Federal Court  Cour fédérale

Date: 20121212

Docket: T-654-12

Citation: 2012 FC 1469

Ottawa, Ontario, December 12, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

BIBIANA NORRIS AND CLINTON NORRIS

Applicants

and

MATSQUI FIRST NATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicants were members of the Matsqui First Nation [Band]. They seek judicial review of a decision by the Band Membership Committee [Committee] to revoke their membership as their names had been entered on the Band list [List] in error. Specifically, the Committee found that the Applicants had reached the age of 18 when their names were entered on the List under a provision of the *Matsqui Band Membership Code* [*Code*] that applied only to applicants under the age of 18.

II. Judicial Procedure

[2] This is an application under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 for judicial review of the decision of the Band, dated February 28, 2012.

III. Background

[3] The Band assumed control of its membership by establishing membership rules under section 10 of the *Indian Act*, RSC, 1985, c I-5 [*IA*].

[4] The Affidavit of Cynthia Collins [Collins Affidavit] states that section 10 of the *Code* was drafted to ensure that membership transfers from other bands to the Band [inter-tribal transfers] were not automatic due to the Band's limited resources. Section 10, according to the Collins Affidavit, was drafted to establish procedures requiring individuals seeking inter-tribal transfers to demonstrate true interest in the Band.

[5] The Applicants, Ms. Bibiana Norris and Mr. Clinton Norris, are siblings who were born in 1957 and 1963, respectively. They were initially members of the Halalt First Nation [HFN] and grew up on its reserve.

[6] The Applicants state that they always felt strongly affiliated with the Band as their mother, Mrs. Julian, and maternal grandparents were members of the Band. Under section 14 of the former *Indian Act*, RSC 1970, c I-6 [former *IA*], Mrs. Julian ceased to be a member of the Band and became a member of the HFN since she married a member of the HFN. Mrs. Julian later rejoined the Band.

[7] In October 1994, Ms. Norris applied for membership in the Band and was entered on the List under section 7 of the *Code* on October 31, 1994. Mr. Norris applied for membership under section 7 on October 16, 1998 and was entered on the List shortly after. Both Applicants were over the age of 18 when they were entered on the List.

[8] The Band claims that the Applicants were admitted by an enrolment officer who took a controversial view of section 7 of the *Code*. Concerned with the enrolment officer's approach, the Committee met on January 24, 1995 to discuss the application of the inter-tribal transfer rules to direct descendents of Band members. It concluded that direct descendents residing on other reserves should not be entitled to membership unless they could demonstrate an intention to fully participate in the Band.

[9] As members of the Band, the Applicants could vote in elections, live on its reserve, participate in community events and programs, and receive benefits in the form of distribution royalties from the Department of Aboriginal Affairs and Northern Development Canada [DAAND] in the amount of $1500 per year. The Band claims that these distribution royalties came from its own source revenues and not DAAND.

[10] Ms. Norris claims that she was active in the Band, working as a language teacher and joining its Governing Body. Mr. Norris claims that he was a receptionist, janitor, and youth outreach worker for the Band, that he was on its Governing Body, and that he attended its meetings, as well as general and policy meetings. The Collins Affidavit challenges his claim that he was a receptionist

and youth outreach worker and states that he was an alternate family representative to the Governing Body and rarely attended meetings.

[11] Ms. Norris lived on the Band reserve from 1997 to 2008; Mr Norris, from 1994 to 2008. The Collins Affidavit alleges that Ms. Norris abandoned her rental house on the Band reserve in 2005, allowing an individual who was not a member of the Band to live in it. The Collins Affidavit states that this contravened Band policy.

[12] According to the Affidavit of Alice McKay [McKay Affidavit], the Committee met in early 2009 to consider the application of the definition of "child" in section 2 to section 7 of the *Code*. The Governing Body, at the Committee's recommendation, decided to remove from the List individuals who were not children under section 2 when their names were entered onto the List under section 7.

[13] On April 27, 2009, the Committee advised the Applicants that their membership was revoked as they were not children under the age of 18 at the time they registered as members of the Band. The Applicants state that they had no prior notice of any intent to revoke their membership and had no opportunity to respond.

[14] The Applicants sent letters appealing the decision under subsection 15(4) of the *Code* to the Membership Clerk on August 21, 2009 and the Governing Body on October 23, 2009 and December 2009. Neither responded.

