Federal Court Cour fédérale

Date: 20190509

Docket: T-2129-18

Citation: 2019 FC 638

Ottawa, Ontario, May 9, 2019

PRESENT: Madam Justice Strickland

BETWEEN:

RONALD ANDREW MORIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant appealed the outcome of a July 25, 2017 election for chief and councillors of the Enoch Cree Nation [Enoch]. The appeal was governed by the *Indian Act*, RSC 1985, c I-5 [*Indian Act* or Act]. Based on the recommendation of the Minister of Indian Affairs and Northern Development [Minister] and pursuant to s 79(b) of the *Indian Act*, the Governor in Council [GIC] issued an Order in Council P.C. 2018-1489, dated November 29, 2018 [OIC], which set aside the election, held on July 25, 2017, of Kelly Morin to the position of councillor. Had it not been for an error in the tabulation of votes, the Applicant would have been declared elected,

rather than Kelly Morin, to the tenth and final councillor position. The Applicant was advised of this by a December 5, 2018 letter from Yves Denoncourt, Acting Director of the Governance Operations Directorate of Crown-Indigenous Relations and Northern Affairs Canada [Director]. The letter also states that neither the Minister nor Enoch have the power or authority to declare the Applicant elected to the councillor position. The Applicant claims that the Minister erred, on the basis of a lack of authority, in failing to declare, or allowing him to be declared, elected.

Factual Background

[2] The facts are not in dispute in this matter.

[3] Enoch has not adopted a custom election code. In the absence of such a code, the *Indian Act* and the *Indian Band Election Regulations*, CRC, c 952 [IBE Regulations] govern its elections of chief and councillors.

[4] The Applicant is a member of Enoch and, in an election for chief and council held on July 25, 2017, he sought to be elected as member of its band council. Sixty five candidates ran for the ten councillor positions. When voting was complete, the electoral officer's official count recorded Kelly Morin as receiving 259 votes and he was declared, by the electoral officer, elected to the tenth and final councillor position. The electoral officer's official count recorded the Applicant as receiving 252 votes, placing him in eleventh position.

[5] On August 10, 2017, the Applicant filed an appeal of the election, raising various concerns and requesting a recount of the votes cast. On October 19, 2017, a recount of the ballots

for the last three councillor positions was conducted. This found that, as a result of a counting error, the Applicant had not been declared as the elected candidate for the tenth councillor position. The Applicant and Enoch were not advised of the recount results until over a year later.

[6] The November 29, 2018 OIC records that, pursuant to s 12(1) of the IBE Regulations, the Enoch election was appealed and the Minister had reported that, following a recount of the ballots cast in the election, it was determined that Kelly Morin, who was declared elected to a councillor position by the electoral officer, had not received a sufficient number of votes to have been so declared. The Minister also reported, based on that finding and in accordance with s 14(b) of the IBE Regulations, that she was satisfied that there was a contravention of the IBE Regulations that might have affected the result of the election. Therefore, the GIC, on the recommendation of the Minister and pursuant to s 79(b) of the *Indian Act*, set aside the election held on July 25, 2017 of Kelly Morin to the position of councillor on the Enoch council.

[7] By letter of December 5, 2018, the Director advised the Applicant that there had been an error in the tallying of the votes and of the issuance of the OIC. Further, that the recount revealed that Kelly Morin, who was declared elected by the electoral officer to a councillor position, had only 245 votes, which is the eleventh highest total of votes cast for any candidate. The Applicant received 254 votes, the tenth highest total of the votes cast. A corrected Statement of Votes was enclosed. The letter then states:

> Had there been no tabulating errors, Mr. Morin [the Applicant] would have been declared elected to the 10th and last councillor position, and Kelly Morin would <u>not</u> have been elected.
>
> Consequently, by Order in Council P.C. 2018-1489 of November 29, 2018, and pursuant to paragraph 79(b) of the Indian Act, the Governor in Council has set aside the July 25, 2017 election of

> Kelly Morin to a councillor position on the Council of the Enoch Cree nation. However, neither the Minister nor the First Nation has the power or the authority to declare Ronald A. Morin elected to a councillor position. Mr. Morin will have to seek office by becoming a candidate at a future by-election that may be held to fill the one vacant councillor position.
>
> As the set-aside for the position of one councillor does not impact the Council's ability to form quorum, the Council remains functional and can make a decision as to whether or not a by-election should be held to fill the vacant position of councillor.
>
> (Emphasis in original)

[8] The Enoch band council did not subsequently seek a special election.

[9] The current term for the Enoch chief and councillors expires on July 31, 2019 and, as of January 28, 2019, no date had been set for the next election.

Decision under Review

[10] In his Notice of Application the Applicant states that he:

> … is seeking judicial review of a decision of the Governor in Council representing the Minister of Crown-Indigenous Relations and Northern Affairs Canada, dated December 5, 2018, [Decision referenced as file #E428-440] regarding the appeal of the Enoch Cree Nation election held on July 25, 2017 to the extent the decision declares neither the Minister nor Enoch Cree Nation may declare Ronald Andrew Morin a councillor despite confirming after a recount of the votes that he had sufficient votes to be elected into council.

