

Federal Court



Cour fédérale

Date: 20120516

Citation: 2012 FC 579

Ottawa, Ontario, May 16, 2012

**PRESENT:** The Honourable Mr. Justice Mosley

**BETWEEN:**

**Docket: T-435-11**

**RAYMOND CAMERON**

**Applicant**

**and**

**THE MINISTER OF INDIAN AFFAIRS AND  
NORTHERN DEVELOPMENT, GREG BLAIN,  
EARL BLAIN, AND ANGELINE THORNE**

**Respondents**

**AND BETWEEN:**

**Docket: T-1401-11**

**RAYMOND CAMERON**

**Applicant**

**and**

**ASHCROFT INDIAN BAND COUNCIL,  
GREG BLAIN IN HIS CAPACITY AS CHIEF  
OF ASHCROFT INDIAN BAND, EARL BLAIN  
IN HIS CAPACITY AS COUNCILLOR OF  
ASHCROFT INDIAN BAND, AND  
ANGELINE THORNE IN HER CAPACITY  
AS COUNCILLOR OF ASHCROFT INDIAN  
BAND**

**Respondents**

**REASONS FOR JUDGMENT**

**INTRODUCTION:**

[1] These Reasons for Judgment address two applications for judicial review that were joined and heard together at Vancouver on January 24, 2012. While the parties are not identical, the facts, pleadings and submissions are intertwined. Accordingly, the two applications are dealt with in these reasons. Both are brought under s.18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

[2] The application in Court docket T- 435-11 concerns a decision of the Minister of Indian Affairs and Northern Development (hereafter the Minister) to dismiss an appeal under s.12 of the *Indian Band Election Regulations*, CRC, c 952 (hereafter “the Regulations”) regarding the election of the Ashcroft Band council in June 2010.

[3] In May, 2011, the Government of Canada adopted what is described as a new “applied title” for the name of the respondent Minister’s position: “Minister of Aboriginal Affairs and Northern Development Canada”. However, the name of the Department and Minister remains unchanged in the statutes and that version will be used in these reasons.

[4] The second application, in Court docket T-1401-11, concerns the failure of the Ashcroft Band Council to apply the *Ashcroft Band Membership Rules* (hereafter “the Membership Rules”) to the Ashcroft Band’s membership list contrary to s.10 of the *Indian Act*, RSC, 1985, c I-5 and to the Membership Rules.

**BACKGROUND:**

[5] The Ashcroft First Nation occupies lands in the interior of British Columbia near the villages of Ashcroft and Cache Creek.

[6] In 1987, the First Nation assumed control of its membership under s.10(1) of the *Indian Act* by establishing written rules.

[7] Under the Band's Membership Rules, certain individuals are entitled to "automatic" membership based on prescribed criteria (Part II of the Membership Rules) related to parentage. The applicant Raymond Cameron falls within that category. Others who may be entitled to membership need to apply and be accepted by a majority of the Band electors during a membership meeting (Parts III and IV of the Membership Rules). The respondent Greg Blain is within the second group.

[8] In accordance with the Membership Rules, membership meetings were held regularly for some years. In 2005, the Band Council stopped holding the meetings. It appears from the evidence that Mr. Greg Blain was never formally recognized as a member by a membership meeting under the Membership Rules, despite his family ties to Band members. Nonetheless, his name was added to the membership list and to the list of those eligible to vote and stand for election. Greg Blain now holds the position of Chief. He was elected to that office in 2004 and has been subsequently reelected every two years.

[9] In 2009, some members of the Band, including the applicant, Mr. Cameron, raised concerns with Indian Affairs and Northern Development Canada (hereafter “INAC”) that the Band’s membership did not accord with the Membership Rules.

[10] In 2009, INAC and the Band Council set up a committee to review the membership of the Band. The committee was comprised of Ms. Starr, an Aboriginal lawyer and elder from Kitimat, British Columbia, Ms. Kirkpatrick a historian and elder of the Band, and the membership clerk of the time. The contract of Ms. Starr was terminated by the Band Council in September 2009 before she could present her findings to the Band. She and Ms. Kirkpatrick nevertheless produced reports.

[11] The Starr and the Kirkpatrick reports say that 76 individuals on the membership list were not entitled to Band membership (including the respondents Greg Blain and Earl Blain): 69 individuals did not apply for membership under the Membership Rules and 7 individuals were deceased or had voluntarily enfranchised. The reports also found that some individuals were not included on the list despite their eligibility as members under the Membership Rules, that regular membership meetings were not being held as required by the Membership Rules, and that deceased members were not consistently removed from the list.

[12] In June 2010, Mr. Cameron began an action in the British Columbia Supreme Court (hereafter “the BCSC”) seeking a declaration and order that some members be struck from the Band’s membership list. The action was dismissed on the ground that the Federal Court had exclusive jurisdiction over the matter (see *Cameron v Albrich*, 2011 BCSC 549).

[13] Mr. Cameron provided evidence to the Band Council and asked that it review the membership list on three occasions: 6 May 2010, 5 August 2011 and 24 August 2011. The respondent Chief and Councillors did not reply to the applicant's requests.

[14] On 8 June 2010, the Band held an election. The Band appointed an electoral officer with the approval of the Minister. The electoral officer, using the membership list provided by the membership clerk, prepared a voters' list. Those lists contained the names of individuals that Mr. Cameron alleges are not members of the Band. Mr. Cameron and Mr. Greg Blain, one of the respondents, were both candidates for the position of chief. The vote for chief was a tie and the electoral officer proceeded to a draw to determine the winner. Mr. Greg Blain was declared chief.

[15] Mr. Cameron appealed the election to the Minister. His appeal was based on the fact that the electoral officer allegedly refused to allow examination of the ballots cast during the election and refused examination of the two ballots used for the draw, including the winning ballot; that the electoral officer refused to correct the voters list; that an incorrect voters list was used for the election; that some candidates were not members of the Band; and that some candidates were nominated by individuals who were not members of the Band.

[16] The appeal was considered by a Minister's Delegate. The Delegate sent the materials submitted to the electoral officer and the other candidates for comments. Mr. Greg Blain was the only party to respond. His response was not disclosed to any other concerned party by the Delegate. The Delegate found the information received to be sufficient. Her decision was communicated to

the applicant by letter in February 2011. The letter states that the appeal was dismissed after consideration of the material sent by him and the respondent.

[17] In her letter, the Delegate notes that the Band assumed controlled of its membership pursuant to s.10 of the *Indian Act* and states that INAC could not, therefore, interfere in the Band's membership issue. It was noted that the membership issue was, at that time, before the BCSC. INAC thus had no choice, in the Delegate's view, but to assume that the membership list and the voters list were valid until the Band or a Court changed the lists. The Delegate indicated that the electoral officer was also bound by the membership list and did not have the authority to challenge it. Finally the Delegate concluded that no corrupt practice occurred during the election and that the electoral officer carefully carried out his obligations.