[15] Since the revocation, the Applicants have not been able to live on the Band reserve and receive royalties from DAAND. The amount of time that the Applicants can spend with their relatives (and that Ms. Norris can spend with her grandchildren) has also diminished because the Applicants feel that they are being watched on the Band reserve. Ms. Norris states that membership in the Band is important to her because it ties her to her family. Mr. Norris feels similarly and states that he has also lost his right to live in Mrs. Julian's house on the reserve, which became his after she passed away.

[16] According to the Collins Affidavit and the McKay Affidavit, however, the Applicants are eligible to rent homes on the Band reserve, even though they are no longer members. The McKay Affidavit also states that Mr. Norris was evicted from his rental home on the Band reserve on January 7, 2009 for failure to pay rent.

[17] Ms. Norris has reactivated her HFN membership, a step she considers temporary, to maintain eligibility for health benefits from DAAND.

[18] On December 20, 2011, counsel for the Applicants wrote to the Band demanding an appeal under the *Code*. Counsel for the Band responded on January 12, 2012, requesting submissions on the grounds on which the Applicants wished to appeal the decision. Counsel to the Applicant made submissions on January 20, 2012.

[19] On February 28, 2012, counsel to the Committee responded that its interpretation of the *Code* was correct and that the appeal provisions in the *Code* did not apply.

IV. Decision under Review

[20] The Committee found that the Applicants were erroneously accepted as Band members under section 7 of the *Code*. Pursuant to subsection 12(2) of the *Code*, it directed that their names be removed from the List and that they be considered never to have been Band members. Since the Applicants' memberships were never valid, they could not avail themselves of the Appeal Process.

[21] The Committee found that the Applicants were accepted as Band members due to a misinterpretation of section 7 the *Code*, which entitles children of at least one natural parent who was or was entitled to be a Band member to become members. Under section 2 of the *Code*, "child" means an individual who has not reached the age of 18.

[22] According to the Committee, the corollary of the definition of child in section 2 is that applicants must show the following to qualify under section 7: (i) that they were children at the time they were seeking membership, and (ii) that they have at least one natural parent that had or was entitled to membership [two-part test]. Neither of the Applicants qualified since both had already reached the age of 18 at registration.

[23] The Committee justified the two-part test on two grounds. First, the *Code* avoids the term "person" in section 7, while similar membership sections of the *IA* use the term. Second, section 7 limits membership to children since the Band is responsible for providing adequate housing to new members with limited land resources; adult applicants, the Committee reasoned, impact these resources differently than children.

[24] The Committee found that subsection 13(2) of the *Code* did not assist the Applicants. Subsection 13(2) makes children, whose parents or guardians have renounced Band membership, eligible for reinstatement upon reaching the age of majority. The Committee reasoned that only those who had already been Band members and were known to the Band at the time they registered fell within subsection 13(2).

[25] According to the Committee, the Applicants were previously members of the HFN and their applications should have proceeded as inter-tribal transfers under section 10 of the *Code*, which required them to: (i) renounce membership in the HFN; (ii) agree to a two-year probationary period during which they must attend Band meetings, social and cultural events to better learn and understand its way of life; and, (iii) receive consent of 75% of the eligible electors of the Band at a referendum.

[26] The Committee determined that the fairest remedy would be to re-process the application as inter-tribal transfers. First, it reasoned that appealing the decision would be "futile" since section 7 did not apply to the applications and should not have been considered in processing them. Second, it found that the section 15 Appeal Process did not apply as the Applicants never held valid Band memberships. Third, the Committee found that section 7 was intentionally drafted to exclude adult applicants and that the conditions imposed on them in inter-tribal transfers addressed the problems that they pose. Fourth, to allow eligible electors to exercise their jurisdiction under the *Code*, the referendum required under section 10 should have taken place. Finally, the Applicants could restore their HFN membership under section 11 of the *IA*.

[27] The Committee stated that Ms. Norris completed her subsection 10(*b*) requirements and that a referendum could be held as soon as possible for her. Mr. Norris, however, still needed to meet subsection 10(*b*) before a referendum could be held for him.

V. Issues

[28] (1) Was the Committee's decision unreasonable because it did not comply with section 10 of the *IA*?

(2) Was the Committee's decision unreasonable because a contextual analysis does not support the two-part test?

(3) Was the Committee's decision unreasonable because the two-part test cannot be read harmoniously with the scheme of the *Code*?

