Federal Court  Cour fédérale

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Docket: T-1734-13

Citation: 2014 FC 687

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 14, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ADRIENNE ANICHINAPÉO AND JEAN-MARC PÉNOSWAY

Applicants

AND

ARMAND PAPATIE, CHARLIE PAPATIE, SUZANNE PAPATIE AND MARGUERITE ANICHINAPÉO

AND

KEVIN PAPATIE, STEVE PAPATIE, LOUISA PAPATIE AND FRANK PÉNOSWAY

AND

HÉLÈNE MICHEL AND ÉVELYNE PAPATIE

AND

HÉLÈNE MICHEL AND RÉGIS PÉNOSWAY

Respondents

JUDGMENT AND REASONS

[1] This application for judicial review by Adrienne Anichinapéo (the principal applicant) and Jean-Marc Pénosway (the applicant) seeks to challenge the decision made on August 7, 2013, by the Election Committee, made up of Armand Papatie, Suzanne Papatie, Charlie Papatie and Marguerite Anichinapéo (the Election Committee) of the Anicinapek community of Kitcisakik (the community) to cancel the elections held on August 5, 2013. The outcome of the elections was that the principal applicant and the applicant were elected chief and councillor, respectively.

[2] The applicants also challenge the new election process which started on September 30, 2013, the October 2, 2013, appointment of the new Election Committee made up of Kevin Papatie, Steve Papatie, Louisa Papatie and Frank Pénosway (the new Election Committee), as well as the October 25, 2013, election of Hélène Michel (the principal respondent) to the office of acting chief and of Régis Pénosway (the respondent) to the office of acting councillor.

[3] On December 10, 2013, Justice Scott issued an order re-establishing on an interim basis the Council in place prior to the August 5, 2013, elections pending the outcome of this judicial review, and ordering it to make its decisions by unanimous agreement.

[4] For the reasons set out below, I am of the view that the applicants' application for judicial review must be allowed.

I. The facts

[5] The Anicinapek community of Kitcisakik is an Algonquin community near Val-d'Or that is very disadvantaged. It has approximately 450 members.

[6] The community is governed by the Anicinapek of Kitcisakik Council (the Council), which consists of one Chief and three Councillors. Council members are chosen through custom, as the community was never subject to the provisions of the *Indian Act*, RSC, 1985, c I-5, regarding elections. Council members are elected for a term of four years.

[7] Until 2005, custom elections existed only in oral form. At a general assembly held on August 29, 2005, a majority of electors present however adopted the *Code électoral* [election code] (the *Code*) in which the rules governing Council elections were recorded. The preamble to that *Code* states that [TRANSLATION] "[i]t replaces all other election codes, processes or customs, written or verbal". Although said *Code* did not receive unanimous support and underwent a review process to make it more consistent with custom and correct what some perceive as deficiencies, it was still in effect in its original form at the time of the events giving rise to this application for judicial review. The community also adopted the *Règles et procédures de régie interne de la Communauté anicinape de Kitcisakik* [rules and procedures respecting the internal governance of the Anicinape community of Kitcisakik (the *Règles internes*).

[8] On June 7, 2013, the exiting Council launched the electoral process by convening a general assembly for June 10, 2013, for the appointment of an election committee. With said assembly being held in a tense and chaotic environment, the Election Committee was finally

elected during a general assembly held on June 14, 2013. As mentioned above, Armand Papatie, Suzanne Papatie, Charlie Papatie and Marguerite Anichinapéo were elected electoral officer, polling clerk and returning officers, respectively.

[9] The work of the Election Committee in the lead-up to the August 5, 2013, elections is not in dispute. Following its inception, the Committee managed the process as required by the *Code*. It also informed the electors of the election schedule and posted the voters list, convened and chaired a nomination meeting 14 days prior to the scheduled voting date, held advanced polls on July 30, 2013, held the voting day on August 5, 2013, and carried out the ballot counting by rejecting ballots that were not filled out according to the rules.

