

Federal Court



Cour fédérale

Date: 20230928

Docket: T-2025-22

Citation: 2023 FC 1309

Ottawa, Ontario, September 28, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

**ETHEL MABEL ARACIL-MORIN,
ESPANA ARACIL-MORIN
AND REMEDIOS GARRITTY**

Applicants

and

ENOCH CREE NATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Ethel Mabel Aracil-Morin (Ethel), her son, Espana Aracil-Morin (Espana), and her daughter, Remedios Garritty (Remedios), seek judicial review of the August 17, 2022 Decisions of the Chief and Council of Enoch Cree Nation (ECN) denying the request of Espana and Remedios to become members of ECN (Decisions). For ease of reference, and not out of any disrespect, I will refer to the Applicants by their first names.

[2] Ethel is a member of ECN. The requests of her children, Espana and Remedios, to become band members of ECN were denied under the 2004 ECN Membership Code, because Espana and Remedios hold membership in another band. On this Application, they argue that provisions of the 2004 ECN Membership Code discriminate on the basis of gender, contrary to section 15 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Alternatively, they argue that the ECN Decisions are unreasonable.

[3] For the reasons that follow, I am dismissing this judicial review. Although the ECN Decisions not to grant Ethel's children membership in her home community is regrettable, there is insufficient evidence in support of the claim that the 2004 ECN Membership Code provisions are discriminatory contrary to section 15 of the *Charter*. Further, the Decisions of the ECN Chief and Council are reasonable as they are consistent with the clear wording of the 2004 ECN Membership Code.

I. Background Facts

[4] The ECN is a Treaty 6 First Nation located northwest of Edmonton, Alberta with approximately 1,900 members. Ethel was born on June 18, 1948 as a member of ECN.

[5] In 1966 Ethel married a man from Kehewin Cree Nation (Kehewin). At that time and by operation of section 14 of the *Indian Act*, SC 1951, c 29 [*Indian Act 1951*], her marriage to a member of Kehewin transferred her membership from ECN to Kehewin.

[6] In 1971, Ethel divorced her husband but remained a member of Kehewin.

[7] In 1975, Ethel married a non-Indigenous man and, by operation of paragraph 12(1)(b) of the *Indian Act* 1951, she lost her Indian status.

[8] In 1985, Bill C-31, *An Act to Amend the Indian Act*, RSC 1985 (1st Supp), c 32 [*Indian Act*], was enacted as an attempt to remedy the historical discriminatory provisions of the *Indian Act* 1951 that disenfranchised women and, by extension, their children.

[9] In 1987, Ethel regained her Indian status. She remained a member of Kehewin being the band she was a member of when she lost her status.

[10] Her daughter, Remedios, was born in 1973 and gained Indian status in 1976. Ethel's son, Espana, was born in 1983 and obtained Indian status after Bill C-31 was enacted.

[11] Remedios and Espana were also listed as members of Kehewin based upon their Mother's membership.

[12] In 1987, pursuant to subsection 10(1) of the *Indian Act*, ECN enacted its first membership code. The 1987 ECN Membership Code allowed for the transfer of membership into ECN from another band, on the condition that the individual gave up membership in the other band.

[13] In 2002, Ethel applied to transfer her membership to ECN under the 1987 Membership Code. Her ECN membership was approved on December 11, 2002.

[14] In 2004, ECN adopted its current Membership Code that states at section 4.2: "A Person who is, or has been, a member or an Indian of another Band is not entitled to membership."

[15] On May 9, 2021, Espana and Remedios applied for membership in ECN. On June 10, 2021, the ECN Membership Clerk denied both of their applications based upon section 4.2 of the 2004 ECN Membership Code.

[16] Espana and Remedios appealed to the ECN Chief and Council. Their appeals were heard on February 16, 2022 and on March 7, 2022, the ECN Chief and Council denied their appeals.

A. *Decisions Under Review*

[17] On August 17, 2022, the ECN Chief and Council provided written reasons to Espana and Remedios. The Decisions are identical and state:

Your appeal was heard by Enoch Cree Nation Chief and Council.

We regret to inform you that your appeal Application for Membership was *denied*. Under the current Membership Code of Enoch Cree Nation effective, April 4, 2004, s 4.0 Persons Not Eligible for Membership, s 4.1 states "A person who is, or has been a member, or an Indian of another Band is not entitled to membership."

As Enoch Cree Nation Chief and Council met on the following dates below:

- Appeal Hearing Feb 16, 2022.
- Decision on Appeal Hearing March 7, 2022.

- Outcome of Appeal Hearing; denied Appellant Mrs. Remedios Garritty [or Mr. Espana Aracil respectively] under the current Membership Code, March 7, 2022.

