

2011 CarswellBC 1031, 2011 BCSC 549

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Cameron v. Albrich

Ray Cameron, Plaintiff and Frederick Albrich, Arnold Blain, Greg Blain, Leah Blain, Jodene Blain, Leslie Blain Jr., Norman Blain, Clinton Blankenship, Robin Blankenship, Shawn Blankenship, Barry Bryant, Charlene Bryant, Cindy Bryant, Kenneth Bryant, Lavonne Comin, Eva Condin, Madison Condin, Jaydee Dick, Arlene Dixon, Leona Dobranski, Leslie Dobranski, Mark Dobranski, Norma Dobranski, Philip Dobranski, Darrin Dobranski, Jade Dyck, Tyler Dyck, John Epp, James Epp, Elizabeth Ferriss, Alfred Gardner, Dawn Gardner, Kenneth Gardner, Glen Gordon, Kevin Gordon, Marcie Gordon, Denise Gurney, Lesley Heidel, Adam Kato, Kimiko Kato, Taylor Kato, Emily Kirkpatrick, Darius Kirkpatrick, Lancette Lewis, Betty Lowry, James Lowry, Jodie Lulu, Denise Lulu, Wilfred Lulu, James Martin, Kenneth Martin, Kierstin Mujcin, Sherry Parnell, Erin Pelletier, Nicole Pigeon, Shantelle Price, Leona Raymond, Mitchell Sakowski, Sharon Schamehorn, Daniel Schnell, Larry Schnell, Catherine Simzer, Jessica Timmerman, Jeffrey Timmerman, Rachel Tudan, Debra Van Norstrand, Teresa Vandell, Deloress Warneboldt, Austin West, Jared West, Ricky Wilson, Cimarone Wilson-Minnabarriet, Castin Wilson-Minnabarriet and Steven Wulff, Defendants

British Columbia Supreme Court

R. Punnett J.

Heard: November 23, 2010

Judgment: April 29, 2011

Docket: Vancouver S103983

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R.M. Kyle, for Respondent / Plaintiff

Subject: Civil Practice and Procedure; Public

Civil practice and procedure.

Aboriginal law.

***R. Punnett J.:***

**Introduction**

1 This is an application to strike this action. The proceeding relates to a dispute over who are the members of the Ashcroft Indian Band (the "Band"). The respondent plaintiff and the applicant defendants are, according to Band records, members of the Band. Of the approximately 250 Band members, the plaintiff contests the membership of the 74 defendants in the Band. This application was brought by five of the defendants who submit that:

- a) the relief sought by the plaintiff in this claim is within the exclusive jurisdiction of the Federal Court;
- b) even if this matter does not fall within the exclusive jurisdiction of the Federal Court, this Court ought to decline jurisdiction; and
- c) in any event, the plaintiff has no standing to bring this claim.

### **Preliminary Matters**

#### ***Service***

2 There are 74 defendants. The plaintiff however has only served the pleadings on the five defendants represented in this hearing. I raised with counsel the concern that all parties had not been served and given the opportunity to be present. Counsel acknowledged that any order made will only be binding on those parties served to date; however, due to the high cost of locating and serving all of the defendants, counsel were of the view that resolution of the issues on this application will likely be persuasive with respect to the remaining defendants if they are eventually served. On that basis the application was heard.

#### ***Admissibility of Affidavit Evidence on Motion to Strike***

3 In support of their application the defendants filed the affidavit of Greg Blain, one of the defendants and the current Chief of the Band. He deposes that he and others have been members of the Band since at least the 1990s and have as such received Band funds for educational purposes, been permitted to run for and hold positions in the Band government including as Ashcroft Councilors, have been included in the voters list and have been permitted to vote.

4 The plaintiff objects to the defendant Greg Blain's affidavit stating that the application to strike pleadings does not permit the admission of evidence and that the pleadings must be accepted as true. The defendants however state that the material goes to the issue of jurisdiction and that in such circumstances affidavit evidence is admissible.

5 The defendants in their motion refer to *Supreme Court Civil Rules* 9-5(1) (Scandalous, frivolous or vexatious matters) and 21-8 (Jurisdiction). They submit that, while they have in their application referred to Rule 9-5, in fact their application is based on the issue of jurisdiction, not on Rule 9-5. An application challenging the jurisdiction of the court can be supported by affidavit evidence: *Western Aerial Applications Ltd. v. Turbomeca USA, Inc.*, 2009 BCSC 123; *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34. As a result the affidavit of Greg Blain is admissible in so far as it addresses the issue of jurisdiction. However, as it is not clear if it is based on direct knowledge or on information and belief it carries little weight and in any event is not relevant given my conclusions in this matter.