(4) Is the Committee's decision unreasonable because the two-part test gives rise to "internal absurdities" in the *Code*?

VI. Relevant Legislative Provisions

[29] The relevant legislative provisions of the *IA* are available in Annex "A".

[30] The relevant legislative provisions of the *Code* are available in Annex "B".

VII. Position of the Parties

[31] The Applicants, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, argue that the standard of reasonableness applies because a constitutional question, a determination of a true jurisdiction or *vires*, or a question of general law that is of central importance to the legal

system as a whole and outside the adjudicator's specialized area of expertise is not at issue (at para 58-60).

[32] According to the Applicants, the two-part test proposed by the Band is unreasonable as: (i) it does not comply with section 10 of the *IA*; (ii) it is inconsistent with a contextual analysis of the *Code*; and, (iii) it creates absurdity.

[33] First, the Applicants argue that the two-part test does not comply with subsections 10(4) and (5) of the *IA*. The effect of subsections 10(4) and (5) is that the *Code* must ensure that those who were entitled to have their names entered on the List before the *Code* was established remain entitled to Band membership.

[34] The Applicants claim that Bill C-31, *An Act to Amend the Indian Act* [Bill C-31] entitled them to have their name entered on the List immediately prior to the establishment of the *Code* and that the two-part test deprives them of that right. The Applicants state that Bill C-31 restored Mrs. Julian's right to membership in the Band and, by consequence, their own right to membership. The Applicants cite *Scrimbitt v Sakimay Indian Band Council*, [2000] 1 FC 513 (TD), for the proposition that subsection 10(4) protects the rights of individuals entitled to band membership under Bill C-31.

[35] The Applicants contend that the two-part test is inconsistent with the *IA*'s prohibition on depriving them of their right to have their names on the List immediately prior to the establishment of the *Code*. They observe that the *Code* was established on June 25, 1987, when Ms. Norris and

Mr. Norris were 30 and 24 years old. The two-part test would deprive them of their right to be members on the very day the *Code* was established.

[36] Second, the Applicants argue that a contextual analysis of the *Code* does not support the two-part test. Structurally, the *Code* distinguishes individuals who have a right to Band membership from individuals who are permitted to apply for membership. The former is governed by the first section of the *Code* ("Membership Criteria", subsections 3 to 7 of the *Code*); the latter, by the second section ("Application for Membership", subsections 8 to 10 of the *Code*). The Applicants argue that they belong in the former group due to Mrs. Julian's membership in the Band.

[37] The Applicants assert that individuals governed by the first section are not required to apply for membership since (i) the first section does not entail a requirement to apply, and (ii) such individuals have an inherent right to membership due to their lineage. Since the first section does not require application, section 7 could not have required them to apply for membership before they reached the age of 18.

[38] According to the Applicants, the two-part test cannot be read harmoniously with the scheme of the *Code*. They observe that the preamble lists the protection of cultural integrity and social harmony as one of the *Code*'s objectives. This objective is not furthered by depriving membership to individuals who have an ancestral and cultural connection to the Band simply because they did not apply for membership before they reached the age of 18. The age-based two-part test, the Applicants argue, serves to "divide and fracture cultural integrity" and makes an arbitrary

distinction between individuals under the age of 18 and those over that age who, nonetheless, have the same ancestral and cultural connection to the Band (Application Record [AR] at p 86).

[39] Finally, the Applicants argue that the two-part test, if applied, would give rise to "internal absurdities" in the *Code* (AR at p 86). In particular, the age-based two-part test assumes that an individual who has not yet reached the age of 18 is sufficiently mature to understand the significance of their right to be a member of the Band and to decide whether or not to apply to become a member.

[40] In support, the Applicants argue that subsections 12(5) and 13(1) and (2) of the *Code* lead to the inference that decisions about Band membership can only be made by individuals who have reached the age of majority. Subsection 12(5) provides that children adopted by non-members shall be removed from the List but are eligible for reinstatement on reaching the age of majority. Subsection 13(1) provides that members may renounce membership upon reaching the age of majority while subsection 13(2) provides that only parents or guardians may renounce a minor's membership who remains eligible for reinstatement on reaching the age of majority.

[41] The Applicants argue the two-part test frustrates subsection 13(2). This is because, while subsection 13(2) makes individuals eligible for reinstatement on reaching the age of majority, section 7 simultaneously makes them ineligible for membership as they are no longer children under section 2 of the *Code*.

