

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20110310**

**Docket: A-5-10**

**Citation: 2011 FCA 96**

**CORAM: BLAIS C.J.  
SHARLOW J.A.  
STRATAS J.A.**

**BETWEEN:**

**CHIEF ALLAN GUSTAFSON, as representative of the Band Council  
of Whitesand First Nation, AND WHITESAND FIRST NATION**

**Appellants**

**and**

**ELTON MITCHELL DIABO AND  
HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
as represented by THE ATTORNEY GENERAL OF CANADA, AND  
THE MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA**

**Respondents**

Heard at Toronto, Ontario, on March 10, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on March 10, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

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**REASONS FOR JUDGMENT OF THE COURT**

(Delivered from the Bench at Toronto, Ontario, on March 10, 2011)

**STRATAS J.A.**

[1] This is an appeal from the Judgment of Justice Barnes of the Federal Court concerning two applications for judicial review: 2009 FC 1250.

[2] The Band Council of Whitesand First Nation decided to revoke the membership of Mr. Diabo in the Whitesand First Nation. Two applications for judicial review then arose:

- *The judicial review of Mr. Diabo seeking reinstatement of his membership in the Whitesand First Nation (T-1868-07).* The Federal Court judge granted this application for judicial review, set aside the decision of the Band Council and ordered it to reinstate Mr. Diabo's membership. He found that Mr. Diabo's membership was taken away under an unfair process.
- *The judicial review of the Whitesand First Nation and Chief Gustafson seeking declaratory relief (T-2054-07).* In this application for judicial review, the Whitesand First Nation and Chief Gustafson sought a declaration that a 1986 Membership Code is valid. They also sought declarations that earlier Band Council resolutions granting Mr. Diabo membership were invalid. The Federal Court judge dismissed this application for judicial review, finding that the record before him was insufficient to determine the matter.

[3] In their notice of appeal in this Court, the appellants, Whitesand First Nation and Chief Gustafson (collectively "Whitesand"), placed before us essentially all of the issues that were before the Federal Court.

[4] However, that changed. Whitesand advised this Court that they were abandoning all grounds for appeal save one: they ask this Court to declare that the 1986 Membership Code is valid. On this

one remaining issue, only Whitesand has made submissions. Mr. Diabo does not challenge the validity of the 1986 Membership Code and the Minister takes no position.

[5] In our view, the appeal is moot and we should not exercise our discretion to hear it:

*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. Now that Mr. Diabo's membership in the Band is no longer a live issue before us, any pronouncement on the validity of the 1986 Membership Code would be academic. Further, we lack the necessary adversarial context to decide whether the 1986 Membership Code is valid. Only Whitesand is taking a position on that issue and, in substance, Whitesand is asking us to ratify its position. In exercising his discretion against hearing a moot appeal, Justice Sopinka, writing for the unanimous Supreme Court in *Borowski* observed (at page 365) that "the appellant seeks...to turn [the] appeal into a private reference." The same is true here.

[6] One day, a new membership controversy in the Band may arise. Should that happen, those whose memberships are revoked or questioned should have their day in court. They should be free to contest Whitesand's current view of the issue, offering evidence and submissions that are not presently before this Court. They should not find themselves faced with an academic ruling in this case.

[7] Therefore, we will dismiss the appeal, without costs.

"David Stratas"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-5-10

**(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE BARNES, DATED  
DECEMBER 7, 2009, IN FEDERAL COURT FILE NOS. T-1868-07 AND T-2054-07)**

**STYLE OF CAUSE:** CHIEF ALLAN GUSTAFSON, as representative of the Band  
Council of Whitesand First Nation, AND WHITESAND FIRST  
NATION v.  
ELTON MITCHELL DIABO AND HER MAJESTY THE QUEEN  
IN RIGHT OF CANADA, as represented by THE ATTORNEY  
GENERAL OF CANADA, AND THE MINISTER OF INDIAN  
AND NORTHERN AFFAIRS CANADA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** March 10, 2011

**REASONS FOR JUDGMENT  
OF THE COURT BY:** (BLAIS C.J., SHARLOW &  
STRATAS JJ.A.)

**DELIVERED FROM THE BENCH BY:** STRATAS J.A.

**APPEARANCES:**

Etienne G.D. Esquega	FOR THE APPELLANTS
Bradley Smith	FOR THE RESPONDENT ELTON MITCHELL DIABO
No Appearance	FOR THE RESPONDENTS ATTORNEY GENERAL OF CANADA AND THE MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA

**SOLICITORS OF RECORD:**

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FOR THE APPELLANTS

FOR THE RESPONDENT ELTON  
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