[18] There is no evidence in the record of formal decisions by the Chief and Council not to hold membership meetings or to add persons to the membership list and voters list without conforming to the Membership Rules. The absence of such evidence is not an answer to this application: *Okemow-Clark v Lucky Man Cree Nation*, 2008 FC 888, upheld by 2010 FCA 48, at para 30. In *Okemow-Clark*, Justice de Montigny dismissed an argument that the application was premature because there was no evidence of a formal decision to remove the applicants from the Band List. He found that a decision had been made and that the Band Council had acted upon it.

[19] In *Cameron v Aldrich*, above, Mr. Justice Punnett noted the reasoning in *Okemow-Clark* and stated the following in relation to the facts in dispute on this application, at paragraph 23:

I find that the fact that the Band Council or Membership Clerk failed to comply with the *Membership Rules* does not mean there was no

decision. The Band delegated certain functions to the Band Council, the Membership Committee and the Membership Clerk. It is their alleged failure to comply with the *Membership Rules* that is at the root of the dispute. The Band Council decided to place individuals on the Band List without following the *Membership Rules*. This may be a decision that is subject to judicial review in the appropriate court and between the appropriate parties.

[20] I agree with the findings and reasoning in *Okemow-Clark* and *Cameron v Aldrich*. From the evidence, I draw inferences of fact that the Band Council deliberately failed to convene membership meetings and placed individuals on the Band membership list who had not been approved for membership in accordance with the Membership Rules. These decisions and actions are reviewable in this Court on this application.

**ISSUES:**

[21] The facts underlining the issues in T-1401-11 (failure to enforce the Membership Rules) are at the basis of the election appeal under review in T-435-11.

[22] The issues in T-1401-11 are:

- a. Did the Ashcroft Band Council exceed its jurisdiction by refusing to apply the Membership Rules and review the Band list?
- b. Did the Ashcroft Band Council breach procedural fairness in failing to respond to the applicant's requests for a membership review?
- c. Does the applicant have standing to challenge the Band's failure to act?
- d. If the application succeeds, what is the appropriate remedy?

[23] The issues in T-435-11 are:

5. Did the Minister err in interpreting the *Indian Act* and the Regulations?
6. Was the decision of the Minister reasonable?
7. Did the Minister commit a breach of procedural fairness?

**RELEVANT LEGISLATION:**

[24] Sections 2, 8, 10 (1) (8) (9) & (10), 14.2(1) & (2), 77, and 79 of the *Indian Act*, RSC, 1985,

c I-5 read as follow:

**2.** (1) In this Act,

**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.

“Band List” means a list of persons that is maintained under section 8 by a Band or in the Department;

« liste de Bande » Liste de personnes tenue en vertu de l'article 8 par une Bande ou au ministère.

“member of a Band” means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

« membre d'une Bande » Personne dont le nom apparaît sur une liste de Bande ou qui a droit à ce que son nom y figure.

**8.** There shall be maintained in accordance with this Act for each Band a Band List in which shall be entered the name of every person who is a member of that Band.

**8.** Est tenue conformément à la présente loi la liste de chaque Bande où est consigné le nom de chaque personne qui en est membre.

**10.** (1) A Band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the Band has given appropriate notice of its intention to assume control of

**10.** (1) La Bande peut décider de l'appartenance à ses effectifs si elle en fixe les règles par écrit conformément au présent article et si, après qu'elle a donné un avis convenable de son intention de décider de cette appartenance, elle y est



its own membership, a majority of the electors of the Band gives its consent to the Band's control of its own membership.

autorisée par la majorité de ses électeurs.

[...]

[...]

(8) Where a Band assumes control of its membership under this section, the membership rules established by the Band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the Band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the Band.

(8) Lorsque la Bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au ministre a été donné en vertu du paragraphe (6); les additions ou retranchements effectués par le registraire à l'égard de la liste de la Bande après cette date ne sont valides que s'ils sont effectués conformément à ces règles.

(9) A Band shall maintain its own Band List from the date on which a copy of the Band List is received by the Band under paragraph (7)(b), and, subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date.

(9) À compter de la réception de l'avis prévu à l'alinéa (7)b), la Bande est responsable de la tenue de sa liste. Sous réserve de l'article 13.2, le ministère, à compter de cette date, est déchargé de toute responsabilité à l'égard de cette liste.

(10) A Band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the Band, is entitled or not entitled, as the case may be, to have his name included in that list.

(10) La Bande peut ajouter à la liste de Bande tenue par elle, ou en retrancher, le nom de la personne qui, aux termes des règles d'appartenance de la Bande, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans la liste.

**14.2** (1) A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion

**14.2** (1) Une protestation peut être formulée, par avis écrit au registraire renfermant un bref exposé des motifs invoqués,

of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds therefor.

(2) A protest may be made under this section in respect of the Band List of a Band by the council of the Band, any member of the Band or the person in respect of whose name the protest is made or that person's representative.

[...]

**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.

(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.

**77.** (1) A member of a Band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the Band and, where the reserve for voting purposes consists of one

contre l'inclusion ou l'addition du nom d'une personne dans le registre des Indiens ou une liste de Bande tenue au ministère ou contre l'omission ou le retranchement de son nom de ce registre ou d'une telle liste dans les trois ans suivant soit l'inclusion ou l'addition, soit l'omission ou le retranchement.

(2) Une protestation peut être formulée en vertu du présent article à l'égard d'une liste de Bande par le conseil de cette Bande, un membre de celle-ci ou la personne dont le nom fait l'objet de la protestation ou son représentant.

[...]

**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) 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.

**77.** (1) Un membre d'une Bande, qui a au moins dix-huit ans et réside ordinairement sur la réserve, a qualité pour voter en faveur d'une personne présentée comme candidat au poste de chef de la Bande et, lorsque la réserve, aux fins

section, to vote for persons nominated as councillors.

d'élection, ne comprend qu'une section électorale, pour voter en faveur de personnes présentées aux postes de conseillers.

(2) A member of a Band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section

(2) Un membre d'une Bande, qui a dix-huit ans et réside ordinairement dans une section électorale établie aux fins d'élection, a qualité pour voter en faveur d'une personne présentée au poste de conseiller pour représenter cette section.

