NATIVE LAW

VOLUME NO. 5

JUNE TO NOVEMBER 1978

Prepared by

Ava Kanner
Under Contract to the
Department of Indian and Northern Affairs
Assisted by Jeffrey Ross

B A N D

GUIDE TO USE

Volume 5 - Band

GUIDE TO USE:-

The cases reported in these volumes appear under their main subject at final instance and/or at all levels.

The Table of Contents lists the cases reported in the volume as well as related cases appearing in other volumes.

Volume IX contains resumés of all the cases with specific details noted, i.e. the cases referred to and the statutes considered in each judgment. The list of cases referred to notes only those cases which are reported in these volumes.

LIST OF VOLUMES

TABLE OF CONTENTS

BAND

SUBJECT BREAKDOWN

BAND

Membership

Bay v. R. (1974) F.C. 523;

Re Joseph Poitras (1957) 2 WWR 545;

Re Sampson Indian Band (1957) 21 WWR 455;

Re Wilson (1954) 12 WWR (N.S.) 676.

Status

Chisholm v. Herkimer (1909) 19 OLR 600;

Chisholm v. R. (1948) Ex. C.R. 370;

R. v. Cochrane (1977) 3 WWR 660;

Re Masset Band Council (1977) 2 WWR 93;

Mintuck v. Valley River Band (1977) 2 WWR 309; (1976) 4 WWR 543.

Council

Beauvais v. Delisle (1977) 1 F.C. 622;

Gabriel v. Canatonquin (1978) 1 F.C. 124;

Isaac v. Davey (1977) 2 S.C.R. 897; (1975) 5 O.R. (2d) 610.

Election of Chief

Smith v. R. and Manzer (1972) F.C. 561.

c/f: Reserve Lands

Logan v. Stynes, 20 D.L.R. (2d) 416

A-32-74

John Bay (*Applicant*)

v.

The Queen (*Respondent*)

Court of Appeal, Jackett C.J., Thurlow and Pratte JJ.—Ottawa, April 30 and May 1, 1974.

Judicial review—Registrar rejecting name for List of Indian Band—Not a "decision" within s. 28 of the Federal Court Act—Indian Act, R.S.C. 1970, c. I-6, ss. 5, 6, 7, 9, 11.

The applicant asked the Registrar under the *Indian Act* to add his name to a Band List. The Registrar's refusal was based on his view that the applicant was not entitled to be registered. Judicial review of the refusal was sought by the applicant under section 28 of the *Federal Court Act*.

Held, quashing the application, that a distinction must be made between section 7 of the *Indian Act* and section 9. Under section 9, where the Registrar investigates a protest against the addition or deletion of a name under section 7, he has power to render a decision. But where, as here, a request is made for the addition of a name under section 7, the Registrar, having granted or refused the request, may later take a different position and exercise his power to delete or add. He has made no "decision" under section 28 of the *Federal Court Act*.

Julius v. Bishop of Oxford [1880] 5 A.C. 214 (H.L.); *In re Danmor Shoe Co. Ltd.* [1974] F.C. 22, applied.

APPLICATION.

COUNSEL:

D. W. Scott and *George Hunter* for applicant.

Paul Betournay for respondent.

SOLICITORS:

Scott & Aylen, Ottawa, for applicant.

Deputy Attorney General of Canada for respondent.

JACKETT C.J. (orally)—I agree with the Reasons given by the other members of the Court. As, however, the question is of importance in connection with the jurisdiction of the Court, I will attempt to express my view on the point involved very briefly in my own words.

A-32-74

John Bay (*Requérant*)

c.

La Reine (*Intimée*)

Cour d'appel, le juge en chef Jackett, les juges Thurlow et Pratte—Ottawa, le 30 avril et le 1er mai 1974.

Examen judiciaire—Refus du registraire d'ajouter un nom à une liste de bande d'Indiens—Il ne s'agit pas d'une «décision» au sens de l'article 28 de la Loi sur la Cour fédérale—Loi sur les Indiens, S.R.C. 1970, c. I-6, articles 5, 6, 7, 9 et 11.

Le requérant a demandé au registraire d'ajouter son nom à une liste de bande, en vertu de la *Loi sur les Indiens*. Le registraire a refusé au motif qu'à son avis, le requérant n'avait pas droit d'y être inscrit. Le requérant a demandé l'examen judiciaire de ce refus en vertu de l'article 28 de la *Loi sur la Cour fédérale*.

Arrêt: la demande est rejetée; il faut faire une distinction entre l'article 7 de la *Loi sur les Indiens* et l'article 9. En vertu de l'article 9, le registraire peut faire tenir une enquête en cas de protestation relative à l'addition ou au retranchement d'un nom, en vertu de l'article 7, et peut rendre une décision à cet égard. Mais lorsqu'on lui demande, comme en l'espèce, d'ajouter un nom en vertu de l'article 7, le registraire peut accueillir ou rejeter la demande, puis, par la suite, il peut adopter une opinion différente et exercer son pouvoir d'ajouter ou retrancher le nom. Il n'a pas rendu une «décision» au sens de l'article 28 de la *Loi sur la Cour fédérale*.

Arrêts suivis: *Julius c. Bishop of Oxford* [1880] 5 A.C. 214 (H.L.); *In re Danmor Shoe Co. Ltd.* [1974] C.F. 22.

DEMANDE.

AVOCATS:

D. W. Scott et *George Hunter* pour le requérant.

Paul Betournay pour l'intimée.

PROCUREURS:

Scott & Aylen, Ottawa, pour le requérant.

Le sous-procureur général du Canada pour l'intimée.

LE JUGE EN CHEF JACKETT (oralement)—Je souscris aux motifs prononcés par les autres membres de la Cour. Cependant, étant donné que la question a de l'importance en ce qui concerne la compétence de la Cour, je vais essayer d'exprimer très brièvement et à ma manière mon opinion sur cette question.

With reference to the Indian Register, the Registrar

(a) under section 7, has a *power* to add to a Band List or a General List the name of a person who is entitled to have his name included in the list and to delete from such a list the name of any person who is not entitled to have his name included therein, which power becomes a *duty* to add or delete, as the case may be, when the occasion to exercise it arises,[1] and

(b) under section 9, after causing an investigation to be made into a protest against the addition or deletion of a name in the exercise of the section 7 power, has a power to render a decision concerning such protest, which decision is final and conclusive.[2]

When the Registrar is asked to exercise the section 7 power to add or delete a name, he must, of course, take a position as to whether the person in question is or is not entitled to have his name on the list so as to give rise to the duty to add or delete. There is, however, a clear difference between a position so taken by the Registrar on the occasion of a request to exercise the section 7 power and a decision rendered by the Registrar in the exercise of his section 9 decision-making power. Once the Registrar has exercised his section 9 decision-making power, his decision has legal effect and his power with regard thereto is spent. When, however, the Registrar takes a position as to whether he has a section 7 duty to add or delete a name, that "decision" has no legal effect. In such a case, as a matter of law, nothing has been decided. The Registrar himself, or his successor, in the very case in which such position was taken, can take a different position at any time and, having taken such a different position, can exercise his section 7 power to add or delete in accordance therewith.

[1] *Julius v. Bishop of Oxford*, [1880] 5 A.C. 214 (H.L.).

[2] By virtue of section 9(2), such a decision is final and conclusive subject to the review provided by section 9(3).

En ce qui concerne le registre des Indiens,

a) l'article 7 confère au registraire le *pouvoir* d'ajouter à une liste de bande ou à une liste générale le nom d'une personne qui a droit à l'inclusion de son nom dans cette liste et de retrancher de la liste le nom de toute personne qui n'a pas droit à l'inclusion de son nom, et lorsqu'il y a lieu d'exercer ce pouvoir,[1] celui-ci devient une *obligation* d'ajouter ou retrancher le nom, selon le cas, et

b) en vertu de l'article 9, après avoir fait tenir une enquête relative à la protestation contre l'addition ou le retranchement d'un nom résultant de l'exercice du pouvoir conféré par l'article 7, le registraire a le pouvoir de rendre une décision concernant une telle protestation, et cette décision est définitive et péremptoire[2].

Lorsqu'on demande au registraire d'exercer le pouvoir conféré par l'article 7 d'ajouter ou retrancher un nom, il doit bien sûr se faire une opinion sur la question de savoir si la personne en cause a ou n'a pas droit à l'inclusion de son nom dans cette liste ce qui donne naissance à l'obligation d'ajouter ou de retrancher ce nom. Il y a cependant une différence nette entre l'opinion que se fait le registraire lorsqu'on lui demande d'exercer le pouvoir conféré par l'article 7 et une décision rendue par le registraire dans l'exercice de son pouvoir de rendre une décision en vertu de l'article 9. Une fois que le registraire a exercé son pouvoir de rendre une décision en vertu de l'article 9, cette décision a un effet juridique et son pouvoir à cet égard est épuisé. Cependant, lorsque le registraire se fait une opinion sur la question de savoir s'il a l'obligation en vertu de l'article 7 d'ajouter ou de retrancher un nom, cette «décision» n'a aucun effet juridique. Dans un tel cas, rien n'a été décidé en droit. Après s'être fait une opinion dans un cas donné, le registraire lui-même, ou son successeur, peut, à tout moment dans ce même cas, adopter une opinion différente, et il peut, par la suite, exercer son pouvoir en vertu

[1] *Julius c. Bishop of Oxford*, [1880] 5 A.C. 214 (H.L.).

[2] En vertu de l'article 9(2), une telle décision est définitive et péremptoire sous réserve de la révision prévue à l'article 9(3).

In my opinion, a conclusion or position that has no legal effect is not a "decision" that can be "set aside" under section 28 of the *Federal Court Act*. Setting aside a decision, in the context of section 28, can have no meaning unless the decision set aside had, otherwise, some legal effect.[3]

• • •

THURLOW J. (orally)—This is an application under section 28 of the *Federal Court Act* to review and set aside the refusal of the Registrar under the *Indian Act* to add the name of the applicant to the Band List of the Iroquois of St. Regis Band. The Registrar's refusal was based on his view that the applicant was not entitled to be so registered and the applicant's attack was directed against his reasons for reaching that view.

The Registrar's authority to add names to a Band List is found in section 7 of the Act which is one of a group of sections dealing with the definition and registration of Indians. Section 5 provides for the maintenance in the Department of Indian Affairs of lists in which are to be recorded the names of persons who are entitled to be registered as Indians. Section 6 provides that the name of every person who is a member of a band and is entitled to be registered shall be on the list for that band and that the name of every person not a member of a band but entitled to be registered shall be on a General List.

Sections 7, 8 and 9 provide as follows:

7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

8. The band lists in existence in the Department on the 4th day of September 1951 shall constitute the Indian Register, and the applicable lists shall be posted in a con-

[3] Compare the decision of this Court in *Re Danmor Shoe Company Ltd.* [1974] F.C. 22 and the decisions referred to therein.

de l'article 7 d'ajouter ou retrancher le nom, en conformité de cette nouvelle opinion.

A mon avis, une conclusion ou une opinion qui n'a aucun effet juridique ne constitue pas une «décision» pouvant être «annulée» en vertu de l'article 28 de la *Loi sur la Cour fédérale*. Dans le contexte de l'article 28, l'annulation d'une décision ne peut avoir de sens que lorsque la décision annulée aurait eu autrement quelque effet juridique[3].

• • •

LE JUGE THURLOW (oralement)—Il s'agit d'une demande présentée en vertu de l'article 28 de la *Loi sur la Cour fédérale* visant à obtenir l'examen et l'annulation de la décision du registraire, en vertu de la *Loi sur les Indiens*, refusant d'ajouter le nom du requérant à la liste de bande des Iroquois de la bande de St-Régis. Le registraire a fondé son refus sur le fait qu'à son avis, le requérant n'avait pas droit d'y être inscrit et la contestation du requérant porte sur les motifs de cette conclusion.

C'est l'article 7, un des articles relatifs à la définition et à l'enregistrement des Indiens, qui confère au registraire le pouvoir d'ajouter des noms à une liste de bande. L'article 5 prévoit que le ministère des Affaires indiennes et du Nord canadien doit conserver des listes où est consigné le nom des personnes ayant droit d'être inscrites comme Indiens. L'article 6 dispose que le nom de chaque personne qui est membre d'une bande et a droit d'être inscrite doit apparaître sur la liste de ladite bande et que le nom de chaque personne qui n'est pas membre d'une bande mais a droit d'être inscrite doit être consigné sur une liste générale.

Les articles 7, 8 et 9 disposent que:

7. (1) Le registraire peut en tout temps ajouter à une liste de bande ou à une liste générale, ou en retrancher, le nom de toute personne qui, d'après la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

(2) Le registre des Indiens doit indiquer la date où chaque nom y a été ajouté ou en a été retranché.

8. Les listes de bande dressées au ministère le 4 septembre 1951 constituent le registre des Indiens et les listes applicables doivent être affichées à un endroit bien en vue

[3] Comparer avec le jugement de la Cour dans l'affaire *Re Danmor Shoe Company Ltd.* [1974] C.F. 22 et les jugements qui y sont mentionnés.

spicuous place in the superintendent's office that serves the band or persons to whom the List relates and in all other places where band notices are ordinarily displayed.

9. (1) Within six months after a list has been posted in accordance with section 8 or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section 7

(*a*) in the case of a Band List, the council of the band, any ten electors of the band, or any three electors if there are less than ten electors in the band,

(*b*) in the case of a posted portion of a General List, any adult person whose name appears on that posted portion, and

(*c*) the person whose name was included in or omitted from the List referred to in section 8, or whose name was added to or deleted from a Band List or a General List,

may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person, and the onus of establishing those grounds lies on the person making the protest.

The remaining subsections of section 9 provide that in such a case the Registrar is to cause an investigation to be made upon which he may render a decision which will be final and conclusive, subject to a further procedure for an inquiry into the correctness of his decision before a County or Superior Court Judge.

These provisions leading to investigation and decision on the entitlement of a person to registration, however, do not apply to the present situation. The applicant is not a person whose name has been omitted from a list posted under section 8 and who thereupon has protested within the six months period referred to in subsection 9(1). His case is simply one of a person who has sought to have his name added to the list under section 7, and that was the only provision that counsel was able to invoke as being applicable to it.

It will be observed that subsection 7(1) gives the Registrar no express authority to decide who is or who is not entitled to be registered. It merely authorizes him to add the name of a person who is entitled or to delete the name of a person who is not entitled and no procedure for determining entitlement or for the exercise of the function is prescribed. If the Registrar adds

dans le bureau du surintendant qui dessert la bande ou les personnes visées par la liste et dans tous les autres endroits où les avis concernant la bande sont ordinairement affichés.

9. (1) Dans les six mois de l'affichage d'une liste conformément à l'article 8 ou dans les trois mois de l'addition du nom d'une personne à une liste de bande ou à une liste générale, ou de son retranchement d'une telle liste, en vertu de l'article 7,

a) dans le cas d'une liste de bande, le conseil de la bande, dix électeurs de la bande ou trois électeurs, s'il y en a moins de dix,

b) dans le cas d'une portion affichée d'une liste générale, tout adulte dont le nom figure sur cette portion affichée, et

c) la personne dont le nom a été inclus dans la liste mentionnée à l'article 8, ou y a été omis, ou dont le nom a été ajouté à une liste de bande ou une liste générale, ou en a été retranché,

peuvent, par avis écrit au registraire, renfermant un bref exposé des motifs invoqués à cette fin, protester contre l'inclusion, l'omission, l'addition ou le retranchement, selon le cas, du nom de cette personne, et il incombe à la personne qui formule la protestation d'établir ces motifs.

Les autres paragraphes de l'article 9 prévoient que, dans ce cas, le registraire doit faire tenir une enquête sur la base de laquelle il pourra rendre une décision qui sera alors définitive et péremptoire, sous réserve de nouvelles procédures devant le juge d'une cour de comté ou d'une cour supérieure afin de déterminer si c'est à bon droit qu'il a rendu sa décision.

Cependant, les dispositions prévoyant une enquête à la suite de laquelle est rendue une décision quant aux droits d'une personne à être inscrite ne s'appliquent pas à la situation présente. Le requérant n'est pas une personne dont le nom a été omis d'une liste affichée, comme le prévoit l'article 8, et qui en conséquence a protesté dans le délai de six mois prévu au paragraphe 9(1). Le requérant a simplement demandé que son nom soit ajouté à la liste conformément à l'article 7 et cet article est la seule disposition que son avocat a pu invoquer comme applicable en l'espèce.

Il convient de remarquer que le paragraphe 7(1) ne confère aucunement au registraire le pouvoir de décider qui a ou n'a pas droit d'être inscrit. Ce paragraphe l'autorise simplement à ajouter le nom d'une personne qui a droit d'être inscrite ou à retrancher le nom d'une personne qui n'y a pas droit; il ne prévoit aucune procédure permettant de déterminer les droits en

a name or deletes a name pursuant to section 7 the procedures of subsection 9(1) to which I have referred may be invoked to determine the entitlement. But if he refuses to add the name of a person who asks to have his name added the procedures do not apply save in the case expressly provided for (i.e. the case of a name omitted from a list when posted under section 8 and a protest within the time limited therefor) and the person concerned has no procedure under the Act for redress even if he is a person entitled to be registered.

In these circumstances counsel for the applicant submitted that a power to decide who is and who is not entitled to be registered is to be implied in subsection 7(1) and that the action of the Registrar in declining to register a person who seeks registration is a decision which is reviewable under section 28 of the *Federal Court Act*.

