

Date: 20080211

Docket: A-45-07

Citation: 2008 FCA 52

**CORAM: NOËL J.A.
SHARLOW J.A.
RYER J.A.**

BETWEEN:

ERMINESKIN CREE NATION and ERMINESKIN TRIBAL COUNCIL

Appellants

and

GEORGE LESLIE MINDE

Respondent

Heard at Edmonton, Alberta, on January 14, 2008.

Judgment delivered at Ottawa, Ontario, on February 11, 2008.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

**SHARLOW J.A.
RYER J.A.**

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal of a decision of Lemieux J. of the Federal Court (the “Applications Judge”), granting the respondent’s (“the respondent” or “Mr. Minde”) judicial review application and quashing the resolution adopted by the Ermineskin Tribal Council (the “Tribal Council”) on December 4, 2005, confirming that Mr. Minde had vacated his office as Chief pursuant to the Ermineskin Tribal Constitution, on the basis that the Tribal Council had adopted this resolution without affording Mr. Minde the right to be heard.

[2] The appellants contend that Mr. Minde's judicial review application was directed against the wrong decision since the determination that he had vacated his office was not made by the Tribal Council but by the Ermineskin Elders Council (the "Elders Council"). They submit that the authority to dismiss Mr. Minde was within the exclusive authority of the Elders Council.

[3] The parties proceeded before the Applications Judge on the basis that the applicable legislation is the Ermineskin Tribal System Constitution and Bylaws, as appended to the affidavit of J. Wilton Littlechild, Q.C., a lawyer acting for the Ermineskin Cree Nation (the "Band Constitution") (Appeal Book, Vol. II, p. 400). The Applications Judge in the course of his reasons referred in particular to the Bylaw 83-01, as amended, and in particular Divisions A and B which deal respectively with the Rules of Conduct for the Chief and Council members and with the qualification, appointment and duties of members of the Elders Council. The relevant portions of Bylaw 83-01 are reproduced as Appendix "A" to this decision.

RELEVANT FACTS

[4] Mr. Minde was the Chief of the Ermineskin Cree Nation. He was first elected in 2002 and again on August 31, 2005, after the process which led to his dismissal was commenced but before it was completed.

[5] Since 1983, the Chief and Tribal Council members of the Ermineskin Cree Nation are chosen by Band custom and therefore Band elections are not governed by the provisions of the *Indian Act* (Sections 74-79).

[6] In apparent compliance with section 12 of the Rules of Conduct, Mr. Minde entered into a Memorandum of Agreement with the Elders Council (then called the Elders Senate) whereby he agreed (amongst other things) to the following (Appeal Book, Vol. II, p. 318):

As Chief, I have myself knowledge about the responsibilities to the Ermineskin Cree Nation Membership and hereby agree to my office becoming vacant for violations to rules as set out with and in the Ermineskin Tribal System. ...

Section 12 requires that the Chief and councillors upon being sworn and assuming their function signify their agreement to abide by the Rules of Conduct by signing this Memorandum in public at a general membership meeting. According to the Affidavit of George Ermineskin, the Memorandum of Agreement was signed when Mr. Minde swore his oath of office (Appeal Book, Vol. II, p.2, para 3). It is not clear whether this took place at the onset of Mr. Minde's first or second term.

[7] On August 8, 2005, the Tribal Council passed a resolution extending the composition of the Elders Council to all Elders of the Ermineskin Cree Nation and the quorum to 9. At the time when this resolution was passed, Bylaw 83-01, Division B (Sections 1(b) and 2(e)) provided for a composition of 5 with a quorum of 3.

[8] On August 12, 2005, prior to Mr. Minde's re-election, an Elders Council was constituted during a meeting attended by 34 Elders (out of 77), and 7 of the 9 members of the Tribal Council. Relying on the aforesaid resolution modifying the composition and quorum of the Elders Council, 9 Elders (and 3 alternates) were selected amongst all the Elders of the Ermineskin Cree Nation to sit as members of the Elders Council and conduct an investigation into alleged improprieties by Mr.

