

Date: 20080718

Docket: T-1805-05

Citation: 2008 FC 888

Ottawa, Ontario, July 18, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

**ROBERTA FAYE OKEMOW-CLARK, GRACE MARY OKEMOW,
JOYCE OKEMOW, ALVIS HOWARD OKEMOW,
EUGENE CLAVIN OKEMOW, DWAYNE CLIFTON OKEMOW,
CRYSTAL LYNNE OKEMOW, EUGENIA BERYL OKEMOW,
EFFREM HOWARD OKEMOW, TERRENCE DAVID OKEMOW,
BOBBY JAY OKEMOW, LANNY MICHAEL OKEMOW and
ELAINE PELLETIER**

Applicants

and

LUCKY MAN CREE NATION and RODERICK KING

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review arising from an internal dispute with respect to the membership of some thirteen individuals (plus seven minor children) in what they consider to be their Band. The applicants contend that their status as members of the Lucky Man Cree Nation has been taken away from them improperly and in contravention of the *Indian Act* (R.S.C, 1985, c. I-5) and of the *Membership Code of the Lucky Man Band* (the *Membership Code*), as a result of which they were prevented from voting in the last Band election held on September 7, 2004.

[2] Having carefully taken into consideration the written and oral submissions of the parties and reviewed their records, I am of the view that the applicants must succeed in their application. I am not prepared, however, to grant all the remedies sought in their application, for the reasons that are set out below.

I. Facts

[3] The events giving rise to this application occurred in 2004. This was an election year in the Lucky Man Cree Nation. In or about December 2003, the Band began the process of revising their election procedures pursuant to the *Lucky Man Cree Nation Election Act* (the *Election Act*). During this process, a dispute arose over whether the applicants were properly listed as voting members of the Band.

[4] All of the applicants are children or grandchildren of Howard Okemow and Grace Okemow. Howard Okemow's father was Robert Musqwa, a member of Little Pine First Nation, and his mother was Lily Okemow, who was originally from Lucky Man First Nation. Upon her marriage to Robert Musqwa, she was transferred to her husband's band. They had two sons, one of which is still a member of Little Pine First Nation.

[5] Howard Okemow, born in 1932, came to reside in Lucky Man Cree Nation upon the passing of his mother Lily Okemow, in 1936, and was raised by his maternal grandfather Okemow

according to the rite and accepted practice of Lucky Man Cree Nation. Howard was raised with his personal belief and with community acceptance that he was a full member of the Lucky Man Band.

[6] All of Howard's children and grandchildren born on or before April 17, 1985 had their names entered in the Band List for Lucky Man Cree Nation prior to April 17, 1985, pursuant to section 9(2) of the *Indian Act*. They apparently continued to enjoy full membership rights and status until 2004. Indeed, three of the applicants were Band councillors prior to the election of 2004. Moreover, one of the applicants (Mrs. Roberta Okemow-Clark) filed an affidavit to which is attached a June 16, 2000 "Voter's List for Lucky Man Cree Nation", showing that all applicants were fully recognized as voters.

[7] In a letter sent to the Registrar at the Department of Indian Affairs and Northern Development (INAC) on December 22, 2003, the respondent Roderick King made enquiries with respect to the definition of "descendant of original members", and asked for a list of original membership for Lucky Man Cree Nation as well as for a list of all adoptions (custom or legal) into Lucky Man Cree Nation. The respondent also sought information as to the impact of Bill C-31 (*An Act to Amend the Indian Act*, S.C. 1985, c. 27, assented to June 28, 1985), which gave status back to people who had lost it through marriage, education, armed forces or ministry. Mr. King specifically asked whether this legislation also gave these people membership into their original bands.

[8] In response, the manager (Policy, Planning and Training) at the Indian Registration and Band Lists (INAC) indicated that there is no definition of "descendent of original members" in the

Indian Act. She also provided a list of the original membership for the Lucky Man Cree Nation. She declined to provide a listing of persons adopted through the courts into the Lucky Man Cree Nation or to provide information as to whether Howard Okemow was adopted either by custom or by law into the Lucky Man Cree Nation as this is personal information exempt from disclosure under subsection 19(1) of the *Privacy Act* (R.S.C, 1985, c. P-21). She did purport, however, to clarify the situation with respect to custom adoptions into the Lucky Man Cree Nation in the following terms:

As a result of the 1985 amendments to the *Indian Act* Bill C-31, persons adopted in accordance with Indian custom by Registered Indians can be recognized as entitled to Indian status and, if the department maintains the Band List, as entitled to band membership. Under the former *Indian Act*, Indian status and band membership could not be gained as a result of Indian custom adoption by Registered Indian parents. The Lucky Man Cree Nation assumed control of its own membership under the provisions of section 10 of the *Indian Act* effective June 23, 1987. I can confirm that between April 17, 1985 and June 23, 1987 [the date upon which the Lucky Man Band assumed control of its membership], while the department maintained the Band List, no individuals were added to the list because of Indian custom adoption.