In my opinion no power to decide the question of entitlement is contained in or is to be implied from subsection 7(1). In a case of this kind if a person is entitled to be registered but registration is refused it seems to me that his remedy before the coming into force of the *Federal Court Act* would not have been to treat the refusal as a decision to be reviewed on *certiorari* but to have sought relief by *mandamus*, when the question of his entitlement, if put in issue, would have had to be determined not by the Registrar but by the Court hearing the application for *mandamus*.

Similarly it does not appear to me that a refusal to register a person on the ground that in the Registrar's view the person is not entitled to registration can be treated as a decision within the meaning of section 28 of the *Federal Court Act* simply because it was necessary for the Registrar to adopt a view on the question of the person's entitlement in order to carry out his function under section 7. As I see it, the Registrar when dealing with a matter under section 7 is not required to conduct an inquiry or to

cause ni ne décrit comment s'acquitter de cette fonction. Si le registraire ajoute ou retranche un nom conformément à l'article 7, on peut invoquer les procédures prévues au paragraphe 9(1), déjà mentionné, dans le but de déterminer les droits en cause. Mais si le registraire refuse d'ajouter le nom d'une personne qui demande à être inscrite, les procédures ne s'appliquent pas excepté dans le cas expressément prévu (c.à-d. lorsqu'un nom est omis sur une liste affichée conformément à l'article 8 et qu'une protestation est adressée au registraire dans les délais fixés) et la Loi n'accorde à l'intéressé aucun moyen d'obtenir un redressement même s'il a droit d'être inscrit.

L'avocat du requérant prétend que, dans les circonstances, le pouvoir de décider qui a ou n'a pas droit d'être inscrit est implicitement prévu à l'article 7(1) et que le refus du registraire d'inscrire une personne qui en fait la demande constitue une décision susceptible d'examen en vertu de l'article 28 de la *Loi sur la Cour fédérale*.

A mon avis, le paragraphe 7(1) ne prévoit ni expressément ni implicitement le pouvoir de se prononcer sur la question des droits en cause. A mon avis, dans le cas où une personne a droit d'être inscrite et se voit opposer un refus, le moyen d'obtenir un redressement avant l'entrée en vigueur de la *Loi sur la Cour fédérale* n'aurait pas été de considérer ce refus comme une décision susceptible d'être révisée par voie de *certiorari*, mais il aurait fallu demander un redressement par voie de *mandamus*, au moment où il aurait eu à faire trancher la question de ses droits, si elle faisait l'objet d'un litige, non au registraire mais à la Cour connaissant de la demande de *mandamus*.

De même, j'estime que le refus d'inscrire une personne parce que, de l'avis du registraire, elle n'a pas droit d'être inscrite ne peut être considéré comme une décision au sens de l'article 28 de la *Loi sur la Cour fédérale* pour la seule raison qu'il fallait que le registraire se fasse une opinion sur la question des droits de la personne afin d'être en mesure de s'acquitter de ses fonctions conformément à l'article 7. A mon sens, lorsqu'il traite d'une question relevant de l'article 7, le registraire n'est pas obligé de faire tenir

afford any one a hearing on the question of a person's entitlement to registration and his view of the person's entitlement when reached binds no one for he is free to change that view at any time and thereupon to act accordingly.

It was also argued that the refusal was a decision in a practical sense, but while I am not unsympathetic to the plight of a person whose application for registration has been refused, I do not think that considerations as to the practical effect can serve to confer on the Registrar a power of decision which the plain wording of the statute does not give him.

As this conclusion is sufficient to dispose of the application it is unnecessary to consider or deal with the merits of the applicant's claim of entitlement to registration and as this may yet be the subject matter of proceedings in the Trial Division it is undesirable that any comment should be made on it beyond saying that I have reached no concluded or tentative view on it.

I would quash the application.

* * *

PRATTE J.—This is a section 28 application against the refusal of the Registrar under the *Indian Act* to add the name of the applicant to the Indian Register.

In order to understand the circumstances in which this application was made as well as the jurisdictional problem that it raises, it is necessary to have in mind the following provisions of the *Indian Act* concerning the registration of Indians:

5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.

6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.

7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

une enquête ou d'accorder à quiconque une audition sur la question de savoir si la personne a droit à l'enregistrement et une fois qu'il s'est fait une opinion sur cette question, elle ne lie personne, car il peut à tout moment en changer et agir en conséquence.

On a aussi soutenu que le refus constituait du point de vue pratique une décision. Sans être insensible à la situation d'une personne dont la demande d'inscription a été refusée, je ne pense pas que des considérations relatives à l'effet pratique de la décision peuvent servir à conférer au registraire un pouvoir de décision que la Loi ne lui donne pas expressément.

Ces conclusions suffisent à trancher la demande et il est inutile d'examiner ou de traiter du fond de la réclamation du requérant concernant son droit à l'enregistrement et puisque la question peut encore faire l'objet de procédures devant la Division de première instance, il n'est pas souhaitable d'ajouter de commentaires au fait que je ne suis parvenu à aucune conclusion définitive ou partielle à cet égard.

Je rejette donc la demande.

* * *

LE JUGE PRATTE—Il s'agit d'une demande présentée en vertu de l'article 28 à l'encontre du refus du registraire d'ajouter le nom du requérant au registre des Indiens en vertu de la *Loi sur les Indiens*.

Pour mieux comprendre le contexte dans lequel cette demande a été présentée ainsi que la question de compétence soulevée, il est nécessaire de rappeler les dispositions suivantes de la *Loi sur les Indiens* relatives à l'enregistrement des Indiens:

5. Est maintenu au ministère un registre des Indiens, lequel consiste dans des listes de bande et des listes générales et où doit être consigné le nom de chaque personne ayant droit d'être inscrite comme Indien.

6. Le nom de chaque personne qui est membre d'une bande et a droit d'être inscrite doit être consigné sur la liste de bande pour la bande en question, et le nom de chaque personne qui n'est pas membre d'une bande et a droit d'être inscrite doit apparaître sur une liste générale.

7. (1) Le registraire peut en tout temps ajouter à une liste de bande ou à une liste générale, ou en retrancher, le nom de toute personne qui, d'après la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

Finally, it must be mentioned that section 11 of the Act indicates who is entitled to be registered as an Indian.

Mr. Bay, the applicant, is not registered as an Indian. He thinks that he should be. He applied to the Registrar to have his name added to the Band List of the Iroquois of St. Regis Band. In support of his application, he submitted evidence which, according to his counsel, established that Mr. Bay was entitled to have his name included on that Band List. The Registrar did not find this evidence satisfactory. He therefore rejected Mr. Bay's request.

It is this "decision" of the Registrar that Mr. Bay now seeks to have set aside under section 28(1) of the *Federal Court Act*. As I am of the view that this Court has no jurisdiction, under section 28(1), to set aside the so-called "decision" of the Registrar, I do not intend to express any opinion on the merits of Mr. Bay's contentions.

It has been made clear by previous judgments of this Court that many expressions of opinion which, in common parlance, are referred to as "decisions", do not constitute decisions within the meaning of section 28(1). In my view, the refusal of the Registrar to accede to Mr. Bay's request is not a decision that this Court has jurisdiction to set aside under section 28(1) of the *Federal Court Act*.

As was said by the Chief Justice in the *Danmor Shoe* case[4],

> A decision that may be set aside under section 28(1) must, therefore, be a decision made in the exercise or purported exercise of "jurisdiction or powers" conferred by an Act of Parliament . . . . Such a decision has the legal effect of settling the matter or it purports to have such a legal effect. Once a tribunal has exercised its "jurisdiction or powers" in a particular case by a "decision", the matter is decided even against the tribunal itself. . . .

In the present case, the so-called decision of the Registrar has been made under section 7 of the *Indian Act*. This section does not empower the Registrar to decide whether a person is entitled to be registered as an Indian; it merely imposes on the Registrar the duty to add to or

[4] [1974] F.C. 22 at page 28.

Il faut rappeler enfin que l'article 11 de la Loi indique quelles personnes ont droit d'être inscrites comme Indiens.

Le requérant, Bay, n'est pas inscrit comme Indien. Il estime qu'il devrait l'être. Il a demandé au registraire d'ajouter son nom à la liste de bande des Iroquois de la bande de St-Régis. A l'appui de sa demande, il a soumis des preuves qui, selon son avocat, démontrent que Bay avait droit à l'inclusion de son nom sur cette liste de bande. Le registraire a décidé que la preuve n'était pas suffisante. Il a donc rejeté la demande de Bay.

C'est cette «décision» du registraire que Bay demande à la Cour d'annuler en vertu de l'article 28(1) de la *Loi sur la Cour fédérale*. Puisque je suis d'avis que cette cour n'est pas compétente aux termes de l'article 28(1) pour annuler la prétendue «décision» du registraire, je n'ai pas l'intention d'exprimer d'opinion sur le fond des prétentions de Bay.

Il ressort clairement de jugements antérieurs rendus par cette cour que de nombreuses expressions d'opinion, qui, dans le langage courant, sont appelées «décisions», ne constituent pas des décisions au sens de l'article 28(1). A mon avis le refus du registraire d'accéder à la demande de Bay n'est pas une décision dont l'annulation relève de la compétence de la Cour en vertu de l'article 28(1) de la *Loi sur la Cour fédérale*.

Comme le déclarait le juge en chef dans l'arrêt *Danmor Shoe*[4],

> Une décision susceptible d'annulation en vertu de l'article 28(1) doit donc être une décision prise dans l'exercice ou le prétendu exercice «d'une compétence ou des pouvoirs» conférés par une loi du Parlement . . . . Une décision de ce genre a pour effet juridique de régler l'affaire, ou elle prétend avoir cet effet. Une fois que, dans une affaire donnée, le tribunal a exercé sa «compétence ou ses pouvoirs» en rendant une «décision», la question est tranchée et même le tribunal ne peut y revenir. . . .

Dans l'affaire présente, la prétendue décision du registraire a été rendue en vertu de l'article 7 de la *Loi sur les Indiens*. Cet article ne confère pas au registraire le pouvoir de décider si une personne a droit ou non d'être inscrite comme Indien; cet article impose seulement au regis-

[4] [1974] F.C. 22 à la page 28.

delete from the Register "the name of any person who . . . is entitled or not entitled, as the case may be," to be registered. If the Registrar wrongly refuses to record in the Register the name of a person who is entitled to be registered, he fails in his duty. However, in such a case, the person who is entitled to be registered does not, by virtue of such a refusal, lose his right to be registered. The refusal of the Registrar to register a person who is entitled to be registered does not have any legal effect, whatever the importance of its practical effect; such a refusal does not settle or purport to settle in any way the question of the entitlement to the registration; it is not binding on anyone. It is not a decision within the meaning of section 28(1).

For these reasons, I would quash the application.

traire l'obligation d'ajouter ou de retrancher du registre «le nom de toute personne qui . . . a ou n'a pas droit, selon le cas,» d'être inscrite. Si le registraire refuse à tort de porter au registre le nom d'une personne qui a droit d'être inscrite, il manque à son devoir. Cependant, dans un tel cas, la personne qui a droit d'être inscrite ne perd pas, du seul fait de ce refus, son droit à être inscrite. Le refus du registraire d'inscrire une personne qui a droit d'être inscrite n'a aucun effet juridique, quelle que soit l'importance des effets pratiques de sa décision; un tel refus ne règle aucunement la question du droit à l'enregistrement, ni ne prétend régler cette question; le refus ne lie personne. Il ne s'agit pas d'une décision au sens de l'article 28(1).

Pour tous ces motifs, je rejette la demande.

SASKATCHEWAN

DISTRICT COURT — HOGARTH, D.C.J.

13

Re The Indian Act
Re Joseph Poitras*

Indians — Right to Be Registered as Member of Band — Alleged Acceptance of Scrip by Ancestors — Determining of Protests — Duty of Registrar in Conducting Inquiry — Indian Act, S. 12 Not Retroactive — "To Be Registered."

The registrar in charge of the Indian Register for the Indian Affairs Branch of the Department of Citizenship and Immigration *held* to have erred in holding that the applicant was not entitled to be registered as an Indian in the Muscowpetung Band.

Sec. 12 (quoted *infra*) of said Act was not intended to have the retroactive effect of ousting the applicant, Joseph Poitras, and his family from the Muscowpetung Reserve after his 36 years residence. That would be a gross and intolerable injustice. The section is susceptible of a more humane interpretation, especially in view of the words "to be registered" as they appear in subsec. (1) thereof. These words should be construed as referring only to the future, as were the words "to be arranged" in *Murphy v. McSorley* [1929] SCR 542, 11 Can Abr 706.

The provision in sec. 9 (1) (*a*) that in the case of a band list the council of the band may protest means that the protest must be by the council and not by individual members of the council. The council can only act in a meeting properly convened where minutes of the meeting are recorded and a resolution passed in the regular way.

There is no provision in the Act for the investigation being conducted and decision of the registrar made on any ground other than that stated in the protest, unless other grounds not stated in the protest are agreed upon by the parties concerned.

The registrar should have required from the protesters the strictest proof of the right of the protesters to protest, and should have insisted upon strict compliance with the Act, having in mind always that the applicant's right to membership in the band should not be disturbed unless the evidence clearly and beyond all doubt established the truth of the grounds stated in the protest.

The registrar acted without agreement of the parties in basing his decision on a ground not stated in the protest. If this conclusion be wrong, nevertheless the registrar failed to weigh and consider properly the evidence both *viva voce* and documentary.

It would be most unjust and unfair to require the applicant, who is now 70 years old, to establish the blood of his ancestors, who have all passed from the scene. It is known, beyond doubt, that he was legally admitted to the Muscowpetung Band in 1920, and was given Indian status in equality with Indians of that band.

[Note up with 2 CED (CS) *Indians*, secs. 2 (1954 Supp.), 7, 8, 13 (original work); 3 CED (CS) *Statutes*, sec. 41; *Words and Phrases* (1947-1955 Supps.).]

---

* See also *In re The Indian Act; In re Wilson* (1954) 12 WWR (NS) 676, 1954 Can Abr 429 (Alta.—Buchanan, C.J.D.C.).

C. A. Lavery, for Poitras, applicant.

J. G. McIntyre, for protesters, respondents.

14

December 4, 1956.

HOGARTH, D.C.J. — The applicant Joseph Poitras, registered as a member of the Muscowpetung Band of Indians, applies under sec. 9 (3) of *The Indian Act,* 1951, ch. 29 (now RSC, 1952, ch. 149) for a review of the decision of the registrar in charge of the Indian register for the Indian Affairs Branch of the Department of Citizenship and Immigration whereby the said registrar decided that the said Joseph Poitras is not entitled to be registered as an Indian in the Muscowpetung Band for the following reasons:

> "Joseph Poitras, son of Pierre Poitras, Sr., received scrip on June 16, 1900. The scrip certificate numbers are A11249 and A2767. Therefore, he is not entitled to membership in the Muscowpetung Band in accordance with the provisions of Section 12 of *The Indian Act.*"

The facts as I find them are as follows: Joseph Poitras was born on November 8, 1884, at what is now the village of Lebret in the province of Saskatchewan. His father went by the name of Tipierre Poitras; his father's Indian name being Patinow. The family never remained in one place but followed the nomadic life of the Indian travelling from place to place. The family consisted of 11 children. Joseph was the second child. At the age of 12 years Joseph left the family camp and found work herding cattle and horses. He never returned to live with the family thereafter.

In 1905 Joseph went to work at the Indian school at Lebret. From there he went to the Sioux (Standing Buffalo) Reserve where he remained two years and then went to work at the Pasqua Indian agency. In 1911 he returned to the Standing Buffalo Reserve and worked out of there for eight years. On April 12, 1919, he went to live on the Muscowpetung Reserve and has lived there ever since. He says he was coaxed by the Indians of the Muscowpetung Reserve to join their band and after residing on the reservation for a year he became a member of the Muscowpetung Band by unanimous vote of the band on June 30, 1920. His membership in the Muscowpetung Band was approved by the Department of Indian Affairs on July 29, 1920. The documents relating to his admission to the band are of interest and importance and are here set forth.

"DEPARTMENT OF INDIAN AFFAIRS

"CANADA

"Commissioner's Office.

Regina, Sask., Apr. 15, 1919.

"Sir:

"A half-breed by the name of Joe Poitras was married fifteen years ago to a Sioux woman, a graduate of the Qu'Appelle School, and they have lived on Standing Buffalo Reserve. He has now made application for permission to reside on Muscowpetung Reserve and I have just had an interview with his wife whose name previously was Leontine Deegan. They have four children in all, two of whom are at Qu'Appelle Industrial School and two under five years of age at home. The Muscowpetung Indians are agreeable to the admission of Poitras to their Band and I beg to recommend therefore that the consent of the Department be given. His reason for leaving the Standing Buffalo Reserve and applying to join the Muscowpetung Band is that the available land on the former Reserve is inadequate to accommodate all the Indians residing and farming thereon. They are both thrifty and good workers.

"Pending the consent of the Department I have granted Poitras permission to reside on the Muscowpetung Reserve.

"[Sgd.] W. M. GRAHAM
Commissioner.

"The Secretary,
"Dept. of Indian Affairs,
"Ottawa."

[The reply was as follows:]

"Ottawa, April 28th, 1919.

"Sir:

"Referring to your letter of the 15th instant, recommending the transfer of Joe Poitras and family from the Standing Buffalo Reserve to the Muscowpetung Reserve, I beg to request that you will report whether it is your intention that these people should only be permitted to reside on the Muscowpetung Reserve, or whether you desire to have them admitted as members of the Band and share in the lands and moneys of the Band. If the latter, it will be necessary to forward the consent of the Band.

"[Sgd.] J. D. MCLEAN
"Asst. Deputy and Secretary."

