

Date: 20090527

**Dockets: T-1587-08
T-610-09
T-660-09**

Citation: 2009 FC 548

T-1587-08

BETWEEN:

**TEMAGAMI FIRST NATION, GARY POTTS, PETER MCKENZIE
ANNETTE POLSON, SHERWOOD BECKER JR. AND THOMAS FRIDAY SR.**

Applicants

and

**JOHN TURNER, JAMIE SAVILLE, ROXANE AYOTTE,
JOHN MCKENZIE, STEVEN LARONDE AND ARNOLD PAUL**

Respondents

AND BETWEEN:

T-610-09

**TEMAGAMI FIRST NATION as represented by Chief Roxane Ayotte,
Second Chief John McKenzie, and Councillors, ARNOLD PAUL, MARTY PRIDHAM,
JAMIE SAVILLE, and STEVEN LARONDE**

Applicants

- and -

**GARY POTTS, PETER MCKENZIE, ANNETTE POLSON, THOMAS FRIDAY, SR., AL
MARQUETTE, and DOUG MCKENZIE and all those purporting to be Chief, Second Chief,
and/or Councilor of Temagami First Nation**

Respondents

AND BETWEEN:

T-660-09

**TEMAGAMI FIRST NATION as represented by first chief FIRST CHIEF GARY POTTS,
SECOND CHIEF PETER MCKENZIE and COUNCILLORS ANNETTE POLSON and
THOMAS FRIDAY SR.**

Applicants

- and -

**ROXANE AYOTTE, JOHN MCKENZIE, JAMIE SAVILLE, MARTY PRIDHAM,
STEVEN LARONDE AND ARNOLD PAUL**

Respondents

REASONS FOR JUDGMENT

HUGHES J.

[1] These Reasons pertain to three separate applications brought in this Court: T-1587-08; T-610-09; and T-660-09. The first, T-1587-08, was heard April 27, 2009, the latter two T-610-09 and T-660-09 were heard together, pursuant to an Order issued on consent, on May 13, 2009. Having heard these applications I agreed not to release any Reasons or Judgments until after completion of a mediation process conducted by another Judge of this Court, Justice Mandamin. Only if the mediation was unsuccessful would I release these Reasons and deliver Judgment. Regretfully that is what I must do.

THE PARTIES

[2] The Applicants and Respondents in each of these proceedings, depending on which proceeding is being considered, claim to represent the Temagami First Nation, an aboriginal First Nation Band located in the vicinity of Bear Island, Lake Temagami, Ontario. Each of the two groups claims to be the Chief, Second Chief and Councillors of the Temagami First Nation. While to some extent the Applicants and Respondents in each application differ in the addition or omission of certain persons it is generally convenient, for simplification, to call each group by the name of the person in that group claiming to be Chief. Thus in T-1587-08 the Potts Group is the Applicant and the Ayotte Group is the Respondent. In T-610-09 the Ayotte Group is the Applicant and the Potts Group is the Respondent. In T-660-09 the Potts Group is the Applicant and the Ayotte Group is the Respondent. However in T-610-09 two persons who were elected to the Potts Council as a result of a by-election, Al Marquette and Doug McKenzie, were not part of the original Potts Group and are not represented by the lawyers representing that group. They are unrepresented. Al Marquette spoke on his own behalf at the May 13 hearing. Doug McKenzie was not present.

[3] At the outset of the Respondents' argument at the hearing of application T-1587-08 their Counsel raised an objection as to the propriety of the naming and persons constituting the Applicants and Respondents to that proceeding. This objection had not previously been raised whether by way of a notice of motion or in the Respondents' written factum. Further, a consent Order was made by Prothonotary Tabib very recently, on March 14, 2009, amending the style of cause by removing and adding certain parties as Applicants and Respondents. Surely if there had been any serious issue as to who should be the proper party or parties an objection should have been

raised at that time. Since no earlier objection had been raised, I refused to hear belated submissions raised orally for the first time at the hearing as to the propriety of any party to that proceeding T-1587-08.

THE RELIEF CLAIMED

[4] In T-1587-08 the Applicants, the Potts Group, seek the following relief:

1. *A declaration that the results of the general election held on June 12, 2008 are valid;*
2. *An order that the two resolutions moved and seconded on August 2, 2008 and termed “Resolution #1: TFN Community Ruling and Directive” and “Resolution #2: TFN Constitutional Amendment” are invalid, unlawful and without authority or effect;*
3. *A declaration that the purported election held on September 20, 2008 was invalid, unlawful and without authority or effect;*
4. *A declaration that any steps taken since June 12, 2008 respecting the purported amending of the Temagami First Nation Tribal Constitution are invalid, unlawful and without authority or effect;*
5. *Costs of this application on a solicitor-and-client basis; and*
6. *Such further and other relief as to this Honourable Court may seem just.*

[5] In application T-610-09 the Applicants, the Ayotte Group, seek the following relief:

1. *a writ of quo warranto pursuant to section 18(1) of the Federal Courts Act, R.S.C. 1985, c.F-7 concerning the claimed right of the Respondents to hold office as the Band Council of Temagami First Nation;*

2. *a writ of quo warranto to the effect that the Respondents have no right to hold office as Chief and/or Councillors;*
3. *a declaration in the nature of quo warranto that the Respondents do not have the right to hold the offices of chief or councillor, as the case may be;*
4. *an injunction enjoining the Respondents from holding themselves out as the Chiefs and Council of the First Nation or otherwise interfering with the lawful exercise of the powers of Chief and Council by the Applicants;*
5. *an injunction enjoining the Respondents from access to, dissipation of, conversion of, or appropriation of Band assets for their personal use, including, but not limited to legal fees in relation to the judicial review application before the Federal Court (Temagami First Nation v. John Turner et al. Court Number T-1578-08);*
6. *costs of this application payable by the Respondents personally on a full indemnity scale (solicitor and client costs); and,*
7. *Such further and other relief as to this Honourable Court may deem just.*

[6] In application T-660-09 the Applicants, the Potts Group, seek the following relief:

1. *A declaration that the petition dated February 3, 2009 and provided to the applicants on February 23, 2009 and the motions dated March 14 and 29, 2009 are invalid, unlawful and without authority or effect;*
2. *A declaration that the justifications relied upon by the respondents in their petition as reasons for impeachment of the applicants are without merit, unreasonable and perverse;*
3. *A declaration that the steps taken by the respondents to assume control of governance of Temagami First Nation based on the petition and motions are invalid, unlawful and without force or effect;*

4. *A writ of quo warranto against the respondents concerning their claimed right to hold office as Chiefs and Council of Temagami First Nation;*
5. *A declaration of the results of the June 12, 2008 general election remain valid and that the Chiefs and Councillors elected at the time and who have not resigned are entitled to remain in elected office;*
6. *An Order consolidating this application under Rule 105 with the application bearing court file no. T-610-09 (brought by the respondents to this application);*
7. *Costs of this application on a solicitor-client basis; and*
8. *Such further and other relief as to this Honourable Court may seem just.*

[7] It is noted that the prayers for relief in each application are directed to a number of different matters, albeit related. No objection has been made by any party at any time as to the number of matters raised, and nor will I.