[9] As to the impact of Bill C-31, the letter from INAC doesn't draw a distinction between Indian status and band membership. Relying on subsection 11(1) of the *Indian Act*, the letter states explicitly that "[e]veryone whose name was entered or was entitled to have his or her name entered in the Lucky Man Cree Nation Band List immediately prior to April 17, 1985" was eligible to have his name entered in the Lucky Man Cree Nation Band List immediately before June 23, 1987.

[10] In reply, then Chief Roderick King wrote back to INAC and sought to have Howard Okemow removed from the Lucky Man Band Membership. This letter of April 8, 2004, reads in part as follows:

This error by your office, that of transferring Howard from No. 201 Little Pine needs to be corrected. Since “band membership could not be gained as a result of Indian custom adoption” then Howard should not have been transferred to Lucky Man’s Registry List. If your office has further records that indicate Howard was admitted to Lucky Man by any other instrument or authority, then please provide our office with copies of these records.

In light of the above information, the wife and children from #215 Howard (Muskwa) Okemow do not qualify for Lucky Man Band Membership under our s. 10 Band Membership Code. Further, membership has instructed me to place a formal objection for their continued s. 11 listing as status Indians belonging to the Lucky Man Band. Please indicate when this family is going to be transferred back to Little Pine Indian Band Registry listing.

[11] Following up on this letter, Chief Roderick King wrote a further letter on June 15, 2004, reiterating his request for information on Howard Okemow’s adoption and arguing that the *Privacy Act* does not apply when an individual has been deceased for over 20 years (Howard Okemow died in 1982). He also contended that the Band was denied the right to protest the adoption of Howard Okemow into the Lucky Man Band in 1936, stating:

We had also requested clarification on the authority used for this transfer from Little Pine Band in 1936. Our Band was without a Chief or Council from the time the government discredited and refused to recognize Lucky Man as our Chief in 1883 until our first election for Chief and Council was held on May 23, 1973. All Bands have had the opportunity to protest and approve transfers or additions to band lists; however, since we had no Band Council, no reserve lands, and no band buildings for public postings we have not been provided these same opportunities.

[12] On July 5, 2004, Chief Roderick King published and circulated a letter to Band members outlining the procedure to amend the *Election Act* of the Band. King advised that the *Election Act* stipulated that a General Band Meeting must be called for the sole purpose of amending the *Election*

Act and that 30 days notice must be provided for such a meeting. King stated that any changes needed to be approved by a majority vote and that changes would only come into effect if they were passed 60 days prior to the election. King concluded that there was not enough time to amend the *Act* prior to the next election to be held in early September, and that any proposed amendments would have to be dealt with by the next council.

[13] On August 9, 2004, King wrote the Band members again and advised that although the Band had taken over control of its Band membership in 1987, it had not created its own membership list pursuant to section 10 of the *Indian Act*. As a result, the Band has continued to use the Treaty Indian Status list drawn up under section 11 of the *Indian Act* since 1987 and has never attempted the task of putting up its own membership list. Since the then Chief and Council felt they were in a direct conflict of interest, the work was referred to a Membership Committee for their review and recommendations. Respondent King neither participated in any of the Membership Committee's meetings nor cast a vote for or against the applicants' membership.

[14] Respondent King acknowledged in his letter to Band members that Council should have presented a Membership List for membership approval but failed to do so. The basis upon which the Membership Committee drew its list is not entirely clear. According to the August 9, 2004 letter from King, the Committee was to start with the Treaty Annuity paylists from 1879 to 1955, together with the INAC Black Book. Yet in her affidavit, the current chief Pauline Okemow, who was a member of that Committee and not a descendent of Howard Okemow, indicated that the Committee reviewed membership and voting rights on the basis of blood quantum (para. 8 of her affidavit). Be

that as it may, the Committee drew a Section 10 Lucky Man Band Membership list, which did not include the applicants' names, and a Section 11 Indian Status list which included the applicants. Band members were advised that membership training would be provided on September 3 and 4, at the conclusion of which they would be asked to vote for the acceptance of persons on the section 11 list into Lucky Man Cree Nation Band Membership.