### **Background**

6 The plaintiff's action is against the individual defendants recorded on the Ashcroft Indian Band membership list (the "Band List" or the "List"). He states they have not been properly added to the List. He seeks the following declarations in his prayer for relief:

- a) A declaration that the defendants be struck from the *Ashcroft Indian Band's Membership List*;
- b) A declaration that the defendants be required to apply for membership in the Ashcroft Indian Band pursuant to the *Ashcroft Indian Band's Membership Rules* if they wish to seek membership in the Ashcroft Indian Band; and
- c) A declaration that any Voters List for use by the Ashcroft Indian Band be prepared based on a membership list that accords with the Ashcroft Indian Band's Membership Rules.

7 The plaintiff's claim is based on the *Ashcroft Indian Band Membership Rules* (the "*Membership Rules*" or "*Rules*") which govern the membership of the Band pursuant to s. 10 of the *Indian Act*, R.S.C, 1985, c. I-5, which provides:

**Band control of membership**

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

**Membership rules**

- (2) A band may, pursuant to the consent of a majority of the electors of the band,
- (a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
  - (b) provide for a mechanism for reviewing decisions on membership.

...

**Acquired rights**

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

...

**Notice to the Minister**

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

**Notice to band and copy of Band List**

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

(a) give notice to the band that it has control of its own membership; and

(b) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

**Effective date of band's membership rules**

(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.

**Band to maintain Band List**

(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.

**Deletions and additions**

(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.

**Date of change**

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

R.S., 1985, c. I-5, s. 10; R.S., 1985, c. 32 (1st Supp.), s. 4.

8 The relevant provisions of the *Membership Rules* state:

2. (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;

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

2.(15) "Membership Committee" (the "Committee") means a committee appointed by Council...

2. (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,

...

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.

9 The defendants are, according to the Band List, Band members. However, the statement of claim alleges that 74 individuals are not entitled to be on the Band List and that the majority of them are not so entitled because they have not applied for membership as required by the *Membership Rules*. It is not disputed that the defendants are on the Band List as Band members. For the purposes of this application, it is accepted that they have not made application for Band membership. It is also accepted that their membership applications have never been voted on by the Band in accordance with the *Membership Rules*.

10 The Band controls its own membership pursuant to s. 10 of the *Indian Act*. The Band assumed such control on September 25, 1987. At the time there were approximately 106 Band members.

11 The Band List, including additions and deletions to that list, is maintained by the Membership Clerk. The Membership Clerk also updates, verifies and provides the Band voters list, which consists of all Band members who are at least 18 years old, to the electoral officer for use in elections (the "Voters List").

12 The *Membership Rules* set out the rules for entitlement to become a Band member. Under the *Membership Rules*, certain categories of individuals are entitled to "automatic" membership based on certain criteria. Other categories of individuals who might be entitled to membership are required to apply for membership and be accepted by a majority of the Band electors. Ultimately, it is the Band who must approve new members.

13 The plaintiff states the issue is that the defendants have failed to apply for membership. The defendants submit they cannot give relief to the plaintiff's requests because they have no authority to remove their own names from the Band List.

## Discussion

### *Who are the Appropriate Parties?*

14 The plaintiff acknowledges that it is the Band itself that has the authority to make decisions respecting Band membership. However, the plaintiff has not joined the Band as a defendant. His reasoning for not doing so is that the Band members have never had the opportunity to make a decision concerning the defendants' entitlement to membership because the defendants' have never applied under the rules thereby triggering the process that would allow the Band to consider their applications.

15 The plaintiff claims that the defendants' failure to apply for membership in the Band has denied the Band members an opportunity to decide on their entitlement to membership. As a result, he seeks a declaration from the court striking those individuals from the Band List. He does not advance his claims against the Band, the Band Council or the Membership Clerk because, he says, there is no "decision" by these entities that is being challenged in these proceedings.

16 The plaintiff further submits that the defendants are the proper parties as the relief sought directly affects them. They are the individuals whose membership is in issue. The plaintiff states that no relief is sought against the Band Council or the Membership Clerk because they have no jurisdiction with respect to the issue of the defendants' entitlement to membership as that lies with the Band. That argument however ignores the procedural

processes contained in the *Membership Rules*.

17 The defendants submit that, in naming the defendants as individuals and not the Band or Band Council, the plaintiff has failed to name the person or entity which actually has the authority to strike the defendants from the Band List. Therefore, the declaration sought that they be struck from the membership is not something that is within their power to do.

18 The Band, through the *Membership Rules*, has delegated to the Band Council control over the process of obtaining Band membership. It is the Band Council that is empowered to carry out the *Membership Rules*. In this instance, the *Membership Rules* provide that the Membership Clerk, Membership Committee and Band Council make decisions. It is their responsibility to require that prospective members make application for membership. The failure of Band members to apply for membership is not the issue. The real issue is the failure of the Band Council to follow the *Membership Rules*. The subject matter of the dispute is the improper addition of parties who may or may not be entitled to be on the membership list.

19 It follows then that what must be considered is the role played by the Band Council on behalf of the Band in its administration, pursuant to the *Membership Rules*, of the Band list.