**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

**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) there was corrupt practice in connection with the election;

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

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

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

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

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

[25] Sections 2, 4 (1) (a), 7, 9 and 12 to 14 of the *Indian Band Election Regulations*, CRC, c 952

state:

**2.** In these Regulations,

**2.** Dans le présent règlement,

“elector”, in respect of an election of the chief or

« électeur » S'entend, à l'égard de l'élection du chef ou des

councillors of a Band, means a person who is qualified under section 77 of the Act to vote in that election; (*électeur*)

conseillers d'une Bande, d'une personne ayant les qualités requises pour voter à cette élection en vertu de l'article 77 de la Loi. (*elector*)

“electoral officer” means the superintendent or the person appointed by the council of the Band with the approval of the Minister; (*président d'élection*)

« président d'élection » signifie le surintendant ou la personne désignée par le conseil de la Bande avec l'assentiment du ministre; (*electoral officer*)

**4.** (1) At least 79 days before the day on which an election is to be held

**4.** (1) Au moins soixante-dix-neuf jours avant l'élection :

(a) where the Band holding the election has assumed control of its own membership under section 10 of the Act, the Band shall provide the electoral officer with a list of the names of all electors;

a) lorsque la Bande qui tient l'élection a choisi de décider de l'appartenance à ses effectifs selon l'article 10 de la Loi, la Bande fournit au président d'élection le nom des électeurs;

**9.** Where it appears that two or more candidates have an equal number of votes, the electoral officer shall give a casting vote for one or more of such candidates, but the electoral officer shall not otherwise be entitled to vote.

**9.** Lorsqu'il arrive que deux candidats ou plus ont obtenu un nombre égal de votes, le président d'élection doit déposer un vote prépondérant en faveur de l'un ou de plusieurs de ces candidats, mais le président d'élection n'a pas

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

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

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

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

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

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

of the election, or

résultat d'une élection, ou

(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.

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 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.

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

**13.** (1) Le Ministre peut, si les faits allégués ne lui paraissent pas suffisants pour décider de la validité de l'élection faisant

complained of, conduct such further investigation into the matter as he deems necessary, in such manner as he deems expedient.

l'objet de la plainte, conduire une enquête aussi approfondie qu'il le juge nécessaire et de la manière qu'il juge convenable.

**14. Where it appears that**

**14. Lorsqu'il y a lieu de croire**

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

a) qu'il y a eu manoeuvre corruptrice à l'égard d'une élection,

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

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) a person nominated to be a candidate in an election was ineligible to be a candidate, the Minister shall report to the Governor in Council accordingly.

c) qu'une personne présentée comme candidat à une élection était inadmissible à la candidature, le Ministre doit alors faire rapport au gouverneur en conseil.

[26] Sections 1, 2, 13, 15 to 19, 21, 22, 24, 25, and 31 of the *Ashcroft Indian Band Membership*

*Rules* (Applicant's Record, at pp.27 to 39) state:

**Part I**

**1.** The Objective of the Ashcroft Indian Band in approving the establishment of these Rules is to protect the cultural and social identity of the Band, to maintain and strengthen the existing sense of community and to ensure continued peace and good order among the members of the Band.

**2.** In these Rules:

(3) "Band List" means a list of persons that is maintained under section 8 of the Indian Act, 1985, by the Band or the Department of Indian Affairs and Northern Development;

(14) "Membership Clerk" (the "Clerk") means a person appointed by the Council to perform the duties of registrar of Band Membership;

(15) “Membership Committee” (the “Committee”) means a committee appointed by Council consisting of four (4) Band members, at least 18 years of age, each of whom represents one of the four (4) major families of the Band, plus one impartial non-Band member who enjoys the confidence of the Band;

(16) “Member of the Band” means a person whose name appears on the Band List or is entitled to have his name appear on the Band List;

[Part II deals with original membership, Part III and IV deals with discretionary membership and Part V deals with loss of membership.]

#### Part VI Application Procedure

**13.** All applications for Band membership shall be submitted to the Clerk on a form to be prescribed.

**15.** The Clerk shall assess the validity of the supporting documents for compliance with the eligibility criteria set out in Part IV of these Rules.

**16.** The Clerk shall forward the application with supporting documents and a brief report on their conformity with the rules to the committee.

**17.** The Committee shall recommend the acceptance or rejection of any application for Band membership to the Council.

**18.** The Council shall, upon receipt of the recommendation of the Committee, hold a referendum of Band members called for that purpose.

**19.** Referendum on Band membership shall be called by Council four (4) times each year in August, November, February and May, unless no application are received during any three (3) months period in any year.

**21.** Upon a vote in favor of a majority of those electors voting, the applicant shall be admitted as a member of the Band effective on the date of the referendum.

### Part VII Appeal Procedure

**22.** A person whose application is rejected by the members of the Band may, after three months from the date of the rejection, re-apply for Band membership according to Part VI of these Rules.

**24.** A person may re-apply for membership only one time after being rejected by the Band members and the second referendum on any re-application for membership shall be considered final.

**25.** No claim shall lie against the Band, the Council, a Band member, nor any of their agents for denial of membership according to these Rules.

[Part VIII deals with the amendment procedure of the Membership Rules and Part IX deals with the coming into force.]

### Part X Delegation of Power

**31.** The Band hereby delegates to the Council the authority to enact regulations to administer these Rules in a fair, impartial manner without discriminating on the basis of sex, religion, age or family and in accordance with the best interests of the Band.

### **STANDARD OF REVIEW:**

[27] In application T-1401-11, the Court is asked to order the Band Council to review the membership list as the applicant alleges that the Council has overstepped its jurisdiction in failing to apply the Membership Rules. The application for judicial review relates to the inaction or refusal to act of the Council. Therefore, this Court must determine if the Band Council has jurisdiction over the Band's membership and if the law creates positive obligations upon the Council with regards to membership. These are questions of law and jurisdiction which are normally reviewable upon a standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50.



[28] As indicated by the Court of Appeal in *Martselos v Salt River Nation #195*, 2008 FCA 221 at paragraph 32: “the main issues require a proper interpretation of the code in order for the Council to act within its jurisdiction. This interpretation must be correct in law and no deference is warranted” (see also *Angus v Chipewyan Prairie First Nation Tribal Council*, 2008 FC 932 at paras 31 to 33; *Felix v Sturgeon Lake First Nation*, 2011 FC 1139 at para 22; and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 53).

[29] Justice Beaudry described the standard in *Bacon v Appeal Board of the Betsiamites Band Council*, 2009 FC 1060 at paragraph 20:

[20] The Court agrees with the parties on this point. According to paragraphs 59-61 of *Dunsmuir*, where a decision maker does not have particular expertise in interpreting its enabling legislation or related legislation, the elements of the correctness standard must be applied when an interpretation issue arises. In the instant case, the Appeal Board does not have such particular expertise.

In this case the Band Council, as an elected body, has no particular expertise in interpreting the *Indian Act* and the Membership Rules. The appropriate standard of review for the T-1401-11 application is correctness.

[30] With regards to the election appeal, the applicant submits that the standard of review for the issue of the interpretation of the *Indian Act* and the Regulations is correctness as it is a question of law (*Esquega v Canada (Attorney General)*, 2007 FC 878, reversed on other grounds by 2008 FCA 182, at para 65; *Dumais v Fort McMurray No 468 First Nation*, 2010 FC 342 at para 4; *Martselos v Salt River Nation #195*, above, at para 28; and *Giroux v Swan River First Nation*, 2006 FC 285, varied on other grounds by 2007 FCA 108, at paras 54-55). The applicant argues that the standard

determined in *Esquega*, above, at paragraph 65, for decisions of the Governor in Council in election appeals should be used for decisions of the Minister in election appeals.