[15] On September 3, 2004, the applicants all personally attended the Band meeting in Saskatoon. According to the uncontradicted affidavit of the applicant Roberta Okemow-Clark, they were approached upon entering the room by two members who had security guards with them. They were told that they had to leave, and that they were not allowed to come into the meeting room or to take part in that Band meeting. The applicant protested that she was still a Band Councillor, along with two other applicants, and that their terms of office continued at least until the election on September 7, 2004. The reply was that none of the applicants were allowed because they had already been placed into a section 11 band list, that they had no longer any rights, and that only section 10 members were allowed to enter the meeting. Since that meeting, the applicants claim that they have lost all rights and benefits as Band members and have been denied any opportunity to appeal or to seek recourse through any channels within the First Nation establishment. They have been denied the right to seek office or to vote in the Band election held on September 7, 2004.

[16] The applicants seek a variety of remedies:

- A declaratory Order that the applicants shall immediately be reinstated as Band members of Lucky Man Cree Nation, with full rights and privileges of Band

Membership, for themselves and for their descendants, and further that they be compensated for any loss of rights and benefits, caused by the wrongful acts of the respondents Lucky Man Cree Nation and Roderick King.

- A declaratory Order that any nominations, elections or by-elections which have taken place since August 9, 2004, be deemed null and void, and that new nominations and elections be held forthwith, with the full participation of the applicants to vote or seek nominations and office as candidates, in such new election to be called and held.
- A declaratory Order that the applicants shall be fully compensated by the respondents, jointly and severally, for all solicitor/client costs, the costs of this application, and any other relief or remedy deemed proper by this Court.
- An injunctive relief Order to prevent the respondents from pursuing, compromising or settling the issue of Treaty Land Entitlement with the Government of Canada, on the basis of its present position pertaining to Band membership, until this matter is fully heard and determined.

[17] At the hearing, counsel for the applicants acknowledged that compensation is not available on a judicial review application. Subsection 18.1(3) of the *Federal Court Act*, R.S.C. 1985, c. F-7, sets out the type of relief the Federal Court may grant on this type of application, and damages or compensation is not amongst the types of relief to be granted: see, for example, *De-Nobile v. Canada (Attorney General)* (1999), 95 A.C.W.S. (3d) 1065, [1999] F.C.J. No. 1727 (QL).

[18] It is interesting to note that Pauline Okemow, the current Chief of Lucky Man Cree Nation, proposes in her affidavit (at para. 11) to resolve this dispute in the following way :

- a) The issue of the Applicants' membership in Lucky Man Cree Nation shall be put to a vote of all members.
- b) The Applicants shall be entitled to cast a vote in that process.
- c) Following this vote, if the Applicants are not held to be members, then the election results from the 2004 election shall stand. If the Applicants are held to be members then a new election shall be called and held within a reasonable time following the vote on membership.
- d) Each party shall bear its own costs in these proceedings.

II. The issues

[19] The respondent Lucky Man Cree Nation took issue, orally and in writing, with the propriety of this application. First of all, counsel argued that the application is premature as the applicants had an obligation to exhaust their internal rights of review and appeal before seeking judicial review. The Band also submitted that the applicants exaggerate their harm as the only right they were deprived of was their right to vote in the 2004 election. In any event, counsel submitted that the Band had nothing to do with any purported decision to strip the applicants of their voting rights, and that it was the Chief's sole and unilateral action that was responsible for any harm that might have been done to the applicants. Finally, Lucky Man Cree Nation asserts that there is no decision upon which to base this judicial review, since no federal board or tribunal was involved and no decision was taken.

[20] The respondent Roderick King does not oppose the applicants' immediate reinstatement as Band members, their request that a new election be held forthwith or that an Order be granted

preventing the Band from pursuing its Treaty Land Entitlement. The only remaining issue which pertains to King, according to his counsel, is therefore whether his actions were tainted with ill motives and bad faith or whether he carried out his duties diligently and with good faith. He contended that he only followed up the merits of a dispute that arose over whether the applicants were properly listed as voting members of the Band. He strenuously argued that he acted diligently in his search for relevant information concerning the transfer of Howard Okemow and impartially as he did not participate in any vote pertaining to this issue; indeed, he had no stake in the result of the 2004 election as he did not even run as a candidate.