[8] Counsel for the Applicants in T-610-09, the Ayotte Group, in addressing this Court at the hearing held on May 13, 2009 stressed that it was not the intention of the Applicants' (Ayotte Group) to have the Court make any Judgment or declaration that would legitimize the Ayotte Group's claim to be Chief and Counsel. Essentially all that these Applicants wished would be for the Court to determine that the most appropriate relief would be to hold a new election. To this extent therefore the relief requested in paragraph 3 in application T-1587-08 and in paragraphs 3 and 4 in application T-660-08 are unnecessary. The relief requested in paragraph 6 in application T-660-08 has already been granted on consent.

ISSUES

[9] The issues in those three applications can be simplified and restated as follows:

1. Are the results of the June 12, 2008 election in which the Potts Group was elected as Chief and Council of the Temagami First Nation valid.
2. If these results were valid were the attempts to impeach the Potts Group as Chief and Council valid and effective for that purpose.
3. Should an injunction issue to restrain the Potts Group Council from expending any further funds in T-1587-08.

ONTARIO PROCEEDINGS

[10] Note must be taken of other proceedings involving many of the same parties in the Ontario Superior Court of Justice, CV-08-471-00. In those proceedings the Temagami First Nation represented by what I have called the Potts Group is named as plaintiff and many of the same persons as I have called the Ayotte Group are named as defendant. Much of the same relief as is claimed in application T-1587-08 in this Court is claimed in that action. An appearance has been entered in that action but no further steps have been taken. I am advised by Counsel for the parties here that the Ontario action has been put “on hold” pending the disposition of proceedings in this Court.

ORGANIZATIONS AND PERSONS INVOLVED

[11] There are many organizations and persons involved in the matters at issue. Some of them are:

TFN: Temagami First Nation

INAC: Indian and Northern Affairs Canada

Roxane Ayotte: Elected Councilor on June 12, 2008. She claims to be First Chief based on elections held in the fall of 2008.

John McKenzie: Chief of Teme-Augama Anishnabai, the land claims negotiation organization. He was a candidate for Second Chief in the June 12, 2008 election and lost by one vote. He was elected Second Chief of the Ayotte Group in the fall of 2008.

Al Marquette: elected as a Councilor in a by-election to the Potts Group Council. He represented himself and spoke in these proceedings.

Virignia Paul: Secretary/Membership Clerk for the Band Council. She was the Elections Officer in all elections held from approximately 1994 to June 12, 2008.

Gary Potts: Claims to be First Chief based on the June 12, 2008 election.

Desire Snef: TFN member and individual who delivered the February 2009 impeachment petitions.

Elizabeth Taylor: Ayotte Group Electoral Officer.

John Turner: Ayotte Group member.

CHRONICLE OF EVENTS

[12] The events relating to these three applications are complex but, except where noted, are largely not contradicted. I list them more or less chronologically with a brief explanation. The first list is derived from the evidence in T-1587-08:

Date and Activity	Detail
March 19, 2008	TFN Community meeting where the issue of ceasing the land claims negotiations was voted on. The resolution passed, but not by a majority, and therefore a second vote was required.

<p>May 1, 2008</p> <p>TFN Council calls a general election</p>	<p>Ms. Paul is appointed as the Band's Electoral Officer. She is the sister of the then Chief.</p>
<p>May 22, 2008</p> <p>Notice of meeting and election</p>	<p>Ms. Paul gave notice to the electors of TFN that a nominations meeting was to be held on May 29, 2008 followed by a general election on June 12, 2008.</p>
<p>May 23, 2008</p> <p>Voters list is posted</p>	<p>The voters' list was posted at three publicly-accessible locations.</p>
<p>June 5, 2008</p> <p>June MacInnes added to voter list</p>	<p>June MacInnes applied to be on the voters' list. The Electoral Officer met with Ms. MacInnes and reviewed the eligibility criteria with her. The Electoral Officer determined that Ms. MacInnes was eligible to vote and she swore an affidavit to that effect. Ms. MacInnes was added to the list.</p>
<p>May 29, 2008</p> <p>Nomination meeting</p>	<p>Four members of the TFN are nominated for first Chief, three for second Chief, and eight members nominated for the four Councilor positions.</p>
<p>June 12, 2008</p> <p>General election</p>	<p>The Electoral Officer was assisted by two Assistant Electoral Officers, Lillian Birtch and Jennifer Potts Paul.</p> <p>Charles Laronde, a member of the TFN who was not on the voters' list, was allowed to vote on election day. He provided a drivers license to prove that he lived on Bear Island. The Electoral Officer and Assistants were satisfied that he was eligible to vote; he swore an affidavit and was added to the list.</p> <p>Three others, Trevor Laronde, Briana Nelles and Simone Twain, attempted to vote but were not added to the list. The Election Officer determined they were not eligible as they lived off the Tribal Ancestral Hunting Lands and did not meet any of the exceptions in the Tribal Constitution.</p>

	<p>The original number on the voters' list was 187. The final total number of voters on election day was 187, factoring in the addition of June MacInnes and Charles Laronde.</p> <p>The polls were closed and the ballots counted by the Electoral Officer, the Assistants and twelve scrutineers. They all agreed on any unclear or spoiled ballots.</p>
<p>June 12, 2008</p> <p>Results of the general election</p>	<p>It was a tie for first Chief as both candidates, Alexander Paul and Gary Potts, received 51 votes. The Electoral Officer was related to both candidates. Based on s. 8-3(p) of the Tribal Constitution the Electoral Officer shall give a casting vote in the event of a tie. Ms. Paul had stated in the past that she would break any tie by flipping a coin, which she did. Based on the coin toss she cast the deciding vote in favour of Gary Potts.</p> <p>Peter McKenzie was elected second Chief (by one vote over John McKenzie) and Roxane Ayotte, Sherwood Beker Jr., Thomas Friday Sr. and Annette Polson were elected as the four Councilors.</p> <p>The Electoral Officer prepared the proscribed results forms and faxed them to various agencies and submitted an elections report to INAC. On June 25, 2008, INAC confirmed the selection of the Chiefs and Council.</p> <p>A recount was held on June 16, 2008 and the vote results were confirmed.</p>
<p>June 27 - July 11, 2008</p> <p>Election appeals are filed</p>	<p>Election appeals were filed by John Turner, Jamie Saville, John McKenzie, and Alex Paul Sr. and six other TFN members.</p> <p>The appeals centered on the issue of voting – specifically that some members who did not meet the eligibility criteria voted while others who met the criteria were denied. They claimed that the Electoral Officer was in a conflict.</p> <p>The Elections Officer wrote “denied – no grounds” on the petitions and returned them to the sender. If the appeal did not meet the requirements under the Tribal Constitution, the Electoral Officer explained the requirements.</p> <p>The first Chief and the elected Councilors were not consulted in the handling of the election appeals.</p>