Minde and another member of the Tribal Council in a financial transaction involving Ermineskin Cree Nation funds (Reasons, para. 35).

[9] The exact words used by the Elders Council to describe its mandate are as follows (Appeal Book, Vol. II, p. 608):

..., the appointed Elders Council (quorum of 9) shall base on its findings, pursue the following disciplinary action:

- a. As per the Bylaw Providing for Conduct of the Ermineskin Council No. E83-01 Section B paragraph 2,
- b. Bylaw E86-01 Ermineskin Tribal Election Custom (Election Regulations) Section 28 paragraph G.

A final report shall be presented along with the facts and infractions listed which may enforce the Elders Council to enact the disciplinary action upon the said individuals responsible for the said infractions.

[10] The transaction under investigation involved the issuance of a series of cheques signed by Mr. Minde and co-signed by Bob Small, an elected Tribal councillor at the time, totalling \$149,000.00. The amount was used towards the purchase of new equipment. It is alleged that the payment was made at an inflated price to an entity for which Mr. Minde's uncle worked as a commissioned agent, and had the potential of benefiting Mr. Minde. To this day, the purchased equipment has not been received and the payment has not been recovered.

[11] Bob Small, the councillor who co-signed the cheques comprising the payment of \$149,000.00, voluntarily appeared before the appointed members of the Elders Council when he

was requested to do so. He answered the questions put to him and was eventually removed from office and barred from seeking elected office for a period of 10 years.

[12] The salient actions taken by the Elders Council in the course of this investigation and their attempts to obtain Mr. Minde's version of the events are summarized below:

- a) On August 23, 2005, the appointed members sent Mr. Minde a Notice of investigation/suspension stating that "Upon reviewing the information regarding the process in which the \$149,000 transaction occurred ... the nine appointed Ermineskin Elders Council do hereby suspend [Chief Minde and Bob Small] suspending all authorities and powers and or privileges effective immediately such suspension shall be without pay until such time as the investigation has been completed and "pursuant to section B, Elders Council paragraph II duties [of the Code of Conduct] directed the Tribal Council to proceed with the direction immediately to enforce this suspension effective immediately." (Appeal Book, Vol. II, p. 324);
- b) On August 24, 2005, the appointed members issued Chief Minde a first invitation to appear before them. On September 1, 2005, a second notice to appear was served on Mr. Minde (Appeal Book, Vol. II, pp. 325, 326);
- c) On September 8, 2005, the Chairman of the Elders Council, George P. Ermineskin, wrote to Mr. Minde reminding him that he failed to appear on two occasions (Appeal Book, Vol. II, p. 330);
- d) On September 22, 2005 the Chairman of the Elders Council gave Mr. Minde a further notice to attend and advised him that if he did not appear, he would forfeit his position as Chief. A further letter was sent on October 17, 2005 advising Mr. Minde that he was still under suspension and that he was required to appear before the appointed members no later than October 31, 2005. This was followed by a final notice to appear issued on October 27, 2005 (Appeal Book, Vol. II, pp. 330, 342 and 352);
- e) On October 31, 2005, the appointed members gave Mr. Minde notice that he had vacated his office as Chief (Appeal Book, Vol. II, p. 358);
- f) On November 14, 2005, the Elders Council advised Mr. Minde of the following action:

Therefore, we the appointed Elders Council are requesting that the Ermineskin Tribal Council enforce this decision also by Band Council motion within the true context of

their authority vested by the Ermineskin Constitution, policies and/or bylaws, customs and traditions of the Ermineskin First Nation (Appeal Book, Vol. II, p. 361).

[13] There is no evidence that Mr. Minde responded to any of the communications from the Elders Council.