[A later letter from the commissioner was as follows:]

"Commissioner's Office,
"Regina, Sask., June 26, 1920.

"Sir:

"I beg to inform you that in April, 1919, a half-breed named Joe Poitras, who is married to an Indian woman and has several children by her, and has been residing on the Standing Buffalo Reserve, of which reserve his wife is a member, applied to me to be admitted as a member of the Muscowpetung Reserve. At the time the application was made I took up the matter with the resident agent, Mr. Christianson, who reported favourably as to this man's admission. On the 15th of April I reported this matter fully to you, to which I received a reply on the 28th of April, asking me if I desired to have Poitras and his family admitted as members of the Band and share in the lands and monies of the Band, pointing out that if it was the latter, it would be necessary to forward the consent of the Band. Some considerable time has elapsed since these instructions were received, which is due to the fact that I was unable to call a meeting and deal with the case. However on the 3rd of June a meeting was held of the Muscowpetung Band, who were unanimously in favour of the admission of Poitras and family, and I am now enclosing herewith Consent of the Band. I shall be glad to receive your approval of this admission in order that Poitras may go ahead with his work of breaking and building.

"I may point out that it would be impossible for this man to extend his farming operations on the Standing Buffalo Reserve, as there is no available land there.

"[Sgd.] W. M. GRAHAM
Commissioner."

"CONSENT OF BAND TO ADMISSION

of *Joe Poitras*

"No. ------ of------ to Band to No. ------ of------ Band.

Muscowpetung Band

Muscowpetung Indian Reserve,

Qu'Appelle Agency,

June 3rd, 1920.

"We, the undersigned Chief and Councillors of the Band of Indians owning the Reserve situated in Treaty No. Four

and known as 'Muscowpetung Reserve,' do, by these presents, certify that the said Band has by vote of the majority of its voting members present at a meeting summoned for the purpose, according to the rules of the Band, and held in the presence of the Indian Agent for the locality on the Third day of June, 1920 granted leave to Joe Poitras to join our said Band, and as a member thereof to share in all land and other privileges of the Band, to which admission we, the undersigned, also give full consent.

"Councillor PAT CAPPO

"Witness to signatures and marks. [Sgd.] CHAS. T. PRATT Interpreter.

"J. B. TEMPLETON

"Certified Correct,

"JAS. H. WALLS
Indian Agent.

"Result of Poll on reverse side hereof."

[The poll showed 18 names in favour and none against.]

"Commissioner's Office,
"Regina, Sask., July 24, 1920.

"Sir:

"I have to inform you that I have not as yet received a reply to my letter No. 17-13 of the 26th June last, dealing with Joe Poitras, whom I recommended be admitted as a member, to the Muscowpetung Reserve, in the Qu'Appelle Agency.

"I may add that Poitras in the meantime, has been breaking land and making preparations to establish himself. Kindly let me know if my recommendation is approved.

[Sgd.] W. M. GRAHAM
Commissioner."

[The reply thereto was:]

"Ottawa, 29th July, 1920.

"Sir:

"Referring to your letter of the 24th instant, and previous correspondence relative to the admission as a member of Muscowpetung's Band of Joe Poitras now residing on the

Standing Buffalo Reserve; I beg to state that the Department approves of your recommendation in the matter and Poitras may henceforth be recognized as a member of Muscowpetung's Band.

"[Sgd.] J. D. McLEAN

Asst. Deputy and Secretary."

It was thus Joseph Poitras became established as a permanent member of the Muscowpetung Band, and with his family, consisting of his wife, who was an Indian woman, and five children he took up residence on the Muscowpetung reservation, and that has been his home and the home of his children for 37 years. His family has been raised there and the children and grandchildren are still there. There is no evidence as to the number of grandchildren, but there is at least one.

When Joseph Poitras and his family went to live on the Muscowpetung reserve in 1919 he began breaking land and erecting buildings, and it is to be noted from the correspondence quoted above that Mr. Graham, the commissioner at that time, in his letter of April 15, 1919, referred to the Poitrases as being thrifty and good workers. Since then they have apparently prospered. I was informed by their counsel that the family now farms 1,000 acres of land on the reserve.

An application was made in 1929 and again in 1932-34 to investigate Poitras' right to membership in the band. It was found on both occasions that he was eligible for band membership, and that ought to have put an end to it.

In 1951 *The Indian Act* was amended to include among other sections the following sections:

"5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.

"6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.

"7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with the provisions of this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

"(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

"8. Upon the coming into force of this Act, the band lists then in existence in the Department shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the list relates and in all other places where band notices are ordinarily displayed.

"9. (1) Within six months after a list has been posted in accordance with section eight or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section seven

"(*a*) in the case of a Band List, the council of the band, any ten electors of the band, or any three electors if there are less than ten electors in the band;

"(*b*) in the case of a posted portion of a General List, any adult person whose name appears on that posted portion; and

"(*c*) the person whose name was included in or omitted from the list referred to in section eight, or whose name was added to or deleted from a Band List or a General List,

"may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person, and the onus of establishing those grounds lies on the person making the protest.

"(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision, and subject to a reference under subsection three, the decision of the Registrar is final and conclusive.

"(3) Within three months from the date of a decision of the Registrar under this section

"(*a*) the council of the band affected by the Registrar's decision, or

"(*b*) the person by or in respect of whom the protest was made,

"may, by notice in writing, request the Registrar to refer the decision to a judge for review, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision, to the judge of the county or district court of the county or district in which the band is situated or in which the person in

respect of whom the protest was made resides, or such other county or district as the Minister may designate, or in the Province of Quebec, to the judge of the Superior Court for the district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other district as the Minister may designate.

"(4) The judge of the county, district or Superior Court, as the case may be, shall inquire into the correctness of the Registrar's decision, and for such purposes may exercise all the powers of a commissioner under Part I of the *Inquiries Act;* the judge shall decide whether the person in respect of whom the protest was made is, in accordance with the provisions of this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive.

• • •

"(6) [On review onus of proof that decision of registrar is erroneous is on the person who requested the reference.]

"12. (1) The following persons are not entitled to be registered, namely,

"(*a*) a person who

"(i) has received or has been allotted half-breed lands or money scrip,

"(ii) is a descendant of a person described in sub-paragraph (i),

"(iii) is enfranchised, or

"(iv) is a person born of a marriage entered into after the 4th day of September, 1951, and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (*a*), (*b*), (*d*), or entitled to be registered by virtue of paragraph (*e*) of section 11,

"unless, being a woman, that person is the wife or widow of a person described in section 11, and

"(*b*) a woman who married a person who is not an Indian unless that woman is subsequently the wife or widow of a person described in section 11.

"(2) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect."

By sec. 5 an Indian register was established. The register included the name on the band list and general list. Joseph Poitras' name being on the Muscowpetung Band list he became

registered and is an Indian by virtue of sec. 2 (*g*) of *The Indian Act*, which reads as follows:

21

"2. (1) In this Act,

• • •

"(*g*) 'Indian' means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian."

Under date of January 31, 1952, John Gambler, the then chief of the Muscowpetung Band, Maurice Cappo and Emil Dubois, councillors of the band, protested to the registrar the inclusion of Joseph Poitras as a member of the Muscowpetung Band. The protest is in the following form:

"INDIAN MEMBERSHIP PROTEST

"To the Registrar,
Indian Affairs Branch,
Department of Citizenship and Immigration,
Ottawa, Ontario.

"In the matter of Section 9 of the
Indian Act, Cap. 29, 15, Geo. VI, 1951.

"We the undersigned Chief and Councillors of the Muscowpetung Band of Indians, Province of Saskatchewan, do hereby, in accordance with the provisions of Section 9 of the *Indian Act*, protest the inclusion of Poitras Joseph [band No.] 104 in our Band.

"Reason for Protest: Joseph Poitras is the son of a person who had received Half breed scrip.

"(Sec. 12—paragraph (*a*) sub-paragraph (ii) of *The Indian Act*.

"This, of course, will include his wife and all minor children.

"Dated at Fort Qu'Appelle this 31 day of Jan., 1952.

"Chief JOHN GAMBLE
Councillor

"Councillor MAURICE CAPPO

"Councillor EMIL DUBOIS

• • • ."

I might say here that in considering this protest we are dealing with lives of people as human beings and their right to happiness arising from rights granted and established 36 years ago. The protest not only affects Joseph Poitras but his wife and children and the right of all of them to share in land and moneys of the band, land which by their industry they have helped to improve

and make more valuable, and in moneys, the common property of all members. With this in mind, the registrar should have required from the protestors the strictest proof of the right of the protestors to protest, and should have insisted upon strict compliance with the Act, having in mind always that Joseph Poitras' right to membership in the band should not be disturbed unless the evidence clearly and beyond all doubt established the truth of the grounds stated in the protest.

Sec. 9 of the Act gives the right to protest within six months after a list has been posted in accordance with sec. 8. Sec. 8 requires the list to be posted upon the Act coming into force in a conspicuous place in the superintendent's office that serves the band, or persons to whom the list relates, and in all other places where band notices are ordinarily displayed.

The only evidence of posting as required by sec. 8 is that given by Mr. Malcolm McCrimmon, the registrar, who said the list was posted September 4, 1951. Mr. McCrimmon did not say where the list was posted nor did he say that it was posted as required by sec. 8. A photostatic copy of the band list is now before me and I observe there is attached thereto the following words:

> "This list is posted pursuant to Section 9, Cap. 29, 15, George VI, 1951 (*The Indian Act*)."

There is nothing in sec. 9 that requires a band list to be posted. It is sec. 8 that directs the posting. There is no evidence that the band list was posted in the superintendent's office and in all other places where band notices are ordinarily displayed.

In absence of proof of posting the list in the places stated in sec. 8 the registrar, in my opinion, erred in entertaining the protest. In my opinion, the absence of proof of proper posting is fatal to the protestors' right to be heard.

It should not be necessary for me to say more, but as there are other phases or features of this reference on which I may be expected to express my view I propose to deal with them.

Sec. 9 (1) (*a*) states that in the case of a band list the council of the band may protest. This, in my opinion, means that the protest must be by council and not by individual members of the council. There is, in my opinion, a difference. The council can only act in a meeting properly convened where minutes of the meeting are recorded and a resolution passed in the regular way. The protest should at least contain a recital in an appropriate way that such procedure was followed or, better still, the protest should be accompanied by an authenticated copy of the

resolution, thus establishing that the protest is in fact that of the council and not a protest of individual members. Members of this band are not ignorant of what is reasonable conformity to procedure in matters of this kind. There is evidence that on a previous occasion the band did in meeting assembled express themselves by resolution. This protest, in my opinion, is nothing more than a protest by three electors. According to sec. 9 (1) (*a*) three electors have no right to protest unless there are less than 10 electors in the band. The Muscowpetung Band list as of June 30, 1951, contains over 200 names. There is no evidence as to how many of them are electors, but out of a membership of over 200 it may reasonably be presumed that there are more than 10 electors.

The reason for protesting as stated in the protest is that

> "Joseph Poitras is the son of a person who had received half breed scrip (Sec. 12—paragraph (*a*) sub-paragraph (ii) of *The Indian Act.*"

In giving his reasons the registrar ignored the grounds stated in the protest and based his decision on a different ground altogether. The reason the registrar gives for arriving at his decision is that Joseph Poitras received scrip, *not that he was the son of a person who had received scrip.* There is a reason for the registrar departing from the grounds stated in the protest and choosing grounds of his own, because I cannot find anywhere in the documents or in the evidence that Pierre Poitras, Sr., who is supposed to be the father of Joseph Poitras, the person being investigated, ever did receive scrip. Nor is there any evidence anywhere before me that any ancestor of Joseph Poitras ever received scrip.

There is a reason for the protestors being required by sec. 9 of the Act to state the grounds for protest and it is that the person against whom the protest is made may know what he has to answer. There is no provision in the statute for the investigation being conducted and decision of the registrar made on any ground other than that stated in the protest, unless other grounds not stated in the protest are agreed upon by the parties concerned.

In my opinion, the registrar acted without agreement of the parties in basing his decision on a ground not stated in the protest. If I err in this conclusion, I am of the opinion that the registrar failed to properly weigh and consider the evidence both *viva voce* and documentary.

Evidence was taken *viva voce* before Mr. J. Glass, a commissioner appointed for the purpose of taking evidence, at Fort

Qu'Appelle, Saskatchewan. Several witnesses were heard, among them Joseph Poitras whose right to membership was being investigated. Before any evidence was received by the commissioner Mr. Glass, I find there was an agreement recorded between counsel for Joseph Poitras and the protestors. This agreement appears in the transcript of the evidence as follows:

> "MR MACPHERSON [counsel for protestors]: I am prepared not to go into the question of his admission to the Band, the records there are clear. The whole thing is: Is he entitled to be registered as an Indian? If that is the case, the rest is in order; and if not, the rest has no meaning.
>
> "MR. TALLANT [counsel for Poitras]: That would be my understanding—as to whether this man is legally entitled to be considered an Indian at all. If he is an Indian, his admission to the Band is in order.
>
> "MR. MACPHERSON: That's right.
>
> "COMMISSIONER: Both of you have agreed as far as his membership in the Band is concerned? You are going to let it stand that if he is an Indian, he was legally admitted to the Muscowpetung Band, is that correct?
>
> "MR. MACPHERSON: That is correct."

This then puts the protestors' basis for protesting on still another ground, not raised in the protest. There is a vagueness about this agreement, and because of that vagueness I do not think it is worthy of much consideration. It would be most unjust and unfair to require Joseph Poitras, who is now 70 years of age, to establish the blood of his ancestors, who have all passed from the scene. This much is known, beyond doubt, that he was legally admitted to the Muscowpetung Band in 1920, and was given Indian status in equality with Indians of the Muscowpetung Band. The question raised by the agreement is: Is he an Indian? An Indian is defined in sec. 2 (*g*) of *The Indian Act* as meaning a person who pursuant to the Act is registered as an Indian. Joseph Poitras' name being on the band list was registered as an Indian by sec. 5 of the Act, and in the eyes of the law should be regarded as an Indian. If the learned counsel did not have in mind the definition of an Indian as stated in the Act they should have clearly said so and stated clearly what they meant by an Indian.

The registrar, Mr. McCrimmon, appeared before me on the review and stated that although the evidence taken by the com-

missioner at Fort Qu'Appelle was before him when he arrived at his decision he paid no attention to it. I here set forth some of the questions put to him and his answers thereto.

"Q. You are the Registrar of the Department of Indian Affairs at Ottawa, are you? A. Yes, sir, the present Registrar.

"Q. Along with this material you had a transcript of evidence taken at Fort Qu'Appelle? A. Yes, sir.

"Q. Now what other material did you consider as well as the things you have told us of in making the decision that the Poitras family would be barred? A. The decision was based practically — I should say entirely on the scrip records.

"Q. And you had those before you when the decision was made? A. Definitely.

"*The Court to witness*:

"Q. You say the decision was based entirely on the scrip records. You gave no heed to the evidence given at Fort Qu'Appelle at all? A. No, because actually there wasn't any concrete evidence to work on.

"Q. I will come to the conclusion as to what part of the evidence was concrete and what was not. I wanted to know: you said you based your decision entirely on the scrip evidence? A. That is what I said."

Here I may say that the registrar erred in failing to pay any attention to the evidence given before the commissioner for reasons which will be apparent later.

The scrip certificate number 378 referred to by Mr. McCrimmon is in the following form:

"580215

"Form C., No. 378

"DEPARTMENT OF THE INTERIOR, CANADA

"(Dept. of The Interior)
(Correspondence)
(Aug)
(4)
(1900)
(Registration Branch)
(Ottawa)

"HALF-BREED COMMISSION

"Born 7th Nov. 1884.

"Fort Qu'Appelle, N.W.T., June 16 1900.

"Under the powers vested in us by an Order of the Governor General in Council dated 2nd March, 1900, We Hereby Certify that Joseph Poitras (son of Pierre Poitras Sr.) a Half-Breed, has proved to our satisfaction that he is entitled under the terms of the said Order to Scrip to the amount of Two Hundred and Forty Dollars ($240), such Scrip to be payable to bearer and to be accepted at par in payment for Dominion Lands.

"I. A. (?)

"Scrip No. A11249 $160 [Sgd.] JAMES WALKER

"Scrip No. A2767 80 Commissioners

"Issued 29/8/1900

"H.E.D.

Accountant."

CANCELLED

This certificate was issued following an application to a Royal Commission sitting at Fort Qu'Appelle on June 13, 1900. The application was made by one Pierre Poitras, not for scrip for himself, but for scrip for his three living sons (minors), Pierre, 17, Joseph, 16, and Michel, 15 years of age. The application was in writing consisting of a number of questions and answers and purports to have been verified by oath of the applicant Pierre Poitras, Sr. The application contains the following statement:

"These are the certificates of baptism of my sons named herein [Exs. A, B, C.]"

The baptismal certificates are attached to the application. There appears at the foot of the first page of the application the following note: "The boys were present." The baptismal certificate pertaining to the son Joseph is marked Ex. B. It is written in French and is as follows:

"*Certificat de Bapteme—*

"Nous, Pretre soussigne certifions que Joseph Poitras ne le 7 Novembre 1884 du legitime mariage do Pierre Poitras et de Euphrasine Desjarlais a ete baptise le 8 Novembre 1884 par le Rev. Pere Magnan.

"Parrain Pierre Poitras

"Marraine Isabelle Bremner

27

"(voir page 92 du Registre No. 2 de la Mission de Qu'Appelle.

"En foi de quoi nous avons signe les presentes le 12 Mai 1900.