[42] The Band agrees with the Applicants that the appropriate standard of review is that of reasonableness.

[43] The Band submits that Bill C-31 did not restore Mrs. Julian's membership in the Band. Bill C-31 repealed section 14 of the former *IA*, which provided that women of one band who married members of another band would cease to be a member of the former band and become a member of the latter band. When Mrs. Julian married the Applicants' father, she ceased to be a Band member and became a member of HFN.

[44] The Band submits that Bill C-31 did not automatically restore membership in one band to women who became members of another band under section 14 of the former *IA* for two reasons: (i) the current *IA* does not entitle individuals to have their names entered at the same time on more than one band list; and, (ii) a band would still have to consent to restoring membership. The Band submits that repealing section 14 does not lead to the inference that Mrs. Julian's membership was restored. It adds that Bill C-31 introduced section 13 of the current IA, which states that no person is entitled to have his name entered at the same time on more than one band list.

[45] The Band argues that subsections 10(4) and (5) of the *IA* do not apply to the Applicants because Mrs. Julian was not entitled to be registered under paragraph 6(1)(*c*) of the *IA*. Under subsection 10(5), subsection 10(4) applies to a person who was entitled to have his name entered on the List under paragraph 11(1)(*c*) of the *IA* immediately before the Band assumed control of the List. Paragraph 11(1)(*c*) refers to persons entitled to be registered under paragraph 6(1)(*c*) but who ceased to be members of a band by reason of the circumstances set out in the latter provision. These

circumstances refer to persons deleted from the Indian Register, or a band list prior to September 24, 1951, under the former *IA* who:

a. lost their status due to the "double mother rule", which provided that the sons of women who obtained Indian status by marriage could not pass their status to their children if they married a non-Indian;
b. were women who married non-Indians;
c. were illegitimate children who lost their status due to a protest regarding their paternity;
d. were children of women who married non-Indians;
e. applied to be enfranchised;
f. were families of Indian men who were enfranchised;
g. lost their status because of the foreign residence clause; and,
h. were enfranchised as a result of practicing certain professions or obtaining university degrees.

[46] According to the Band, the two-part test could not have deprived the Applicants of a subsection 10(4) right because the Applicants had no such right immediately prior to the establishment of the *Code*. Bill C-31 did not give Mrs. Julian a right to have her name entered on the List immediately before the *Code* was established because she did not fall within the circumstances described in paragraph 6(1)(*c*).

[47] The Band also submits that the Applicants' argument that there is no obligation to apply for membership under section 7 is immaterial since section 7 did not apply to the Applicants. The two-

part test excluded the Applicants from the ambit of section 7 as they had reached the age of 18 when they sought Band membership. The Band submits that the Committee intentionally drafted section 7 to include the word "child" due to the limited land resources available to the Band and that adults impact this resource differently than children.

[48] The Band disputes the Applicants' argument that the two-part test lacks harmony with the overall objectives of the *Code*. The Band notes that the preamble also lists "maintaining and enhancing economic stability" and "ensur[ing] continued peace and good order among the membership of the first nation" as objectives. The Band submits that it would not be in the best interests of its members to allow members of other bands to become members of the Band, especially in light of its limited land resources. The conditions on inter-tribal transfers also promote the objectives of the *Code* by requiring a probationary period in which an applicant integrates himself or herself into the Band and the consent of eligible electors.

[49] The Band submits that the two-part test does not create any absurdity since the Band must protect existing members and need not give a remedy to an individual whose parent or guardian did not provide him or her with Band membership. The Band distinguishes the circumstances of persons falling under subsections 12(5) and 13(2) of the *Code* from those of the Applicants, who were members of HFN until they were 37 and 35. Individuals under subsections 12(5) and 13(2) are a population known to the Band, which it factors into its decision-making on maintaining and enhancing economic stability. These individuals, moreover, have had direct exposure to the Band's culture and have been part of it during some portion of their lives.

VIII. Analysis

Standard of Review

[50] The Applicants and the Band agree that the appropriate standard of review is that of reasonableness. Under this standard, courts may only intervene if a decision is not justified, transparent or intelligible. To be reasonable, a decision must also be in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

(1) Was the Committee's decision unreasonable because it did not comply with section 10 of the *IA*?