#### ***Band Membership Rules***

20 As noted earlier the *Membership Rules* require that a prospective member apply to the Band to become a Band member. Upon receipt of the prospective member's application the Membership Clerk assesses it and then forwards it to the Membership Committee. The Membership Committee then makes a recommendation to the Band Council and the Band Council schedules a membership referendum. Such referendums are to be held four times a year.

21 For reasons not disclosed in the material, the *Membership Rules* with respect to applying for membership do not appear to have been followed. As noted, those *Membership Rules* give the Band Council the authority to assess, recommend and arrange for referendums on membership applications. Given the defendants are shown as members, at some point they were added to the Membership List. For the purposes of this application, that occurred without the required application for membership being made. The Band Council through its Membership Committee has, on that assumption, failed to comply with the *Membership Rules*.

22 In *Okemow-Clark v. Lucky Man Cree Nation*, 2008 FC 888, the Federal Court was faced with a situation where the chief determined that certain members were in fact not members. It was alleged that he did so without following the band's membership code and the *Indian Act*. The chief argued that there was no decision and no federal board or tribunal was involved. The court found that in fact a decision had been made and that it was also a decision of the band council in that they had acted on it. The court reasoned that judicial review is concerned with the legality of a decision and it should not be immune to review merely because there is no evidence of a decision being formally made or compliance with membership rules. In other words, judicial review cannot be avoided by ignoring rules and not making a formal decision, yet creating a situation and acting on it and in doing so effectively determining the issue.

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.

24 The named defendants are an identifiable group that does have an interest in the outcome of the litigation. The named defendants' rights under the *Indian Act* and entitlement under the *Band Rules* will be affected by the outcome of this litigation. Therefore, the plaintiff was correct to name the parties with a direct interest in the litigation in the action: *Sutherland v. Hudson's Bay Co.*, 2005 CanLII 63808 (ON S.C.), at para. 7.

25 However, the plaintiff has failed to name all of the appropriate parties in his application. Assuming this Court has jurisdiction, the plaintiff should have named as additional defendants the Band Council, the Membership Committee and the Band.

26 The issue of this Court's jurisdiction and the standing of the plaintiff must now be addressed.

### **Exclusive Jurisdiction of the Federal Court**

#### ***The Federal Court Act***

27 The defendants submit that the plaintiff is seeking declaratory relief against a "federal board, commission or other tribunal" and as a result under s. 2 of the *Federal Courts Act*, R.S. 1985, c. F-7, the Federal Court has exclusive jurisdiction. The plaintiff replies that no relief is being sought against a "federal board, commission or other tribunal" because there is no "decision" of the Band, the Band Council, the Membership Committee or the Membership Clerk that is being challenged in these proceedings.

28 Given my finding that the subject matter of the dispute is compliance with the *Membership Rules* by the Band, Band Council, Membership Committee and Membership Clerk then whether they are a "federal board, commission or other tribunal" must be determined. If I conclude that they are a "federal board, commission or other tribunal" then I must decline jurisdiction.

29 The Federal Court has exclusive jurisdiction with respect to declarations and other relief sought against a "federal board, commission or other tribunal". Section 18 of the *Federal Courts Act* provides:

#### **Extraordinary remedies, federal tribunals**

**18.** (1) Subject to section 28, the Federal Court has exclusive original jurisdiction:

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

30 A "federal board, commission or other tribunal" is defined in s. 2 of the *Federal Courts Act*, as follows:

2. (1) In this Act, ... "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or

any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

31 A "Band Council" under the *Indian Act* means:

(a) in the case of a band to which section 74 applies, the council established pursuant to that section,

(b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

32 The nature of a Band Council was considered in *Ermineskin v. Ermineskin Band Council* (1995), 96 F.T.R. 18, [1995] FCJ No. 821 (F.C.T.D.) (QL). *Ermineskin* was a judicial review of a Band Council decision to strike a person from the membership list of the band. The Ermineskin Band, like the Ashcroft Band, controlled its membership under s. 10 of the *Indian Act*. Its membership rules however, unlike those before this Court, provided that the Band Council had authority to maintain the membership list and to delete names. On the issue of the nature of the Band Council, the court held that the decision of the Band Council respecting membership was a decision by a "federal board, commission or other tribunal" stating at para. 14 (QL):

14 ... the rules which the Ermineskin Band Council apply in exercising authority over Band membership are a "manifestation" of the powers conferred by the Government of Canada under the aegis of section 10 of the Indian Act. ... [T]he authority being exercised by the Band Council is derived from the Indian Act. It follows, therefore, that it is a decision of a federal board ...

33 In doing so the court cited *Lameman v. People's Government* (1995), 90 F.T.R. 319, [1995] F.C.J. No. 242 (F.C.T.D.) (QL) at 2:

The jurisprudence has established that an Indian band council and persons purporting to exercise authority over members of Indian bands who are acting pursuant to provisions of the Indian Act, RSC 1985, c.1-5, fall within the definition [of "federal board, commission or other tribunal"].