"RR. PP. O.M.I.

"Mission du Sacre Coeur, Qu'Appelle.

"[Sgd.] J. P. MAGNAN, P.O.M.I."

Joseph Poitras in his evidence before the commissioner said he had brothers named Pierre and Michael. There are many others by the name of Poitras, some of them named Pierre Poitras and some named Joseph. It seems to have been a fairly common name. In the light of Joseph Poitras' evidence that he did not know anything about this scrip issue, could it be that in other Poitras families there were also sons named Pierre, Joseph and Michael? Identity becomes important. Counsel for the protestors realized the necessity of establishing identity and closely examined and cross-examined witnesses in an attempt to prove identity, the attempts being chiefly directed to establish that Pierre Poitras or Joseph Poitras had at some time owned or operated farm lands. There is nothing whatever in the evidence to show that either of them ever owned any land at any time or were ever engaged in farming other than as farm labourers on the land of others until 1919 when Joseph Poitras went on the Muscowpetung reservation and in 1920 became a member of the band. John Anaquod who gave evidence before the commissioner Mr. Glass said that he had known a Pierre Poitras who was engaged in farming, but he also said that that man was not the present Joseph Poitras' father.

The registrar gave as reason for his decision that Joseph Poitras received scrip on June 16, 1920. Certificate No. 378, *supra,* stated that Joseph Poitras, son of Pierre Poitras, is *entitled* to scrip to the amount of $240 and that such scrip was to be payable to bearer. There is also a document number A11249 stating that in conformity with Form C, No. 378, the bearer is entitled to an allowance of $160 in any purchase of Dominion lands, and another document number A2767 which states that in conformity with Form C, No. 378, the bearer is entitled to an allowance of $80 in any purchase of Dominion lands. Nowhere does the name of Joseph Poitras or Pierre Poitras appear on either of these documents, and there is no evidence that Joseph Poitras ever received either of these scrip issues. The most likely conclusion is that the applicant Pierre

Poitras, Sr., received the both scrip allowances and sold them, which he could easily do as they were both payable to bearer, and that he kept the money. I am satisfied that the Joseph Poitras now being investigated never received any part of the scrip issue. Any person into whose possession these scrip issues came, whether by sale, gift, theft or otherwise, being in favour of bearer, could profit to the extent of the amount of money stated on the face of them. It must be kept in mind that the reason for the registrar's decision is that Joseph Poitras received scrip, not that scrip was allotted. Not only is there no evidence that Joseph Poitras, whose right to membership in the band is being protested, received scrip but he emphatically denies that he ever received scrip. Here are some excerpts from his evidence: * * *

> "Q. Mr. Poitras, were you old enough to remember in 1900, there was a Commission sat in Fort Qu'Appelle to deal with Halfbreed Scrip and Halfbreed lands? A. No, I dont."

That there are other Joseph Poitrases and other Pierre Poitrases is established from the evidence of John Anaquod.

The purpose of producing the baptismal certificate with the application of Pierre Poitras, Sr., was to establish the date of birth of his alleged son, Joseph Poitras. It will be observed that the certificate states that the Joseph Poitras therein named is the son of legitimate marriage of Pierre Poitras and Euphrasine Desjarlais and that he was born on November 7, 1884, and baptized on November 8, 1884. I here quote a further excerpt from the evidence of Joseph Poitras in which he gives the name of his mother:

> "Q. What was your mother's name? A. Pahnowiss or Wees.
>
> "Q. Did she have a first name? A. Freezene Pahnow."

There is no similarity whatever between the name of the woman appearing in the baptismal certificate and the name of the woman whom Joseph Poitras swears was his mother. Two different women cannot bear the same son. In other words, a man cannot have two different mothers. So if the mother of Joseph Poitras was Pahnowiss or Wees, Freezene Pahnow, he could not be the Joseph Poitras named in the baptismal certificate.

I feel that I should not conclude my decision in this case without some observation relating to sec. 12 of *The Indian Act*. I cannot bring myself to the conclusion that Parliament ever

intended sec. 12 to have the retroactive effect suggested by counsel for the protestors. To construe sec. 12 as being retroactive and operating to oust Joseph Poitras and his family from the Muscowpetung reserve after 36 years' residence there would be a gross and intolerable injustice. I would place a more humane interpretation on sec. 12, especially in view of the words "to be registered" as they appear in sec. 12 (1) of *The Indian Act*. These words "to be registered" should be interpreted to refer only to future registrations and should not be applied to exile Joseph Poitras and his family from lands where their home has been established since the year 1919 and so deprive them after all these years of the right to share in the lands and moneys of the Muscowpetung Band. The words "to be registered" should be construed as referring to the future as were the words "to be arranged" construed in *Murphy v. McSorley* [1929] SCR 542.

For the foregoing reasons I find that the registrar erred in his decision, and Joseph Poitras in respect of whom this protest is made was and is a member of the Muscowpetung Band of Indians and is entitled to have his name included in the Indian register as a member of the said band.

ALBERTA

SUPREME COURT — JOHNSON, J.A.

Pecover v. Bowker and Governors of University of Alberta

Universities — Admission as Student — Conditions of — Power to Impose — University Act, SS. 23, 24, 30, 69 — Powers of Board of Governors — Necessity of Resolution or Regulation — Absence of Delegation to Dean of Law Faculty — Powers of Court.

Mandamus — Effect of Alternative Remedy.

Secs. 23 and 24 of *The University Act*, RSA, 1942, ch. 179, are sufficiently wide to permit the University of Alberta through its board of governors to make rules governing the admission of students.

Quaere whether the court has the power to inquire into the reasonableness of such rules. *Foley v. Benedict*, 86 ALR 477 (Texas Com. of Appeals) referred to. By sec. 27 of said Act, however, the board must act by resolution or regulation. In the instant case which resulted from the rejection by the dean of the law faculty of the application of the applicant herein to be admitted as a student of law it was not shown that there was any such regulation of the board of governors or that the board had delegated its authority to the dean. *Held* that

ALBERTA

DISTRICT COURT — BUCHANAN, C.J.D.C.

Re The Indian Act
Re Samson Indian Band

Indians — Right to Be Registered as Member of Band — Protests — Duty of Registrar — Reference to Judge — Duty of Judge under S. 9 of Indian Act Held Not to Have Arisen — Procedure Prescribed by Act Not Complied With — Purpose of Act — SS. 11 and 12 as Key Sections — SS. 8, 9 — Correction of Typographical Error in S. 9 — "To Be Registered" in S. 12.

Statutes — Interpretation — Obvious Errors in Wording — Correction by Court.

On a reference to a judge under sec. 9 of the *Indian Act*, RSC, 1952, ch. 149, from the decision of the registrar in respect to a protest against the inclusion of certain persons in a band list his duty under sec. 9 (4), "to decide whether the persons in respect of whom the protests are made are in accordance with the provisions of this Act entitled or not entitled, as the case may be, to have their names included in the Indian register," does not arise unless the protest to the registrar has been made strictly in accordance with the detailed provisions of said sec. 9.

Where there is no valid protest before the registrar his right to cause an investigation to be made does not arise. Since in the present case the registrar's right to investigate never arose his decision based on the investigation he made and the subsequent reference of his decision to the court were both equally invalid.

Since the tests of entitlement and non-entitlement to registration set out in secs. 11 and 12 are severe it follows that the enforcement of the procedure by which names are added to, and above all, subtracted from, band lists should be equally severe.

Said sec. 9 contemplates the lodging of a protest, firstly, against the "inclusion or omission" of a name in a band list when posted in accordance with the provisions of sec. 8; and, secondly, by the "addition or deletion" of a name in accordance with sec. 7.

The substitution of the word "any" for the word "that" in the phrase "of the name of that person" at the end of sec. 9 (1) is a reasonable typographical correction falling within that class of "mere corrections of careless language," designed to give the true meaning of the statute.

The posting of a band list as required by sec. 8 must necessarily precede any action to challenge a name thereon since the six months' period permitted for such challenge runs from the date of posting.

Three points in the present case on which the strict requirements of the Act were not complied with were: (1) The Samson band list was not posted as required by sec. 8; (2) The grounds of the protest were not stated in reasonably intelligent and intelligible fashion; (3) The 10 protesters did not qualify themselves as electors of the Samson band and thus entitled to lodge the protests with the registrar.

Secs. 11 and 12 are the key sections of said Act; they constitute the tests by which rights to registration are to be determined and show that the process of determination based thereon was to commence with the posting of band lists following the coming into force of the Act. If the correct application of those sections results in the purging from band lists of the descendants of scrip takers, descendants who have passed their whole lives on reserves, and if that result is to be deemed inhumane, it is for parliament not for the court to amend the legislation. Secs. 11 and 12, in fact, set the standards by which the band lists in existence in the Indian Affairs Branch of the Department of Citizenship and Immigration upon the coming into force of the Act were to be regulated, corrected, and if found encumbered with the names of those not entitled to be registered, to be purged.

Although the conclusion of Hogarth, D.C.J. (Sask.) in *Re Joseph Poitras* (1956-57) 20 WWR 545, was agreed with herein his view that "to be registered" in sec. 12 refers only to future registrations, i.e., that the section was not retrospective, was not agreed with.

[Not up with 2 CED (CS) *Indians*, secs. 2 (1954 Supp.), 7, 8, 13 (original work); 3 CED (CS) *Statutes*, secs. 41, 61; *Words and Phrases* (1947-1955 Supps.).]

A. F. Moir, John Gorman and *J. P. Brumlik,* for appellants.

G. H. Steer, Q.C., G. A. C. Steer and *K. J. Leathem,* for protesters.

March 1, 1957.

BUCHANAN, C.J.D.C. — I preface the reading of my judgment this morning with an explanatory comment. Since the presentation of argument by counsel on Wednesday morning, I have had time for the study of that argument only. My judgment has necessarily been hurriedly prepared. In the public interest and in the interest of the Samson band I thought it unwise to delay the rendering of my decision.

I digress to correct a suggestion inadvertently made on Wednesday morning last. The Crown represented by the Indian Affairs Branch, Department of Citizenship and Immigration, has remained neutral throughout these proceedings, assisting with equal courtesy counsel both for the protesters and for those whose presence on the Samson band list is protested ("the appellants"). The Crown is not a party to these proceedings and is not represented by counsel.

Now to turn to my decision. It is entitled:

> "In the Matter of the Indian Act, being ch. 29 of the Statutes of Canada, 1951, now ch. 149 of the Revised Statutes of Canada, 1952."

It is further entitled:

> "In the Matter of a Reference to this Court under sec. 9, subsec. (3) of the said Act, of the decisions of the Registrar,

32

> in charge of the Indian Register, Indian Affairs Branch, Department of Citizenship and Immigration, in respect of 27 protests against the inclusion in the band list of the Samson Band, Hobbema, Alberta of the persons named therein,"

and I here list the names and the band numbers of those 27 individuals referred to in the 27 protests [list followed].

It should be noted in passing that sec. 10 of the *Indian Act* provides that:

> "Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be."

In other words the fate of the Indian family follows that of the head of the family.

On January 15, 1952, 10 members of the Samson band occupying lands in the Hobbema Indian Reserve, Hobbema, Alberta, completed 27 individual protests by the terms of which they protested against the inclusion in the Samson band list of 27 individuals both men and women, then on the band list.

To appreciate the significance of that brief statement one must examine with some care the "definition and registration" sections of the Act, and of the series of Dominion enactments preceding the Act, which dealt with Indian affairs. The Act, incidentally, is one of a long series dealing with Indian affairs and extending back to 1868. In that year by *"The Secretary of State Act,* an Act providing for the organization of the Department of The Secretary of State of Canada and for the management of Indian and Ordnance Lands," ch. 42 of 31 Vict., 1868, there was laid the foundation to which the present definition of an Indian may be traced. Its sec. 15 reads thus:

> "15. For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immovable property:
>
> "Firstly. All persons of Indian blood reputed to belong to the particular tribe, band or body of Indians interested in such lands or immovable property, and their descendants;

"Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immovable property, and the descendants of all such persons; And

"Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants."

In the *Indian Act* of 1886, ch. 43, an Indian was more briefly defined in sec. 2 (*h*) thereof as follows:

"2 (*h*). The expression 'Indian' means —

"First, any male of Indian blood reputed to belong to a particular band. [The expression 'band' having previously been defined as 'any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest monies for which the Government of Canada is responsible'].

"Secondly. Any child of such person.

"Thirdly. Any woman who is or was lawfully married to such person."

This definition was repeated without change in the *Indian Act* as it appeared in RSC, 1906, ch. 81, sec. 2 (*f*). It might be noted that sec. 16 of the same Act denied to half-breeds in Manitoba who had shared in the distribution of half-breed lands the status of an Indian. Sec. 2 (*d*) of RSC, 1927, ch. 98, consolidating once more the *Indian Act* made no change in the 1886 and 1906 definitions of "an Indian."

I now come to *The Indian Act* of 1951, the Act under which these proceedings are taken (now RSC, 1952, ch. 149). Sec. 123 of that Act (1951) repealed in their entirety all those sections of the RSC, 1927, *Indian Act,* relating to Indian affairs and by its secs. 5 to 17, headed, "Definition and Registration of Indians," provided fully and in greater detail than in any previous legislation, for the definition of those entitled and not entitled to be registered as Indians in the Indian register and likewise for the removal from or addition to band lists or general lists of those entitled or not entitled to be registered as Indians.

Secs. 11 and 12 of the present Act dealing with entitlement and non-entitlement respectively read as follows:

34

"11. Subject to section 12, a person is entitled to be registered if that person

"(*a*) on the 26th day of May, 1874, was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* chapter 42 of the statutes of 1868, was amended by section 6 of chapter 6 of the statutes of 1869, and section 8 of chapter 21 of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada;

"(*b*) is a member of a band

"(i) for whose use and benefit, in common, lands have been set apart or since the 26th day of May, 1874, have been agreed by treaty to be set apart; or

"(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act;

"(*c*) is a male person who is a direct descendant in the male line of a male person described in paragraph (*a*) or (*b*);

"(*d*) is the legitimate child of

"(i) a male person described in paragraph (*a*) or (*b*), or

"(ii) a person described in paragraph (*c*);

"(*e*) is the illegitimate child of a female person described in paragraph (*a*), (*b*) or (*d*), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered; or

"(*f*) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (*a*), (*b*), (*c*), (*d*) or (*e*).

"12. (1) The following persons are not entitled to be registered, namely,

"(*a*) a person who

"(i) has received or has been allotted half-breed lands or money scrip,

"(ii) is a descendant of a person described in sub-paragraph (i),

"(iii) is enfranchised, or

"(iv) is a person born of a marriage entered into after the 4th day of September, 1951, and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph (*a*), (*b*), (*d*), or entitled to be registered by virtue of paragraph (*e*) of section 11,

"unless, being a woman, that person is the wife or widow of a person described in section 11, and

"(*b*) a woman who is married to a person who is not an Indian.

"(2) The Minister may issue to any Indian to whom this Act ceases to apply, a certificate to that effect."

An official known as the registrar, by secs. 5, 6 and 7 of the Act, was given charge of the Indian register in the Indian Affairs Branch at Ottawa. This Indian register, which it was the registrar's duty to maintain, consists of band lists and general lists in which must be recorded the name of every person entitled to be registered as an Indian.

I now turn back to the affairs of the Samson band and to the 27 protests of 10 members of that band against the continued presence on the Samson band list of the 27 persons named therein. Sec. 8 of the Act provides:

"8. Upon the coming into force of this Act, the band lists then in existence in the Department shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the list relates and in all other places where band notices are ordinarily displayed."

The registrar is given extraordinary powers of adding to or subtracting from band lists or general lists as provided in sec. 7 of the Act:

"7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with the provisions of this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

"(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom."

It should be stated that any action taken by the registrar independently under sec. 7 is subject to the right of protest given by sec. 9 of the Act.

36

Councils of a band and any 10 electors of a band—the word "elector" being defined in sec. 2 (1) (*e*) of the Act as a person who is registered on a band list, is of the full age of 21 years, and is not disqualified from voting at band elections—by the provisions of sec. 9, may protest the presence or the absence of names from band lists or from general lists.

Sec. 9 of the Act reads thus:

"9. (1) Within six months after a list has been posted in accordance with section 8 or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section 7

"(*a*) in the case of a Band List, the council of the band, any ten electors of the band, or any three electors if there are less than ten electors in the band,

"(*b*) in the case of a posted portion of a General List, any adult person whose name appears on that posted portion, and

"(*c*) the person whose name was included in or omitted from the list referred to in section 8, or whose name was added to or deleted from a Band List or a General List,

"may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person.

"(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision, and subject to a reference under subsection (3), the decision of the Registrar is final and conclusive.

"(3) Within three months from the date of a decision of the Registrar under this section

"(*a*) the council of the band affected by the Registrar's decision, or

"(*b*) the person by or in respect of whom the protest was made,

"may, by notice in writing, request the Registrar to refer the decision to a judge for review, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision, to the judge of the county or district court of the county or district

in which the band is situated or in which the person in respect of whom the protest was made resides, or such other county or district as the Minister may designate, or in the Province of Quebec, to the judge of the Superior Court for the district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other district as the Minister may designate.

"(4) The judge of the county, district or Superior Court, as the case may be, shall inquire into the correctness of the Registrar's decision, and for such purposes may exercise all the powers of a commissioner under Part I of the *Inquiries Act*; the judge shall decide whether the person in respect of whom the protest was made is, in accordance with the provisions of this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive."