[10] The only incident that seems to have marked this period is the opposition to the nomination of James Papatie, Chief of the community from 1997 to 2005 and once again candidate for the office of Chief. It appears that Adrienne Anichinapéo's sister-in-law opposed the candidacy of Mr. Papatie at the nomination meeting held on July 22 on the ground that the *Code* prohibits the candidacy of all non-resident persons of Kitcisakik. James Papatie allegedly decided to withdraw his candidacy in light of the prevailing tension, but the assembly purportedly decided to maintain his candidacy and asked the Election Committee to ensure that Mr. Papatie accepted that decision. In his affidavit, Mr. Papatie stated that he confirmed in writing to the electoral officer that he wished to maintain his candidacy; however, said written document was not tendered in evidence. In any event, the name of Jimmy Papatie appeared on the ballots, and he received 35 votes.

[11] On August 5, 2013, the election took place as scheduled. The statement of the vote provided the following day by the Election Committee showed that 127 ballots were tabulated. The principal applicant was elected with 47 votes, her two main opponents (Nona Pénosway and Jimmy Papatie) received 39 and 35 votes, respectively. The principal respondent, as well as the applicant and Évelyne Papatie, was elected as councillor. The statement of the vote was published and circulated to the community.

[12] On August 7, 2013, the Election Committee issued a communiqué setting aside the August 5 election. The reasons for such a decision are as follows:

> [TRANSLATION]
> Indeed, in accordance with the election code, this clause was not complied with: "Three (3) months prior to the date of the scheduled election, the exiting Council convenes a general assembly of electors to appoint an Election Committee composed of one (1) electoral officer , one (1) polling clerk and four (4) returning officers".
>
> Moreover, in accordance with the election code, this statement was not complied with: "During the election campaign, the candidates and the electors are called upon to show respect to everyone. No person shall compromise the integrity of the candidates or the election procedure".
>
> Applicant's Record, p. 107

[13] It does not appear that this communiqué, signed by three of the four Committee members (Marguerite Anichinapéo, the principal applicant's sister, did not sign it), was circulated to the community after the principal applicant prohibited its dissemination.

[14] From August 13 to 16, 2013, a four-day annual general assembly was organized by the exiting Council to present the previous fiscal year. On August 16, the principal applicant was

allegedly the victim of personal attacks particularly by the principal respondent, who allegedly accused her of mistakenly requesting and receiving a salary increase in the past. The principal respondent denies having uttered said words to the principal applicant or disrespecting her. As a result of the altercation, the principal applicant allegedly addressed the crowd by stating as follows: [TRANSLATION] "If this is how things are going to be, I prefer to step aside. If you want an election, you can have one". The respondents submit that at that point the principal applicant allegedly invited the assembly to begin a new election process before leaving the room.

[15] The annual assembly continued on August 19, 2013. The issue of setting aside the election was allegedly discussed, and apparently the assembly finally set aside the August 5 election. The applicants allege that no notice was given that the issue of elections would be discussed during this assembly, and that only 40 people were present. The respondents allege, for their part, that the members were able to express themselves freely as to the setting aside of the election, including those who opposed setting it aside. No documentary evidence relating to the decisions made during the assembly was submitted by the parties.

[16] On August 26, 2013, Adrienne Anichinapéo convened a first meeting of the Council elected on August 5, 2013, to discuss the necessary steps for the swearing-in of the new Council and the mandate of each councillor. These topics, however, were not discussed as the respondents Hélène Michel, Évelyne Papatie and Régis Pénosway submitted that following her intervention during the assembly of August 16, 2013, Adrienne Anichinapéo resigned from her position as Chief.

[17] On September 6, 2013, the two non-resigning members of the exiting Council, Hélène Michel and Régis Pénosway, convened an assembly for September 10. Speaking at the assembly, the principal applicant read a statement that she never submitted an official letter of resignation following the assembly of August 19, and that she agreed to remain as Chief. She also allegedly distributed a legal opinion that she purportedly sought from Paul Dionne, according to which the Election Committee had no authority to set aside the August 5 election. The respondents allege that the principal applicant also allegedly stated that she would enter the leadership race if the assembly decided to launch a new election process.

[18] On September 30, 2013, the two non-resigning members of the exiting Council circulated a notice of an assembly scheduled for October 2, 2013, to appoint members for the new Election Committee. On this occasion, Adrienne Anichinapéo again denied having resigned and formally opposed the process in addition to distributing a number of letters and notices to the members present. Nevertheless, the assembly decided to proceed with the appointment of members for the new Election Committee. Kevin Papatie, Steve Papatie, Louisa Papatie and Frank Pénosway were elected electoral officer, polling clerk and returning officers, respectively, of the new Election Committee.