[11] The Applicant's reference to the December 5, 2017 decision refers to the Director's letter of that date, which bears reference number E4218-2/440. The Applicant's submissions attribute

the Director's letter to the GIC and/or the Minister, in particular, the Director's statement that neither the Minister nor the Enoch band council had the power or the authority to declare him elected to a councillor position. The Respondent agrees that the reasons for the decision of the GIC, as represented by the Minister, are those of the Director and are the subject of this judicial review.

Relevant Legislation

Indian Act, RSC 1985, c I-5

74 (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.	**74 (1)** Lorsqu'il le juge utile à la bonne administration d'une bande, le ministre peut déclarer par arrêté qu'à compter d'un jour qu'il désigne le conseil d'une bande, comprenant un chef et des conseillers, sera constitué au moyen d'élections tenues selon la présente loi.
…	[…]
(3) The Governor in Council may, for the purposes of giving effect to subsection (1), make orders or regulations to provide	**(3)** Pour l'application du paragraphe (1), le gouverneur en conseil peut prendre des décrets ou règlements prévoyant :
(a) that the chief of a band shall be elected by	**a)** que le chef d'une bande doit être élu :
(i) a majority of the votes of the electors of the band, or	**(i)** soit à la majorité des votes des électeurs de la bande,
(ii) a majority of the votes of the elected councillors of the band from among themselves,	**(ii)** soit à la majorité des votes des conseillers élus de la bande désignant un d'entre eux,
but the chief so elected shall	le chef ainsi élu devant

remain a councillor; and

cependant demeurer conseiller;

(b) that the councillors of a band shall be elected by

b) que les conseillers d’une bande doivent être élus :

(i) a majority of the votes of the electors of the band, or

(i) soit à la majorité des votes des électeurs de la bande,

(ii) a majority of the votes of the electors of the band in the electoral section in which the candidate resides and that he proposes to represent on the council of the band.

(ii) soit à la majorité des votes des électeurs de la bande demeurant dans la section électorale que le candidat habite et qu’il projette de représenter au conseil de la bande.

…

[…]

75 (1) No person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.

75 (1) Seul un électeur résidant dans une section électorale peut être présenté au poste de conseiller pour représenter cette section au conseil de la bande.

(2) No person may be a candidate for election as chief or councillor of a band unless his nomination is moved and seconded by persons who are themselves eligible to be nominated.

(2) Nul ne peut être candidat à une élection au poste de chef ou de conseiller d’une bande, à moins que sa candidature ne soit proposée et appuyée par des personnes habiles elles-mêmes à être présentées.

…

[…]

78 (1) Subject to this section, the chief and councillors of a band hold office for two years.

78 (1) Sous réserve des autres dispositions du présent article, les chef et conseillers d’une bande occupent leur poste pendant deux années.

(2) The office of chief or councillor of a band becomes vacant when

(2) Le poste de chef ou de conseiller d’une bande devient vacant dans les cas suivants :

(a) the person who holds that office

a) le titulaire, selon le cas :

(i) is convicted of an indictable offence,

(i) est déclaré coupable d’un acte criminel,

(ii) dies or resigns his office, or

(ii) meurt ou démissionne,

(iii) is or becomes ineligible to hold office by virtue of this Act; or

(iii) est ou devient inhabile à détenir le poste aux termes de la présente loi;

(b) the Minister declares that in his opinion the person who holds that office

b) le ministre déclare qu’à son avis le titulaire, selon le cas :

(i) is unfit to continue in office by reason of his having been convicted of an offence,

(i) est inapte à demeurer en fonctions parce qu’il a été déclaré coupable d’une infraction,

(ii) has been absent from three consecutive meetings of the council without being authorized to do so, or

(ii) a, sans autorisation, manqué les réunions du conseil trois fois consécutives,

(iii) was guilty, in connection with an election, of corrupt practice, accepting a bribe, dishonesty or malfeasance.

(iii) à l’occasion d’une élection, s’est rendu coupable de manœuvres frauduleuses, de malhonnêteté ou de méfaits, ou a accepté des pots-de-vin.

(3) The Minister may declare a person who ceases to hold office by virtue of subparagraph (2)(b)(iii) to be ineligible to be a candidate for chief or councillor of a band for a period not exceeding six years.

(3) Le ministre peut déclarer un individu, qui cesse d’occuper ses fonctions en raison du sous-alinéa (2)b)(iii), inhabile à être candidat au poste de chef ou de conseiller d’une bande durant une période maximale de six ans.

(4) Where the office of chief or councillor of a band becomes vacant more than three months

(4) Lorsque le poste de chef ou de conseiller devient vacant plus de trois mois avant la date

before the date when another election would ordinarily be held, a special election may be held in accordance with this Act to fill the vacancy.

de la tenue ordinaire de nouvelles élections, une élection spéciale peut avoir lieu en conformité avec la présente loi afin de remplir cette vacance.

79 The Governor in Council may set aside the election of a chief or councillor of a band on the report of the Minister that he is satisfied that

(a) there was corrupt practice in connection with the election;

(b) there was a contravention of this Act that might have affected the result of the election; or

(c) a person nominated to be a candidate in the election was ineligible to be a candidate.