In respect of the 27 persons whose names I listed initially, 10 persons describing themselves as members of the Samson band, on January 15, 1952, lodged protests with the registrar, in every case stating the ground of their protest thus: "because his fore-bearer took script," and they spelled scrip "script." The registrar under the power contained in subsec. (2) of sec. 9 "caused an investigation to be made." By an Order-in-Council P.C. 1953/249, dated February 19, 1952, a commissioner was appointed under the *Inquiries Act,* RSC, 1952, ch. 154, to inquire into the protests; this the commissioner did during March 29, 30 and 31, and April 1, 1954 and July 7 and 8, 1955. The 1954 evidence led the commissioner to advise the registrar that none of the protests could be sustained. A year's investigation of departmental records at Ottawa brought additional materials, brought a 1955 further hearing by the commissioner and brought a reversal of his previous opinion and advice to the registrar. The latter, on November 6, 1956, rendered his decision in respect of the 27 protests, this decision being based on materials gathered at the commissioner's hearing. In every case the protested person was held, by the registrar, not entitled to be registered as an Indian in the Samson band. The 27 persons affected by the registrar's decision filed with the registrar on almost the last day of the period provided for such filing, namely, February 4, 1957, a request that the decision of the registrar be referred to a judge for review. As I deliver this judgment on March 1, 1957, I am reminded that five years, years of painful suspense for those protested (the appellants), of golden opportunity for the writers of editorials and of letters to the newspapers, and of unlimited joy to the propagandists,

38

have gone by since the protesters initiated these proceedings. The responsibility for the unreasonable delay rests upon the Indian Affairs Branch, upon the commissioner and, more recently, upon the appellants themselves.

Counsel, both for the appellants (and the appellants are those persons whose presence on the band list is the subject of protest) and for the protesters, desired that certain questions of law and statutory interpretation should be heard before embarking on an examination of the evidence taken before the commissioner, some 250 pages in all, and before calling such additional *viva voce* evidence as counsel or the court might deem necessary. Argument on the preliminary questions has been heard and a transcript thereof is now before me.

Mr. Moir, for the appellants, submits that on five grounds the registrar's decision cannot be sustained:

(1) Sec. 8 of the Act not having been complied with, the registrar was not justified in entertaining the protests.

(2) If the phraseology of sec. 9 (1) of the Act be carefully studied and correctly interpreted it will be found not to permit the protesting of names of Indians already on a band list when posted as provided in sec. 8.

(3) The 10 protesters described in their 27 protests as "members of the Samson Band of Indians" having failed to identify themselves as "electors"—an essential under sec. 9 (1) (*a*)—are therefore not qualified as protesters.

(4) The grounds set out in the protests, namely, "because his [or her] fore-bearer(s) took script" do not comply with the requirements of sec. 9 (1) of the Act not being in fact "a brief statement of the grounds" of the protest and in fact being void for uncertainty.

In the fifth place and finally, sec. 12 of the Act on which the protests purport to be based and which sets out those persons not entitled to be registered should not be interpreted as of retrospective or retroactive operation and, if not so interpreted, fails completely as a ground of protest.

Mr. George Steer, for the protesters, submits that the construction of the relevant sections of the Act, all of which have been quoted above, are a complete answer to his opponent's preliminary objections. I think that his argument may be summed up thus: The 1951 *Indian Act* repeals completely the pre-existing statutory provisions as to the definition and registration of Indians; sec. 11 defines those who may be registered, sec. 12,

those who may not be registered; the registrar's decision having been referred to this court, the court need not be deterred by alleged failure in strict compliance with the statutory provisions; the duty of the court is set out simply and clearly in subsec. (4) of sec. 9:

> " * * * the judge shall inquire into the correctness of the Registrar's decision; * * * the judge shall decide whether the persons in respect of whom the protests were made, are, in accordance with the provisions of this Act entitled or not entitled, as the case may be, to have their names included in the Indian Register."

On the inquiry before the commissioner, counsel for the appellants reminded him that the Samson band by reason of the discovery of oil on reserve lands has suddenly become possessed of a highly valuable asset and that loss of status as band members would be to the individual appellants an irretrievable disaster. Although I accept that as a statement of fact, I doubt its relevancy. I must adhere strictly to my responsibility which is to interpret the Act and to apply it.

I now deal with arguments of counsel for the appellants and in reverse order. In their fifth ground of objection the appellants challenge the correctness of the registrar's decision because of the construction placed by him on sec. 12; he deemed it referable to any persons whose names appeared on band lists posted pursuant to sec. 8, or alleged to have been so posted. How then, shall sec. 12 be interpreted? Do the words therein "to be registered" refer to future registration only as held by Hogarth, D.C.J. in *Re Joseph Poitras* (1956-57) 20 WWR 545, at 561? It should be noted that the opening phraseology of sec. 11 follows the same pattern as does the opening phraseology of sec. 12. Sec. 11 commences in this fashion: "Subject to sec. 12" (and those are very important words) "subject to sec. 12 a person is entitled to be registered if that person * * *" and then there are set out in a series of subheadings those entitled to be registered. Sec. 12 reads: "The following persons are not entitled to be registered, namely, * * *" and there are set out in a series of subheadings those not entitled to be registered among whom are persons "who have received or have been allotted half-breed lands or money scrip," or, those who are "descendants of a person who has received or has been allotted half breed lands or money scrip." Surely the opening words of those two sections are to be interpreted in the same fashion. To say that the words, "is entitled to be," in sec. 11 are also to be construed as referable to the future only would make that section, in my opinion, completely meaningless.

Although I respectfully agree with Hogarth, D.C.J. in the decision at which he arrived in the *Poitras* case, *supra,* I find his interpretation of sec. 12 (p. 561) unacceptable. He holds that the section refers only to future registrations. I agree with Mr. Steer that secs. 11 and 12, in fact, set the standards by which the band lists in existence in the Indian Affairs Branch upon the coming into force of the Act were to be regulated, corrected, and if found encumbered with the names of those not entitled to be registered, to be purged. In so holding I am not overlooking those rules of statutory construction as set out in the following cases cited by Mr. Moir: *Midland Ry. v. Pye* (1862) 10 CB (NS) 179, 30 LJCP 314, 142 ER 419; *Young v. Adams* [1898] AC 469, 67 LJPC 75; *Lauri v. Renad* [1892] 3 Ch 402, 61 LJ Ch 580; *Smith v. Callander* [1901] AC 297, 70 LJPC 53; *In re Pulborough School Board Election; Bourke v. Nutt* [1894] 1 QB 725, 63 LJQB 497. I adopt with respect the reasoning of Scott, L.J. in *Barber v. Pigden* [1937] 1 KB 664, 677, 106 LJKB 858, where, in support of his finding that *The Law Reform (Married Women and Tortfeasors) Act* was in fact retrospective in its application he stated, "The dominant intention of the Act is clear beyond all doubt."

For the "dominant intention" of the Act, one must look at secs. 5 to 17 as a whole. Upon so doing I hold that the "dominant intention" becomes quite clear; that secs. 11 and 12 are the key sections of the Act; that they constitute the tests by which rights to registration were to be determined and that the process of determination based on secs. 11 and 12 was to commence with the posting of band lists following the coming into force of the Act (sec. 8). If the correct application of those sections results in the purging from band lists of the descendants of scrip takers, descendants who have passed their entire lives on reserves, and if that result is to be deemed inhumane, it is for parliament not for the court to amend the legislation. It is not the function of the court to whittle down and render nugatory the clearly expressed intentions of parliament. On their fifth ground of objection the appellants therefore fail.

The four remaining arguments of counsel for the appellants deal with the interpretation of secs. 8 and 9 of the Act. It is my view that if the tests of entitlement and non-entitlement to registration set out in secs. 11 and 12 of the Act are severe—and they are—then equally severe should be the enforcement of the procedure by which names are added to, and above all, subtracted from band lists.

An examination of the evidence taken at the inquiry indicates quite clearly the hopeless position in which the phraseology of the 27 protests left counsel for the appellants. The grounds for the protests were expressed thus: "because his fore-bearer took script." What is a fore-bearer? My most recent *Oxford Dictionary* ignores the word entirely. Is it an ancestor? If so, what ancestor? Ancestor of what generation? Into the records of what ancestor is the protested person to delve? The records are all with the Indian Affairs Branch and in spite of the courtesy and patience of the registrar, Mr. Malcolm McCrimmon, are most difficult to discover and when discovered, to understand. Over the years, Indian affairs have been under the direction of several different departments at Ottawa, rendering the discovery of pertinent documents most difficult and, in some cases, quite impossible. The registrar, for example, was unable to state, or to find departmental records purporting to show whether any of the ancestors of the appellants who allegedly took scrip subsequently returned the value of the scrip and were re-established as band members. That many Indians, takers of scrip, did so re-establish themselves is, nevertheless, a well-authenticated fact. Neither could the registrar establish whether "scrip" payable to bearer always came into the hands of or was actually cashed by the Indian for whose benefit it purported to be issued. I hold that the words, "because his fore-bearer took script" are a completely inadequate statement of "grounds." They fall far short of that precision of statement necessary to the preparation by the appellants of their defence.

No attempt was made by the protesters to qualify themselves as "electors." They described themselves in the protests merely as "members of the Samson Band of Indians" and that too on forms apparently supplied by the Indian Affairs Branch. The Act, by sec. 9, requires that when the protest of the inclusion of names on a posted band list is being made "any ten *electors* of the band" may do it, not *members*. Are the 10 protesters electors? The court has no information other than that provided in the protests. The protesters, as self described, are not electors. I accept their own description of themselves and hold them not to be electors.

Mr. Brumlik for the appellants was critical of the construction and phraseology of sec. 9 and he was quite entitled to be critical. A careful scrutiny of that section reveals that the final words of subsec. (1) "of the name of that person," should properly refer to the addition or deletion of a name from a band list and not to a band list as posted, since the reference in those final words can only be to the earlier words in lines 2 and 3, of the

subsection, "within three months after the name of a person has been added to or deleted from a Band List." I agree with Mr. Steer, however, that sound principles of interpretation demand that the general intent of the section shall prevail. I hold that the section contemplates the lodging of a protest, (1) Against the "inclusion or omission" of a name in a band list when posted in accordance with the provisions of sec. 8; and (2) By the "addition or deletion" of a name in accordance with sec. 7. The substitution of the word "any" for the final word "that" in subsec. (1) of sec. 9 would seem a reasonable typographical correction falling within that class of "mere corrections of careless language," designed to give the true meaning of the statute. *Maxwell on Interpretation of Statutes,* 10th ed., 229; *Morris v. Structural Steel Co.* [1917] 2 WWR 749. The substitution would thus permit in the case of the Samson band list "the council of the band or any ten electors of the band" to lodge their protest against the inclusion of the names of the appellants in that list. On their second ground of objection the appellants fail.

Mr. Gorman refers me to the *Poitras* case cited *supra,* in which Hogarth, D.C.J. at p. 554 dealt with the statutory requirements in respect to the posting of band lists upon the coming into force of the Act. By a rather strange coincidence, the words there used by Judge Hogarth may be applied almost without change to the case at bar, since Mr. McCrimmon, the registrar, gave identical evidence in that case and at the inquiry herein. I quote from p. 554:

> "Sec. 9 of the Act gives the right to protest within six months after a list has been posted in accordance with sec. 8. Sec. 8 requires the list to be posted upon the Act coming into force in a conspicuous place in the superintendent's office that serves the band, or persons to whom the list relates, and in all other places where band notices are ordinarily displayed.
>
> "The only evidence of posting as required by sec. 8 is that given by Mr. Malcolm McCrimmon, the registrar, who said the list was posted September 4, 1951. Mr. McCrimmon did not say where the list was posted nor did he say that it was posted as required by sec. 8. A photostatic copy of the band list is now before me and I observe there is attached thereto the following words:
>
> " 'This list is posted pursuant to Section 9, Cap. 29, 15, George VI, 1951 (*The Indian Act*).'

"There is nothing in sec. 9 that requires a band list to be posted. It is sec. 8 that directs the posting. There is no evidence that the band list was posted in the superintendent's office and in all other places where band notices are ordinarily displayed.

"In absence of proof of posting the list in the places stated in sec. 8 the registrar, in my opinion, erred in entertaining the protest. In my opinion, the absence of proof of proper posting is fatal to the protesters' right to be heard."

With this opinion as expressed by Hogarth, D.C.J., I with respect agree. The posting of a band list as required by sec. 8 must necessarily precede any action to challenge a name thereon since the six months period permitted for such challenge runs from the date of posting. On three scores, therefore, I find failure in compliance with the strict requirements of the Act: (1) Failure to post the Samson band list as required by sec. 8; (2) Failure to state in reasonably intelligent and intelligible fashion the grounds of the protests; and (3) Failure of the 10 protesters to qualify themselves as electors of the Samson band and thus entitled to lodge the 27 protests with the registrar.

In what position do these findings leave the court? Mr. Steer argues that in spite of these instances of non-compliance with the Act my duty still remains under sec. 9 (4),

"to decide whether the persons in respect of whom the protests are made are in accordance with the provisions of this Act entitled or not entitled, as the case may be, to have their names included in the Indian register."

In my view, this duty arises only when a protest has been made to the registrar *under sec. 9,* and strictly in accordance with its detailed provisions. The three defects which I have found in respect of and in the 27 protests are just as fatal in my view as though the protests had been filed after the expiry of the six months' period provided by sec. 9, for the filing of protests.

There being no valid protests before the registrar, the right to cause an investigation to be made never accrued. Only "where a protest is made to the Registrar, *under this section*" (i.e., sec. 9) shall he cause an investigation to be made. Since the right to investigate never arose, the decision of the registrar based upon that investigation and the subsequent reference of his decisions to this court were both equally invalid.

I hold the proceedings by way of protest to have been a nullity *ab initio.* Those members of the Samson band referred to in the 27 protests are entitled to have their names included in the Indian register as members of the Samson band.

ALBERTA

DISTRICT COURT — BUCHANAN, C.J.D.C.

In the The Indian Act

In re Wilson

Indians — Right to Be Registered as Member of Band — Indian Act, S. 11 (b) (e) — Name Included in Original Band Membership List as Infant of Female Member of Band — Right Also to Be Included as Illegitimate Child of Such Female — His Own Previous Evidence of Paternity Without Probative Value.

The Registrar of the Department of Citizenship and Immigration decided, under the powers given him by sec. 9 (2) of *The Indian Act*, 1951, ch. 29 (now RSC, 1952, ch. 149) that the person referred to herein as "Wilson" was not entitled to have his name included in the Indian register as a member of the Beaver Band at Horse Lake and Clear Hills. In proceedings taken under subsecs. (3) and (4) of said sec. 9 to inquire into the correctness of said decision

Held:

Since Wilson came within class (*b*) as described in sec. 11 of the Act, he was entitled to have his name so included. The treaty pay list of June 1, 1900, must be joined with the treaty pay list of July 6, 1899, to form the original band membership list of the Beaver Band. That being done, Wilson's name, as the infant of Madeline, No. 41, must be held to have been and to be a member of the Beaver Band from the date of the first payment of annuity to his mother on his behalf.

Wilson was also entitled to have his name so included on the ground that he came within class (*e*) of said section (being the illegitimate child of a female person described in class [*b*] of said sec. 11). The registrar, not having been reasonably satisfied that the father of the child was not an Indian, was not entitled to declare that the child was not, or is not, so entitled to be registered.

It would appear to be a gross and intolerable injustice if some 60 years after his birth, Wilson should be required to prove his Indian paternity affirmatively, when at the time of his birth the representatives of the Crown were the only persons capable of recording vital statistics and were so negligent of their responsibilities to the band and its members as to maintain no record whatsoever of the births of children within the band. Very few, if any, of the members of the band whom the department accepts as such could produce evidence of birth satisfactory to a court. The evidence upon which prior decisions as to Wilson's paternity had been made had been largely that given by himself, and such evidence when given in respect of his own birth has no probative value whatsoever.

[Note up with 2 CED (CS) *Evidence*, secs. 125-127; *Indians*, sec. 2.]

C. F. Noble, for Indian Affairs Branch of the Department of Citizenship and Immigration.

Wilson in person.

March 29, 1954.

BUCHANAN, C.J.D.C. — These proceedings are taken under subsecs. (3) and (4) of sec. 9 of *The Indian Act,* 1951, ch. 29 (now RSC, 1952, ch. 149) (hereinafter referred to as "the Act"). Their purpose is to inquire into the correctness of the decision of the Registrar of the Department of Citizenship and Immigration, who by virtue of his office has charge of the Indian register, by which decision, rendered under powers conferred on him by sec. 9 (2), he held that the person described as Sam Jean Baptiste Wilson, hereinafter referred to as "Wilson," is not entitled to have his name included in the Indian register as a member of the Beaver Band at Horse Lake and Clear Hills in Alberta. I shall refer to this band hereafter as "the Beaver Band."

The Act passed by the Dominion Parliament in June of 1951 and proclaimed in that year provides for appeals both by individuals and by a band council, all designed to ensure that only those strictly entitled thereto, in accordance with the rigid definitions contained in the Act, shall enjoy the privileges and share in the assets provided by the federal government for those who qualify as "Indians." Secs. 5, 6 and 7 of the Act deal with the maintenance of an Indian register by the department and with additions to or deletions therefrom; sec. 8 of the Act deals with the posting of band lists; sec. 9 deals with protests against inclusion, omission, addition or deletion of names from a band or general list, subsequent investigation and decision by the Registrar of the Department of Citizenship and Immigration, hereinafter referred to as "the department," and the reference of the registrar's decision to a judge for review and a decision which sec. 9 (4) of the Act provided shall be final and conclusive. These sections read as follows:

> "5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.
>
> "6. The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.
>
> "7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with the provisions of this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

"(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

"8. Upon the coming into force of this Act, the band lists then in existence in the Department shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the list relates and in all other places where band notices are ordinarily displayed.

