Federal Court  Cour fédérale

Date: 20220829

Docket: T-951-21

Citation: 2022 FC 1237

Ottawa, Ontario, August 29, 2022

PRESENT: The Honourable Madam Justice Strickland

Docket: T-951-21

BETWEEN:

MARILYN JOHNSTON

Applicant

and

THE OKANAGAN INDIAN BAND

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision dated May 10, 2021 [2021 Reconsideration Decision], by the Okanagan Indian Band [OKIB] Chief and Council [collectively, Council], refusing to give consent, pursuant to section 12 of the *Indian Act*, RSC 1985 c I-5, to the transfer of the band membership of Ms. Marilyn Johnston [Applicant] from another Indian band to the OKIB.

Background

[2] OKIB, the Respondent, is an Indian Band as defined in the *Indian Act*. Pursuant to section 10(1) of the *Indian Act*, a band may assume control over its own membership if it establishes membership rules for itself in writing in the manner set out in that section. In that event, the band is required to maintain its own band list (section 10(10)). If a band does not establish its own membership rules, then individuals will be entitled to have their names entered in a band list maintained for the band by the Department of Indigenous Services [Department] if they meet the specified criteria (section 11). OKIB is a section 11 band, it does not have a membership code and its Band list is maintained by the Department. Individuals may only have their names entered in one band list (section 13), however, pursuant to section 12 of the *Indian Act* they may transfer their membership to another band if the council of the admitting band consents.

[3] The Applicant was registered in the Indian Registry maintained by the Department of Indian and Northern Affairs Canada (now the Department of Indigenous Services), pursuant to section 6(2) of the *Indian Act*, on November 16, 1987 and, at the same time, was registered as a member of the OKIB, pursuant to section 11(2)(b) of the *Indian Act*. Her entitlement to registration was based on the fact that her father, Frank Jack, was a member of the OKIB. The supporting documentation for the Applicant's application for registration in the Indian Registry included a Statutory Declaration completed by Frank Jack on June 12, 1987 confirming the Applicant's paternity.

[4] The Applicant claims that she was raised by her maternal grandfather and her aunt and uncle, Raymond and Rhoda Simla, on the OKIB reserve lands. In 1976, the Applicant moved to Fort St. James, British Columbia, and began working there providing social services. On January 22, 1988, the Applicant wrote to OKIB and Nak'azdli Whut'en Indian Band seeking a transfer of her band membership to the latter band. She remains a member of the Nak'azdli Whut'en Indian Band.

[5] The Applicant has been attempting to transfer her membership back to OKIB since making her first request to do so by letter to OKIB dated August 19, 2002. Her efforts in that regard will be addressed in detail later in these reasons.

[6] In 2009, the Applicant moved to the farm of her aunt, Rhoda Simla, on the OKIB reserve. She continued her efforts to transfer her band membership back to OKIB. However, her application was not processed.

[7] On October 6, 2010, OKIB adopted the Okanagan Indian Band Membership Transfer Policy [2010 Transfer Policy]. The Applicant's application to transfer her membership back to OKIB was assessed by an OKIB administrator as having met all of the requirements of the 2010 Transfer Policy and Council was informed of this. However, on February 8, 2012 Council voted to suspend all membership transfer applications "until further clarity is completed on the membership transfer policy".

[8] On November 13, 2013, Rhoda Simla passed away, naming the Applicant as the sole beneficiary of her estate. Assets of the estate included interests in four lots of land which have been described in the record as follows:

a) Lot 144-1 Block 4 CLSR 80912 (the whole interest);

b) Lot 9 Block B Fry Sketch 319-36 Parcel 2 No Plan (the whole interest);

c) Lot 10 Block 4 Rem RSBC 551 (an undivided½ interest); and

d) Lot 10 Block B Fry Sketch 319-36 No Plan (the whole interest).

[Simla Estate Lands]

[9] Although the Applicant was the sole beneficiary of the estate, because she was not a member of OKIB, she was not eligible to receive any possessory or occupational interest in the Simla Estate Lands on the OKIB reserve. In that circumstance, section 50 of the *Indian Act* permits the Superintendent of Indian Affairs to offer the interest in the land for sale to band members, sell it to the highest bidder and then pay the proceeds to the non-band heir or beneficiary. If there are no bidders then the interest in the land would be returned to the band without payment of any compensation to the non-member heir or beneficiary for the value of the land.

[10] While the Applicant's application for transfer of her membership back to OKIB was still awaiting determination, the Executive Director of OKIB wrote to AANDC (now Indigenous Services Canada [ISC]) requesting that the Simla Estate Lands be sold and that anyone improperly living on the lands be removed. Lot 145 Block 4 and Lot 144-1 were subsequently sold by AANDC [Sold Simla Estate Lands].

[11] The Applicant resides on Lots 9 and 10 Block Fry Sketch with her daughter and grandson [Remaining Simla Estate Lands].

[12] On September 27, 2016, a member of the OKIB Council, Lyle Brewer, and Randy Marchand an OKIB staff member, attended at the Remaining Simla Estate Lands along with members of Russell Shortt Surveying, including Ray Marchand, who had been engaged by Council to survey the boundaries of those lands. The Applicant refused to allow them access. According to Councillor Brewer, she ordered everyone off the property, demanded to see papers authorizing them to attend on the land and stated that she was the owner of the property. The Applicant also removed the surveyor's tripod to the shoulder of the road. Councillor Brewer reports that the Applicant then got back in her car and said something like "Do you want me to go back to my house and get my gun?". There is no evidence that this incident was raised by Council with the Applicant at that time.

[13] In February 2017, the Applicant wrote to AANDC asking that they intervene with her OKIB membership transfer application, which remained unresolved. By letter dated September 14, 2017 AANDC acknowledged a letter from her dated of May 18, 2017 advising that her 2009-2010 band membership transfer application had not been accepted or rejected. AANDA (now Indigenous and Northern Affairs Canada [INAC]) advised that it could not assist the Applicant as it had no authority to intervene in OKIB's process.

[14] On September 27, 2017, OKIB Council adopted the Section 12 Membership Transfer Policy [2017 Transfer Policy].

[15] On March 6, 2018, OKIB advised the Applicant of this development. On April 16, 2018, OKIB wrote to the Applicant advising her of the new policy and that, before her application for transfer of membership could move forward, the listed document and/or updated information was required. However, the increased application fee and new application form were waived in her case. She was advised that if the required documents were not provided by June 20, 2018 her application would be considered inactive and would not be processed until the documents were received. The letter also addresses the submission of optional documentation pertaining to OKIB or Sylix ancestry. Also on April 16, 2018, the Department of Justice, Aboriginal Law section, wrote to the Applicant advising that OKIB Council had asked ISC to proceed with the sale of the Remaining Simla Estate Lands and that ISC would do so if the Applicant did not provide ISC with satisfactory evidence, by September 30, 2018, that she is an OKIB member.

[16] On May 7, 2018, OKIB advised the Applicant that three documents were still outstanding (signed letters from the Nal'azdli Whu'en band confirming that she did not hold a Certificate of Possession of that band's lands and owed no debt to that band and, a photocopy of her current Certificate of Indian Status (status card) as the one she had submitted had expired) and that if these were not received by June 20, 2018 her application would be rejected as incomplete and Council would not consent to her transfer to OKIB.

[17] On May 28, 2018, the Applicant attended the OKIB Band Office to have her status card renewed as part of her transfer membership application (it appears from an email from Veronica Wilson that the Applicant had originally attended and applied to renew her status card on May, 17, 2018, without incident). An OKIB Employee Incident Report Form submitted by Veronica Wilson, an Indian Registry Administrator, dated May 29, 2018 [Wilson Incident Report Form]

states that Ms. Wilson told the Applicant that she needed the long-form birth certificate, not the version that she had with her. Ms. Wilson claims that during this interaction the Applicant "got loud" and demanded that Ms. Wilson photocopy the birth certificate and renew her status card. Ms. Wilson reported that she "felt threatened by her aggressive and rude behaviour". There is no evidence that this incident was raised with the Applicant by OKIB at that time.

[18] On June 15, 2018, surveyor Jason Shortt attempted to access the Remaining Simla Estate Lands for the purposes of a survey at the request of Council. On October 25, 2018, he wrote a letter to Council stating that the Applicant had refused to allow the surveyors to proceed without a court order [Shortt Letter]. The record contains no evidence indicating why this letter was submitted four months after the surveyor's attendance.

[19] A decision on the Applicant's request to transfer her band membership was made on July 30, 2018 by way of a Band Council Resolution [2019 Decision]. Council declined to consent to have the Applicant's name entered in the OKIB Band List, under section 12 of the *Indian Act* and OKIB's 2017 Transfer Policy, on the basis that the Applicant had failed to provide signed letters from the Nak'azdli Whut'en Indian Band stating that she does not hold a Certificate of Possession on any of that band's land and that she does not have any outstanding debts, which documents were required by sections 6.1(b)(ii) and 6.1(b)(iii) of the 2017 Transfer Policy. However, that another application would be considered sooner than 5 years from the date of the decision if she provided the missing information.

[20] By September 18, 2018, the Applicant had provided the two outstanding letters. She claims that she had advised OKIB that they had been delayed due to forest fires in the area of the Nak'azdli Whut'en reserve lands which had forced evacuations.

[21] On October 29, 2018 and November 27, 2018, Victor Rumbolt, then Executive Director of OKIB, wrote to the Applicant advising that the outstanding letters had been received and that her application to transfer her membership to OKIB was now being considered by Council. However, that Council's initial review had raised two issues. The Applicant was invited to make further submissions on those issues before Council made a final decision.

[22] The first issue was her OKIB ancestry. The letter states that the Applicant's mother was not an OKIB member and her father was not listed on her birth certificate. OKIB's membership files indicated that when the Applicant first sought to join OKIB in the 1980's she provided one or more statutory declarations to the Indian Registry to establish that her father was an OKIB band member. However, OKIB did not have copies. The letter requested that she provide copies, and any other information or documentation she might like Council to consider regarding her ancestry, by November 13, 2018.

[23] The second issue was described as threatening behaviour to OKIB staff and guests. Copies of the Brewer and Marchand Emails (with names deleted), the Wilson Incident Report Form (name deleted) and the Shortt Letter were attached. The Applicant was advised that if she would like to respond to those statements with her own perspective on these incidents and how Council should take them into account when determining her membership application, she

should do so by letter by November 13, 2018. The Applicant responded by letter dated December 3, 2018.

[24] By Band Council Resolution dated January 7, 2019 Council declined to consent to the Applicant's name being added to the OKIB band list [2019 Decision]. The stated reason for this was that:

> OKIB has received multiple reports of aggressive and threatening behaviour by Ms. Johnston toward OKIB staff and guests, including verbal threats to use a firearm against an OKIB member, and she has not provided sufficient excuse or explanation for this behaviour. She has not taken responsibility for this behaviour and has denied it. As a result, we do not believe she would make a positive contribution to the OKIB community.

[25] On September 17, 2019, OKIB filed a Notice of Civil Claim in the Supreme Court of British Columbia [SCBC] seeking, among other things, a declaration that OKIB, as the beneficial owner of the Remaining Simla Estate Lands, was entitled to all of the rents, actual and potential, in respect to those lands since the death of Rhoda Simla; damages arising from trespass and conversion; and an order enjoining the Applicant from entering the OKIB reserve and the subject lands.

[26] On January 17, 2020, pursuant to section 4.10 of the version of the 2017 Transfer Policy then in effect (adopted September 25, 2017 and amended November 14, 2017), the Applicant launched a protest against the 2019 Decision [Protest]. Section 4.10 provided that any applicant wishing to appeal a decision of Chief and Council under the transfer policy could submit a protest to the Indian Registrar under section 14.2 of the *Indian Act*.

[27] On August 4, 2020, OKIB filed an application for summary trial in the SCBC seeking remedies that included a declaration that OKIB, as the beneficial owner of the Remaining Simla Estate Lands, was entitled to all the rents, both actual and potential, in respect of the land since the death of Rhoda Simla, damages arising from trespass and conversion and, an order enjoining Ms. Johnston, the defendant in that action, from entering the Reserve and the Remaining Simla Estate Lands [Trespass Claim].

[28] On August 17, 2020, the Applicant brought a cross application seeking a stay of the SCBC Trespass Claim until her Protest could be heard.

[29] The SCBC issued its decision with respect to the summary trial application and the stay application on October 14, 2020 (*Okanagan Indian Band v Johnston*, 2020 BCSC 1749) [Trespass Decision]. It adjourned OKIB's summary trial application with respect to the Trespass Claim and stayed the proceedings for a period of one year.

[30] In December 2020, the 2017 Transfer Policy was amended by Council to remove the right to protest to the Indian Registrar.

[31] By letter dated January 11, 2021, OKIB Chief Byron Louis wrote to the Applicant and offered to reconsider the 2019 Decision. The letter refers to her Protest to the Indian Registrar in which counsel for the Applicant stated that the Applicant did not have an adequate opportunity to respond to the statements from OKIB representatives and guests regarding the Applicant's behaviour prior to Council making its decision to deny her application. Chief Louis stated that

Council wished to give the Applicant another opportunity to respond and present her views to Council. The previously provided documents (the Brewer and Marchand Emails, Wilson Incident Report and the Shortt Letter) were again attached. Chief Louis advised that Council would consider any further information or documentation if received by February 10, 2021 and also invited the Applicant to attend a Council meeting (via Zoom) on March 1 or March 8, 2021 to make verbal submissions to Council, should she wish to do so. She could also bring a lawyer to the Council meeting if she wished. Chief Louis also noted that the 2017 Transfer Policy had been amended in December 2020 to remove the right to protest to the Indian Registrar.

