

Federal Court



Cour fédérale

Date: 20180525

Docket: T-2107-16

Citation: 2018 FC 544

Ottawa, Ontario, May 25, 2018

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**GUY PETERS, BRANDON LEE ENGSTROM,
and AMBER RACHEL RAGAN**

Applicants

and

**PETERS FIRST NATION BAND COUNCIL,
NORMA WEBB IN HER CAPACITY AS
CHIEF OF PETERS FIRST NATION,
LEANNE PETERS IN HER CAPACITY AS
COUNCILLOR OF PETERS FIRST NATION,
and VICTORIA PETERS IN HER CAPACITY
AS COUNCILLOR OF PETERS FIRST
NATION**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Guy Peters, Brandon Lee Engstrom and Amber Rachel Ragan have brought an application for judicial review of decisions of the Peters First Nation [PFN] to deny them membership in the PFN. Their applications for membership were refused by the Band Council of the PFN on July 25, 2016. Mr. Engstrom's and Ms. Ragan's appeals were refused by a vote of the PFN membership on November 6, 2016. The PFN membership has yet to convene a vote respecting Mr. Peters' appeal, and the time in which to do so has now expired.

[2] For the reasons that follow, the decisions of the Band Council were unreasonable and procedurally unfair. Guy Peters is declared to be a member of the PFN. The decisions of the Band Council to refuse the applications for membership of Mr. Engstrom and Ms. Ragan are set aside, and the matters are remitted to the Band Council for redetermination in accordance with these Reasons for Judgment.

II. Background

[3] The PFN is a small First Nation comprising 65 members on three reserves. The first reserve has just 12 habitations, the second only one. The third, given its inhospitable terrain, has none.

[4] On April 17, 1985, the *Indian Act*, RSC 1985, c I-5 was amended by Bill C-31, *An Act to Amend the Indian Act*, 1st Sess, 33rd Parl, 1984-85 [Bill C-31] to permit bands to assume control over their memberships. The relevant provisions read as follows:

Persons entitled to be registered

6 (1) Subject to section 7, a person is entitled to be registered if

(a) that person was registered or entitled to be registered immediately before April 17, 1985;

...

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

Personnes ayant droit à l'inscription

6 (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants :

a) elle était inscrite ou avait le droit de l'être le 16 avril 1985;

...

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

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 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

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

Notice to band and copy of Band List

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

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

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

Effective date of band's membership rules

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

(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 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.

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;

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. |

[5] On June 25, 1987, the PFN gave notice to the Minister that it was assuming control of its membership and adopted interim membership rules. The interim rules provided that s 11(1) of the *Indian Act* would continue to govern membership until the majority of Electors of the PFN adopted a final membership code.

[6] On September 18, 1987, the Minister confirmed that the PFN had assumed control over its membership pursuant to s 10(7) of the *Indian Act* effective June 25, 1987. The Minister's correspondence also noted that the PFN's membership rules could not deprive a person of membership if he or she had acquired that right before the PFN assumed control.

[7] On October 15, 1987, the Minister provided the PFN with its membership list as of the date on which the PFN assumed control. There were 54 names on the list, comprising those who appeared in the computer records of Indian and Northern Affairs Canada [INAC], and those who appeared on a “manually maintained” list.

[8] Guy Peters’ name appeared on the “manually maintained” list provided to the PFN on October 15, 1987. He was shown as registered to the PFN under s 11(1)(a) of the *Indian Act*.

[9] Members of the PFN approved the *Peters (Final) Indian Band Membership Code* [Membership Code] on March 9, 1990. Part III of the Membership Code provides as follows:

Part III - Membership Criteria

1. Membership in the Peters Indian Band shall consist of the following persons:

- A. everyone whose name appeared on the Band List on April 17, 1985;
- B. everyone who became entitled to have his or her name registered on the Peters Band List in accordance with Section 6 paragraph 2 of the Indian Act, as amended, by the date the Membership Code is adopted by the Band;
- C. everyone who became entitled to have his or her name registered on the Peters Band List in accordance with Section 6 paragraph 1(f) of the Indian Act, as amended, by the date the Membership Code is adopted by the Band;
- D. everyone who is granted Band Membership Status pursuant to part IV and V of this Membership Code;
- E. everyone who is a natural child of a parent whose name is registered on the Band List;

[10] Under Part IV of the Membership Code, the Band Council must consider all applications in accordance with the membership criteria. The Band Council must notify an applicant of its decision within 30 days. If a decision cannot be made within 30 days, the Band Council must provide the applicant with an interim reply. If doubt exists with respect to the application, the Band Council must convene a general meeting to consider the application and render a decision. An applicant denied membership must be provided with reasons outlining the basis for the decision.

