.

[94] The Respondents argue that the Elders Council acted with authority and was properly constituted, that the process was fair and impartial, that the eligibility list complied with the *Mitchikanibikok Anishinabe Onakinakewin*, and that the *Corbiere* principles have no application here. They add that the Applicants are precluded by their conduct from raising procedural fairness arguments since they rejected every effort at reconciliation and accommodation.

The issues

[95] The issues can be briefly stated as follows:

a. Does the Federal Court have jurisdiction?

b. Was the *Mitchikanibikok Anishinabe Onakinakewin* complied with?

c. Was the process biased or otherwise unfair?

d. Should the Court embark on a *Corbiere* analysis?

e. Is relief warranted?

The Jurisdiction of the Federal Court

[96] The litigants all agree that the Federal Court has jurisdiction to adjudicate the matters at issue here. However, though the parties all agree, this does not necessarily mean that the Court indeed has jurisdiction, and an inquiry into jurisdiction is still thus required: *Devil's Gap Cottagers (1982) Ltd. v. Rat Portage Band No. 38B (Wauzhushk Onigum Nation)*, 2008 FC 812, [2009] 2 F.C.R. 267 at para. 26; *Chavali v. Canada*, 2001 FCT 268, 202 F.T.R 166 at para. 6, aff'd 2002 FCA 209, 291 N.R. 311.

[97] In this case, the fundamental issue is whether the traditional council of the Algonquin of Barriere Lake selected by custom, and the bodies purporting to supervise such selections under the custom, such as the Elders Council, are included in the expression "federal board, commission or other tribunal" used in subsections 18(1), 18.1(2) and (3) of the *Federal Courts Act*.

[98] Section 2 of the *Federal Courts Act* contains a definition of a federal board, commission or other tribunal which refers to jurisdiction or powers conferred by an Act of Parliament:

"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown […]	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale […]

[99] The *Indian Act* defines the "council of the band" for the purposes of that Act as follows:

"council of the band" means	« conseil de la bande »
(*a*) in the case of a band to which section 74 applies, the council established pursuant to that section,	*a*) Dans le cas d'une bande à laquelle s'applique l'article 74, le conseil constitué conformément à cet article;
(*b*) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;	*b*) dans le cas d'une bande à laquelle l'article 74 n'est pas applicable, le conseil choisi selon la coutume de la bande ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de celle-ci.

[100] The "custom of the band" to which this definition refers clearly includes the *Mitchikanibikok Anishinabe Onakinakewin*.

[101] The use customary selection processes is one of the few aboriginal governance rights which has been given explicit federal legislative recognition through the *Indian Act*. The *Mitchikanibikok Anishinabe Onakinakewin* is itself the contemporary manifestation of the traditional customary governance selection system of the Algonquin of Barriere Lake. That custom is explicitly recognized by this provision of the *Indian Act*.

[102] As a form of aboriginal customary law, the *Mitchikanibikok Anishinabe Onakinakewin* is an emanation of the federal common law following the principles set out by the Supreme Court of Canada in *Roberts v. Canada*, [1989] 1 S.C.R 322. In that case, it was found that federal common law formed part of the laws of Canada under the meaning of section 101 of the *Constitution Act*,

1867. The Supreme Court of Canada also added that the federal common law included the law of aboriginal title. This view was further reiterated in *R. v. Côté,* [1996] 3 S.C.R. 139 at para. 49. As noted by J.M. Evans and B. Slattery:

> In this manner, the common law of aboriginal title – and indeed the common law governing aboriginal and treaty rights generally – became federal common law. To put the point precisely, it became a body of basic *public* law operating uniformly across the country within the federal sphere of competence. In this respect, then, the law of aboriginal title resembles the law of Crown liability, which Laskin C.J.C. earlier singled out as a prime example of federal common law. ['Federal Jurisdiction-Pendant Parties-Aboriginal Title and Federal Common Law-Charter Challenges-Reform Proposals: *Roberts v. Canada*" (1989) 68 Can. Bar Rev. 817 at 832]

[103] In the absence of an order under subsection 74(1) of the Act, the implementation of the *Mitchikanibikok Anishinabe Onakinakewin* is a condition precedent under the *Indian Act* to the recognition of a band council under that Act for the Algonquin of Barriere Lake. The exercise of authority by that band council under that Act is dependent on the *Mitchikanibikok Anishinabe Onakinakewin*. Consequently, the traditional council selected pursuant to the *Mitchikanibikok Anishinabe Onakinakewin* and the bodies purporting to supervise the proper selection of the Chief and council under that custom, such as the Elders Council, fall under the meaning of "federal board, commission or other tribunal" as those terms are defined in the *Federal Courts Act*.

[104] I note that the Federal Court of Appeal has had no hesitation finding that an Elders Council exercising authority to remove a Chief under a band constitution was amenable to judicial review in the Federal Court. In *Minde v. Ermineskin Cree Nation*, 2008 FCA 52, 372 N.R. 268, Noël J.A. stated the following at para. 33:

> With respect to Mr. Minde's preliminary argument that the Elders Council, if it was the decision-maker, is not amenable to judicial review because it is not a federal board, commission or other tribunal within the meaning of section 18 of the *Federal Courts Act*, I need only say that the jurisdiction of the Federal Court under section 18 does not depend on form, but is based on the authority to decide. To the extent that the Elders Council is empowered to and did terminate Mr. Minde as Chief pursuant to the Band Constitution, its decision can be reviewed pursuant to section 18.