[32] The Applicant initially declined the invitation to make submissions to Council (by letter dated January 21, 2021). However, by letter to Council dated February 10, 2021, her counsel advised that the Applicant was agreeable to attend a Council meeting on March 8, 2021, via Zoom, and requested that her legal counsel also be in attendance. By the same letter, counsel for the Applicant provided written submissions to Council [February Submissions]. Ultimately, however, counsel for the Applicant advised by letter of April 13, 2021 that the Applicant did not wish to attend the Council meeting in person and requested that the reconsideration of her membership transfer application be made based on the February Submissions. Counsel indicated that should Council have any questions or concerns the Applicant and her counsel would be happy to answer them in writing**.**

[33] By Band Council Resolution dated May 10, 2021, Council again refused to consent to the Applicant’s transfer of her membership to OKIB. That decision is the subject of this judicial review.

Relevant Legislation

***Indian Act*, RSC 1985 c I-5**

> **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
>
> > **(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
> >
> > **(b)** is a member of another band,
>
> 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.

Section 12 Membership Transfer Policy (as approved on September 25, 2017 and amended on November 14, 2017 and December 21, 2020)

1 PURPOSE

1.1. The purpose of this Policy is to establish procedures for obtaining the consent of Chief and Council pursuant to section 12 of the *Indian Act* for the admission to membership in the Okanagan Indian Band of any person who:

(a) is entitled to be registered under section 6 of the Indian Act, but not entitled to have his or her name entered in the OKIB Membership List, or

(b) is a member of another band.

1.2. This Policy establishes the circumstances in which:

(a) Chief and Council may consent to the admission of a person to the OKIB Membership List under section 12 of the *Indian Act* without a Community Vote; and

(b) Chief and Council will refer an application for admission to the electors of OKIB for a Community Vote prior to consenting to the admission of a person to the OKIB Membership List under Section 12 of the *Indian Act*.

2 SCOPE

2.1. This Policy applies to registered status Indians under section 6 of the Indian Act who wish to transfer to the OKIB Membership List in accordance with section 12 of the *Indian Act*.

3 DEFINITIONS

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3.2. **Applicant** means a person seeking Chief and Council's consent under this policy to become a Band Member, pursuant to section 12 of the *Indian Act*.

3.3. **Band Member** means a person on the OKIB Membership List.

3.4. **Chief and Council** means the elected Chief and Council of OKIB.

3.5. **Community Vote** means the non-binding vote by eligible OKIB electors in person, at a vote called by Chief and Council, on whether or not an Applicant should be added to the OKIB Membership List.

3.6 **Filing Fee** means a one-time, non-refundable processing fee of $250.00 dollars to be paid before OKIB processes and application under this Policy

3.7. **INAC** means the Ministry of Indigenous and Northern Affairs Canada and any successor ministry or department.

3.8. **Indian Registry Administrator** means the OKIB staff person responsible for maintaining a list of Band Members for the Indian Registrar and registering status Indians on behalf of INAC.

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3.10. **OKIB Ancestry** means a connection by line of descent to a current or former Band Member.

3.11. **OKIB Membership List** means the Band List of the Okanagan Indian Band maintained under section 8 of the *Indian Act*.

3.12. **OKIB** means the Okanagan Indian Band.

…

3.14. **Statutory Declaration** means a solemn declaration that meets the requirements of section 41 of the *Canada Evidence Act*.

3.15. **Supporting Documents** means all documents submitted by the Applicant and the documents listed in section 7 of this policy.

…

3.16 **Well-Established Community Residence** means a person has been living on one of the OKIB reserves for at least five consecutive years.

4 POLICY

Applicants with OKIB or Syilx Ancestry

4.1. The Chief and Council may, by band council resolution, consent to the admission of an Applicant to the Membership List without a Community Vote where the Applicant is registered under section 6 of the *Indian Act* and:

(a) was formerly registered as a Band Member and was involuntarily transferred to the membership of another band, including transfer as a child;

(b) was formerly registered as a Band Member and voluntarily transferred to the membership of another band;

(c) is of OKIB ancestry and has provided evidence satisfactory to the Chief and Council of OKIB Ancestry; or

(d) is of Sylix Ancestry and has provided evidence satisfactory to the Chief and Council of Sylix Ancestry, Well-Established Community Residence and current familial and community ties to the OKIB.

Other Applicants

4.2 Chief and Council may, by band council resolution, refer an applicant to a Community Vote where an Applicant:

(a) does not meet the criteria in section 4.1 of this Policy;

(b) is a registered Indian under section 6 of the *Indian Act*;

(c) has provided some evidence of Well-Established Community Residence; and

(d) has provided some evidence of current familial and community ties to OKIB;

4.3 Subject to section 4.4, Chief and Council may, by band resolution, consent to the admission of an Applicant to the Membership List where the Applicant:

(a) does not meet the criteria in section 4.1 of this Policy;

(b) is a registered Indian under section 6 of the *Indian Act*;

(c) has provided evidence satisfactory to the Chief and Council of Well-Established Community Residence; and

(d) has provided evidence satisfactory to the Chief and Council of current familial and community ties to OKIB.

4.4 Chief and Council will consider the results of a Community Vote under section 4.2 in deciding whether to grant consent under section 4.3.

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Denial of Admission to Band Membership

4.6. Chief and Council will, by band council resolution, deny the admission of Applicants to the OKIB Membership List who do not meet the criteria in at least one of sections 4.1 and 4.3.

4.7 OKIB understands and complies with its obligations not to discriminate on the basis of criminal convictions for which a pardon has been granted or in respect of which a suspension of records has been ordered. However, to the extent it is permitted by the *Canadian Human Rights Act*, Chief and Council may deny admission of an Applicant to the OKIB Membership List who has been deemed by Chief and Council to pose a risk to the safety and social well-being of OKIB Band Members because of criminal activity.

4.8 Chief and Council may deny the admission of an Applicant to the OKIB Membership List who holds a Certificate of Possession for lands on the reserve of another band or who owes outstanding debts to another band.

4.9 An Applicant who applies to the OKIB Membership List and is denied may not re-apply to the OKIB for at least five years following the Applicant's last application, except if the Applicant is able to provide new evidence of OKIB Ancestry of Sylix Ancestry.

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5 RESPONSIBILITY

5.1. The Indian Registry Administrator is responsible for providing recommendations to Chief and Council with complete applications and all Supporting Documents.

5.2. Each Applicant is responsible for providing the Indian Registry Administrator with the documents required by this policy. Incomplete applications will not be processed.

6 PROCEDURE

Applicants with OKIB or Syilx Ancestry – Application Requirements

6.1. Where an Applicant applies under section 4.1:

(a) The Applicant must submit a signed, dated Membership Transfer Application and Filing Fee to the Indian Registry Administrator accompanied by the following documents:

(i) A photocopy of the Applicant's current Indian registration card;

(ii) The Applicant's original long form birth certificate; and

(iii) If the Applicant is a member of a band governed by section 10 of the *Indian Act*, a signed letter or band council resolution from the originating band confirming the Applicant is a member.

(b) Applicants eighteen years of age or older must provide the following additional information:

(i) Criminal Record Check;

(ii) Signed letter from the originating band stating the Applicant does not hold a Certificate of Possession on any of the band's lands; and

(iii) Signed letter from the originating band stating the Applicant does not have any outstanding debts to that band.

(c) The Applicant may submit evidence of OKIB Ancestry, if applicable, including any one or more of the following:

(i) Full form birth certificate;

(ii) Full form baptismal certificate;

(iii) A Statutory Declaration of one or more parents or grandparents of OKIB Ancestry declaring that person's knowledge or belief as to the OKIB Ancestry of the Applicant;

(iv) Statutory Declarations of three other persons of OKIB Ancestry declaring their knowledge or belief as to the OKIB Ancestry of the Applicant; or

(v) Any other evidence satisfactory to the Chief and Council of an Applicant's OKIB Ancestry.

(d) The Applicant may submit evidence of Syilx Ancestry, if applicable, including any one or more of the following:

(i) Full form birth certificate;

(ii) Full form baptismal certificate;

(iii) A Statutory Declaration of one or more parents or grandparents of Syilx Ancestry declaring that person's knowledge or belief as to the Syilx Ancestry of the Applicant;

(iv) Statutory Declarations of three other persons of Syilx Ancestry declaring their knowledge or belief as to the Syilx Ancestry of the Applicant; or

(v) Any other evidence satisfactory to the Chief and Council of an Applicant's Syilx Ancestry.

(e) The Applicant may submit evidence of Well-Established Community Residence, if applicable, Including any one or more of the following:

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(f) The Applicant may submit evidence of current familial and community ties to OKIB, if applicable, including any one or more of the following:

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(g) The Indian Registry Administrator will review the complete applications and submit a recommendation including all Supporting Documents to Chief and Council.

(h) Upon receipt of the Indian Registry Administrator's recommendations at a duly convened Council meeting, Chief and Council will, by band council resolution, give or deny their consent to the Applicant becoming a Band Member.

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Other Applicants – Application Requirements

6.2 Where an Applicant applies under section 4.3:

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NOTICE OF DECISIONS ON BAND MEMBERSHIP

6.9. After a final decision on an application has been made by Chief and Council, the Indian Registry Administrator will send a formal letter to each individual Applicant stating:

(a) whether the Applicant's application was approved or denied;

(b) Chief and Council's reasons for approving or denying the application; and

(c) the effective date of the approval or denial.

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Decision under Review

[34] The Band Council Resolution which comprises the 2021 Reconsideration Decision begins with a series of recitals by Council. These include the statement that the Applicant's request for membership was governed by subsection 12(b) of the *Indian Act* and by the 2017 Transfer Policy. Further, that subsection 12(b) gives band councils broad discretion to grant or deny consent to transfer to their band from another band. And, that the 2017 Transfer Policy establishes the procedures for seeking the consent of the OKIB pursuant to section 12 of the *Indian Act* admission to membership in the OKIB, including for former band members and

people with OKIB ancestry. However, that the 2017 Transfer Policy does not limit Council's discretion to grant or deny consent to transfer membership of OKIB where the procedures are followed, or the basis on which it may grant or deny consent, except that it may not consent where the criteria in one of sections 4.1 and 4.3 are not met. Further, that the consent of Council is not automatic once an applicant has provided the documentation listed in the 2017 Transfer Policy. Council states that the fulfilment of these requirements only means that the application is ready to be considered by Council (or put to the Community in circumstances where a vote is required), and that Council retains the discretion to grant or deny consent to transfer.

[35] Council next set out the background facts to the reconsideration. This includes that the Applicant had first been registered for Indian status and membership in OKIB on November 16, 1987, but that she had requested a transfer to the Nak'azdli Whut'en band on January 22, 1988 and, on August 19, 2002, she wrote to OKIB to request a transfer back to OKIB from Nak'azdli Whut'en band. Council states that between 2002 and 2018 the Applicant had provided documents and written submissions on her application to transfer and that during this period she had also written to Council several times to request that her application be processed. There had also been correspondence from OKIB to the Applicant requesting missing information and inviting her to submit information regarding her ancestry. Council states that in making its decision it considered all correspondence between OKIB and the Applicant regarding her application and all of the documents she provided. Council notes that the Applicant relocated to OKIB's reserve lands in 2009 to live with OKIB member Rhoda Simla who had bequeathed the Simla Lands to the Applicant. However, that the Applicant was not able to inherit those as she was not a member of OKIB and her membership application was still outstanding. The Applicant

continued to live on the Simla Estate Lands. Council also states that it was aware of reports by a Councillor, staff and visitor regarding "threatening, aggressive or obstructive behaviour" by the Applicant, "including" the three incidents then listed – these were the events described in the Brewer and Marchand Emails, the Wilson Incident Report Form and the Shortt Letter. Council then summarizes the procedural steps that led to the reconsideration.

[36] Council next summarizes the Applicant's submissions. This included that she spent her weekends and holidays as a child with her aunt and uncle, Rhoda and Raymond Simla, and other OKIB members on the OKIB reserve; she viewed her aunt as a mother; and, has a close connection to the community and has family members living and buried on the reserve. The Applicant had submitted that she transferred to the Nak'azdi Whut'en band for purposes of her work in a specialized victim service program in that community, she always planned to return to OKIC and, at the time she transferred her membership out, she was advised by OKIB employees that she could transfer her membership back. The Applicant relocated to the lands of her aunt and uncle in 2009, where she resides with her youngest daughter and grandson. As to the alleged incidents of threatening behaviour, the applicant had submitted that:

- With respect to the alleged Brewer/Marchand incident, she was frustrated and concerned that OKIB's delay in processing her membership transfer application might lead to the sale of the Remaining Simla Estate Lands. She requested the surveyor to leave and demanded OKIB get a court order if they wanted to conduct a survey. She denied that she threatened Councillor Brewer at all or with a gun. She does not own a firearm;

- With respect to the alleged incident with Veronica Wilson, she recalled interacting with Ms. Wilson, was frustrated by the delay in considering her membership transfer application but did not threaten Ms. Wilson. The Applicant is an elder and was 70 years old at the time;

- With respect to the alleged incident with Jaron Shortt, she requested the surveyor to leave the lands. She recalled an RCMP officer was present and was sympathetic to her situation. She requested OKIB get a court order to proceed with the survey.

[37] Council also noted that in her Protest, which the Applicant referred to in her written submission, she alleged bias on the part of Council members because they wish to acquire the Simla Estate Lands. One of her letters to Council also appeared to allege bias because one of the Councillor's relatives, Cecil Louis, purchased some of the land that had previously been sold.

[38] Council then set out its findings. Council states that it considered the available evidence on OKIB ancestry and accepted that there is evidence of the Applicant's OKIB ancestry by way of the statutory declaration of Frank Jack. However, that ancestry was just one factor that may be considered in the exercise of its discretion when considering a request to transfer membership. Further, that ancestry or former band membership does not obligate Council to consent to transfer of membership. Council states that "in all of the circumstances", ancestry on its own was an insufficient basis to justify granting consent to the Applicant to transfer her membership.

[39] Council states it considered the Applicant's evidence of connection to the OKIB community and acknowledges that she says that she spent time with her aunt and uncle on OKIB as a child, and had a close bond with Ms. Simla. Council states that it had no reason to doubt this.