79 Le gouverneur en conseil peut rejeter l'élection du chef ou d'un des conseillers d'une bande sur le rapport du ministre où ce dernier se dit convaincu, selon le cas :

a) qu'il y a eu des manœuvres frauduleuses à l'égard de cette élection;

b) qu'il s'est produit une infraction à la présente loi pouvant influer sur le résultat de l'élection;

c) qu'une personne présentée comme candidat à l'élection ne possédait pas les qualités requises.

Indian Band Election Regulations, CRC c 952

8 (1) 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.

…

11.1 (1) This section applies to an election where, as a result of the office of chief or a councillor becoming vacant under subsection 78(2) of the Act or the election of a chief or councillor being set aside

8 (1) Immédiatement après le dépouillement du scrutin, le président d'élection déclare publiquement comme étant élus les candidats ayant obtenu le plus grand nombre de voix.

[…]

11.1 (1) Le présent article s'applique aux élections tenues lorsque le conseil de bande n'atteint plus le quorum parce qu'un poste de chef ou de conseiller est devenu vacant en application du paragraphe

under section 79 of the Act, it is no longer possible for the council of a band to form a quorum.

78(2) de la Loi ou parce que l'élection du chef ou d'un conseiller est rejetée en vertu de l'article 79 de la Loi.

(2) An accelerated election shall be held in accordance with sections 4 to 11 for the election of chief of a band whose reserve consists of more than one electoral section, or for the election of chief or councillor of any other band, subject to the following changes:

(2) Une élection accélérée doit être tenue conformément aux articles 4 à 11 pour élire le chef d'une bande dont la réserve est divisée en plus d'une section électorale ou le chef ou un conseiller de toute autre bande, compte tenu des adaptations suivantes :

…

[…]

12 **(1)** Within 45 days after an election, a candidate or elector who believes that

(a) there was corrupt practice in connection with the election,

(b) there was a violation of the Act or these Regulations that might have affected the result of the election, or

(c) 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 Assistant Deputy Minister particulars thereof duly verified by affidavit.

12 **(1)** Si, dans les quarante-cinq jours suivant une élection, un candidat ou un électeur a des motifs raisonnables de croire :

a) qu'il y a eu manœuvre corruptrice en rapport avec une élection,

b) qu'il y a eu violation de la Loi ou du présent règlement qui puisse porter atteinte au résultat d'une élection, ou

c) qu'une personne présentée comme candidat à une élection était inéligible,

il peut interjeter appel en faisant parvenir au sous-ministre adjoint, par courrier recommandé, les détails de ces motifs au moyen d'un affidavit en bonne et due forme.

(2) Where an appeal is lodged under subsection (1), the Assistant Deputy Minister

(2) Lorsqu'un appel est interjeté au titre du paragraphe (1), le sous-ministre adjoint

shall forward, by registered mail, a copy of the appeal and all supporting documents to the electoral officer and to each candidate in the electoral section in respect of which the appeal was lodged.

fait parvenir, par courrier recommandé, une copie du document introductif d'appel et des pièces à l'appui au président d'élection et à chacun des candidats de la section électorale visée par l'appel.

(3) Any candidate may, within 14 days of the receipt of the copy of the appeal, forward to the Assistant Deputy Minister 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.

(3) Tout candidat peut, dans un délai de 14 jours après réception de la copie de l'appel, envoyer au sous-ministre adjoint, par courrier recommandé, une réponse par écrit aux détails spécifiés dans l'appel, et toutes les pièces s'y rapportant dûment certifiées sous serment.

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

(4) Tous les détails et toutes les pièces déposés conformément au présent article constitueront et formeront le dossier.

13 (1) The Minister 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 deems necessary, in such manner as he deems expedient.

13 (1) Le Ministre peut, si les faits allégués ne lui paraissent pas suffisants pour décider de la validité de l'élection faisant l'objet de la plainte, conduire une enquête aussi approfondie qu'il le juge nécessaire et de la manière qu'il juge convenable.

(2) Such investigation may be held by the Minister or by any person designated by the Minister for the purpose.

(2) Cette enquête peut être tenue par le Ministre ou par toute personne qu'il désigne à cette fin.

(3) Where the Minister designates a person to hold such an investigation, that person shall submit a detailed report of the investigation to the Minister for his

(3) Lorsque le Ministre désigne une personne pour tenir une telle enquête, cette personne doit présenter un rapport détaillé de l'enquête à

consideration.	l'examen du Ministre.
14 The Minister shall report to the Governor in Council when the Minister is satisfied that	**14** Le Ministre fait rapport au gouverneur en conseil lorsqu'il est convaincu :
(a) there was corrupt practice in connection with an election;	**a)** soit qu'il y a eu des manœuvres frauduleuses à l'égard d'une élection;
(b) there was a contravention of the Act or these Regulations that might have affected the result of an election; or	**b)** soit qu'il y a eu violation de la Loi ou du présent règlement pouvant influer sur le résultat d'une élection;
(c) a person nominated to be a candidate in an election was ineligible to be a candidate.	**c)** soit qu'une personne présentée comme candidat à une élection ne possédait pas les qualités requises pour être admissible à la candidature.