[105] The jurisprudence of this Court has also consistently upheld its supervisory powers over band elections held under custom: see notably *Francis v. Mohawk Council of Kanasetake*, 2003 FCT 115, [2003] 4 F.C. 1133 at paras. 11 to 18; and *Ballantyne v. Nasikapow*, [2001] 3 C.N.L.R. 47, 197 F.T.R. 184 at paras. 5-6.

[106] Consequently, whether the selection process is carried out by election pursuant to the *Indian Act*, or pursuant to custom, the Federal 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. I find this is so irrespective of whether or not the selection process flows, as in this case, from ancient custom, or from custom developed pursuant to the revocation of an order under section 74 of the Act which must comply with ministerial conditions. In either circumstance, this Court has jurisdiction.

Was the *Mitchikanibikok Anishinabe Onakinakewin* complied with?

[107] As a preliminary matter, I note that the important Board of Directors structure specifically provided for in the *Mitchikanibikok Anishinabe Onakinakewin*, as amended, seems to have fallen

into disuse. Though questioned about this at the hearing, counsel for both parties did not seem overly preoccupied by this fact, even though this Board is the body entrusted with the management of the community's social and economic programs. These programs are now under third-party management. One would have expected in the wake of third-party program management that the issue of the demise of the elected Board of Directors would have been one of the principal preoccupations of the community. However this was not raised by the parties to this litigation.

[108] I will accept for the purposes of this Application, without deciding the issue, that the selection of the Matchewan council in July of 2006 was carried out in accordance with the *Mitchikanibikok Anishinabe Onakinakewin* and that Chief Matchewan and his council were duly and properly recognized by the INAC on May 29, 2007.

[109] However, events subsequent to May 29, 2007 have clearly shown that both parties in these proceedings have each twisted and turned the *Mitchikanibikok Anishinabe Onakinakewin* to suit their own agenda and objectives as events unfolded.

[110] First we have the resignation of Chief Jean Maurice Matchewan in September of 2007 in the wake of charges being laid against him. The record shows that Chief Matchewan decided to resign in order to await the outcome of these charges. He could have decided to continue as Chief on the basis that the charges laid against him did not mean he was guilty of anything. However, he decided to resign, and this resignation should have triggered a leadership selection for the position of Chief.

[111] Instead, we have former Chief Wawatie, resigning Chief Matchewan and councillor Benjamin Nottaway working in concert to ensure the continued presence of Mr. Matchewan on the council through the unusual designation of Benjamin Nottaway as “acting “ Chief and the somewhat curious placement of former Chief Matchewan on the councillor’s seat vacated by Mr. Benjamin. The net result was to have Chief Matchewan “resign” while still effectively holding the reins of power on the council. All this was carried out with little or no involvement of the community or even of the elders. Rather, the Elders Council controlled by former Chief Wawatie assumed upon itself the authority to decide the matter with the Matchewan council. It had no authority or legitimacy to do this under the *Mitchikanibikok Anishinabe Onakinakewin*.

[112] Section 8.10 of the *Mitchikanibikok Anishinabe Onakinakewin* is clear that a member of the council, including the Chief, ceases to hold office upon resignation. This section also provides that when a position becomes vacant, the remaining council members decide, in consultation with the elders, if and when the position needs to be filled.

[113] In this case, the council, in consultation with the elders, could have decided not to fill the vacant position of Chief pending the resolution of the charges against Mr. Matchewan and could have thus continued operating with the remaining four members of the council. A new selection process could have been held at a later date, at which time Mr. Matchewan could have attempted to return as Chief in the event the charges against him were dismissed. The council however decided that the position would be filled and that the council would continue its operations with Mr. Matchewan sitting. Such a decision was not provided for under the *Mitchikanibikok Anishinabe*

Onakinakewin, and rather, a selection process for the vacant Chief position should have been triggered.

[114] It is therefore not surprising that a large segment of the community was questioning these maneuvers. The record before me shows that the Matchewan council and the Elders Council resisted calls to hold community meetings to discuss the matter or to review the leadership in the wake of these events. Combined with the school closure, a crisis largely driven by the Matchewan council itself, it is not surprising that tensions mounted in the community.

[115] The process leading to the selection of the Ratt council on January 30, 2008 was itself somewhat at odds with the *Mitchikanibikok Anishinabe Onakinakewin*.

[116] Counsel for the Applicants argued at the hearing on this Application that the January 30, 2008 leadership selection cannot be questioned in these proceedings. I reject this argument.

[117] Indeed, these proceedings require this Court to determine the legitimacy of the selection process leading to the June 24, 2009 leadership selection assembly. This in turn requires an inquiry into the legitimacy of the process purportedly removing the Matchewan council on January 30, 2008 and resulting in the selection of the Ratt council instead. The legitimacy of the selection of the Ratt council is thus clearly at issue in these proceedings.