[40] Council states that there was no evidence of involvement with or participation in the community in her adult life prior to her receiving OKIB membership in 1987, which she gave up only two months later, in January 1988. Her January 1988 request to transfer membership notes that she had been living in Fort St. James for 11 years, and that she did not feel she could do justice by the OKIB living so far away. Council states that other than her transfer request in 2002 and residing on the reserve lands since 2009, Council was not aware of any participation by the Applicant in the community before or after relocating to the OKIB reserve, nor was there any evidence of this before Council. Council considered that the Applicant's submissions on her connection to the community must be balanced against her brief time as an OKIB member, her willingness to give up that membership for other opportunities, and the absence of evidence of contribution to or participation in the community as an adult.

[41] Council also states that the Applicant's potential contribution as an OKIB member must be considered in light of the reports of threatening or aggressive behaviour towards OKIB councillors and staff. Council states that it considered the Applicant's submissions regarding these alleged incidents of threatening behaviour, but that she had not provided any accounts from others regarding the alleged incidents. Council states that it accepted and preferred the account of Councillor Lyle Brewer, which was confirmed by Randy Marchand, and of Ms. Wilson whom

Council states had no personal interest in the matter and gave written reports shortly after the alleged incidents. Council found that the Applicant had demonstrated threatening and aggressive behaviour as described by Councillor Brewer and Ms. Wilson. Council accepted that no threats were uttered in the Shortt incident, but found that the Applicant prevented the surveyors from completing their survey. Council states that it took notice of the fact that the RCMP were contacted by Randy Marchand on September 27, 2017 and attended with the surveyors on June 15, 2018 at the request of OKIB. Further, that Councillor Brewer had noted in his account that OKIB officials and the surveyors left after the Applicant's threat, out of concern that the altercation might turn physical and found that this suggested the threatening behaviour was taken seriously and there were concerns about safety.

[42] Council notes that the Applicant had not provided any statements from others to speak to her character. Council found that the Applicant had demonstrated some connection to the community, but in light of all of the circumstances, including incidents of threatening and aggressive behaviour, it was not convinced that she had positively contributed to or participated in the community, or would do so in the future. Council states that it remained concerned about the threatening and aggressive behaviour involving Councillor Brewer and Ms. Wilson and did not believe that the Applicant would make a positive contribution to the community. In these circumstances, her ancestry and connections to the OKIB community were not sufficient to justify consenting to her OKIB membership.

[43] Council went on to address allegations of bias in her Protest and in a letter to Council dated May 18, 2017, although they had not been addressed in her most recent submissions to Council, and dismissed that concern.

[44] Council resolved that the Applicant's request for Council's consent to transfer her membership to the OKIB was denied.

Issues and Standard of Review

Preliminary Issue

[45] OKIB has filed a motion to strike the Applicant's affidavit affirmed on October 15, 2021 [Johnston Affidavit] and filed in support of her application for judicial review of the 2021 Reconsideration Decision. That motion will be dealt with as a preliminary issue in these reasons.

Issues

[46] The issues raised by the Applicant in this matter can be appropriately reframed as follows:

1. Was the 2021 Reconsideration Decision reasonable?
2. Was there a breach of the duty of procedural fairness?
3. If the Applicant is successful on issue 1 or 2, what remedy should issue?

[47] With respect to the first issue, the parties submit and I agree that the reasonableness standard of review applies.

[48] This is because when a court reviews the merits of an administrative decision there is a presumption that the reasonableness standard of review will apply for all aspects of that decision, including the administrative decision-maker's interpretation of its enabling statute (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 23 and 25; see also *Peters First Nation v Engstrom*, 2021 FCA 243 at para 14).

[49] On judicial review, the Court "must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[50] As to the second issue, issues of procedural fairness are to be reviewed on a correctness standard (see: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). That said, in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] the Federal Court of Appeal held that although the required reviewing exercise may be best – albeit imperfectly – reflected in the correctness standard, issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the Court is to determine whether the proceedings were fair in all of the circumstances. That is, "the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*CPR* at paras 54-56; see also

Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship), 2020 FCA 196 at para 35).

[51] Subsequently, the Federal Court of Appeal in *Ahousaht First Nation v Canada (Indian Affairs and Northern Development)*, 2021 FCA 135 [*Ahousaht*] restated this as follows:

> [14] The standard of review on issues of procedural fairness is essentially correctness: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 79. As stated in *Vidéotron Ltée v. Canada (Shared Services)*, 2019 FCA 307, 313 A.C.W.S. (3d) 299 at para. 12:
>
> > Issues of procedural fairness are to be reviewed on a correctness standard. While it may be that "no standard of review is being applied" when a court considers issues of procedural fairness because the question is "whether the procedure was fair having regard to all the circumstances," this Court's review is "best reflected in the correctness standard" for such issues *(Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2018] F.C.J. No. 382 at para. 54).

[52] Accordingly, I understand the standard of review for issues of procedural fairness to be correctness, or at least, essentially correctness.

Preliminary Issue

[53] OKIB has brought a motion seeking to strike out the Johnston Affidavit. The basis for this motion is stated to be that the Johnston Affidavit "seeks to establish itself as an alternative to the Certified Tribunal Record" [CTR] and that it contains "inadmissible duplicative information", most of which is included in the CTR, fresh evidence that was not before Council when it made the 2021 Reconsideration Decision and, that the affidavit narrative colours the

facts in the CTR which is “argument masquerading as evidence”. OKIB submits that the offending portions of the affidavit are so numerous and intertwined with the surrounding paragraphs that severance of the offending portions is difficult so the affidavit should be struck out in whole. Alternatively, the offending portions should be struck out.

[54] The Applicant submits that her affidavit contains general background information and sets out, in a chronological way, relevant facts which for the most part form a part of the record, Where facts in the affidavit do not form part of the record, they are relevant and are not controversial, do not contain hearsay, argument or opinion and are not prejudicial.

Analysis

[55] An applicant who files an application for judicial review is entitled to file supporting affidavit evidence (Rule 306, *Federal Courts Rules*, SOR/98-106 [*Rules*]). Affidavits are to be confined to facts within the deponent’s personal knowledge (Rule 81(1)), and are to “adduce facts relevant to the dispute without gloss or explanation” (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18 [*Quadrini*]). Affidavits must be free from argumentative materials and the deponent must not interpret evidence previously considered by a tribunal or draw negative conclusions (*Canadian Tire Corporation v Canadian Bicycle Manufacturers Association*, 2006 FCA 56 at paras 9-10 [*Canadian Tire*]). And, while an affidavit may contain non-argumentative orienting statements, such evidence is admissible only for the narrow purpose of providing background information for the reviewing court and may not engage in spin or advocacy (*Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45 [*Delios*]).

[56] As explained in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 [*Assn of Universities and Colleges*], in determining the admissibility of an affidavit in support of an application for judicial review, the differing roles played by the court and the administrative decision-maker must be kept in mind. Parliament gave the administrative decision-maker, and not the court, jurisdiction to determine certain matters on their merits. Because of this demarcation of roles, the court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before a court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible.

[57] The recognized exceptions are when an affidavit: provides general background in circumstances where that information might assist the court in understanding the issues relevant to the judicial review but does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker; brings to the attention of the reviewing court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker so that the court can fulfill its role of reviewing for procedural unfairness; and, highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding (*Assn of Universities and Colleges* at para 20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-25 [*Bernard*]; *Delios* at para 45; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 39-41 [*Henri*]).

Duplicate Information

[58] OKIB takes great exception to the fact that much of the Johnston Affidavit addresses information contained in the CTR. OKIB has generated a chart to demonstrate that 22 of the 36 exhibits attached to the Johnstone Affidavit are in fact found in the CTR. OKIB submits that the Johnston Affidavit contains information that is duplicative of the CTR filed by OKIB "thereby contravening the requirement that affidavit evidence neither 'supplement the evidentiary record [nor] replace that evidence'", citing *Tsleil-Waututh Nation v Canada (Attorney General)* 2017 FCA 116 at paragraph 33 [*Tsleil-Waututh*].

[59] In my view, to the extent that OKIB is suggesting that because a document appears in a CTR that an applicant may not refer to and attach as an exhibit the same document in their supporting affidavit, OKIB misreads *Tsleil-Waututh*. There, Justice Stratas revisited the general rule that evidence that was not before the decision-maker, subject to certain exceptions, is not admissible at judicial review. He also spoke to the general background rule:

> [29] The applicants do not object to the fact that the affidavits filed by the respondents contain background explanations and summaries. After all, looking at the material before me, it seems that most of the affidavits filed by the applicants do that as well.
>
> [30] Instead, the applicants object to the extent to which the respondents' affidavits provide background information and summaries, the argumentative nature of some of the statements, and the presence of hearsay and opinion…..
>
> [31] The current law on providing background information or orienting summaries of information in an affidavit offered in an application for judicial review is set out in authorities such as *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297, *Delios v. Canada (Attorney General)*, 2015 FCA

117, 472 N.R. 171 and *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189.

[32] According to these authorities, normally the evidentiary record before the administrative decision-maker is the only evidence admissible in the reviewing court. But in circumstances where the administrative decision-maker has developed an evidentiary record and the record is complex, voluminous or both, summaries or statements of general background in an affidavit are admissible in the reviewing court for orienting or introductory purposes and for no other purpose.

[33] Where, as here, the administrative decision-maker has developed an evidentiary record, general background statements or summaries are tendered not to supplement the evidentiary record, replace that evidence or wade into the merits of the matter decided by the administrative decision-maker. Instead, they are admissible for just one limited purpose: to explain the record and the proceeding below for the purpose of orienting the reviewing court. This is seen from the following passage in *Association of Universities* (at para. 20):

> Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, *e.g.*, *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider.

[34] In *Delios*, this Court amplified upon this (at para. 45), adding that the general background statements and summaries should avoid argumentation:

> The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural

> and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy—that is the role of the memorandum of fact and law—it is admissible as an exception to the general rule.

[35] In *Delios* (at para. 46), this Court also reiterated the warning in *Association of Universities* to the effect that in providing background information, the affidavit must not go further and does not "go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider."

[36] The reference in *Delios* to "non-argumentative … statements" is a nod to the many cases in our Court and Rule 81(1) to the effect that affidavits are to be "confined to facts" without argument.

[37] A number of the applicants cited *Canada (Attorney General) v. Quadrini*, 2010 FCA 47 and its admonition in para. 18 that facts should be presented without "gloss or explanation." This phrase should not be read out of context. *Quadrini* warns against controversial argumentation that steps over the line of permissibility. Sometimes a good, admissible summary of what took place below can contain explanations. But an affidavit is not supposed to be a memorandum of fact and law.

[38] In *Bernard*, this Court emphasized the primary rationale behind allowing an affidavit filed on judicial review to provide background information: it is to assist "this Court's task of reviewing the administrative decision (*i.e.*, this Court's task of applying rule of law standards) by identifying, summarizing and highlighting the evidence most relevant to that task" without offering fresh evidence going to the merits of the matter before the administrative decision-maker (at para. 23). This "respects the differing roles of the administrative decision-maker and the reviewing court, the roles of merits-decider and reviewer, respectively, and in so doing respects the separation of powers" (at para. 23). Again, the background information is merely for orienting the reviewing court, not to provide evidence as to what

> took place before the administrative decision-maker: the record before that decision-maker is the evidence of what took place.
>
> …….
>
> [40] I conclude that all of the background statements and summaries to which the applicants object are admissible for the limited purpose of orienting this Court as the reviewing court, not as evidence of what actually happened below. The evidence of what actually happened below is found exclusively in the record that will be filed with this Court.
>
> (Emphasis added)

[60] *Tsleil-Waututh* does not stand for the proposition that if documents are contained in a CTR then an Applicant is precluded from addressing them in neutral way in a narrative when providing the history or background to the matter at issue. Rather, *Tsleil-Waututh* establishes that if a CTR or other record exists, then general background statements or summaries are admissible for the limited purpose of explaining the record and the proceeding below to orient the reviewing court. In so doing, they do not replace the evidence found in the record.

[61] In my view, OKIB's argument that because a CTR exists containing much the same documentation referred to and contained in the Johnston Affidavit and that the affidavit should be struck out as containing duplicate information, cannot succeed. Further, it is obvious that if the information is found both in the record and in the affidavit then it is not new evidence, it is evidence that was before Council when it made its decision. I note that the Applicant has provided a chart which links most of the paragraphs (by paragraph number) of the Johnston Affidavit to information found in the CTR (by page number). Another chart lists the remaining paragraphs and indicates the Applicant's description of the information in that paragraph and the

Applicant's position that it provides general information and/or non-controversial and non-prejudicial information.

[62] As indicated above, the jurisprudence establishes that affidavit evidence that provides general background information may, as an exception to the general rule, be admissible on judicial review, but that such evidence can go no further. It cannot speak to the merits of the matter that was before the administrative decision-maker.

[63] Thus, the question is whether the information contained in the Johnson Affidavit – to the extent that it is not also contained in the CTR – falls within that exception.

Background Information

[64] OKIB asserts that the Applicant is "padding the record". OKIB submits that in reproducing much of the CTR, as well as providing impermissible and unnecessary duplication, the affidavit provides fresh evidence and additional narrative and commentary that asserts or is suggestive of additional facts that were not before the decision-maker and does not fall within any of the exceptions to the new evidence rule.

[65] More specifically, OKIB submits the Johnston Affidavit is too lengthy and too wide ranging to be considered general background statement of summary of the record below and that much of the Johnston Affidavit is "recycled" from a previous affidavit filed in relation to OKIB's Trespass Claim against her.

[66] While I do not consider the Johnston Affidavit to be either lengthy or wide ranging, I do note that the Applicant first applied to transfer her membership back to OKIB in 2002, nearly 20 years before the 2021 Reconsideration Decision. It is therefore unsurprising that her affidavit would take 71 paragraphs to set out the background to the decision under review. I also found her affidavit to be very helpful in that it sets out in clear, chorological order the background leading up to that decision. An applicant's narrative of events can provide helpful background information and context which is otherwise not reflected in the record (*Marcusa v Canada (Public Safety and Emergency Preparedness*), 2019 FC 1092 at para 20). This is such a circumstance.