[21] Since judicial review is concerned with the legality of a decision, the good faith or bad faith of a decision maker and his or her motives are irrelevant unless, of course, impartiality is at stake. As a result, whether former Chief Roderick King carried out his duties diligently and with good faith is immaterial to the issue raised by the applicants. The only question to be determined by this Court is whether the process followed to deny the applicants' membership in the Band was in conformity with the Band *Membership Code* and with the *Indian Act*.

[22] Before addressing this substantive issue, however, the Court must consider the preliminary issues raised by the Lucky Man Cree Nation.

III. Analysis

[23] Counsel for Lucky Man Cree Nation argued that the applicants have bypassed the internal remedies found in the *Membership Code* and the *Election Act* and have proceeded directly to the Court. Reliance was put on a few decisions of this Court (*Saskatchewan (Minister of Agriculture, Food and Rural Revitalization) v. Canada (Attorney General)*, 2006 FC 345, 289 F.T.R. 237; *Shea v. Canada (Attorney General)*, 2006 FC 859, 296 F.T.R. 81; *Gambini v. Canada (Attorney General)*, 2005 FC 666, 272 F.T.R. 312) and of the Supreme Court of Canada (*Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129) for the proposition that there is an obligation on a party to exhaust its internal rights of review and appeal prior to seeking judicial review from this Court.

[24] I am well aware of the compelling policy reasons that militate in favour of encouraging a grieving party to use the internal remedies at his disposal before resorting to the courts, especially in the Aboriginal context. As stated by my colleague Justice Robert Barnes in *Sweetgrass First Nation v. Gollan*, 2006 FC 778, 294 F.T.R. 119 (at para. 53), “the electors and elected representatives of [a First Nation Band] are fully capable of conducting their business without outside involvement”. The alternative remedy does not have to be perfect, but it has to be adequate.

[25] In the present case, I am not convinced that the *Membership Code* and the *Election Act* do provide an adequate alternative forum for resolving the dispute between the applicants and the respondents. First of all, the *Election Act* grants a right to appeal only to the candidates or to the

electors who gave or tendered their vote at the election. Since the applicants have been prevented from running as candidates and from voting, they are shut out of this appeal procedure.

[26] As to the *Membership Code*, the situation is more complex because the procedure outlined in sections 6 and 7 of this Code have not been followed. These sections read as follows:

6. The Lucky Man Band has given the Chief and Council the power to determine membership under provisions of this Code.

7. The Lucky Man Band shall establish a Review Committee (Elders, Judge, or Peacemaker) to review membership decisions, with powers to adjust, suspend or reverse decisions, whose decision must be ratified by the majority of Lucky Man Band electors.

[27] However, the Chief and Council delegated the work coming up with a membership list to the Membership. This procedure was completely irregular for a number of reasons. First of all, the *Membership Code* gives the Chief and Council the power to determine membership so, at a minimum, they had to approve the Committee's recommendations. Second, counsel for Chief Roderick King admitted at the hearing that the Council should have been involved in putting this procedure in place. Third, it is not entirely clear according to Chief Roderick King himself whether this Committee is the same as the Review Committee set out in the Act. In light of this confusion surrounding the drawing of the Membership List and of the *ad hoc* nature of the procedure followed, the applicants cannot be blamed for not having relied on the *Membership Code* to bring their grievances to a resolution. One cannot help but being left with the impression that the applicants had no other option than to resort to the courts; either the membership list was drawn by a committee which had no proper legal existence, or it was made by the Review Committee

established by the *Membership Code* without prior input from the Chief and Council. In both cases, the procedure was a nullity and the applicants were totally justified in coming to the Court for relief.

[28] The respondent Lucky Man Cree Nation further submits that a judicial review can only be made to deal with an administrative decision of a federal board or tribunal. In the present case, it is argued there is no federal board or tribunal involved, and no actual decision was made. The applicants' complaint lie against the unilateral acts of former Chief Roderick King; since he is not empowered to act on his own and can only validly act in concert with Council pursuant to the *Membership Code* and the *Election Act*, so the argument goes, the Chief is not a federal board or tribunal vis-à-vis the decision and could not bind Lucky Man in this regard. There is therefore no federal board against which to bring judicial review. Counsel for the respondent Lucky Man argues that no decisions were made by Chief and Council and that former Chief Roderick King made "opinions" that the applicants should not be classified as members of Lucky Man and should not vote in the 2004 election.