[118] In fact, the legitimacy of the Ratt council is the first ground raised by the Applicants in their Application in order to support their position. The Applicants were fully aware that this issue was at stake in these proceedings, and by arguing that it should not to be considered, they are simply attempting to have this Court apply a double standard, one for the Matchewan council and another for themselves. This Court will not follow the Applicants down this path.

[119] Rather than seeking a court order to challenge the appointment of "acting" Chief Nottaway and the assignment of a councillor's seat to resigning Chief Matchewan without community involvement, the opponents decided to use the *Mitchikanibikok Anishinabe Onakinakewin* as a blunt instrument to dislodge the entire sitting council. To achieve this end, they held a meeting of elders and community members who supported their cause. Nothing in the record before me shows that the impeached leaders were invited to this meeting, or that those in the community who favoured the Matchewan council participated or were even invited to attend. On January 30, 2008, the opponents thus proceeded with their own simultaneous leadership review and leadership selection meeting which resulted in the selection of the Ratt council.

[120] This method of leadership review and selection does not fit well within the letter or the spirit of the *Mitchikanibikok Anishinabe Onakinakewin*. Section 8.11 of the *Mitchikanibikok Anishinabe Onakinakewin* clearly allows for a leadership review to be held at any time if an undefined "sufficient number" of community members approach the elders to convene a leadership review assembly. If the elders agree to hold such an assembly, the concerned leader or leaders must be invited to attend. The purpose of the assembly is not to dislodge the leadership, but to resolve the

complaints though discussion. However, if a consensus is reached that the leader must be removed, then the selection process is triggered.

[121] It is obvious from the *Mitchikanibikok Anishinabe Onakinakewin* that a leadership review meeting and the ensuing leadership selection are two different processes that are not contemporaneous one to another. If the leadership review results in the removal of a leader, then suitable candidates must be indentified by the council in consultation with the elders pursuant to subsection 8.6(2) of the *Mitchikanibikok Anishinabe Onakinakewin*. Thereafter, a leadership assembly must be properly convened by the elders pursuant to subsection 8.6(3), and as a logical consequence, a proper list of selectors needs to be established in order to give effect to section 8.9. Finally, the selection assembly needs to take place.

[122] By collapsing all these matters in one combined leadership review and leadership selection meeting involving only one segment of the community, the opponents were not themselves in compliance with the *Mitchikanibikok Anishinabe Onakinakewin*. The opponents were rather attempting to dislodge the sitting council through a process which would appear to give them legitimacy. It is perhaps understandable that the opponents acted as they did in circumstances where the Matchewan council was itself not complying with the custom, but that does not necessarily render legitimate the process they used.

[123] The process leading to the June 24, 2009 selection assembly reappointing Chief Matchewan and Councillor Benjamin Nottaway was a new attempt to use the *Mitchikanibikok Anishinabe*

Onakinakewin to meet certain defined ends. This new attempt at leadership selection was heavily dependent on the use of an Elders Council as the organizing committee of the selection.

[124] An Elders Council is indeed provided for in the second amendment to the *Mitchikanibikok Anishinabe Onakinakewin*, but its sole mandate is to sit as an appeal body to resolve disputed election results to the Board of Directors or disputed removals from this board. Paragraphs 3.4(1)(c) and (d), subsection 3.10(2) and section 3.11 of the second amendment to the custom are clear on this point. I further note that under subsection 3.11(4), no member of the Elders Council "shall vote or support any candidate in the election."

[125] However, this Elders Council seems to have taken a life of its own, assuming mandates and authorities which were never provided under the *Mitchikanibikok Anishinabe Onakinakewin*.

[126] As noted above, the Elders Council, under the control of former Chief Wawatie, attempted to provide legitimacy to the manoeuvres surrounding Chief Matchewan's "resignation" when charges were laid against him. The Elders Council then took an active role in impeding a leadership review of the Matchewan council. The Elders Council also took various legal proceedings against the Minister to challenge the appointment of the third-party manager as well as to challenge the subsequent INAC recognition of the Ratt council. Certainly, this Elders Council was taking on a far larger role than that of an election appeal board under the *Mitchikanibikok Anishinabe Onakinakewin*.

[127] In the process leading up to the June 24, 2009 leadership selection assembly, the Elders Council took upon itself to appoint and instruct Mr. Penner as a facilitator and to generally act as the organizing body for the selection process. This selection process was a thinly veiled attempt to dislodge the Ratt council. The members of the Elders Council knew full well that many among the elders and the community did not agree with the tactics they were promoting, yet they proceeded in complete disregard to these serious concerns.

[128] When the Elders Council assumed the authority to organize the selection process, an authority which it did not have under the custom, the approach it used was hardly compatible with that of a body acting objectively and without favour to any candidate, as called for under the *Mitchikanibikok Anishinabe Onakinakewin*.

Was the process biased or otherwise unfair?