34 I am satisfied that the Band Council in acting pursuant to the *Membership Rules*, even if not in compliance with the *Membership Rules*, is doing so pursuant to the *Indian Act*. As a result their decisions fall within the definition of a "federal board, commission or other tribunal" and any declarations sought against the Band Council must be sought in Federal Court.

35 Likewise, the Membership Committee, appointed by the Band Council and the Membership Clerk, falls within the definition of "federal board, commission or other tribunal": , 108 F.T.R. 297 (F.C.T.D.), [1996] F.C.J. No. 129.

36 This leads to the issue of the "Band" itself. In this case under the *Membership Rules* the Band members make the determination of who is and who is not a member.

### ***Band***

37 The *Indian Act* defines a "Band" as:

"band" means a body of Indians



(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(b) for whose use and benefit in common, moneys are held by Her Majesty, or

(c) declared by the Governor in Council to be a band for the purposes of this Act;

38 The plaintiff submits that a "Band" is not a federal board, commission or tribunal. They rely on *Chapman v. Chicago* (1991), 5 O.R. (3d) 220, [1991] O.J. No. 1607 (Div. Ct) where Maloney J. held that:

An Indian Band, however, is not a federal board or tribunal within the meaning of those terms as they are used in the *FCA (Sabattis v. Oromoctow Indian Band)* (1986), 32 D.L.R. (4th) 680 ...).

39 In addition they submit that issues arising in relation to a first nation's control of its *Membership Rules* are not within the exclusive jurisdiction of the Federal Court because they are inherent rights, not rights conferred by the *Indian Act: Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123 and *Devil's Gap Cottagers (1982) Ltd. v. Rat Portage Band No. 38B (Wauzhushk Onigum Nation)*, 2008 FC 812. They also refer to the *UN Declaration on the Rights of Indigenous Peoples*, which was endorsed by the Government of Canada on November 12, 2010. Control over membership as an inherent right of First Nations was expressly recognized in article 33 of the *Declaration*:

### Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions this does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

...

40 The Plaintiff further submit that legislation is presumed to conform to international law referring to the Supreme Court of Canada in *14957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, at para. 30

30 ... My reasons for the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para 70, observed that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review". As stated in *Driedger on the Construction of Statutes*, *supra*, at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

41 As a result they argue that, even if the Band falls within s. 18 of the *Federal Courts Act*, that jurisdiction is not exclusive. This despite the fact that the relief sought by the plaintiff is a declaration directing that the defendants apply for membership as required by the *Membership Rules*.

42 The defendants argue that the authority given under the *Membership Rules* is a "manifestation" of the

powers conferred by the Government of Canada under s.10 of the *Indian Act*. As discussed earlier, s.10 of the *Indian Act* permits a Band to assume control over its Band List. The Band has assumed that control and established its *Membership Rules* pursuant to s.10. However, at issue is whether that makes the Band a "federal board, commission or other tribunal". Does the grant of such powers bring the Band within that definition? In doing so, is it exercising a statutory duty delegated to it by Parliament? The defendants rest their submission on the argument that matters relating to membership arise under the authority of s.10 of the *Indian Act* and hence the exercise of those powers by the Band, Band Council or others under the *Membership Rules*, because of their nature as an exercise of statutory duty, are exercised as a federal board.

43 They refer to *Horseman v. Horse Lake First Nation*, 2005 ABCA 15, in support. In *Horseman* the plaintiff sought damages in tort for her allegedly wrongful removal from the Band and also sought a declaration that "she was, and still is, a member of her aboriginal community" (para.1). The majority held that the Court of Queen's Bench had jurisdiction respecting the tort action but struck the declaratory relief plea on the basis that "[o]nly the Federal Court would have jurisdiction to make such a declaration (para. 57). The majority stated as well at para. 68 that:

[68] ... no order pronounced in the Court of Queen's Bench in the context of this litigation as presently framed can have the effect of restoring the Respondent to the rolls of the Horse Lake First Nation. The Court of Queen's Bench has no jurisdiction to grant such an order or to declare that the Respondent "is and at all material times has been a member of the Band". ...

44 In *Horseman*, it was the Band, through its council, that had the authority to remove the respondent from the registry and as such would act as a federal board, commission or other tribunal.