[11] Part V of the Membership Code states that if an applicant has been denied membership, he or she may appeal to the Electors of the PFN by delivering a notice of appeal within 30 days of the decision. Within 60 days of receipt of a notice of appeal, a general meeting of the Electors must be convened to review the decision and render a decision. An applicant is entitled to be present and make representations in person or through an agent or legal counsel.

A. *Guy Peters*

[12] Mr. Peters is the son of Robert Wilmer Peters, a member of the PFN, and Mary Tommy, a member of the Skwah First Nation. On September 17, 1985, at the age of 19, Mr. Peters applied to be registered as a status Indian. On August 21, 1987, he received a letter from INAC confirming his registration as a member of the PFN.

[13] In a letter to former PFN Chief Frank Peters dated October 15, 1987, the Acting Registrar of INAC confirmed that Mr. Peters' name had been added to the "manually maintained" list. The

letter explained that the “manually maintained” list was “a list of persons whose entitlement to band membership has been recently confirmed and whose names have been manually added to the band list but do not appear in the computer record”.

[14] On November 12, 1987, Chief Frank Peters wrote to the Acting Registrar to confirm that the PFN had assumed control over its band membership, and asked that Mr. Peters’ name be removed from the “manually maintained” list. It does not appear that INAC ever responded to this correspondence.

[15] In October 1996, Minnie Peters wrote to the PFN to request that Mr. Peters be accepted as a member of the PFN. It does not appear that the PFN ever responded to this request.

[16] On October 24, 2012, Mr. Peters was included, together with approximately 60 other individuals, in a “collective application” for membership in the PFN. The Respondents say that the PFN did not consider this to be a proper application, but it nevertheless requested further information from the applicants. When their representative did not respond, the PFN assumed the collective application had been abandoned.

[17] On March 11, 2016, Mr. Peters submitted a further application for band membership. The PFN rejected the application on July 25, 2016. The letter from the Band Council reads as follows:

Council have carefully considered your application for membership and sought legal advice. In reviewing the records, it appears that the Department of Indian Affairs placed your name on the manually maintained list pursuant to subsection 11(2) of the

Indian Act in 1987. In anticipation of the passage of the Membership Code, it was left to the discretion of Council for the Peters First Nation as to whether you would be admitted as a member of the Peters First Nation. By letter dated November 12, 1987, Chief Frank Peters advised the Acting Registrar that your name was to be removed from the subsection 11(2) list and thus you did not become a member of the Peters First Nation. Several other individuals were removed at that point as well.

Unfortunately at present it is our view, which has been confirmed by our legal counsel, that you are not entitled to membership in the Peters First Nation. We appreciate your desire to become a member of the Peters First Nation.

[18] On August 17, 2016, Mr. Peters requested an appeal. On October 12, 2016, the PFN informed Mr. Peters that it was investigating the matter and expected to provide him with further information in the near future.

[19] Part V of the Membership Code provides that a general meeting of the Electors shall be held within 60 days of receipt of a notice of appeal. To date, no appeal has been convened. Mr. Peters therefore seeks judicial review of the Band Council's decision dated July 25, 2016. The PFN says it is still willing to conduct an appeal vote for Mr. Peters.

B. *Brandon Lee Engstrom and Amber Rachel Ragan*

[20] Mr. Engstrom was born on December 11, 1991. His father is Robert Dwayne Peters, a member of the PFN. His mother is Sharon Engstrom, a member of the Heiltsuk Nation.

[21] Mr. Engstrom was formerly known as Brandon Peters-Jackson. He says that his name appeared on the band list in 1996. The Respondents reply that the document is not a genuine membership list, and its origin is unclear.