[129] I note that the customary selection process at issue here was not an adjudicative process, and that Mr. Penner and the Elders Council did not act in any adjudicative capacity. Consequently, the duties of fairness and impartiality at issue are different from those which apply to adjudicative bodies.

[130] The Supreme Court of Canada has stated in a number of decisions that the obligations imposed by the duty of fairness vary with the circumstances: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 21.

[131] Furthermore, as noted by the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 636-39, the extent of the duty of fairness depends upon the nature and the functions of the administrative body, and consequently, a claim of reasonable apprehension of bias will be viewed differently in the case of an adjudicative body as compared to a body entrusted with wide policy making authority. Page 638 of that decision contains the following observation:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

[132] I am ready to recognize for the purposes of this litigation, without deciding, that insofar as it purported to have authority to organize the customary leadership selection process, the duty of fairness owed by the Elders Council and its agents, such as Mr. Penner, was low.

[133] Nevertheless, those who carry out and supervise leadership selection processes for public bodies, such as a band council, are required at a minimum to project and demonstrate a degree of fair play and impartiality such as to ensure a credible result from those processes.

[134] I find comfort for this proposition in the *Mitchikanibikok Anishinabe Onakinakewin* itself, which is based on the principles of *Nitochkiteaminan*, Our Fire, *Niteabetomowinan,* Our Belief, and *Nimokichanan,* Our Feast, described above, which incorporate the cultural values of respect, unity and good faith. I also find comfort for this proposition in the context of customary band elections in various court decisions, including notably *Francis v. Mohawk Council of Kanasetake,* 2003 FCT 115, [2003] 4 F.C. 1133 at paras 72-73 and *Ballantyne v. Nasikapow,* [2001] 3 C.N.L.R. 47, 197 F.T.R. 184 at paras. 55 and 66-67.

[135] The question which must be asked to determine bias requires that the Court ask what an informed person would conclude, viewing the matter realistically and practically, and having thought the matter through: *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369 at p. 394. Though this question was applied in that case in the context of an adjudicative function, it is a useful reference point from which to decide if a minimum degree of fair play and impartiality was maintained such as to ensure a credible result from the selection process at issue here.

[136] Even using this low threshold, I find that that the process leading to the June 24, 2009 leadership assembly was both biased and unfair. That process had one objective, and that was to dislodge the Ratt council and reinstate instead Jean Maurice Matchewan and his supporters in order to attempt to force the hand of the Minister in recognizing them as Chief and council.

[137] The role of Mr. Penner needs to be addressed here. Though the process itself was biased and unfair, this is not necessarily a reflection on Mr. Penner. I have been presented with no evidence which allows me to doubt the integrity of Mr. Penner or his commitment to what he believed were the community's best interests. Unfortunately, he became entangled in a difficult situation and coped as best he could.

[138] When Mr. Penner was first contacted by the Algonquin Nation Secretariat, and when he accepted the mandate as facilitator, it was clearly understood that he would be working under the guidance of only one of the groups, namely the group supporting the Matchewan council. This is reflected in Mr. Penner's affidavit affirmed November 25, 2009 at paragraph 3:

> I was invited by the Elders of the Algonquins of Barriere Lake ("ABL") and the Michikanibikok Inik Customary Council, led by Acting Chief Benjamin Nottaway and members of his Council, Councillors Jean Maurice Matchewan, Moise Papatie, David Wawatie and Jean-Paul Ratt ("the Matchewan-Nottaway Council"), to assist the ABL in undergoing a new leadership selection process. I worked with members of the ABL, under the direction of ABL Elders, from February 23, 2009 to June 24, 2009, to facilitate the leadership selection process. This process concluded with a leadership selection assembly on June 24, 2009. My involvement with the members of the ABL during this period is the basis of my knowledge of the facts as hereinafter stated.

[139] The very fact that the Algonquin Nation Secretariat was funding the facilitator for the selection process rendered that process biased from the start. Indeed, the Algonquin Nation Secretariat had already taken a clear and strong position against the Ratt council and in favor of the Matchewan council.

[140] Even more significant is the fact that the Algonquin Nation Secretariat had a strong vested financial interest in the demise of the Ratt council. Indeed, as noted above, that council had withdrawn the community from the Algonquin Nation Secretariat, with resulting significant cuts in funding from INAC for that organization. In such circumstances, there was an inescapably clear appearance of bias attached to anyone funded by the Algonquin Nation Secretariat to carry out a leadership selection process for the Algonquin of Barriere Lake.

[141] The entire premise on which the selection process was conducted was that the Matchewan council was legitimate while the Ratt council was not. Indeed, the very trigger of the selection process was the resignation of the Matchewan council, which presupposed that the Ratt council was illegitimate and therefore not subject to a prior leadership review under the *Mitchikanibikok Anishinabe Onakinakewin.*

[142] Moreover, the Elders Council was a clear supporter of the Matchewan council and it was itself embroiled in bitter litigation with the Minister as opponents to the Ratt council. In such a context, the Elders Council could have no claim to organize and preside over an unbiased and fair selection process.

[143] In addition, an examination of the conduct of the process itself shows that it was also highly deficient. I note in particular the following incidents as but examples of these deficiencies.