[51] The Committee's decision was not unreasonable for failing to comply with section 10 of the *IA*. The application of the two-part test to the Applicants; that is, to persons who did not have a pre-existing, automatic entitlement to Band membership under Bill C-31, falls within the range of possible, acceptable outcomes.

[52] The success of the Applicants' argument that the two-part test is inconsistent with subsections 10(4) and (5) of the *IA* depends upon whether they can establish that they had a pre-existing, automatic entitlement to membership in the Band before the *Code* was established. To have such an entitlement, the Applicants must fall within the class of persons entitled to Band membership under section 11 of the *IA*, in particular, paragraph 11(1)(*c*). In short, they must demonstrate that Bill C-31 automatically entitled Mrs. Julian, and consequently themselves, to membership in the Band.

[53] Assessing this argument is a problem of statutory interpretation. In interpreting the relevant sections of the *IA*, this Court follows *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27. Accordingly, the words of the *IA* must be read in their "'entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" (at para 21, citing Elmer Driedger, Construction of Statutes, 2d ed (Toronto: Butterworths, 1983) at 87).

[54] Subsection 10(4) of the *IA* prohibits the membership rules of a band from depriving a person of the right to have his or her name entered on its band list by reason only of a situation that existed or an action that was taken before the rules came into force if that person had the right to have his or her name entered in the band's list, immediately before the rules were established. Subsection 10(5) of the *IA* states that, for greater certainty, this prohibition applies in respect of a person who was entitled to have his or her name entered on the band's list under paragraph 11(1)(*c*) of the *IA* immediately before the band assumed control of the list if that person does not subsequently cease to be entitled to have his or her name entered on the list.

[55] Section 11 of the *IA* identifies who, commencing April 17, 1985, is entitled to have their name entered on a band's list. The sub-provision that is relevant to the Applicants is paragraph 11(1)(*c*) of the *IA*, which entitles a person to have their name entered on the List if they are entitled to be registered under paragraph 6(1)(*c*) and ceased to be a member of the Band by reason of the circumstances set out in paragraph 6(1)(*c*).

[56] In *Sawbridge Band v Canada*, 2004 FCA 16, [2004] 3 FCR 274, Justice Marshall Rothstein described the interaction of subsections 10(4) and (5) and paragraph 11(1)(*c*) of the *IA*. He held that paragraph 11(1)(*c*) provides for an "automatic entitlement" to membership in a band as of the date that Bill C-31 came into force. This is an entitlement that, under subsections 10(4) and (5), a band's membership rules "cannot operate to deny" (at para 26 and 29).

[57] To establish that paragraph 11(1)(*c*) of the *IA* automatically entitles them to membership, the Applicants must belong to one of the categories of persons enumerated in paragraph 6(1)(*c*) of the *IA*. Paragraph 6(1)(*c*) has two functions. Its primary function is to enumerate the categories of persons entitled to be registered under the *IA* whose name were omitted or deleted from the Indian Register (or from a band list prior to September 4, 1951) under the former *IA*. Its secondary function is, by the operation of paragraph 11(1)(*c*), to automatically entitle these persons to membership in a band.

[58] The categories of person outlined in paragraph 6(1)(*c*) are persons who were not entitled to be registered under the former *IA* because:

a. they were subject to the double mother rule;

b. they were women who married a person who is not an Indian;

c. they were illegitimate children of Indian women and there was a protest respecting their paternity; and,

d. they became enfranchised.

[59] By operation of subsection 11(3.1) and paragraph 6(1)(*c*.1) of the *IA*, the children of women who were not entitled to be registered under the former *IA*, because they married a person who is not an Indian or became enfranchised, are also automatically entitled to band membership.

[60] For the purposes of automatic entitlement to membership in a band, the *IA* distinguishes between (i) women who (pursuant to section 14 of the former *IA*) became members of another band because they married an Indian from that band, and (ii) those whose registration itself was (pursuant to paragraph 12(1)(*b*)) of the former *IA*) cancelled because they married a person who was not an Indian and whose membership in their band was (also pursuant to section 14) consequently cancelled. A member of the latter group is automatically entitled to membership in a band but a member of the former is not. Although the *IA* repealed section 14, it did not automatically entitle all women who previously lost their band membership due to that provision; only those whose registration itself was also cancelled are so entitled.