The decision was made to uphold the current Membership Code of Enoch Cree Nation. If you have any questions or require further information please contact the Enoch Cree Nation Membership Department.

II. The Evidence

[18] The Applicants' Record includes the following Affidavit evidence: Affidavit of Espana Aracil-Morin sworn November 24, 2022, Affidavit of Ethel Aracil-Morin sworn November 25, 2022, Affidavit of Remedios Garritty sworn November 25, 2022, and Affidavit of Sonya McDonald sworn on January 12, 2023.

[19] The Respondent relies upon the Affidavit of Sonya McDonald sworn on January 12, 2023.

[20] A certified tribunal record (CTR) was also filed on behalf of ECN.

III. Issues and Standard of Review

[21] The following issues arise on this judicial review:

- A. Preliminary issues
- B. Do the provisions of the 2004 ECN Membership Code breach section 15 of the *Charter*?
- C. Are the ECN Decisions reasonable?

[22] The parties did not make submissions on the applicable standard of review for the *Charter* challenge of the provisions of the 2004 ECN Membership Code.

[23] The Supreme Court of Canada held that an administrative decision where the issue is whether a provision of the decision maker's enabling statute violates the *Charter* is to be reviewed for correctness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 57). Recently, the Federal Court found that a section 15 *Charter* challenge to a First Nation's voting policy is a constitutional question to be reviewed on a correctness standard of review (*McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220 at para 54).

[24] Accordingly, in my view, the issue of whether the provisions of the 2004 ECN Membership Code infringe the *Charter* should be considered on the correctness standard of review.

[25] The merits of the Decisions of the ECN Chief and Council to deny membership is considered on the reasonableness standard of review (*Vavilov* at paras 10, 23 and 25; *Peters First Nation Band Council v Peters*, 2019 FCA 197 at para 44).

IV. Analysis

A. *Preliminary issues*

[26] As a preliminary issue, ECN argues that the Court should not consider the Applicants' *Charter* arguments as they are being raised for the first time on this judicial review (*Alberta*

(Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61 at para 22).

[27] However, in reviewing the CTR, I note that the Applicants raised discrimination arguments in their appeal to the ECN Chief and Council. Specifically, the February 16, 2022 ECN meeting minutes record that the Applicants argued that the 2004 ECN Membership Code is discriminatory. In her submissions at the meeting, 'Remi' (Remedios) stated "this code is discriminatory."

[28] In the circumstances, while the Applicants may not have specifically raised a section 15 *Charter* argument before the ECN Chief and Council, I am satisfied that the issue of discrimination was raised in their appeals. Therefore, I do not agree with ECN that this is an issue being raised for the first time in the context of this judicial review Application.

[29] In a related argument, in their written submissions, ECN also objects to the Court considering the "the entire evidentiary record in support of the Charter arguments" as new evidence, including the supporting information in the Affidavits of Ethel Aracil-Morin, Espana Aracil-Morin and Remedios Garritty.

[30] As noted, I am satisfied that the Applicants raised "discrimination" as an issue before the ECN Chief and Council regarding the 2004 ECN Membership Code. Further, I would characterize the evidentiary record in support of the *Charter* submissions as providing background information and, therefore, within a recognized exception (*Association of*

Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 at para 20).

[31] I will, therefore, consider all of the evidence filed by the Applicants.

B. *Do the provisions of the 2004 ECN Membership Code breach section 15 of the Charter?*

[32] In accordance with section 57 of the *Federal Courts Act*, RSC 1985, c. F-7, the Applicants served a Notice of Constitutional Question on the Respondent, as well as each of the Provincial and Territorial Attorneys General. None of the Attorneys General filed evidence or participated in the hearing of this matter.

[33] The Applicants seek a declaration that sections 3.1, 4.2, and 5 of the 2004 ECN Membership Code breach section 15 of the *Charter* and, therefore, are unconstitutional.

[34] The effective date of the ECN Membership Code is April 4, 2004. The opening paragraphs state as follows:

WHEREAS the Enoch Cree Nation has inherent rights, values and traditions, including Treaty rights and the right to self determination;

AND WHEREAS the inherent and Treaty rights of the Enoch Cree Nation cannot be abrogated or derogated by the *Charter of Rights and Freedoms* or any other laws of Canada;

AND WHEREAS the Enoch Cree Nation assumed control of its Membership effective June 25, 1987, by approval of the majority of its Members;

AND WHEREAS the Enoch Cree Nation wishes to amend and clarify its existing code known as the “Enoch Tribe

Membership Code” adopted June 25, 1987 and amended December 11, 1997;

THEREFORE the Enoch Cree Nation has enacted this Membership Code by approval of the majority of its Electors to replace the “Enoch Tribe Membership Code (1987, amended 1997).