[29] This argument is appealing at first sight but must be rejected. First of all, it may well be that the decision to remove the applicants from the Band's list and to prevent them from voting was inchoate and never formally recorded or voted upon by Chief and Council, but it was nevertheless acted upon. In a letter sent to one of the applicants on September 10, 2004, the Chief Electoral Officer for Lucky Man Cree Nation purported to explain why she was denied the right to participate

and vote on the polling day on the basis that she was not on the section 10 list of confirmed members of the Band. The Chief Electoral Officer wrote:

Lucky Man Band maintains two lists, a section 10 list that contains only the names of those members who are considered confirmed. On this list are only 36 names of members eighteen and over. The second list contains the names of those not yet confirmed and are yet under section 11.

In the Lucky Man Cree Nation Membership Act paragraphs 7, 8 and 9 states that the current membership of this band are the ones who finalize the membership list. It remains the power of the membership to confirm those under section 11 as members of Lucky Man thus given them the right to vote at Lucky Man.

I am sorry to have had to refuse you and the others this sacred right but until those under section 11 have been confirmed as band members, no electoral officer may allow them on the voters list.

[30] It is no defence to argue in this case that no decision was formally made and that the former Chief took it upon himself to express an “opinion” as to the membership of the applicants. If such an argument were to be accepted, it would be an encouragement for band councils and other administrative entities to refrain from recording their decision and to proceed on the basis of informal decisions. On the basis of the evidence that has been put before the Court, I am satisfied that a decision has been made to take away from the applicants their membership in the Band, as evidenced by their ineligibility to vote or to run in the September 7, 2004 election. That decision was not only that of the former Chief, but that of the Council as well given that it was enforced by the Chief Electoral Officer and not rescinded ever since. Since the right to participate in the electoral process is one of the most fundamental rights associated with membership in a Band, its

denial is as clear an indication as there can be of the applicants' loss of their membership in the Lucky Man Cree Nation.

[31] The preliminary objections raised by the respondent Lucky Man having been dismissed, the next issue for this Court is to determine whether it should take it upon itself to determine whether the applicants should indeed have their names included in the Band Membership List. The applicants have urged the Court to go that far, but the respondents have strenuously opposed that course of action.

[32] As mentioned above, the *Indian Act* was amended in 1985 to enable those Indian bands that so wish to gain full control over their membership. The relevant sections of this *Act* are reproduced in an Annex to these reasons. Paragraphs 10(1) and (4) are particularly relevant for this case, and are set out here for ease of reference:

Band control of membership

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

Acquired rights

(4) Membership rules

Pouvoir de décision

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

Droits acquis

(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent

established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.	priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.
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[33] Subsection 11(1) of the *Indian Act* as amended further provides that a person was entitled to have his or her name on a Band list maintained by the Department if the name of that person was entered in the Band list for that Band or was entitled to have it entered on the Band list immediately prior to April 17, 1985.

[34] The Lucky Man Band assumed control of its membership pursuant to section 10 of the *Indian Act* on June 23, 1987. The Lucky Man Cree Nation *Membership Code*, which remains in effect throughout the material times of this action, states:

8. The following persons are entitled to Membership in the Lucky Man Cree Nation:

- a) The original (existing and present) Members, and those who were entitled to be members of the Lucky Man Cree Nation, prior to April 17, 1985;
- b) The natural and legally adopted child or children of a parent(s) who is a member, or is entitled to be a member, of the Lucky Man Cree Nation under clause 8(a);
- c) Persons entitled to membership as a result of reinstatements by which they automatically received membership under amendments to the Indian Act, June 28, 1985;
- d) Such other persons as may be determined to have made significant contributions to Lucky Man Cree Nation, Chief

and Council may recommend conferring an Honorary Band Membership.

[35] It would be remiss of me to determine whether the applicants should be on the Lucky Man Cree Nation Membership list, for at least two reasons. There is very little evidence on the record as to whether the applicants had their names entered on the Band list maintained by INAC immediately prior to April 17, 1985, or, for that matter, on the day the Lucky Man Cree Nation assumed control of its membership. All there is attached to the affidavit of Roberta Okemow-Clark is a copy of a June 16, 2000 Voter's list for Lucky Man Cree Nation showing the applicants as fully recognized as voters (exhibits "A" and "B"), a reference in a letter from Roderick King to INAC treaty paylists showing that Howard Okemow was adopted and transferred from Little Pine to Lucky Man in 1936 (exhibit "E"), and a copy of Howard Okemow's registry listing attached to that same letter purportedly containing false information with respect to Howard's parents.