[61] Mrs. Julian belonged to the former group because she married a member of the HFN. Since Mrs. Julian never ceased to be registered under the former *IA*, neither she nor her children (the Applicants) were automatically entitled to membership in the Band under paragraph 11(1)(*c*) and subsections 10(4) and (5) do not prohibit the Band from applying the two-part test to them.

[62] The Applicants are correct that subsection 10(4), according to *Scrimbitt*, above, "protects the rights of those entitled to Band membership pursuant to Bill C-31" (at para 31). The Applicants, however, did not have a right to membership in the Band pursuant to Bill C-31. Their situation is

thus distinguishable from that of the applicant in *Scrimbitt* who had become disentitled to registration under the former *IA* (at para 7).

[63] The two-part test for section 7 of the *Code* does not deny these particular Applicants of any right to have their names entered on the List. Insofar as it applies to the Applicants, the two-part test is not inconsistent with subsections 10(4) and (5) of the *IA*. Applying the two-part test to the children of women whose membership was transferred to another band under section 14 of the former *IA* is not inconsistent with the *IA* and falls within the range of possible, acceptable outcomes.

(2) Was the Committee's decision unreasonable because a contextual analysis does not support the two-part test?

[64] The Applicants argue that the Committee's decision is also unreasonable because it obliges them to apply for membership in the Band. This argument rests on two critical assumptions. First, that there is a structural distinction in the *Code* between persons who have a right to be members and those who may apply; under this distinction, the former need not apply to be members of the Band. The second assumption is that the Applicants were not obliged to apply because they fell within the scope of section 7 of the *Code*.

[65] It is sufficient to deal with this question by addressing the second assumption. Section 7 of the *Code* requires that, to be entitled to Band membership, children must have at least one natural parent that had or was entitled to have Band membership. The word "children" in section 7 must be read harmoniously with section 2 of the *Code*, which defines child to mean "any individual who has not reached the age of 18". In interpreting the meaning of "children" in section 7, it was reasonable for the Committee to rely on the definition of "child" in section 2.

[66] By the time the *Code* was ratified, on June 25, 1987, the Applicants were not within the scope of section 7 of the *Code* as they had already reached the age of 18. Since they did not fall within the ambit of section 7 when the *Code* was established (nor when they requested to become members of the Band in 1994 and 1998), they were not relieved of the obligation to apply for membership in the Band.

[67] This approach is also reasonable in light of section 13 of the *IA*, which provides that no person is entitled to have his name entered at the same time on more than one band list. Ms. Norris was a member of HFN until 1994 and Mr. Norris, a member of HFN until 1997. It is difficult to understand how the Applicants could be automatically entitled to be entered on the List without application if (i) they were already members of HFN, and (ii) the *IA* prevented them from being members of more than one band.

[68] The Committee's decision is not unreasonable; in that, it required the Applicants to apply for membership. The question of whether persons falling within section 7 of the *Code* are exempt from the obligation to apply for Band membership is immaterial in relation to the Applicants, who were never within the scope of that provision.

(3) Was the Committee's decision unreasonable because the two-part test cannot be read harmoniously with the scheme of the *Code*?

[69] The preamble to the *Code* identifies three inter-linked objectives for the Band's membership rules: (i) to protect cultural integrity and social harmony; (ii) to maintain and enhance economic stability; and, (iii) to ensure continued peace and good order among the members of the Band. It is telling that the Applicants, in arguing that the two-part test fractures the Band's cultural integrity by

arbitrarily distinguishing between individuals over and under the age of 18, only cite the first objective.

[70] The objective of preserving cultural integrity and social harmony should be read in light of the objective to maintain and enhance economic stability. Indeed, the language of the *Code* combines these into a single objective, suggesting that they illuminate one another: "[T]he objective of the [*Code*] is to protect the cultural integrity and social harmony along with maintaining and enhancing economic stability ..." [Emphasis added]. By contrast, the third objective is expressed separately.

[71] The first and second objectives suggest that the age component of the two-part test is reasonable, especially if one considers section 10 of *Code*. The Collins Affidavit stresses that intertribal transfers by adults who already had a home and life on the reserve of another band exert undue pressure on the Band's resources and that section 10 requires these individuals to undergo "a process to prove that they were truly interested being part of the Matsqui community" (at para 3). When it is read in conjunction with the provision for intertribal transfers in section 10 of the *Code*, the two-part test is consequently consistent with the objective of maintaining economic stability while preserving cultural integrity and social harmony.

