Federal Court  Cour fédérale

Date: 20221005

Dockets: T-926-21
T-1061-21

Citation: 2022 FC 1380

Ottawa, Ontario, October 5, 2022

PRESENT: Mr. Justice Sébastien Grammond

Docket: T-926-21

BETWEEN:

ANNETTE PITTMAN, RAYMOND DICK,
SERAPHINE BOOMER AND DAYTON DICK

Applicants

and

ASHCROFT INDIAN BAND, GREG BLAIN, EARL BLAIN,
DENNIS PITTMAN AND BLAIR MACKENZIE
IN HIS CAPACITY AS ELECTORAL OFFICER

Respondents

Docket: T-1061-21

BETWEEN:

ANNETTE PITTMAN, RAYMOND DICK,
SERAPHINE BOOMER AND DAYTON DICK

Applicants

and

ASHCROFT INDIAN BAND COUNCIL, GREG BLAIN IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS CHIEF OF THE ASHCROFT INDIAN BAND, EARL BLAIN IN HIS CAPACITY AS COUNCILLOR OF THE ASHCROFT INDIAN BAND, DENNIS PITTMAN IN HIS CAPACITY AS COUNCILLOR OF ASHCROFT INDIAN BAND, AND ARNOLD BLAIN, DALLAS BLAIN, JASON BLAIN, KYLE BLAIN, LESLIE BLAIN JR., LOGAN BLAIN, MELISSA BLAIN, ROMAN BLAIN, TRISTA BLAIN, ZACHARY BLAIN, CLINTON BLANKINSHIP, SHAWN BLANKINSHIP, LAVONNE COMIN, MATTHEW COMIN, ARLENE DIXON, BRENDAN DIXON, NOLAN DIXON, RACHEL DIXON, ALFRED GARDNER, DAWN GARDNER, KENNETH PETER GARDNER, KENNETH RYLEY GARDNER, FLECIA GORDON, MARCIE GORDON, ADAM GURNEY, DENISE GURNEY, LESLEY HEIDEL, DEBRA KILBACK (VAN NOSTRAND), JACQUELINE KOUPRIE, BETTY LOWRY, JAMES MARTIN, KENNETH MARTIN, ADRIAN PELLETIER, ALEXANDER PELLETIER, BLAISE PELLETIER, CECILA PELLETIER, ELLEN PELLETIER (LAMBERT), ERIN PELLETIER, KATHERINE PELLETIER, MICHAEL PELLETIER, REGINA PELLETIER, ROLAND PELLETIER, VINCENT PELLETIER, SHARON SCHAMEHORN, TERESA VANDELL, MICHAEL VAN NOSTRAND AND DELORESS WARNEBOLDT

Respondents

JUDGMENT AND REASONS

[1] Membership in the Ashcroft Indian Band has given rise to recurring controversies. The applicants, three of whom were unsuccessful candidates in the last election, assert that two groups of persons who voted in the election are not entitled to membership. They seek declarations that these persons are not entitled to vote and that the election and a referendum held at the same time were invalid and other orders.

[2] The resolution of this matter involves two aspects of the rule of law principle: one cannot allege a breach of the law unless one has evidence of the breach; and the law cannot be changed without following the established procedure. Here, the relevant law is the Membership Rules

enacted in 1987 by the Band. The applicants' basic submission is that two groups of persons have been added to the Band's membership list without following the procedure set forth by the 1987 Rules.

[3] According to the applicants, the first group of disputed members consists of persons who, given their age and the fact that they have only one parent who is a Band member, could only become members by a vote of all the Band members. There is no written record of such a vote with respect to these persons. The applicants infer that these persons never became members. I disagree. All available evidence suggests that these persons were duly admitted into the Band in the late 1980s or early 1990s. The loss or destruction of the minutes of the relevant meetings does not disentitle these persons from membership. The controversy regarding these persons' entitlement for membership has been going on for many years, yet no evidence was ever found that their names were not regularly added to the Band list.

[4] The applicants challenge the entitlement to membership of a second group of persons. In 2012, the Council of the Band adopted a resolution (or "BCR") to admit children who have only one parent who is a Band member, without the need for a vote of all Band members in each case. In 2021, a referendum was held to enact a membership code that would replace the 1987 Rules and set forth rules similar to those found in the 2012 BCR. The applicants argue that the 2012 BCR and 2021 referendum are invalid. As the persons in this second group derive their entitlement to membership solely from the 2012 BCR and 2021 referendum, their names would not have been lawfully added to the Band list.

[5] I agree with the applicants. The Council did not have the power to amend the 1987 Rules by way of resolution. Membership rules can only be amended by a vote of the majority of the electors of the Band. The 2021 referendum was also invalid, because the votes of the second disputed group were critical in securing a majority in favour of the new code. However, these persons were not members yet and were therefore not entitled to vote. As a result, the persons in the second disputed group never became members of the Band.

[6] Therefore, I will declare that the 1987 Rules remain in force, quash the 2012 BCR and the 2021 referendum and declare that the persons in the second disputed group are not members of the Band. I will suspend the latter declaration for 18 months to allow the parties to reach a mutually acceptable solution.

[7] The results of the 2021 election, in contrast, are not affected by this issue. While the second disputed group illegally voted, the margin of victory was greater than the number of persons in that group.

I. Background

A. *Ashcroft Indian Band*

[8] Ashcroft Indian Band is a First Nation governed by the *Indian Act*, RSC 1985, c I-5 [the Act]. It is a component of the Nlaka'pamux nation. Both parties informed me that it was appropriate to refer to it as the "Band," and I will do so throughout these reasons. The Band is

located in south central British Columbia. Prior to the events described below, it had approximately 100 members, of whom about 40 resided on the Band's reserves.

B. *The 1987 Membership Rules*

[9] In 1985, the Act was amended to put an end to more than a century of discrimination against women in the transmission of Indian status. These amendments are commonly known as Bill C-31. Categories of persons who had lost Indian status pursuant to the former version of the Act, most importantly Indian women who had married non-Indian men, regained Indian status.

[10] Bill C-31, however, separated the concept of Indian status from that of membership in a First Nation. Section 10 of the new Act empowered First Nations to enact their own membership codes. In exercising this power, however, First Nations had to recognize the acquired rights of reinstated persons. In other words, persons who regained Indian status through Bill C-31 had an automatic right to become members of their former First Nations. A different rule was applied to the children of reinstated persons. These children obtained Indian status pursuant to section 6(2) of the Act. However, Bill C-31 imposed a two-year moratorium on their automatic entitlement to First Nation membership. This was intended to give First Nations time to develop alternative provisions regarding the admission of children of reinstated persons.

[11] The Band availed itself of this opportunity and enacted its Membership Rules [the Rules] on June 28, 1987. The Minister of Indian Affairs confirmed the validity of the Rules in September 1987. For this reason, I must treat the Rules as enacted in conformity with the

requirements of section 10 of the Act, even though little evidence subsists regarding the process leading to their enactment.

[12] Section 1 of the Rules states that their purpose is to "protect the cultural and social identity of the Band" and "to maintain and strengthen the existing sense of community." Part II of the Rules is entitled "Original Membership" and, in reality, describes categories of persons who are automatically entitled to membership. These categories include persons who were band members when the Rules came into force, persons whose both parents are members of the band and persons who regained Indian status pursuant to Bill C-31. With respect to children of reinstated persons, section 4 of the Rules affords automatic membership on certain conditions:

> All minor children born of natural parents, at least one of whom is a resident restored member, are deemed to be original members.

[13] This provision does not apply to persons who were already adults in 1987, nor to the children of reinstated persons who resided off-reserve.

[14] Part III of the Rules is entitled "Discretionary Membership." It provides persons who are not entitled to automatic membership pursuant to Part II the opportunity to apply for admission in the Band. This applies, in particular, to "all children of restored members eighteen years or older on the day these Rules come into force." According to section 8, applicants must prove they hold Indian status and are lineal descendants from a "Band member with Indian blood." Part VI sets out the "Application Procedure." A membership clerk must first ensure that the application is accompanied by proper documentation. The application is then reviewed by a membership committee composed of representatives of the "four major families" of the Band

and one non-member. The membership committee may recommend acceptance or rejection of an application. The application must then be submitted to a referendum of Band members.