Issues and Standard of Review

[12] In his submissions, the Applicant identifies the following issues:

i. Did the Minister err in her choice of procedure and application of the law/legislation regarding her decision?

ii. Was the Minister's decision procedurally unfair or unreasonable?

iii. Should the Enoch band council be entitled to declare the Applicant a councillor?

[13] The Respondent frames the issues as:

i. What is the appropriate standard of review regarding questions of (a) legislative authority and (b) procedural fairness?

ii. Does the Minister have legislative authority to appoint the Applicant to a councillor position with Enoch?

iii. Does the Enoch band council have legislative authority to appoint the Applicant to a councillor position?

iv. Does section 35 of the *Constitution Act, 1982* provide for the relief the Applicant seeks?

v. Was the duty of procedural fairness owed to the Applicant infringed upon as a result of (a) the length of time it took for the decision to be rendered and (b) the thoroughness of the reasons for the decision?

[14] In my view, the issues can be addressed as follows:

Issue 1: Did the Minister err in finding that she lacked legislative authority to declare the Applicant elected to a councillor position?

Issue 2: Did the Minister err in finding that the Enoch band council does not have legislative authority to declare the Applicant elected to a councillor position?

Issue 3: Was there a breach of the duty of procedural fairness?

Issue 4: What remedies are available to the Applicant?

[15] As to the standard of review, the Respondent submits, based on its characterization of the issues and paragraphs 30 and 50 of *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], that the question of whether the Minister or the Enoch band council have the legislative authority to declare the Applicant elected as a councillor is a pure question of jurisdiction attracting the correctness standard. I note, however, that in *Dunsmuir* the Supreme Court stated that: "'Jurisdiction' is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdictional questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction…" Further, the Supreme Court stated that jurisdictional questions will be narrow and cautioned that reviewing judges

must not brand as jurisdictional issues that are doubtfully so (*Dunsmuir* at para 59) and, more recently, that "[t]he reality is that true questions of jurisdiction have been on life support since *Alberta Teachers*. No majority of this Court has recognized a single example of a true question of *vires*, and the existence of this category has long been doubted" (*Canadian (Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 41, see also paras 34-41).

[16] Here, the Minister was conducting an appeal of the subject election. The Minister had to decide if there was a contravention of the *Indian Act* or the IBE Regulations that might have affected the result of that election (s 14(b), IBE Regulations). The Minister decided that there was and reported this to the GIC which then set aside the election of Kelly Morin based on the Minister's finding and recommendation (s 79(b), *Indian Act*). The authority of the Minister to make that decision is not at issue. What is at issue is whether, having made that decision, the Minister and the Enoch band council were precluded from going further and declaring the Applicant elected, as the Director stated in his reasons.

[17] In his application for judicial review, the Applicant challenges the Minister's conclusion that neither she nor the Enoch band council have the power or the authority to declare the Applicant as elected to a councillor position on the basis that a reasonable interpretation of provisions of the *Indian Act* does not support that finding.

[18] In *Dunsmuir*, when discussing the determination of the appropriate standard of review, the Supreme Court held: "[d]eference will usually result where a tribunal is interpreting its own statute or statues closely connected to its functions, with which it will have a particular

familiarity" (para 54). Reasonableness has also previously been held to be the presumptive standard of review for ministerial interpretations of their home statute (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 49-50; *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85 at para 40; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34).

[19] In considering the appropriate standard of review in accordance with paragraphs 51-65 of *Dunsmuir*, and the circumstances of this matter, I am not convinced that this is a question of pure jurisdiction as the Respondent submits. Rather, it is one of statutory interpretation by the Minister of a statute with which she has a particular familiarity. Accordingly, in my view, reasonableness is the standard of review applicable to issues 1 and 2. That said, whether the standard is correctness or reasonableness is not determinative of the outcome of this application for judicial review.

[20] As to the third issue, the standard of review of correctness applies to issues of procedural fairness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 43, 59 and 61). And, as recently noted by Justice Rennie of the Federal Court of Appeal, "[a] court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]).

Issue 1: Did the Minister err in finding that she lacked legislative authority to declare the Applicant elected to a councillor position with the Enoch band council?

[21] It is undisputed that the Applicant had enough votes to be elected councillor and that this should, and would, have been the outcome but for a tallying error. The Applicant submits that, as a result, he should be declared to be a councillor.

[22] He submits that the finding that the Minister does not have the authority to declare the Applicant elected as a councillor failed to take into consideration s 74(1) and s 74(3)(b) of the *Indian Act* which allow the Minister to make that declaration. Further, s 8(1) of the IBE Regulations and s 23 of the *First Nations Elections Act*, SC 2014, c 5 both confirm that candidates with the majority of votes will become councillors. Given that the Minister confirms that the Applicant had sufficient votes to be elected, and that the *Indian Act* specifically contemplates the election of those who receive the majority of votes, it reasonably follows that he should be declared elected. The Applicant acknowledges that neither the *Indian Act* nor the IBE Regulations directly address declaration of a candidate as elected following a recount. However, he submits that this legislative gap or deficiency has resulted in a decision that compromises the democratic and electoral process for the Applicant and Enoch. He points out that the Minister has overarching general authority over band elections pursuant to the *Indian Act* which is broadly and generally drafted. He submits that the Minister should interpret ambiguous legislation to the benefit of First Nations. Further, the Minister is infringing on Enoch's right to internal political authority by refusing to declare the Applicant to be a councillor, given that the Enoch band members democratically elected him. The declaring of the Applicant to be elected as a councillor is simply the right thing to do.