[19] On October 8, 2013, the new Election Committee convened an assembly for October 15, 2013, by sending a notice to that effect, to which was attached an election schedule setting the date of the nomination of candidates for October 23, 2013, and the polling dates for January 7, 9 and 15, 2014. The principal applicant attended the meeting of October 15, 2013, to file an official letter of opposition to the new election process addressed to Kevin Papatie, on the basis

of a petition signed by 81 members of the community seeking compliance with the vote held on August 5. The evidence does not show whether this petition was presented to the assembly.

[20] The following day, on October 16, 2013, the new Election Committee issued a notice convening a general assembly to fill by election the vacant offices of chief and councillor.

[21] The applicants filed their application for judicial review on October 21, 2013, and served it on the respondents on October 22. At the October 23 assembly, the members present acknowledged the application for judicial review and decided that elections would be held on October 25 following custom elections.

[22] At the assembly held on October 25, it appears that Hélène Michel and Régis Pénosway agreed that Hélène Michel would act as acting chief and that Régis Pénosway would be her [TRANSLATION] "right-hand person". The two other councillors, Evelyne Papatie and Ghislain Pénosway, were apparently elected by way of show of hands. On Monday, October 28, the new Election Committee issued a communiqué informing the population of Kitcisakik of the results of the election held on October 25, while noting that the new Council was elected on an interim basis pending the elections scheduled for January 7, 9 and 15, 2014.

[23] It should be added, in conclusion to this factual backdrop, that the community is clearly very divided about this entire process. The principal applicant says she has the support of the 81 members who signed a petition to uphold the August 5 election results (Affidavit of Adrienne Anichinapéo dated November 15, 2013, Exhibit A-30). As for the respondents, they claim to

have received unanimous votes from 107 members who signed an endorsement letter addressed to the Council elected on an interim basis (Affidavit of Suzanne Papatie, Exhibit D-23).

II. Impugned decisions

[24] As it appears from the notice of application for judicial review and the applicants' memorandum, a number of decisions are challenged in this file. The applicants challenge mainly the decision to set aside the August 5, 2013, election. In this respect, it should be noted that the applicants consider the communiqué of the Election Committee dated August 7, 2013, as being the decision at issue, whereas the respondents submit rather that this communiqué is only a recommendation and that the decision was formally made by the assembly on August 19, 2013.

[25] The applicants also plead the illegality of the notice of the general assembly distributed by the respondents on September 30, 2013, which had the effect of launching the new election process. Consequently, they also attack the nomination, at the October 2, 2013, assembly, of the new Election Committee. Finally, they question what they view as the illegal holding by Hélène Michel and Régis Pénosway of the offices of acting chief and acting councillor of the Anicinapek of Kitcisakik Council.

III. Issues

[26] This application for judicial review raises, in my opinion, the following issues:

A. Should the Court exercise its discretion to allow the applicants (1) to bring an application for judicial review of more than one decision (2) more than 30 days after the date on which the first of these decisions was rendered?

B. Is the setting aside of the election of August 5, 2013, valid?

C. Is the new election process that led to the election of October 25, 2013, valid?

IV. Analysis

[27] The parties did not make any submissions with regard to the applicable standard of review in this case. Following the decisions of the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, and of the Federal Court of Appeal in *Martselos v Salt River Nation #195*, 2008 FCA 221, there seems to be no doubt that the jurisdiction of the Election Committee and the assembly to set aside the elections raises a jurisdictional issue over which neither the Election Committee nor the assembly have specific expertise. The same holds true for the third issue, which implicitly raises the issue of whether the custom can supplement the *Code* and authorize the holding of an election in a manner not provided by the *Code*. The correctness standard should therefore be applied and the Court owes no deference to the decisions made. Conversely, the standard of reasonableness will apply insofar as the issue is rather whether the Election Committee or the assembly erred in its application of the *Code* to the facts in issue.