[31] The respondent Minister submits that since *Dunsmuir*, questions of law will not necessarily attract a standard of correctness as the Court owes deference to a tribunal when it interprets “its own statute or statutes closely connected to its function” (*Dunsmuir*, above, at paras 51 and 54).

Furthermore, the respondent Minister notes that the jurisprudence cited by the applicant does not concern decisions of the Minister but decisions of the Governor in Council, decisions of appeal committees and decisions of Band councils.

[32] *Dunsmuir* sets out a two step test to determine the standard of review: (1) verify if the standard was satisfactorily determined by the previous jurisprudence; and if not (2) proceed to an analysis of the factors making it possible to identify the proper standard. Considering the arguments in the previous paragraphs, I think it is appropriate to complete a standard of review analysis as set out in *Dunsmuir*, above, at paragraph 64:

[64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

See also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 16.

[33] Firstly, there is no privative clause in the *Indian Act* or in the Regulations. Secondly, the Minister's review of election appeals requires consideration of multiple interests and the balancing of costs and benefits between parties. The appeal process, as shown by the evidence and upon reading the *Indian Act* and the Regulations, is intended to be a time and cost-effective method of resolving disputes and thus should be treated with deference (*Dunsmuir*, above, at para 69; and *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 36). Thirdly, the question at issue is the interpretation of the *Indian Act* and the Regulations in the context of an election appeal. With regards to questions of law, the Supreme Court has noted the following at paragraph 55 of *Dunsmuir*:

[...] A question of law that is of “central importance to the legal system . . . and outside the . . . specialized area of expertise” of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[34] In this case, the law, the election provisions of the *Indian Act* and the Regulations, lies inside the specialized area of expertise of the decision-maker (*Esquega*, above, at para 62). The question of law is not central to the legal system. Finally, it is fair to assume that the Delegate has expertise in interpreting the electoral laws and in applying them in accordance with INAC policies (see *Dunsmuir*, above, at paras 54 and 68). All these factors point towards a high degree of deference. I therefore conclude that the appropriate standard of review of the Delegate's decision is reasonableness.

[35] When courts review a decision on the reasonableness standard they must look at the existence of justification, transparency and intelligibility within the decision-making process and see

if the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir*, above, at para 47.

[36] These applications also raise questions of procedural fairness. The Court must determine whether, in all of the circumstances of the decision, fairness was accorded the applicant: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Felix v Sturgeon Lake First Nation*, above, at para 23; *Bacon v Appeal Board of the Betsiamites Band Council*, above, at para 21; and *Esquega*, above, at para 65.

#### **ANALYSIS:**

#### **T-1401-11**

[37] This application invokes a concept at the very heart of our system of governance: the rule of law. It is well settled that Band councils must also respect this principle: *Laboucan v Little Red River Cree Nation No 447*, 2010 FC 722 at para 36; and *Long Lake Cree Nation v Canada (Minister of Indian and Northern Affairs)*, [1995] FCJ No 1020 at para 31.

[38] The importance of the rule of law was recently highlighted by Justice Douglas Campbell in *Friends of the Canadian Wheat Board v Canada (Attorney General)*, 2011 FC 1432 at paragraph 3:

[3] A most recent reminder of the rule of law as a fundamental constitutional imperative is expressed by Chief Justice Fraser in *Reece v Edmonton (City)*, 2011 ABCA 238 at paragraphs 159 and 160:

The starting point is this. The greatest achievement through the centuries in the evolution of democratic governance has been

constitutionalism and the rule of law. The rule *of* law is not the rule *by* laws where citizens are bound to comply with the laws but government is not. Or where one level of government chooses not to enforce laws binding another. Under the rule of law, citizens have the right to come to the courts to enforce the law as against the executive branch. And courts have the right to review actions by the executive branch to determine whether they are in compliance with the law and, where warranted, to declare government action unlawful. This right in the hands of the people is not a threat to democratic governance but its very assertion. Accordingly, the executive branch of government is not its own exclusive arbiter on whether it or its delegatee is acting within the limits of the law. The detrimental consequences of the executive branch of government defining for itself - and by itself - the scope of its lawful power have been revealed, often bloodily, in the tumult of history.

When government does not comply with the law, this is not merely non-compliance with a particular law, it is an affront to the rule of law itself [...].

[Emphasis by Campbell J.]

(See also *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 70-72; and *Re Manitoba Language Rights*, [1985] 1 SCR 721 at paras 59-60)

[39] While this application concerns a matter arising within the competence of a First Nation operating within the framework of both federal statute law and a membership code adopted by the Band, the principle remains the same.

[40] For the reasons set below, I will allow this application for judicial review.

1. Did the Ashcroft Band Council exceed its jurisdiction by refusing to apply the Membership Rules and review the Band list?

[41] Central to this application is the duty of keeping and administering the membership list; also known as a Band list under the *Indian Act*. This duty is found in s.8 of the *Indian Act*. A Band list can be maintained either by INAC (s.9) or by the Band itself (s.10). As noted by Justice Desjardins in *Abenakis of Odanak v Canada (Minister of Indian Affairs and Northern Development)*, 2008 FCA 126 at paragraph 2:

[2] Under the provisions of section 10 of the Act, which was enacted in 1985, a Band which wishes to do so may assume the control of its own membership if it establishes membership rules in writing and if it is authorized to do so "by a majority of its electors". According to the Minister of Indian Affairs and Northern Development, who shepherded the bill to amend the Act through the House of Commons on March 7, 1985, this measure was the beginning of a process for the complete political independence of Indians (House of Commons Debates, March 7, 1985, page 12: 7 see also *Sawridge Band v. Canada*, [2003] 3 C.N.L.R. 344 (F.C.T.D.), paragraphs 28 to 32).

[42] Section 10 has been described as protecting acquired rights: *Abenakis of Odanak v Canada*, above, at para 38. It gives Bands the opportunity to take control over their membership, a concept akin to citizenship as it holds obligations and privileges: participating in Band elections, living on reserve, receiving benefits, etc (*Sandberg v Norway House Cree Nation Band Council*, 2005 FC 656 at para 12). The concept of membership is thus linked with concepts of aboriginal self-governance and democracy.

[43] The Ashcroft Band took this opportunity in 1987 and adopted their Membership Rules pursuant to s.10(1) of the *Indian Act*. There is some dispute as to whether this was done on notice and with the consent of a majority of the electors of the Band as required by the section but the

initiative was accepted by the Minister and acted upon by the Band. The respondent Chief and Council can not now claim that the process of adopting the Membership Rules was not legitimate as INAC ceased to be responsible for the Band's membership following the 1987 decision and neither the action of the Band at that time nor the Minister's acceptance of the decision has been challenged.