[23] In my view, s 74 (1) of the *Indian Act*, as relied upon by the Applicant, does not assist him. It simply provides that the Minister may declare, after a date set out, that chief and council are to be selected by elections to be held in accordance with the *Indian Act*. Similarly, s 74(3)(b)(i) simply stipulates that, for the purpose of giving effect to s 74(1), the GIC may make orders or regulations to provide that councillors of a band shall be elected by majority vote. In this case, the relevant regulations are the IBE Regulations, s 8(1) of which stipulates that immediately after completing the counting of the votes, the electoral officer shall publically declare to be elected the candidates having the highest number of votes.

[24] The legislative authority of the GIC to set aside the election of a councillor comes from s 79(b) of the *Indian Act*, which was relied upon by the Minister and the GIC in this matter. But s 79 goes no further. As to the procedure to be followed when an election is set aside, s 11.1(1) of the IBE Regulations concerns accelerated elections. It states that the accelerated election process set out applies to an election where, as a result of the office of chief or a councillor becoming vacant under s 78(2) of the *Indian Act*, or the election of a chief or councillor being set aside under s 79, it is no longer possible for the council of a band to form a quorum. In other words, it sets out the accelerated election process to be followed if the vacating or the setting aside of an election has the result of a loss of quorum, which is not the circumstance in this matter. Under s 78(4), where an office is vacated more than three months before the date when another election would ordinarily be held, a special election may be held to fill the vacancy.

[25] The Respondent points to *Lambert v Canada (Attorney General)*, 2012 FC 832 [*Lambert*] which is factually similar to this matter. There, Mr. Lambert was denied his rightful election as

chief by a simple counting error and a candidate with fewer votes was declared the winner. The GIC recognized the error and set aside the election, but took no further steps. Mr. Lambert sought a remedy that would place him in office as chief. He submitted that the Minister and the GIC should have declared him chief or, alternatively, convened a by-election, bearing the cost of same.

[26] Mr. Lambert argued that the GIC and the Minister failed to exercise their discretion by not declaring him chief or calling a by-election and unreasonably fettered their discretion in that regard. As here, Mr. Lambert relied on the silence of the *Indian Act* and the IBE Regulations as to the responsibility of the Minister or the GIC when an election recount is complete, submitting that the *Indian Act* is to be interpreted in a broad and liberal manner and, by doing so, the Minister and the GIC had the authority to declare the correct person as chief following a recount. Mr. Lambert submitted that it was unfair and unreasonable of the Minister to do nothing once the error was found. In rejecting that argument, Justice Mosley stated:

> [26] The *Indian Act* and the *Election Regulations* do not give the Minister or the Governor in Council the power to declare someone Chief after a successful election appeal. S.79 of the *Indian Act* provides that the Governor in Council may only set aside, as it did, the election. A broad and liberal interpretation of the *Indian Act* does not enable the Court to give more power to the Minister or to the Governor in Council when the Act clearly indicates that Parliament did not delegate such power to either office. To infer otherwise would to be to assume that Parliament intended that the Minister or Governor in Council could impose a Chief on the band following a contested election.
>
> [27] As stated by Strayer, D.J. in *McIvor v Canada (Attorney General)* 2006 FC 1187 at paragraph 11, “Parliament has provided the Governor in Council with a power of oversight of certain band elections. It is no doubt a power to be used sparingly.

[27] In *Lambert*, Justice Mosley made these findings in the context of the question of whether the Minister failed to exercise his discretion by not declaring Mr. Lambert elected as chief. Regardless, the same principles apply. By virtue of the rule of law, all exercises of public authority must find their source in law (*Dunsmuir* at para 28) and the *Indian Act* does not authorize the Minister or the GIC to declare elected a person who successfully appeals an election result. Further, in the context of statutory interpretation, where there is a gap in a legislative scheme, courts will generally be reluctant to read-in to the legislation to fill the gap or cure under-inclusive legislation that fails to apply to circumstances that need to be covered. This is because it is not the role of the court to second guess the legislature or to amend legislation (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis Canada, 2014) at paras 380-381).

[28] I agree with the Applicant that it logically follows from the *Indian Act* and the IBE Regulations, not to mention the very fabric of the democratic process, that because he received the majority of votes, he should be recognized as an elected councillor. In my view, once the Minster and the GIC acknowledged and acted upon the tallying error and acknowledged that the Applicant should have been declared the winner, this became a matter of achieving the correct democratic result of that valid election. The difficulty here is that in the absence of any source of law permitting the Minister and the GIC to make the desired declaration, the Court's hands are tied. It cannot order that they do something they have no legislative authority to do.