<p>July 9, 2008</p> <p>Correspondence from John McKenzie</p>	<p>In a letter from John McKenzie to Chief Potts, John McKenzie asks the Councilors not to conduct any meetings as the election results were being appealed.</p>
<p>July 29, 2008</p> <p>Council receives a petition</p>	<p>The Potts Group received a petition signed by voting and non-voting members “directing” the Council to hold a community meeting on August 2, 2008 during which members the TFN would be allowed to vote on a resolution to declare the positions of First Chief and Second Chief vacant and hold a new election.</p> <p>The Chiefs and Council responded via letter on the same day stating that they did not endorse the community meeting and that the petition was not in accordance with the Tribal Constitution. They affirmed the fall community meeting scheduled for September 20-21, 2008.</p> <p>One Councilor, Roxane Ayotte, disagreed with the Chiefs and Councilors on this issue and later resigned.</p>
<p>August 2, 2008</p> <p>First Ayotte Group community meeting</p>	<p>Two resolutions were presented at the August 2 Ayotte Group meeting:</p> <p>Resolution #1: TFN Community Ruling and Directive: requiring a new general election for all TFN Council positions.</p> <p>Resolution #2: TFN Constitutional Amendment: to remove many of the criteria for voter eligibility.</p> <p>The resolutions did not receive majority support of eligible voters at the meeting, as set out in the Tribal Constitution, and were deferred for a second vote.</p>
<p>August 17, 2008</p> <p>Second Ayotte Group community meeting</p>	<p>On a second vote the two resolutions were passed. It is unclear who voted.</p>
<p>August 28, 2009</p>	<p>John McKenzie issued a news release stating that the Teme-Augama Anishnabai Council did not recognize the current Chiefs and Council of the TFN.</p>

September 7, 2008	Notice of the Ayotte nomination meeting and election posted on TFN letterhead.
September 12, 2008	Roxane Ayotte resigns as a June 12, 2008 elected Councilor.
September 14, 2008	Ayotte Group nomination meeting, results posted on TFN letterhead.
September 20 - 21, 2008 Community meeting and Ayotte Group elections	<p>Ayotte Group elections, results posted on TFN letterhead. Roxane Ayotte was elected First Chief, John McKenzie Second Chief, and Jamie Saville, John Turner, Steven Laronde, Arnold Paul as Councilors.</p> <p>The election took place at the same time as the scheduled fall community meeting.</p> <p>On the 21st a “compromise resolution” was put forward at the meeting to disregard the June 12 and September 20 elections and hold a new election. The majority of meeting attendees, regardless of voting status, voted in favour of the resolution: 41 in favour, none against, 3 abstentions.</p>
October 7, 2008 Communication from Potts Group to the community Communication from John Turner to the community	<p>The Potts Group sent a letter to the community cancelling the scheduled October 11th meeting and stating that they were going to apply to the Federal Court for resolution of the issues.</p> <p>John Turner distributed his own notice stating that the meeting would go ahead.</p>
October 11, 2008 Ayotte Group community meeting	<p>A community meeting was held by the Ayotte Group. Both Resolutions 1 and 2 passed, as did the “compromise resolution” to hold another election. It is unclear who voted.</p> <p>Elizabeth Turner was appointed Electoral Officer. A Council of Elders was also appointed.</p>
October 12, 2008 Notices posted	Notice of the Ayotte Group elections, with nominations to be held on the 20 th and elections on the 26 th , was posted.

	100 people attend the polls, but their voting status was not determined.
October 12-14, 2008 Protest Camp	A protest camp was set up outside the Band Office.
October 15, 2008	Application for Judicial Review filed in the Federal Court of Canada (Court File No. T-1587-08) by the Potts Group.
October 17, 2008	A Statement of Claim was filed in Ontario Superior Court by the Potts Group.
October 26, 2008 Ayotte Group election	Ayotte Group election. The same people were elected as on September 20 th , except that Marty Prindham was elected as Council instead of John Turner. John Turner did not run in the second election.
October 27, 2008	Ayotte Group attempted to assert their leadership at the Band Office.
November 6, 2008	An injunction motion is filed by the Applicants. The motion is dismissed by Justice Noel on November 11, 2008.

[13] Further evidence was adduced in T-610-09 which, on consent of the parties, applies also to T-660-09. The following is a chronology of those events:

Date and Activity	Detail
February 23, 2009 Petitions delivered to the TFN Band Office	<p>Desiree Senf delivers petitions to the Band Office. The petitions take three different forms. The First Petition stated:</p> <ul style="list-style-type: none"> • That the Chiefs and Council (Potts) put themselves in a conflict of interest in bringing the Judicial Review application in T-1787-08 to protect their interests and that this action was in conflict with resolutions called and voted on at the September 20 and October 11, 2008 meetings; • That Chief and Council (Potts) acted beyond their powers of office by filing the Judicial Review and naming individual community members without obtaining the support of the community through a vote; • A Band meeting must be called to vote on and decide the above charges.

	<p>The Second petition is dated February 2009 and has additional text to the First. The Second petitions are signed by one person per page and include text to the effect that their signature is without prejudice to any position they may take in another forum.</p> <p>While the Third petition is similar to the text of the First and Second, this petition, dated February 1, is more specific. It addresses: money spent on the Judicial Review, changes to the Rama Revenues Committee, suspension of the Land Claims Negotiations, and using the Judicial Review process to “usurp the community process”. No explanation for the differences was provided.</p> <p>A covering letter accompanying the petitions stated:</p> <ul style="list-style-type: none"> • 51% of eligible voters (as on the list compiled for June 12th) had signed the petition in accordance with the impeachment provision in the Constitution (s. 5-1 H); • That 9 specified members should be added to the voters list as they met the qualifications as of June 12, 2008 and also signed the petition. • A Band meeting would be held at the Bear Island Recreation Centre on Saturday March 14, 2009 at 10 am. <p>A receipt was provided with a photocopy of the original petition.</p>
<p>March 10-12, 2009</p> <p>Communication via letter between Chief Potts and Ms. Senf</p>	<p>A letter from the Potts Group was sent to Ms. Senf. In it the Chief and Council stated that the petitions did not comply with the requirements of the Tribal Constitution and therefore a community meeting would not be scheduled. They stated some of the problems with the petitions were:</p> <ul style="list-style-type: none"> • There were 88 personal signatures, not sufficient to meet the percent required by the Tribal Constitution. • Forty-six signatures were from non-eligible voters; • The documents had different wording; • Many of the “signatures” were in electronic form or were not on the actual petition. <p>Ms. Senf responded on March 12 stating that she did not accept their position and that a meeting must be held.</p> <p>Ms. Senf sent a second letter on March 12 adding four more signatures to the petition. It is not indicated if they were eligible voters as of June 12,</p>

	2008.
March 10, 2009 Open letter from the Potts Group to the Community	In the letter the Potts Group stated that there were problems with the petition, no community meeting would be called, denied any allegation of a conflict of interest, and defended their position.
March 14, 2009 Community meeting	<p>Three resolutions were put to the Community to vote on. The voting was performed by secret ballot, Ms. Turner was the polling officer, and different colored ballots were used. A total of 117 ballots were cast on all three resolutions. The proper classification of those into eligible and non-eligible voters is disputed.</p> <p><i>Resolution #1 Therefore, be it resolved that Temagami First Nation finds Chief Gary Potts, Second Chief Peter McKenzie and Councilors Annette Polson, Sherwood Becker Jr. and Thomas Friday to be in a conflict of interest and are removed from office pursuant to Section 5-1 of the Temagami First Nation Tribal Constitution.</i></p> <p>Resolution #1 passed with 115 votes in favor, 0 against, 1 abstention, and 1 spoiled.</p> <p><i>Resolution #2: Therefore be it resolved that the Temagami First Nation hereby revokes all administrative and executive authority, including signing authority of Gary Potts, Peter McKenzie, Annette Polson, Sherwood Becker Jr. and Thomas Friday.</i></p> <p>Resolution #2 passed with 116 votes in favor, 0 against, and 1 abstention.</p> <p><i>Resolution #3: Therefore be it resolved that Temagami First Nation directs the Minister of Indian and Northern Affairs Canada to immediately recognize Chief Roxane Ayotte, Second Chief John McKenzie and Councilors Steve Larond, Marty Pridham, Arnold Paul and Jamie Saville as the duly elected representatives who hold the administrative and executive authority of the Temagami First Nation.</i></p> <p><i>And that the Temagami First Nation directs Chief Roxane Ayotte, Second Chief John McKenzie, Councilors Steve Laronde, Marty Pridham, Arnold Paul and Jamie Saville to take the necessary action and inform all staff members, Indian and Northern Affairs officials, Bank of Nova Scotia, Banks, Ontario Government official, Chiefs of all First Nations organizations in Ontario that Gary Potts, Peter McKenzie, Annette</i></p>