[44] Subsection 10(9) of the *Indian Act* creates the obligation for the Band to maintain a Band list and subsection 10(10) gives the Band the power to add or delete names from the list in accordance with the Membership Rules. The maintenance of the membership list in accordance with the Membership Rules is a public law duty: *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 CNLR 205 at para 37.

[45] As described in the background section above, under the Band's Membership Rules, certain individuals are entitled to "automatic" membership based on certain criteria (Part II of the Membership Rules) while others who might be entitled to membership need to apply for membership and be accepted by a majority of the Band electors during a membership meeting (Part III and IV of the Membership Rules). Membership meetings must be held 4 times a year unless no applications were made during a period of 3 months.

[46] The Membership Rules include specific provisions on how to amend the rules (ss.26 to 29). The jurisprudence has established that membership rules cannot be modified at will: *Angus v Chipewyan Prairie First Nation Tribal Council*, above, at para 55. The Band Council is bound by

the Membership Rules and it cannot deviate from them: *Sandberg v Norway House Cree Nation Band*, above, at para 12.

[47] The respondent argues that s.10 creates no positive obligation and no legal duty to act. It relies mainly on the use of the word *may* in subsection 10(10) of the *Indian Act*. I find this argument wholly unconvincing.

[48] Under the primary rule of statutory interpretation, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21; and s.12 of the *Interpretation Act*, RSC 1985, c I-21.

[49] Considering that the purpose of s.10 of the *Indian Act* is to return control over membership to Bands, the wording of s.10(10) can be interpreted as enabling Bands to select the way in which they want to add or delete names from the membership list. Considering the self-governance purpose of s.10 of the *Indian Act*, Parliament's intention was to avoid imposing a specific method of managing the Band list and it instead left that question to the Bands to decide for themselves through their membership rules; hence the use of the wording "in accordance with the membership rules of the Band" in subsection 10(10).

[50] Furthermore, s.10(10) of the *Indian Act* should be read with the rest of the section and more specifically s.10(9), which does create a legal obligation: "A Band **shall** maintain its own Band List..." (emphasis added). The Ashcroft Band delegated the authority to make by-laws to



administer the Membership Rules “in a fair, impartial manner without discrimination...” to the Band Council: s.31 of the Membership Rules. Sections 18 and 19 of the Membership Rules also create positive obligations on the Council who must submit the membership committee report to a referendum.

[51] As indicated by Justice Snider in *Sandberg v Norway House Cree Nation Band*, above, at paragraph 12: “The Act together with the membership rules of each Band who chooses to control its own membership provide integrity to the process of becoming and remaining a member of a Band.”

[52] The Membership Rules and the *Indian Act* impose a duty upon the Band Council to maintain the membership list in accordance with the Membership Rules. This is supported by the analysis of Justice Punnett in *Cameron v Albrich*, above, at paragraphs 18 to 21, and 23. He observed at paragraph 21 that: “... [a]s noted, those *Membership Rules* give the Band Council the authority to assess, recommend and arrange for referendums on membership applications...”.

[53] The respondents argue that the proper method to challenge the membership of some individuals currently listed as Band members would be through a judicial review of each of the membership clerk’s decisions to add the names of those individuals on the Band list. In my view, that would be an unnecessary and wasteful expenditure of judicial resources. The applicant is not challenging the membership of any particular individual; rather he is asking this Court to ensure that the Band Council correctly applies the Membership Rules.

[54] Challenging the membership of each of the 76 allegedly false members would not only take a considerable amount of time, it would not accomplish what the applicant is trying to achieve through this application; namely to ensure that the Band Council abides by the Membership Rules. The rule of law does not solely circumscribe the action of governments, it also requires them to take action by assigning legal duties: see *David Suzuki Foundation v Canada (Minister of Fisheries and Oceans)*, 2010 FC 1233, varied in part on other grounds by 2012 FCA 40, at paras 163-164; and *Att Gen of Can v Inuit Tapirisat et al*, [1980] 2 SCR 735 at para 23.

[55] Contrary to the respondents' contention, the *Indian Act* imposes no duty on the membership clerk to exercise the Band's or Council's responsibilities and the Membership Rules do not delegate the powers of the Band to the membership clerk. The Membership Rules do impose a duty on the membership clerk, but that duty is only to assess the validity of an application and to transfer the application with a brief report to the membership committee (ss.15-16 of the Membership Rules). The membership clerk does not make the final decision as it is the Band, through a referendum, that has that responsibility. Consequently, the membership clerk does not have the power to change the membership list. The duty, as indicated above, lies on the respondents in their capacities as Chief and Council.

[56] The lack of an appeal mechanism in the Membership Rules for non-applicants does not leave the applicant without recourse or permit the Band Council to escape its responsibilities. The fact that the *Indian Act* does not create an appeal mechanism for Bands who choose to take control over their membership leaves the resolution of disputes to be determined by each Band in accordance with the self governance principles underlying s.10 of the *Indian Act*.

[57] Considering the above, I find that the Band Council has an obligation to ensure the proper application of the Membership Rules. The evidence submitted to the Council and to this Court by the applicant and the continuing unrest in the Band with regards to membership issues raises reasonable grounds to question the validity of the membership list (see the Starr Report at p. 102 of the Applicant's Record; Kirkpatrick report at p.128 of the Applicant's Record; and Letter from Ray Cameron at p.20 of the Applicant's Record; and Voters list petition at p.87 of the Applicant's Record).

[58] The evidence indicates that no membership meetings have been called since 2005 contrary to ss.18 and 19 of the Membership Rules (see p.8 of the Kirkpatrick Report at p.135 of the Applicant's Record; and Ray Cameron Letter at p.574 of the Applicant's Record). The respondents did not submit any evidence contradicting the evidence submitted by the applicant. The Band Council can not evade its responsibilities by remaining mute on the issue. By refusing to act according to its jurisdiction and the law, the Band Council committed a reviewable error and breached the rule of law.

2. Did the Ashcroft Band Council breach procedural fairness in failing to respond to the applicant's requests for a membership review?

[59] The applicant argues that the Band Council owed him a duty of procedural fairness. The Council breached the duty of procedural fairness, he claims, on two grounds: the Council did not respond to his demands and the Council ignored the evidence accompanying the demands. As stated in *Laboucan v Little Red River Cree Nation No 447*, above, at paragraph 36 and in *Sparvier v*

*Cowessess Indian Band*, [1993] 3 FC 142 at paragraphs 47-48, Band councils must respect due process and procedural fairness in their dealings with individual members.

[60] In this instance, however, there is no evidence of actions or procedures by the Band Council that denied the applicant natural justice. Here the Band Council took no action. In the circumstances, no procedure was undertaken in which fairness was due the applicant: *Lavallee v Alberta (Securities Commission)*, 2009 ABQB 17 at para 66; and *Prince Edward Island (Liquor Control Commission) v Prince Edward Island (Human Rights Board of Inquiry) (re Burge)*, [1995] PEIJ No 148 (CA).