"9. (1) Within six months after a list has been posted in accordance with section eight or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section seven

"(*a*) in the case of a Band List, the council of the band, any ten electors of the band, or any three electors if there are less than ten electors in the band,

"(*b*) in the case of a posted portion of a General List, any adult person whose name appears on that posted portion, and

"(*c*) the person whose name was included in or omitted from the list referred to in section eight, or whose name was added to or deleted from a Band List or a General List,

"may, by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person.

"(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision, and subject to a reference under subsection (3), the decision of the Registrar is final and conclusive.

"(3) Within three months from the date of a decision of the Registrar under this section

"(*a*) the council of the band affected by the Registrar's decision, or

"(*b*) the person by or in respect of whom the protest was made,

"may, by notice in writing, request the Registrar to refer the decision to a judge for review, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision, to the judge of the

county or district court of the county or district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other county or district as the Minister may designate, or in the Province of Quebec, to the judge of the Superior Court for the district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other district as the Minister may designate.

"(4) The judge of the county, district or Superior Court, as the case may be, shall inquire into the correctness of the Registrar's decision, and for such purposes may exercise all the powers of a commissioner under Part I of the *Inquiries Act;* the judge shall decide whether the person in respect of whom the protest was made is, in accordance with the provisions of this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive."

The registrar, in compliance with sec. 9 (3) of the Act, has made available to me either directly or through Mr. Noble, counsel for the department, all material considered by the registrar in making his decision that Wilson is not entitled to be included in the Indian Register as a member of the Beaver Band. In addition I have had the advantage of hearing the *viva voce* evidence of Mr. Malcolm McCrimmon, an officer of lengthy and wide experience in the Indian Affairs Branch of the Department, Mr. E. J. Galibois, superintendent, Indian agency, Fort St. John, B.C., and of Wilson himself. Due to the extreme difficulty, if not impossibility, of procuring the personal attendance of all witnesses whose oral evidence I would very much like to have heard, I of necessity trespassed upon those rules of admissibility which normally govern in a court of law and admitted the evidence given by Mr. Galibois of certain statements made to him by (i) Baptiste Bisson of Mount Valley, Alberta, the maternal grandfather of Ernest Horseman, the present chief of the Beaver Band; (ii) the said Chief Ernest Horseman, and (iii) Mrs. Madeleine Davis, whose name appears on the membership list of the Beaver Band, posted in accordance with the requirements of sec. 8 of the Act on or about September 4, 1951.

These proceedings are in effect an appeal by Wilson from the registrar's decision that his name was rightly deleted from the band list of the Beaver Band. A review of this decision calls not only for a careful weighing of the oral evidence taken at the hearing before me at Grande Prairie, and a study of the body of material contained in the registrar's file, but also for a close examination of sec. 11 of the Act. Wilson must prove

47 A

or be proven to fall within one of the six classes of persons described in that section, or fail in his appeal. This section is quoted in full *infra*.

Before attempting to determine the precise meaning of the words of sec. 11 by which are set out the six classes of persons entitled to be registered as Indians in the Indian Register, on either a band or a general list, it is necessary to examine Wilson's personal history and his association with the Beaver Band, thus securing those facts which are essential to the determination of the question at issue, viz.: Is Wilson entitled to be registered?

The person now known as Wilson is said to have been born in or about 1893 or 1894 near Peace River, Alberta. Evidence as to his paternity is conflicting. There is evidence which might lead to the conclusion that he was born to an Indian mother, Madeline (Monomoniende) Sanata, of a white father, of American extraction, Ned Wilson by name. There is likewise evidence in support of the suggestion that Wilson may have been sired by one Le P'tit (Lepshie) Laboucan, as to whose racial extraction the record is silent. The evidence in support of these two and yet other conclusions will be analysed later.

Counsel for the crown has produced to me, from the records of the department, photostatic copies of the treaty pay lists of the Beaver Band, dated respectively July 6, 1899; June 1, 1900; May 13, 1901; and June 24, 1926. Neither Wilson's name nor that of his mother appears on the pay list of July 6, 1899 (covering the first payment on annuity to this band) there being only 13 entries on that list, with a total of 34 persons paid. On the treaty pay list for June 1, 1900, under No. 17 appears the name "Chatelas," in whose family there are shown to be six persons. Under No. 41 on the same list appears the name Madeline, whose family is shown to consist of two persons. It is conceded by the crown that these two persons are Madeline, the mother of Wilson, and Wilson, her infant child, the present appellant, whose status and band membership are in question. The treaty pay list of May 13, 1901, shows that by that date, Madeline had married Pierre Chatelas, appearing on the band list as No. 50, a son of the Chatelas, above referred to under No. 17. The family of Pierre Chatelas, in respect of whom treaty was paid, was shown on the same list to consist of four persons, of whom presumably the infant child Wilson was one. The treaty pay list of June 24, 1926, shows that Pierre Chatelas, under the same No. 50, was paid treaty money in respect of a family of seven persons, and that a boy conceded to be Wilson, having married, had been withdrawn from the Pierre Chatelas

group No. 50, and was shown independently as No. 78—two persons being shown as receiving treaty money under his number.

In 1942 and 1943 investigations were carried out by the Indian Affairs Branch (then under the Department of Mines and Resources) with the apparent aim of purging or correcting the band lists in the Lesser Slave Lake Agency. Wilson, by reason of his non-Indian name, was questioned and is said to have told his interrogator that he was the legal son of a man by the name of Wilson, who had married his mother. This answer being adequate to disqualify Wilson under the then definition of an Indian, he was promptly suspended from his treaty payment. At that time Wilson had been on the band list and had been paid treaty for some 43 years. In 1944 the Honourable Mr. Justice W. A. Macdonald was appointed as a commissioner under the authority of order-in-council, P.C. 3744, to conduct an inquiry into the question of membership of certain individuals in the Indian bands of Lesser Slave Lake Agency. The results of the inquiry having been reported by him to the minister of the day, Wilson's name was formally removed from the band list, and he and his family ceased to receive treaty money.

As provided by sec. 8 of the new *Indian Act* of 1951, quoted *supra,* Indian band lists were posted throughout Canada upon the coming into force of the new Act, and it became the privilege of the council of the Beaver Band to protest against the absence from the Beaver Band List of Wilson's name (sec. 9 [1]). This protest was lodged. Under sec. 9 (2), the registrar then caused an investigation to be made into the matter, and rendered a decision by which he confirmed the deletion of Wilson's name from the band list. Wilson, as was his privilege, thereupon, by notice in writing, requested the registrar to refer the decision to a judge for review. The matter is now before this court for the purpose of such review.

It is worthy of note that the only evidence which appears to have been heard by Mr. Justice Macdonald was that of Wilson himself who, according to the transcript of the evidence, then swore through an interpreter as follows:

> "My name is Jean Baptiste Wilson. I am 50 years of age. I was born at Peace River. My father is Ned Wilson, an American. My mother is Madeline Monomoniendi, a Treaty Indian at Dunvegan. They paid treaty there first. I was about one year old when my father died. My mother was married to the American. She then married Pierre Chatelain. He was a Treaty Indian from Dunvegan. He was paid treaty

at Dunvegan. He died 17 years ago. I was brought up by Pierre Chatelain and my mother. He supplied food, clothing and a home. I have been getting treaty ever since my mother and Pierre were married. I got a separate ticket when I got married 22 years ago. My children are: Harry, 22; Helen, 19. I have a brother, Alexis Chatelain, and a sister Marie Chatelain."

In his evidence given before me, Mr. Malcolm McCrimmon, who conducted the investigations into band membership in the Lesser Slave Lake Agency in 1942-1943, when asked as to what light the department could throw on the question of Wilson's birth (transcript p. 11) stated that in many cases the department had been able to locate church records, but that in respect of Wilson no birth records of any sort were available. It would seem, therefore, that the decision of the then minister, based upon the evidence taken before Mr. Justice Macdonald, whereby Wilson was adjudged not to be an eligible member of the Beaver Band, and the decision of the registrar whereby the protest made by the council of the Beaver Band under sec. 9 (1) of the Act was dismissed, were both based largely upon the evidence given by Wilson himself. It is a new departure when the evidence of an individual as to his own paternity is accepted as admissible much less as conclusive evidence on the question. It is my considered opinion that the evidence of Wilson as to the circumstances of his birth and in particular as to his paternity are completely valueless. He states that his father died when he was one year of age. There is no information available as to the source of Wilson's information with regard to his birth; it must be assumed to have been merely the local rumour and idle chatter in the band which came to his ears in his later life.

From the evidence taken before me, it becomes clear that even among the older members of the Beaver Band, as well as among Indian non-members of the band, there is a decided conflict in the evidence as to Wilson's birth. In a report made February 6, 1952, by Mr. E. J. Galibois, superintendent for the department at Fort St. John, consequent upon the receipt of the protest of the Beaver Band Council, in respect of the deletion of Wilson's name from the band list, Mr. Galibois summarized the story given by a non-Indian, Baptiste Bisson, aged over 90, of Mount Valley, Alberta, maternal grandfather of Ernest Horseman, present chief of the Beaver Band, as related by Bisson to Chief Ernest Horseman on January 25, 1952:

"Madeline Sanata was not married to the American (a white man who had come to Canada from the States and who was not known under any other name) but they intended

to be married at the priest's next visit to Saskatoon Lake. The American disappeared before the priest's visit. Some months after, seeing that her promised was not coming back and as it was winter and she needed support, Madeline started to live with Le P'tit (Lepshie) Laboucan, who promptly got her with child. They stayed together off and on; they did not get along and fought. When her baby was born, that was in the month that they dry meat (September) they had parted for good. That baby was Jean Baptiste whom we call now Sam Wilson and his father was Le P'tit Laboucan. It was a year later that Madeline married Pierre Chatelas before the priest and Pierre adopted his wife's child, Indian fashion.

"All this happened before the Treaty was made. Sam Wilson was about six years old when the Treaty was first made at Dunvegan. Pierre Chatelas was there then, and he took treaty for himself and his family in which was included Sam Wilson. I believe they took treaty for three children at that first treaty; there was first Jean Baptiste, and Alexis, and Mary, but I am not too sure about that."

Mr. Galibois, commenting on this story obtained by him at second-hand, says that Chief Ernest Horseman believes that Baptiste Bisson, his grandfather, was of sane and normal state of mind when he gave him the above story, and *that its credibility cannot be questioned.* It is to be noted that no information is given in Bisson's statement as to the status of Laboucan, said to be Wilson's father, and that the suggestion that Madeline married the American, and that Wilson was born of the marriage, or even of the liaison, is contradicted.

I permitted Mr. Galibois in his evidence to relate to the court facts stated to have been given to him by a Mrs. Madeleine Davis, aged 75, who appears as No. 46 on the band list as at June 30, 1951, and who by reason of illness was unable to attend court. Mr. Galibois produced notes made during his conversation with Mrs. Davis in January of 1952. Mrs. Davis stated that the father of Jean Baptiste Wilson was a white man, an American; that they were married in church; that they lived two months together and that then the man went out trapping and never came back. He is supposed to have perished. Mrs. Davis confirmed the fact that the mother of Wilson later on married Pierre Chatelas, a full-blooded Indian. It will be noted that Mrs. Davis's story flatly contradicts that told by Baptiste Bisson, grandfather of Chief Ernest Horseman, a person whose credibility, according to Chief Ernest Horseman, could not be questioned.

Wilson himself gave evidence before me. He preferred to talk, and did talk, through an interpreter. His testimony as a whole would indicate that he is just as slow of thought as he is of speech. He professed to have no recollection of having appeared before Mr. Justice Macdonald, denied having stated that his father was Ned Wilson, denied that Wilson was his father, said that the name "Wilson" was given to him by an Indian agent, Larue, who when he was issuing his ticket to him merely said, "put him Wilson" (transcript p. 34).

In respect of the question of paternity, it is argued by counsel for the crown that the entire burden of proof falls upon Wilson as suggested in the legal maxim, *"probatio incumbit ei qui dicit non ei qui negat."* It would appear to me a gross and intolerable injustice if, some 60 years after his birth, Wilson should be called upon to prove his Indian paternity affirmatively, when at the time of his birth the representatives of the crown were the only persons capable of recording vital statistics and were so negligent of their responsibilities to the band and its members as to maintain no record whatsoever of the births of children within the band. It is safe to say that very few, if any, of the members of the band whom the department accepts as such could produce evidence of birth satisfactory to a court. The evidence upon which previous decisions as to Wilson's paternity have been made has been largely that given by himself, and I have already expressed the opinion that such evidence when given in respect of his own birth has no probative value whatsoever.

The details of Wilson's personal history and of his association with the Beaver Band having been set out, we are now in a position to consider sec. 11 of the Act, which reads thus:

> "11. Subject to section twelve, a person is entitled to be registered if that person
>
> "(*a*) on the twenty-sixth day of May, eighteen hundred and seventy-four, was, for the purposes of *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* chapter forty-two of the statutes of 1868, as amended by section six of chapter six of the statutes of 1869, and section eight of chapter twenty-one of the statutes of 1874, considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada,
>
> "(*b*) is a member of a band

"(i) for whose use and benefit, in common, lands have been set apart or since the twenty-sixth day of May, eighteen hundred and seventy-four have been agreed by treaty to be set apart, or

"(ii) that has been declared by the Governor in Council to be a band for the purposes of this Act,

"(*c*) is a male person who is a direct descendant in the male line of a male person described in paragraph (*a*) or (*b*),

"(*d*) is the legitimate child of

"(i) a male person described in paragraph (*a*) or (*b*), or

"(ii) a person described in paragraph (*c*),

"(*e*) is the illegitimate child of a female person described in paragraph (*a*), (*b*) or (*d*), unless the Registrar is satisfied that the father of the child was not an Indian and the Registrar has declared that the child is not entitled to be registered, or

"(*f*) is the wife or widow of a person who is entitled to be registered by virtue of paragraph (*a*), (*b*), (*c*), (*d*) or (*e*)."

If Wilson's contention that he is entitled to be registered is to be sustained, he must bring himself within one of the six classes or categories (*a*) to (*f*) inclusive of this section.

It should be noted that sec. 12 of the Act which lists the persons not entitled under any circumstances to be registered in the Indian register, does not affect either the argument or the court's decision since admittedly Wilson does not fall within any of the five classes of persons described in sec. 12. We may therefore deal with sec. 11 without regard to sec. 12.

In my study of sec. 11, I have been greatly assisted by the memorandum thereon prepared by Mr. L. A. Couture, departmental legal adviser for his deputy minister. I find myself in sympathy with the registrar, who considers that sec. 11 "offers difficulties in interpretation." I am not called upon, nor would it be proper for me, to make any extensive analysis generally of sec. 11 (as Mr. Couture has done) with a view to setting bounds to the classes which the draftsman attempted to define with precision. I am charged merely with the task of deciding whether Wilson, the details of whose life, and of whose association with the Beaver Band have been outlined *supra*, can demand to be registered upon the ground that he belongs to one—or

53

perhaps to more than one, though one will be ample—of the six classes (*a*) to (*f*) inclusive.

Clause (*a*) we need not consider, since those eligible thereunder would now be at least 80 years of age, and Wilson was born in or about 1893 or 1894.

Clause (*b*) I do not find easy of interpretation. Its apparent simplicity is deceiving. I believe that like clause (*a*) it deals with general and basic entitlement; that although it is phrased in the present tense, it necessarily imports the past; that by design it contains no reference whatever to blood or paternity but merely to band membership, the intention, in my view, being that in determining the entitlement of the older members of any band which came into being, in its relationship to the Act, in the last decade of the 19th century, when records were of necessity inadequate, there must above all be finality; there must be a band membership which, once established, cannot be impugned on any grounds. This interpretation of the significance of clause (*b*) is rendered the more reasonable by the nature of clauses (*c*) (*d*) (*e*) and (*f*) which follow; they deal with the descendants, male or female, of the two classes described in (*a*) and (*b*). This interpretation moreover has the eminent recommendation that it gives a fair and just meaning to the clause; in effect it raises a self-imposed estoppel against the crown—let membership once be established and the status of "the member" is beyond challenge.

If, therefore, it can be acceptably argued that Wilson "is" or "was" a member of the Beaver Band, then his status as a person "entitled to be registered" is established.

Neither Wilson nor his mother appeared on the band list of July 6, 1899 but, as stated *supra*, his mother Madeline did appear in the pay list of June 1, 1900 (as No. 41 thereon) and as a member of a family of two. She and her child are described thereon as "Indians not paid last year who have returned." It is conceded that the second member of the family was the infant child, later to be known as Sam Jean Baptiste Wilson. It should be noted that in the same pay list of June 1, 1900, there also appeared as a member of the band, under No. 19, one Gouraugeau Narcisse. Under the same No. 19 on the approved Beaver Band membership list of June 30, 1951, appears widow Gouraugeau (Gourgan). On the June 1, 1900, pay list under No. 21 appears Kygar, with an additional member of his family, presumably his wife. On the approved Beaver Band membership list of June 30, 1951, appears "Kygar, widow." Is it not a fair conclusion that if the widow of Gouraugeau, No. 19, and the widow of Kygar,

No. 21, survive as eligible members of the Beaver Band as shown by the band list of June 30, 1951, they do so by virtue of the fact that their husbands were and are deemed to have been "members of a band," viz., Beaver Band as defined in sec. 11 (*b*)? And does not the appearance of the widows Gouraugeau and Kygar on the June 30, 1951, band list indicate that such is the view of the registrar? In my view the treaty pay list of June 1, 1900, must be joined with the treaty pay list of July 6, 1899, to form the original band membership list of the Beaver Band. That being done, Wilson's name, as the infant of Madeline, No. 41, must be held to have been and to be a member of the Beaver Band from the date of the first payment of annuity to his mother on his behalf.