C. *Implementation of the Rules 1987–2004*

[15] In the years following the coming into force of the Rules, a significant number of reinstated persons obtained automatic membership. Moreover, many of their children applied for discretionary admission. The evidence shows that these applications were decided at Band meetings, which all members of the Band could attend, instead of referendums. Moreover, there is scant evidence of the existence of a membership committee distinct from the Band meetings. While the minutes of some of these Band meetings have survived, it is common ground that many records of that era are now missing. Thus, written evidence of the admission process is not always available. From the records that are available, it appears that all applications were accepted, although a few applications for transfer from another First Nation were refused.

[16] The practice of holding membership votes at Band meetings appears to have ceased around 1996. The respondents suggest that the Band then adopted a practice of automatically admitting all children who have at least one parent who is a member of the Band, instead of requiring them to apply for discretionary admission in accordance with the 1987 Rules. They called this practice the "every child policy." There is, however, little evidence of anyone being admitted into the Band during the period 1996–2012. In all likelihood, the members of the second disputed group were admitted into the Band after 2012 (see Jodene Blain's affidavit dated August 16, 2021). Thus, I cannot reach any conclusion as to the practice prior to 2012.

[17] Moreover, concerns began to be raised regarding discriminatory aspects of certain provisions of the Rules, in particular the fact that minor children of reinstated persons were automatically admitted, whereas adult children were not, and the fact that automatic admission was granted only to children of members who resided on the reserve. The discriminatory aspect of the latter rule became more apparent after the decision of the Supreme Court of Canada in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*].

D. *Controversies Regarding Membership 2004–2012*

[18] The *Corbiere* decision had another effect on the governance of the Band: it granted off-reserve members the right to vote in Council elections, which were then held pursuant to the Act.

[19] Mr. Greg Blain, one of the respondents in these proceedings, was elected chief in 2004 and has held this position ever since. Chief Blain's father was a reinstated person who became a member of the Band when the Rules came into force in 1987. Chief Blain obtained Indian status in 1988. As he was already an adult, he could not avail himself of the automatic membership provisions of the 1987 Rules. Although this is contested, Chief Blain states that he applied for membership in 1988 and was admitted shortly thereafter. There is no surviving written record of his application nor minutes of the meeting at which he was admitted. I will return to this issue later in these reasons.

[20] In 2006, Ms. Annette Pittman, one of the applicants, ran for chief against Mr. Blain and lost. During the election campaign, she began asserting that the membership list and, by extension, the voters' list contained the names of persons who were never properly admitted in

the Band by a vote of the membership, including that of Chief Blain. She drew up her own membership list, which excluded a number of persons whom she believed had not been properly admitted into the Band. She challenged the results of the election, but the Minister dismissed her appeal.

[21] In 2009, as doubts continued to be expressed regarding the entitlement to membership of many persons whose names were on the Band list, the Council agreed to commission a membership review. It retained the services of Ms. Vina Starr, a lawyer who had participated in the drafting of the 1987 Rules. She was to be assisted by Ms. Charlene Pittman, the Band's membership clerk. Those seeking a membership review eventually persuaded the Council to include Ms. Mae Kirkpatrick, a former chief of the Band and Ms. Annette Pittman's aunt, in the process. Ms. Starr, Ms. Kirkpatrick and Ms. Charlene Pittman spent a number of days reviewing membership files. However, they never produced a report as a committee, because the Council decided to terminate Ms. Starr's mandate. Ms. Starr wrote a report describing the process she followed, but she did not opine on anyone's membership. Ms. Kirkpatrick wrote her own report, reaching the conclusion that many persons whose names appeared on the membership list had to apply for membership but never did. I will return to the methodology used to produce Ms. Kirkpatrick's list later in these reasons.

[22] The Council did not take any measures following what I will call the "Starr review." In the 2010 election, Mr. Raymond Cameron, who is Ms. Kirkpatrick's son, ran for chief against Mr. Blain and lost. Mr. Cameron appealed the result to the Minister, but his appeal was dismissed.

E. *This Court's 2012 Decision*

[23] In 2011, Mr. Cameron brought two applications to this Court. The first application was for judicial review of the Minister's decision to dismiss the election appeal. In the second application, Mr. Cameron sought a writ of mandamus requiring the Band to apply the Rules and to undertake a membership review process.

[24] My colleague Justice Richard Mosley allowed both applications: *Cameron v Canada (Indian Affairs and Northern Development)*, 2012 FC 579. The basic reason for his decision was his finding that the Band had failed in its duty to apply the Rules. He noted that there were "reasonable grounds to question the validity of the membership list" (paragraph 57) and that no membership meetings had been called after 2005 (paragraph 58). Apparently, the Band had not filed any evidence opposing the application. Justice Mosley also rejected the Band's submission that the proper procedure would be to seek judicial review of each decision to put a person's name on the membership list without following the Rules (paragraphs 53–54). Beyond the impracticality of proceeding in this fashion, he noted that Mr. Cameron did not challenge anyone's membership but simply wanted the Band to comply with its own law.

[25] In his formal judgment, Justice Mosley declared that the Council had breached its duty to administer the band list in compliance with the 1987 Rules. He ordered the Council to convene a membership committee and to submit to it with the name of every person who needed to apply for membership. The impending election was deferred to allow for the completion of this process.

F. *Aftermath of This Court's Decision*

[26] The Band set up a process to respond to Justice Mosley's judgment. What we know about this process is found in an affidavit sworn in 2012 by Darcy Robinson, who then was the membership clerk and band administrator. Mr. Robinson states that he compiled all available information regarding membership issues, including the Band's records, which were incomplete, the Starr and Kirkpatrick reports of 2009, and information obtained from Mr. Cameron. In addition, the Band wrote to affected members to have their views on the matter. The individual answers are not in the record, but Mr. Robinson states that "many responses expressed frustration that their membership was being challenged, and asserted that they were and had long been on the Band list and treated as members."

[27] Mr. Robinson then sought a legal opinion regarding the compatibility of the 1987 Rules with the *Canadian Charter of Rights and Freedoms* [the Charter]. This opinion was provided to the Council at a meeting held on August 13, 2012. At that meeting, a majority of the Council adopted a resolution (identified as BCR no 2) setting out how the 1987 Rules should be interpreted to avoid discrimination. This resolution's preamble is in reality a judgment about the constitutional validity of section 4 of the 1987 Rules. It concludes that "the discriminatory provisions of the code, including section 4 of the code, are, in accordance with section 52 of the Constitution Act, 1982, are [sic] of no force and effect." The operative part of the resolution contains the following provision:

> Section 4 of the Code shall be read and applied so as to extend the benefits set out therein to all persons equally. The qualifications under section 4 of the membership code are as follows:

> All persons, possessing some Indian blood, and born of natural parents, at least one of which is, was, or is entitled to be a member of the Ashcroft Band, are deemed to be original members.
>
> […]

[28] The Council then studied the case of each individual whose membership had been challenged by Mr. Cameron or in the Starr review, in what is known as BCR no 4. In each case, the Council reached the conclusion that the person was already a member and did not need to apply for discretionary membership, either because the person had previously applied and was voted in, or because they were entitled to automatic membership pursuant to the Council's interpretation of the 1987 Rules, as set forth in the resolution adopted earlier the same day.

[29] The Council also adopted a further resolution (BCR no 6) granting membership to a number of persons. In his affidavit, Mr. Robinson states that the aim of this resolution was to clear a backlog of applications for membership that had not been processed because of the ongoing controversies surrounding membership. The list appended to the resolution shows that some of these persons were admitted on the basis that their two parents are members of the Band (a category of automatic admission pursuant to the 1987 Rules), while others are admitted on the basis of the Council's interpretation of section 4.

[30] The Council also appointed a membership committee pursuant to the Rules. However, as it had found that no one needed to apply for membership, the Council did not forward the names of any such persons to the membership committee.

[31] Mr. Cameron was not satisfied with the Council's response to Justice Mosley's judgment. He brought a motion asking Justice Mosley to issue further directions and an application for judicial review of the resolutions adopted at the August 13, 2012 Council meeting. However, Mr. Cameron discontinued these proceedings. I have little information as to why he did so. He has since passed away. There is no suggestion that he reached any kind of agreement with the Council.

[32] Elections were held in late 2012 and in 2016. (Beginning in 2016, the Band has conducted its elections pursuant to the *First Nations Elections Act*, SC 2014, c 5 [the *FNEA*].) The membership issue was not raised on these occasions. A further election was called for May 6, 2021. Raymond Dick, Seraphine Boomer and Dayton Dick, who are applicants in the present proceeding, were candidates in that election. On that occasion, the Council also called a referendum to submit a new membership code to the members of the Band membership. This membership code purports to regularize the membership of anyone whose name appears on the existing membership list. It also entitles to membership any person who is a status Indian and who has at least one parent who is a Band member and a status Indian.