A. *Should the Court exercise its discretion to allow the applicants (1) to bring an application for judicial review of more than one decision (2) more than 30 days after the date on which the first of these decisions was rendered?*

[28] Rule 302 of the *Federal Court Rules*, SOR/98-106 provides that an application for judicial review shall be limited to a single order in respect of which relief is sought. The case law specifies, however, that this rule does not apply where there is "a continuous course of conduct": *Shotclose v Stoney First Nation*, 2011 FC 750, at paragraph 64.

[29] In the case at bar, the various impugned decisions are closely related and stem from the same series of events. Were it not for the setting aside of the August 5, 2013, election by the respondents, members of the Election Committee, or by the general assembly, the new election process of September 30, 2013, would not have begun and the respondents Hélène Michel and Régis Pénosway would not hold the offices of acting chief and acting councillor, respectively.

[30] In *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 (at paragraph 6), Justice Campbell, referring to the statement of Justice Muldoon in *Mahmood v Canada*, [1998] FCJ No 1345 (at paragraph 10), noted that "the acts in question must not involve two different factual situations, two different types of relief sought, and two different decision-making bodies". It is true that the impugned decisions here were not made by the same decision-maker (to the extent that the applicants' argument that the decision to set aside the August 5, 2013, election was made by the Election Committee is accepted). However, in my view, it is logical and reasonable that the Court hear the applicants' applications for judicial review together given the close link between the events. It is in the best interest of all community members that all facets of the dispute be dealt with in a single decision, so that closure can be brought to the matter and the community can address, under the leadership of a Council, whose

legitimacy will not be questioned, important decisions that need to be taken in the short and medium term.

[31] Incidentally, I note that the respondents do not object to the application for judicial review involving all of the issues raised, and implicitly accept the merits of this approach by presenting issues and arguments themselves related both to the setting aside of the elections and the new election process. In the event that my conclusion in that respect is wrong, I would exercise the jurisdiction conferred on me by Rule 55 of the *Federal Court Rules* to allow the parties to dispense with compliance with Rule 302.

[32] Moreover, I am of the opinion that the applicants should be allowed to bring their application for judicial review more than 30 days following the date on which the decision to set aside the election held on August 5, 2013, was made. Subsection 18.1(2) of the *Federal Courts Act*, RSC, 1985, c F-7, provides that an application for judicial review shall be made within 30 days after the time the decision was first communicated or within any further time that a judge may fix or allow. In this case, the limitation period was clearly missed whether or not the decision is considered to have been made by Election Committee or by the assembly. The conditions required by the case law to allow any further time seem to me nonetheless to have been met.

[33] The decision whether to grant an extension of time is a discretionary one: *Muckenheim v Canada (Employment Insurance Commission)*, 2008 FCA 249, at paragraph 8. Tests have been developed in the case law to guide the exercise of that discretion, and the Federal Court of

Appeal summarized them as follows in *Canada (Attorney General) v Larkman*, 2012 FCA 204, at paragraph 61 (*Larkman*):

> 1. Did the moving party have a continuing intention to pursue the application?
>
> 2. Is there some potential merit to the application?
>
> 3. Has [the opposing party] been prejudiced from the delay?
>
> 4. Does the moving party have a reasonable explanation for the delay?

See also: *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846, at paragraph 3; *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 FC 263 (FCA), at page 282 (*Grewal*).

[34] These factors are not cumulative and the importance of each individual factor will depend on the circumstances of the case. Thus, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, *supra*, at page 282, cited in *Larkman*, *supra*, at paragraph 62.

[35] The respondents do not dispute that the application raises, a priori, serious issues. They argue rather that the applicants have not demonstrated a continuing intention to rely on judicial review and do not have a reasonable explanation for the delay. They add that the principal applicant was actively involved in the process that led to the election of the interim Council and made submissions at the September 10, October 2, October 15 and October 23, 2013, meetings

and that she commenced legal proceedings only after realizing that the assembly did not accept her arguments.

[36] My view, on the contrary, is that the principal applicant demonstrated by her actions her continuing intention to object both to the setting aside of the election and the new election process. It is true that she attempted by all means to perform her duties as Chief and to recruit the assembly to her cause prior to turning to this Court. However, consideration must be given to the fact that recourse to the courts is not to be taken lightly by Aboriginal communities and often constitutes a last resort. In this context, and in light of the fact that the respondents did not demonstrate having been prejudiced from the applicants' delay in applying to this Court, it is appropriate to grant the extension of time sought by the applicants.