	<p><i>Polson, Sherwood Becker Jr. and Thomas Friday do not represent the Temagami First Nation and have no authority to authorize payment to legally bind the Temagami First Nation.</i></p> <p>Resolution #3 passed with 115 votes in favor, 0 against, and 2 abstentions.</p>
<p>March 26, 2009</p> <p>By-election for the Potts Group</p>	<p>Two Councilor seats were vacant due to resignations. Ms. Ayotte had resigned in the fall of 2008 and Sherwood Becker Jr. resigned March 10, 2009. In the by-election the two successful candidates were Doug McKenzie and Al Marquette.</p>
<p>March 29, 2009</p> <p>Second vote on the three resolutions</p>	<p>The results are as follows:</p> <p>Resolution #1: 79 in favor, 0 against, 0 abstentions Resolution #2: 79 in favor, 0 against, 0 abstentions Resolution #3: 79 in favor, 0 against and 0 abstentions</p>
<p>March 30 - April 6, 2009</p> <p>Correspondence with INAC</p>	<p>Ayotte reported the results of the three resolutions to INAC and requested that INAC update their records accordingly.</p> <p>INAC took the position that they cannot determine the legitimate leadership for the First Nation. Therefore, the leadership of TFN would be listed as “indeterminate pending an internal resolution or consensus, or pending a determinative ruling by the courts on the substantive issues. Accordingly, INAC does not currently recognize any of the disputing parties or factions as Chief and Council of the Temagami First Nation and we will take the necessary steps, if required, to ensure the delivery of essential services.”</p>
<p>March 30 - April 13, 2009</p> <p>Correspondence with the TFN’s Bank</p>	<p>Ayotte sent the results of the three resolutions to the Bank and instructed them to change the signing authority.</p> <p>The Bank refused to accept changes to the signing authority as directed by the Ayotte Group. The Bank took the position that there was a hearing scheduled for April 27 and they would await the outcome of the hearing before making any changes.</p>
<p>April 9, 2009</p> <p>Open letter from Chief Potts to the Community</p>	<p>Potts sent a letter to update the Community on “information that [they] may not be aware off...” He stated that he met with INAC officials on April 3 and INAC confirmed that they had not recognized the Ayotte Council. The letter also states that the Potts Council had discussed the situation with the Bank. He quoted paragraph 11 of the November 17, 2008 reasons of Noel J. in which the injunction motion was refused as</p>

	the Band was still able to operate.
April 14, 2009 Open letter from Chief Ayotte to Potts Council	In response to the April 9 letter the Ayotte Group took the position that INAC did not recognize the Potts Group, that the reasons of Noel J. did not state that Potts was the Chief, and addressed issues with the Bank. They also argued that the impeachment issue was “wholly separate” from the issues raised in the Judicial Review application (T-1578-08).
April 17, 2009 Ayotte Group filed a Notice of Application in T-610-09	Application for <i>quo warranto</i> for the Potts Group and injunctions enjoining them from holding themselves out as Chief and Council of the TFN and enjoining them from access, dissipation, conversion or appropriation of the Band assets for personal use including funds for T-1578-08.
April 23, 2009 Potts Group filed a Notice of Application in T-660-09	Applications for <i>quo warranto</i> for the Ayotte Group and several declarations to the effect that the impeachment was invalid, that the justifications relied on in the impeachment are not valid, and that the June 12, 2008 election remains valid.

CUSTOM

[14] The parties are agreed that the Temagami First Nation is what is known as a “custom band”. It has a written Constitution. However, in considering the interpretation of that Constitution and in respect of matters not dealt with in the Constitution, consideration must be given to customary practices of the Band.

[15] Justice Martineau of this Court has given careful consideration as to the question of custom in his decision in *Francis v. Mohawk Council of Kanesatake*, [2003] 3 C.N.L.R. 86. At paragraph 21 of that decision, he found that the jurisprudence has established that it is incumbent on the party

asserting the existence of a certain custom to establish what it is and the derivation thereof. He wrote:

21 The jurisprudence has established that it must be incumbent upon those who are relying upon "custom" to at least establish what it is and the derivation thereof: McArthur v. Saskatchewan (Registrar, Department of Indian Affairs and Northern Development) (1992), 91 D.L.R. (4th) 666 [[1992] 4 C.N.L.R. 33] (Sask. Crt. Q.B.) ("McArthur"). However, while the Act allows for the selection of the "council of the band" by the custom of the Band, it does not set out guidelines as to how that custom is to be identified.

[16] At paragraph 23 he summarized the constituent elements of custom:

23 The constituent elements of custom may therefore be summarized as follows:

- 1) "practices" for the choices of a council;*
- 2) practices must be "generally acceptable to members of the band"; and*
- 3) practices upon which there is a "broad consensus".*

[17] At paragraph 24, he found that the jurisprudence defines custom as having two components; the first involves practices which have been established through repetitive acts in time or by a single act such as adoption of a code. At paragraph 25 he recognized that custom can vary from time to time. At paragraph 26 he addressed the second component of custom, general acceptance by a broad consensus of the members of the Band. Thereafter he reviewed the law as to how a practice may become a custom. At paragraph 36 he concluded that in order to be a custom, a practice 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. He wrote at paragraph 36:

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 behaviors which may tentatively arise to remedy certain exceptional difficulties of implementation at a particular moment in time as well as other practices which are clearly understood within the community as being followed on a trial basis. If present, such a "broad consensus" will evidence the will of the community at a given time not to consider the adopted electoral code as having an exhaustive and exclusive character. Its effect will be to exclude from the equation an insignificant number of band members who persistently objected to the adoption of a particular rule governing band elections as a customary one.

[18] Counsels are agreed that this decision correctly states the law.

THE CONSTITUTION AND CUSTOM

[19] Since September 26, 1978 the Temagami First Nation has had a written Constitution. It has been amended four times as of this date. Counsel are agreed that the determination of the issues in these applications is to be made on the basis of what is set out in that Constitution subject to interpretation and augmentation by the custom of that Nation as established in evidence.

[20] Important in considering the issues at hand are the following provisions of the Constitution and customs:

- Section 2 defines persons eligible to vote as being those on the Band Membership List of eighteen (18) years of age or older and resident on Tribal Ancestral Hunting Lands (subsection D to I and K to N to provide further definitions as to residency)

A) *Must be on Band Membership List*

B) Must be 18 (eighteen) years of age or older

C) Resident on tribal Ancestral Hunting Lands

- Subsection 2 (J) provides that, except in close votes, a small number of unqualified voters does not affect the result of a vote.