[29] That said, and although this was not raised by the Applicant, it is entirely unclear to me if and why, in these particular circumstances, a declaration is required in order for the Applicant to

take office. It is undisputed that the Applicant received the required majority of votes and, but for a tallying error, he would have been declared elected. There is no issue as to the validity of the election itself and the election of the candidate declared in error to be elected was set aside. Thus, there is no issue of the displacement of a sitting council member, or of the election more broadly being invalid or tainted by corruption. Counsel for the Respondent was unable to point me to anything in the *Indian Act* that required a declaration in these circumstances.

[30] Further to the same point, the OIC merely sets aside the election of Kelly Morin. Yet, in effect, the Minister interprets this to also render the July 25, 2017 election results pertaining to the Applicant, although confirmed on recount, to be invalid or of no effect – due to the absence of legislative authority to declare him elected. Given this, the Minister then also concludes that the Applicant's only remedy is to seek office by becoming a candidate at a future by-election that may be held to fill the vacant position.

[31] However, neither the *Indian Act* nor the IBE Regulations stipulate that a declaration is required following a recount and resultant setting aside of the election of an individual to a position, or that running in an optional special election is the only recourse in such circumstances. Further, there may well be a distinction between, on the one hand, an office becoming vacant (*Indian Act*, s 78(2)) giving rise to the potential of calling a special election (s 78(4)), and, on the other hand, the setting aside of the election of a councillor (s 79), as was done in this case. It is true that the legislative scheme appears to suggest that, unless quorum is lost due to an elected position being set aside or becoming vacant, an accelerated election is not

necessary. Further, that a special election may be held if an office is vacated. However, the *Indian Act* is silent as to the conduct of a special election when an elected position is set aside.

[32] The Director's letter does not explain why the Minister was of the view that a declaration was required following the recount or why, for example, the electoral officer could not have simply declared the corrected election result. Nor does the Director explain why a special election was the Applicant's only available remedy in these circumstances. This appears to be premised on the view that a declaration was required to validate his election and on the Director's stated view that the office of councillor held by Kelly Morin was 'vacated', thus giving rise to the possibility of a special election. In my view, it is questionable whether in fact his position was vacated – as that term is described in the legislation. Nor does it make much sense that the Applicant would have to run in an entirely new optional election for the position he has already been elected to fill.

[33] However, as the Applicant did not raise either the question of the necessity of a declaration following recount and the setting aside of an election of an individual to a position, or the distinction between that circumstance and the vacating of a position, I make no finding in that regard. Nor, for the same reason and in the context of the reasonableness of the decision, do I make any finding as to the adequacy of the Minister's reasons for finding that a declaration was required and that an optional, special election was the only available recourse. I do, however, agree with the Respondent that the reasons were sufficient to explain that the legislation did not afford either the Minister or the Enoch band council specific authority to declare the Applicant elected.

Issue 2: Did the Minister err in finding that Enoch does not have legislative authority to declare the Applicant elected to a councillor position?

[34] The Applicant submits that Enoch maintains its inherent right to self-government pursuant to s 35 of the *Constitution Act, 1982* (Schedule B to the Canada Act 1982 (UK), 1982, c 11) [*Constitution Act, 1982*] and, as such, it has the right to make decisions pursuant to its electoral matters. The current chief and councillors intended to honour the recount results and the community decision to vote the Applicant into office but the Minister declared that this was not permitted and imposed an unrealistic and expensive condition of a by-election. The decision not to make the declaration infringes on Enoch's protected right to governance. The Applicant submits that Enoch should not be limited in its ability to declare the Applicant a councillor.

[35] For its part, the Respondent states that, like the Minister, the Enoch band council has no legislative authority to make the requested declaration. It is open to First Nations to adopt a custom election code which could, if the First Nation so wished, provide for a remedy of the sort that the Applicant seeks. However, Enoch has not done so and the election was therefore governed by the *Indian Act* which contains no provision granting it's band council authority to declare the Applicant to be a councillor. The Respondent notes that, pursuant to s 78(4), it was open to the Enoch band council to seek a special election to fill the vacancy created by the declaration removing Kelly Morin as a councillor, but it chose not to do so. And while the Minister did have the discretionary power to call a special election, this must be balanced with Enoch's inherent right to self-government. As to s 35 of the *Constitution Act, 1982*, this recognizes and affirms the existing Aboriginal and treaty rights of the aboriginal peoples of Canada. Canada respects the s 35 rights of Enoch and the Applicant, and supports Enoch's

inherent right to self-government. However, to the extent that the Applicant relies on any collective right held by Enoch pursuant to s 35, the subject application for judicial review has been brought by an individual member of Enoch and not Enoch First Nation. An important party is therefore not before the Court to argue this point and the issue, therefore, should not be decided in the context of this limited application.

[36] In my view, the Minister's finding that the Enoch band council lacks authority to declare that the Applicant is an elected councillor is, in the absence of a legislative provision granting that authority, not in error. As to the Respondent's submission that, by the adoption of a custom election code, Enoch could put in place an election process of its own choosing that could speak to situations such as this, while this may be true, in my view, it is not an answer to the issue which now arises from the electoral provisions, or lack thereof, contained in the *Indian Act*.