[67] Nor do I see the basis for OKIB's expressed concern because the content of the Applicant's affidavit filed in the Trespass Claim contains similar content to her affidavit filed in support of this application for judicial review. While it may be that certain of the issues in these two proceedings differ, both arise from the same basic factual situation and encompass the Applicant's efforts to transfer her membership to OKIB and to inherit, possess and occupy the subject lands.

[68] OKIB does not explain why the similarity of Ms. Johnston's affidavit evidence filed in both matters is problematic with respect to the admissibility of her evidence in this matter. In my view, OKIB's real concern is with the Trespass Decision itself, which is found in the CTR, and which sets out and is based on the similar (or "recycled") affidavit evidence from Ms. Johnston filed in the Trespass Claim (I note that affidavit of Ms. Johnston which was filed in that matter

and to which OKIB averts is not included in the CTR, but that OKIB includes it in its motion record as an exhibit to an affidavit sworn by a paralegal employed by OKIB's counsel).

[69] OKIB also submits that the 2021 Reconsideration Decision postdates the commencement and subsequent stay of the Trespass Claim. This is true, but is not particularly relevant to OKIB's motion to strike the Johnston Affidavit, particularly as OKIB Council had to have been aware of the SCBC proceedings. OKIB goes on to submit that on judicial review the focus must be on whether the 2021 Reconsideration Decision was reasonable and procedurally fair. I agree. However, OKIB next states that matters relevant to the trespass issue are fundamentally different from those before this Court on this judicial review. While that may, or may not be so, this simply serves to again highlight that OKIB's real concern here is with any perceived potential impact the Trespass Decision could have in this proceeding. OKIB does not explain why – in relation to the Trespass Claim – the Johnston Affidavit filed in support of this judicial review is not background information.

[70] OKIB also provides a chart listing 12 items that OKIB submits demonstrate that the Johnston Affidavit contains information that could have been provided to OKIB prior to the 2021 Reconsideration Decision but was not. Thus, it is inadmissible.

[71] For example, paragraph 21 of the Johnston Affidavit and related Exhibit I. Paragraph 21 states that the Applicant's membership transfer application was brought to OKIB band council for consideration in 2010, but, following a closed room decision, her application was tabled. She states that she continued to make attempts to have her membership approved but OKIB failed to

process the application. She attaches correspondence from OKIB dated March 17, 2011. This is a "To Whom it May concern" notice that, effective October 6, 2010, OKIB Chief and Council developed a new membership transfer policy entailing a $50 fee and asking that recipients resubmit their applications with the documents listed on a checklist and to pay the fee if they had not already done so.

[72] It is of note that the February Submissions to Council also state that the Applicant's application was brought to OKIB band council for consideration in 2010 but following a closed room decision, her application was tabled. This information was therefore before Council when it made the 2021 Reconsideration Decision. It is not new evidence. I also note that Exhibit I, the generic notice apparently aimed at persons who had previously applied for membership transfer, is not controversial. Indeed, OKIB filed the affidavit of Michael Fotheringham, Executive Director for OKIB, affirmed on October 15, 2021 [Fotheringham Affidavit] which speaks to the OKIB transfer policy history and confirms that on October 6, 2010 OKIB approved the 2010 Policy.

[73] OKIB also takes issue with paragraph 28 of the Johnston Affidavit where the Applicant states that her aunt named her as the sole beneficiary of her estate. She attached as Exhibit N a copy of her aunt's will. I note that the February Submissions to Council state that Rhoda Simla named the Applicant as the sole beneficial of her estate in her will dated December 21, 2002. Accordingly, this is not new evidence, as it was information before Council when it made the 2021 Reconsideration Decision. Further, the content of the will is not controversial. While the actual will itself was not before Council (or at least is not in the CTR), its content is not in

dispute. In my view, in these circumstances, attaching the will as an exhibit does not, in effect, provide "new evidence" thereby warranting the striking out of the Johnston Affidavit or that paragraph thereof. The actual document can and will be disregarded but its content is not in dispute and is not controversial.

[74] OKIB also takes issue with paragraph 35 of the Johnston Affidavit. This states that the Applicant received correspondence from AANDA advising that Lot 145 Block 4 and Lot 144-1 Block 4, the Sold Simla Lots, had been sold and attaching as Exhibit Q a letter from AANDC dated August 18, 2015 in that regard. The identity and sale of these lots is not new information. The February Submissions made on behalf of the Applicant also states that two of the four parcels comprising the lands left to her by her aunt had been sold pursuant to section 50 of the *Indian Act*. And, again, this is not controversial. OKIB sought to have those lands sold and was well aware that they had been sold. While the AANDC letter may not have been before Council (although I would expect that similar notification from AANDA may well have been), the sale of the lots is not new information warranting the striking out of the Johnston Affidavit in whole or the subject paragraph. The attached exhibit can simply be disregarded.

[75] Finally, by way of one further example, I note that while the Johnston Affidavit refers in paragraphs 55, 56 and 57 to the filing of her Protest, the commencement of the Trespass Claim and her response filed to that claim, this is not new evidence. Moreover, OKIB would undoubtedly have in its records copies of the attached exhibits pertaining to those proceedings. Council, in fact, addressed the Applicant's assertions contained in the Protest in the 2021

Reconsideration Decision. The documents are also exhibits to the affidavit filed with OKIB's motions to strike – clearly, OKIB was aware of them and their content.

[76] In short, having reviewed all of the items identified by OKIB, I agree with the Applicant that the challenged paragraphs provide general background information which is not controversial. To the extent that the affidavit evidence and related exhibits are not found in the CTR and do not provide the necessary foundation for the alleged breaches of procedural fairness (*Marcusa* at para 20), they will not be considered in determining this application for judicial review.

[77] OKIB also asserts that the Johnston Affidavit contains impermissible gloss or explanation. OKIB submits that this includes paragraphs 2 to 12 of the affidavit in which the Applicant "narrates her upbringing, career opportunities, and life decisions, including transferring away from OKIB to Fort St. James and her justification for doing so". Again, however, most of this information – including why she transferred her membership to Nak'azdli Whu'en in 1988 – is contained in the February Submissions, which submissions are acknowledged in the 2021 Reconsideration Decision. It is true, as the Applicant concedes, that at paragraph 11 she adds that she was highly respected for her work in victim services and received long time service awards from the Fort St. James RCMP detachments, which information was not contained in the February Submissions or elsewhere in the CTR and, as such, it will be disregarded. But this is a minor transgression.

[78] OKIB also takes issue with paragraphs 36 and 37 of the Johnston Affidavit as providing a "new gloss". However, paragraph 36 merely recites the content of the Brewer and Marchand Emails which are contained in the CTR. In paragraph 37, the Applicant denies threatening Mr. Brewer or anyone else with physical violence. She states she does not own a firearm and did not own one in 2016. At that time, she was 66 years old. She is 5' 4" tall. She states she has no history of violence or threatening behaviour and that her career has involved defusing tense situations. She simply wanted the surveyors to leave the Remaining Simla Estates Lands as they were left to her by her aunt in a valid will. To the extent that this evidence goes beyond describing the content of the February Submissions speaking to this incident, I agree that it adds a gloss and must be disregarded. However, this is not a circumstance where the affidavit evidence is "tendentious, opinionated and argumentative" nor is the purpose of the Johnston Affidavit "to provide to this Court an assessment of the evidence which differs from that made by" the decision-maker, as was the case in *Canadian Tire Corporation* (at paras 10, 12).

[79] Finally, OKIB takes issue with paragraphs 44 to 67 of the Johnston Affidavit. These essentially describe the Applicant's efforts to have her membership transferred to OKIB from 2018 forward. OKIB asserts that the Applicant provides unnecessary, although unspecified, gloss on the application process and on the alleged interactions with Veronica Wilson and Jason Shortt. While in my view it would have been preferable that the affidavit simply referred to the information contained in the February Submissions with respect to those alleged incidents, much of what is stated is encompassed by these submissions. To the extent that it goes beyond this, I will disregard it, together with any other affidavit evidence that goes beyond a neutral depiction of background events.

[80] OKIB also submits that the Johnson Affidavit essentially repeats the February Submission made by her counsel as a first-person narrative and that by retelling this same story as a first hand account the Applicant is impermissibly interpreting the evidence previously considered by Council, referencing *Canadian Tire Corporation*.

[81] However, this is the Applicant's story. She is entitled to file an affidavit in support of her application for judicial review. More significantly, and as set out above, in doing so she is largely simply setting out the factual background of which she has personal knowledge and which was before Council when it made the 2021 Reconsideration Decision and is found in the CTR. To the extent that certain sentences of some paragraphs or even some paragraphs of her affidavit go beyond this, they will be disregarded.

[82] In that regard, the Applicant points out that in *Tsleil-Waututh* the Court considered whether some of the background statements and summaries in the respondent's affidavits were too argumentative or contained statements of opinion. Even though the Court found that, in some respects, some of the background statements and summaries in the affidavits should have been more clinically expressed, much of what was claimed to be said to be argumentative, when examined, was not argumentative at all. Further, that the panel hearing the applications would not be misled or swayed by argumentative statements or statement of opinion. Justice Stratas concluded that the subject background information and summaries offered by the respondents' deponents fulfilled the purpose of orienting the panel as to what happened below, at least from the respondents' perspective, without causing undue prejudice. Accordingly, he declined to strike out any of the background information and summaries in the respondents' affidavits.

[83] In my view, this is a similar circumstance. While the Johnston Affidavit could have been more carefully crafted to ensure that aspects of it did not add a gloss to information or go beyond providing a neutral depiction of the background events leading up to the 2021 Reconsideration Decision, to the minor extent that it does, the Court is able to disregard those sentences or paragraphs of the affidavit.

Scope of Application

[84] OKIB next attacks the scope of the Johnston Affidavit on the basis that it is not co-extensive with the relief sought. OKIB submits that because the Applicant is challenging only the 2021 Reconsideration Decision, much of her affidavit is irrelevant and addresses matters that do not assist the Court in resolving the claim - such as her prior attempts to have her membership transferred.

[85] However, I agree with the Applicant that understanding the history of her applications for a transfer of her membership is essential context to the decision under review, which itself refers to some of these past events. This does not expand the scope of the application, as the parties agree that the present application concerns only the 2021 Reconsideration Decision. Further, the Applicant asserts that the 2021 Reconsideration Decision is both unreasonable and breached procedural fairness. Her evidence pertaining to delay speaks, at the very least, to the latter assertion. Whether delay is, or is not, relevant is an issue on the merits. I also note that OKIB submits that "[t]he Applicant cannot arbitrarily expand the scope of legal relevance by adding evidence" citing *Merck Frosst Inc v Canada (Minister of Health)*, [1997] FCJ No 1847 at paragraphs 8 and 9. First, I do not agree that this is what the Applicant is doing. Second, the

Court in *Merck* held that formal relevance is determined by reference to the issues of fact which separate the parties. In an application for judicial review, the notice of motion is required to set out the legal rather than the factual grounds for seeking review, the issues are defined by the affidavits filed by the parties. Thus, cross-examination on those affidavits – which is what was at issue in the paragraphs referenced by OKIB – is limited to those facts sworn to by the deponents. Here, the Applicant asserts in her Notice of Application that there was a breach of procedural fairness/natural justice based on delay. In her affidavit, she states, among other things, that Council did not address this when assessing her membership transfer application. I also note that OKIB chose not to cross-examine her on her affidavit.

Procedural Fairness Exception

[86] OKIB next asserts that much of the evidence in the Johnston Affidavit does not establish the breaches of procedural fairness set out in her Notice of Application. For example, her evidence pertaining to delay is not relevant or probative because it speaks to historical conduct, not a procedural defect in relation to the 2021 Reconsideration Decision, which is the only decision under review. OKIB states that the Applicant did not lead any evidence that suggests she was not provided with an opportunity to know the basis on which the 2021 Reconsideration Decision would be made or that OKIB was lacking evidence when deciding issues.

[87] In my view, the issue of delay, and its role, if any, with respect to procedural fairness afforded to the Applicant with respect to the making of the 2021 Reconsideration Decision, is an issue on the merits. If delay is determined not to be relevant, then the evidence concerning delay will also not be relevant. And, in that regard, the Applicant submits that she has provided

evidence that she was not provided an opportunity to know the basis on which the decision would be made in paragraph 62 of her affidavit which, ironically, OKIB seeks to strike out.

[88] OKIB goes on to submit that the Applicant does not adduce any evidence regarding how or whether the alleged defects of procedural fairness prejudiced her ability to receive a fair outcome in her decision. Again, this goes to the merits of the Applicant's procedural fairness arguments and the sufficiency of her evidence. In my view, OKIB's real concern here is reflected in its submission that it is *prima facia* prejudicial to OKIB for the Applicant to "confound" the review of the 2021 Reconsideration Decision with allegations relating to wholly distinct matters, including relating to the Trespass Claim or past unchallenged decisions pertaining to her membership transfer requests and that the "reasonableness or fairness of the 2021 Reconsideration Decision under review cannot take its colour from separate conduct or unrelated matters". The Court is not confounded and is able to discern the relevance, if any, of these issues.

[89] Finally, OKIB submits that the Applicant does not contest the level of procedural fairness she received from OKIB and that "it appears to be common ground that she received the maximum level of procedural fairness available". Therefore, there is no justification for leading evidence suggestive of her rights and interests in the matter under review, as she has received the highest level of procedural fairness. OKIB submits that as this is not in issue, all such evidence is immaterial. The Applicant disagrees. In particular, she disagrees with OKIB's statement that she was advised by letter in advance of the reconsideration setting out the "central issues vexing OKIB about her transfer application". Again, in my view, this is an issue to be dealt with on the

merits, it is not an issue to be eliminated – as OKIB would prefer – by the striking out of the Johnston Affidavit.