J) It should be noted that a small number of unqualified voters will not result in an election being set aside unless the number of unqualified voters is large enough to have affected the results. For example, if a councillor was elected by a majority of ten (10) votes over his next opponent, then up to nine (9) unqualified persons voting would not affect the election and the election would stand, but if ten (10) or more unqualified persons voted then the election of the councillor would be set aside. This might not affect the election of any other councillor or of the Chief of the same election.

- Section 3 provides for a Council comprising a Head Chief, a Second Chief and a number of Councillors. A three year fixed term is provided by an amendment made May 22, 2008:

Section 3 Political Representation

One (1) Head Chief, one (1) Second Chief, and one (1) Councillor for every fifty band members meeting resident guidelines. There should be no more than two (2) Councillors and no more than nine (9) Councillors. Before additional Councillors are added to the Council 1/3 of the fifty (50) band members must be resident, i.e., 17 members instead of 101.

The First Chief, the Second Chief and all Councillors will be voted in for the same three (3) year term at the General Election to be held in the month of June, commencing June 2008.

- Section 5-1(B) provides for the general responsibilities for Chiefs and Councillors to represent the TFN policies, By-Laws, and Political Issues and concerns for the good of TFN.

Section 5-1 Chiefs and Councillors:

The Chiefs and Councillors responsibilities are to represent Temagami First Nation members on Band Policies, Laws, Bylaws, and Political Issues & Concerns for the good of Temagami First Nation members on N'Daki Menan.

- Section 5-1(H) provides for a charge of conflict of interest to be made against the Chief or a Councillor. A 51% vote is required. The parties are agreed that the custom of the band is to provide for two stage voting as set out in section 5-2 (B) should 51% not be achieved at a first meeting. A charge of conflict of interest is commenced by a petition signed personally by 51% of eligible voters.

Should the Chief or member of Council be charged with a conflict of interest or acting beyond their powers of office, a petition for a Band Meeting stating clearly the charge, must be signed personally by 51% of eligible voters and presented to the Band Office. A receipt will be given to the person bringing in the petition along with a photocopy of the original. Then a date will be set for a Band Meeting not before fourteen (14) clear days when the petition was handed in at the Band Office and not later than twenty-one (21) clear days. Should the Councillor or Chief be found in conflict of interest He or She shall be removed from office by 51% of Band Members voting for that purpose, should 51% vote that person is innocent, then the person shall retain their official position.

- Section 5-2(B) provides for voting at Band Member Meetings. A first vote is held which, if it fails to gain 51% is set for a second vote at a subsequent meeting held, on notice within a stipulate time. A simple majority prevails at the second vote.

B) 51% of eligible voters must be in favour or against a motion before it can be passed or defeated. Excepted as stated in the following clause.

- Section 6 provides that the Council can propose bylaws, section 6-1 incorporates provisions of the *Indian Act* as to subject matter, none pertinent here.

The Council can propose bylaws for any or all of the following purposes to maintain and improve the quality of life on Bear Island Reserve.

- Section 7 makes it mandatory that Council shall appoint a Council of Elders whose function is to advise as to Tribal Traditions and render final judgment on election appeals.

Section 7 Council of Elders

A) Shall be appointed by Council to advise Council in Tribal Traditions

B) Shall render final judgments on election appeals.

- Section 8-2 provides for voting including a voters list: I reproduce 8-2 (A) (B) and (C):

A) The Electoral Officer shall prepare a voters list containing the names, in alphabetical order, of all electors.

B) *The Electoral Officer shall post one or more copies of the voters in conspicuous place in the section.*

C) *Any elector may apply to have the voters list revised on the ground that the name of an elector has been omitted therefrom or the name of a person not qualified to vote is included therein.*

- Section 8-3(L) gives the Electoral Officer the power to add a qualified voter to the list

L) An elector whose name does not appear on the voters list may vote at an election, providing that the Electoral Officer or his/her deputy is satisfied that such person is qualified to vote.

- Section 8-3(O) and (P) provide that the Electoral Officer shall declare the results of an election, if there is a tie the Electoral Officer has a casting vote. The evidence is that it is the custom of the TFN in the event of a tie that the Electoral Officer's vote is determined by a coin toss.

O) Immediately after the completion of the counting of the votes, the Electoral Officer shall publicly declare to be elected the candidate or candidates having the highest number of votes and he/she shall also post in some conspicuous place a statement signed by him showing the number of votes cast for each candidate.

P) Where it appears that two or more candidates have an equal number of votes, the Electoral Officer shall give casting vote for one or more of such candidate, but the Electoral Officer shall not otherwise be entitled to vote.

- Section 8-5 provides for Election Appeals. The process includes a report to be made by the Electoral Officer to the Council of Elders. The evidence is that such a report, by custom, consists of something like a simple line through the claim document with the addition of a word such as “Denied”. There was however no Council of Elders at the time of the June 2008 election or thereafter. There is no evidence to indicate that there was any custom to dispense with the Council of Elders.

A) Within thirty days after an election any candidate at the election or any elector who gave or tendered his vote at the election who has reasonable grounds for believing that:

1. there was corrupt practice in connection with the election;

2. there was a violation of the Act or these regulations that might have affected the result of the election; or

3. a person nominated to be a candidate in the election was ineligible to be a candidate;

may lodge an appeal by forwarding by registered mail to the Electoral Officer particulars thereof duly verified by affidavit.

B) Where an appeal is received by the Electoral Officer pursuant to subsection one, the electoral officer shall within seven days of the receipt of the appeal forward a copy of the appeal together with all supporting documents by registered mail to the Elders and to each candidate in the electoral section.

C) Any candidate may within fourteen days of the receipt of the copy of appeal forward to the Electoral Officer by registered mail a written answer to the particulars set out in the appeal together with any supporting documents relating thereto duly verified by affidavit.

D) All particulars and documents filed in accordance with the provisions of this section shall constitute and form the record.

E) 1) The Electoral Officer may, if the material that has been filed is not adequate for deciding the validity of the election complained of, conduct such further investigation into the matter as he or she deems necessary in such manner as he or she deems expedient;

2) Such investigation may be held by the Electoral Officer or by any person designated by the Electoral Officer;

3) Where the Electoral Officer designates a person to hold such an investigation, such person shall submit a detailed report of the investigation to the Electoral Officer for consideration.

F) Where it appears that:

1) there was corrupt practice in connection with an election;

2) there was a violation of the Constitution or these regulations that might have affected the result of an election or;

3) a person nominated to be candidate in an election was ineligible to be a candidate, the Electoral Office shall report to the Council of Elders accordingly.

CONSIDERING THE RELEVANT EVENTS

a) Historical Removal of Chiefs

[21] Prior to the events now at issue there have been two circumstances in which Chiefs of the TFN have left office before the expiry of their terms. The first was in 1993 when First Chief Joseph

Katt and a Councillor were removed from office. The evidence of Virginia Paul, which is not contradicted on this point, is that a petition was circulated alleging improper conduct. A community meeting was held at which the Chief and Councillor were present and given an opportunity to defend themselves. A vote was held, the Councillor resigned voluntarily, the vote favoured removal of the Chief, a motion to that effect was made by Council and the Chief was removed.