### 3. Does the applicant have standing to challenge the Band's failure to act?

[61] The respondents have questioned whether Mr. Cameron has standing to bring this application relying upon *Cameron v Albrich*, above, at paragraphs 66-73. However, the application before this Court differs from the action dismissed by the BCSC. As stated by Chief Justice Fraser, dissenting on the issue of abuse of proceedings, in *Reece v Edmonton (City)*, 2011 ABCA 238 at paragraphs 143 and 159, in obiter:

[143] Further, more critically, this statement assumes that a citizen has no right to challenge unlawful government conduct. However, where a wrongdoer is government itself, it is contrary to the rule of law to suggest that citizens are without a remedy. It is a central role of the courts to assure the legality of government action. This underscores why the chambers judge ought to have determined the central issue here. Should public interest standing be granted to the appellants to challenge the City's alleged unlawful conduct in its treatment of Lucy? As noted, that issue was never properly explored and resolved. It should have been.

...

[159] [...] Under the rule of law, citizens have the right to come to the courts to enforce the law as against the executive branch. And courts have the right to review actions by the executive branch to determine whether they are in compliance with the law and, where warranted, to declare government action unlawful. This right in the hands of the people is not a threat to democratic governance but its very assertion. [...]

See also *Harris v Canada*, [1998] FCJ No 1831, [1999] 2 FC 392 at para 24; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2011 BCSC 1219 at para 60; and *R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706 at para 25.

[62] The applicant is a member of the Band and as such he has an interest in ensuring that the Band Council applies the law. This is particularly the case considering that it is the Band who delegated the authority over membership to the Band Council (s.31 of the Membership Rules). Band members should be accorded standing to ensure that this is accomplished properly. This conclusion is supported by the objective of the Membership Rules set out in s.1:

**1.** The Objective of the Ashcroft Indian Band in approving the establishment of these Rules is to protect the cultural and social identity of the Band, to maintain and strengthen the existing sense of community and to ensure continued peace and good order among the members of the Band.

[63] This view of the matter is also supported by Parliament's grant of the right to protest a Band list maintained by INAC to any Band member: s.14.2(2) of the *Indian Act*. This reflects the collective interest that membership is an issue that affects all members and not solely those whose membership is contested or whose application for membership has failed.

[64] The respondents' argument, relying on *Moulton Contracting Ltd v Behn*, 2011 BCCA 311, that an individual not representing the community cannot bring an action to assert aboriginal rights

is misplaced. While that proposition is, in general, correct, this application is not based on a violation of aboriginal rights.

[65] The applicant is personally affected by the lack of enforcement of the Membership Rules. The voters list for Band elections is based on the membership list. If this list is inaccurate, election results may be compromised. As an elector, Mr. Cameron has the right to demand that regulations are properly applied to ensure the legitimacy of his government. It is clear that the membership list affects election results as it will have an impact on the number of electors and the number of candidates (see ss.2, 75 and 77 of the *Indian Act* and s.4 of the Regulations).

[66] Based on the foregoing, I conclude that the applicant has standing to bring this application.

4. If the application succeeds, what is the appropriate remedy?

[67] The applicant asks for two remedies: a declaration and an order in the nature of *mandamus*. Considering the above analysis, I see no difficulty in the issuance of a declaration stating that the Ashcroft Band Council has failed its legal obligation to maintain the membership list in accordance with the Membership Rules and the *Indian Act*.

[68] As indicated by Chief Justice Fraser in *Reece v Edmonton (City)*, above, at paragraph 167:

[167] Long lines of authority make plain that the declaratory remedy is an inherent and fundamental aspect of the power of the courts in the discharge of their obligations as defenders of the rule of law. A court's jurisdiction to declare government action unlawful can only be removed by statutory language of exceptional clarity and, in the case of a breach of constitutional law, not at all.

[69] The second remedy requested is an order to require the Band Council to review the membership list. The criteria for the issuance of *mandamus* are outlined in *Devinat v Canada (Immigration and Refugee Board)*, [1999] FCJ No 1774 (CA) at paragraphs 60 and 73, *Apotex Inc v Canada (Attorney General)*, [1993] FCJ No 1098 (CA) at paragraph 45, and *Seyoboka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1290 at paragraph 7:

1. There must be a public legal duty to act;
2. The duty must be owed to the applicant;
3. There must be a clear right to performance of this duty;
4. When the duty sought to be enforced is discretionary, the nature of the discretionary power and the manner in which it must be exercised must be considered;
5. No other adequate remedy is available to the applicant;
6. The order sought will be of some practical value or effect;
7. The Court in the exercise of its discretion finds no equitable bar to the relief sought;
8. On a "balance of convenience", an order in the nature of *mandamus* should (or should not) issue.

[70] As indicated by Justice Walsh in *Canadians for the Abolition of the Seal Hunt et al v Canada (Minister of Fisheries and the Environment)*, [1981] 1 FC 733 at paragraph 21: "It goes without saying that a law or regulation should be enforced and little is added to this by *mandamus* unless there is a complete refusal to enforce it or them" (see also *IWA/IBA Canada, Local 2995 v Ontario*, [2002] OJ No 5202 (Div Ct), at para 10; and *R v Benson*, [2009] OJ No 239 at para 22).

[71] Here, I am satisfied that the criteria for the issuance of mandamus have been met as the Band Council has, by its non-action, refused to apply the Membership Rules. The Band Council has a public legal duty to act, it owes that duty to the applicant and other members of the First Nation, no other adequate remedy is available to the applicant, the order will have practical effect and there is no equitable bar to the relief sought. The balance of convenience favours the issuance of the order as there is no indication that the Band Council will act of its own volition to remedy the problem.

[72] Reviewing the membership list will require some time, resources and the analysis of the evidence submitted. In those circumstances, I consider it best to leave it to the Band and its Council to decide how to proceed to remedy the breach and to give effect to that remedy. I think it appropriate to require that this be done within a reasonable time period which I consider to be six months from the date of the issuance of this judgment.

[73] In light of this, it will be necessary to delay the next election which is currently scheduled to be held in June, 2012 pending the review and updating of the membership list. I note that in *Esquega v Canada (Attorney General)*, 2008 FCA 182, the Court of Appeal stayed an election until the Band Council dealt with the issue of off-reserve voters (see para 11). In that case, the question arose in the context of a constitutional challenge to election results. However, the circumstances were analogous. Until certain steps had been taken the next election could not be legally held. In the present case, a stay is necessary to avoid an election that would be held on the basis of an invalid membership list. Further litigation would likely result. In the interests of Band and judicial economy, the problem should be rectified before the next election is held.



**T-435-11**

[74] For the reasons that follow, the application for judicial review of the Minister's Delegate's decision regarding the election appeal is also allowed.