[22] Ms. Ragan was born on October 23, 1996. Her father is Robert Dwayne Peters, a member of the PFN. Her mother, Corinna Ragan, is not a status Indian. Ms. Ragan was registered as a status Indian when she was approximately 14 years old. Her parents believed she was registered as a member of the PFN.

[23] Ms. Ragan's name was included in the "collective application" submitted in October 2012, which the PFN subsequently deemed to be abandoned.

[24] Mr. Engstrom and Ms. Ragan submitted separate applications for membership in the PFN dated December 18, 2015. Both applications were rejected on July 25, 2016. The letters from the Band Council were identical, and read as follows:

Council have carefully considered your application for membership in the Peters First Nation. We are of the view, having obtained legal advice, that under the current Membership Code you are not entitled to become a member. However, we do wish to advise you that we are going to propose amendments to the Membership Code which may result in a reconsideration should you reapply after the new Membership Code is in effect.

[25] Ms. Ragan requested an appeal on August 11, 2016. Mr. Engstrom requested an appeal on August 23, 2016. The Band Council convened a general meeting to vote on both appeals on November 6, 2016. There was no discussion of eligibility criteria for membership in the PFN.

Chief Norma Webb questioned Mr. Engstrom and Ms. Ragan about whether they had criminal records, their employment history, their dependents, the benefits they might seek from the PFN, and whether they intended to live on reserve. Mr. Engstrom's and Ms. Ragan's appeals were voted on together, and were narrowly rejected (19 to 18).

III. Issues

[26] This application for judicial review raises the following issues:

- A. What is the standard of review?
- B. Are the decisions amenable to judicial review?
- C. Were the decisions reasonable?
- D. Were the decisions procedurally fair?
- E. What are the appropriate remedies?

IV. Analysis

A. *What is the standard of review?*

[27] A band council's interpretation and application of a custom membership code are subject to review by this Court against the standard of reasonableness (*Norris v Matsqui First Nation*, 2012 FC 1469 at para 50 [*Norris*]). The Court will intervene only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[28] While the Applicants argue that the applicable standard of review is correctness (citing *Cameron v Canada (Indian Affairs and Northern Development)*, 2012 FC 579), they say that nothing turns on this point because the decisions cannot be sustained against either standard.

[29] There is no dispute that questions of procedural fairness are subject to review against the standard of correctness (*Crawler v Wesley First Nation*, 2016 FC 385 at para 19).

B. *Are the decisions amenable to judicial review?*

[30] In the course of the hearing, a question arose regarding which decisions are the subject of the application for judicial review. The Notice of Application filed on December 6, 2016 is directed towards:

... three decisions of the Peters First Nation Band Council (the "Band Council") on July 25, 2016 rejecting each of the Applicants'

applications for Band membership, which were finally decided on appeal on November 6, 2016 (the “Decisions”).

[31] This suggests that the three decisions of the Band Council dated July 25, 2016 and the two subsequent appeals dated November 6, 2016 are all in issue. Moreover, the Notice of Application was filed within 30 days of the appeals, not within 30 days of the Band Council’s decisions. The Respondents do not object to the application for judicial review as untimely.

[32] Pursuant to direction of the Court dated March 27, 2018, the parties were given a further opportunity to address which decisions are the subject of the application for judicial review, and whether those decisions are amenable to judicial review. The parties’ further submissions were received on April 6, 2018.

[33] Both parties maintain that the two appeals dated November 6, 2016 are not amenable to judicial review, because the PFN is not a federal board, commission or other tribunal within the meaning of s 2 of the *Federal Courts Act*, RSC 1985, c F-7. They take this position despite the authority of *Lameman v Gladue*, [1995] FCJ No 242 (QL) (FC) at paragraph 5 and *Cameron v Albrich*, 2011 BCSC 549 at paragraph 49. Both of these cases stand for the proposition that a band’s exercise of a statutory duty to maintain a band list, whether pursuant to the *Indian Act* or its own customary law, entails the band acting as a federal board, commission or other tribunal for the purposes of the *Federal Courts Act* (see, more generally, *Horseman v Horse Lake First Nation*, 2013 FCA 159 at paras 4-6).