[33] Prior to the election, one of the applicants, Ms. Pittman, raised the issue of membership with the Band administrator and the electoral officer. Her concerns were dismissed and the election and referendum took place with a voters' list that included several persons whose eligibility she disputes. Chief Blain was re-elected, by a margin of 42 votes. Messrs. Earl Blain and Dennis Pittman were elected councillors, by a margin of 34 votes. The membership code was adopted by a margin of 14 votes.

[34] The applicants then brought two applications for judicial review. The first one, the "Band list application," challenges the Council's failure to comply with Justice Mosley's judgment and the entitlement of two groups of persons to membership in the Band. This first application also challenges the validity of the 2012 BCRs and the 2021 referendum. The second application, which I will call the "FNEA application," is brought under section 31 of the *FNEA* and challenges the results of the 2021 election.

II. Analysis

[35] Although the applicants brought two separate applications and seek a broad array of remedies, two basic issues emerge: the entitlement to membership of the first group of disputed members and the entitlement of the second group. These reasons are therefore organized as follows. I first address the standard of review. I then turn to the entitlement of the first and second disputed groups. I discuss the validity of the 2012 BCRs and the 2021 referendum as part of my reasons regarding the second group's entitlement. Once both groups' entitlement is determined, I draw the consequences with respect to the validity of the 2021 election. Lastly, I explain which remedies are warranted.

[36] At the outset, I emphasize that this judgment is not about the relative merits of the 1987 Rules and the 2021 membership code. It is for the Band's membership, not for the Court, to decide which categories of persons should become members of the Band and according to which procedure. Neither does this judgment rule on the constitutional validity of the 1987 Rules. For reasons explained later, this issue was not properly brought before the Court.

A. *Standard of Review*

[37] The selection of a standard of review is a challenging exercise in this case.

[38] Several aspects of the applications for judicial review call for this Court to act as the original decision-maker. In the *FNEA* application, the Court decides the validity of the election without showing deference to anyone: *McCallum v Canoe Lake Cree First Nation*, 2022 FC 969 at paragraph 68 [*McCallum*]. The Band list application seeks several declarations, that is, statements of the legal situation of the parties.

[39] Yet other aspects of the applications involve an explicit or implicit challenge to a specific decision. Most conspicuously, the applicants are asking me to quash the 2012 BCRs and to invalidate the 2021 referendum. These decisions would normally be reviewed on a reasonableness standard: see, for example, *McCallum*, at paragraph 26. Even where a declaration is sought, the relevant legal situation may include a decision to grant membership to someone. Extending reasonableness review to such decisions raises practical difficulties, as we have no evidence of these decisions and, at least in the case of the second disputed group, it is unclear who would have made them. This makes it only more difficult to separate the issues on which the Court is the original decision-maker and those on which it is reviewing someone else's decision.

[40] The parties have not provided meaningful submissions regarding the standard of review. They have largely argued the case as if I were the original decision-maker. They have not argued

that the matters at hand should have been decided by a decision-maker established by the Band. At the end of their submissions, the respondents stated that they abandoned any "technical defences" and wished the Court to provide a comprehensive solution on the merits.

[41] Fortunately, it is not necessary to reach a definitive conclusion regarding the standard of review, given the manner in which I am deciding the merits. With respect to the first disputed group, the applicants failed to bring any evidence that their inclusion on the Band list results from an incorrect or, *a fortiori*, an unreasonable decision or application of the law. The entitlement of the second disputed group depends largely on the validity of the 2012 BCRs and the 2021 referendum. I conclude that the Council acted unreasonably in purporting to enact the 2012 BCRs. As to the referendum, the reasoning the respondents put forward to sustain its validity is unreasonable.

B. *The First Disputed Group*

[42] The first disputed group of members consists of 21 persons whose names appeared on the 2021 voters' list, who in fact voted in the 2021 election, but who were identified in the 2009 Starr review as not having been duly admitted into the Band pursuant to the 1987 Rules. They are: Arnold Blain, Greg Blain, Leslie Blain Jr., Clinton Blankinship, Shawn Blankinship, Lavonne Comin, Arlene Dixon, Alfred Gardner, Dawn Gardner, Kenneth Peter Gardner, Marcie Gordon, Denise Gurney, Lesley Heidel, Debra Kilback (Van Nostrand), Betty Lowry, James Martin, Kenneth Martin, Erin Pelletier, Sharon Schamehorn, Teresa Vandell and Deloress Warneboldt.

[43] According to the applicants, these persons have in common the fact that they were not members of the Band when the 1987 Rules came into effect, that they were adults at that time (or, in a few cases, non-resident minors), that they have one parent who is a Band member and one who is not and that they obtained Indian status pursuant to section 6(2) of the *Indian Act*, that is, they are children of a reinstated person.

[44] In substance, the applicants submit that these persons were not entitled to automatic Band membership and could only become Band members if their applications were accepted by a vote of a majority of Band members, pursuant to Parts III and IV of the 1987 Rules. They assert that there is no evidence of any such vote with respect to the 21 persons in the first disputed group.

[45] In his decision, Justice Mosley acknowledged that legitimate concerns had been raised with respect to these (and many other) persons' entitlement to membership. He did not, however, decide the issue himself. He envisioned a process whereby a neutral body would investigate each individual's situation and make a decision. As he did not intend to decide the matter himself, I read paragraph 8 of his judgment as a summary of the applicants' allegations rather than a decision regarding Chief Blain's membership.

[46] Things did not unfold as Justice Mosley envisioned. As I explained above, the Council took it upon itself to decide that everyone whose membership was disputed was indeed a valid member, leaving no work for the membership committee. It is obvious from Justice Mosley's order that he intended the bulk of the membership review to be performed by the membership

committee, not by the Council itself. He could not have contemplated that the Council would change the membership rules to circumvent his order.

[47] Ten years have passed since Justice Mosley's decision. If anything, this shows that nothing useful is likely to be accomplished by mandating a further membership review. There is much more evidence before me than what apparently was put before Justice Mosley. In contrast to what was sought before Justice Mosley, the applicants are effectively asking me to rule on the entitlement to membership of specific individuals. The respondents have expressed the hope that my decision would bring a final resolution to the issue. Therefore, I will decide the issue myself instead of mandating a further review.

[48] At the outset, it must be emphasized that the applicants bear the burden of proving that the persons in the first disputed group are not entitled to membership. This is so for two interrelated reasons. First, in an application for judicial review, as in most legal proceedings, applicants bear the burden of establishing their claims, for instance that a decision is unlawful or unreasonable. An applicant cannot initiate a lawsuit, bring no evidence, and simply require that the defendant prove their rights. Second, there is a presumption of regularity of public decisions and registries, often expressed by the Latin maxim, *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium:* Sidney N Lederman, Alan W Bryant and Michelle K Fuerst, *The Law of Evidence in Canada*, 6th ed (Markham: LexisNexis, 2022) at paragraphs 4.57–4.59; *Commission des relations de travail du Québec v Canadian Ingersoll-Rand Company Limited*, [1968] SCR 695 at 706. Here, a person's presence on the Band list gives rise to a rebuttable

presumption that the person validly acquired membership. In fact, most of the members of the first disputed group have been on the Band membership list since 1996 or 1998.

[49] The applicants' allegations are based mainly, if not exclusively, on the findings of the 2009 Starr review. At this juncture, it is necessary to provide more details regarding the process and the outcome of this review.

[50] In August 2009, Ms. Starr, Ms. Kirkpatrick and Ms. Charlene Pittman reviewed the entire membership list. They ascertained the precise provision of the *Indian Act* and of the Rules under which each individual was entitled to Indian status or membership in the Band. A file was created for each person and a list was created to tabulate all the information.

[51] Where a person acquired Indian status after June 27, 1987, that is, the date when the Rules came into force, and did not benefit from automatic entitlement under section 4 of the Rules, the mention "voted in" was added where a record existed showing that the person was admitted at a specific meeting; otherwise, the mention "must apply" was added. Ms. Kirkpatrick explains the process as follows in her affidavit:

> We had a very limited number of membership meeting minutes. Whatever membership minutes the band may have had, [Charlene] had very few in her possession as Membership Clerk. She would always say to us, "I got what I got." I was able to provide even fewer. We were far from having a comprehensive record. Where we didn't have a copy of the minutes, [Charlene] or I would say if we had a clear memory of someone being voted in. If one of us had reason for doubt, or otherwise disagreed, we would not record the person as having been voted in. Not surprisingly, and despite the fact that she or I, and sometimes both of us, attended many membership meetings, neither of us had a clear recollection of all the people who had been voted in over the previous decade.