**5. Did the Minister err in interpreting the *Indian Act* and the Regulations?**

[75] Election appeals may be lodged with the Minister of Aboriginal Affairs and Northern Development under s.12(1) of the Regulations. The final decision does not rest with the Minister as only the Governor in Council possesses the power to set aside an election: s.79 of the *Indian Act*.

[76] Under s.13 of the Regulations, the Minister is given the discretionary power to order an investigation when the evidence submitted is insufficient. The Minister has a duty to report to the Governor in Council when he is satisfied that the criteria of s.14 are met: (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.

[77] The applicant submits that the Minister erred in interpreting the *Indian Act* and in finding that the Regulations did not require him to investigate the validity of the voters list and, by extension, the membership list of the Ashcroft Indian Band. It is clear from s.14(c) of the Regulations that the Minister must verify that all candidates were eligible. That requires verification that they were all members of the Band: ss.2 "elector", 75 and 77 of the *Indian Act* and s.2 "elector"

of the Regulations. It is also clear from s.14(b) of the Regulations that the Minister must verify that the voters list corresponds with the membership list and that all candidates were nominated by qualified electors: ss.2 “elector”, 75 and 77 of the *Indian Act* and ss.2 “elector”, 4 and 4.2 to 4.5 of the Regulations.

[78] The question is whether it was reasonable for the Minister to interpret the *Indian Act* and the Regulations as requiring him to look only at the Band list as it existed at the moment of the election?

[79] The applicant contends that the Minister should have verified the validity of the membership list before considering the conformity of the voters list with the membership list. The respondent Minister argues that he does not have the power to question the membership list. The Minister contends that the Band took control over its membership pursuant to s.10 of the *Indian Act* and adopted its own membership rules. As a consequence, it is argued, the Minister lost jurisdiction over issues of membership. Since an individual listed on the Band list is deemed a member of that Band (ss.2 “member of a Band” and 8 of the *Indian Act*), it was reasonable for the Minister to assume that all individuals on the membership list were members and were thus entitled to be on the voters list.

[80] As indicated by s.10(9) of the *Indian Act*, when a Band takes control over its membership, “...the Department shall have no further responsibility with respect to that Band List...” Considering the general principle of statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, above, at paragraph 21 and as found in s.12 of the *Interpretation Act*, it was reasonable for the Minister to conclude that the *Indian Act* did not require him to look beyond the membership list.

[81] The Minister is not an appeal body for issues of membership and cannot become one through election appeals. Unless the Band itself or a Court finds that the membership list was incorrect, it is reasonable for the Minister to assume that all individuals listed on a membership list under the control of a Band are members and consequently electors. Furthermore, it seems impractical for the Minister to interpret the Band's Membership Rules and to collect evidence on all the members of the Band to verify if they are truly members of the Band. Considering the *Indian Act* as a whole, the plain meaning of the provisions at play, the role of the Minister and INAC, and the nature of election appeals, I find that the Minister's interpretation of the legislation was reasonable.

6. Was the decision of the Minister to dismiss the appeal reasonable?

[82] The applicant claims that the Minister's decision was unreasonable for three reasons: (1) the Minister did not consider the evidence on the alleged non-members' participation in the election; (2) in particular, the Minister failed to consider the applicant's evidence; and (3) the Minister should not have relied on the action in front of the BCSC to dismiss the appeal.

[83] At the hearing, counsel for the applicant dropped the allegations of corrupt practices initially advanced.

[84] The applicant's concerns largely relate to the weighing of the facts by the Minister's Delegate. In *Canada Revenue Agency v Telfer*, 2009 FCA 23 at paragraph 33, the Federal Court of Appeal had this to say about arguments of this nature: "Since deciding what weight to accord to a

particular fact is at the heart of exercising discretion, it will normally be difficult to persuade a court that an administrative decision-maker has acted unreasonably in this regard.” Nevertheless, if the decision lacks justification, transparency or intelligibility, intervention from this Court is justified: *Dunsmuir*, above, at para 47.

[85] I have found that the Minister’s interpretation of the *Indian Act* as foreclosing his intervention in membership questions was reasonable. It was also reasonable for the Minister to conclude that neither the *Indian Act* nor the Regulations gives power to the electoral officer to review or question the membership list (see s.4 of the Regulations).

[86] The power to conduct an investigation is discretionary and is to be used when the Minister finds that the material that has been filed is not adequate for deciding the validity of the appeal (s.13 of the Regulations). In this case, the Minister found the material sufficient. The applicant was unable to demonstrate how that conclusion was unreasonable.

[87] The standard of proof for s.14 b) of the Regulations requires proof of the appearance of a violation of the *Indian Act* or the Regulations: *Keeper v Canada*, 2011 FC 307 at para 5; and *Hudson v Canada (Indian Affairs and Northern Development)*, 2007 FC 203 at para 87. If that standard is met, the Minister must report to the Governor in Council.

[88] Considering the evidence submitted by the applicant to the Minister regarding the non-application of the Membership Rules and of s.10 of the *Indian Act* by the Band Council, it would have been open to the Delegate to determine that the standard was met. The Delegate had to

consider the evidence related to alleged violations of the *Indian Act* or of the Regulations. She appears to have accepted Respondent Greg Blain's account of the facts without considering the live issue created by all of the evidence surrounding the non-application of the Membership Rules and thus of s.10 of the *Indian Act*.

[89] The election which was the subject of the appeal was decided after a tie was broken by the electoral officer. It is not difficult to infer that the non-application of the law may have had an impact on the election result. In my view, the Minister's Delegate ignored the evidence before her and failed to provide an adequate explanation as to why she did not believe that the s.14 threshold was reached.

[90] It is clear from reading the Delegate's decision letter that she considered the action before the BCSC as an example of a proper way to challenge the memberships of allegedly false members of the Band. She indicated that if the applicant had won that action, he could have used the judgment to challenge the validity of the election. In reaching that conclusion, the Delegate abdicated her responsibility to properly consider the matter.

[91] Considering the evidence the Minister's Delegate had before her and considering the standard of proof of s.14 of the *Indian Act*, the decision does not meet the standard of reasonableness.

7. Did the Minister commit a breach of procedural fairness?

[92] The final issue relates to procedural fairness. The applicant alleges that procedural fairness was breached during the appeal because he was not allowed to view Greg Blain's response and he was not given an opportunity to reply to Blain's comments. The applicant also raises the question of unreasonable delay.

[93] The election appeal clearly affects the rights and privileges of the applicant as a Band member and candidate for the office of Chief. Therefore, the decision-maker owed procedural fairness to the applicant: *Ross v Canada (Indian and Northern Affairs)*, 2007 FC 499 at para 38; and *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14.