I hold therefore that Wilson was, and is, a member of a band as defined in sec. 11 (*b*) and is entitled to be registered.

It may also be argued that Wilson falls within class (*e*) of sec. 11. It has not been disputed that his mother Madeline, No. 41 on the treaty pay list of June 1, 1900, qualified as a member of Beaver Band. The story of Baptiste Bisson, as reported to Mr. Galibois and quoted *supra* is fully endorsed by Chief Horseman; the latter goes so far as to say that Bisson's credibility cannot be questioned. Neither do I question it. Bisson says that Madeline, the mother of Wilson, was not married to the American; that the American disappeared before the priest's visit; that Madeline started to live with Le P'tit Laboucan, who promptly got her with child. The child was obviously illegitimate since there was no suggestion of a priestly visit. Later Madeline married Pierre Chatelas, No. 50 on the pay list of 1900. I accept in respect of the birth of Wilson the evidence of Bisson in preference to that of Madeleine Davis and, above all, in preference to that of Wilson, whose evidence as to his own birth I have already held to be of no probative value whatever.

Before holding that Wilson falls within class (*e*) being the illegitimate child of a female person, namely, Madeline (Monomoniende) (Sanata) Chatelain, a person described in par. (*b*) of sec. 11, I must deal with the proviso thereto that such illegitimate child is not entitled to be registered if the registrar is satisfied that the father of the child was not an Indian, and if the registrar (presumably as a result of his having been satisfied that the father of the child was not an Indian) has declared that the child is not entitled to be registered. I hold, having had placed at my disposal all the evidence which has been placed before the registrar, that he could not reasonably have been satisfied that the father of the child was not an Indian inasmuch as the evidence before him on that point was entirely

55

contradictory and unsatisfactory. The registrar, not having been reasonably satisfied that the father of the child was not an Indian, was not entitled to declare that the child was not, or is not, entitled to be registered.

On the ground therefore that Wilson falls within class (*b*) and class (*e*) as described in sec. 11 of the Act, I hold that Wilson, in respect of whom the protest herein was made, is, in accordance with the provisions of the Act, entitled to have his name included in the Indian Register as a member of the Beaver Band of Horse Lake and Clear Hills.

ALBERTA

DISTRICT COURT — EDWARDS, D.C.J.

Shibley v. Saulnier and Scott

Military Law — Action for Damages against Soldier — Limitation of under S. 215, National Defence Act — Default of Appearance — Leave to Raise Defence of Section on Assessment of Damages Refused.

Automobiles — Imminent Collision — Car Running into House — One Driver Held Solely to Blame.

In this action the defendant S., a soldier, was found solely liable for the damages sustained by the plaintiff. On the assessment of damages he was represented by an officer who claimed for him the protection of the limitation section (215) (quoted *infra*) of the *National Defence Act*, RSC, 1952, ch. 184, and asked (notice of motion having been given) for leave to set up the section as a defence.

Held: Having regard to the fact that S., although duly served with a statement of claim on January 12, 1952, and noted in default on December 18, 1952, and later examined for discovery on April 23, 1953, at no time entered any appearance or objection until served with the notice for the assessment of damages returnable on May 7, it would be inequitable and unjust not only to the plaintiff but to the co-defendant to allow this defence to be pleaded and raised at the eleventh hour, especially so when no reasonable explanation or excuse was offered for the delay.

[Note up with 1 CED (CS) *Automobiles*, secs. 5, 11, 38; 2 CED (CS) *Limitation of Actions*, sec. 119; 3 CED (CS) *Military and Naval Law*, sec. 5A (as new section); *Practice*, sec. 42.]

A Canadian army motor vehicle driven by the defendant S., a soldier, ran into and damaged the plaintiff's building, on the corner of an intersection in Calgary, when a collision between said vehicle and an automobile driven by the defendant Sc. was imminent.

[RIDDELL, J.]

1909

Nov. 5.

CHISHOLM v. HERKIMER.

Parties—Band of Indians—Representation of Class—Con. Rule 200—Order of Local Judge—Jurisdiction—Con. Rules 47,368—Petition to Set aside Proceedings—Practice—Motives of Petitioners—Status.

In an action against a Band of Indians collectively and against five individual members of the Band, to recover moneys alleged to be due to the plaintiff for professional services rendered to the Band, an order was made by a local Judge, on the application of the plaintiff, and on the consent of a solicitor instructed by a resolution passed at a meeting of the Band, that the five individual defendants should defend on behalf of the Band for the benefit of all members of the Band, and that all members of the Band should be bound by any judgment that might be pronounced in the action, etc. Upon this order were founded a judgment for the plaintiff and an order appointing a receiver to receive all moneys due to the defendants from the Dominion Government, to be applied upon the judgment:—

Upon the petition of six members of the Band, on behalf of themselves and all other members, the Superintendent General of Indian Affairs and the Minister of Justice also joining as petitioners, to set aside the proceedings before the local Judge so far as they affected the rights of the Band or its members other than the individual defendants:—

Held, that the six petitioning members had the right, as representing the class to which they belonged, the members of the Band, to petition or move against the proceedings, and it was immaterial what their motives, or those of the other petitioners, in so petitioning, were, nor was it important whether they came before the Court by way of petition, appeal, or otherwise.

An order for representation can only be made by the Court: Con. Rule 200; a local Judge is not the Court, and has no power to make such an order. Con. Rule 368 applies only to business properly brought before a Judge in Chambers; and Con. Rule 47 restricts the power of the local Judge to certain particular kinds of motion unless the parties agree or the solicitors for all parties reside in the county; here the solicitors for all those who were formally parties did reside in the county; but, before an order can be made by a local Judge binding those not formally before the Court, they must either agree that the motion be heard by him or have a solicitor residing within the county.

Order for representation and all orders and judgments based thereon set aside except so far as they affected the individual defendants.

PETITION to set aside a judgment and other proceedings in this action. The facts are stated in the opinion.

The petition was heard by RIDDELL, J., in the Weekly Court at Toronto, on the 4th November, 1909.

W. E. Middleton, K.C., and *H. S. White*, for the petitioners.

R. V. Sinclair, K.C., and *H. E. Rose*, K.C., for the plaintiff.

November 5. RIDDELL, J.:—The plaintiff, a solicitor, sets up that he was employed by the Mississaguas of the Credit, a band of Indians, to press a claim in respect of certain moneys to which it was asserted they were entitled in the hands of the Crown at Ottawa.

Riddell, J.

1909

CHISHOLM v. HERKIMER.

He took proceedings in the Exchequer Court of Canada, and was successful in obtaining a decree for a large sum. The proceedings are reported in *Henry* v. *The King* (1905), 9 Ex.C.R. 417.

The solicitor claimed for his services a considerable sum, which was not paid. He thereupon brought an action on the 3rd March, 1909, against Herkimer, Sault, Laforme, McDougall, and Tobicoe, "Chief Councillor and Councillors of the Mississaguas of the Credit, on behalf of themselves, as well as all other members of said Mississaguas, and the said Mississaguas of the Credit," as defendants.

On the 5th March, 1909, a meeting of the Band was held to consider the question of their indebtedness to the plaintiff; and that meeting—a small number of the Band being there present—passed a resolution stating that they wished their council to deal with the matter and were willing to abide by their decision; the council met and decided to call a public meeting of the electors of the Band to consider the matter. On the 14th May, 1909, this meeting was held—a small number again being present—and decided to give instructions to Mr. McEvoy to represent them and the Mississagua Band in the action and to consent to judgment for the amount sued for, also to consent to the appointment of a receiver and to a restraining order, "provided that said judgment is only to be paid out of the funds of the Mississaguas of the Credit at Ottawa . . . and is not to be binding in any way against the property of said . . . Band on their reserve, or of any member of the Band on the reserve . . ."

Mr. McEvoy received authority accordingly "to act for them in the above matters and endeavour to carry out the terms of the above resolution on their behalf." Armed with this, he appeared with the plaintiff before His Honour Judge Elliott at London on the 12th June, 1909. That local Judge first made an order, "It appearing that the class being numerous and the five individual defendants are members of said Mississaguas of the Credit . . . that the said" five persons "do defend on behalf of said Mississaguas of the Credit for the benefit of all members of said Mississaguas of the Credit, and that all the members of said Mississaguas of the Credit shall be bound by any judgment that may be pronounced in this action in the same manner and to the same extent as if they were personally made parties to this action."

On the same day, no appearance having been entered, an order

Riddell, J.

1909

CHISHOLM v. HERKIMER.

was made by the same local Judge, reciting the order just mentioned, and that the five defendants named appeared by their counsel and had submitted the rights of their co-defendants, the other members of the Band, and of the Band, to the Court, and submitted, as well on their own behalf as on behalf of all other members of said Mississaguas of the Credit, and said Mississaguas of the Credit, to such order as might be made herein, and then ordering that the plaintiff be at liberty to enter final judgment against the defendants for the sum of $10,700.47 and interest . . . and that said judgment should be binding upon "the whole of the members of the Mississaguas of the Credit in the same manner and to the same extent as if they were personally made parties to this action." It will be noticed that the judgment is not declared to be binding upon "the Mississaguas of the Credit." Upon this order a judgment was entered on the 15th June, 1909: "It is this day adjudged that the plaintiff recover against the said defendants $10,824.01 to be paid to the plaintiff."

On the 29th June, 1909, an order was made by the same local Judge appointing the plaintiff receiver to receive all moneys due the defendants from the Government, to be applied on the plaintiff's judgment, and restraining the defendants, either by themselves or by their agent Van Loon, or other agent, from receiving it until the plaintiff's judgment was paid. On the 2nd July an order was made appointing the local Master at Ottawa receiver in the room and stead of the plaintiff, but not otherwise varying the previous receiving order.

The Band is composed of some 267 persons, men, women, and children.

Now come six members of the Band, and also the Superintendent-General of Indian Affairs and the Minister of Justice, by petition to the Court, and ask, amongst other things, that it may be declared that the proceedings before the local Judge were and are null and void in so far as they purport to affect the rights of the tribe or the members of the said tribe other than the individual defendants, and that they be set aside and vacated. The six petitioners come to Court asking relief "on behalf of themselves and all other members of the Mississaguas of the Credit;" the Superintendent-General of Indian Affairs and the Attorney-General and Minister of Justice

for Canada join in the petition; they, the six first named petitioners, being themselves members of the Band.

Upon the matter being opened before me in Weekly Court, I offered an issue to be tried upon all the points in controversy—this was declined: I therefore proceed to dispose of the case on the material before me.

I take it for granted that the plaintiff has an honest claim to quite the amount of his judgment, and that he has acted in good faith throughout.

I do not think that anything turns upon how the petition came to be lodged: apparently it was at the instance of the authorities in Ottawa. The petitioners are before the Court—the matter is before the Court. "It is absolutely immaterial what motive has induced the plaintiff to bring this action. Once it is brought, the Court . . . must decide according to law . . . whatever be the motives and wishes of the respective litigants:" Lord Halsbury, L.C., in *Powell* v. *Kempton Park Racecourse Co.*, [1899] A.C. 143, at p. 157: *Freeman* v. *Canadian Guardian Life Insurance Co.* (1908), 17 O.L.R. 296, 299; *Township of Bucke* v. *New Liskeard Light Heat and Power Co.* (1909), 1 O.W.N. 123.

The petitioners may petition or move as representing the class to whom they belong, *i.e.*, the members of the Mississagua Band. Whether the Superintendent-General of Indian Affairs or the Attorney-General and Minister of Justice for the Dominion can, need not be considered.

Nor do I pay any attention to the manner in which the case is brought before the Court. If the proper practice should be by appeal under Con. Rule 48 (see Con. Rule 47 (*a*) (*b*) (*c*)), I shall consider this such an appeal, or if in another way, then I consider it so brought, making all necessary amendments, extension of time, etc. All these niceties of practice go to costs, and I do not think this a case for costs in any event.

The order for judgment does not make the judgment binding upon the Band—and any order for receiver, etc., based upon the proposition that the Band are bound by the judgment, is, of course, irregular and cannot stand.

But the chief difficulty is as regards the judgment binding the several members of the Band. That could only be if the order for representation is valid. Such an order can only be made by the

Riddell, J.

1909

CHISHOLM v. HERKIMER.

Court: Con. Rule 200. The local Judge is not "the Court," and has no power to make such an order: *Re Reid* (1909), 13 O.W.R. 915, 1026.

A very ingenious argument was advanced by Mr. Sinclair as follows: Con. Rule 47 (1242) gives the local Judge, in actions brought in his county, "the like powers of a Judge in the High Court, in Court or Chambers;" and Con. Rule 368 provides that "a Judge sitting in Chambers may exercise the same power and jurisdiction, in respect of the business brought before him, as is exercised by the Court." Therefore, it is argued, as the Court could make this order, a Judge in Chambers could do so also, and consequently so could the local Judge. But there are two weak points: (1) Con. Rule 368 applies only to business properly brought before the Judge in Chambers: *Re Reid, ubi supra*; and (2) Con. Rule 47 restricts the power of the local Judge to certain particular kinds of motion unless the parties agree or the solicitors for all parties reside in the county. Here the petitioners had no solicitor; and they did not consent. I do not forget that the petitioners were not formally parties to the action, and that the solicitors for all those who were formally parties did reside in the county; but I think, before an order can be made by a local Judge binding those not formally before the Court, that they must either agree that the motion be heard by him or have a solicitor residing within the county, at least.

The order for representation will be set aside and also all orders and judgments based upon this order, except so far as they affect the individual defendants.

I express no opinion upon the other questions argued: it may be well for all parties to consider whether this is not a proper case for a settlement.

The plaintiff has, I am convinced, acted in good faith throughout, and it is not a case for costs; especially is this so, as much of the relief sought could not be obtained in this summary way; but, even had the other relief not been sought, I would still, as a matter of discretion, have directed that no costs should be paid by either party.

1947
Dec. 11
1948
May 21

BETWEEN:

CONSTANCE CHISHOLM, in her quality of sole devisee and testamentary executrix of Andrew Gordon Chisholm, deceased..... } SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Indian Act, R.S.C. 1927, c. 98, s. 90(2)—No recovery for services rendered Indians not approved by Superintendent General of Indian Affairs—Decision of the Minister is not subject to review by the Court.

Held: That there can be no recovery against the Crown for services rendered a band of Indians at the request of such band unless an agreement to such effect has been approved in writing by the Superintendent General of Indian Affairs.

2. That the decision of the Minister of Mines and Resources to pay or not to pay is not subject to review by the Court.

ARGUMENT on question of law ordered to be set down and disposed of before the trial.

The argument was heard before the Honourable Mr. Justice O'Connor at Ottawa.

Auguste Lemieux, K.C. for suppliant.

W. R. Jackett for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

O'CONNOR J. now (May 21, 1948) delivered the following judgment:

This is a Petition of Right brought by Constance Chisholm, sole devisee and executrix of the will of the late Andrew Gordon Chisholm, K.C., who died at London, Ontario, on the 11th day of January, 1943.

In these proceedings the following question of law was set down for hearing:—

Assuming the allegations of fact contained in the Petition of Right to be true, does a petition of right lie against the Respondent for any of the relief sought by the Suppliant in the said Petition?

1948

CHISHOLM v. THE KING

O'Connor J.

The facts alleged in the Petition of Right are:—

The late Mr. Chisholm, between the years 1915 and 1942, both inclusive, rendered legal services to the Six Nations Indians, particulars of which are set out in the account of $5,034.70, annexed to and forming part of the Petition of Right. The services rendered were in connection with the preparation and prosecution of a claim by the Six Nations Indians against the Crown.

The Six Nations Indians are wards of the respondent and under the Indian Act, R.S.C., 1927, chap. 98, as amended, the Minister of Mines and Resources is and has been at all times material the trustee of the Indians, and as Superintendent General of Indian Affairs has the control, direction and management of the Indians in Canada, including their trust funds.

The professional services were rendered to the Six Nations Indians at their own request, and for their benefit and advantage and protection and promotion of their welfare as such band.

The charge for such services is most modest and reasonable. Mr. Chisholm applied to the respondent as trustee for the Six Nations Indians for payment of the account, but failed to obtain any settlement. The Six Nations Indians have always viewed with favour and approved the account, and have been willing that Mr. Chisholm be paid an adequate remuneration and by a resolution of the Six Nations, dated 8th of February, 1943, they duly approved and recommended that the sum of $1,500 be paid to the suppliant on account of the bill for such legal services, but no payment has been made.

For these reasons the respondent is indebted to the suppliant in the said sum of $5,034.70.

The facts alleged do not show that there is any liability on the respondent for the account. It is not suggested that the respondent ever instructed Mr. Chisholm to act. Because the respondent holds money in trust for the Indians does not impose a liability on the respondent to pay this account out of the trust funds or otherwise. The decision of the Minister either to pay or not to pay the account is not subject to review by the Court. The Court has no jurisdiction to do so.

1948

CHISHOLM v. THE KING

O'Connor J.