[52] The Starr review never completed its mandate. The Council fired Ms. Starr in September 2009 apparently after learning that the outcome of her review would not align with their wishes, and after Ms. Starr insisted on presenting her preliminary findings to the Band's membership instead of the Council's lawyer. Ms. Starr later produced a report, describing the genesis of the Rules, the process followed in August 2009 and the circumstances of her firing in September 2009. There is no indication that she had reached definitive conclusions about anyone's entitlement to membership. No list is appended to her report. Ms. Kirkpatrick produced her own report independently of Ms. Starr. She appended what she described as the latest iteration of the working list produced by the three women, in which 69 persons have a "must apply" notation beside their names.

[53] Ms. Kirkpatrick states that the list developed by Ms. Starr, herself and Ms. Charlene Pittman was not meant to be final and that Ms. Starr was open to revise it if new information came to light. For her part, Ms. Charlene Pittman insists that the "must apply" notations were provisional and meant only that more information was needed to reach a conclusion. Indeed, the affected persons were never contacted nor were they asked to provide any information in their possession bearing on the matter.

[54] In my view, the applicants cannot discharge their burden of proving that the persons in the first disputed group have never been admitted into the Band by relying on the list appended to Ms. Kirkpatrick's report. The presumption of validity of the Band list has not been rebutted.

[55] First, as the saying goes, absence of evidence is not evidence of absence. Given the process followed, an indication that a person "must apply" means little beyond the fact that no written evidence was found in the Band's records. Yet, both parties acknowledge that the Band's records are woefully incomplete. As the surviving minutes of meetings show that most applications were accepted, the most likely conclusion is that a person described as "must apply" had actually applied and was granted membership, but the records have disappeared.

[56] The fact that Ms. Kirkpatrick and Ms. Charlene Pittman had no recollection, had doubts or disagreed about their memories does not prove that a person was never admitted into the Band. In fact, in her affidavit, Ms. Kirkpatrick does not make that inference, except in the case of Chief Blain. She states: "Let me say here that Greg Blain is the kind of guy who leaves an impression. If he had been voted in and I was there, I would have remembered and if I wasn't there, others sure would have told me." Such a hypothetical assertion, however, is wholly insufficient for me to reach the conclusion that Chief Blain was never admitted into the Band.

[57] Moreover, there are reasons to doubt the accuracy of Ms. Kirkpatrick's memory. She lists at least seven persons as not having applied for membership, even though there are membership meeting minutes showing that they were duly admitted into the Band: Nicole Blain (Pigeon), Norman Blain, Jodene Blain, James Lowry, Ricky Wilson, Larry Wilson and Philip Dobranski. Yet, Dean Lulu and Charles Wray, who are shown as members in good standing on the 2009 list, were admitted on the same day as Nicole, Norman and Jodene Blain, at a meeting presided by Ms. Kirkpatrick. The highly partisan tone of Ms. Kirkpatrick's 2009 report also casts doubt on the impartiality of the process.

[58] Second, there is no positive evidence that anyone was added to the membership list contrary to the Rules during the relevant period. What the evidence reveals is that membership meetings were regularly held in the years after the adoption of the Rules, to process the numerous applications made by persons who had gained Indian status as a result of Bill C-31. The applicants' theory would assume that unbeknownst to Ms. Kirkpatrick, who was chief during a significant part of that period, someone would have surreptitiously added the names of persons who did not in fact apply to the membership list. This is simply implausible.

[59] Third, some members of the first disputed group gave evidence that they applied for membership in 1987 or shortly thereafter and that they were admitted into the Band. In particular, Earl Blain stated that he applied for the admission of his minor children, Jodene, Nicole and Norman, and he understands that they were voted in at a meeting held in November 1988. He adds that the children of his brother, Les Blain Sr., who are Greg, Les Jr. and Lavonne, were admitted around the same time. Chief Blain states that he and his brother Les Jr. applied for membership in 1988. In early 1990, after they made inquiries, both brothers received a letter from the Band stating that they had been admitted on January 12, 1989. We now know that this date is incorrect, as it is Stanley Blain who was admitted on that date. Nonetheless, this evidence tends to confirm that the members of the first disputed group were admitted into the Band pursuant to a vote.

[60] To summarize, there is not a shred of evidence that the members of the first disputed group were improperly admitted into the Band. There is a presumption that their names were regularly added to the Band list. All available evidence tends to reinforce this presumption

instead of rebutting it. Unless we are to conclude that these persons lost their rights when the Band lost its records, we must now accept that they are valid members.

[61] To reach this conclusion, I do not rely on the decision sheets appended to one of the 2012 BCRs, in which the Council purported to find that the members of the first disputed group (and others) were valid members. In most cases, the Council based its decision on its own interpretation of the 1987 Rules, an issue I now turn to. Only three members of the first disputed group were found to have actually applied for membership. The evidence on which the Council based its decisions is not before me. The decisions may simply reflect the fact that the Council did not have more minutes of membership meetings than I now have, and perhaps had even less.

C. *The Second Disputed Group*

[62] The applicants also challenge the inclusion of a second group of persons on the Band's membership list. These persons are said to be children of one member of the first disputed group and one person who is not a Band member. Pursuant to the 1987 Rules, they can only be admitted into the Band by a vote of the membership. These persons are: Dallas Blain, Jason Blain, Kyle Blain, Logan Blain, Melissa Blain, Roman Blain, Trista Blain, Zachary Blain, Matthew Comin, Brendan Dixon, Nolan Dixon, Rachel Dixon, Kenneth Ryley Gardner, Flecia Gordon, Adam Gurney, Jacqueline Kouprie, Adrian Pelletier, Alexander Pelletier, Blaise Pelletier, Cecila Pelletier, Ellen Pelletier (Lambert), Katherine Pelletier, Michael Pelletier, Regina Pelletier, Roland Pelletier, Vincent Pelletier and Michael Van Nostrand. They all voted in the 2021 election and referendum.

[63] It is common ground that no membership votes were held after 1996. While it is not entirely clear that the members of the second disputed group were all born after that date, the respondents acknowledge that they never were the subject of a membership vote. It follows that they have not become members of the Band based on the 1987 Rules alone. According to the respondents, there are nevertheless three alternative bases for finding that these persons have become members. First, the respondents assert that the 1987 Rules must be interpreted according to the 2012 BCRs, which would make these persons members, because they have one parent who is a member of the Band. Second, the respondents argue that the 1987 Rules have been repealed and replaced by the new membership code adopted in the 2021 referendum. There is no dispute that the persons in the second disputed group would be entitled to membership if the 2021 code was validly adopted. Third, the respondents say that the practice of automatically admitting children having only one Band member parent has become a custom that displaces the Rules.

[64] I am unable to agree with the respondents. For the following reasons, it was unreasonable for the Council to enact the 2012 BCRs and to consider that the 2021 membership code was validly adopted by referendum. Moreover, the 1987 Rules have not been displaced by a custom. Before explaining why this is so, I must deal with the respondents' argument that the passage of time forecloses any challenge to the validity of the BCRs or the referendum.

(1) Effect of the Passage of Time

[65] The respondents argue that the applicants' challenge to the validity of the 2012 BCRs and the membership code purportedly adopted by referendum in 2021 is out of time, presumably

because it was brought outside the 30-day time limit set forth in section 18.1(2) of the *Federal Courts Act*.

[66] With respect to the BCRs, I disagree. The statutory time limit does not apply where the basis of the challenge is that delegated legislation was enacted without jurisdiction. The constitutional validity of legislation is an issue that can always be submitted to the Courts, even though many years have passed since the enactment of the challenged statute: *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paragraphs 134–135, [2013] 1 SCR 623 [*Manitoba Metis*]. Likewise, there is a long line of authority to the effect that municipal by-laws may be challenged at any time, regardless of statutory time limits or the Court's discretionary appreciation of the timeliness of the application, where the basis of the challenge is a lack of jurisdiction: *Tonks v Reid*, [1967] SCR 81 at 85; *Immeubles Port Louis Ltée v Lafontaine (Village)*, [1991] 1 SCR 326 at 372; *Lorraine (Ville) v 2646-8926 Québec inc*, 2018 SCC 35 at paragraph 25, [2018] 2 SCR 577.

