

1995 CarswellNat 226, 96 F.T.R. 181, 55 A.C.W.S. (3d) 888

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Ermineskin v. Ermineskin Band Council

Rachel Ermineskin, Applicant v. The Ermineskin Band Council, Respondent

Ermineskin v. Ermineskin Indian Band Council

Federal Court of Canada — Trial Division

Jerome A.C.J.

Judgment: May 26, 1995

Docket: Doc. T-688-94

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Counsel: *Ronald Johnson*, for Applicant.

*Glenn Ortt*, for Respondent.

Subject: Public; Civil Practice and Procedure

Native Law --- Bands and band government

Council deleting R. from Band membership list — R. applying for judicial review — Indian Act, R.S.C. 1985, c. I-5.

Band was authorized to regulate its membership through its membership rules. R. was advised that she had been deleted from the Band membership list, and that she had a right of appeal. R. applied for judicial review and argued that she was denied procedural fairness and natural justice. Council submitted that its decision was not open to judicial review and argued that council's powers were derived from the history, customs, culture, and communal life of the Band. They did not amount to a delegation of governmental or administrative powers by the government, and there was an appeal process contained within the Band membership rules that R. had not exhausted. Held, the application was dismissed. Council was required to exercise its discretionary powers fairly. Council's authority to make decisions regarding Band membership was derived from the Act, and therefore it was the proper subject of a judicial review application. R. chose not to avail herself of the potentially curative appeal procedure that was contained in the Band membership rules. It was not appropriate to consider R.'s application when other avenues of appeal had not been exhausted.

Native Law --- Practice and procedure — Jurisdiction — Federal Court.

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***Jerome, A.C.J. reasons for order:***

1 This application for judicial review pursuant to section 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended, was transferred from the Court of Appeal by Order dated March 17, 1994. The applicant, Rachel Ermineskin, seeks an order setting aside the decision of the Ermineskin Indian Band Council rendered August 4, 1987, to delete her name from the Ermineskin Band List. This application came on for hearing before me on February 15, 1995, at the conclusion of which the matter was reserved and I indicated that these written reasons would follow.

2 The applicant, Rachel Ermineskin, is a member of the Blackfoot Indian Band. She became a member of the Ermineskin Indian Band (the "Band") by virtue of her marriage to Jean Baptiste Ermineskin, a treaty Indian registered as a member of that Band on November 29, 1984. The applicant left her spouse on December 25, 1984 and has not resided on the Hobbema reserve since that time, save for overnight visits with her son. Her spouse is now deceased.

3 On July 2, 1986, the Ermineskin Indian Band gave notice to the Minister of Indian Affairs and Northern Development (the "Minister"), pursuant to section 10(6) of the *Indian Act*, R.S.C. 1985, c. I-5 (the "Act"), that it wished to control its membership and provided the Minister with a copy of the proposed membership rules. On March 17, 1987, the Minister gave notice to the Band that the membership rules had been approved pursuant to section 10(7) of the Act.<sup>[FN1]</sup> Accordingly, the Band is authorized by the Minister to regulate its own membership through the established Ermineskin Membership Rules.

4 Section 6 of the Ermineskin Band Membership Rules provides for the deletion of persons from the official membership list in accordance with the following terms:

The Band Council may at any time delete from the Band List the name of any person who has applied to the Band Council to have his or her name deleted from the Band List or the name of any person who is not then lawfully resident on the reserve and who, in the judgment of the Band Council, either does not have a significant commitment to the history, customs, traditions, culture and communal life of the Band or has a character or lifestyle that would cause his or her continued membership in the Band to be seriously detrimental to the future welfare or advancement of the Band; provided that, before a decision to delete the name of any person from the Band List is made under this Section, otherwise than pursuant to an application by such person, *the Band Council shall give fifteen days notice to such person who shall then be entitled to make representations to the Band Council in writing, in person or through an agent or counsel within such period of*

*fifteen days.*

(Emphasis added)

5 On May 11, 1987 the Band Council issued a notice to the applicant advising that "the Ermineskin Band Council hereby gives you 15 days notice under section 6 of the Ermineskin Band Membership Rules" in which to make representations to the Council with respect to her membership in the Band. That notice was received on May 25, 1987, as evidenced by the double registered mail receipt reproduced in the affidavit sworn by Jim Minde, Executive Director of the Ermineskin Tribal Council, on November 14, 1991. The applicant did not respond to this notice.