[36] As a result, this Court is not in a position to determine whether the applicants had their names entered or were entitled to have their names entered in the Lucky Man Cree Nation Band list immediately prior to April 17, 1985. Under the former *Indian Act*, Indian status and band membership could not be gained as a result of Indian custom adoption by Registered Indian parents. This situation has changed as a result of the 1985 amendments to the *Indian Act*. The new definition of a "child" in section 2 of the Act includes a child adopted in accordance with Indian custom, but it does not appear to apply retroactively. This is all the more reason to determine if Howard Okemow was legally adopted by his maternal grandfather, therefore entitling him to have his name entered in the Band list immediately prior to April 17, 1985, or if his name was entered in the Band list

immediately prior to that same date. All of this information is crucial to assess the membership of the applicants in the Lucky Man Cree Nation.

[37] There is another reason why this Court should not intervene at this stage. Subsection 18.1(3) of the *Federal Courts Act* provides that on an application for judicial review, the Federal Court may “declare invalid or unlawful, or quash, set aside, or set aside and refer back for determination in accordance with such instructions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal”. Contrary to the situation on appeal, the Court has no jurisdiction to substitute its own decision to that of the original decision maker. This is all the more so, it seems to me, when the decision quashed originates from an elected body. First Nations Bands have acquired the right to govern themselves and are fully capable to exercise that right; courts should be loathe to intervene in governance issues that are better left to the membership of a band and its elected representatives.

[38] The matter shall therefore be remitted to the Chief and Council to be dealt with in accordance with the *Membership Code* of the Lucky Man Band. The compromise solution proposed by Chief Pauline Okemow in her affidavit cannot be countenanced by this Court as it derogates from that Code and more particularly from its sections 6, 7 and 8. Pursuant to these provisions, the Chief and Council have the power to determine membership. In drawing up a membership list, they must be guided by section 8 of the Code. While the Band may control its membership, its authority to do so is in turn limited by section 10 of the *Indian Act*. In particular,

subsection 10(4) provides that membership rules of a Band may not deny membership to anyone entitled to have her or his name on the list.

[39] Section 7 of the *Membership Code* also provides that the Lucky Man Band shall establish a Review Committee composed of elders, judge or peacemaker, to review membership decisions. If the applicants or any other interested person is not satisfied with the decisions made by the Chief and Council, they are entitled to challenge these decisions before the Review Committee which is empowered to adjust, suspend or reverse the original decisions made by the Chief and Council. In the end, the decision of the Review Committee must be ratified by the majority of Lucky Man Band electors. It is only after the completion of this process that an applicant shall be allowed to challenge the decision made before this Court on its merits.

[40] In the meantime, the status quo should be maintained. The uncontradicted affidavit evidence of Roberta Okemow-Clark is that all applicants were eligible to vote in the 2000 election and that three of the applicants were elected as Band Councillors. Unless and until the applicants are removed from the Membership List in due compliance with the *Membership Code* and the *Indian Act*, they shall therefore immediately be reinstated as Band Members of Lucky Man Cree Nation, with full rights and privileges of Band Membership, for themselves and for their descendants. In particular, they shall be eligible to vote and to seek nominations and office as candidates in any upcoming election to be called and held.

[41] Needless to say, the respondents shall not pursue, compromise or settle the issue of Treaty Land Entitlement with the Government of Canada as if the applicants were not Band members, at least until a decision is properly made to exclude them from the Lucky Man Cree Nation. Since an election is likely to be held soon, there is no need to cancel the results of the September 2004 election or the nominations made thereafter.

[42] The applicants have sought their costs on a solicitor/client basis, but I do not think this is an appropriate case for such costs on the basis of the evidence that is before me. The former Chief may have been mistaken in his actions, as he himself concedes, but bad faith or ill motives have not been established. Indeed, he had no personal interest in the outcome of this dispute as he did not seek re-election in the 2004 election. As for the new Chief and Council, they have not delayed the procedures in this Court and there is no evidence to support a finding that the Band, per se, was involved in the decision to abrogate the applicants' voting rights. The applicants shall therefore have their costs, to be awarded on the scale set by Column III of Tariff B.

ORDER

THIS COURT ORDERS that this application for judicial review is therefore partially granted.

The decision to exclude the applicants from the Band list is quashed, with the attendant consequences outlined in these reasons, and the matter of the applicants' membership in the Lucky Man Cree Nation is remitted to the Chief and Council to be dealt with in accordance with the *Membership Code* of the Lucky Man Cree Band and the *Indian Act*. Costs are awarded to the applicants.