[72] The interaction of sections 7 and 10 demonstrates how the Band has elected to balance its objective to protect cultural integrity and social harmony and its objective to maintain economic stability. Economic stability is maintained by ensuring that only those adult applicants who can demonstrate a true interest in joining the Band by meeting the requirements under section 10 are

entered on the List. Cultural integrity and social harmony, on the other hand, is protected by ensuring that persons who are members of another band who feel some affiliation with the Band may be entered on its List under the intertribal transfer provisions. In light of the Band's limited resources, this balance falls within the range of possible, acceptable outcomes.

(4) Is the Committee's decision unreasonable because the two-part test gives rise to "internal absurdities" in the *Code*?

[73] The Committee's application of the two-part test to the Applicants does not give rise to any internal absurdities in the *Code* that would render the decision unreasonable. This Court has found that it is not unreasonable to apply the two-part test to adults applying for an inter-tribal transfer if those adults do not have an automatic entitlement to Band membership under section 11 of the *IA*.

[74] It is true that persons under the age of 18 belonging to one band may not always have sufficient maturity to understand the significance of membership in another band and to decide whether or not to become a member of that band. The Band, however, should not be expected to accommodate members of another band who decided to join the Band at a later stage in their lives.

[75] In *Grismer v Squamish Indian Band*, 2006 FC 1088, 299 FTR 268, Justice Luc Martineau's discussion of an age limit imposed on the membership of adopted children in another band's membership rules helps to uncover some of the rationale for the age limit in section 7 of the *Code*: "The Squamish Nation decided that only children under the age of eighteen were to be eligible to apply for membership. The Membership Committee was of the view that in order to have a sufficient cultural tie to the Squamish to overcome the lack of a bloodline connection, the child

should not only have to be adopted by two Squamish members but should also be raised in the Squamish community" (at para 81).

[76] Although these Applicants do have an obvious bloodline connection, they were raised in the HFN community, which, according to the Collins Affidavit, has some differences (particularly, linguistic differences) from the Band. It is not unreasonable for the Band to take the view that a person seeking membership under section 7 of the *Code* should have a sufficient cultural tie to the Band. It is within the range of possible and acceptable outcomes for the Band to require that such persons join the Band while they are still young enough to be raised in order to strengthen these cultural ties.

[77] This Court agrees with Justice Martineau in *Grismer*, above, that, in the absence of a legal prohibition, this Court should not "second guess" the decision of a Committee whose membership rules were "duly adopted after being discussed and agreed upon by the members" of a band (at para 82).

[78] The provisions of the *Code* cited by the Applicants in support of this argument (subsections 12(5), 13(1), and (2)) do not assist the Applicants. These provisions address the circumstances of individuals who were already members of the Band but were removed from its List. The Applicants, by contrast, were never Band members before they applied to join the Band in 1994 and 1998. The Band alleges that persons falling within the scope of subsections 12(5), 13(1), and (2) remain part of its decision-making process and that they usually have had direct exposure to its culture and have

been part of it during some portion of their lives. It is not unreasonable to adopt specific membership reinstatement rules that would apply to this group.

IX. Conclusion

[79] For all of the above reasons, the Applicants' application for judicial review is dismissed. Due to the nature of the issues, therein, no costs are awarded.

JUDGMENT

THIS COURT ORDERS that the Applicants' application for judicial review be dismissed.

No costs be awarded.

"Michel M.J. Shore"

Judge

ANNEX "A"

***Indian Act*, RSC, 1985**

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

...

(*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

(c.1) that person

(i) is a person whose mother's name was, as a result of the mother's marriage, omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under paragraph 12(1)(*b*) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read

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

[...]

(*c*) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)*a*)(iv), de l'alinéa 12(1)*b*) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

(c.1) elle remplit les conditions suivantes :

(i) le nom de sa mère a été, en raison du mariage de celle-ci, omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu de l'alinéa 12(1)*b*) ou en vertu du sous-alinéa 12(1)*a*)(iii) conformément à une ordonnance prise en vertu du paragraphe

immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions,

109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions,

(ii) is a person whose other parent is not entitled to be registered or, if no longer living, was not at the time of death entitled to be registered or was not an Indian at that time if the death occurred prior to September 4, 1951,

(ii) son autre parent n'a pas le droit d'être inscrit ou, s'il est décédé, soit n'avait pas ce droit à la date de son décès, soit n'était pas un Indien à cette date dans le cas d'un décès survenu avant le 4 septembre 1951,

(iii) was born on or after the day on which the marriage referred to in subparagraph (i) occurred and, unless the person's parents married each other prior to April 17, 1985, was born prior to that date, and

(iii) elle est née à la date du mariage visé au sous-alinéa (i) ou après cette date et, à moins que ses parents se soient mariés avant le 17 avril 1985, est née avant cette dernière date,

(iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted ...