45 In *Sabattis v. Oromocto Indian Band* (1987), 32 D.L.R. (4th) 680, 76 N.B.R. (2d) 227 (N.B.C.A.) the issue before the New Brunswick Court of Appeal was whether the Band's power to nominate and elect chief and councillors and to surrender any right or interest of the Band in a reserve conferred upon the Band by the *Indian Act* were powers that would bring them within the definition of "federal board, commission or tribunal". The court at said the following:

The sections of the Indian Act to which counsel refer do not, in my opinion, confer upon an Indian Band powers that are in any way analogous to those conferred upon a municipal council by a provincial legislature. The Band does not, by virtue of those sections, exercise any municipal or governmental power in relation to the reserve nor does it act as agent for the Minister of Indian Affairs and Northern Development or perform any decisive role in the exercise by the Minister of his statutory authority relative to the reserve. The Band's role, in my view, is more akin to that of an elector in a municipal context or to a shareholder in a corporate context. Thus, on examining the nature of the powers conferred on an Indian band and the character and function of the band, I am of the opinion that the sections of the Indian Act relied upon by counsel do no more than establish procedures for the election of a chief and councillors, (and the Act recognizes that a Council may exist by the custom of the band), and for the surrender of reserve lands (and such surrenders must be to the Crown in any event), and do not amount to a delegation of either governmental or administrative powers by the Parliament of Canada. I would therefore conclude that an Indian Band is not the type of tribunal contemplated by the definition in s. 2 of the *Federal Court Act* which has application to "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada".

For the reasons I have given, I would respectfully disagree with the learned trial judge and hold that the Oromocto Indian Band is not a "federal board, commission or other tribunal" as defined in the *Federal Court Act* and that the Court of Queen's Bench of New Brunswick has jurisdiction to hear this matter.

46 As a result a "band" is not a federal board unless it is exercising a statutory duty delegated to it by Parliament.

47 This is consistent with the comments of Dawson J. in *Devil's Gap* at paras. 33 and 55 where he refers to *J. G. Mortgage Development Corp. v Canada (Minister of Public Works)*, [1992] F.C.J. No. 883 as follows:

[33] Following her review of the jurisprudence, Justice Mactavish distilled, at paragraph 48 of her reasons, a number of principles. The following are of particular relevance to the present case:

1. The phrase "powers conferred by or under an Act of Parliament" found in the definition of a "federal board, commission or other tribunal" in subsection 2(1) of the *Federal Courts Act* is "particularly broad" and should be given a liberal interpretation: *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 (C.A.).

2. The powers referred to in subsection 2(1) of the *Federal Courts Act* do not include the private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality or authorized business: *Wilcox v. Canadian Broadcasting Corporation*, [1980] 1 F.C. 326 (T.D.).

3. Although the character of the institution is significant to the analysis, it is the character of the powers being exercised that determines whether the decision-maker is a "federal board, commission or other tribunal" for the purposes of section 18.1 of the *Federal Courts Act*: *Aeric*.

4. While an organization may be a "federal board, commission or other tribunal" for some purposes, it is not necessarily so for all purposes. In determining whether an organization is a "federal board, commission or other tribunal" in a given situation, it is necessary to have regard to the nature of the powers being exercised: *Jackson v. Canada (Attorney General)* (1997), 141 F.T.R. 1 (T.D.), aff'd (2000), 261 N.R. 100 (C.A.).

...

[55] The decision in *J.G. Morgan Development* is said to stand for the principle that, if the decision at issue is of a private nature, it is not reviewable. In my view, this decision is consistent with the jurisprudence of the Federal Court of Appeal. More precisely stated, it stands for the principle that it is the source or character of the power being exercised that determines whether an entity is acting as a "federal board, commission or other tribunal" and therefore subject to review.

48 The foregoing authorities are clear that a first nations "band" is not a federal board unless it is exercising a statutory duty that has been specifically delegated to it by Parliament. In both *Chapman* and *Sabattis* the issues related to the electoral provisions of the *Indian Act*. Those provisions were held by the court in *Sabattis* to be procedural only and did not delegate governmental or administrative powers.

49 In the present circumstances, the Band is exercising a statutory duty to maintain a band list pursuant to s. 10 of the *Indian Act*. The duty to maintain a band list is the duty of the Minister unless, as in this case, the band

assumes control of its own list. The purpose of a band list is to determine entitlement to benefits and voting rights. While there may be a parallel inherent right to control band membership, in this case the Band is carrying out a statutory duty and as such the Band is a federal "board, commission or other tribunal" as defined by the *Federal Courts Act*.

### ***Declaration Regarding the Voting List***

50 The defendants submit that the authority for the creation of the Voters List and the conduct of the election of the Band Chief and Band Council is found in the Band's control of membership under s. 10 of the *Indian Act*, and more specifically in the *Indian Band Election Regulations*, C.R.C. 1978, c. 952 ("Elections Regulations"). The *Elections Regulations* require that the Band provide its Voters List to the electoral officer prior to an election: *Indian Band Council Elections Order*, Can. Reg 97-138, Schedule 1, *Election Regulations*, s. 4(1). The Band practise is that the Membership Clerk updates, verifies and provides the Voters List to the electoral officer.

51 As in the case of the Band membership list the authority for the Voters List and elections is found in the *Indian Act* and the *Election Regulations*. For the reasons given earlier, any person delegated with the authority to compile or amend the voters list does so pursuant to a federal act in the capacity of a "federal board, commission or other tribunal".