B. *Is the setting aside of the election of August 5, 2013, valid?*

[37] Prior to determining the validity of the setting aside of the election of August 5, 2013, it is necessary to determine who, from the Election Committee or the assembly, set aside the election. It must then be determined whether the Election Committee or the assembly, if any, had jurisdiction to do so. Finally, in the event that the answer to this question is yes, it will be necessary to assess the reasonableness of that decision in light of the established facts and the applicable law.

[38] The applicants submit that the decision to set aside the August 5, 2013, election was made by the Election Committee, whereas the respondents submit rather that the communiqué distributed by the Election Committee on August 7, was only a recommendation to the assembly,

who formally dealt with the issue at its assembly on August 19, 2013. Based on the evidence adduced, the applicants' position must be accepted.

[39] The very wording of the communiqué leaves little room for interpretation. The subject line was entitled: [TRANSLATION] "Setting aside of the election". The introductory phrase of the communiqué reads as follows: [TRANSLATION] "This is to inform you that we will set aside the election held on Monday, August 5". This is followed by the text reproduced in paragraph 12 of these reasons, prefaced by the following heading: [TRANSLATION] "The reasons for such a decision are as follows". Finally, the communiqué contains a separate section prefaced by the title [TRANSLATION] "Recommendations", in which it is suggested that the electoral officer, the polling clerk and the returning officers should be external persons with no ties to the organization. Given this unequivocal language, the claim that the communiqué, specifically, the section on the setting aside of election, was a mere recommendation strikes me as being tenuous.

[40] The respondents attempted to argue that the communiqué could not have had the effect of setting side the election insofar as it was never distributed to community members. This argument cannot be accepted for the simple reason that the existence of a decision cannot be confused with its subsequent dissemination.

[41] This conclusion is even more inevitable given that the alternative makes no sense. There is no documentary evidence, in the form of written minutes or other, that the assembly did indeed find in favour of setting aside the election at its meeting of August 19, 2013, as required by section 9 of the *Règles internes*. Nor was a notice of assembly, in accordance with section 12 of

those same *Règles*, in which it was explicitly mentioned that the setting aside of the elections would be discussed at this assembly. Finally, no communiqué was issued following the assembly of August 19 to inform community members that the August 5 election had been set aside. The only evidence submitted consists of unsupported assertions by Hélène Michel and Armand Papatie in their respective affidavit. This is, in my view, insufficient to show that it was the assembly that decided to set aside the election rather than the Committee.

[42] However, the *Code électoral* confers no power on the Election Committee or the electoral officer to set aside the election after the counting of the votes. The *Code* only provides for the proper conduct of elections, and thus allows the Committee to withdraw the candidacy of any candidate who does not respect the integrity of the process (s. 3.4 of the *Code électoral*). It does not contain any provision making it possible to set aside an election or to appeal the results of an election. This is one of the shortcomings in respect of which remedial attempts are apparently being made. Indeed, it appears that the Council retained a professional firm to formulate proposals to rectify the anomalies and deficiencies of the *Code*. A report by said firm dated October 30, 2012, was tendered in evidence, but there is no proposal for an appeal process. In any event, the report was not acted upon at the time of the August 5, 2013, election and the *Code électoral* was not amended.

[43] I am therefore of the view that the Election Committee did not have the authority to set aside the election. Nor did the assembly have any more power to do so. Such a conclusion may well result in a requirement to appeal to the Federal Court, by way of *quo warranto* under section 18.1 of the *Federal Courts Act*, each time the results of an election are challenged. This outcome

may be undesirable, and it may be preferable that these questions be left to the community to decide through an internal mechanism. However, until the community reaches a consensus on such a mechanism and amends the *Code électoral* accordingly, it will be for the Court to decide these issues.

[44] The respondents argue that the custom of the Anicinapek of Kitcisakik was much broader than the *Code électoral* and that the gaps in the *Code* could be filled by drawing on that custom. However, this argument must overcome a major obstacle. The *Code électoral*, adopted during a general assembly held on August 29, 2005, by a majority of the electors present and whose legality was not contested, indeed provides in its preamble that [TRANSLATION] "[i]t replaces all other codes, procedures or custom elections, written or oral . . .". Given that the *Code* was not amended at the time the election of August 5, 2013, was held, its provisions must take precedence over all other practices or customs that may have existed prior to its coming into force.