[67] In the present case, the main basis for the applicants' challenge is that the Council lacked the power (or jurisdiction) to amend the 1987 Rules by way of a BCR. Hence, there is no time limit and the validity of the BCR can be challenged at any time.

[68] The situation is somewhat different with respect to the 2021 referendum. There is no doubt that the Band membership has the power (or jurisdiction) to amend the Band's membership code, by way of a referendum or other means of expressing the will of a majority of electors. Thus, the applicants' challenge does not pertain to jurisdiction, but to the manner in

which this jurisdiction was exercised, and the statutory time limit set forth by subsection 18.1(2) of the *Federal Courts Act* applies.

[69] The application for judicial review was brought approximately two months after the referendum, outside the 30-day limit set by subsection 18.1(2). The applicants seek an extension of time. They explain that due to limited resources, they filed the application aimed at the election results first, and then prepared the second application, dealing with the band list and the referendum. I accept that this is a reasonable explanation for a relatively short delay and that the applicants had a continuous intention to challenge the referendum results. Moreover, I do not see how this short delay prejudiced the respondents in any way. The respondents do not oppose the extension of time. Thus, I extend the time limit for filing the application for judicial review in file T-1061-21.

[70] Moreover, if the 2012 BCRs are invalid, then the persons who derive their entitlement to membership from these BCRs are not valid members of the Band. It is true that in certain circumstances, decisions made pursuant to legislation later declared invalid are not themselves invalidated. For instance, a conviction stands even though the legislation creating the offence is subsequently invalidated: *R v Sarson*, [1996] 2 SCR 223. Applying this principle to the present case, however, would effectively deprive the invalidation of the BCRs of its practical effect. If we were to validate individual decisions to grant membership based on the criteria set forth in the 2012 BCRs until today, we would create a permanent state of things in which a large category of persons are considered members, will be entitled to vote in Band elections and will potentially transmit their membership to their children, even though they were not admitted in compliance

with the 1987 Rules. To push the matter one step further, we would be bound to recognize that these persons validly participated in the 2021 referendum, which was designed to overcome the invalidity of the 2012 BCRs, from which they purportedly derive their membership. One cannot accept that a fundamental aspect of the Band's political status be changed through such a circular and unlawful process, simply because individual grants of membership were not challenged within 30 days. Such a dramatic change would jeopardize the rule of law.

(2) Invalidity of the 2012 BCRs

[71] As I explained above, the Council adopted a series of resolutions (or BCRs) intended to address the issues raised by Justice Mosley's judgment. One of those resolutions (BCR no 2) purported to find that certain aspects of the 1987 Rules were discriminatory and to rewrite them in a manner that would bring them in compliance with section 15 of the Charter. Another resolution (BCR no 4) purported to adjudicate the entitlement to membership of close to 100 persons, according to the criteria set by the first resolution. Yet another resolution (BCR no 6) purported to admit other persons, whose applications had not yet been processed.

[72] In reality, the 2012 BCRs amount to an attempt to amend the 1987 Rules. The Council does not have the power to do this. Neither does it have the power to declare the Rules unconstitutional and read them down in a manner that it thinks is compliant with the Charter. While the Rules direct the Council to apply them in a non-discriminatory manner, this does not include a power to amend them. I will deal with each of these propositions in turn.

[73] Before doing so, I point out that nothing in Justice Mosley's judgment compelled the Council to act as it did. The constitutional validity of the 1987 Rules was not challenged before him. The basic premise of his judgment was that the Council was bound to apply the Rules, not change them in a circuitous way.

(a) *Council Cannot Change the 1987 Rules*

[74] The Council cannot change the 1987 Rules because they were enacted by the Band membership, and the Council's powers are subordinate to those of the membership. The contrary interpretation is unreasonable, as it ignores the structure of the Act and the case law applying it. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 174–188, [2019] 4 SCR 653 [*Vavilov*], the decision-maker's failure to have regard to similar constraints led the Supreme Court of Canada to find a decision unreasonable.

[75] The 1987 Rules were enacted pursuant to section 10 of the Act. Subsection 10(2) provides that a First Nation may enact membership rules with the consent of a majority of its electors. It is well established that a power conferred to a First Nation's membership cannot be exercised by the council. In *Key First Nation v Lavallee*, 2021 FCA 123 at paragraph 42, the Federal Court of Appeal stated that "the *Indian Act* . . . reserves certain matters and powers which may only be exercised exclusively by the band as a whole. Those include matters of aboriginal title and band membership." See also *Omeasoo v Canada (Minister of Indian Affairs and Northern Development)*, [1989] 1 CNLR 110 (FCTD); *Sandberg v Norway House Cree Nation Band Council*, 2005 FC 656 at paragraph 12.

[76] In the present case, the 2012 BCRs can only be characterized as an amendment to the 1987 Rules. They seek to change one of its prominent features, namely, that persons who have only one parent who is a Band member are required to apply for discretionary admission. The 2012 BCRs purport to substitute a very different rule, whereby these persons have an automatic right to membership. Moreover, they seek to adjudicate controversies regarding individual entitlements to membership or to grant applications for membership. Nothing in the Rules grants the Council the power to make such decisions. Hence, the 2012 BCRs are invalid, because they exceed the Council's powers.

[77] This would be true even if the power to enact membership rules were considered an inherent power, as the respondents seem to suggest, instead of a power delegated by the Act. Such a power would inhere in the Band's membership, not in the Council. Where an inherent power is exercised by the membership, the council is bound by the rules established by the membership and cannot purport to amend them: *Lavallee v Louison*, 1999 CanLII 8714 (FC) at paragraphs 45–51; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 at paragraph 48, [2019] 4 FCR 217 [*Whalen*]; *Thomas v One Arrow First Nation*, 2019 FC 1663 at paragraph 30.

[78] The applicants have focused their challenge on BCR no 2, which purports to change the membership rules, and BCR no 4, which purports to implement BCR no 2. There is, however, no evidence with respect to the persons who are listed in BCR no 6. They are not members of the first or second disputed group. They are not named as respondents in these proceedings. Some of them may be entitled to automatic admission pursuant to the 1987 Rules. The parties made no

submissions in this regard. For these reasons, I will restrict my findings to BCRs nos 2 and 4, and I refrain from expressing any opinion regarding BCR no 6.

[79] I also wish to clarify the consequences of the invalidation of BCR no 4. That BCR purported to confirm that close to 100 persons are members of the Band. It is invalid because the Council has no power to adjudicate membership disputes. This, however, does not mean that the persons named in that BCR are not members in good standing. The invalidation of BCR no 4 does not affect the status of persons whose names have been validly added to the membership list. Indeed, most if not all members of the first disputed group are named in that BCR. Other persons named in that BCR are not parties to this proceeding and I have not received evidence or submissions in their regard. Nevertheless, if they are in the same situation as those in the first disputed group, the same conclusions would logically apply to them.

(b) *Council Cannot Adjudicate the Constitutional Validity of the 1987 Rules*

[80] The respondents argue that the 2012 BCRs are nevertheless valid because the Rules conflict with the Charter. The Council, so to speak, had to choose between the Rules and the Charter, and cannot be faulted for giving priority to the Canadian constitution. This, however, assumes that the Council has jurisdiction to entertain a constitutional challenge to the validity of the Rules. For the following reasons, I find that it does not.

[81] The Supreme Court of Canada wrote long ago that "The question of the constitutionality of legislation has in this country always been a justiciable question": *Thorson v Attorney General of Canada*, [1975] 1 SCR 138 at 151. The courts' role in adjudicating the constitutional validity

of legislation has been described as a "judicial power fundamental to a federal system as described in the *Constitution Act*": *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307 at 328. By extension, administrative tribunals can decide constitutional issues arising in cases before them, provided that they have the power to decide questions of law: *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765. For example, First Nations election appeal tribunals are presumed to have jurisdiction over constitutional issues: *Perry v Cold Lake First Nations*, 2018 FCA 73 at paragraph 45. Likewise, administrative tribunals must exercise their discretionary powers in a manner consistent with Charter values: *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*].