[34] Instead, the Applicants argue that this Court has a broad discretion to review the decisions of the Band Council, despite the two subsequent appeals. They note that the parties have conducted this proceeding on the understanding that it is directed towards the three decisions of the Band Council dated July 25, 2016. The Applicants commenced the appeals in the hope of avoiding the expense of litigation, and to prevent a preliminary objection based on prematurity. The PFN has held a vote respecting only two of the three appeals, and no further reasons have been provided.

[35] The Applicants also cite the decision of the Federal Court of Appeal in *Bellegarde v Poitras*, 2011 FCA 317 at paragraph 7 for the proposition that the appeals cannot stand if the Band Council lacked authority to deny the applications for band membership, because subsequent votes of the Electors cannot cure decisions that were unlawful.

[36] The Respondents say the decisions of the Band Council dated July 25, 2016 have been rendered moot by the subsequent appeals. The Applicants complain that mootness was not properly raised in the Respondents' Memorandum of Fact and Law. Mootness is mentioned in paragraphs 44, 50, and 51 of the Respondents' Memorandum, but only in connection with the PFN's decision to remove Mr. Peters from the band list in 1987. The Court's jurisdiction is disputed in paragraphs 50 and 51, but not specifically on the ground of mootness.

[37] The doctrine of mootness is an aspect of general policy or practice that allows a court to decline to answer questions that have become hypothetical or abstract, and where the decision of the court would have no practical effect on the parties. The essential question that must be asked

is whether some “live controversy” which affects or may affect the rights of the parties continues to exist (*Borowski v Canada (AG)* (1989), 57 DLR (4th) 231 at 239 [*Borowski*]).

[38] The two-part test for mootness requires the Court to decide: (a) whether the concrete dispute between the parties has disappeared such that the issues have become academic; and (b) if the response to the first question is affirmative, whether the Court should nevertheless exercise its discretion to hear the case (*Borowski* at 239). The exercise of the Court’s discretion is informed by the following three factors: (i) the existence of an adversarial relationship between the parties; (ii) concern for judicial economy; and (iii) awareness of the Court’s proper law-making function (*American Express Marketing & Development Corp v Black Card LLC*, 2018 FC 362 at para 32).

[39] The Applicants assert that there continues to be a live controversy over whether they are entitled to be members of the PFN. In the alternative, they ask the Court to exercise its discretion to decide the case, because the necessary adversarial context continues to exist; the matter has been thoroughly argued; the interests of judicial economy favour a decision on the merits; the underlying issues remain unresolved; and their resolution will have a meaningful effect on the rights of the parties. The Applicants also say it would be contrary to public policy to permit the Band Council to insulate its decisions regarding band membership from judicial review through the appeal process contemplated by the Membership Code.

[40] Assuming, without deciding, that the appeals are not amenable to judicial review, for the reasons articulated by the Applicants I am satisfied that it is in the interests of justice to decide the application for judicial review on its merits. I therefore exercise my discretion to do so.

C. *Were the decisions reasonable?*

i. *Guy Peters*

[41] The Respondents say that Mr. Peters' name was not on the band list on April 17, 1985, and it was therefore open to the PFN to subsequently deny his band membership. They note that Mr. Peters' Indian status and membership in the PFN was not confirmed by INAC until August 21, 1987.

[42] Mr. Peters applied to be registered as a status Indian on September 17, 1985. On August 21, 1987, the Acting Registrar of INAC sent a letter to Mr. Peters which stated the following:

... I am pleased to confirm that you are now registered in the Indian Register maintained in this Department in accordance with paragraph 6(1)(a) of the Indian Act under the name Guy Peters.

You are also registered as a member of the Peters Band in accordance with paragraph 11(1)(a) of the Act.

[43] INAC's letter to Chief Frank Peters dated October 15, 1987 confirmed that Mr. Peters was registered as a member of the PFN. The fact that Mr. Peters' name appeared only on the "manually maintained" list is irrelevant. Furthermore, he acquired his right to membership before

the Membership Code came into effect, and he therefore benefited from the protection afforded by s 10(4) of the *Indian Act*. Pursuant to Bill C-31, the PFN had no power to deprive him of his previously-acquired right to band membership. It follows that former Chief Frank Peters acted without authority when he sought to remove Mr. Peters from the band list in November 1987.