[90] In conclusion, I note that the Applicant refers to *Mayne Pharma (Canada) v Canada (Minster of Health)*, 2005 FCA 50, which held that motions to strike out all or parts of affidavits should not be routinely made, especially where the question is one of relevance. Only in exceptional cases where prejudice is demonstrated and the evidence is obviously irreverent will such motions be justified (at para 13). Further, that in *Quadrini* at para 18 the Federal Court of Appeal held that, as a general rule, an affidavit must contain relevant information which would be of assistance to the Court in determining the application and that the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. "The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions". I note that the Federal Court of Appeal has also held that it is well-established that the discretion to strike an affidavit or part of it should be exercised sparingly, only in exceptional circumstances, and where it is in the interest of justice to do so, such as where a party would be materially prejudiced (*Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 29).

[91] For the reasons above I am not persuaded that the Johnston Affidavit is abusive or that it is clearly or "obviously irrelevant" (*Maynard* at para 18; *Coldwater First Nation v Canada (Attorney General)*, 2019 FCA 292 at para 14). Nor am I persuaded that this is an exceptional circumstance or that OKIB will be prejudiced if the affidavit is not struck out. To the extent that some portions of it add a gloss to the evidence that was before Council, it will be disregarded.

[92] In my view, the Johnston Affidavit is admissible as much of it already forms a part of the record. To the extent that it does not, it is admissible as general background information for the limited purpose of orienting the Court (or as it speaks to the allegations of breach of procedural fairness). As stated in *Tsleil-Waututh*, in any judicial review of an administrative decision where a complete record exists before the administrative decision-maker, if the Court needs to know what happened below it will look to that record, including documents filed before the administrative decision-maker. If what happened below actually bears upon any of the issues to be decided by the Court, the Court will rely on the record. Thus, background statements or summaries "will not factor into the Court's decision at all" (*Tsleil-Waututh* at para 24).

[93] Accordingly, I decline to exercise my discretion to strike all or part of the Johnston Affidavit.

Issue 1: Whether the 2021 Decision Was Reasonable

Applicant's Position

[94] The Applicant submits that Council erred when it misinterpreted the 2017 Transfer Policy. She submits that on the plain wording of the policy she was entitled to a positive decision and to OKIB membership as she met the criteria set out in section 4.1(b) of the 2017 Transfer Policy. Evidence of well-established community residence and community ties to OKIB applies only to section 4.1(d), not 4.1(b) under which she applied.

[95] The Applicant further submits that Council erred when it considered irrelevant factors when making the 2021 Reconsideration Decision, including the alleged threatening behaviour, contribution to the community, and character. By doing so, Council failed to comport with the specific constraints imposed by the 2017 Transfer Policy as to when membership transfer application may be denied, which are set out in sections 4.7 and 4.8 of the policy, and acted outside of its jurisdiction. Alternatively, if those considerations were relevant, then the Applicant should have been given the opportunity to address them in her application.

[96] Further, that the reasonableness of the decision is also constrained by the serious impact of the decision on the Applicant, which in effect will dispossess her from her ancestral home and precludes her from inheriting the Remaining Simla Estate Lands.

[97] Finally, the Applicant submits that the 2021 Reconsideration Decision does not comply with the rationale and purview of the 2012 Transfer Policy, which is to promote "fair treatment for those seeking to transfer to OKIB" and a "return to hereditary values".

Respondent's Position

[98] The Respondent submits that Council reasonably interpreted the legislation and policy scheme as giving it wide discretion to consider and weigh membership transfer applications "on any rational basis". The Respondent submits that when assessing legislative interpretation by an administrative decision-maker, courts should begin from a position of deference and only undertake a preliminary analysis of the text, context and purpose of the legislation and then examine the decision-maker's reasons (referencing *Canada (Citizenship and Immigration) v*

Mason, 2021 FCA 156 at paras 8-20 [*Mason*]). While administrative decision-makers must follow the modern rule of statutory interpretation, they are not required to engage in a formalistic interpretation of statutory language (referencing *Vavilov* at paras 119-122).

[99] The Respondent submits that the Council's interpretation was both reasonable and correct in light of the legislative scheme of section 12 of the *Indian Act* and the text, context and purpose of the 2017 Transfer Policy. This is because section 12 of the *Indian Act* grants broad discretion to band councils to grant or withhold their consent to requests to transfer into their band and, because the 2017 Transfer Policy structures the transfer application process that Council is expected to follow but maintains Council's broad discretion provided by section 12. The Respondent notes that: (i) the 2017 Transfer Policy states that its purpose is to establish procedures for obtaining the consent of Chief and Council per section 12 of the *Indian Act* but it does not mention criteria for establishing membership; (ii) the purpose of the 2017 Transfer Policy is reflected in the organization of section 4 of that policy; (iii) the text of section 4.1 of the 2017 Transfer Policy is permissive, not mandatory; and (iv) the language of the 2017 Transfer Policy is clear that OKIB Council is not required to consent to the application upon completion of the application requirements under section 6. The submission of the materials is a prerequisite to the exercise of Council's discretion.

[100] OKIB agrees that this was an important decision having substantial impact on the Applicant, and submits that this is part of the context that colours the reasonableness review and is relevant to the level of procedural fairness to be accorded. However, the impact of the decision cannot transform policy guidelines into mandatory criteria. Further, that the Applicant overstates

the effect of the 2021 Reconsideration Decision as she voluntarily relinquished her OKIB membership in 1988. OKIB suggests that even if her application to transfer her membership were ultimately approved, her entitlement to possess Remaining Simla Estate Lands is an open issue given that the Applicant did not have membership at the time of Ms. Simla's death. However, that this question is not properly before and should not be addressed by this Court. Instead, for purposes of this judicial review "the Applicant's *de facto* occupation of lands in Ms. Simla's Estate should not be treated as a *legal right* of which she will be deprived lest this Court encourage self-help remedies".

[101] OKIB characterizes as *obiter dicta* statements made by Justice Watchuk at paragraph 56 of the Trespass Decision (referenced by the Applicant in paragraph 51 of her written submission) and submits that they are not binding or persuasive.

[102] Finally, the Respondent alleges that the 2021 Reconsideration Decision complied with the rationale and broad purview of section 12 of the *Indian Act* and the 2017 Transfer Policy and that OKIB did not consider irrelevant factors.

Analysis

[103] Council's underlying authority to make the 2021 Reconsideration Decision stems from section 12 of the *Indian Act*. This permits members of one band to transfer their membership to another band "if the council of the admitting band consents".

[104] In its reasons, Council states that section 12(b) of the *Indian Act* gives band councils broad discretion to grant or deny consent to transfer of members to the band from another band. While section 12 of the *Indian Act* does not appear to have been previously interpreted by the courts, as pointed out by the Respondent, the word "consents" is unqualified and is not made subject to any other sections of the *Indian Act*. This tends to suggest that Parliament intended to give a broad discretion to band councils when deciding whether or not to consent to a membership transfer application (see *Canada (Attorney General) v Boogaard*, 2015 FCA 150 at paras 41-42 [*Boogaard*]; see also *Vavilov* at para 110).

[105] The Respondent also refers to *Aboriginal Law in Canada*, at para 1.1450, which states that under section 12 any status Indian or any band member from another band may be admitted into a band by the council but are admitted to membership in the band "at the sole discretion of the band council" (Jack Woodward, QC, *Aboriginal Law in Canada*, (Toronto, Ontario: Thompson Reuters Canada) (loose-leaf updated February 1, 2022. Release 1)), as well as to the record of the House of Commons Debates [Hansard] with respect to the introduction of section 12 of the *Indian Act* in 1985 by way of Bill C-31 as being indicative of an intent to give band control over their own membership.

[106] I agree with the Respondent that discretion as to whether to give or withhold consent is not circumscribed under section 12 of the *Indian Act*. I also agree that the overall purpose of section 12 of the *Indian Act* (indeed, sections 8 to 12 more generally) is to afford bands control over their own membership. Accordingly, Council did not err in its interpretation of section 12 of

the *Indian Act* and reasonably found that it had broad discretion to grant or deny consent under that provision.

[107] That said, it must also be remembered that even broad grants of discretionary in decision-making are subject to limits. As stated in *Boogaard*:

> [53] In finding that the Commissioner is entitled to a very broad margin of appreciation in this case, I do not suggest for a moment that he is anything close to immune from review. His discretion is not absolute or untrammelled. Even the broadest grant of statutory power must be exercised in good faith, in accordance with the purposes of the provision, the governing statute and the Constitution:
>
> > In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

[108] In its reasons, Council next set out its interpretation of the 2017 Transfer Policy as follows:

> 7. The Policy does not limit Council's discretion to grant or deny consent to transfer membership to OKIB where the procedures are followed, or the basis on which it may grant or deny consent, except that it may not consent where the criteria in one of sections 4.1 and 4.3 are not met.

> 8. The consent of Council is not automatic once an applicant has provided the documentation listed in the Policy. The fulfillment of these requirements only means the application is ready to be considered by Council or put to a Community Vote, as required by the Policy. Council retains discretion to grant or deny consent to transfer.

[109] Broadly speaking, the issue then becomes whether the broad discretion afforded to Council by section 12 of the *Indian Act* is limited or circumscribed by the 2017 Transfer Policy.

[110] Section 1.2 of the 2012 Transfer Policy sets out the purpose of the policy:

> 1.2. This Policy establishes the circumstances in which:
>
> > (a) Chief and Council may consent to the admission of a person to the OKIB Membership List under section 12 of the *Indian Act* without a Community Vote.
>
> [emphasis added]

[111] Section 4.1 states:

> The Chief and Council may, by band council resolution, consent to the admission of an Applicant to the Membership list without Community Vote where the Applicant is registered under section 6 of the *Indian Act*, and
>
> (a) was formerly registered as a Band Member and was involuntarily transferred to the membership of another band, including transfer as a child;
>
> (b) was formerly registered as a Band Member and voluntarily transferred to the membership of another band;
>
> (c) is of OKIB ancestry and has provided evidence satisfactory to the Chief and Council of OKIB Ancestry; or
>
> (d) is of Sylix Ancestry and has provided evidence satisfactory to the Chief and Council of Sylix Ancestry, Well-

> Established Community Residence and current familial and community ties to the OKIB.
>
> [emphasis added]

[112] Section 4.1, by the use of the word "may", permits Council to exercise its discretion to consent to a transfer application if the applicant meets at least one of the criteria set out in subsections 4.1 (a), (b), (c) or (d). While not applicable in this matter, sections 4.2 and 4.3 deal with "other applicants". That is, those who do not fit within any of the section 4.1 criteria. This section also use permissive language in that Council may, by band council resolution, refer such an application for a community vote and may consent to the admission of the applicant to the membership list. Further, section 4.4 states that Council will consider the results of the community vote in deciding "whether or not" to grant consent under section 4.3.

[113] Subsections 6.1(a) and (b) set out the documentation that must be submitted by an applicant having OKIB or Sylix ancestry when applying under section 4.1:

> 6.1 Where an Applicant submits under section 4.1:
>
> (a) The Applicant must submit a signed, dated Membership Transfer Application and Filing Fee to the Indian Registry Administrator accompanied by the following documents:
>
> (i) A photocopy of the Applicant's current Indian registration card;
>
> (ii) The Applicant's original long form birth certificate; and
>
> (iii) If the Applicant is a member of a band governed by section 10 of the *Indian Act*, a signed letter or band council resolution from the originating band confirming the Applicant is a member.

> (b) Applicants eighteen years of age or older must provide the following additional information:
>
> (i) Criminal Record Check;
>
> (ii) Signed letter from the originating band stating the Applicant does not hold a Certificate of Possession on any of the band's lands; and
>
> (iii) Signed letter from the originating band stating the Applicant does not have any outstanding debts to that band.
>
> [emphasis added]

[114] However, while section 6.1(h) requires Council to make a decision with respect to a complete application submitted to it with a recommendation by the Indian Registry Administrator (section 6.1(g)), it does not limit the discretion afforded to Council when deciding whether or not to consent to the transfer request:

> (h) Upon receipt of the Indian Registry Administrator's recommendation at a duly convened Council meeting, Chief and Council will, by band council resolution, give or deny their consent to the Applicant becoming a Band Member.
>
> [emphasis added]

[115] The criteria in sections 4.1, 4.3, and 6.1 are essentially threshold requirements that an applicant must meet before Council will exercise its discretion to grant or refuse the requested transfer of membership.

[116] The 2017 Transfer Policy does contain one provision that limits Council's discretion, being section 4.6. However, section 4.6 requires Council to deny the admission into OKIB

membership, that is to refuse consent, if the applicant does not meet threshold criteria in sections 4.1 or 4.3. Sections 4.7 and 4.8 explicitly state the Council "may deny" an application in certain other circumstances. The 2017 Transfer Policy does not contain any provisions that require Council to consent to an application or stipulate circumstances in which consent must be granted. Notably, there is no provision that requires Council to consent to a transfer of membership application if the threshold requirements are met. This, along with the permissive language used in sections 1.2(a) and 4.1, and elsewhere, indicates that Council's discretion afforded by section 12 of the *Indian Act* is not constrained by the policy, other than the requirement to refuse consent found in section 4.6.

[117] In this matter, OKIB's Executive Director confirmed by letter of October 29, 2018 that the Applicant had satisfied all of the outstanding documentary requirements pertaining to her application (sections 4.1(b) and 6(a) and (b)). It appears that OKIB had also obtained from ISC a copy of the Statutory Declaration of the Applicant's father which she had originally submitted to the Department with her initial application for OKIB membership, accepted in 1987 (optional evidence of OKIB ancestry per section 6(c)(iii) but requested from the Applicant by OKIB). Therefore, in my view, having met threshold criteria in sections 4.1 and 6.1, the Applicant was entitled to be considered for OKIB membership under section 4.1(b) of the 2017 Transfer Policy and Council was required to consider her application and to make a decision (sections 6.1 (g) and (h)). However, the policy does not limit Council's discretion by requiring it to grant consent if the threshold criteria are satisfied. Council may grant or deny consent so long as it exercises it discretion reasonably. Accordingly, I do not agree with the Applicant that under the plain wording of the 2017 Transfer Policy she was entitled to membership because she met the section

4.1(b) and 6.1(a) and (b) threshold requirements. Nor do I agree with her submission that Council disregarded the applicable requirements.