[82] A law-making body, whether a legislature or a delegated body, is not invested with a similar power. Of course, if a law-making body thinks one of its own enactments is unconstitutional, it may repeal or amend it. The nature of this process, however, is fundamentally different from a court declaring a statute to be of no force or effect for being contrary to the Constitution: *R v Sullivan*, 2022 SCC 19 at paragraph 45. It is simply a new exercise of the body's law-making power.

[83] In contrast, a law-making body or, for that matter, a component of the executive branch, cannot strike down or refuse to apply an enactment of another law-making body because it believes it to be unconstitutional. That would be a usurpation of the latter body's powers. In such a situation, the proper course of action is to seek a judicial decision, as all levels of government have done on numerous occasions, unless the body in question is granted an explicit power of

disallowance (see, for example, the former section 82 of the Act; section 90 of the *Constitution Act, 1867*; and section 19.1 of the *Statutory Instruments Act*, RSC 1985, c S-22).

[84] If the Council was exercising a law-making function when it adopted the impugned BCRs, it had to stay within the confines of its powers. As I have explained above, it was not within the Council's powers to enact or amend membership rules. The Council cannot enlarge its law-making powers merely by declaring the Rules contrary to the Charter. The Council does not have a power to disallow a membership code adopted by the Band's members. Quite the contrary, the Council is in a subordinate position in these matters, as I showed above. It is trite law that a subordinate law-making body must respect higher norms and cannot change them: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 38.

[85] The respondents seem to suggest that the Council was exercising an adjudicative function when it purported to declare the Rules unconstitutional. However, they have not identified the source of such a power. The Rules, in particular, do not grant any discretionary decision-making power to the Council with respect to membership, let alone the power to decide questions of law. According to the Rules, the power of discretionary admission is to be exercised by the Band's membership, upon recommendation by the membership committee. The Council's only role in that process is to call a referendum of Band members when the membership committee makes a recommendation. There is no discretion involved in this step of the process. As there is no discretionary power to begin with, the principles in *Doré* do not assist the respondents.

[86] Justice Mosley's judgment did not grant any additional power to the Council. It is true that at paragraph 72 of his reasons, he left it "to the Band and its Council to decide how to proceed to remedy the breach and to give effect to that remedy." Nevertheless, the formal judgment ordered the Council to appoint a membership committee, which was to review applications for membership and make recommendations to a meeting of Band members. The assumption was that the process established by the Rules would be followed. That process does not afford the Council any decision-making role or discretionary power.

[87] Thus, it was unreasonable for the Council to attempt to amend the Rules by purporting to judge their constitutional validity. It lacks any power to do so. As the Supreme Court stated in *Vavilov*, at paragraph 68:

> Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended.

[88] In practice, this means that a council that believes that a provision of a membership (or election) code is invalid cannot purport to rectify the matter itself; it must rather set in motion the process for amending the code, which typically involves approval by the membership: see, for example, *Clark v Abegweit First Nation Band Council*, 2019 FC 721; *Linklater v Thunderchild First Nation*, 2020 FC 1065; *McCallum*, at paragraphs 96–103.

(c) *Council Cannot Rely on its Power to Apply the Rules*

[89] The respondents also argue that the Council was empowered to adopt the 2012 BCRs pursuant to section 31 of the Rules, which reads as follows:

> 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.

[90] A similar provision was considered in *Angus v Chipewyan Prairie First Nation Tribal Council*, 2008 FC 932. In that case, a First Nation purported to adopt a BCR terminating the electoral officer, thereby thwarting the election appeal process. My colleague Justice James Russell concluded that the provision in question "does not provide a power to a newly-elected Band Council to modify or change the primary functions and purpose of the Election Code."

[91] Likewise, in this case, the Council cannot rely on section 31 to change a basic feature of the Rules. To amend the Rules is not to "administer" them. Moreover, as I explained above, it is a basic legal principle that a delegation of power is presumed not to include the power to contradict the delegating instrument. Therefore, the BCRs cannot contradict the Rules.

[92] Moreover, sections 26–29 of the Rules set forth an amendment procedure involving a special meeting of the members of the Band. These provisions would be rendered useless if section 31 had the wide ambit urged by the respondents.

[93] In this context, I cannot read the prohibition on discrimination in section 31 as granting a wide-ranging power to review the constitutional validity of the Rules and to amend them accordingly. In other words, the prohibition applies to what the Council is empowered to do ("to administer these Rules"). It does not enlarge the Council's powers.

(d) *Respondents Cannot Challenge the Validity of the 1987 Rules in This Proceeding*

[94] In their written submissions, the respondents argue that the Rules discriminate contrary to section 15 of the Charter and seek a declaration that they are of no force or effect. However, they have not brought their own application for judicial review seeking such relief, nor have they given a notice of constitutional question.

[95] As a result, the issue of the constitutional validity of the Rules is not properly before me. Nothing in these reasons should be interpreted as an opinion on this issue.

[96] For similar reasons, the respondents cannot challenge the process by which the Rules were adopted in 1987. Had the matter been properly raised, adequate evidence could have been put before the Court. In any event, the Minister gave notice on September 18, 1987 that the Band controlled its membership. This would suggest that the Minister was satisfied that the Rules were adopted with the consent of a majority of the Band's electors. Indeed, in his judgment, at paragraph 43, Justice Mosley held that it was too late to challenge the validity of the adoption of the Rules in 1987.

(3) Invalidity of the 2021 Referendum

[97] The respondents, however, argue that a new membership code was adopted by way of referendum in 2021 and grants membership to every person whose entitlement is in dispute in this proceeding. The difficulty with this argument, however, is that the persons whose

entitlement is disputed voted in the 2021 referendum. In other words, if the 2012 BCRs are invalid, persons in the second disputed group were not Band members when they voted in the referendum. The fact that the referendum amended the Band's membership rules does not operate retroactively to entitle those persons to vote in the referendum.

[98] Hence, the argument becomes circular, unless the votes of disputed members did not affect the result of the referendum. That, however, is not the case here. There are 27 persons in the second disputed group, but the membership code was adopted by a margin of only 14 votes. The usual method for deciding whether an irregularity affected the outcome of an election, known as the "magic number" test, is to compare the number of irregular votes with the margin of victory. If the former is greater than the latter, the outcome is affected: *Opitz v Wrzesnewskyj*, 2012 SCC 55 at paragraphs 71–73, [2012] 3 SCR 76 [*Opitz*]. The evidence does not allow me to confidently adopt a different test or reach a different conclusion: *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraphs 54–57, [2018] 4 FCR 467. To the contrary, it is reasonable to assume that most of the disputed members voted according to their self-interest.

[99] The applicants put forward an additional reason to argue that the 2021 membership code was not validly adopted: it was not approved by an absolute majority of Band members voting in the referendum. I disagree. While section 10 of the Act and section 28 of the 1987 Rules provide for the adoption or amendment of membership rules with "the consent of a majority of the electors," the Federal Court of Appeal stated that this means that a majority of the electors must vote, and a majority of those who vote must be in favour of the proposed measure: *Abenakis of Odanak v Canada (Indian Affairs and Northern Development)*, 2008 FCA 126 at paragraph 42.

This requirement was satisfied here. Thus, my finding that the 2021 membership code was not validly adopted does not rest on this ground.

[100] The respondents nevertheless argue that the results of the referendum are valid or can no longer be challenged, because the voters' list is presumed to be valid or because of the doctrine of laches. I reject these submissions, for the following reasons.

(a) *Looking Behind the List*

[101] The respondents argue that in determining who could vote in the 2021 referendum, the presence of a person's name on the Band's membership list is conclusive. They rely on *Medeiros v Echum*, 2001 FCT 1318 at paragraphs 103–109 [*Medeiros*], and *Marchand v Canada (Registrar, Indian and Northern Affairs)*, 2000 BCCA 642 at paragraph 38 [*Marchand*].

[102] The applicants respond that the definition of "elector" in section 2 of the *Indian Act* must be read as meaning that a person's name must be on the band's list, but also that the person must be entitled to membership. By way of analogy, they also rely on *Opitz*, at paragraph 63, where the Supreme Court of Canada stated that a judge may look at any evidence regarding a person's age, citizenship or residence to determine if the person was entitled to vote.

[103] In the exceptional circumstances of this case, I agree that the Band's membership list is not conclusive evidence of the right to vote in the referendum, but not for the reasons put forward by the applicants. I must say that I have concerns with the wide-ranging propositions they put forward. While the Supreme Court mentioned in *Opitz* that a judge could look at

evidence of an elector's citizenship, I take this to mean that a judge could require the production of an elector's passport, certificate of birth or other acceptable proof of citizenship. I would be surprised if the Court had in mind that on an election appeal, an elector's entitlement to citizenship can be challenged. In the First Nations context, there are processes for challenging a person's entitlement to membership. If they are not used, one cannot normally transform an election appeal into a membership challenge.