52 The declaration sought by the plaintiff is therefore within the exclusive jurisdiction of the Federal Court.

53 This disposes of the plaintiff's action and this application. However, in the event I am incorrect on the issue of jurisdiction I will address the remaining issues.

### ***The Effect of the Declarations Sought***

54 The plaintiff seeks a declaration that the defendants "be required to apply for membership" pursuant to the *Membership Rules* and that any future Voters List be prepared in accordance with those *Rules*. He submits his right to benefits from the Band has been infringed by non-members use and by non-members votes that amount to interference with election results. As a result he asserts that a declaration will have the effect of resolving a long standing dispute over who are entitled to be Band members.

55 The defendants submit such declarations will serve no utility and amount to no more than a request that the court interpret the *Membership Rules*. They state that the plaintiff does not claim any "actual or apprehended infringement or interference" with his rights.

56 Declaratory relief requires that the applicant must have some legal right that has been infringed. The defendants refer to *Behr v. College of Pharmacists of British Columbia*, 2005 BCSC 879, in which Cohen J. considered the nature of declaratory relief as follows:

[12] In *Kaiser Resources Ltd. v. Western Canada Beverage Corp.* (1992), 71 B.C.L.R. (2d) 236 (S.C.), Bouck, J. dealt succinctly with the general principles to be applied in an application for a declaration, at paras. 29-32, as follows:

A judicial declaration is an unusual legal animal. For example, it is unlike a claim in tort where damages are the usual remedy. Or a claim for breach of contract where specific performance may be the proper remedy. In the first instance, tort is the cause of action and damages the remedy. In the second,

breach of contract is the cause of action and specific performance the remedy.

But a declaratory order has no similar common law or equitable foundation. Rather, its legal existence is based upon a rule of Court: B.C. Supreme Court R. 5(22).

Once a court grants a declaration, it is binding on those affected. However, unlike a judgment finding a breach of contract and awarding the remedy of specific performance, "the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights": Sarna, *The Law of Declaratory Judgments*, 2nd Ed. (1988), p. 1. Put another way, a declaration is both a decree that declares an infringement of a right and an order prescribing the remedy.

When applying for a declaration, applicants must show the infringement of a right. That right may arise under a statute, the common law or in equity: *Simmonds v. Newport Abercan Black Vein Steam Coal Co.*, [1921] 1 K.B. 616 (C.A.) at 627.

[13] In *Fraser v. Houston*, [1996] B.C.J. No. 2096 (S.C.), Hood, J. dealt with the general principles at paras. 12-13, and 29-34, as follows:

12. Counsel submitted that the claim for a declaration, and consequential relief based thereon, cannot be maintained, notwithstanding Rule 5(22) which provides:

**Declaratory order**

(22) No proceeding shall be open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

I note here that consequential relief is sought.

13. In order to be entitled to seek a declaratory order the plaintiff must demonstrate a right which gives him standing, that is, a right under a contract or statute or in equity. The plaintiff has not done so and he is not entitled to seek a declaratory order against Addwest. And reference was made to the decision of Gibbs JA in *Heller v. Vancouver Regional District* (1992), 71 B.C.L.R. (2d) 100 (C.A.) at 105 where that learned judge states with regard to Rule 5(22):

And R. 5(22) permits proceedings where, as here, only a declaration is sought. However, neither rule waives or qualifies the principle underlying all litigation and that is that the party invoking the aid of the court must demonstrate a right which gives standing, in this case the right to the declaration sought.

Gibbs J.A. then went on to show that in the case before him, the plaintiff did not have a right or cause of action against the defendant in negligence, the only right apparently advanced by her counsel; that accordingly she did not have a right "which would give her the standing necessary to qualify for the declaration requested in the petition."

...

29. It is my opinion, that while there need not necessarily be a cause of action between the parties be-

fore the court will have jurisdiction to grant declaratory relief, and that jurisdiction is quite broad, it is not at large or unfettered. A litigant seeking declaratory relief must demonstrate that he or she has a right which has been infringed by, or requires protection from, the other party. If the right cannot be demonstrated, the party does not have standing and the court does not have declaratory jurisdiction.

30. The authorities have defined the right or interest sufficient to entitle a party to seek a declaratory judgment in general terms. But clearly some right or interest must exist. Mr. Justice Gibbs searched for, but was unable to ascertain, the source of the right in *Heller*. Chief Justice McEachern found that there was a legal relationship between the parties, which gave rise to a real issue concerning their rights. In *Kaiser* Mr. Justice Bouck found that the applicant had to show the infringement of its right, listing the various possible sources of such a right, statute, common law and equity. And I do not read *British Columbia Ferry Corp.*, which is based on the decision of Bankes, L.J. in *Simmonds*, at page 627, the passage to which I have already referred, as saying anything to the contrary. Nor do I read the case as saying that Lord Dunedin's dictum in the *Russian Commercial* case, as regards the proper case for granting declaratory relief, is too restrictive of the court's jurisdiction to grant that relief. In the *Russian Commercial* case Lord Dunedin simply stated that the person seeking declaratory relief must have a real interest to raise the issue. I will refer to what Lord Dunedin said further in a moment when I refer to what I consider to be the leading case on the subject matter, *Solosky v. The Queen* (1980), 105 D.R. (3d) 745 (S.C.C.).