[118] The Applicant also submits that sections 4.7 and 4.8 of the 2017 Transfer Policy outline the circumstances in which Council may deny a membership transfer application and, because she does not fall within either of those situations, Council did not have grounds upon which to deny consent.

[119] Section 4.7 states that while OKIB understands that it is not to discriminate on the basis of criminal convictions for which a pardon has been granted or a suspension record has been received, to the extent that it is permitted by the *Canadian Human Rights Act*, Council may deny the admission of an applicant to the OKIB Membership List if the applicant "has been deemed by Chief and Council to pose a risk to the safety and social well-being of OKIB Band Members because of criminal activity". It is true that there is no evidence in the record of any convictions for criminal activity by the Applicant in this matter – pardoned or at all – nor did Council deem her to pose a risk because of criminal activity. As to section 4.8, this states that Chief and Council may deny admission to an applicant who holds a Certificate of Possession for lands on the reserve of another band or who owes outstanding debts to another band. The record establishes that the Applicant provided documentation from the Nak'azdli Whu'em band confirming that she does not hold a Certificate of Possession nor does she owe a debt to that band and Council does not assert that this provision has not been met.

[120] However, for the reasons set out above, I do not agree with the Applicant that sections 4.7 and 4.8 are the only grounds upon which Council may deny an application. Further, while it is clear from those provisions that Council may, in its discretion, deny consent in those circumstances, it is not compelled to do so.

[121] As discussed above, section 12 of the *Indian Act* is silent as to what factors a band council can consider in granting or denying consent. The purpose of the 2017 Transfer Policy, as set out in section 1.2 of that policy, is to establish procedures for obtaining consent and the circumstances in which Council "may consent" to a membership transfer application. The 2017 Transfer Policy does not fetter Council's discretion, other than by establishing a circumstance where Council may not consent to a transfer of membership (section 4.6). Otherwise, the underlying discretion afforded by section 12 of the *Indian Act* remains open to Council. So long as it exercises its discretion reasonably, it may deny an application for transfer of membership on other grounds.

[122] The Applicant also argues that Council took into consideration irrelevant matters – her alleged threatening behaviour, her contribution to the community and her character. She submits that in considering these irrelevant matters Council failed to comport with the specific constraints imposed by the 2017 Transfer Policy, referencing paragraph 108 of *Vavilov*. I respectfully disagree.

[123] The referenced paragraph of *Vavilov* discusses governing statutory schemes as a legal constraint on administrative decision-makers, stating:

> [108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[124] In my view, this does not assist the Applicant as section 12 of the *Indian Act* affords band councils wide discretion and does not impose any constraints on them when making decisions as to band membership. And, as discussed above, other than section 4.6, the 2017 Transfer Policy speaks in permissive terms with respect to the granting or denying of consent. Other than sections 4.7 and 4.8, the policy does not define what factors may be considered by Council when

considering an application, nor does it purport to be exhaustive in setting out the factors that Council can consider.

[125] Therefore, on its face, it was not unreasonable for Council to consider the Applicant's alleged threatening behaviour, her contribution to the community and her character when deciding whether or not to consent to her requested membership transfer to OKIB. I say on its face because there is nothing in the record before me speaking to prior membership transfer decisions made by Council. There is no way of knowing what factors would typically be taken into account in making such decisions. However, nor are the factors that were considered arbitrary, particularly as the alleged threatening behaviour and the Applicant's character pertain to potential risk to, and the well being of, OKIB community members (see *Munroe v Canada (Attorney General)*, 2021 FC 727 at para 57; see also *Association des Senneurs du Golf Inc v Canada (Minister of Fisheries)*, 1999 CanLII 8744 (FC) at paras 30, 35).

[126] Unfortunately, the Applicant does not expand upon this argument to assert that Council's assessment of those considerations was unreasonable in the context of the decision it had to make. She does, however, assert that if they were relevant then she should have been given the opportunity to address them in her application. That argument will be dealt with in these reasons on the second issue, procedural fairness.

[127] I agree with the Applicant that because Council's decision will have a very harsh impact on her that this must factor into my assessment of the reasonableness of the 2021 Reconsideration Decision (as well as being a procedural fairness consideration). I also reject

OKIB's submission that the Applicant "overstates" the effect of the 2021 Reconsideration Decision because she voluntarily relinquished, or as counsel termed it when appearing before me, that she "walked away from" her OKIB membership in 1988. This ignores that she has been trying to transfer her membership back to OKIB since 2002. Further, that s 4.1(b) of the 2017 Transfer Policy explicitly contemplates the transfer back of former members who voluntarily transferred to another band.

[128] OKIB also submits that, while it is not a matter before or to be considered by this Court, even if the Applicant's application to transfer her membership were ultimately approved, her entitlement to possess Remaining Simla Estate Lands is an open issue given that the Applicant did not have membership at the time of Ms. Simla's death. OKIB cannot have it both ways. If this is not an issue before this Court then it also cannot sustain an argument by OKIB that the harshness of the impact of the 2021 Reconsideration Decision is somehow lessened by the potential outcome of that issue.

[129] Further, as pointed out in the analysis of the balance of convenience branch of the tripartite test for a stay in the Trespass Decision, had OKIB completed the transfer application promptly, or at least in 2012, the Applicant would have been a member of OKIB when her aunt died. She would have received the bequest of the subject lands pursuant to s 50 of the *Indian Act*, subject to the Minister's approval. "The lack of certainty of the Lots lies at the feet of the Band as a result of their delays". Likewise, had OKIB dealt with the transfer application before the death of the Applicant's aunt, the main consideration that Council relied upon in denying her transfer request in 2021 – the alleged aggressive and rude behaviour – would never have

occurred and we would not be considering the impact of the harshness of the 2021 Reconsideration Decision as an aspect of this judicial review. This illustrates that the harsh impact of the 2021 Reconsideration Decision was also likely avoidable.

[130] That said, as explained in *Vavilov*, "[w]here the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention" (*Vavilov* at paragraph 132). Here the Applicant does not assert that the Council's reasons lacked justification, although she does not agree with the reasons given.

[131] The Applicant also submits that the 2021 Reconsideration Decision is unreasonable because it does not comply with the rational of the membership transfer policy. She states that this is because it fails to promote "fair treatment for those seeking to transfer to OKIB" and a "return to hereditary values". However, the Applicant is quoting from the prior version of the membership transfer policy, the 2010 Transfer Policy. The 2017 Transfer Policy applied to the 2019 Decision and the 2021 Reconsideration Decision and does not contain that wording. Its purpose is set out in section 1.2 and, as stated above, this is to establish procedures for obtaining the consent of Council pursuant to section 12 of the *Indian Act* of the admission to membership in the OKIB and to establish the circumstances in which Council may consent to such an admission (without a community vote). In my view, the Applicant has not established that the 2021 Reconsideration Decision was made contrary to the purpose of the 2017 Transfer Policy.

[132] Further, the Applicant's submission that she did not receive "fair treatment" is better assessed in the context of the duty of procedural fairness, not as a constraint on the reasonableness of the 2021 Reconsideration Decision.

[133] In conclusion, "[t]he administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue" (*Vavilov* at para 121, see also paras 117-120). In view of section 12 of the *Indian Act* and its legislative history and effect, the purpose and wording of the 2017 Transfer Policy and Council's reasons as set out in the 2021 Reconsideration Decision, I am satisfied that Council did not err in its interpretation of the 2017 Transfer Policy as permitting it broad discretion to grant or to deny the Applicant's application for transfer of her membership to OKIB and that it was open to consider the Applicant's alleged threatening and aggressive behaviour. However, as will be discussed below, Council breached procedural fairness in failing to provide the Applicant with notice that it also intended to assess her behaviour in the context of other factors.

Issue 2: Whether the 2021 Reconsideration Decision was made in breach of the duty of procedural fairness

Applicant's position

[134] The Applicant submits that the 2021 Reconsideration Decision was made in breach of Council's duty of procedural fairness because: it was made after an unreasonable delay of nearly 20 years from when the Applicant first requested a transfer of her membership (citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 106, 115, 121 [*Blencoe*]);

the 2021 Reconsideration Decision followed two other decisions denying the Applicant's membership transfer application which were made for different reasons; the 2021 Reconsideration Decision was made after the amendment of the 2017 Transfer Policy, removing the Applicant's ability to appeal (protest) the 2021 Reconsideration Decision; the 2021 Reconsideration Decision was made without providing the Applicant an opportunity to know the basis on which the Decision would be made; and, Council took into account irrelevant factors without giving the Applicant an opportunity to address them.

Respondent's position

[135] The Respondent submits that OKIB provided the Applicant the highest level of procedural fairness.

[136] Further, that the delay is moot, without remedy and outside the scope of this judicial review. More specifically, that the delay is outside the scope of this judicial review which is concerned with the 2021 Reconsideration Decision, therefore, any past delay by past OKIB councils is moot; the delay is also rendered moot by the fact of OKIB's three decisions; and, in the case of an application for a benefit, there is no remedy for delay other than to order that a decision be made, which has happened in this matter.

[137] The Respondent also submits that the 2021 Reconsider Decision was made for the same reasons as the 2019 Decision on the merits; it was a reconsideration of the 2019 Decision in order to give an opportunity to respond to the allegations of aggressive conduct.

[138] The Respondent also argues that the Applicant has not explained how the amendment of the 2017 Transfer Policy removing the right of protest (appeal) under s 14.2 of the *Indian Act* affected procedural fairness and submits that, by amending the policy, OKIB provided a direct, and effective, avenue for transfer applicants such as the Applicant to judicially review OKIB's decisions.

[139] OKIB also submits that the Applicant was provided with reasonable notice and that OKIB's primary concern in the making the 2021 Reconsideration Decision would be the same issue that it had faced in the 2019 Decision, the allegations pertaining to the Applicant's conduct.

Analysis

[140] I would first note that, when appearing before me, counsel for the Applicant advised that the Applicant was no longer taking issue with the amending of the 2017 Transfer Policy to remove the right of protest under s 14.2 of the *Indian Act*. Accordingly, I will not address that issue. I also agree with the Respondent that whether Council took into consideration irrelevant factors in making the 2021 Reconsideration Decision falls within the reasonableness review, which has been addressed above.

[141] The salient issues here are whether the Applicant knew the case to be met and an opportunity to respond, and the impact, if any, of delay.

i. Notice and opportunity to respond

[142] The 2018 Decision was made on procedural grounds, specifically, that the Applicant had not submitted two of the documents required by the 2017 Transfer Policy – namely letters from Nak'azdli Whu'en band that she did not hold Certificates of Possession for any of its lands and owed no debts to that band (s 6.1(b)(ii) and (ii)). It was not a decision on the merits of her application. Once that information had been received, the 2019 Decision was made. It is based on a very discrete ground, specifically:

> OKIB has received multiple reports of aggressive and threatening behaviour by Ms. Johnston toward OKIB staff and guests, including verbal threats to use a firearm against an OKIB member, and she has not provided sufficient excuse or explanation for this behaviour. She has not taken responsibility for this behaviour and has denied it. As a result, we do not believe she would make a positive contribution to the OKIN community.

[143] In short, consent was refused because Council found her alleged aggressive and threating behaviour was insufficiently explained leading to the belief that the Applicant would not make a positive contribution to the OKIB community. Her alleged behavior was the *only* factor that led to that conclusion.

[144] As the Respondent points out, in her affidavit the Applicant states that the basis for the 2019 Decision denying her application "was that I would not be a contributing member of the community *on the basis of the allegations made against me by Mr. Brewer and Ms. Wilson*". That is, on the basis of the alleged threatening and aggressive behaviour.

[145] Following the filing of the Protest, Chief Louis wrote to the Applicant stating that in her protest letter the Applicant's legal counsel had stated that the Applicant did not have an adequate opportunity to respond to statements from OKIB representatives and guest *regarding her*

behaviour prior to OKIB counsel making its decision to deny her application and that OKIB wished to give her another opportunity to respond and present her views to Council. The Brewer and Marchand Emails, Wilson Incident Report and Shortt Letter were attached. The letter stated that Council would consider any further information or documentation provided in writing and also invited the Applicant to attend a Council meeting to make verbal submissions if she wished to do so.

[146] Thus, the focus of the offer to reconsider was clearly on the allegations of aggressive and threatening behaviour.

[147] In that regard, the Applicant states in her affidavit:

> 62. By letter dated January 11, 2021, Byron Louis, Chief of the OKIB, contacted me and offered to reconsider my membership transfer application and provide me with the opportunity to respond to my alleged behaviour to OKIB representatives and guests. I was not asked to provide any information about my character, my connections to the community, or my contribution to the community, past or future, nor was I told that there factors would be considered to be relevant by Council….

[148] In response to the offer to reconsider, the February Submissions were made on behalf of the Applicant. This provided background information including an explanation of why the Applicant had moved to Fort St. James, her work there in Alcohol and Drug Services, then Probation and later in a specialized victim services program. She stated that she transferred her band membership in 1988 because of safety issues to her and her family due to the nature of her work and to enhance her credibility and trust with the individuals that she served in the community. She also stated that when she transferred her membership she was advised by OKIB

employees that she could transfer her membership back as it was always her intention to return to OKIB. She also described her efforts to transfer her membership back, starting in 2002. She then outlined events following her aunt's death, the sale of two of the parcels of land bequeathed to her by her aunt and her living arrangements of the Remaining Simla Estate Lands. The Applicant then addressed the three alleged incidents of aggressive and threatening behaviour.

[149] The 2021 Reconsideration Decision did address those allegations and the explanations offered by the Applicant. But it did so in the context of other factors:

- The Applicant was not a band member until 1987; she had not provided any evidence of, and Council was not aware of, any involvement with or participation in the community in her adult life prior to receiving OKIB membership; she gave up her membership only two months after receiving it;

- The Applicant did not seek to transfer back to OKIB until 2002; Council was not aware of any participation by the Applicant in the community before or since relocating to the reserve in 2009 nor was there any evidence of this before Council. Council stated that while the Applicant had provided evidence of her connection to the community, this had to be balanced against her brief time as an OKIB member, her willingness to give up that membership for other opportunities and the absence of evidence of contribution or to participation in the community as an adult;

- Council also stated that any potential future contribution by the Applicant had to be considered in light of the reports of threatening or aggressive behaviour;

- Further, that the Applicant had not provided any statements for others to speak to her character.