[44] Chief Frank Peters' attempt to remove Mr. Peters' name from the band list in 1987 is not the subject of this application for judicial review. However, the statement in the Band Council's decision of July 25, 2016 that "it was left to the discretion of Council for the Peters First Nation as to whether [Mr. Peters] would be admitted as a member of the Peters First Nation" is plainly wrong. The Band Council's failure to recognize that Mr. Peters was statutorily entitled to membership in the PFN through the operation of Bill C-31 renders its decision unreasonable.

ii. *Brandon Lee Engstrom and Amber Rachel Ragan*

[45] The Applicants say that Mr. Engstrom and Ms. Ragan met the membership criteria prescribed by the Membership Code, and the Band Council therefore had no discretion to refuse their applications. Part III of the Membership Code states that the PFN shall consist of everyone who was on the band list on April 17, 1985, or who is a natural child of a parent whose name appears on the band list.

[46] The Applicants argue that the Band Council was not permitted to consider factors that are not enumerated in the Membership Code. In the alternative, they say the Band Council abused its discretion by considering irrelevant factors, such as the Applicants' ages, whether they had

provided their mothers' written consent, and whether they submitted their applications to the band office in person. They also say the Band Council failed to consider relevant factors, such as the Applicants' ages when they first sought to become members of the PFN, or when they discovered that they were not already members. The Applicants argue that the Band Council cannot impose additional rules that have the effect of frustrating the objectives of the Membership Code.

[47] The Respondents reply that the membership criteria found in Part III of the Membership Code are only the first step in the process. A failure to meet these criteria will result in immediate disqualification, but meeting them will not necessarily entitle an applicant to membership. Furthermore, the Respondents state that the Applicants could meet the requirement of being a "child" of a PFN member only if they were under the age of 17. According to the Respondents, none of the Applicants were under the age of 17 when they submitted their membership applications, and they therefore did not meet the initial criteria prescribed by the Membership Code.

[48] The Respondents rely on *Norris*, where this Court upheld a band's interpretation of a comparable provision in its membership code to encompass only persons under the age of 18. In *Norris*, the Court found it was not unreasonable for the band to require an applicant to demonstrate certain cultural ties before qualifying for membership (at para 76).

[49] In this case, the Respondents note that the Introduction to the Membership Code states:

We, the peoples of the PETERS INDIAN BAND, in order that our rights and freedoms – inherent, aboriginal and or otherwise rights –

be fully protected, exercised and preserved to ensure justice and our security; to maintain STALO traditions and customs; to promote harmony and the common good; therefore do ordain and establish this MEMBERSHIP CODE as provided by Section 10 of the Indian Act, as amended. ...

[50] The Applicants argue that the membership code considered in *Norris* differs from the Membership Code of the PFN. They note, for example, that the membership code considered in *Norris* contains an explicit provision governing the age of a “child”. They allege that the Respondents are using *Norris* to retroactively justify the decisions of the Band Council. According to the Applicants, if the Respondents wish to introduce an age restriction into the Membership Code, then the Code must be amended in accordance with the prescribed procedure.

[51] The Band Council provided no substantive reasons for its decisions to deny the Applicants’ applications for membership. The evidence adduced in these proceedings supports the Applicants’ assertion that the various rationales subsequently provided by the Band Council were developed *ex post facto*. There is nothing in the record to confirm that the Band Council’s decisions, at the time they were made, were based on the Applicant’s ages, the absence of their mothers’ written consent, or their failure to submit their applications in person to the band office. These justifications were offered in piecemeal fashion long after the decisions had been communicated to the Applicants.

[52] The absence of adequate reasons to support the Band Council’s decisions renders them unreasonable. This is not a case where the record permits the Court to “connect the dots” and discern reasons that might have informed the decisions (*Newfoundland and Labrador Nurses’ Union v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 at paras 15-18). It appears

that the applications were summarily rejected, with possible justifications concocted only after the Applicants indicated their intention to pursue appeals.

D. *Were the decisions procedurally fair?*

[53] The Applicants say they were denied procedural fairness, because the Band Council:

- (a) did not respect their legitimate expectation that their applications would be decided solely in accordance with the criteria prescribed by the Membership Code;
- (b) denied them a meaningful opportunity to know the grounds on which their applications would in fact be assessed;
- (c) failed to inform them of any deficiencies in their applications;
- (d) failed to provide them with decisions within 30 days of their applications, as required by Part IV of the Membership Code;
- (e) failed to provide adequate or any reasons;
- (f) failed to convene an appeal for Mr. Peters;

- (g) misrepresented the membership criteria; and
- (h) made prejudicial and irrelevant statements during the appeals.