[104] What makes this case different is that it does not involve a dispute regarding an individual's entitlement to membership, but an unlawful attempt by the Council to change unilaterally the Band's membership rules. As Justice Mosley emphasized, what is at stake is the rule of law. As a public body, the Council must act according to the law. Instead, the Council decided to disregard the law made by the members of the Band and to substitute its own rules, in an attempt to circumvent Justice Mosley's judgment. Likewise, in *McCallum*, at paragraph 94, my colleague Justice Cecily Y. Strickland refused to consider the membership list as determinative because it was created based on criteria other than those found in the membership code that was in force.

[105] Abiding by the rule of law is all the more important in this case as the Council purported to change the membership of the Band. There are few issues more important to a First Nation than the definition of its membership. It goes to the very identity of a First Nation as a political entity. For this reason, Parliament empowered First Nations' voters, not their councils, to enact membership rules or codes. Moreover, it does not take much perspicacity to understand that

giving councils the power to change membership rules would pave the way to partisan manipulation.

[106] A decision to enlarge the Band's membership must be made by a majority of those who are members before the enlargement. Those who would benefit from the enlargement cannot vote in the referendum. In other words, the result of the referendum is not retroactive. Thus, only those entitled to membership pursuant to the 1987 Rules had a right to vote. If it were otherwise, the self-determination of the existing collective could be defeated by those who wish to join, but are not yet members.

[107] For these reasons, the issue of the validity of the referendum cannot be divorced from that of the validity of the voters' list. It is beyond dispute that 27 persons (the members of the second group) were on the list, but were not entitled to membership pursuant to the 1987 Rules, because they have only one parent who is a Band member and they did not apply for discretionary admission. The votes of these 27 persons may well have affected the outcome.

[108] *Medeiros* and *Marchand* do not assist the respondents. In *Medeiros*, a First Nation held a vote to ratify a settlement agreement with a Crown corporation, but prevented its off-reserve members from voting, because it considered them as forming a different, yet unrecognized, First Nation. Justice Russell held that the First Nation could not disregard its own membership list and effectively arrogate to itself the power to create a separate First Nation. The present situation is significantly different, as it involves the unlawful enactment of membership rules, which jeopardizes the validity of the whole membership list.

[109] *Marchand* dealt with paragraph 6(1)(a) of the Act, which grants Indian status to a person who "was registered or entitled to be registered immediately before April 17, 1985." The British Columbia Court of Appeal held that this phrase includes persons who were registered in error before that date. The provision had the effect of regularizing the Indian register as of that date. There is no corresponding provision in the 1987 Rules that would regularize the status of those in the second disputed group.

(b) *Laches and Consequential Arguments*

[110] The respondents have also invoked the doctrine of laches as a bar to the applicants' claims. The Supreme Court of Canada described this doctrine as follows in *Manitoba Metis*, at paragraph 145:

> The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo* . . .

[111] In their written submissions, the respondents raised the defence of laches mainly with respect to the first disputed group, but did not explain precisely in what respect the applicants' conduct constitutes acquiescence nor how the respondents changed their position in reliance on the applicants' acquiescence. The oral submissions did not make things clearer.

[112] The basic problem with this submission is that it amounts to asking the Court to validate a significant change to the 1987 Rules, simply because the Council persisted in a course of action

calculated to undermine them. Yet, as Justice Mosley noted, the Council's failure to abide by the 1987 Rules is a breach of the rule of law. One cannot tolerate the Council's systematic disregard for the rules enacted by the Band's membership.

[113] Another fundamental issue is that acquiescence presupposes knowledge: *Manitoba Metis*, at paragraph 147. Yet, there is little evidence that anyone knew about the 2012 BCRs when they were made or in the following years. The applicants state that they only became aware of their existence in the aftermath of the 2021 election. While the BCRs were disclosed to Mr. Cameron's lawyer upon their adoption, the communication was explicitly restricted to the purposes of litigation. There is no evidence that Mr. Cameron disclosed them to anyone else or that the Council made them public.

[114] The respondents place much emphasis on the discontinuance of Mr. Cameron's challenge to the 2012 BCRs and to the Band's response to Justice Mosley's judgment. As Mr. Cameron was working in close association with other opponents of Chief Blain, in particular Ms. Pittman and Ms. Kirkpatrick—he was the latter's son—his decisions should be imputed to the whole group. I am unable to agree with this submission, as there is no evidence of the reasons leading Mr. Cameron to discontinue his proceedings and no evidence that the current applicants agreed with the discontinuance. In particular, no suggestion was made that he, nor the current applicants nor Chief Blain's opponents generally, reached any kind of settlement with the Band.

[115] In any event, the respondents have not explained in what respect they have changed their position or acted to their detriment in reliance on the applicants' alleged acquiescence. I note, in

this regard, that with one exception, the individual respondents have not appeared in this proceeding. To the extent that the passage of time would have made it more difficult to marshal evidence with respect to membership votes during the period 1987–1996, this would affect mainly the first, not the second disputed group.

[116] It seems that the real basis for the respondents' laches argument is that many persons will suddenly be deprived of the benefits of membership, contrary to their long-standing belief that they are members of the Band. The law, however, must be complied with, however inconvenient the result. As I will explain later, the solution to this is not to turn a blind eye to a systematic failure to apply the 1987 Rules, but to stay the effects of this judgment to allow all parties to reach a mutually acceptable solution.

(4) Custom

[117] The respondents also argue that the practice of granting membership to everyone who has at least one parent who is a member of the Band—what they call the "every child policy"—has become the Band's customary law and displaces the 1987 Rules. Indeed, the preamble of the 2012 BCR no 2 asserts that this policy forms part of the "customs, traditions and laws" of the Band.

[118] I am prepared to assume, for the sake of discussion, that section 10 of the Act does not prescribe any particular process for the adoption of a membership code and that the "consent of a majority of the electors of the band" can be given through means that include custom. With respect to elections, our Court recognizes a "custom" "when it is shown to reflect the broad

consensus of the membership of a First Nation": *Whalen*, at paragraph 32. A broad consensus may be expressed by the enactment of a written law by the formal vote of a First Nation's membership: *McCallum*, at paragraph 60. It may also arise through "a course of conduct which expresses the First Nation's membership's tacit agreement to a particular rule": *Whalen*, at paragraph 36. The burden of proving a custom is on the party alleging it: *Whalen*, at paragraph 41.

[119] The main difficulty with the respondents' argument is that whatever custom existed before 1987 was itself displaced by the adoption of the Rules. I must assume that the Rules were validly adopted by a majority of the Band's members, which means that their content attracted the broad consensus of the community. Thus, the Rules met the test for custom and displaced any prior conflicting custom.

[120] In other words, there is no hierarchy between unwritten customary law and written laws adopted by a First Nation's membership. Both reflect the broad consensus of the community, as that concept is understood in this Court's jurisprudence. Therefore, when they conflict, the more recent law prevails.

[121] In this regard, it does not assist the respondents to assert that surveys conducted in 1986–1987, prior to the adoption of the Rules, were more consistent with the "every child policy" than what found its way in the Rules. Nor can they rely on historical evidence purporting to describe the laws of the Band prior to the imposition of the Act. We must assume that the members decided to displace any pre-existing custom when they adopted the 1987 Rules. Pre-existing

custom does not operate as a limit on the members' power to enact membership rules under section 10 of the Act.

[122] This leaves the possibility that a new custom emerged after 1987 and displaced the written Rules. There is, however, simply no evidence that the "every child policy" became a custom after 1987. The fact that most, or perhaps all, applicants were granted membership during the period 1987–1996 may show that Band members were of the view that every child of a member should be admitted; but it is equally compatible with the principle that a vote according to the Rules was required.

[123] With respect to the period 1996–2012, I concluded above that there is little evidence that new members were admitted and, *a fortiori*, that the alleged "every child policy" was followed. Most importantly, there is no evidence that Band members (as opposed to Council members or Band employees) were made aware of whatever policy was in existence. Acts of the Council that are not generally known to the members cannot change the custom: *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 at paragraph 37. Hence, it is impossible for me to find that any policy that was followed during that period attracted the broad consensus of the members of the Band.