[14] On December 4, 2005, at a special meeting of the Tribal Council which Mr. Minde did not attend and of which he had no notice (Affidavit of Mr. Minde, Appeal Book, Vol. I, p. 50, para. 9), a resolution (the “December 4 Band Council Resolution”) was passed in the following terms:

Be it resolved that at a duly convened special meeting, we the Ermineskin Tribal Council make the following decision in accordance to the Council Code of Conduct within the Ermineskin Tribal Constitution;

Whereas, the Ermineskin Tribal Council has accepted the recommendation by the Ermineskin Elders Council to implement Section 15 on October 31, 2005 and;

Whereas, George L. Minde has failed to appear before the Ermineskin Elders Council within the specified timeline allotted and;

Therefore, the Ermineskin Tribal Council now exercise its authority in reference to Section 11, where George L. Minde has vacated his position as Chief, in accordance to violation of Sections: 4, 5 & 9 of the Council Code of Conduct within the Ermineskin Tribal Constitution.

[15] On December 16, 2005, the Ermineskin Cree Nation and the Tribal Council filed a statement of claim in the Alberta Court of Queen's Bench against Mr. Minde alleging the following:

- i.** At the time of taking his oath of office, he signed an agreement dated October 27, 2004 with the Ermineskin Elders Senate whereby he agreed in the event he violated the Rules of the Ermineskin Tribal System, his office would be deemed to become vacant;
- ii.** He breached the Code of Conduct and thereby breached the agreement he signed on October 27, 2004;

- iii. He breached his fiduciary duty in his capacity of Chief in his dealings with an auto dealer and his involvement in the fraudulent purchase of heavy equipment at inflated values;
- iv. He has committed a breach of trust by conspiring to have the ECN purchase the heavy equipment; and
- v. He is guilty of deceit and misrepresentation in his dealings with a Tribal member and in arranging for three cheques to be endorsed and turned over to the auto dealer without the knowledge and consent of the Tribal Council.

[16] On January 30, 2006, Mr. Minde sought judicial review of the December 4 Band Council Resolution. He sought relief on the basis that it was adopted by the Tribal Council in breach of procedural fairness in that he was not given any notice of the Tribal meeting, did not know what action was being proposed and did not know the allegations made against him and had no opportunity to defend himself.

[17] On February 8, 2006, the Tribal Council obtained an interlocutory injunction from the Alberta Court of Queen's Bench (Belzil J.) preventing Mr. Minde from entering the Ermineskin Cree Nation offices and conducting financial transactions on behalf of the Ermineskin Cree Nation. In addition, Mr. Minde was ordered not to interfere with Ermineskin Cree Nation staff.

[18] On October 31, 2006, reasons were rendered by the Applications Judge in this case holding that the Tribal Council had breached its obligations of procedural fairness in adopting the December 4 Band Council Resolution. However, he postponed the issuance of any order pending further submissions by the parties.

[19] On December 20, 2006, the Applications Judge ordered that the December 4 Band Council Resolution be quashed.

[20] However, on April 11, 2007, Pelletier J.A. of the Federal Court of Appeal ordered a stay of the Applications Judge's decision until the present appeal was heard and disposed of (2007 FCA 16). He ruled that irreparable harm had been established for the following reasons (para. 4):

... The appellants applied to the Alberta Court of Queen's Bench for an injunction restraining the respondent from entering the Band office. [Mr. Minde] obtained an adjournment of that application upon giving the Court an undertaking to stay away from the Band office pending the disposition of the injunction application. [Mr. Minde] breached his undertaking, entered the Band office and arranged for the payment to Band members of approximately \$1.8 million, an expenditure which was not authorized and for which no budget existed. There were serious financial repercussions for Band operations. Largely on the strength of this incident, Mr. Justice Belzil decided that the appellants would suffer irreparable harm if an injunction was not granted. I am of the same view with respect to the motion for a stay of execution which is before me.

[21] As matters presently stand, the December 4 Band Council Resolution confirming that Mr. Minde has vacated the office of Chief remains in effect, as does the injunction issued by the Alberta Court of Queens Bench preventing Mr. Minde from entering the Band offices and conducting financial transactions on behalf of the Band.