[144] The joint elders and community meeting convened by public notice for March 9,' 2009 was cancelled by the Matchewan supporters without explanation.

[145] The venue for the subsequent meeting of March 24, 2009 was changed without explanation, leaving the elders supporting the Ratt council without information about the change. When finally the Ratt council supporters made their way to that meeting, their serious concerns about the process were simply ignored or dismissed.

[146] The biased Elders Council was further tainted by the selection of supporters of the Matchewan council as replacements to former Chief Wawatie on the Elders Council after the latter had passed away.

[147] The eligibility list for selectors was substantially modified to the extent that intervention by legal counsel was required to correct the situation and return to a prior approved list.

[148] The selection assembly was held well beyond the confines of the Rapid Lake community, thus making it difficult and certainly uncomfortable for supporters of the Ratt council to voice their position at such assembly or their opposition to such an assembly.

[149] Any claim to objectivity and fairness in such circumstances is simply untenable.

[150] I have consequently no hesitation whatsoever in finding that the selection process leading to the June 24, 2009 selection assembly was biased and unfair and, in addition, as noted above, did not comply with the *Mitchikanibikok Anishinabe Onakinakewin*.

Should the Court embark on a *Corbiere* analysis?

[151] The Applicants further argue that a large number of community members living off reserve were excluded from the eligibility list of selectors in contravention to the principles set out by the Supreme Court of Canada in *Corbiere*, above.

[152] For the reasons which follow, this is not a case in which to proceed with a *Corbiere* analysis or any other analysis under section 15 of the *Canadian Charter of Rights and Freedoms*.

[153] In the leadership selection meeting of January 30, 2008 which resulted in the selection of the Ratt council, nothing in the record before me shows that the Applicants had any concerns with the eligibility of selectors or with *Corbiere* principles. The Applicants are somewhat remiss to now argue this matter against the Respondents when they themselves ignored it.

[154] In addition, the analogous ground of discrimination found in *Corbiere*, namely "Aboriginality-residence (off-reserve band member status)" may not necessarily be applicable here since the distinction made in paragraph 8.9(2)(b) of the *Mitchikanibikok Anishinabe Onakinakewin* rather relates to the use and occupation of the traditional territory and knowledge of, and connection with, the land. It is not however necessary to decide whether the distinction made in the

Mitchikanibikok Anishinabe Onakinakewin falls or not under the analogous ground of "Aboriginality-residence (off-reserve band member status)" or if it constitutes or not another analogous ground under section 15 of the *Canadian Charter of Rights and Freedoms*.

[155] Indeed, none of the Applicants are affected by the distinction. Though in an affidavit he signed, Mr. Chad Thusky questions his exclusion from the eligibility list, he is not an applicant in these proceedings. Moreover, Mr. Chad Thusky asserts in his affidavit that he meets the definition of a selector under the *Mitchikanibikok Anishinabe Onakinakewin*, and thus the complaints set out in his affidavit do not appear to be directly related to *Corbiere*.

[156] I add that the factual background to properly consider this matter is absent from the record. There is no clear evidence as to how many members of the Algonquin of Barriere Lake are excluded by the distinction made in the *Mitchikanibikok Anishinabe Onakinakewin* and as to how such distinction may affect them.

Is relief warranted?

[157] The Respondents argue that even if this Court finds that the process leading to the June 24, 2009 leadership selection was flawed, the Applicants are precluded from obtaining the relief they seek since they rejected every effort at reconciliation and accommodation which was made to them by the Respondents.

[158] Though I have found serious deficiencies in the process leading to the June 24, 2009 leadership selection, nevertheless the Elders Council did make a proposal to Chief Ratt, suggesting that he appoint a co-facilitator and enter into a reconciliation process which could have resulted in a selection process respectful of the *Mitchikanibikok Anishinabe Onakinakewin*.

[159] The Applicants question the sincerity of this offer of reconciliation, and further argue that unreasonable timelines were imposed on them to find and fund a co-facilitator. I do not accept the Respondents' arguments on these matters.

[160] On April 16, 2009 the Elders Council wrote to Chief Ratt with its initial proposal for reconciliation. This initial proposal was rejected shortly thereafter by Chief Ratt. It was only after the Ratt council had lost its bid for an interlocutory injunction on May 12, 2009 that Chief Ratt finally agreed to consider a reconciliation process, but he did so in the most ambiguous of terms, only agreeing to a co-facilitator "to assist in a reconciliation process to possibly compliment the work we have been doing thus far" (page 296 of the affidavit of Michel Thusky). This was not a firm commitment to reconciliation on a proper leadership selection process.

[161] The argument that time and money were an impediment to the selection of a co-facilitator is spurious. I agree with Mr. Penner that had Chief Ratt shown a sincere commitment to the reconciliation process and carried out some steps towards the appointment of a co-facilitator, more time to resolve these matters could have been agreed to. As noted by Mr. Penner at paragraph 38 of his affidavit:

> In a personal conversation I had with Casey Ratt, I assured him that ten-day time frame being imposed was to ensure that steps were being taken by Casey Ratt to appoint a co-facilitator in accordance with his May, 13 2009 letter promising to do so.