31. Generally there must be a dispute, and some privity in law, between the parties. In this regard it is stated in *The Law of Declaratory Judgments* at page 23:

A proper case for a declaratory judgment generally requires some privity in law between parties concerned, an existent right and an interference or dispute concerning the right. A petitioner who has no right in the nature of a claim capable of being enforced or redressed in a civil action cannot seek a judicial declaration for the evident reason that he cannot take advantage of or suffer the consequences of such an order: the lack of standing to sue robs the court of its declaratory jurisdiction.

Questions which are purely academic, hypothetical, obscure or of no relevance to the parties cannot form a suitable basis for an application for relief.

32. The authority cited is *Solosky v. The Queen*. There, Dickson J., as he then was, speaking for the court, stated at page 753:

Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.

The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and time again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438, in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p.448):

The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone

presently existing who has a true interest to oppose the declaration sought.

And see also the decision of Wilson J., speaking for the court on the point, in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at 480 and 486, stating that as a minimum basis for a claim to locus standi, the plaintiff must establish at least a threat of the violation of a right.

57 The defendants refer as well to *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539. In *Cheslatta* the Court of Appeal upheld a decision that no declaratory relief would be granted because the declaration sought would not serve a legal purpose because there was no dispute to be resolved.

58 While it may be, subject to the issue of standing generally, that the plaintiff has a right that is affected, that right alone does not resolve the issue of whether the court should grant the declaratory relief sought. In "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977) 3 Dal. L.J. 706, Hudson states:

The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. ...

(Emphasis added)

59 At para. 13, Newbury J. A., for the court in *Cheslatta*, states:

13. Generally, modern courts have continued to adhere to the principle that declaratory actions should not be entertained where the declaration will serve little or no practical purpose or raises a matter of only hypothetical interest. Conversely, where the pleadings disclose a "real difficulty," present or threatened the action will lie. ...

...

60 This leads to a consideration of the relief sought against the defendants. Assuming the declarations are made, what would be their effect?

61 The defendants submit that relief, including declaratory relief, must only be granted against those who can give it effect. The plaintiff asserts that since the band ultimately must make the membership decisions the Band Council and Membership Clerk are without authority. They submit that the Band has been denied the opportunity to vote because the defendants have not applied for membership. Therefore, it is the defendants who must initiate the process by making application.

62 The plaintiff's submission assumes that ordering the defendants to apply for membership in accordance with the membership rules will give effect to the declarations sought. This ignores the fact that the process to be followed is contained in the *Membership Rules*. The requested declarations that the defendants' names be removed from the membership list and the voters list cannot be made against the defendants because no defendant has access to or control over the Band List. Hence they cannot strike a defendant's name, including their own,



from the list. Nor does any defendant have access to or control over the Voters List and therefore they cannot amend or prepare a new list.

63 The declarations sought in this instance will have little utility and will not in my view settle the dispute between the parties. To order the applicant defendants to apply for membership will not resolve the issue of their membership. The subject matter of the dispute is the failure of the Band Council to comply with the *Membership Rules* not the failure of the defendants to apply for membership.

64 In addition declaratory relief cannot be sought against a non-party. The declarations sought must be brought against those having authority with respect to the Band List and the Voters List.

65 In *London Passenger Transport Board v. Moscrop*, [1942] All E.R. 97, Viscount Maugham stated at p. 104:

...

... but, on the other hand, the persons really interested were not before the court, ... It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties whether by representation, orders or otherwise before a declaration by its terms affecting their right is made. ...

...

See also, *Sutherland v. Hudson's Bay Co.*, [2003] O.J. No. 2005, 122 A.C.W.S. (3d) 992.

### **Standing of the Plaintiff**

66 The plaintiff states he claims as an individual, not in any collective or representative capacity. He is not claiming on behalf of any other party or parties. The submission of the plaintiff is that he has suffered damage peculiar to himself given that housing and other benefits are spread thinner due to sharing with individuals who are not entitled to be members. In addition, he alleges the election results have been affected and while affecting his rights generally as a member he personally lost his bid for the office of Chief when the votes were tied and the electoral officer drew a name from a hat to break the tie. He submits that if even one non-member wrongfully voted in the 2010 election and voted for the other candidate he would have been elected chief. As a result, he alleges his individual rights have been infringed.