FEDERAL COURT DECISION

[22] In assessing whether the Tribal Council was in breach of the rules of procedural fairness, the Applications Judge applied the standard of correctness. He concluded that the Tribal Council had violated procedural fairness in failing to hear Mr. Minde before adopting the December 4 Band Council Resolution (Reasons, para. 44):

Although it is well-recognized the content of the rules of procedural fairness vary depending on the circumstances, in my view, there can be no question the applicant was entitled to procedural fairness in respect of the [Band Council Resolution “BCR”] of December 4, 2005 which declared that, in accordance to the Tribal Council Code of Conduct within the Ermineskin Tribal Constitution, Chief Minde had vacated his position as Chief. His right to remain in office was directly affected. For this proposition, I need only cite the well-known decisions of the Supreme Court of Canada in *Nicholson v. Haldeman-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311, *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 and *Lakeside Colony of Hutterian Bretherin v. Hofer*, [1992] 3 S.C.R. 165.

[23] In so holding, the Applications Judge dismissed the appellants’ contention that the decision to dismiss Mr. Minde had been made by the Elders Council, which afforded Mr. Minde numerous opportunities to be heard, and that Mr. Minde sought judicial review of the wrong decision. According to the Applications Judge the authority to discipline the Chief and declare his office vacated rested with the Tribal Council.

[24] In coming to this conclusion, the Applications Judge first relied on four factors that are extrinsic to the Band Constitution pursuant to which Mr. Minde was held to have vacated his office as Chief (Reasons, paras. 53-66):

1. there was no evidence that the amendment to the composition and quorum of the Elders Council was ever ratified by a majority of the general membership of the Ermineskin Cree Nation and so, the actions of the Elders Council were invalid;
2. the evidentiary record showed that the appointed members to the Elders Council did not consider that they had the authority to issue a binding decision in respect of Mr. Minde;
3. the Tribal Council was estopped from advancing before the Court the proposition that the Tribal Council was not the decision-maker since they had argued the contrary before the Alberta Court of Queen’s Bench and;
4. the wording of the Band Council Resolution showed that the Tribal Council was acting pursuant to its own authority to dismiss Mr. Minde as Chief.

[25] The Applications Judge then turned his attention to the relevant provisions of the Band Constitution. He noted that matters of tenure to the elected offices of the Chief and Council members were designed to be handled at the first level by the Tribal Council itself with an appeal to the Elders Council, whose decision would be final. This suggests that the Elders Council was empowered to decide in the first instance that the Chief has vacated his office (Reasons, paras. 67, 68).

[26] The Applications Judge did note that the Rules of Conduct contain provisions to the effect that the Chief and any councillor are considered to have abandoned their duties and vacated their office upon performing certain prohibited acts, without more. However, he inferred that a right to a hearing before the Tribal Council also exists in such circumstances (Reasons, para. 69). Finally, he held that no effect was to be given to the agreement signed by Mr. Minde upon becoming Chief of the Ermineskin Cree Nation (Reasons, para. 71).

POSITION OF THE PARTIES

[27] In support of their appeal, the appellants contend that the Applications Judge failed to give effect to the Ermineskin Tribal Constitution and the Rules of Conduct applicable to the Chief and Council. In particular, the appellants submit that the Elders Council has exclusive authority to monitor and discipline the Chief, as necessary from time to time (Bylaw 83-01, Division B, Section 2(a)), and that Mr. Minde was held to have vacated his office pursuant to the exercise of that authority.

[28] According to the appellants, the subsequent resolution adopted by the Tribal Council confirming that Mr. Minde had forfeited his office was only required for enforcement purposes as the communication of November 14, 2005 makes clear (see para. 12 f) above). However, the decision was that of the Elders Council, and was binding on everyone including the Tribal Council and its members. The appellants contend that the Applications Judge erred in concluding otherwise.

[29] The appellants further allege that the Applications Judge committed an error in law when he held that the Elders Council's actions were invalid by reason of its composition and quorum. According to the appellants the composition and quorum provided for in Bylaw 83-01, Division B is directory and no injustice can result from extending the composition of the Elders Council to include all Elders and operating with a quorum of 9.