"Yves de Montigny"

Judge

ANNEXE "A"

Indian Act (R.S., 1985, c. I-5)

Band Lists

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

Band Lists maintained in Department

9. (1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

Existing Band Lists

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

Deletions and additions

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

Date of change

(4) A Band List maintained in the Department shall indicate the date on which each name was added thereto or deleted therefrom.

Application for entry

(5) The name of a person who is entitled to have his name entered in a Band List maintained in

Listes de bande

Tenue

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

Liste de bande tenue au ministère

9. (1) Jusqu'à ce que la bande assume la responsabilité de sa liste, celle-ci est tenue au ministère par le registraire.

Listes existantes

(2) Les noms figurant à la liste d'une bande le 16 avril 1985 constituent la liste de cette bande au 17 avril 1985.

Additions et retranchements

(3) Le registraire peut ajouter à une liste de bande tenue au ministère, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

Date du changement

(4) La liste de bande tenue au ministère indique la date où chaque nom y a été ajouté ou en a été retranché.

Demande

(5) Il n'est pas requis que le nom d'une personne qui a droit à ce que celui-ci soit consigné dans

the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.

Band control of membership

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

Membership rules

(2) A band may, pursuant to the consent of a majority of the electors of the band,

- (a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
- (b) provide for a mechanism for reviewing decisions on membership.

Exception relating to consent

(3) Where the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

Acquired rights

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right

une liste de bande tenue au ministère y soit consigné, à moins qu'une demande à cet effet soit présentée au registraire.

Pouvoir de décision

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

Règles d'appartenance

(2) La bande peut, avec l'autorisation de la majorité de ses électeurs :

- a) après avoir donné un avis convenable de son intention de ce faire, fixer les règles d'appartenance à ses effectifs;
- b) prévoir une procédure de révision des décisions portant sur l'appartenance à ses effectifs.

Statut administratif sur l'autorisation requise

(3) Lorsque le conseil d'une bande prend, en vertu de l'alinéa 81(1)p.4), un règlement administratif mettant en vigueur le présent paragraphe à l'égard de la bande, l'autorisation requise en vertu des paragraphes (1) et (2) doit être donnée par la majorité des membres de la bande âgés d'au moins dix-huit ans.

Droits acquis

(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit

to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

Idem

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

Notice to the Minister

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

Notice to band and copy of Band List

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

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

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

Effective date of band's membership rules

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the

consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.

Idem

(5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)c) avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

Avis au ministre

(6) Une fois remplies les conditions du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le ministre du fait que celle-ci décide désormais de l'appartenance à ses effectifs et lui transmet le texte des règles d'appartenance.

Transmission de la liste

(7) Sur réception de l'avis du conseil de bande prévu au paragraphe (6), le ministre, sans délai, s'il constate que les conditions prévues au paragraphe (1) sont remplies :

a) avise la bande qu'elle décide désormais de l'appartenance à ses effectifs;

b) ordonne au registraire de transmettre à la bande une copie de la liste de bande tenue au ministère.

Date d'entrée en vigueur des règles d'appartenance

(8) Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au

Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

Band to maintain Band List

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

Deletions and additions

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

Date of change

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

Membership rules for Departmental Band List

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

(a) the name of that person was entered in the Band List for that band, or that person was entitled to have it entered in the Band List for that band, immediately prior to April 17, 1985;

ministre a été donné en vertu du paragraphe (6); les additions ou retranchements effectués par le registraire à l'égard de la liste de la bande après cette date ne sont valides que s'ils sont effectués conformément à ces règles.

Transfert de responsabilité

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

Additions et retranchements

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

Date du changement

(11) La liste de bande tenue par celle-ci indique la date où chaque nom y a été ajouté ou en a été retranché.

Règles d'appartenance pour une liste tenue au ministère

11. (1) À compter du 17 avril 1985, une personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour cette dernière au ministère si elle remplit une des conditions suivantes :

a) son nom a été consigné dans cette liste, ou elle avait droit à ce qu'il le soit le 16 avril 1985;

(b) that person is entitled to be registered under paragraph 6(1)(b) as a member of that band;

b) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)b) comme membre de cette bande;

(c) that person is entitled to be registered under paragraph 6(1)(c) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

c) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)c) et a cessé d'être un membre de cette bande en raison des circonstances prévues à cet alinéa;

(d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

d) elle est née après le 16 avril 1985 et a le droit d'être inscrite en vertu de l'alinéa 6(1)f) et ses parents ont tous deux droit à ce que leur nom soit consigné dans la liste de bande ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Additional membership rules for Departmental Band List