(iv) elle a eu ou a adopté, le 4 septembre 1951 ou après cette date, un enfant avec une personne qui, lors de la naissance ou de l'adoption, n'avait pas le droit d'être inscrite; [...]

…

[...]

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its

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

intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

décider de cette appartenance, elle y est autorisée par la majorité de ses électeurs.

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

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

(*a*) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and

a) après avoir donné un avis convenable de son intention de ce faire, fixer les règles d'appartenance à ses effectifs;

(*b*) provide for a mechanism for reviewing decisions on membership.

b) prévoir une procédure de révision des décisions portant sur l'appartenance à ses effectifs.

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

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

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the

(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.

rules came into force.

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

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

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

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

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

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

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

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

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

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

(8) Where a band assumes control of its membership under this section,

(8) Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent

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

article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au ministre a été donné en vertu du paragraphe (6); les additions ou retranchements effectués par le registraire à l'égard de la liste de la bande après cette date ne sont valides que s'ils sont effectués conformément à ces règles.

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

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

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

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

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

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

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

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

conditions suivantes :

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

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

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

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

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

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

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

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

…

[...]

(3.1) A person is entitled to have the person's name entered in a Band List maintained in the Department for a band if the person is entitled to be registered under paragraph 6(1)(c.1) and the person's mother ceased to be a member of that band by reason of the circumstances set out in

(3.1) Toute personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour celle-ci au ministère si elle a le droit d'être inscrite en vertu de l'alinéa 6(1)c.1) et si sa mère a cessé d'être un membre de la bande en raison des circonstances prévues au sous-alinéa

subparagraph 6(1)(c.1)(i).

6(1)c.1)(i).

13. Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department.

13. Par dérogation aux articles 11 et 12, nul n'a droit à ce que son nom soit consigné en même temps dans plus d'une liste de bande tenue au ministère.

ANNEX "B"

Matsqui Band Membership Code

SHORT TILE …

2. For the purpose of this code:

DEFINITIONS

...

CHILD means any individual who has not reached the age of 18

…

MEMBERSHIP CRITERIA

…

All other Children **7.** Subject to sections 4, 6(a)(b), 8, 9(2) and 9(3) of this code, children must have at least one natural parent that had or was entitled to have Matsqui Band membership, whether living or deceased, to be entitled to Matsqui membership.

…

APPLICATION FOR MEMBERSHIP

…

Intertibal Transfers 10. Membership may be granted to a member of another Indian Band, providing the applicant:

(a) renounces his membership in his former Band, and;
(b) agrees to a probationary period of two years prior to enrollment during which time the applicant must attend Matsqui Band meetings, social and cultural events to better learn and understand the Matsqui way of life, and;
(c) receives consent of 75% of the eligible electors of the Band at a referendum held for that purpose.

…

LOSS OF MEMBERSHIP

Transfers

12. …

Erroneous Membership

(2) Any person whose name was wrongfully entered on the Matsqui Band list through error, omission, oversight, or any other reason shall be removed from that list and shall be considered never to have been a Matsqui Band member.

…

RENOUNCEMENT OF MEMBERSHIP

Voluntary

13. (1) A Matsqui member may renounce his membership upon reaching the age of majority.

Children

(2) A Matsqui member who has not reached the age of majority may have their membership renounced by his or her parents or guardians, however, the child is eligible for reinstatement upon reaching the age of majority.

…

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-654-12
STYLE OF CAUSE:	BIBIANA NORRIS AND CLINTON NORRIS v MATSQUI FIRST NATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	December 6, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	December 12, 2012

APPEARANCES:

Michelle S. Jones	FOR THE APPLICANTS
Stan H. Ashcroft	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lawson Lundell LLP Vancouver, British Columbia	FOR THE APPLICANTS
Ashcroft & Company Vancouver, British Columbia	FOR THE RESPONDENT