[35] The specific provisions challenged by the Applicants are as follows:

- 3.1 The following Persons are entitled to be added to the Membership List by applying and providing satisfactory proof of their entitlement to membership:
 - (a) An Indian Person, both of whose parents are Members, and who has at least one Eligible Grandparent who is a Member; [See Schedule "A"]
 - (b) An Indian Person, one of whose parents is a Member and the other parent is an Indian, and who has at least one Eligible Grandparent who is a Member; [See Schedule "B"]
 - (c) An Indian Person, one of whose parents is a Member and the other parent is a non-Indian, and who has at least one Eligible Grandparent who is a Member.

provided the Person is not a member and never has been a member of another Band.

...

- 4.2 A Person who is, or has been, a member or an Indian of another Band is not entitled to membership.

...

- 5.7 If an applicant satisfies the eligibility criteria, the Clerk shall:
 - (a) notify the applicant and the Council in writing of their decision to add the applicant's name to the Membership List upon the expiration of the thirty (30) day appeal period, in the event no appeal is filed.
 - (b) post a notice in the ECN administration office and another Public Places on the Reserve of the decision to add

the applicant to the Membership List, upon the expiration of the thirty (30) day period and in the event no appeal is filed.

- 5.8 If an applicant does not satisfy the eligibility criteria, the Clerk shall notify the applicant and the Council in writing of the decision to deny the applicants application for membership.

[36] Subsection 15(1) of the *Charter* provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[37] In their written submissions, the Applicants describe their *Charter* argument as follows:

2. The Applicants respectfully submit that the Decision denying their application for membership in Enoch is based on provisions of the Membership Code of Enoch Cree Nation that discriminate on the basis of gender in breach of s. 15 of the [*Charter*] and are not saved by s. 1, and are therefore unconstitutional.

[Footnotes omitted.]

[38] The Applicants argue that the historical discriminatory treatment of their Mother, Ethel, is perpetuated by the 2004 ECN Membership Code provisions, which bar them from becoming members of ECN. As noted, Ethel lost her membership in ECN and became a member of Kehewin as a result of a marriage. Then in 1975, as a result of marriage to a non-Indigenous man, Ethel lost Indian status.

[39] After the rectification of the discriminatory provisions of the *Indian Act* in 1985, Ethel regained Indian status, and was listed as a member of Kehewin, being her band membership at the time she lost status. As a result, her children also became members of Kehewin.

[40] Ethel successfully applied to regain her ECN membership under the 1987 ECN Membership Code. However, when Espana and Remedios applied for membership in ECN, the 2004 ECN Membership Code had been enacted. This resulted in their requests being denied because of their membership in Kehewin.

[41] The Applicants argue that the 2004 ECN Membership Code incorporates the 1985 *Indian Act* provisions that were found discriminatory in *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 at para 9 [*McIvor*] and *Descheneaux v Canada (Attorney General)*, 2015 QCCS 3555 [*Descheneaux*]. These cases found that differential treatment of the plaintiffs, based upon discrimination against their mothers and grandmothers under the *Indian Act*, produced effects that constituted discrimination under section 15 of the *Charter*.

[42] *McIvor* and *Descheneaux* concerned status under the *Indian Act*. All three Applicants here have status under the *Indian Act*. The issue in this case is not Indian status, but band membership.

[43] As noted, Ethel's membership in ECN was re-instated before the 2004 ECN Membership Code went into effect. Accordingly, I do not take the Applicants to be arguing that the 2004

ECN Membership Code is discriminatory against Ethel herself. The issue is whether the provisions of the 2004 ECN Membership Code are discriminatory toward Espana and Remedios.

[44] In support of their argument that the 2004 ECN Membership Code is discriminatory, the Applicants rely on *McCallum v Canoe Lake Cree First Nation*, 2022 FC 969 [*McCallum*] where the Court held that the reasoning in *McIvor* and *Descheneaux* applied to allegations of discrimination under a band membership code enacted under section 10 of the *Indian Act*. In *McCallum* the membership code was based on provisions of the *Indian Act* that were found not to comply with section 15 of the *Charter* because they perpetuated discrimination.