[22] In 2002, according to the evidence of Virginia Paul, the then first Chief Raymond Katt was charged with acting beyond his powers of office. A petition was circulated, and then a community meeting was held where Raymond Katt was present and answered the charge. A motion calling for his removal was made and passed but a second vote was required. According to the Affidavit of Arnold Paul, Chief Katt attempted to cancel the second meeting but was unsuccessful. At the second meeting the vote to remove Katt was ratified.

[23] I derive from this evidence that it is the custom of the TFN to initiate a process of removal by petition, then by a community meeting where the persons charged with misconduct are expected to be present to explain their actions. A vote is held which, if it fails to secure 51% of the eligible voters, proceeds to a second vote at a subsequent meeting. If the second vote approves removal, Council is expected to hold a meeting and pass a motion approving removal of the person in question.

b) The June 12, 2008 Election

[24] Prior to June 12, 2008 the Constitution had provided for staggered three year terms of Office for the Chiefs and Councillors of the TFN. The June 12 election was the first for which all of the Chiefs and Councillors would be elected at the same time, all for three year terms.

[25] There is no dispute as to procedures leading up to the election. However it is important to note that there was no Council of Elders in place. There had been no Council of Elders since 2006. No reason for this omission has been put in evidence. There is evidence that in 2006 a Council of Elders was in place and did review election appeals which is one of the functions of that Council.

[26] An election was held on June 12, 2008 for Chiefs and Councillors. The original number of eligible voters was said to be 187, two more were added making the number 189. Three others applied to be added to the voters' list but their applications were denied by the Electoral Officer. The ballots were cast and counted, then recounted. The result was that each of the two candidates for Chief, Alexander Paul and Gary Potts, received the same number of votes, 51. Following what appears to be the custom, the Electoral Officer flipped a coin, the result was in favour of Potts, thus the Electoral Officer voted in favour of Potts as Chief.

[27] Following the announcement of the results, some members of the TFN appealed on the basis that certain persons who had voted were ineligible and some of those who were not allowed to vote were eligible. Given the tie for Chief it is clear that a difference of even one vote could have a material effect on the result of the vote for Chief.

[28] It is at this point that I take issue with what the Electoral Officer, Virginia Paul, did. In paragraph 38 of her Affidavit of November 5, 2008 she lists three reasons upon which an appeal could be granted. She says:

38. Section 8-5, Part F of the Tribal Constitution provides that where it appears that there was (1) corrupt practice, (2) a violation of the Tribal Constitution that might have affected the election results, or (3) a nominee was ineligible to be a candidate, the Electoral Officer must report to the Council of Elders. I found none of these three things. The appeals were therefore denied.

[29] This is where things went wrong. It was not for the Electoral Officer to deny the appeal, which is the function of the Council of Elders. What the Electoral Officer must determine is, with respect to point (2), determine if there is an alleged violation that might have affected the result. If there is such an allegation, it must be referred to the Council of Elders for determination on the merits. The allegation must not simply be denied by the Electoral Officer.

[30] What the Electoral Officer did, according to paragraph 39 of her affidavit, is simply draw a line through the letter of appeal, write “denied”, and return the letter to its sender. This was not correct. If the allegation might have affected the outcome of the voting, and here even one vote could have done that, then the Council of Elders must decide upon the merits of the allegation.

[31] The election of June 12, 2008 was flawed from the beginning because there was no Council of Elders in place to deal with appeals. Even after the election was held no Council of Elders was created to deal with appeals. The Electoral Officer has no power to deal with allegations of voting irregularities, the Officer’s job is to determine if the alleged irregularities “might” have affected the

results of the election, if so the matter as to irregularities, in this case voter eligibility, is for the Council of Elders to decide.

[32] Therefore I find that the result of the elections of June 12, 2008 is a nullity. A new election must be held prior to which time a Council of Elders must be in place.

c) The July / August 2008 Resolutions

[33] In late July a number of TFN Band members circulated and signed a petition calling for a meeting on August 2, 2008 to vote on the following resolution:

Resolution: "TFN Community Ruling and Directive"

Whereas, the members of the Temagami First Nation do not accept the results of the June 12th, 2008 elections for the positions of Chief and Second Chief due to legitimate election appeals being denied without appropriate and fair consideration.

Whereas, the elections of all councillors at the June 12th, 2008 elections, are considered to be legitimate for the reason that their positions had all been won by significant margins generally not of concern within the appeals.

Therefore be it resolved that, effective immediately, the positions of Chief and Second Chief shall be vacant, and new elections for these positions will be held on Saturday August 30th 2008, with a poll on Bear Island to be open from 9:00am to 8:00pm.

[34] The Potts Group Council responded by an open letter dated July 29, 2008 stating:

Attached is a letter and petition received at the Band Office July 29, 2008 from John Turner, James Saville, Alex Paul and John McKenzie.

Reference 1: to the third sentence in part which reads "...the petition resolution in accord with our Constitution".

Reference 2: from first paragraph third line of petition: Resolution:
“TFN Community Ruling and Directive”

“...legitimate election appeals being denied without appropriate and fair consideration.”

Reply to Reference 1: Our Constitution considers a petition only in Section 5 regarding Chief and Councillors Responsibilities of Office.

Conclusion: This petition is not in accordance with our Constitution.

Reply to Reference 2: In our Constitution, the Electoral Officers since September 26, 1978, namely Laura McKenzie, Linda George Mathias and our present Electoral Officer, Virginia Paul have sole authority to deny or accept an appeal. No Council or Individual members can override the Constitutional Authority of the Electoral Officer.

The Petition Resolution, “TFN Community Ruling and Directive”, is not in accordance with our Constitution.

The letter and petition received July 29, 2008 is noted for the record.

[35] The confusion arises as a direct result of the fact that no Council of Elders was in place to deal with election appeals. The Potts responding letter above is wrong in saying that the Electoral Officers decide appeals as to voting, they do not. However the petition is also wrong in attempting to set aside the election by declaring the positions at a meeting of the community held to vote on that matter. The proper course would have been to appoint a Council of Elders, even at that late date, to determine the question of voter eligibility. If the Council of Elders decides that even a few persons who voted were not eligible or a few who were refused the opportunity to vote should have been eligible the election of Potts as Chief should have been set aside.

[36] The meeting ultimately held to vote on the petition was improper; it has no basis in the Constitution or in custom. As a result the so-called second election where the Ayotte Group was elected as Chief and Councillor was invalid.

[37] There was a second resolution voted on at the meeting of August 2, 2008 which would have the effect of removing most restrictions on voter eligibility particularly as to residence. The evidence indicates that this would increase the number of eligible voters from under 200 to over 670. A second meeting was held on August 17, 2008 at which both resolution 1, to set aside the Potts Council, and resolution 2, to increase voter eligibility, were passed.

[38] I have already addressed resolution 1, it was improper. Resolution 2 would amend the Constitution in a profound respect going to the very heart of voter eligibility and increasing the number of eligible voters by over three times the original number. I accept the evidence of Virginia Paul at paragraph 46 of her affidavit of November 5, 2008 where she says that all Constitutional amendments in the past were voted upon at a community meeting called by the Chiefs and Council for that purpose. At the time of this resolution the Potts Group were ostensibly the Chiefs and Council, although I have held their election to be invalid, and should have, upon receipt of the petition, called a meeting and attended the meeting. They should not have refused to attend. It was their duty to call and allow a meeting on the second resolution, even if not the first. Even though they were not validly elected, out of necessity it was their duty to respect the petition and guide the community through this obvious crisis.

d) The Ayotte Group Election

[39] In September 2008 an election was purportedly held as a result of which the Ayotte Group was elected Chiefs and Council. Again, no Council of Elders was in place.