6 On July 22, 1987 the Band Council sent correspondence to the applicant, wherein it states:

**RE: MEMBERSHIP MEETING, August 4-5, 1987**

We hereby notify you that you have 15 days from July 22, 1987 to make any representations you may wish to make to the Band Council in writing, in person, or through an agent or Counsel on whether the Band Council ought to make a decision to delete your name from the Band List under Section 6 of the Band's Membership Rules as set out (Quote: Sec. 6 enclosed).

Please note that a meeting of the Band Council will be held at the Nisku Inn, Nisku AB. on August 4 and 5, 1987 (August 3rd is a holiday) consider any representations you may wish to make. Please advise Phyllis Rattlesnake at 585-3741 if you intend to be present at such meeting so that an appointment can be made for you.

**ERMINESKIN BAND COUNCIL**

7 The applicant did not contact the Band to make representations or inquire as to why she was to be deleted from the Band membership list. Accordingly, the Band Council determined to delete her from the Band list on August 4, 1987. She was advised of this decision by letter dated August 15, 1987, which reads in part as follows:

Further to the meeting of the Ermineskin Band Council on August 4 and 5, 1987, we advise you that the Band Council decided to delete your name from the Band List under Section 6 of the Band's Membership Rules on the grounds that you are not lawfully resident on the Reserve and, in the judgment of the Band Council, you do not have a significant commitment to the history, customs, traditions, culture and communal life of the Band.

We draw your attention to Sections 12 and 13 of the Rules which give you a right of appeal to the electors of the Band:

. . . . .

8 Sections 12 and 13 of the Band Membership Rules state as follows:

12. Any person whose application for membership in the Band pursuant to section 3 of these Rules has been denied, or whose name has been deleted from the Band List pursuant to section 6, by the Band Council may

appeal such decision to the electors of the Band by delivering notice in writing to the Band Council at the office of the Band within 15 days after communication to him or her of the decision of the Band Council.

13. Within 60 days after receipt of a notice of appeal pursuant to section 12 of these Rules the Band Council shall convene a meeting of the electors of the Band for the purpose of disposing of the appeal and the applicant shall be entitled to be present at such meeting and make representations thereto in person or through an agent or counsel. The decision of a majority of the electors of the Band is final and conclusive.

9 The applicant seeks to have the Band Council decision vacated on the grounds that the Council failed to follow its own procedures by failing to accord her adequate notice and by failing to provide her with reasons. The applicant contends that I should exercise my discretion to set aside the decision of the Band Council on the grounds that she was denied procedural fairness and natural justice.

10 Three issues must be considered. First, the respondent contends that the decision of the Band Council to delete the applicant's name from its membership list is not open to review by the Federal Court. In particular, the respondent argues that the Band Council's powers with respect to membership are derived from the history, customs, culture and communal life of the Band as embodied in the Band's Membership Rules.

11 While I agree that the Court should be reluctant to place the decision-making process of the Band Council under a microscope because it involves Band customs and rituals, that is not a *carte blanche* for Band Council decisions to be made in complete absence of procedural fairness nor from adhering to its own established rules and procedures. The Band Council cannot operate in a vacuum. At the very least, the Council must exercise its discretionary powers fairly and failure to do so will, in the appropriate circumstances, warrant judicial intervention.

12 Second, the respondent refers the Court to *Sabbattis v. Oromocto Indian Band* (1986), 32 D.L.R. (4th) 680 (N.B.C.A.), and contends that the prerogatives exercised by the Band Council in addressing membership matters do not amount to a delegation of governmental or administrative powers by the Parliament of Canada as they are inherent and customary aboriginal powers. As such, rulings of the Band Council on membership issues are said to fall outside the class or species of decisions reviewable under s. 18.1 of the *Federal Court Act*. I do not agree.