[45] It is true that the *Code électoral*, insofar as it serves as the expression and codification of the existing custom of the Anicinapek of Kitcisakik, may well, over time, be supplemented with or even amended by practices that would develop alongside its text. That is a possibility addressed by Justice Martineau in *Francis v Mohawk Council of Kanesatake*, [2003] 4 FC 1133, at paragraph 35 (*Francis*). The preamble cited above does not appear to circumvent this principle, as it appears to preclude the concurrent application of a custom or practice which preceded the adoption of the *Code électoral*. In any event, I need not decide this issue in the

context of this case, as no evidence was filed in support of an alleged custom whereby the assembly may set aside the results of an election.

[46] It is well established in the case law that custom must be proven by the party seeking to rely on it: *Taypotat v Kahkewistahaw First Nation*, 2012 FC 1036, at paragraph 28; *McArthur v Saskatchewan (Registrar, Department of Indian Affairs and Northern Development)*, [1992] SJ no 189, 91 DLR (4th) 666 (Sask QB); *Francis, supra*, at paragraph 21. In *Francis*, mentioned above, Justice Martineau ruled on the requirements for rejecting an election code in favour of a custom:

> **35** . . . It is quite common that behaviours arising through attitudes, habits, abstentions, shared understandings and tacit acquiescence develop alongside a codified rule and may colour, specify, complement and sometimes even limit the text of a particular rule. Such behaviours may become the new custom of the band which will have an existence of its own and whose content will sometimes not be identical to that of the codified rule pertaining to a particular issue. In such cases, and bearing in mind the evolutionary nature of custom, one will have to ascertain whether there is a broad consensus in the community at a given time as to the content of a particular rule or the way in which it will be implemented.
>
> **36** For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a "broad consensus" as to its applicability. This would exclude sporadic behaviours which may tentatively arise to remedy certain exceptional difficulties of implementation at a particular moment in time as well as other practices which are clearly understood within the community as being followed on a trial basis. If present, such a "broad consensus" will evidence the will of the community at a given time not to consider the adopted electoral code as having an exhaustive and exclusive character. . . .

[47] In the case at bar, no evidence of a "broad consensus" that the assembly is authorized to make a ruling setting aside an election was adduced before the Court. At best, it is suggested that said power is recognized by the community as a [TRANSLATION] "practice parallel" to the *Code électoral* and as being part of the custom. The only precedent relied upon in support of this custom dates back to 2002, therefore, prior to the adoption of the *Code électoral*. Former chief James Papatie states in his affidavit that the election of two individuals elected as councillors was set aside by the general assembly. Apart from the fact that very little is known about the circumstances surrounding this event, the respondents did not provide any explanation as to the relevance of said isolated incident which occurred prior to the adoption of the *Code électoral* to support the emergence of a custom subsequent to the adoption of said *Code*.

[48] In short, and for all the foregoing reasons, I am of the view that the decision to set aside the election of August 5, 2005, is null and void. Neither the Election Committee nor the general assembly had jurisdiction to make that decision. This would suffice in disposing of this application for judicial review.

[49] Even assuming that the Election Committee (or the general assembly) was able to set aside the election, the grounds relied upon to do so were clearly insufficient. The first ground relied upon by the Election Committee to justify its decision is that the general assembly for the appointment of the Committee was not convened three months prior to the date of the scheduled election, as required by article 3.1 of the *Code électoral*. This provision reads as follows:

[TRANSLATION]

> 3.1 Election Committee
>
> Three (3) months prior to the date of the scheduled election, the exiting Council convenes a general assembly of electors to appoint an Election Committee composed of one (1) electoral officer, one (1) polling clerk and four (4) returning officers. Each candidate for these positions must be nominated and supported by an elector present. If there is more than one candidate for the same position, a vote will be taken by a show of hands.