[162] Chief Ratt and his council had a unique opportunity to resolve the leadership selection crisis in their community. The opposing Elders Council had made a clear commitment to a reconciliation process, and Mr. Penner was available to assist in this reconciliation. Rather than latch on to this unique opportunity, Chief Ratt wrote a long letter to Mr. Penner on May 29, 2009 in which he took a self-righteous approach to the entire crisis, and by so doing rejected any serious attempts at reconciliation.

[163] It is settled law that relief pursuant to sections 18 and 18.1 of the *Federal Courts Act* is discretionary and may be withheld in appropriate circumstances: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 40. The discretion to grant or withhold such relief must, of course, be exercised judicially and in accordance with proper principles.

[164] The conduct of the requesting party has been found to be a factor which may be taken into account in withholding such some types of relief: *Homex Realty v. Wyoming*, [1980] 2 S.C.R. 1011 at 1033-34; *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14, 263 D.L.R. (4th) 51 at paras. 9-10. However, barring acquiescence or undue delay, the conduct of a requesting party may not be a proper factor for withholding relief by way of a writ of *quo warranto* in light of the very nature of this writ. However I need not decide this last issue here.

[165] Indeed, though the discretion to withhold relief in the form of *quo warranto* may be quite limited, the test to grant such relief is nevertheless stringent. The test for *quo warranto* relief and the additional considerations appropriate for the Court to consider in deciding on such relief were set out in *Jock v. Canada*, [1991] 2 F.C. 355 (T.D.). The substantive rules for *quo warranto* require, among other, that the "holder must have already exercised the office; a mere claim to exercise it is not enough": *Jock v. Canada*, above, at 370; *Catholique v. Lutsel K'e First Nation*, 2005 FC 1430, 282 F.T.R. 138 at para. 63.

[166] In this case, there is no evidence that the Respondents are exercising the offices of Chief and councillor. On the contrary, the evidence submitted indicates that they may be claiming a right to these offices, but that no effective use of the authority attached to these offices appears to have been truly exercised. This is moreover compounded by the Minister's decision not to recognize either litigants in these proceedings as Chief and council.

[167] Taking this into account, relief by way of *quo warranto* shall be denied in regard to the positions of Chief and council.

[168] I will also deny relief by way of *quo warranto* in regard to the Elders Council. As these reasons for judgment make abundantly clear, the Elders Council role, under the leadership selection custom, is to decide appeals from elections to or removals from the Board of Directors. A declaration of *quo warranto* in these circumstances will serve no useful purpose since the Board of

Directors appears to have fallen into disuse and, in any event, the management of the programs and services which would befall to this Board of Directors has been taken over by a third-party manager.

[169] Though I recognize that the Applicants refused the proposal for reconciliation which was made to them, I do not consider, in the particular circumstances of this case, that this should impede the declaration of invalidity relating to the process leading to the June 24, 2009 leadership selection. In light of the circumstances of this case, this Court would be remiss if it abdicated its responsibilities by refusing a declaration. However, the refusal of the Applicants to accept reconciliation may be properly taken into account on the issue of costs.

[170] The Court will thus declare that the process leading to and concluding with the June 24, 2009 leadership selection was invalid since that process was biased and unfair and did not comply with the selection custom of the band. This declaration is not to be interpreted as an endorsement of the Applicants claims to the positions of Chief and council.

[171] This is a case where an order for costs would simply aggravate an already tense situation and would not serve the purposes of a possible reconciliation which this troubled community so desperately needs. Moreover, this litigation may have been avoided had the Applicants accepted the reconciliation proposal which had been made to them by the Elders Council. I have thus decided to exercise my discretion under Rule 400 of the *Federal Courts Rules* and make no order as to costs.

[172] At the hearing on this Application, the parties indicated that they may be pursuing discussions to resolve their differences on leadership selection for the community. Hopefully this judgment will assist them in reaching a consensus which has been sorely lacking in the past years.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

i. The Application is granted in part;

ii. The process leading to and concluding with the June 24, 2009 leadership selection for the Algonquin of Barriere Lake is declared invalid;

iii. No costs are adjudicated.

"Robert M. Mainville"
Judge

SCHEDULE
EXTRACTS FROM CODIFIED AND AMENDED LEADERSHIP SELECTION CUSTOM OF THE ALGONQUIN OF BARRIERE LAKE

Succession of Chiefs and Councillors

8.5 (1) Members of the Council shall serve for life, subject to their resignation or removal in accordance with section 8.10

(2) When a Chief or Councillor dies, that person is succeeded by one of the children of the Chief or Councillor, provided:

(a) the child is proposed as a suitable successor by the Chief or Councillor, and

(b) the People do not disapprove of the child as successor.

(3) If the Chief or Councillor does not have a child, if the child declines, if the Chief or Councillor does not think the child would be suitable for the position, or if the People disapprove of the child as successor, the, a selection process will be initiated by the Chief or Councillor to select a successor.