13 In order for a judicial review application to be properly before this Court pursuant to section 18.1, the decision being reviewed must emanate from a "federal board, commission or other tribunal" as defined in section 2 of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended. As I recently stated in *Lameman et al. v. The Peoples Government*, T-1733-94, February 10, 1995, unreported, at p. 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*, R.S.C. 1985, c. I-5, fall within the definition. In addition, the Federal Court of Appeal decision in *Canatonquin, et al. v. Gabriel, et al.*, [1980] 2 F.C. 792, held that an Indian band council came within the jurisdiction of the Federal Court where the election of the council was pursuant to band custom and not the *Indian Act*. Pratte, J.A., writing for the Court, stated at p. 793:

We are all of the view that the judgment below [[1978] 1 F.C. 124] correctly held that the council of an Indian band is a 'federal board' within the meaning of section 2 of the *Federal Court Act*...

We see no merit in the appellants' contention that the Trial Division does not have jurisdiction because the only issue raised by the action, namely the validity of the election of the defendants to the Council of the Band, is governed by customary Indian law and not by a federal statute.

14 In addition, the rules which the Ermineskin Band Council apply in exercising authority over Band membership are a "manifestation" [FN2] of the powers conferred by the Government of Canada under the aegis of section 10 of the *Indian Act*. That section establishes, *inter alia*, the process by which a band may assume control of its own membership list and the terms under which the Minister will approve band membership rules. It is not sufficient that the Band Council is purporting to exercise a power traditionally governed by Indian law for it to be removed from the judicial scrutiny. This point was laid to rest in *Canatonquin, supra*. Accordingly, I find that the 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 and may be the proper subject of a judicial review application in this Court.

15 Finally, the respondent contends that there is an appeal process contained within the Band's Membership Rules [FN3] which should prevent the Court from exercising its discretionary jurisdiction over this matter unless or until that process has been exhausted. The respondent argues that the Membership Rules and procedures would be rendered meaningless if this Court intervenes as it would invalidate the authority of the Band Council by permitting circumvention of the established rules. Finally, the respondent states that intervention by the Court would frustrate the policy grounds underlying the Band's authority over its membership list, that being, increased aboriginal autonomy and dominion over their own affairs.

16 Recently, in *Madsen v. Canada (A.G.)*, T-2441-93, February 22, 1995, unreported, (F.C.T.D.), I was asked to intervene where there were allegations of a denial of procedural fairness. I indicated that because judicial review is a discretionary remedy, it would be inappropriate to consider such an application where other avenues of appeal had not been exhausted by the applicant. This is consistent with the principles enunciated by the Supreme Court of Canada in *Re Harelkin and University of Regina*, [1979] S.C.R. 561.

17 Here, the applicant was advised of her right to appeal the decision of the Band Council as evidenced by the letter dated August 15, 1987. Despite this advice, the applicant chose not to avail herself of the potentially curative appeal procedure to the Band Council electors as provided for in sections 12 and 13 of the Band Membership Rules. It is at that stage that the applicant could have aired her disagreement with the Council's procedures or methodology including her lack of notice. I am guided by the above mentioned principles and decline to interfere in the business of the Band Council as a matter of discretion. Accordingly, it would be inappropriate to express an opinion as to the substantive merits of the applicant's claim.

18 This application for judicial review is therefore dismissed. I make no order as to costs.

**FN1** A copy of the Ermineskin Indian Band membership rules are reproduced in full commencing at p. 12 of the Respondent's Application Record.

**FN2** As the term is used by Iacobucci, C.J., as he then was, in *Southam Inc. v. Canada (A.G.)*, [1990] 3 F.C. 465 at 479 (C.A.).

**FN3** Section 12 of the Membership Rules of the Ermineskin Indian Band provides for a right appeal where a Band Member has been deleted from the Band List under section 12.

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