[50] It is true that the general assembly for the appointment of the Election Committee was only convened on June 14, 2013, that is, seven weeks prior to August 5, 2013. First, I note that the Committee never thought it was necessary to raise this irregularity at the time of its appointment, or at any time before the date of the election. Second, the late appointment of the Election Committee did not prevent the nomination meeting from taking place within the timeframe required by article 3.4 of the *Code électoral* (that is, fourteen days prior to the taking of the vote). Finally, and more importantly, there is no evidence that the delay in appointing the Election Committee could have influenced the results of the election. Section 79 of the *Indian Act* provides that the Governor in Council may set aside the election of a chief or councillor if the Minister is satisfied that there was a contravention of the Act that might have affected the result of the election. I am aware that the Anicinapek of Kitcisakik adopted a *Code électoral* and that, therefore, the *Indian Act* does not govern their elections. The fact remains that in the absence of provisions regarding the setting aside of elections in the *Code électoral*, the logic underlying section 79 of the *Indian Act* may apply.

[51] The second ground raised by the Election Committee to set aside the election of August 5, 2013, is that the following principle, drawn from article 3.4 of the *Code électoral* [TRANSLATION] (nomination process), was not respected: [TRANSLATION] "During the election campaign, the candidates and the electors are called upon to show respect to everyone. No person shall compromise the integrity of the candidates or the election procedure". However, the Election Committee never explained or referred to any incident where a candidate or voter compromised the integrity of another candidate or of the election process. At best, Respondent Armand Papatie simply made vague allegations of [TRANSLATION] "pressure" and [TRANSLATION] "intimidation" by [TRANSLATION] "the camp of candidate Adrienne Anichinapéo", without ever providing concrete examples in support of these allegations. This seems to me to be clearly insufficient to justify a decision of far-reaching consequences such as that of setting aside an election, especially since, again, the respondents did not even attempt to show that the pressure and the intimidation Adrienne Anichinapéo or her supporters are accused of may have impacted the results of the election. Furthermore, the *Code électoral* provides that the sanction for such conduct is the withdrawal of a candidacy by the electoral officer following a majority vote by a show of hands of electors assembled at a meeting called for such purpose, and not the complete setting aside of the election following the taking of the vote.

[52] I am therefore of the view that even if the Election Committee (or the general assembly) had the power to set aside the election, the grounds relied upon to make such a decision were clearly insufficient. In these circumstances, the decision to set aside the election did not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[53] It is evident from reading the numerous affidavits submitted by the respondents in these proceedings that Chief Adrienne Anichinapéo was not universally accepted in the community. She was also accused of receiving a salary increase that was not formally approved by the Council, of doing everything in her power to prevent the reform of the *Code électoral* and to prevent the assembly from rendering a decision on the report by the firm retained to make recommendations in this regard, and of having manipulated the Wanaki project (construction project for a new village) by turning the debate into a political issue.

[54] All these questions certainly deserved to be debated in the community, and it is quite normal that there is no consensus on such important issues. In a democracy, it is through the election process and only after debate in which the views of major players from various camps are heard that these issues are decided. Unless illegal acts have been committed by elected officials in the exercise of their authority, in which case these matters will be put before the courts, it is ultimately up to the electors to sanction leaders who govern them if they believe that they are not meeting their expectations or are making decisions that go against the majority's wishes. The challenging of election results by defeated candidates is not part of the Canadian tradition, and it would be an insult to the First Nations to consider that it might be otherwise in their different customs.

[55] I therefore conclude that the decision to set aside the election that was held on August 5, 2013, whether made by the Election Committee or by the general assembly, is null and void. Not only neither had the authority to make such a decision, but also the grounds relied upon are clearly insufficient. In these circumstances, it is not necessary for me to rule on the third issue

raised by the applicants, namely, whether the election process that led to the October 25, 2013, election is valid or not.

[56] Moreover, I am of the view that it would be inappropriate, as is usual practice when the Court overturns a decision challenged by way of application for judicial review, to refer the matter back for a new decision. For the reasons set out above, the August 5, 2013, election can only be declared valid, no purpose would be served in referring the matter back to the Election Committee (or the assembly even) for redetermination: *Yassine v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 949, at paragraphs 9 and 11; *Landry v Savard*, 2011 FC 720, at paragraphs 91 to 93.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, that the decision to set aside the August 5 election be quashed, and that the candidates elected to the offices of chief and councillors in that election be confirmed in their positions; with costs to the applicants.

"Yves de Montigny"
Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 17, 2014
JUDGMENT AND REASONS :	DE MONTIGNY J.
DATED:	JULY 14, 2014

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