[40] From what Counsel for the Ayotte Group has said to this Court, I understand that this Group is no longer claiming to be Chief and Councillors, subject to a new election being called. Since I have determined that a new election is the most appropriate course of action I do not need to dwell on this matter further.

e) The February /March 2009 Resolutions

[41] In February 2009, those persons largely aligned with the Ayotte Group circulated a petition among TFN Band members. That petition stated essentially that the petitioners alleged that the Potts Group Council had acted in a position of conflict of interest in taking Federal Court proceedings T-1587-08 and requested that a Band meeting be called to decide upon the allegation.

In particular it said:

Whereas Chief Garry Potts, Second Chief Peter McKenzie and Councillors Annette Polson, Sherwood Becker Jr. and Thomas Friday have placed themselves in a conflict of interest by participating in decisions and taking actions to involve Temagami First Nation in a Federal Court Action of October, 2008. The Federal Court action is purely a process to protect their own interest, which is to remain as Chief and Council. This is in direct conflict with resolutions that called for a new general election that were tabled at the Community Meeting of September 20, 2008 and passed by a final vote on October 11, 2008.

And Whereas Chief Garry Potts, Second Chief Peter McKenzie and Councillors Annette Polson, Sherwood Becker Jr. and Thomas Friday have acted beyond their powers of Office by filling the

Federal Court action initiating the Judicial Review in October, 2008 and naming individual community members as respondents in the action without obtaining the support of the community through a vote at a community meeting. This is contrary to Section 5-1(i) Tribal Constitution, and/or contrary to the spirit and intent of this section. The Tribal Constitution does not provide Chief and Council with the powers to suppress the community decisions nor the political voice of community members by using Colonial institutions.

***Therefore** we the undersigned support this petition and call of a Band meeting with proper notice according to the Temagami First Nation Tribal Constitution so that Band Members can vote and decide on the charges against Chief Gary Potts, Second Chief Peter McKenzie, and Councillors Annette Polson, Sherwood Becker Jr., and Thomas Friday.*

[42] Much dispute has arisen as to who was eligible to sign such a petition and whether the correct form of petition was signed and whether signatures provided by electronic and facsimile could be considered acceptable. A further complication arose since a few persons who were part of the Ayotte Group signed the petition with added language to the effect that they were doing so without prejudice. A yet further complication arose since a few more people signed a petition that contained different wording including a further complaint against the Potts Group.

[43] At the hearing before me in May, Counsel for each of the parties reviewed the question of persons eligible to vote, acceptance of facsimile and electronic signatures and, the differences in wording of the petitions. I will disregard the differently worded petition with additional charges against the Potts Council, only three persons appear to have signed this form of petition and their numbers make no difference to the calculations. Taking the remainder, if calculated as the Ayotte Group would urge, the number of petitioners exceeds the 51% requirement. Taking the Potts Group position the number are just below that requirement.

[44] In considering whether the petition has met the threshold number guidance can be taken from the Constitution, in particular the opening words and sections 2(J) and (K):

The Temagami First Nation's political guidelines under the Tribal custom require updating and clarification. The main consideration being the interests of the majority of Band Members must be served by the elected Political representatives.

...

J) It should be noted that a small number of unqualified voters will not result in an election being set aside unless the number of unqualified voters is large enough to have affected the results. For example, if a councillor was elected by a majority of ten (10) votes over his next opponent then, up to nine (9) unqualified persons voting would not affect the election and the election would stand, but if ten (10) votes or more unqualified person voted then the election of the councillor would be set aside. This might not affect the election of any other councillor or of the Chief at the same election.

K) Subject to other provisions of this section. The question as to where a person is or shall reside at any material time or during any material period shall be determined by reference to all the facts of the case.

[45] The Courts have expressed a similar attitude. The Courts are critical of those who reject petitions and the like based on fine points raised in respect of alleged irregularities. That attitude is wrong. I quote Russell J. in his recent decision in *Nekaneet First Nation v. Oakes*, February 10, 2009, 2009 FC 134 at paragraphs 76 and 77:

76 *As the Applicants point out, it is not always necessary to strictly construe the provisions of an election code, and non-compliance does not necessarily invalidate the election process. (Brian A. Crane, Robert Mainville and Martin W. Mason, First Nations Governance Law (Markham, Ont.: LexisNexis Butterworths, 2006) at 200). Therefore, if the Nekaneet Governance Committee terms of reference, for example, were not strictly followed, that does not necessarily invalidate the Referendum Vote.*

77 A vote will generally not be rendered invalid as a result of irregularities unless such irregularities would have materially affected the results. A succinct statement of this principle may be found at paragraph 20 of Ta'an Kwach'an Council (Re), [2006] Y.J. No. 139, 2006 YKSC 62:

20 The general common law principle is that the will of the people as expressed in an election will not be set aside unless the irregularity or non-compliance with election law or practice is such that the outcome would have been materially affected. Obviously any irregularity affects the election process in some way. Unless it materially affects the validity of the election results, courts will not set aside the decision of the voters.

[46] Overall consideration must be given to the fact that a considerable proportion of the TFN Band has expressed concerns with the Potts Group Council and want to have a meeting to discuss those concerns and if necessary, vote on them. A fair and generous approach should have been given in considering the eligibility of those entitled to sign the petition. Electronic and faxed copies of signatures should have been accepted. The “without prejudice” petitions should have been accepted. This was not a vote, it was a request that a meeting to be held.

[47] I find that the Potts Group improperly rejected the petition and improperly refused to hold a meeting.

[48] As it turns out a meeting was held in any event. Largely, it appears, supporters of the Ayotte Group turned out. Supporters of the Potts Group, including members of that Group itself, boycotted the meeting. The Potts Group justify their boycott on the basis that it was their view that the

meeting was illegal. Their Counsel cites MacKay J. in *Linklater v. Peter Ballantyne Cree Nation*, [2001] 1 C.N.L.R. 156 at paragraph 26:

26 Treating that question as a general issue, without reference to the specific facts of this case and without passing judgment on whether or not custom was followed by those who arranged the by-election, I answer that question "Yes". In my view it warrants a response since the issue raised is basic to the legal regime under which the Peter Ballantyne Cree Nation or any other is governed. There can be no doubt, in my opinion, that the Chief and Council of the nation can ignore the results of a local by-election that does not follow "custom" which is applicable to the election. In so doing the Chief and Council exercise their responsibility to uphold the law, i.e., the custom, of the nation where it is applicable. If they be wrong in interpreting custom they may be subject to account, but they cannot avoid their responsibility.

[49] As I have held, the Potts Group Council was wrong to ignore the petition. That Group was free to attend the meeting or not. It would have been better of they did. The issues needed to be discussed, not ignored. As MacKay J. said, they cannot avoid their responsibility, if they were wrong, and if they were, they may be subject to account.

[50] A first meeting was held March 17, 2009. A total of 117 ballots were cast in respect of three resolutions. The results were recorded as follows:

Resolution #1: Therefore, be it resolved that Temagami First Nation finds Chief Gary Potts, Second Chief Peter McKenzie and Councillors Annette Polson, Sherwood Becker Jr. and Thomas Friday to be a conflict of interest and are removed from office pursuant to Section 5-1 of the Temagami First Nation Tribal Constitution.