67 The defendants assert that the plaintiff has no standing to sue as an individual as the relief sought is not in respect of his own rights. As a result, they submit he is not a proper party and should be ordered to cease to be a party under Rule 6-2(7)(a).

68 There are general principles that apply to the issue of standing to seek declaratory relief. Where the standing is rooted in aboriginal rights there are additional factors.

69 The general principals of standing to seek declaratory relief were considered in *London Passenger Transport Board v. Moscop*, [1942] All E.R. 97, (H.L.), cited with approval in *Chow v. Patterson* (1973), 38 D.L.R. (3d) 721 (B.C.S.C.) at para. 9. The respondent in *London* sought a declaration regarding the right of employees to be represented by union officials. The respondent had so such right. The declaration sought was in re-



spect of the rights of others. Viscount Maugham at 103 stated the following:

...

I cannot call to mind any action for a declaration in which (as in this case) the plaintiff claimed no right for himself, but sought to deprive others of a right which did not interfere with his liberty of his private rights. Still less can I think that there is any precedent for such an action in the absence of the persons who are interested in opposing the declaration. It has been stated again and again, and also in this House, that the jurisdiction to give a declaratory judgment should be exercised "with great care and jealousy" and "with extreme caution". ... (Emphasis added and citations omitted)

...

70 In *Epost Innovations Inc. v. Canada Post Corp.* (1999), 2 C.P.R. (4th) 76, 91 A.C.W.S. (3d) 214, the Court stated:

A litigant seeking declaratory relief must demonstrate that he or she has a right which has been infringed by or requires protection from the other party. If the right cannot be demonstrated the party does not have standing and the court does not have declaratory jurisdiction. *Fraser v. Houston*, [1996] B.C.J. No. 2096 (Q.L.) (S.C.).

71 The claims advanced by the plaintiff are rooted in his status as a member of the Band. While he alleges personal damages as a result of the allegedly invalid memberships of the defendants, that does not change the nature of the rights he asserts. The plaintiff's material makes clear that he is one of several Band members who have sought to have their concerns respecting the non-members addressed. The substance of his claim is that his rights as a Band member have been interfered with. Those rights may, as between various Band members, affect them to different degrees but that does not change the fact that they are collective rights.

72 In *Moulton Contracting Ltd. v. Her Majesty the Queen in Right of the Province of British Columbia*, 2010 BCSC 506, Hinkson J. considered the special case of standing as it applies to aboriginal and treaty rights. At paras. 32 - 35 he said the following:

### **Standing**

[32] While aboriginal and treaty rights are exercised by individuals, such rights are collective rights and are neither possessed by nor reside with individuals: *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at para. 115. The assertion of a claim by an individual member of an aboriginal group to assert collective treaty or other collective aboriginal rights on behalf of an aboriginal community was held by Mr. Justice Davies to be unsupported at law in *Komoyue Heritage Society v. British Columbia (A.G.)*, 2006 BCSC 1517 at para. 35.

[33] Similarly, in *Te Kipilanoq v. British Columbia*, 2008 BCSC 54 at para. 25, with reference to a number of authorities, Mr. Justice Parrett concluded that "[t]he collective nature of [ Aboriginal rights and title] rights requires an authority from the people who are, in this case, collectively represented by their elected council."

[34] In *Canadian National Railway Co. v. Brant* (2009), 96 O.R. (3d) 734 (S.C.J.), Mr. Justice Strathy dealt with an action by the plaintiff railway against the defendant after he blockaded a railway line interfering with the plaintiff's business operations. The defendant counterclaimed on the basis that the railway line

trespassed on Mohawk territory thus violating his Aboriginal rights as a member of the Mohawk Nation. The railway applied to strike the counterclaim on the basis that the defendant lacked standing to bring a personal claim for the alleged breach of collectively held aboriginal rights.

[35] Relying upon the reasoning of Parrett J. in *Te Kiapilanoq*, Strathy J. allowed the motion, finding at paras. 50-51:

Aboriginal title, treaty rights and Aboriginal rights are a right held by Aboriginal people in common and they cannot be asserted by individual members of the community. To put it in the words used by Prothonotary Hargrave in *Wahsatnow v. Canada (Minister of Indian Affairs and Northern Development)*, [2002] F.C.J. No. 1665, 2002 FCT 2012, the claims in this case are not a right that the defendants themselves may claim. If the right exists, it is a right that belongs to the Band and can only be asserted by its lawful representatives or in a representative action.

There is good reason for this. If, as the statement of defence alleges, the Tyendinaga Mohawk Nation has Aboriginal title to the lands in question, any claims for trespass to those lands should be enforced by the authorized representatives of that Nation and not by individuals who may or may not represent its will.

73 As a result I find that the plaintiff has no standing to bring this claim.

#### **Orders**

74 This proceeding is dismissed as this Court lacks jurisdiction in respect of the claims made. The plaintiff shall pay the costs of the applicant defendants.

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