[30] Finally, the appellants contend that the Applications Judge further erred, when he held that the Memorandum of Agreement, signed by Mr. Minde when he took his oath, had only ceremonial value.

[31] Mr. Minde for his part raises as a preliminary matter the argument that the decision of the Elders Council, if it was the decision-maker, is not amenable to judicial review since the Elders Council is not a federal board commission or other tribunal within the meaning of section 18 of the *Federal Courts Act*. Otherwise, Mr. Minde supports the decision of the Applications Judge, and his conclusion that the authority of the Elders Council does not extend to terminating or disciplining the chief.

ANALYSIS AND DECISION

[32] The standard of review of the decision of the Applications Judge is correctness with respect to questions of law and reasonableness with respect to findings of mixed fact and law (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). It is well established that a review of whether procedural fairness was followed in a given situation is evaluated on the standard of correctness (*Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para. 100). The question to be answered in this appeal is whether it was open to the Applications Judge to hold that the decision declaring that Mr. Minde had vacated his office was that of the Tribal Council and not the Elders Council. For the reasons that follow, I am of the view that this question ultimately stands to be decided on the proper construction of the Band Constitution, an exercise which calls for a standard of correctness.

[33] With respect to Mr. Minde's preliminary argument that the Elders Council, if it was the decision-maker, is not amenable to judicial review because it is not a federal board, commission or other tribunal within the meaning of section 18 of the *Federal Courts Act*, I need only say that the jurisdiction of the Federal Court under section 18 does not depend on form, but is based on the authority to decide. To the extent that the Elders Council is empowered to and did terminate Mr. Minde as Chief pursuant to the Band Constitution, its decision can be reviewed pursuant to section 18.

[34] In the course of his reasons, the Applications Judge cautioned that construing the Band Constitution was difficult and any conclusion had to be reached with a caveat given that it had gaps, and needed to be updated. He added (Reasons, para. 66):

... Indeed, that was the view expressed by Mr. Littlechild when First Reading was given to a proposed updating of the Custom Law providing for the conduct of the Ermineskin Council. At respondents' record, page 84, Mr. Littlechild stated "this bylaw went back to 1983 and needed to be updated in a manner that makes sense and was practical."

[35] Because of these difficulties, which are very real, the Applications Judge first looked to factors extrinsic to the Band Constitution to arrive at his decision. First, he noted that the resolution of August 8, 2005, purporting to extend the composition and quorum of the Elders Council was never ratified by the membership of the Band. As a result the Elders Council operated in breach of the requirements of Bylaw 83-01, which required a composition of 5 members and a quorum of 3. The Applications Judge went on to hold that this requirement was mandatory (as opposed to directory), and that accordingly the actions of the Elders Council were invalid from start to finish (Reasons, paras. 53-58).

[36] In my respectful view, this would be a relevant consideration if the decision under review was that of the Elders Council. Furthermore, I question the Applications Judge's conclusion that the actions taken by the Elders Council in the course of inquiring into Mr. Minde's financial dealings are invalid. His exact reasoning is that the actions in question were taken by an Elders Council composed of all the Elders of the Ermineskin Cree Nation operating with a quorum of 9, at a time when the mandatory requirement set out in Division B of Bylaw 83-01 provided for a composition of 5 with a quorum of 3 (Reasons, paras. 54, 55).

[37] The question whether a legal requirement is mandatory (as opposed to directory) such that actions which fail to comply are to be disregarded, must be analyzed in light of the purpose of the legislation under consideration and the particular action sought to be invalidated. The question to be answered in the present context is whether ignoring the actions taken by the Elders Council for failure to comply with Bylaw 83-01, promotes or defeats the object of the Ermineskin Tribal Constitution (see *Sparvier v. Cowessess Indian Band (T.D.)*, [1993] 3 F.C. 142 at para. 22 and the cases quoted at paras. 23, 24 and 25).