Resolution #1 passed with 115 votes in favour, 0 against, 1 abstention, 1 spoiled.

Resolution #2: Therefore it be resolved that the Temagami First Nation hereby revokes all administrative and executive authority, including signing authority of Gary Potts, Peter McKenzie, Annette Polson, Sherwood Becker Jr. and Thomas Friday.

Resolution #2 passed with 116 votes in favour, 0 against, and 1 abstention.

Resolution #3: Therefore be it resolved that Temagami First Nation Directs the Minister of Indian and Northern Affairs Canada to immediately recognize Chief Roxane Ayotte, Second Chief John McKenzie and Councillors Steve Larond, Marty Pridham, Arnold Paul and Jamie Saville as the duly elected representatives who hold the administrative and executive authority of the Temagami First Nation.

And that the Temagami First Nation directs Chief Roxane Ayotte, Second Chief John McKenzie, Councillors Steve Laronde, Marty Pridham, Arnold Paul and Jamie Saville to take the necessary action and inform all staff members, Indian and Northern Affairs officials, Bank of Nova Scotia, Banks, Ontario Government official, Chiefs of all First Nations organizations in Ontario that Gary Potts, Peter McKenzie, Annette Polson, Sherwood Becker Jr. and Thomas Friday do not represent Temagami First Nation and have no authority to authorize payment to legally bind the Temagami First Nation.

Resolution #3 passed with 115 votes in favour, 0 against, and 2 abstentions.

[51] It was determined that, notwithstanding the overwhelming majority voting in favour of the resolutions at the meeting, the required 51% of the eligible voters was not met and a second meeting with a second vote was required.

[52] Section 5.2-B (B) of the TFN Constitution requires notice of a second meeting be given, but does not say what form that notice should take. In the present case it is clear that at least the 117 persons at the first meeting would have had notice of the second meeting. The evidence,

particularly that of John Turner, is that notice was given by a variety of methods including Canada Post, by hand, and by e-mail, as well as other means. There is no evidence as to any custom developed by the Band for giving notice. The Potts Group Counsel argues that the Canada Post notice was inadequate given the time it would take to sort and deliver the mail. There is, however, no evidence from anyone to the effect that they got notice too late or that they had no notice at all. I find on the evidence that adequate notice of the second meeting was given.

[53] At the second meeting held March 29, 2009 all three resolutions were noted upon and in each 79 voted in favour with 0 against and 0 abstentions. It is not entirely clear whether those voting included eligible voters as calculated on narrower or broader criteria. Keeping in mind that an earlier resolution passed by the Ayotte Group might have expanded the eligible voters from about just under 200 to about 675 or more it is impossible, on the evidence, to tell from what group the 79 voters who attended the second meeting came. Given the lack of evidence on this point, I find that the resolutions adopted at the second meeting cannot be considered to be valid.

[54] The Potts Group raises a second concern with respect to the resolutions. They argue that there can be no conflict of interest, as alleged, simply because the Chiefs and Council decide to refer a matter of controversy to the Courts. I agree. Freedom of access to the Court system should not be inhibited by challenges based on alleged conflict of interest.

[55] The Ayotte Group argues, however that the Potts Group Council funded the Court application out of TFN Band funds and should have sought general Band approval before doing so.

They say that since it was the personal position of the Potts Group members as Band Council that was being challenged; they should have paid for it personally. That, the Ayotte Group argues, is the conflict.

[56] If this is the true conflict, it was not clearly set out in the petition. The petition makes reference to the institution of the Court proceedings, not how they were to be funded. I agree that this may be a nicety but it is an important one. That matter could have been discussed more fully at a Band meeting with the Potts Group present.

[57] The Constitution of the TFN section 5-1 (H) sets out that the petition must be one:

“...stating clearly the charge”

[58] It is important to do so for at least two reasons. First, impeachment of a Chief or Councillor is a serious matter. They should know clearly and unequivocally what the charge made against them is. Second, those attending the meeting should know clearly what is to be discussed.

[59] I find, therefore, that these three resolutions cannot be considered valid, first because the petition does not clearly state the charge, and second because the evidence does not clearly state who voted at the second meeting.

CONCLUSIONS AND COSTS

[60] With respect to the matters at issue, I have concluded, in summary:

1. The election of June 12, 2008 wherein the Potts Group was elected as Chiefs and Councillors is invalid; and
2. The resolutions sponsored by the Ayotte Group to have the June 12, 2008 elections held invalid and to enlarge voter eligibility are invalid.

[61] This then requires consideration of the third issue namely what are the remedies.

[62] Section 18(1)(a) of the *Federal Courts Act* R.S.C. 1985, c.F-7 gives this Court the power to grant a declaration in the nature of a writ of *quo warranto*. Section 18.1(3) of that *Act* permits this Court declare a matter invalid and return it for new a determination with directions as to how that best might be done. I note that in *Sparvier v. Cowessess Indian Band No. 73* [1993] 3 F.C. 142, Rothstein J. (as he then was) was reluctant to issue a final Judgment without giving the parties and their Counsel adequate time to consult with each other and formulate appropriate recommendations. This should not dissuade the Court from making a remedial order if required as stated by Phelan J. in *Jackson v. Piikani Nation*, February 1, 2008, 2008 FC 130 at paragraph 37:

37 The Court has authority to fashion the appropriate remedy. The Court should not "read in" wording where the Band can deal with its true intentions more directly. However, to reflect what the evidence of intent is and to prevent confusion in the future, I will make a remedial order.

[63] It is important to have some interim continuity, therefore in a caretaker role only, the present Potts Group Council (including McKenzie and Marquette) should continue, but only briefly, until the new election is held. This Council shall not make any important decisions during this time.

[64] I therefore request that Counsel consult with their clients and within 30 days provide in writing their recommendations as to an appropriate Judgment including a draft Judgment, that will do the following:

1. Immediately put in place a Council of Elders;
2. Hold new elections for the position of Chief, second Chief and Councillors of the Temagami First Nation within a very few days after the Council of Elders has been put in place;
3. Set aside the election results of June 12, 2008;
4. Set aside all purported resolutions by the Ayotte Group;
5. Maintain in the interim the Potts Group and Chief and Councillors (including Marquette and McKenzie as elected in the by-election) in a caretaker role only until the final results of the new election are determined.

[65] Each party in each application should bear its own costs, therefore there will be no order as to costs in any application. However the TFN should provide funds to compensate the Ayotte Group in the same way that the Potts Group has been funded.

[66] Judgment will be reserved until receipt of Counsels' written submissions.

"Roger T. Hughes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1587-08; T-610-09 and T-660-09

STYLE OF CAUSE: **TEMAGAMI FIRST NATION et al. v. JOHN TURNER et al.**

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: April 27 & May 13, 2009

REASONS FOR JUDGMENT: Hughes, J.

DATED: May 27, 2009

APPEARANCES:

Ms. Maureen Ball	FOR THE APPLICANTS in T-1587-08 & T-
Ms. Andrea Risk	660-09
	FOR RESPONDENTS in T-610-09
	TEMAGAMI FIRST NATION
Mr. Clifford Lax	FOR THE RESPONDENTS in T-1587-08 &
Ms. Amy Salyzyn	T-660-09
Mr. Patrick Nadjiwan	FOR APPLICANTS in T-610-09
	JOHN TURNER et al.

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