Wasakawegan

8.6 (1) Wasakawegan, or blazing, is the process for selecting leaders. In this process, leaders are nominated by the Elders and selected by the People.

(2) To initiate a selection process, the Council consults with the Elders and asks them to help identify a suitable candidate or candidates if more than one position is open.

(3) Once a suitable candidate or candidates have been identified, the Elders convene a Leadership Assembly of the People.

(4) The proceedings of the Leadership Assembly are as follows:

(a) the assembly starts in the morning;

(b) seats representing the number of positions which are open are placed in the center of the Assembly area;

(c) an equal number of seats are also placed in the center for the spouses of leaders to be selected;

(d) the People gather in a circle, around the seats;

(e) the nominated candidate is escorted by one of the Elders to one of the seats in the center;

(f) the spouse of the nominated candidate is also escorted to a seat by another Elder;

(g) the Elder who nominates a candidate addresses the Assembly and the Elder who brings forward the spouse also addresses the Assembly;

(h) the candidate and spouse also addresses the Assembly;

(i) the floor will then be open for general discussion;

(j) if there is consensus amongst the People on the candidate, this shall be announced to the Assembly; and

(k) the Assembly continues until all the positions are filled.

(5) Once a candidate is selected, the person undergoes a training, probation and evaluation period for two years. This transition allows the selected candidate to improve and enhance leadership skills by observing and working with the present Council.

Confirmation of Selection

8.7 (1) When the training, probation and evaluation period is finished, the Elders again convene a Leadership Assembly of the People to consider the confirmation of the candidate or candidates.

(2) The Assembly proceeds in the same way as outlined in section 8.6 (4), except that different Elders must this time escort the candidates and their spouses.

(3) The selection of the candidate is confirmed if there is a consensus amongst the People.

(4) The confirmed candidate begins exercising the responsibilities of the position immediately, however, the title of the position does not transfer until the current holder of that title dies.

Eligibility of Candidate

8.8 (1) Only adult members of the First Nation who are married are eligible to be candidates for Chief or Councillor.

(2) To qualify as an eligible candidate, a person must also:

(a) be open-minded, possess good judgment and courage;

(b) use and occupy the traditional territory and have knowledge of, and connection with, the land, especially the area which the person is to represent;

(c) have Okima mskwe, leadership blood; and

(d) speak the Algonquin language and have knowledge of the customs and traditions.

Eligibility of Selectors

8.9 (1) Only eligible selectors are entitled to participate in the selection of the Chief or Councillors.

(2) To be an eligible selector, a person must:

(a) be an adult member of the First Nation, and

(b) use and occupy the traditional territory and have knowledge of, and connection with, the land.

Ceasing to Be a Member of Council

8.10 (1) A member of the Council shall cease to hold this position upon:

(a) resignation;

(b) death;

(c) ceasing to be a member of the First Nation; or

(d) removal from office pursuant to section 8.11.

(2) When a position becomes vacant, the remaining Council members shall decide, in consultation with the Elders, if and when the position needs to be filled.

Leadership Review

8.11 (1) The leadership of any member of Council is open for review at any time.

(2) A leadership review is initiated when a sufficient number of members of the First Nation approach the Elders to convene an assembly to review the leadership of one or more members of the Council.

(3) If the Elders think that a leadership review is appropriate, then, they shall convene an assembly and ask the leader to attend.

(4) The purpose of a leadership review is not to remove the leader. If the people feel that a leader has done something wrong, they must inform the leader of this first and give the person an opportunity to correct the situation.

(5) If a leadership review is not resolved to the satisfaction of the People, either because the leader has not provided an adequate explanation or is unwilling to resign or change, then, the Elders shall request if the People want to remove the leader.

(6) If there is a consensus on removal then the Chief or Councillor shall be removed from this position.

Review of the Mandate of Council

8.12 (1) There shall be a review of the mandate of the Council at least once every four years.

(2) The date of the Mandate Review shall be established by the Elders in consultation with the Council.

(3) Once a date for the Mandate Review is established, the Elders shall convene an Assembly of the People.

(4) The proceedings of the Assembly to Review the Mandate of Council are as follows:

(a) the Elders shall read out the *Mitchikanibikok Anishinabe Onakinakewin*;

(b) the Elders shall review with the Council and the People the roles and responsibilities of the Council;

(c) the record of the Council for the preceeding four years shall be reviewed by the People; and

(d) the People shall establish a mandate for the Council for the next four years.

EXTRACT OF AMENDMENT TO THE CODIFIED CUSTOM CONSERNING THE BOARD OF DIRECTORS

Ceasing to Hold Office

3.4 (1) A member of the Board shall cease to be a member and vacate his or her seat upon:

(a) submitting a written resignation to the Chief;

(b) being found medically unfit to carry out the duties and complete the term of office owing to physical or mental disability;

(c) absence, without just cause as determined by the Council of Elders, for four (4) consecutive regularly scheduled meetings of the Board;

(d) being found responsible for conduct unbecoming his or her office by the Council of Elders;

(e) conviction of an indictable offence; or

(f) ceasing to be a member of the Algonquins of Barriere Lake.