[38] The Applications Judge did not address this question. If he had, he might well have come to a different conclusion. I have in mind in particular the fact that based on this record, it seems that the broadening of the composition of the Elders Council to include all Elders, and the extension of the quorum from 3 to 9 was intended to give the Elders Council more legitimacy (not less) in light of the importance of the mandate undertaken. There is no evidence that the increase in the number of persons on the Elders Council, or the concurrent increase in the quorum was adopted for an improper purpose or that it caused or was intended to cause Mr. Minde prejudice. In these circumstances, I doubt that the actions of the Elders Council can be set aside on the sole ground that it performed its functions with an extended composition and quorum. However, this question need not be answered at this time given that the decision of the Elders Council is not the subject of the judicial review brought by Mr. Minde.

[39] The second extrinsic factor on which the Applications Judge relied is the state of mind of the members of the Elders Council. In his view, it is telling that the members did not consider that they

had the authority to make a final decision, since they considered that their decision had to be ratified by the Tribal Council (Reasons, paras. 59, 60).

[40] Along the same lines, the Applications Judge relied on the position taken by the appellants before the Alberta Court of Queen's Bench. He held that the appellants were estopped from taking the position that the Elders Council was the decision-maker in the proceeding before him given that they had taken a contrary position before the Alberta Court of Queen's Bench (Reasons, para. 63). In so holding, the Applications Judge was apparently referring to the following statement in the reasons of Belzil J. (2006 ABQB 118):

35. The [appellants] argue that [Mr. Minde] was removed as ECN Chief by virtue of passage of a resolution of the [Tribal Council] on December 4, 2005.

[41] Counsel for the appellants stands by this passage. His position has always been that the decision reached by the Elders Council to the effect that Mr. Minde had vacated his office had to be enforced by a resolution of the Tribal Council. He contends however that the decision of the Elders Council was final and binding on the Tribal Council. In my respectful view, the fact that the Elders Council considered that a resolution of the Tribal Council was necessary in order to enforce its decision does not resolve anything.

[42] Finally, the Applications Judge found that the wording of the December 4 Band Council Resolution indicates that the Tribal Council passed it in the exercise of its own authority to dismiss Mr. Minde as Chief (Reasons, para. 64). He emphasized that part of the resolution which reads:

“... the Tribal Council ... now exercise its authority in reference to Section 11, where George L. Minde has vacated his position as Chief, in accordance to violation of sections 4, 5 and 9 of the Council Code of Conduct within the Emneskin Tribal Constitution” ...

[43] This statement again begs the question as to whether the Tribal Council was giving effect to the binding decision of the Elders Council as the appellants contend, or whether it was exercising independent authority to follow (or not to follow) the decision of the Elders Council.

[44] In my respectful view, the issue in this case must ultimately be decided by reference to the Band Constitution. The question to be decided is which body – as between the Elders Council and the Tribal Council – had the legal authority to discipline the Chief and declare that he had ceased to hold office. The Applications Judge turned his attention to this question towards the end of his reasons (paras. 66-71). His reasoning for concluding that the Tribal Council was the decision-maker essentially rests on the fact that in a case of a suspension from elected office pursuant to sections 7, 8 and 9 of the Rules of Conduct provided pursuant to Bylaw 83-01 (see Appendix “A”), there is a right to hearing before the Tribal Council as provided in section 10 with an appeal to the Elders Council pursuant to section 15 (Reasons, para. 68). If that is so, the Elders Council cannot have been the decision-maker in the present matter.

[45] However, the right of appeal provided by section 15 only applies with respect to “suspensions” (or reprimands) and we are not dealing with a suspension in this case. Sections 7 and 9 are the only provisions which call for a suspension as the only sanction, and the right to a hearing before the Tribal Council is restricted to those two provisions. Significantly, no right to a hearing

before the Tribal Council is provided with respect to the violation of sections 8 or 11, both of which can result in the person concerned losing their office.