[45] The Applicants submit that based upon *McIvor*, *Descheneaux*, and *McCallum*, the 2004 ECN Membership Code provisions (sections 3.1, 4.2, and 5) that bar them from membership in ECN because of their membership in Kehewin, perpetuate the previous discriminatory provisions of the *Indian Act*. They are only members of Kehewin because of the discriminatory impact of the former provisions of the *Indian Act* on their Mother. Thus, they argue that the generational effect of section 14 of the *Indian Act* is ‘echoed’ in the current 2004 ECN Membership Code, similar to the effect of the *Indian Act* in the membership code in *McCallum*.

[46] The Supreme Court of Canada recently restated the test applicable to section 15 of the *Charter* in *R v Sharma*, 2022 SCC 39 [*Sharma*] at para 28, where the Court notes the test for assessing a section 15 claim requires the claimant to demonstrate that the impugned law or state action:

- (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and

- (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage [citations omitted].

[47] On the first step of the section 15 analysis, I note that the 2004 ECN Membership Code does not, on its face, create an apparent distinction based on gender. Although the Applicants rely upon *McCallum*, this case is different from *McCallum*. In *McCallum*, this Court found that the membership code directly incorporated the historical discriminatory provisions of the *Indian Act* that infringed section 15 of the *Charter* (*McCallum* at paras 100-102).

[48] Here, based upon the words used, the 2004 ECN Membership Code does not incorporate provisions from the *Indian Act* that create a distinction based on an analogous or enumerated ground. The Membership Code states only: “[a] Person who is, or has been, a member or an Indian of another Band is not entitled to membership.”

[49] However, the Court must also consider if the 2004 ECN Membership Code creates or contributes to a “disproportionate impact” on the Applicants on the basis of gender (*Sharma* at para 31).

[50] In this case, it is not disputed that the Applicants, Espana and Remedios, are members of Kehewin because of their Mother’s membership in Kehewin, by operation of the discriminatory provisions of the *Indian Act* 1951. It is also not disputed that Espana and Remedios were denied membership in ECN because of their membership in Kehewin. Accordingly, there is a cause and effect relationship between the discrimination suffered by Ethel and the inability of her children to become members of her home community.

[51] Thus the 2004 ECN Membership Code has a disproportionate impact on Espana and Remedios, which can be traced to the historical discrimination suffered by their Mother.

[52] Although the Respondent argues that historical discrimination suffered by Ethel cannot be relied upon to support Espana's and Remedios' section 15 claim, I read the decisions in *McIvor*, *Descheneaux*, and *McCallum* to stand for the contrary. Further, I do not agree that the discrimination claims made by Espana and Remedios which are based upon the impact of maternal discrimination is an attempt at retroactive application of the *Charter* (*McIvor* para 62).

[53] Although the Respondent argues that the Applicants could have applied under the 1987 Membership Code (as their Mother did) to be granted membership, in my view, that is a hypothetical argument and does not respond to the question of whether the current 2004 ECN Membership Code results in a disproportionate impact on the Applicants.

[54] Notwithstanding this, even if the Applicants can establish that the 2004 ECN Membership Code has a disproportionate impact on them, they must also meet the second part of the section 15 test and demonstrate that the distinction imposes a burden or denies a benefit that reinforces, perpetuates, or exacerbates disadvantage.

[55] On the second part of the section 15 test, the Applicants have the evidentiary burden of demonstrating that the distinction caused them harm. This harm can include economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion (*Sharma* at paras 51-53).

[56] Here, other than being denied membership in their Mother's home community, the Applicants have not provided any evidence to establish that the denial of membership in ECN reinforces, perpetuates, or exacerbates disadvantage (Sharma at para 28). There is no evidence that the Applicants are prevented from visiting their family members at ECN. Nor is there any evidence that they are unable to participate in ECN community and cultural activities. They also did not offer any evidence that there are differences in the membership benefits between Kehewin and ECN. Finally, there is no evidence of economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion.

[57] Therefore, even if the 2004 ECN Membership Code has a disproportionate impact on the Applicants, Espana and Remedios, there is no evidence that they have been denied a benefit sufficient to satisfy the second prong of the section 15 *Charter* test. Accordingly, the Applicants have failed to meet their evidentiary burden.

[58] In summary, there is no dispute about the discriminatory nature of the former provisions of the *Indian Act*. Nor is there any dispute about what the *McIvor*, *Descheneaux*, and *McCallum* decisions stand for. However, for the reasons outlined above, in my view the provisions of the 2004 ECN Membership Code and the circumstances of Espana and Remedios' differ from those of the parties in *McIvor*, *Descheneaux*, and *McCallum*.

[59] As I have concluded there is no breach of section 15 of the *Charter*, it is not necessary to consider section 1 of the *Charter*.