[124] For similar reasons, the 2012 BCRs cannot give rise to a custom. As I explained above, there is no evidence that they were made public and that Band members knew about them. Through the expedient of declaring a custom, the Council cannot usurp the power of the members of the Band to enact or amend membership rules.

[125] The respondents also rely on the results of a survey of Band members conducted in 2012 in the aftermath of Justice Mosley's judgment. The actual results of the survey are not in evidence. We only have a summary provided by Mr. Robinson in his 2012 affidavit. It appears that only 30 members responded to the survey. It is difficult to draw any conclusions from such imprecise information.

[126] As for the 2021 referendum, I have explained above that it cannot constitute a valid expression of the views of the Band's membership.

D. *Validity of the 2021 Election*

[127] The applicants also challenge the validity of the 2021 election. I have concluded that only the members of the second disputed group, that is, 27 persons, voted without being entitled to do so. Yet, the successful candidates for chief and both councillor positions were elected by a margin greater than 27 votes. Thus, even if the members of the second disputed group voted in contravention of the provisions of the *FNEA*, this did not affect the result of the election.

[128] Moreover, as Chief Blain is a member of the Band, his election did not breach the *FNEA*.

[129] Given that there are no grounds for overturning the results of the 2021 election, it is not necessary for me to decide whether the application for judicial review with respect to the election results was brought within the time limit set by section 32 of the *FNEA*, nor whether the Court has jurisdiction to extent this time limit.

E. *Remedies*

[130] This brings me to the issue of remedies. The applicants have sought a broad array of remedies, including declarations, injunctive relief and orders setting aside the results of the 2021 election and referendum. They also ask the Court to mandate a membership review process similar to that envisioned by Justice Mosley and to retain jurisdiction.

[131] As there is no evidence that the admission of the first disputed group into the Band was irregular, all remedies in respect of that group, including a declaration that Chief Blain is ineligible and an order setting aside the results of the 2021 election, are dismissed. For the same reason, a membership review would be useless, and no order is made in this regard.

[132] In contrast, the second disputed group are not valid members of the Band, because the 2012 BCRs and the 2021 referendum, which both purported to admit them, were invalid. To remedy this situation, and to guide further steps that the parties will need to take, I will first quash the 2012 BCRs (that is, BCRs nos 2 and 4) and the 2021 referendum and declare that the 1987 Rules remain in force. I will also issue a declaration that the members of the second disputed group have not been validly admitted into the Band. This means that these persons are not entitled to the rights and benefits associated with membership in the Band.

[133] This will undoubtedly place the second disputed group in a difficult situation. These persons may have legitimately believed, for a number of years, that they were members of the Band. They may depend on services offered by the Band to its members. They may reside on the

reserve. The Band's membership may well want to correct this situation, at least to a certain extent. One solution would be to amend the 1987 Rules to extend membership to some or all of these persons, by way of a referendum in which only current members vote. Another solution, which does not require an amendment to the Rules, would be for some of these persons to apply for discretionary admission under the 1987 Rules. The Council would then be required to set in motion the process set forth in the Rules. In giving these examples, I do not wish to mandate a particular course of action nor express an opinion as to who should be entitled to membership. I simply acknowledge that measures may be taken in response to this judgment, and that it will take some time to do so in a proper fashion.

[134] The applicants attempt to avoid some of these consequences by reframing the order they are seeking as pertaining only to the disputed members' right to vote. This, however, is illogical. Unless there are specific provisions to this effect in a First Nation's election or membership code, a person cannot be a member of a First Nation for certain purposes only. The modified order sought by the applicants could also lead to a situation where non-members are afforded rights associated with membership for an indefinite period. A preferable approach is to suspend the effects of this judgment on members of the second disputed group for a period of 18 months. During this period, the members of the second disputed group will enjoy the rights and benefits flowing from membership in the Band. However, this suspension will not apply to voting rights, as it would enable a replay of the 2021 referendum, in which persons who are not members voted.

III. Disposition

[135] For these reasons, the application for judicial review in file T-926-21 will be dismissed and the application for judicial review in file T-1061-21 will be granted in part. I will make the orders described above.

[136] No costs will be awarded. This is a case of divided success in which each party is successful with respect to a discrete portion of the case. Moreover, both parties share responsibility for the controversies that have plagued the Band for more than fifteen years. In these circumstances, it would be unjust to ask one party to bear the other party's costs.

JUDGMENT in T-926-21 and T-1061-21

THIS COURT'S JUDGMENT is that:

1. The applicants' request for an extension of time to bring their application for judicial review in file T-1061-21 is granted.
2. The application for judicial review in file T-926-21 is dismissed.
3. The application for judicial review in file T-1061-21 is granted in part.
4. Resolutions nos 2 and 4 adopted by the Council of the Ashcroft Indian Band on August 13, 2012 are *ultra vires* and are hereby quashed.
5. The results of the referendum held on May 6, 2021 are quashed and the membership code proposed for adoption was never validly enacted.
6. Membership in the Ashcroft Indian Band is governed by its Membership Rules adopted on June 28, 1987.
7. Dallas Blain, Jason Blain, Kyle Blain, Logan Blain, Melissa Blain, Roman Blain, Trista Blain, Zachary Blain, Matthew Comin, Brendan Dixon, Nolan Dixon, Rachel Dixon, Kenneth Ryley Gardner, Flecia Gordon, Adam Gurney, Jacqueline Kouprie, Adrian Pelletier, Alexander Pelletier, Blaise Pelletier, Cecila Pelletier, Ellen Pelletier (Lambert), Katherine Pelletier, Michael Pelletier, Regina Pelletier, Roland Pelletier, Vincent Pelletier and Michael Van Nostrand have not been validly admitted into the Ashcroft Indian Band and are not entitled to the rights and benefits associated with membership in the Band.
8. The effects of the declaration in the preceding paragraph are suspended for 18 months from the date of this judgment, except with respect to the right to vote in Band elections, a referendum, a general meeting or similar occasions, including any process under section 10(2) of the *Indian Act*.

9. No costs are awarded.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-926-21 T-1061-21
STYLE OF CAUSE:	T-926-21: ANNETTE PITTMAN, RAYMOND DICK, SERAPHINE BOOMER AND DAYTON DICK v ASHCROFT INDIAN BAND, GREG BLAIN, EARL BLAIN, DENNIS PITTMAN AND BLAIR MACKENZIE IN HIS CAPACITY AS ELECTORAL OFFICER T-1061-21: ANNETTE PITTMAN, RAYMOND DICK, SERAPHINE BOOMER AND DAYTON DICK v ASHCROFT INDIAN BAND COUNCIL, GREG BLAIN IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS CHIEF OF THE ASHCROFT INDIAN BAND, EARL BLAIN IN HIS CAPACITY AS COUNCILLOR OF THE ASHCROFT INDIAN BAND, DENNIS PITTMAN IN HIS CAPACITY AS COUNCILLOR OF ASHCROFT INDIAN BAND, AND ARNOLD BLAIN, DALLAS BLAIN, JASON BLAIN, KYLE BLAIN, LESLIE BLAIN JR., LOGAN BLAIN, MELISSA BLAIN, ROMAN BLAIN, TRISTA BLAIN, ZACHARY BLAIN, CLINTON BLANKINSHIP, SHAWN BLANKINSHIP, LAVONNE COMIN, MATTHEW COMIN, ARLENE DIXON, BRENDAN DIXON, NOLAN DIXON, RACHEL DIXON, ALFRED GARDNER, DAWN GARDNER, KENNETH PETER GARDNER, KENNETH RYLEY GARDNER, FLECIA GORDON, MARCIE GORDON, ADAM GURNEY, DENISE GURNEY, LESLEY HEIDEL, DEBRA KILBACK (VAN NOSTRAND), JACQUELINE KOUPRIE, BETTY LOWRY, JAMES MARTIN, KENNETH MARTIN, ADRIAN PELLETIER, ALEXANDER PELLETIER, BLAISE PELLETIER, CECILA PELLETIER, ELLEN PELLETIER (LAMBERT), ERIN PELLETIER, KATHERINE PELLETIER, MICHAEL PELLETIER, REGINA PELLETIER, ROLAND PELLETIER, VINCENT PELLETIER, SHARON SCHAMEHORN, TERESA VANDELL, MICHAEL VAN NOSTRAND AND DELORESS WARNEBOLDT

PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 22, 2022
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	OCTOBER 5, 2022

APPEARANCES:

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