(2) If a member of the Board does or ceases to hold office in accordance with Section 3.4 (1) and such event occurs six (6) months or more before the end of the term of office, a special election shall be held to fill the vacancy for the remainder of the term.

Elections

3.5 (1) Elections shall be held at least once every three (3) years. The actual date of the election shall be declared by the Chief, after consultation with the Board of Directors, between eighteen (18) and twenty-one (21) days prior to the date of the election.

(2) Elections for the Board shall be determined on the basis of the candidate with the highest number of votes.

(3) If there is a tie in the number of votes between two (2) or more candidates, and the tie must be broken because only a single position is available, then a recount shall be immediately undertaken by the Election Supervisor. If there is still a tie after the

recount, then a second or subsequent ballot shall be held as soon as possible for the candidates who are tied.

Eligibility of Candidates

3.6 Any member of the First Nation who has been continuously resident on the Traditional Territory throughout the proceeding twelve (12) months, who is of Algonquin ancestry, speaks the Algonquin language and is at least eighteen (18) years of age, may be nominated as Director.

Eligibility of Voters

3.7 (1) Only eligible voters may participate in nominations and elections for the offices of Directors. To be an eligible voter, a person must be:

(a) a member of the First Nation;

(b) at least eighteen (18) years of age; and

(c) continuously resident on the Traditional Territory throughout the proceeding twelve (12) months.

(2) For the purposes of determining who is an eligible voter:

(a) any individual who is temporarily absent from the Traditional Territory to go to school, to obtain training, for hospitalization or to obtain care in a nursing home, shall not loose his or her residency by reason only of the absence; and

(b) any individual who is temporarily absent from the Traditional Territory for purposes of work for a period of not more than six (6) months in the twelve (12) months prior to the elections shall not lose his or her residency.

Nomination Meeting

3.8 (1) Whenever an election of the Board of Directors is to occur, a Nomination Meeting shall be convened at least twelve (12) days prior to the election for the purpose of nominating candidates.

(2) At the Nomination Meeting, all candidates shall describe their qualifications for office and participate in a public question and answer forum.

Election Procedures

3.9 (1) As soon as the election date is declared, an Election Supervisor and a Deputy Election Supervisor shall be appointed by the Customary Council to run the election. They shall be completely impartial and shall not vote or support any candidate in the election.

(2) The Election Supervisor and Deputy Election Supervisor shall prepare a list of names of eligible voters in alphabetical order of their usually-used family name.

(3) Ballots shall be prepared containing the names of the candidates for the Board in alphabetical order of their usually-used family name.

(4) Elections shall be by secret ballot and private areas provided to ensure secrecy.

(5) The election place(s) shall open from 9:00 A.M to 9:00 P.M. on election day.

(6) Each eligible voter shall secretly mark a cross or check mark opposite the names of no more that four (4) candidates whom the voter would like to choose as Directors for the Board of Directors.

(7) No voter shall be interfered with in making free and secret selections, nor may a voter be forced to divulge what selections were made.

(8) Immediately after the end of voting at 9:00 P.M., the Election Supervisor and Deputy Election Supervisor shall, in the presence of the candidates who choose to be present, open the election boxes, assess the selections made and announce the names of the candidates elected.

(9) The four (4) candidates who receive the highest number of votes shall be declared elected as Directors.

(10) All election papers shall be placed in envelopes, sealed and retained under security for six (6) months, after which time they shall be destroyed in the presence of the Election Supervisor and Deputy Election Supervisor, who shall sign a testimonial that they personally witnessed the destruction.

Appeals

3.10 (1) Within the twenty-one (21) days following the date of the election, any candidate who was not elected may appeal the results of the election provided there is sufficient evidence of:

(a) corrupt practice in connection with the election;

(b) violation of the election procedures or regulations;

(c) ineligibility of any person who was elected; or

(d) ineligibility of any voter.

(2) Any appeal shall be made to the Council of Elders which shall be established by the Elders of the Algonquins of Barriere Lake.

Council of Elders

3.11 (1) The Council of Elders of the Algonquins of Barriere Lake shall consist of four (4) Elders at least two (2) of whom shall be male and at least two (2) female.

(2) The Council of Elders shall be selected by the Elders of the Algonquins of Barriere Lake on the basis of the following criteria:

(a) age;

(b) respect;

(c) impartiality; and

(d) knowledge of, and connection with, the land.

(3) Every Elder on the Council of Elders shall remain on the Council of Elders for a term of three (3) years.

(4) No member of the Council of Elders shall vote or support any candidate in the Election

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-654-09
STYLE OF CAUSE:	Casey Ratt et al. v. Jean Maurice Matchewan et al.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 1-2, 2010
REASONS FOR ORDER AND ORDER:	Mainville J
DATED:	February 17, 2010

APPEARANCES:

Mr. Michael Swinwood Ms Liza Swale	FOR THE APPLICANTS
Mr. David Nahwegahbow Ms. Tammy Desmoulins	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elders Without Borders Ottawa, Ontario	FOR THE APPLICANT
David Nahwegahbow Corbiere	FOR THE RESPONDENT