Règles d'appartenance supplémentaires pour les listes tenues au ministère

(2) Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(2) À compter du jour qui suit de deux ans la date de sanction de la loi intitulée Loi modifiant la Loi sur les Indiens, déposée à la Chambre des communes le 28 février 1985, ou de la date antérieure choisie en vertu de l'article 13.1, lorsque la bande n'a pas la responsabilité de la tenue de sa liste prévue à la présente loi, une personne a droit à ce que son nom soit consigné dans la liste de bande tenue au ministère pour cette dernière dans l'un ou l'autre des cas suivants :

(a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

a) elle a le droit d'être inscrite en vertu des alinéas 6(1)d) ou e) et elle a cessé d'être un membre de la bande en raison des circonstances prévues à l'un de ces alinéas;

(b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

b) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)f) ou du paragraphe 6(2) et un de ses parents visés à l'une de ces dispositions a droit à ce que son nom soit consigné dans la liste de bande ou, s'il est décédé, avait ce droit à la date de son décès.

Deeming provision

(3) For the purposes of paragraph (1)(d) and subsection (2),

(a) a person whose name was omitted or deleted from the Indian Register or a band list in the circumstances set out in paragraph 6(1)(c), (d) or (e) and who was no longer living on the first day on which the person would otherwise be entitled to have the person's name entered in the Band List of the band of which the person ceased to be a member shall be deemed to be entitled to have the person's name so entered; and

(b) a person described in paragraph (2)(b) shall be deemed to be entitled to have the person's name entered in the Band List in which the parent referred to in that paragraph is or was, or is deemed by this section to be, entitled to have the parent's name entered.

Where band amalgamates or is divided

(4) Where a band amalgamates with another band or is divided so as to constitute new bands, any person who would otherwise have been entitled to have his name entered in the Band List of that band under this section is entitled to have his name entered in the Band List of the amalgamated band or the new band to which that person has the closest family ties, as the case may be.

Entitlement with consent of band

12. Commencing on the day that is two years after the day that an Act entitled An Act to amend the Indian Act, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, any person who

Présomption

(3) Pour l'application de l'alinéa (1)d) et du paragraphe (2) :

a) la personne dont le nom a été omis ou retranché du registre des Indiens ou d'une liste de bande dans les circonstances prévues aux alinéas 6(1)c), d) ou e) et qui est décédée avant le premier jour où elle a acquis le droit à ce que son nom soit consigné dans la liste de bande dont elle a cessé d'être membre est réputée avoir droit à ce que son nom y soit consigné;

b) la personne visée à l'alinéa (2)b) est réputée avoir droit à ce que son nom soit consigné dans la même liste de bande que celle dans laquelle le parent visé au même paragraphe a ou avait, ou est réputé avoir, en vertu du présent article, droit à ce que son nom y soit consigné.

Fusion ou division de bandes

(4) Lorsqu'une bande fusionne avec une autre ou qu'elle est divisée pour former de nouvelles bandes, toute personne qui aurait par ailleurs eu droit à ce que son nom soit consigné dans la liste de la bande en vertu du présent article a droit à ce que son nom soit consigné dans la liste de la bande issue de la fusion ou de celle de la nouvelle bande à l'égard de laquelle ses liens familiaux sont les plus étroits.

Inscription sujette au consentement du conseil

12. À compter du jour qui suit de deux ans la date de sanction de la loi intitulée Loi modifiant la Loi sur les Indiens, déposée à la Chambre des communes le 28 février 1985, ou de la date antérieure choisie en vertu de l'article 13.1, la personne qui :

(a) is entitled to be registered under section 6, but is not entitled to have his name entered in the Band List maintained in the Department under section 11, or

a) soit a le droit d'être inscrite en vertu de l'article 6 sans avoir droit à ce que son nom soit consigné dans une liste de bande tenue au ministère en vertu de l'article 11;

(b) is a member of another band,

b) soit est membre d'une autre bande,

is entitled to have his name entered in the Band List maintained in the Department for a band if the council of the admitting band consents.

a droit à ce que son nom soit consigné dans la liste d'une bande tenue au ministère pour cette dernière si le conseil de la bande qui l'admet en son sein y consent.

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE: Roberta Faye Okemow-Clark et al.
v.
Lucky Man Cree Nation et al.

PLACE OF HEARING: Saskatoon, Saskatchewan

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AND JUDGMENT BY:** de MONTIGNY J.

DATED: July 18, 2008

APPEARANCES:

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