[150] Council concluded that the Applicant had demonstrated some connection to the community, but in light of all of the circumstances, *including* the incidents of threatening and aggressive behaviour, it was not convinced that she had had or would positively contribute to, and participate in, the community. Council stated that it remained concerned about that behaviour and did not believe she would make a positive contribution to the community. It found that her OKIB ancestry and community connections were not sufficient to justify consenting to her OKIB membership in these circumstances.

[151] In light of the letter offering to reconsider the 2019 Decision on the basis of the Protest, in which the Applicant claimed she was not provided an adequate opportunity to respond to statements regarding her behaviour prior to Council making its decision, and stating that Council wished to give her another opportunity to respond, I agree with the Applicant that she was not given sufficient notice of the case to be met – specifically, that Council intended to also assess her behaviour in the context of past community contributions and her character. Council specifically noted the absence of evidence in that regard. And, although the Applicant elected not to appear before Council, her counsel had advised Council by letter of April 13, 2021 that should it have any questions or concerns that the Applicant would be happy to respond to them in writing. I note that this letter is not found in the CTR so it is possible that Council overlooked it or was not aware of its existence. Regardless, it is admissible as it speaks to this issue of procedural fairness raised by the Applicant. In short, the Applicant was not given notice that a

lack of character references or evidence as to community participation would be considered as factors when assessing her alleged threatening and aggressive behaviour.

[152] I do not agree with OKIB's submission that the 2021 Reconsideration Decision was based on only one material reason – concern that the Applicant would not make a positive contribution to the community because of her threatening and aggressive behaviour – and that the other considerations were not material reasons for the decision but merely explanations provided by Council in the context of considering her behaviour. In fact, in another portion of OKIB's submissions it states that the Applicant "was provided with ample notice that OKIB's primary concern in the 2021 Decision would be the same as that it faced in the 2019 Decision, namely, the allegations regarding her conduct" (referencing paragraph 32 of the Trespass Decision which speaks to the basis of the Protest, including that the Applicant claimed that she was not provided the opportunity to dispute the allegations of inappropriate behaviour).

[153] While I do agree that the Applicant was provided with notice of the Council meeting, the opportunity to make submissions in writing and in person, if she wished, and to be represented by counsel, my concern is with respect to the lack of notice that Council intended to consider not just the alleged incidents of threatening behaviour when assessing her application to transfer her membership back to OKIB, but also to weigh this against other factors, such as her character and past community participation, which factors were not identified to her as such.

[154] It seems to me that if Council is afforded broad discretion to consider any reasonable factors when considering whether or not to consent to an application to transfer membership, it

would be coincident that Council is also required by procedural fairness to clearly identify to applicants all factors that it intends to consider when conducting a reconsideration. On that point, I would also note that when the reconsideration was offered, there was no suggestion that the Applicant had not met the threshold requirements or that her application was incomplete. The basis for the reconsideration was defined by Chief Louis's letter, not the sufficiency of her original application.

[155] In my view, OKIB breached procedural fairness by failing to give the Applicant notice of the fact that it intended not just to consider and weigh her submissions responding to the alleged incidents of aggressive and threatening behaviour but that it would also assess this against other, unidentified factors. This denied the Applicant the opportunity to provide evidence, if she wished, addressing her character, her past contributions to the community and to explain why the alleged incidents would not impact her future contributions to the community. This differs from the 2019 Decision, which refused the application solely because Council found the Applicant's alleged aggressive and threating behaviour was insufficiently explained, leading to the belief that the Applicant would not make a positive contribution to the OKIB community. That brief decision did not suggest to the Applicant that factors other than her past behaviour were at issue and could be determinative. Nor did the letter offering to reconsider that decision. In short, the Applicant did not know the case to be met nor did she have a full and fair chance to respond (CPR at para 56).

[156] I am also influenced in this determination by the very serious impact the 2021 Reconsideration Decision had on the Applicant and I do not agree with OKIB's submissions

intended to downplay this. Not only did the 2021 Reconsideration Decision deny the Applicant OKIB membership, it also further opened the door to the selling of the Remaining Simla Estate Lands, where she has lived since 2009 and lives today with her daughter and grandson. The more serious the impact on and individual, the greater the procedural fairness required (see *National Council of Canada Muslims v Canada (Attorney General)* 2022 FC 1087 at para 201; see also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 25).

ii. Delay

[157] While OKIB asserts that the "historic delay" is not relevant to this judicial review, the Applicant disagrees.

[158] I do not agree with OKIB that because a decision has finally been made about the Applicant's membership transfer that this renders all aspects of the prior delay "moot". Had the Applicant been seeking *mandamus* to force Council to make a decision, then her application may well have been rendered moot by the making of that decision. But that is not the situation or remedy sought in this matter. And, as stated in *Ratzlaff v British Columbia (Medical Services Commission)* (1996), BCJ No 36 (BCCA) (QL), at para 23, "[w]here the position of the party at risk, here the appellant, is that the delay is such as to amount to an abuse of power, I think the whole of that period of delay must be looked at in determining whether it is such as to amount to oppression or an abuse of power".

[159] I summarise below the main events leading up to the 2021 Reconsideration Decision:

- In August 2002, the Applicant first requested to transfer her band membership back to OKIB. She states in her affidavit that she was advised that OKIB was in the process of adopting a new band membership transfer policy; that she made many attempts over the next several years to have her membership transferred; and, that she was told by the membership administrator that OKIB was waiting for 20 applicants before it would begin processing;

- The Fotheringham Affidavit describes the OKIB membership transfer policy history. Mr. Fotheringham was not employed by OKIB until December 2018, was began his employment as the Executive Director in 2020. He states that as the Executive Director he familiarized himself with OKIB's "institutional memory" although how he did so is not explained. Mr. Fotheringham states that prior to the 2010 Policy, OKIB's practice was that all applicants had to be approved by a band referendum before OKIB would consent to transfer, regardless of whether they were former OKIB members or had OKIB ancestry or not. He states that due to the cost of referendums, for many years, including the relevant time period of this application, until the 2017 Transfer Policy was passed, OKIB had a practice of requiring applicants to contribute to the cost of the referendum by paying a fee. OKIB would only hold the referendum when there were a sufficient number if applicants to cover the subject referendum costs;

- The Fotheringham Affidavit confirms that on July 20, 2004 Council met and considered a letter from the Applicant requesting transfer of her membership. The minutes of that Council meeting are attached as an exhibit and indicate that Chief and Council agreed that James Louie, Registry Clerk, would follow the current

Band policy (unspecified), and provide a response back to the Applicant reiterating that policy. The Fotheringham Affidavit states that he and his staff were unable to locate this correspondence from Mr. Louie to the Applicant;

- The Fotheringham Affidavit also attaches as an exhibit the minutes of a July 14, 2009 Council meeting at which the Applicant's request to transfer was again discussed. The minutes also record that the Band had a policy on membership transfers (unspecified), however, that a recent membership code had been voted down by the membership. A review of the policy was to be undertaken, along with a presentation on the procedures to be explained by the Registry Officer. The direction was given that Edmund Gus would follow up with James Louie on the membership transfer referendum procedures and status of the applications being held;

- The Fotheringham Affidavit attaches as an exhibit the minutes of a July 21, 2009 Council meeting, which indicate that the Applicant attended as a visitor. The minutes also indicate that the Applicant had also attended the last Council meeting but when she spoke with the Indian Registry Officer, James Louis, he was unaware of the situation. She advised Council that she would like have her matter dealt with as soon as possible for the reasons she gave at the last meeting. The minutes then go on to note that the last time the referendum and application were brought forward Council had asked that this be sent to the Registry Officer to bring back a plan on the overall cost of the referendum to be born by the applicants, that no band funds were to be utilized to cover the expenditures, but that the information was never provided. Council reports that it tried to explain

the process and the cost of the referendum but that due to INAC polices and funding cutbacks, a backlog had arisen. An information package would be provided by James Louis and Edmund Gus would follow up with James Louie to present the process along with the estimated cost to hold a referendum to be presented to Council as a briefing note. Council asked the Governance Committee meeting to be scheduled on Thursday, July 30, 2009 and stated that the process, cost and a proposed plan would be reviewed resulting in a response to the Applicant following that meeting. The Fotheringham Affidavit states that he and his staff had not been able to locate any record of the July 20, 2009 meeting or a response to the Applicant;

- The Fotheringham Affidavit states that on October 6, 2010, OKIB Council approved the 2010 Policy;

- The Johnston Affidavit states that her application was brought to Council for consideration in 2010 but was tabled following a closed room decision;

- The Fotheringham Affidavit attaches as exhibits letters dated October 13, 2011 from the Applicant acknowledging the new by-law (presumably the 2010 Transfer Policy) and requesting that Council refer to her file (concerning her request to transfer membership) and that she would be happy to attend a Council meeting, as well as a letter to Sherry Louis asking that the Applicant's membership request be put on the agenda for the next Council meeting;

- The Fotheringham Affidavit attaches as an exhibit a October 14, 2011 letter from Veronica Wilson advising that she had reviewed the Applicants file and it

contained all forms required except a letter of reference (credit check) from the originating band's (Nak'azdli Whu'en) accounting department and asking if the Applicant would like OKIB to request this;

- The Fotheringham Affidavit attaches as an exhibit the minutes of a February 8, 2012 Council meeting at which the Applicant attended as a visitor. Transfer of the Applicant's membership was again discussed, the minutes noting "relevant documentation: BCR for consideration/package to be distributed", before adding that no decisions would be taken in front of visitors. The minutes then go one to say that the transfer process had changed in the last year, transfers had been moving ahead based on direct linage and that when transfers come to the table it should be clear on the linage and that policies and procedures have to be clear. Council then agreed to suspend all membership transfers until "further clarity is completed on the membership transfer policy". The Fotheringham Affidavit states that he believes that the reference in the minutes to a BCR is the memorandum to Chief and Council from Veronica Wilson dated January 13, 2012 referencing the transfer of the Applicant, which is found in the CTR. This memo states that the Applicant had fulfilled all of the requirements to apply for transfer to the OKIB and, if accepted by Council, that Ms. Wilson was requesting that a BCR be drawn up and signed by Chief and Council stating that the Applicant has been accepted into the OKIB membership, Ms. Wilson provided proposed draft BCR wording;

- The Applicant's aunt died on November 3, 2013. No decision had been made at that time about the Applicant's membership transfer;

- Although no decision had been made, on August 6, 2014, Ken McGregor, then Executive Director of OKIB, wrote to ISC requesting that the Simla Estate Lands be sold and that anyone improperly living on the lands be removed;

- Although no decision had been made, on or about August 18, 2015 two of the Simla Estate Lands lots were sold;

- The Johnston Affidavit outlines the various communications the Applicant had with AANDA seeking to have them intervene in the transfer request;

- The Fotheringham Affidavit attaches an October 23, 2017 briefing note to Council concerning the approval of the 2017 Transfer Policy as well as a draft "to whom it may concern" letter to those who wished to apply to transfer their membership to OKIB. The Fotheringham Affidavit acknowledges that a copy of the final version of that letter signed by Chief Louis and dated effective November 15, 2017 is found as an exhibit to the Johnston Affidavit [Exhibit T]. The briefing note also attaches a draft *pro forma* letter – name to be inserted – advising that the 2017 Transfer Policy had been approved and the fee had to be paid. The Fotheringham Affidavit acknowledges the final version of this letter was sent to applicants for membership and that a copy of the letter addressed to the Applicant is dated March 6, 2018 and is found as an exhibit to her affidavit [Exhibit U], which letter encloses a copy of the 2017 Transfer Policy;

- On April 16, 2018, ISC informed the Applicant that Council had asked ISC to proceed with the sale of the Remaining Simla Estate Lands and that ISC would do

so if the Applicant did not provide ISC with satisfactory evidence that she is a member of OKIB by September 30, 2018;

- By letters dated April 16 and May 7, 2018 OKIB advised the Applicant that her documentation was incomplete as she had not provided letters indicating that she held no Certificates of Possession and owed no debts to Nak'azdli Whu'en band;

- The 2018 Decision denying her application due to the two missing letters is dated July 20 2018;

- The Applicant states that by September 2018 she had provided the missing documentation (this is not in dispute);

- On November 27, 2018 the Applicant received a letter from Victor Rumboldt, then Executive Director of OKIB, requesting additional information about her ancestry (a copy of her father's statutory declaration) and inviting her to respond to the alleged incidents of aggression and threatening behaviour by December 12, 2018;

- On September 17, 2019, before making a decision on the merits of the Applicant's request to transfer her membership, OKIB filed the Notice of Civil Claim;

- On January 7, 2019, OKIB rendered the 2019 Decision denying the Applicant's membership transfer application;

- On January 14, 2020, the Applicant filed her Protest pursuant to s 14.2(1) of the *Indian Act*;

- On August 4, 2020, OKIB filed its Notice of Application for Summary Trial in the SCBC;

- On August 14, 2020, the Applicant filed a cross-application in the SCBC seeking a stay of proceedings on the basis of the Protest;

- The summary trial was adjourned and the stay was issued on October 14, 2020;

- On November 14, 2017, OKIB amended the 2017 Transfer Policy to remove section 4.10, the ability to protest pursuant to s 14.2 of the *Indian Act*. When cross-examined on his affidavit, Mr. Fotheringham was asked why this was done, and his response was that this was "because council had a clear understanding that they themselves were the sole authority about who to admit as a member and who not to and this appeal process took that authority away". OKIB offered a different explanation in its written submissions, which counsel for the Applicant accepted when appearing before me;

- On January 11, 2021, OKIB offered to reconsider the 2019 Decision; and

- The 2021 Reconsideration Decision was made on May 21, 2021.

[160] This timeline leaves little doubt that the delay was significant. Further, between 2002 and May 2018 – a span of 16 years – the delay lay entirely with OKIB. There is also no evidence

before me that OKIB ever requested the Applicant to contribute to the cost of a referendum or held a referendum during that period.