[46] The Applications Judge overcame this obstacle by inferring that a right to a hearing before the Tribal Council must nevertheless exist in cases which can lead to the loss of an office (Reasons, para. 69). He drew that inference from section 32(a) of Bylaw E86-01 which deals with “the establishment and election of the Band Council”:

32(a) Pursuant to the Ermineskin Tribal System, Rules of Conduct Sections (8) (9) (10), an elected Chief or Council member shall be removed from office upon the following conditions:

- i.** A member of the Tribal Council has deceased.
- ii.** A member of the Tribal Council submits a formal resignation in writing.
- iii.** A member of the Tribal Council has been convicted of a criminal offence.
- iv.** A member of the Tribal Council has had no involvement in the operations of the tribe without a valid reason for four (4) consecutive working days.

[47] After referring to this provision and quoting the introductory paragraph, the Applications Judge said (Reasons, para. 69):

... To make sense of this provision, it would appear that Bylaw E-86-01 has incorporated by reference the hearing and decision-making authority of Tribal Council to remove Chief and Council subject to appeal to the Elders Council.

[48] I would first observe that if that were so, the recourse available to Mr. Minde in this case would have been an appeal to the Elders Council. More importantly however, a hearing before the

Tribal Council does not have to be inferred to make sense of this provision. The causes for removal under paragraphs i) and ii) fall outside the authority of the Elders Council since they are not matters of discipline. The causes set out in paragraphs iii) and iv) are matters of discipline that can lead to the potential loss of an elected office and therefore come under the exclusive authority of the Elders Council pursuant to section 2(a) of Division B of the Rules of Conduct. In such cases, the Rules of Conduct do not provide for a hearing before the Tribal Council.

[49] Section 2(a) of Division B of the Rules of Conduct is the only provision which allows for the oversight of the Chief and Council in matters which can lead to a loss of office. It provides:

2(a) The Elders Council shall advise the Chief and Council, and monitor the conduct of the Chief and Council with authority to discipline the Chief and Council as necessary from time to time, as per Memorandum of Agreement attached as Appendix B.

(My emphasis)

[50] In this instance, Mr. Minde signed a Memorandum of Agreement with the Elders Council (at the time known as the “Elders Senate”) indicating that he understood that his office would become vacant if he failed to abide by the Rules of Conduct (see para. 6 above). While Mr. Minde now suggests that the agreement was not contemplated by the Rules of Conduct, there is no other explanation for its existence.

[51] The Applications Judge also dismissed the Memorandum of Agreement as having no significance. He held that it was signed for ceremonial purposes (Reasons, para. 71). With respect, the fact that the Memorandum of Agreement was entered into during Mr. Minde’s swearing in ceremony does not alter its significance. There is no basis for disregarding the Memorandum of

Agreement and Mr. Minde's recognition during one of his two mandates that his tenure as Chief was subject to the authority of the Elders Council to discipline him as necessary pursuant to section 2(a) of Division B of the Rules of Conduct.

[52] Aside from the authority which section 2(a) grants to the Elders Council to discipline the Chief and Council, there is no provision in the Band Constitution authorizing any other Ermineskin government body to oversee the Chief and Council members with respect to matters which can lead to a loss of office.

[53] When regard is had to the Rules of Conduct as a whole and the particular provisions that we have reviewed, it becomes clear that the authority to discipline the Chief, in relation to violations which can lead to a loss of office, belongs to the Elders Council. The initial decision in that regard and any subsequent review or reconsideration of that decision are within the exclusive jurisdiction of the Elders Council.

[54] In my respectful view, the Applications Judge erred when he construed the Band Constitution as granting the Tribal Council the authority to decide Mr. Minde's fate. Only the Elders Council had that authority and it follows that Mr. Minde directed his judicial review application against the wrong decision. Nothing of course prevents Mr. Minde from seeking an extension of time to attack the decision of the Elders Council if he wishes to do so.

[55] For these reasons, I would allow the appeal, set aside the decision of the Applications Judge, and rendering the decision which he ought to have rendered, I would dismiss Mr. Minde's judicial review application with costs in favour of the appellants.