[54] In *Ermineskin v Ermineskin Band Council* (1995), 96 FTR 181 (TD) [*Ermineskin*], Justice James Jerome said the following at paragraph 11:

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

[55] In this case, it is unclear whether the decisions of the Band Council were made in accordance with the Membership Code, were informed by other considerations, or were based on a combination of the two. Pursuant to *Norris*, the Band Council may have some latitude in interpreting and applying the Membership Code. However, if the Band Council wishes to interpret or apply the Membership Code in a manner that departs from the plain language of its provisions, then it must inform applicants of the manner in which their applications will be decided and give them with a reasonable opportunity to prepare their applications accordingly. Similar considerations apply to any appeal of a decision to refuse an application for membership in the PFN.

[56] The Applicants were not apprised of the factors that might be considered by the Band Council in deciding their applications. I therefore conclude that the decisions of the Band Council to deny the Applicants' applications for membership in the PFN were procedurally unfair.

E. *What are the appropriate remedies?*

[57] As Justice Jerome observed in *Ermineskin*, courts are reluctant to intervene in decisions of band councils respecting matters that lie at the heart of a band's autonomy and self-government (see also *Sandberg v Norway House Cree Nation Band Council*, 2005 FC 656 at para 23; *Shotclose v Stoney First Nation*, 2011 FC 750 at para 58). However, this must be balanced against the duty of governments, aboriginal and non-aboriginal alike, to respect the rule of law. Aggrieved persons must have a right to apply to a court of competent jurisdiction to vindicate their legal rights and obtain meaningful redress.

[58] Mr. Peters is a member of the PFN by virtue of the *Indian Act*, as amended by Bill C-31. He acquired the right to membership in the PFN through the operation of law. In light of this conclusion, no useful purpose would be served by remitting his application for membership to the Band Council for redetermination. Mr. Peters is entitled to a declaration that he is a member of the PFN.

[59] The decisions of the Band Council respecting the applications for membership submitted by Mr. Engstrom and Ms. Ragan were unreasonable and procedurally unfair. However, pursuant

to *Norris*, the PFN may have some latitude in interpreting and applying its Membership Code. It would therefore be inappropriate for this Court to issue a declaration respecting Mr. Engstrom's and Ms. Ragan's membership in the PFN. Their applications for membership must be remitted to the Band Council for redetermination in accordance with these Reasons for Judgment.

[60] I express no view on whether the Membership Code may be interpreted and applied to exclude applicants who (a) are more than 17 years of age; (b) have not provided the written consent of one or more of their parents; (c) do not complete a prescribed form or deliver it to the band office in person; or (d) fail to meet any other criterion that is not explicitly contained in the Membership Code. These are matters for the PFN to decide in a reasonable manner within a fair process. An unsuccessful application for membership may be the subject of an appeal pursuant to Part V of the Membership Code, or an application for judicial review to this Court.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Guy Peters is declared to be a member of the Peters First Nation.

2. The decisions of the Band Council of the Peters First Nation to refuse the applications for membership of Brandon Lee Engstrom and Amber Rachel Ragan are set aside, and the matters are remitted to the Band Council for redetermination in accordance with this Court's Reasons for Judgment.

3. One set of costs is awarded to the Applicants in accordance with the high end of Column III of Tariff B.

“Simon Fothergill”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2107-16

STYLE OF CAUSE: GUY PETERS, BRANDON LEE ENGSTROM, AND AMBER RACHEL RAGAN v PETERS FIRST NATION BAND COUNCIL, NORMA WEBB IN HER CAPACITY AS CHIEF OF PETERS FIRST NATION, LEANNE PETERS IN HER CAPACITY AS COUNCILLOR OF PETERS FIRST NATION, AND VICTORIA PETERS IN HER CAPACITY AS COUNCILLOR OF PETERS FIRST NATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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JUDGMENT AND REASONS: FOTHERGILL J.

DATED: MAY 25, 2018

APPEARANCES:

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