[94] The content of procedural fairness varies according to the context of each case: *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at para 46. The factors to consider when determining the content of procedural fairness are set out in *Baker*, above, at paragraphs 23 to 27, and read as follow:

- 1) the nature of the decision and its process;
- 2) the nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operate;
- 3) the effect of the decision on the individual;
- 4) the legitimate expectation of the individual; and
- 5) deference to the procedural choices made by the decision-maker.

[95] The appeal process is very different from the judicial process and involves considerable discretion (*Baker*, above, at paras 23 and 31; and *Esquega*, above, at para 68). The Regulations

provide for some procedural steps but not for the circulation of the responses to the appellant (s.12 of the Regulations; see also *Baker*, above, at para 24). Appeal decisions are final apart from being subject to judicial review (*Baker*, above, at para 31). The decision is of importance to the candidates as it relates to their ability to participate in the Band's governance (see *Baker*, above, at para 25; and *Esquega*, above, at para 71).

[96] I find that nothing in the Senate Report – referenced by the applicant – would give rise to an expectation that the Minister would follow a different procedure than the one outlined in the *Indian Act* and the Regulations, and normally applied by INAC. No promises were made to the applicant (see *Baker*, above, at para 26; and *Girard v Canada*, [1994] FCJ No 420, 79 FTR 219 at paras 28-29). The statement of the Minister's Delegate found in the Senate Report only reaffirms the procedural safeguards already found in the Regulations (see Senate Report at p.27). Lastly, it is important that the Minister's expertise and procedural choices found in the department's policy be respected (see *Baker*, above, at para 27). INAC procedural choices in such appeals are geared towards the objectives of fairness and efficiency.

[97] Consequently, I find that the applicant was entitled to a low to mid level of procedural fairness.

[98] The applicant relies heavily on *Esquega*, above, to support his position that Chief Blain's response should have been distributed for comment; however the circumstances of the present case are different from those in *Esquega*. In that case, it was the submissions of the appellant that were not communicated to the respondent as required by s.12(2) of the Regulations (see paras 69 and 79).

[99] Considering that, in this instance, the response of Greg Blain did not raise new issues and only replied to the allegations of Mr. Cameron, considering that s.12 of the Regulations does not provide for the distribution of the material, considering the absence of any grounds for legitimate expectations and considering the need for the appeal process to be expedient, I find that procedural fairness did not require that the Minister distribute the response to the applicant.

[100] Finally, on the point of unreasonable delay, the respondent INAC submits that this argument was not found in the Notice of Application and that pursuant to rule 301(e) of the *Federal Courts Rules*, SOR/98-106 the applicant is not entitled to rely on that argument. As stated by Justice Kelen in *Métis National Council of Women v Canada (Attorney General)*, 2005 FC 230 at paragraph 45, the applicant cannot raise grounds for review not found in the Notice of Application and in the supporting affidavits. This is to avoid prejudice to the respondents: *AstraZeneca AB v Apotex Inc*, 2006 FC 7 at para 19.

[101] In this instance, the respondent Minister does not appear to have been prejudiced as he submitted compelling arguments to counteract most of the applicant's allegations. In any event, a delay of 7 months does not, in my view, qualify as unreasonable (see *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 101-102, 104, 115 and 121). The delay did not diminish the fairness of the proceeding. The Minister acted in good faith in managing the appeal.

[102] Considering the above, I find that the Minister did not breach his duty of procedural fairness to the applicant.



## CONCLUSIONS:

[103] For the above reasons, in Application T-1401-11, the Court finds that the Ashcroft Indian Band Council acted outside of its jurisdiction and contrary to the rule of law by declining to apply the Band Membership Rules and, in consequence, failing to respect s.10 of the *Indian Act*. The failure of the Band Council, the elected government of the Ashcroft Indian Band, to properly exercise its responsibilities may have had and may continue to have an adverse effect on the good administration of the Band and in particular of Band Council elections. A Declaration and Order of Mandamus will issue to remedy that problem.

[104] The next scheduled election will be stayed pending the revision of the membership list. The present Chief and Council will be maintained in office pending the review of the list. They will be expected to take the necessary measures in good faith to constitute the Membership Committee and revise the membership list in accordance with the Band Membership Rules. The Court will retain jurisdiction over this application pending the outcome of that process to permit the parties to bring any motions that may be necessary to clarify the orders which I will issue: *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 119.

[105] In Application T-435-11, the Court finds that the decision of the Delegate was unreasonable as it was not based on the facts and the law, and lacked justification, transparency and intelligibility: *Dunsmuir*, above, at para 47; see also *Keeper*, above; and *Hudson*, above. However, in the expectation that steps will be taken by the Band to resolve the underlying problem with the membership list in accordance with the Declaration and Order in T-1401-11, I see no point in

remitting the matter to the Minister for reconsideration or to issue an Order of Mandamus against the Minister. The solution to this problem rests with the Band and not the Minister.

[106] The applications for judicial review are thus granted. Separate judgments will be issued for each application.

“Richard G. Mosley”

---

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-435-11

**STYLE OF CAUSE:** RAYMOND CAMERON

and

THE MINISTER OF INDIAN AFFAIRS AND  
NORTHERN DEVELOPMENT, GREG BLAIN,  
EARL BLAIN AND ANGELINE THORNE

**DOCKET:** T-1401-11

**STYLE OF CAUSE:** RAYMOND CAMERON

and

ASHCROFT INDIAN BAND COUNCIL,  
GREG BLAIN IN HIS CAPACITY AS CHIEF  
OF ASHCROFT INDIAN BAND, EARL BLAIN  
IN HIS CAPACITY AS COUNCILLOR OF  
ASHCROFT INDIAN BAND, AND  
ANGELINE THORNE IN HER CAPACITY  
AS COUNCILLOR OF ASHCROFT INDIAN BAND

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** January 24, 2012

**REASONS FOR JUDGMENT:** MOSLEY J.

**DATED:** May 16, 2012

**APPEARANCES:**

Rosanne Kyle  
Elin Sigurdson  
Janes Freedman

FOR THE APPLICANT  
(Raymond Cameron)

F. Matthew Kirchner  
Kate Bloomfield

FOR THE RESPONDENTS  
(Greg Blain and Earl Blain)

Shelan Miller

FOR THE RESPONDENT  
(The Minister of Indian Affairs and  
Northern Development)

**SOLICITORS OF RECORD:**

ROSANNE KYLE  
ELIN SIGURDSON  
JANES FREEDMAN  
Kyle Law Corporation  
Vancouver, British Columbia

FOR THE APPLICANT  
(Raymond Cameron)

F. MATTHEW KIRCHNER  
KATE BLOOMFIELD  
Ratcliff & Company LLP  
Vancouver, British Columbia

FOR THE RESPONDENTS  
(Greg Blain and Earl Blain)

MYLES J. KIRVAN  
Deputy Attorney General of Canada  
Vancouver, British Columbia

FOR THE RESPONDENT  
(The Minister of Indian Affairs and  
Northern Development)