C. *Are the ECN Decisions reasonable?*

[60] Having addressed the constitutional challenge to the 2004 ECN Membership Code, I will now address the reasonableness of the Decisions. Specifically the issue is if the ECN Chief and Council Decisions to deny Espana's and Remedios' membership in ECN are reasonable applications of the 2004 ECN Membership Code.

[61] The Applicants argue that the Decisions are not reasonable because they are arbitrary and treat Espana and Remedios differently than Ethel and other band members who have transferred their membership to ECN in the past. They argue that they satisfy the membership criteria under subsection 3.1(c) by having a parent who is a member, but are disqualified because of their membership in Kehewin.

[62] The difference in treatment between Ethel and her children however arises from the different versions of the Membership Codes in place at the relevant times. The 1987 version of the ECN Membership Code under which Ethel applied did not contain a provision barring the transfer of membership to ECN from another band. The 1987 Membership Code only barred a person from holding membership with two bands at the same time. Whereas, the 2004 ECN Membership Code introduced restrictions on transfer of memberships.

[63] Although the Applicants rely upon *Samson Band of Indians*, (1988), 24 FTR 130 [*Samson Band*] and *Garner v Union Bar First Nation*, 2021 FC 657 [*Garner*] to support their argument that they have a right to membership under subsection 10(4) of the *Indian Act*, these

cases involve different facts. *Samson Band* was an action for a writ of *mandamus*, requiring the Minister to approve the Band's proposed membership code. The action was dismissed as the proposed code only dealt with members actually on the list prior to 1987, not those entitled to be added. Further, *Garner* does not address membership arising from Bill C-31, but rather the removal of the applicant from the band list, without notice or reasons and without legal justification. These cases do not support the Applicants' argument that they are entitled to membership in ECN.

[64] The Applicants further argue that even if ECN is entitled to control its membership list under the *Indian Act*, such a right is subject to limits. They rely upon *Johnston v Okanagan Indian Band*, 2022 FC 1237 where the Court noted the harsh impact a membership decision will have on an applicant must be a factor in the Court's assessment of the reasonableness of the decision (*Johnston* at para 127). I accept that the harshness of the Decisions are factors to consider in the reasonableness analysis, but, as noted above in the *Charter* analysis, the Applicants have not provided evidence to support a claim that the provisions of the 2004 ECN Membership Code have had a disproportionate, or harsh, impact upon them.

[65] As noted by the Court in *Norris v Matsqui First Nation*, 2012 FC 1469, individuals do not have an automatic entitlement to membership in a band and they must comply with the membership code to become members.

[66] Further, in *Cameron v Canada (Indian Affairs and Northern Development)*, 2012 FC 579, the Court confirmed that Chief and Council are bound to apply the membership code as adopted by the band, stating as follows:

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

...

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

...

[46] The Membership Rules include specific provisions on how to amend the rules (ss.26 to 29). The jurisprudence has established that membership rules cannot be modified at will: *Angus v Chipewyan Prairie First Nation Tribal Council*, above, at para 55. **The Band Council is bound by the Membership Rules and it cannot deviate from them:** *Sandberg v Norway House Cree Nation Band*, above, at para 12.

[Emphasis added]

[67] Here the Chief and Council applied the wording of the 2004 ECN Membership Code as adopted by ECN. In so doing, the Chief and Council acted reasonably and there is no basis for this Court to intervene.

V. Conclusion

[68] This judicial review is dismissed as the Applicants have failed to provide evidence of differential treatment that perpetuates historical disadvantage to support their claim that the challenged provisions of the 2004 ECN Membership Code contravene section 15 of the *Charter*.

[69] Further, I have found that the Decisions are reasonable, as the Chief and Council applied the clear wording of the 2004 ECN Membership Code to the Applicants circumstances. Any distinction in the treatment between Ethel and her children is a result of a different membership code in place at the time of Ethel's membership transfer.

[70] Notwithstanding these findings, considering the Applicants' familial connections to ECN, it is regrettable that they have not been granted membership in their Mother's home community.

[71] In the normal circumstances, ECN, as the successful party, would be entitled to costs. However, I do not regard this judicial review as having been unreasonably brought as it raises genuine issues with the, perhaps unintended, consequences of the 2004 ECN Membership Code. I also understand that ECN may soon revisit its membership code to remedy this situation.

[72] In the circumstances, I decline to award costs to the ECN.

JUDGMENT IN T-2025-22

THIS COURT'S JUDGMENT is that:

1. This Application for judicial review is dismissed.
2. No costs are awarded.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2025-22

STYLE OF CAUSE: ETHEL MABEL ARACIL-MORIN, ESPANA ARACIL-MORIN and REMEDIOS GARRITTY v ENOCH CREE NATION

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