[37] As to the Applicant's submissions concerning Enoch's right to self-governance, aboriginal and treaty rights are protected by s 35 of the *Constitution Act, 1982*. However, Enoch is not a party to this application for judical review. Its view on the impact of the decision on its right to self-governance is unknown. And, in any event, issues of infringement of rights are generally not best dealt with by way of judicial review (*Kitkatla Band v Canada (Minister of Fisheries and Oceans)* (2000), 181 FTR 172 (TD) at para 19; *Prophet River First Nation v Canada (Attorney General),* 2015 FCA 15 at paras 79-80). Accordingly, I agree with the Respondent's submission that this is not an appropriate venue for determination of s 35 rights.

Issue 3: Was there a breach of the duty of procedural fairness?

[38] The Applicant submits that he and Enoch were not afforded the level of procedural fairness to which they were entitled when applying the *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] factors.

[39] He submits that there was an extensive delay of fourteen months between the recount being conducted and when the Applicant and the Enoch band council were notified of the tallying error and the resultant OIC that invalidated the election of Kelly Morin, and the Minister's confirmation that the Applicant had received the majority of votes and, but for the error, would have been declared elected. The Minister was aware that, during this time, a candidate who was not validly elected was acting in the position of councillor, but still the Minister did not alert the Applicant and Enoch of the recount results. The Minister's decision was of significant importance as it prevented the Applicant from serving as an elected councillor, with attendant increase of salary, thus denying him of this opportunity and denying Enoch of the benefit of his public service. It also defeated the democratic process, as well as Enoch's inherent and fundamental right to self-govern.

[40] Further, the Applicant submits that the Minister failed to provide any reasons supporting the unreasonable and incorrect claim that the Minister and the Enoch band council lack legislative authority to declare the Applicant elected.

[41] The Applicant also submits that he had requested that all of the ballots be recounted. Instead, and without explanation despite requests for such, the Minister recounted the ballots for only the last three councillor positions. Thus, it is possible that there were other discrepancies and errors in the election results. If so, then a by-election may have been a viable option had all of the votes been recounted in October 2017 and the results provided in a timely fashion.

[42] The Respondent acknowledges that the Applicant is entitled to a general duty of procedural fairness but asserts the procedure followed was fair in all regards. As to the length of the delay, this is acknowledged but the Respondent submits that it did not prejudice the Applicant or render the decision unfair (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 101, 105 [*Blencoe*]). Nor is there any evidence that, if the OIC had been issued earlier, the outcome would differ. This is because the Minister would still lack the authority to declare the Applicant elected to the councillor position and, while a special election could have been sought by the Enoch band council at an earlier date, this would not have guaranteed the Applicant the councillor position.

[43] As a starting point, I note that it is undisputed that the recount was held on October 19, 2017 but that the Applicant and the Enoch band council were not advised of the results until the Director's letter dated December 5, 2018, received on December 7, 2018, fourteen months later. Although the Director filed an affidavit in this application for judicial review, it is silent as to the delay. It neither acknowledges the delay nor offers any explanation for it. When appearing before me, counsel for the Respondent acknowledged that the delay was not justified and should not have occurred.

[44] I also note that the Applicant is self-represented. He did not make a request, as he was entitled to do, for the certified tribunal record. Nor did the Respondent, of its own accord, cause the record to be issued. Thus, there is no record that might shed light on the delay.

[45] In the supporting affidavit filed by the Applicant, he explains that the cost of a by-election is a significant expense, approximately $45,000. The next election is expected to be held on June 24, 2019. Given the fourteen-month delay, the cost of a by-election and that there were still nine councillors remaining, such that council's ability to function and form a quorum was not impacted, when the OIC was received in December 2018, the Enoch band council determined that a by-election would not be held. The Applicant states that in these circumstances it simply did not make sense to do so. In my view, this was a reasonable and fiscally sound approach in the circumstances that Enoch and the Applicant were facing.

[46] Here, the term of elections is determined by s 78(1) of the *Indian Act*, being twenty-four months. The recount was completed on October 19, 2017. It would have been apparent to the Minster that a delay of fourteen months in communicating the recount results would likely negatively impact the Applicant and Enoch. First, a person who was not duly elected was acting as a councillor and was being paid to do so. Second, the Applicant was unable to serve in that position and was not receiving compensation that he would otherwise have been entitled to. Third, the democratic process was undermined as Enoch's democratically expressed choice for band councillor was unable to fill that position. Fourth, if a special election was required to fill the position, then a lengthy delay made it unlikely that this would occur given the cost and erosion of the current election term.

[47] The Respondent relies on *Blencoe* for the proposition that even if the delay were deemed to be unreasonable, in order for it to constitute a breach of procedural fairness, the delay must also be prejudicial in a significant way. In *Blencoe*, having concluded that the respondent's *Charter* rights were not violated by state-caused delay in the human rights proceedings against him, the Supreme Court went on to consider whether the delay could amount to a denial of natural justice or an abuse of process, even where the respondent's ability to have a fair hearing was not compromised and he had not been prejudiced in an evidentiary sense (paras 101-104). The Court was prepared to recognize that a delay may amount to an abuse of process if the delay was clearly unacceptable and had directly caused a significant prejudice. To be found unacceptable, the delay must have been unreasonable or inordinate, based on contextual factors. There is no abuse of process by delay *per se*:

> 122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[48] In this matter, the recount itself was straightforward. It involved counting a relatively small number of votes. There is no evidence that an investigation was conducted pursuant to s 13(1) of the IBE Regulations. The delay was caused solely by the Respondent who, unlike in *Lambert*, offers no explanation for why fourteen months elapsed between when the votes were recounted and when the Applicant was informed of the miscount. No justification for the delay is offered nor is it suggested by the Respondent that the time it took to advise the Applicant of the

recount results was in keeping with the normal practice and usual timelines. The delay should also be considered in the context of the purpose of the appeal process, which includes ensuring that the persons holding office are those that were democratically elected, and in view of the fact that the election results are only valid for a two-year period and the longer the delay in announcing the recount results the less likely it is that a special election might be called, if indeed that is the only remedy open to the Applicant as the Minister maintains.