[161] However, in her written submissions the Applicant does not flesh out how this delay – beyond its existence – amounts to a breach of procedural fairness or an abuse of process. She merely states that OKIB egregiously breached procedural fairness because the decision was made after an unreasonable delay and, without more, cites *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 106, 115 and 121.

[162] In *Blencoe*, the Supreme Court of Canada considered whether delay could amount to a denial of natural justice or an abuse of process even where the respondent had not been prejudiced in an evidentiary sense. The Court was prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. It emphasized, however, that few lengthy delays would meet this threshold and, in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process (para 115). For there to be abuse of process, the proceedings must be unfair to the point that they are contrary to the interests of justice (para 120). Further:

> 121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra,* at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".

> 122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[163] In *Fabbiano v Canada (Citizenship and Immigration)*, 2014 FC 1219 at paragraph 8 [*Fabianno*], Justice O'Reilly explained the concept of abuse of process as follows:

> [8] Abuse of process is a common law principle permitting courts to stop proceedings that have become unfair or oppressive. This includes situations where there has been an unacceptable delay resulting in significant prejudice (*Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, at para 101). A key question is whether the delay "impairs a party's ability to answer the complaint" (at para 102). Alternatively, a court can provide a remedy where the proceedings have become oppressive for other reasons including, for example, where the person carried on with his life reasonably believing that no further action would be taken against him (*Ratzclaff v British Columbia (Medical Services Commission)* (1996), BCJ No 36 (BCCA) (QL), at para 23).

[164] I would first note that the Applicant has not explicitly addressed whether or not the delay was inordinate, although, viewed contextually, one would think that it was (*Blencoe* at para 122; *Faroon v Canada (Citizenship and Immigration)*, 2015 FC 931 at para 53).

[165] Second, in her written submissions the Applicant also does not articulate how she was prejudiced by the delay. However, when appearing before me, her counsel submitted that the delay was highly prejudicial because, if her application had been addressed in 2011 when

OKIB's records confirmed that she met all of the requirements, no issue would have arisen as to her right to inherit the Simla Lands and, therefore, there would have been no frustration driven incidents upon which her transfer application was later denied.

[166] More significantly, however, the Applicant does not clearly argue that there has been an abuse of process, stemming from delay, such that the proceeding has become so oppressive that the 2021 Reconsideration Decision should be quashed on that basis. That is, the delay was "unacceptable to the point of being so oppressive as to taint the proceedings". This is tied to the remedies that she seeks, as will be discussed below.

[167] At the end of the day, while I accept that the delay was likely inordinate and that the Applicant was likely prejudiced by that delay, she simply has not provided submissions, grounded in the record and the law, to support an abuse of process finding based on delay. Her submissions are aimed more broadly at her overall perception of Council's cumulative actions or inactions, delay was just one of these. That is, the Applicant in essence makes a bad faith argument noting, for example, that while her application to transfer her membership was pending, OKIB sought to sell, and did sell two lots of the Simla Estate Lands; before making the 2019 Decision, OKIB filed the Notice of Civil Claim; and, after the Applicant submitted her Protest, OKIB filed its application for summary judgment. Yet the Applicant does not engage with a bad faith analysis based on the facts and the law.

Remedy

[168] The issue of delay is also related to remedy. This is not a more typical situation where a stay of a proceeding is an appropriate remedy to an abusive process – the Applicant does not seek to permanently stay a process that she has initiated – the consideration of her application of a transfer of her membership to OKIB.

[169] Instead, the Applicant seeks declaratory relief, as well as an order of *certiorari* setting aside the 2021 Reconsideration Decision and an order of *mandamus* compelling Council to consent to her membership transfer and communicate that consent to the Indian Registrar or, alternatively, compelling Council to render the decision in a manner that is reasonable, fair and consistent with the principles of natural justice and procedural fairness.

[170] The Respondent refers to *Marsh v Zaccardelli*, 2006 FC 1466 [*Marsh*] at paragraph 40 to argue that the Applicant's proper course of action would have been to have sought *mandamus* to compel Council to make a decision, and as she had not, the delay essentially fell at her feet. In *Marsh*, the Court found that the evidence did not establish a delay sufficient to taint the proceeding as required by the test in *Blencoe*. It then went on to identify a policy concern, being that the delay had only been raised before the adjudicator, noting that the common remedies for a person aggrieved by any delay in reaching a decision are *mandamus* or a stay of proceedings (depending upon whether the person is the moving or responding party). The court expressed concern that the applicant took no step to expedite or compel the decision at issue, but simply

awaited the decision and, having learned that it was negative, argued that the adjudicator lost jurisdiction by delay. It then stated:

> [42] Consistent with this view are the remarks of the Federal Court of Appeal in *Gill v. Canada (Minister of Employment and Immigration),* [1984] 2 F.C. 1025. In the context of what it characterized to be "extraordinary bureaucratic delay" the Court wrote as follows:
>
> > This is not, however, to say that I think that the Government can, by simple inaction, defeat rights which were clearly intended to be granted. It may well be that the recently discovered administrative duty to act fairly encompasses a duty not unreasonable to delay to act; or, put positively, that the procedural duty to act fairly includes a duty to proceed within a reasonable time. It does not by any means follow, however, that the breach of such a duty would give rise to the setting aside of the tardy action when it is finally taken. The remedy surely is to compel timely action rather than to annul one that, though untimely, may otherwise be correct.
> >
> > [underlining added]
>
> [43] As to the second reason, relating to the nature of the relief sought, in the context of the delay and prejudice here asserted by Ms. Marsh it would make little sense to simply overturn the decision of the Adjudicator and remit the matter to a new decision-maker to start afresh. Indeed, for this reason Ms. Marsh instead asks the Court to grant the relief that was sought before the Adjudicator, as more particularly set out at paragraph 18 above.

[171] In my view, while the Applicant did not previously seek *mandamus* to compel Council to make a decision on her membership transfer application, unlike *Marsh,* it is apparent that she made many efforts over many years seeking to have Council make a decision. That said, I do agree that quashing a decision on the basis of delay may be counter productive if the remedy is simply to remit the matter back for reconsideration, thus incurring further delay. When appearing

before me, counsel for the Applicant agreed that this was so. This would also appear to be why the Applicant also seeks orders of *mandamus* as remedies in this application for judicial review.

[172] However, as the Respondent points out, to obtain an order for *mandamus* the Applicant must meet the test set out *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA) [*Apotex*] (see also *Canada (Attorney General) v Arsenault*, 2009 FCA 300 at para 32). The Respondent submits that the Applicant cannot meet this test. While the Applicant does not address this, I agree that there is a live issue at least with respect to the discretionary nature of Council's decision. That is, where the duty sought to be enforced is discretionary, *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered". *Mandamus* is also unavailable to compel the exercise of a "fettered discretion" in a particular way.

[173] Given that I have found that Council had broad discretion when making membership transfer decisions, the remedy of *mandamus* would not appear to be available to the Applicant to provide an order compelling Council to consent to her membership transfer. This is because the 2017 Transfer Policy does not impose a specific duty on Council to act in a particular way – other than considering a complete application in accordance with the process set out. *Mandamus* cannot compel the exercise of discretion to obtain a specific result (see *Lemaigre v Première nation des Dénés de Clearwater River*, 2015 FC 601 at paras 21 – 23).

[174] I also do not agree with the Applicant that this is a circumstance, described in *Vavilov* in the context of remedial discretion of courts with respect to remedy, where it would be appropriate to decline to remit this matter back to Council. There the Supreme Court held that:

> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.
>
> [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at paras. 54 and 88. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

[175] This is not a circumstance where a particular outcome is inevitable and, accordingly, it would not be appropriate to decline to remit the matter back to Council for redetermination, with the benefit of these reasons.

[176] All of that said, what the Applicant is effectively seeking is that the 2021 Reconsideration Decision be quashed and that the Court direct Council to consent to her membership transfer. However, the Council's decision was a discretionary one and the Court is not in a position to step into its shoes (see *Orr v Alook*, 2012 FC 590 at para 21; see also *Bruno v Samson Cree Nation*, 2006 FCA 249 at para 23). In my view, the appropriate remedy is to set aside the 2021 Reconsideration Decision and remit it back to Council for redetermination in accordance with these reasons.

Conclusion

[177] I have found that the Applicant was denied procedural fairness because Council failed to give her notice of the fact that it intended not just to consider and weigh her submissions responding to the alleged incidents of aggressive and threatening behaviour, but that it would also assess this against other unidentified factors. This denied the Applicant the opportunity to provide evidence, if she wished, addressing her character, her past contributions to the community and to explain why the alleged incidents would not impact her future contributions to the community.

[178] Given this, the 2021 Reconsideration Decision must be set aside and the matter must be remitted in whole back to Council for redetermination.

[179] In that regard, prior to the redetermination Council shall notify the Applicant of all of the factors that it intends to consider when assessing her alleged threatening and aggressive behaviour and provide her with an opportunity to make submissions, provide statements of other individuals and submit documents responding to those factors. Council shall affect the redetermination process promptly and without delay.

Costs

[180] At my request, following the hearing the parties provided brief written submissions on costs which I have now reviewed.

Applicant's position

[181] The Applicant submits solicitor client costs are appropriate because OKIB took more than 19 years to come to a final decision with respect to her membership transfer application and its actions constituted reprehensible, scandalous or outrageous conduct as demonstrated by the fact that: while her application was pending (largely due to inaction on the part of the OKIB), OKIB took aggressive steps to sell land that the Applicant would have inherited had she been a member of the band; after the Applicant filed the Protest, OKIB brought its summary trial application seeking to remove her from the land, this also required the Applicant to retain counsel to bring the cross application for a stay; and, OKIB continuously came up with new reasons to deny the transfer application, ultimately relying upon allegation of threatening and aggressive conduct – which information it had known of for several years – yet had never raised any concerns about the incidents with the Applicant.

[182] Alternatively, the Applicant seeks and elevated lump sum of 50% of her actual costs of $87,346.46, less 20% representing the costs of the SCBC proceedings. In the further alternative, the Applicant seeks tariff costs in the amount of $15,310.19 and encloses a bill of costs. If she is unsuccessful, the Applicant submits that given the substantial delay, which is almost entirely attributable to OKIB, and that the alleged threatening and aggressive behaviour is attributable to that delay, no costs should be awarded to OKIB.

Respondent's position

[183] OKIB acknowledges the asymmetry between it and the Applicant and states that OKIB is prepared to forego an award of costs (should it succeed) in respect of the application and the accompanying motion so long as no award of costs is awarded against it (should it not succeed).

[184] OKIB submits that it exercised its broad discretion fairly and reasonably and made a decision that was within the range of reasonable outcomes. However, OKIB does not wish to cause financial hardship to the Applicant by way of an adverse costs award, should the judicial review be dismissed. OKIB submits that its conduct in determining the Applicant's transfer and on the judicial review application does not warrant payment of costs by OKIB to the Applicant. OKIB submits that the facts of the matter militate in favour of a no costs order or an order that the parties bear their own costs.

Analysis

[185] Pursuant to Rule 400 (1) of the *Federal Courts Rules*, SOR/98-106, the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. In exercising that discretion the Court may consider the factors set out in Rule 400(3), which include: the result of the proceeding; the importance and complexity of the issues; whether the public interest in having the proceeding litigated justifies a particular award of costs; any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; and, any other matter that the Court considers relevant. The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs (Rule 400(4)).

[186] With respect to the awarding of solicitor-client costs, the general rule has been stated by the Supreme Court of Canada to be that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct, or, where reasons of public interest may justify the making of such an order (*Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 at para 86; *Quebec (Attorney General) v Lacombe* 2010 SCC 38 at para 67).

[187] In my view, an award of costs on a solicitor-client basis is not warranted in this case. And, while there is an imbalance of financial resources between the Applicant and OKIB (which is acknowledged by OKIB) this alone is not a sufficient factor to justify and award costs on a

solicitor-client basis (see generally *Whalen v Fort McMurray No. 40 468 First Nation*, 2019 FC 1119 [*Whalen*]).

[188] However, the Applicant has been successful both with respect to OKIB's motion to strike and her application for judicial review. The motion to strike was, in my view, largely ill-founded. Further, OKIB's position, as I understand it, appears to be that because it views the 2019 Reconsideration Decision to have been reasonable and fair, there should be no award of costs against it and that costs need not follow the event. However, I have found that OKIB breached procedural fairness and find that costs should follow the event, as they do in the normal course. I see no reason why the Applicant should not be afforded her costs as OKIB submits. Particularly in light of the acknowledged financial imbalance.

[189] The Applicant states that her actual costs were $87,346.46, less 20%, being $69,877.17. Her Tarriff B costs, based on Column III, are $15,310.19.

[190] In *Whalen*, as in this case, the applicant sought costs on a solicitor-client basis or, in the alternative, lump sum costs or a cost award on an elevated scale. There, Justice Grammond restated the general purposes and principles underlying cost awards as well as the circumstances in which solicitor-client costs award may be warranted and ultimately concluded that an award of costs according to the Tariff would be insufficient and that a lump sum on an elevated basis was warranted. Lump sums must not be "plucked from thin air", and have been found to fall within a range of 25-50% of the actual legal costs of the successful party (*Whalen* at para 33; *Nova*

Chemicals Corporation v Dow Chemical Company, 2017 FCA 25 at para 17; *Garner v Union Bar First Nation*, 2021 FC 657, at para 53).

[191] In my view, a similar approach is appropriate in this matter and I award the Applicant a lump sum of $25,000.00.

JUDGMENT IN T-951-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. The 2019 Reconsideration Decision will be set aside and the matter will be remitted back to Chief and Council of the Okanagan Indian Band for redetermination, taking into account these reasons; and

3. The Applicant shall have her costs paid by Okanagan Indian Band in the all inclusion lump sum amount of $25,000.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-951-21
STYLE OF CAUSE:	MARILYN JOHNSTON v THE OKANAGAN INDIAN BAND
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
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JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	AUGUST 29, 2022

APPEARANCES:

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