“Marc Noël”

J.A.

“I agree
K. Sharlow J.A.”

“I agree
C. Michael Ryer J.A.”

APPENDIX "A"

A. Rules of Conduct - Ermineskin Tribal Constitution, (Bylaw 83-01), as amended

1. The Chief and Council of the Ermineskin Cree Nation shall have salaries established through the Ermineskin Tribal budget process.
2. The Chief and Council shall receive no other form of salary from Tribal resources.
3. The Chief and Council shall not receive honoraria for committee meetings during the day concerning Ermineskin business. Salaries are in lieu of such payments.
4. No individual or Councillor shall authorize or commit funds on behalf of the Ermineskin Cree Nation or Council except by decision in a quorum of Council at a regular Council meeting and such expenditure or commitment must be delegated to the Tribal administrator or, alternatively, limits must be set on the authority of Chief and Council at a regularly scheduled Council meeting, and ratified by a general membership meeting (a) the Chief shall have authority to commit funds not exceeding \$500.00 providing the expenditure falls within the following criteria:
5. The Chief and Council dealing with any issue that has the potential of benefiting himself or any member of his immediate family shall refrain from taking part in any discussion or decision related to that issue and shall refrain from voting.
6. The Council shall attend all regular, special, or general meetings called by the Chief unless Council members are ill or have permission by the Chief to be absent from the meeting.
7. Any Ermineskin Tribal Council Member, including the Chief, who misses a regular meeting without leave, shall be removed from the Council payroll and Council fees shall be suspended until Council decided pursuant to Section 10 of this Custom Law
8. Any Councillor including the Chief who misses three (3) consecutive regular meetings without leave or permission shall be considered to have abandoned their duties and their office becomes vacant.
9. Any Councillor including the Chief shall be immediately suspended for conduct unbecoming his duties as Councillor, also his salary, travel and Council fees shall be suspended until Council decides pursuant to section 10 below.
10. Any violation for 7 and 9 shall get automatic suspension and the Council member shall receive written notice thereof, upon receipt of which he has right of hearing to counsel. Council can reinstate suspended person with or without pay by three/four vote.
11. Any Councillor breaking any three (3) rules of conduct shall have their Council fee suspended and considered to have abandoned their duties thereby vacating their office.
12. Chief and Councillors shall signify their agreement to abide by these rules of conduct during their term of office when sworn in as Chief or Councillor as per attached as

Appendix A to this custom law and a Memorandum of Agreement signed in public at a general membership meeting.

13. ...

14. ...

15. A Councillor has the right to appeal on any suspension of reprimand resulting from violations of the above rules of conduct. The appeal will be directly to the Ermineskin Council of Elders as established pursuant to clause B below whose decision on these matters shall be final.

B. Elders Council

1. Qualification and appointment:

- (a) The Elders Council shall be appointed from a list of candidates submitted by the Elders
- (b) The Elders Council shall consist of five (5) Elders from the Ermineskin Membership;
- (c) An Elder is a person who is sixty (60) years of age and is respected by the community;
- (d) An Elder shall be replaced upon resignation or for conduct unbecoming by the Elders;
- (e) The Elders Council shall be knowledgeable of the Ermineskin Tribal Council.

2 Duties:

- (a) The Elders Council shall advise the Chief and Council, and monitor the conduct of the Chief and Council with authority to discipline the Chief and Council as necessary from time to time, and as per Memorandum of Agreement attached as Appendix B.
- (b) The Elders shall have ex-officio representation on all committees for the Ermineskin Tribal System, accepting thereto all elections.
- (c) ...
- (d) ...
- (e) A quorum shall consist of three (3) Elders
- (f) ...

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-45-07

STYLE OF CAUSE: Ermineskin Cree Nation and
Ermineskin Tribal Council and
George Leslie Minde

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: January 14, 2008

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: SHARLOW J.A.
RYER J.A.

DATED: February 11, 2008

APPEARANCES:

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Mr. James L. Dixon, Q.C. FOR THE RESPONDENT

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