[49] In these circumstances, I am persuaded that a delay of fourteen months to inform the Applicant that he had received enough votes and that he should have been declared to be elected as councillor was unreasonable and that the Applicant was significantly prejudiced by the delay, resulting in a breach of procedural fairness. Even if, as the Respondent argues, there is no certainty that the Applicant would have been elected if a special election had been called, the delay in releasing the recount results effectively eliminated the possibility of special election being called. The Enoch band council declined to do so and, although the Respondent asserts that the Minister had the discretion to convene a special election, she did not exercise her discretion to do so, despite being solely responsible for the unexplained delay. Further, the delay precluded the Applicant from seeking judicial review at an earlier time.

[50] In these circumstances, I am unable to conclude, given the nature of the substantive rights of the Applicant and the consequences for him arising from the delay, that a fair and just process was followed (*Canadian Pacific* at para 54).

Issue 4: What remedies are available to the Applicant?

[51] As I have found above, the *Indian Act* does not provide legislative authority to the Minister to declare the Applicant elected as councillor. Accordingly, this Court cannot order the Minister to do so. Similarly, it cannot order Enoch to make the declaration.

[52] However, the Applicant has asked that this Court declare that he was elected as a councillor of Enoch in the July 25, 2017 election.

[53] Pursuant to s 18(1)(a) of the *Federal Courts Act*, RSC 1985, c F-7 this Court may grant declaratory relief.

[54] The Supreme Court of Canada in *Ewert v Canada*, 2018 SCC 30 addressed the circumstances in which declaratory relief can be granted, stating:

> [81] A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 143; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 37; L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 88; see also *Federal Courts Rules*, SOR/98-106, r. 64. A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought: see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at pp. 830-33.

[55] The Supreme Court went on to state that a declaration is a discretionary remedy. And, "[l]ike other discretionary remedies, declaratory relief should normally be declined where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question" (para 83). It found that, the case before it, a statutory grievance procedure could potentially provide an alternative means to challenge whether the regulator had complied with its obligation and that, in most cases, this procedure would be reason to decline to grant a declaration. However, in the exceptional circumstances of the case before it, a declaration was warranted.

[56] In my view, in this matter, the criteria for declaratory relief are met and an adequate alternative statutory mechanism is not available to the Applicant.

[57] Here, according to the Minister, the only possible remedy available to the Applicant arises if the Enoch band council determines that a special election is to be held. This would be at Enoch's expense. It would also mean that the Applicant would have to run and win in a new election, even though it is undisputed that he was validly elected as a councillor in the July 25, 2017 election. I would also note that the possibility of the Enoch band council convening a special election was negatively impacted by the Minister's fourteen-month delay in advising the Applicant and Enoch of the recount results, given that the election is only for a twenty-four-month term, and that the Minister did not exercise any discretion she held to call a special election, even though the Minister was solely responsible for the unexplained delay.

[58] Further, the possibility of a special election is not an adequate alternative statutory mechanism protecting the Applicant's interests. According to the Minister, for the Applicant to assume his rightfully elected position, he must not only be validly elected by the majority of Enoch votes, which he was, but he must also be declared as elected. Given that the Minister has no legislative authority to make such a declaration and nor does the Enoch band council, the only suitable remedy in the exceptional circumstances surrounding this successful recount is for the Court to grant the declaratory relief that the Applicant requests.

[59] Even if I had found the decision to be unreasonable based on inadequate reasons explaining why a declaration was required and why a special election was the only available remedy, I would still have granted declaratory relief. This is because the unreasonable delay in releasing the recount results, which spawned this application for judicial review, means that there are now less than two months left until a new general election of the Enoch chief and council will be held. Thus, sending the matter back for reconsideration would be very unlikely to produce a new decision prior to the next election or, in any event, result in a special election.

JUDGMENT in T-2129-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;

2. The Applicant, Ronald Andrew Morin, is hereby declared to be elected as a councillor of the Enoch First Nation Band Council, pursuant to the recount of the July 25, 2017 election results, as reflected in the Order in Council, P.C. 2018-1489, dated November 29, 2018, and issued by the Governor in Council; and

3. As the Applicant did not seek costs, none are awarded.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2129-18
STYLE OF CAUSE:	RONALD ANDREW MORIN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	APRIL 11, 2019
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	MAY 9, 2019

APPEARANCES:

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Eve Coppinger Maria Mendola-Dow	FOR THE RESPONDENT

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