Nor is there any liability if the claim is on the basis that:—

(a) the Six Nations engaged Mr. Chisholm and agreed to pay him out of the trust funds in the possession of the respondent

or

(b) the resolution approving and recommending payment is an assignment of the trust funds or an order to pay $1,500 out of such funds;

because Section 90 (2) of the Indian Act provides:—

No contract or agreement binding or purporting to bind, or in any way dealing with the moneys or securities referred to in this section, or with any moneys appropriated by Parliament for the benefit of Indians, made either by the chiefs or councillors of any band of Indians or by the members of the said band, other than and except as authorized by and for the purposes of this part shall be valid or of any force or effect unless and until it has been approved in writing by the Superintendent General.

It is not alleged that there was such approval.

The question of law will, therefore, be answered in the negative.

The costs will be costs in the cause.

Judgment accordingly.

1948

Jan. 7, 8 & 9
Apr. 23

May 21

BETWEEN:

FRANK MILLER, Chief Councillor of the Six Nations of the Grand River on behalf of himself and all others, members of the said Six Nations of the Grand River and the said Six Nations of the Grand River..... SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Petition of Right—Argument on question of law—No cause of action disclosed—Petition of Right held not to lie against Respondent.

Held: That when suppliants sought relief for a breach of trust alleged to have resulted from the surrender of certain lands owned by the Six Nations Indians and such land was held in trust by the Crown solely for the purpose of granting the same to purchasers chosen by the Six Nations and such purchase money was received not by the Crown but by the trustee appointed by the Indians, a Petition of Right claiming damages for breach of trust does not lie against respondent.

MANITOBA COUNTY COURT

Philp C. Co. Ct. J.

Regina v. Cochrane

Indians — Employee of Indian band running post office — Charged with an offence as a "postal employee" — Band not a legal "person" — Band a mail contractor and its employees not falling within charge — The Post Office Act, R.S.C. 1970, c. P-14, ss. 2(1), 5(1)(o), 22(1), 65 — The Indian Act, R.S.C. 1970, c. I-6, s. 2(1).

The accused was charged, as a postal employee, with converting public moneys to her own use contrary to s. 65 of the Post Office Act. Her defence was that the Crown had failed to prove that she was a postal employee within the meaning of the Act.

Held, the accused was acquitted. A postal employee was defined as a person employed in any business of the post office but did not include a mail contractor or its employees. The accused was employed to run a post office by an Indian band which had a contractual relationship with the post office. An Indian band, being neither a natural person nor a corporation, was not a legal "person" and accordingly could not be a postal employee. It was a mail contractor and the accused, as an employee of a mail contractor, did not fall within the provisions of s. 65.

Hague v. Cancer Relief and Research Institute, [1939] 3 W.W.R. 1, 160, 47 Man. R. 325, [1939] 4 D.L.R. 191 referred to.

Mintuck v. Valley River Band No. 63A, [1976] 4 W.W.R. 543, affirmed [1977] 2 W.W.R. 309 (Man. C.A.) distinguished.

[Note up with 13 C.E.D. (West. 2nd) *Indians*, s. 1.]

B. A. MacFarlane, for the Crown.

A. L. V. Stewart, for accused.

11th March 1977. PHILP C. Co. Ct. J.:—Francis Jean Cochrane stands charged:

"THAT she, the said Francis Cochrane, a postal employee, between the first day of October in the year of our Lord one thousand nine hundred and seventy-five and the twenty-fourth day of June in the year of Our Lord one thousand nine hundred and seventy-six, both dates inclusive, at or near Koostatak, in the Eastern Judicial District, in the Province of Manitoba, did unlawfully convert to her own use public moneys entrusted to her in the amount of Two Thousand six hundred and forty-two dollars and ninety-five cents ($2,642.95), contrary to Section 65 of the Post Office Act and amendments thereto."

At the close of the Crown's case counsel for the accused moved for dismissal on the ground that the Crown failed to prove that the accused was "a postal employee".

The evidence is not in dispute. Some time prior to the time period in the charge the post office at Koostatak was transfer-

red to the Fisher River Band. The evidence of E. K. Curtis, Postal Zone Supervisor, was as follows:

"Q. Did you ever have occasion to visit the post office when this particular individual, known to you as Francis Cochrane, was in control of the post office? A. No, not since I transferred the office to the band. I forget the exact date when it was.

"Q. What was the arrangement with respect to the post office in connection with both, as you've referred to, the band and Mrs. Cochrane? A. Well, the band became the nominal postmaster and they hired Mrs. Cochrane to run the post office for them.

"Q. Was there any documentation that was prepared directly between the Canada Post Office and Mrs. Cochrane? A. An oath of secrecy."

In cross-examination Mr. Curtis testified:

"Q. The actual transfer is done, I understand, by way of contract with the band; is that correct? A. It's a memorandum of conditions, yes.

"Q. It's an assignment of conditions; it's a contract with whoever becomes the nominal postmaster; it's of that nature, that's what the document is? A. Yes, it bears out the responsibilities of the incoming postmaster . . .

"Q. I see. And the post office, I understand, it's based on a contract with the band. They are to administer the post office at Koostatak; is that correct? A. Yes. In this instance here, the band itself was the nominal postmaster of the Koostatak post office.

"Q. The band is in charge of hiring their own employees with respect to working in the post office? A. That's right.

"Q. And whoever they hire, I take it, is now an employee of the post office? A. No.

"Q. They're an employee of the band? A. That's right.

"Q. And the responsibility of the person who works in the post office is to the band not to the post office; is that correct? A. Yes. It's up to the band to ensure that whoever is carrying out the duties of running the post office for them does it in a proper, efficient manner.

"Q. And the band, being the nominal postmaster, is responsible for training the person who they place in the position; they're responsible for just about everything, paying her and everything else; is that correct? A. That's right.

"Q. Under the transfer terms the band is made, I understand, personally responsible for any losses incurred. They are responsible for any losses incurred. Are they responsible to the post office to make up any loss of monies? A. Yes.

"Q. And they are the ones that are bound by the regulations governing the post office? A. That's right."

The Post Office Act, R.S.C. 1970, c. P-14, makes no mention of the term "nominal postmaster", to which Mr. Curtis referred. "Postmaster" is defined in s. 2(1) of the Act as follows:

" 'postmaster' means a postal employee in charge of a postal area or postal agency, whether in a temporary or permanent capacity",

and "postal employee" is defined as follows:

" 'postal employee' means *a person* employed in any business of the Canada Post Office, *but does not include a mail contractor or an employee of a mail contractor*". (The italics are mine.)

There is no question that the accused was "employed in any business of the Canada Post Office" and the issue is whether she was "a mail contractor or an employee of a mail contractor" so as to be excluded from the definition of a postal employee. The accused was not a mail contractor. She had no contractual relationship with the Canada Post Office and she was employed by, paid by and under *the control and supervision of the band.*

The narrow issue then is whether the band was a postmaster or a mail contractor. By the definitions supra, a postmaster is a postal employee and a postal employee is "a person". Section 28 of the Interpretation Act, R.S.C. 1970, c. I-23, expands the word "person" to include a "corporation". While a band has certain powers conferred upon it under the Indian Act, R.S.C. 1970, c. I-6, is the band "a person" in law?

"Band" is defined in s. 2(1) of the Indian Act as follows:

" 'band' means a body of Indians

"(*a*) for whose use and benefit in common, lands, a legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September, 1951,

"(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

"(*c*) declared by the Governor in Council to be a band for the purposes of this Act".

In *Hague v. Cancer Relief and Research Institute*, [1939] 3 W.W.R. 1 at 5, 160, 47 Man. R. 325, [1939] 4 D.L.R. 191, Dysart J. stated:

"In law 'a person' is any being that is capable of having rights and duties, and is confined to that. Persons are of two classes only — natural persons and legal persons. A natural person is a human being who has the capacity for rights or duties. A legal person is anything to which the law gives a legal or fictitious existence and personality, with capacity for rights and duties. The only legal person known to our law is the corporation — the body corporate.

"There are other groups or associations of natural persons which the statute law recognizes, and endows with some personality and some rights or duties, such as registered trade unions, but these are not corporations. In any event, they are composed of persons."

The status of a band was considered by Solomon J. in *Mintuck v. Valley River Band No. 63A*, [1976] 4 W.W.R. 543, affirmed [1977] 2 W.W.R. 309. He concluded that although a band may have many more powers than a corporation, a band is not "a body corporate capable of being sued as a person under Queen's Bench Rules" [pp. 553-54].

On appeal to the Manitoba Court of Appeal Guy J.A. considered the status of a band and concluded that a "band could well be a suable entity" [p. 311]. He referred to the Supreme Court of Canada decision of *International Brotherhood of Teamsters, Local 213 v. Therien*, [1960] S.C.R. 265, 22 D.L.R. (2d) 1, and to the decision of Locke J. at pp. 277-78, including the following statement:

"The legislature, by giving the right to act as agent for others and to contract on their behalf, has given them two of the essential qualities of a corporation in respect of liability for tort since a corporation can only act by its agents".

In the resolution of the issue before me it is not the nature or extent of the powers of a band that has to be determined, it is the status of a band. In my view there is a difference between a "suable entity" and a "corporation"; and, while an unincorporated association or body may enjoy some of the essential qualities of a corporation, that does not constitute the association or body a corporation or a legal person. I find that a band is neither a natural person nor a corporation and, therefore, not a person capable of being a postal employee under the Post Office Act. A fortiori, a band cannot be a postmaster.

If the Fisher River Band was not the postmaster (or even the "nominal postmaster", whatever that term implies) at Koostatak Post Office, what was its status? Although the contract between the band and the Canada Post Office referred to in the evidence was not entered as an exhibit, the evidence referred to above satisfies me that a contract respecting the operation of the Koostatak Post Office was entered into between the band and the Canada Post Office. While the definition of a postal employee refers to a "mail contractor" and to a "mail contract", those expressions are not defined in the Act. Sections 22 to 35 of the Act pertain to "Contracts for the Conveyance of Mail" and s. 22(1) provides:

"22. (1) For the purposes of this section and sections 23 to 35, 'contract' means a contract for the conveyance of mail".

The contract between the band and the Canada Post Office pertains to the running of the Koostatak Post Office; it was not a contract for the conveyance of mail. There are no sections of the Act similar to ss. 22 to 35 relating to the type of contract between the band and the Canada Post Office but such a contract is included in the powers and duties and functions of the Postmaster General under s. 5(1)(*o*). The Postmaster General may "enter into and enforce contracts relating to the conveyance of mail or to *any other business of the Canada Post Office*". (The italics are mine.)

I can come to no other conclusion than that the contract between the band and the Canada Post Office related "to any other business of the Canada Post Office" and that the contract was a "mail contract". The band was, under the circumstances, a mail contractor and the evidence is undisputed that the accused was the employee of the band, that is, an employee of a mail contractor.

I find, therefore, that the accused was not a postal employee as described in the charge.

Counsel for the Crown has argued alternatively that s. 65(3) applies to involve the accused as an aider and abettor. I cannot accept that argument. Section 65(1) created an offence, the essential ingredient of which is conversion by a postal employee or by a mail contractor. I do not have before me evidence of such an offence or attempt thereat by a postal employee or a mail contractor. The accused cannot be found to have advised or knowingly and willingly participated in a contravention of s. 65(1) when no such contravention occurred or was attempted.

The evidence disclosed that the accused, at the commencement of her employment in the Koostatak Post Office, completed a Canada Post Office form of Oath of Allegiance, Oath of Office and Secrecy (Ex. 1). This does not affect my finding of the status of the accused. Canada Post Office regulations require the taking of such oaths by mail contractors and their employees and it cannot be argued that the taking of such an oath constituted the accused a postal employee.

The charge against the accused is dismissed.

BRITISH COLUMBIA SUPREME COURT

70

Hutcheon J.

Re Masset Band Council, Russ and Yeltatzie

Coroners and inquests — Air crash — Third crash involving airline serving isolated Indian community — Band not allowed to be represented by counsel at inquest — Application for writ of certiorari to quash — Band should have been represented — Writ not ordered as no evidence jurors' decision was improper — The Coroners Act, R.S.B.C. 1960, c. 78, s. 23.

The Masset Band of Indians lives in an isolated community which was served by only two airlines. On a coroner's inquest into the third crash within 18 months of one of the airlines, the band council asked to be represented by counsel. The coroner ruled the band's counsel was not a person in standing and had no interest under s. 23.

On an application for a writ of certiorari to quash the proceedings, *held*, the band did come within s. 23 as a person whose interests might be affected, especially if it was common practice for the coroner's jury to make recommendations in respect of matters arising out of an inquest. However, the order for a writ was refused. There was no evidence to show the jury's decision was not the proper one and there had been too long a delay in making the application.

[Note up with 5 C.E.D. (West. 2nd) *Coroners and Inquests*, s. 2.]

S. A. Rush, for applicants.

E. E. Bowes, for Attorney General of British Columbia.

(Vancouver No. A760711)

8th December 1976. HUTCHEON J.:—At the inquest held 2nd December 1975 at Prince Rupert into the death of three persons who died in the crash of an airplane operated by North Coast Air Services Limited, the coroner, Mr. E. T. S. Moore, refused the request made on behalf of the Masset Band to participate in the inquest through counsel, Mr. Linde. The application before me, briefly stated, is for the issue of a writ of certiorari to quash the proceedings.

The coroner's statement was that Mr. Linde was not a person in standing and had no interest. I have construed that decision to mean that those for whom he wished to speak did not come within the description of persons in s. 23 of The Coroners Act, R.S.B.C. 1960, c. 78, who may appear by counsel at an inquest.

Section 23 reads as follows:

"23. Any person whose interests may be affected by any of the evidence likely to be adduced at an inquest may appear personally or by counsel at the inquest and may tender evidence and call witnesses and may examine, cross-examine, or re-examine witnesses, as the case may be, and he may

obtain from the Coroner a summons directed to any witness whom he desires to call."

The background to the inquest is set out in a letter from Linde to the Deputy Attorney General dated 4th October 1975. I quote from the first page of that letter:

"Dear Sir:

"*Re: North Coast Air Services Ltd. — Crash Inquest*

"North Coast Air Services Ltd. is one of the only two airline companies that provide service between Masset and Prince Rupert. The company lost a plane in a crash some weeks ago near Prince Rupert, in which crash lives were lost. This was the third crash in 18 months, and the second loss of life.

"The Chief Councillor of the Masset Band has asked me to represent the Band, whom he feels is an interested party, at the upcoming inquest into this most recent crash. None of the deaths in this most recent crash were of people from his Band, but two in the previous crash were.

"It is the opinion of the Chief Councillor that the people he represents have an awful lot at stake in this airline as it is one of the two airlines that can be used, and is used. If the airline is not operating properly (three crashes with loss of life in two in less than 18 months can only lead to this speculation) he feels that the future safety of his people is directly related and at issue."

Masset is a small community at the northern tip of the Queen Charlotte Islands. I am told that the Masset Band is made up of approximately 1,000 Indians of the Haida nation. The applicants in this case are the Masset Band Council, the chief councillor of the band and Mr. Horace Yeltatzie, a member of the band and the father of two children who had been killed in a previous crash in March 1974.

Mr. Bowes for the Attorney General has argued that the coroner has an absolute discretion under s. 23 to refuse the right to any person to participate through counsel. That *was* the law as the following quotation from Jervis on Coroners, 7th ed., p. 39, shows:

"What interests may be represented by counsel or solicitor upon the inquest is a matter entirely within the discretion of the coroner; if it seems to him that the jury are likely to be benefited by their assistance he ought to allow them to be heard."

I am unable to read s. 23 as a statement of the law which I have just quoted. If a person is one whose interests may be affected he may appear personally *or* by counsel. The coroner must determine in the first instance whether the person comes within s. 23. Such a determination involves the construction of the statutory provision and the application of the section to a particular set of facts.

It is clear from the transcript of the hearing that the coroner had reached his decision before the inquest opened. I make a point of that not to apply the reasoning in *Re Brown and Patterson* (1975), 6 O.R. (2d) 441, 21 C.C.C. (2d) 373, 53 D.L.R. (3d) 64, that the coroner was not acting judicially. The point to be made is that the coroner had much more information about the request than appears in the brief statement made by Mr. McNish who was present at the hearing in place of Linde.

The facts which I have quoted from Linde's letter of 4th October 1975 are not in dispute. The question, then, as in *Bell v. Ont. Human Rights Commn.*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1 (sub nom. *Regina v. Tarnopolsky; Ex Parte Bell*), is one of law: whether the language of s. 23, that is, "Any person whose interests may be affected by any of the evidence", applies to the Masset Band Council, the chief of the band, or one of its members.

By s. 81 of the Indian Act, R.S.C. 1970, c. I-6, it is the council of a band which is vested with broad powers to make by-laws for the purpose of the health of residents on the reserve, the regulation of traffic, the observance of law and order and many other matters. Its jurisdiction is not unlike that of a municipal council to be exercised for the well-being of the community.

If, indeed, there was not some legal obligation on the band council, the band council was properly concerned with the operation of one of the two airlines which linked the isolated community of Masset on the Queen Charlotte Islands with the mainland. There had been three accidents within 18 months in two of which lives were lost.

The present Coroners Act does not authorize the jury in specific terms to make recommendations in respect of matters arising out of the inquest but it is certainly a very common practice. That practice will have the force of statute if and when The Coroners Act, 1975 (B.C.), c. 15, is proclaimed. Section 28(3) of that Act provides that the jury

may make recommendations in respect of any matter arising out of the inquest. Recommendations are not binding on anyone but they are the result of serious deliberation and they could have an effect on future flight operations in and out of Masset.

For these reasons I am satisfied that the Masset Band Council comes within the language of s. 23 as a person whose interests may be affected by any of the evidence likely to be adduced at an inquest and who was entitled to appear by counsel at the inquest.

In my opinion the chief of the council would not be entitled to appear separately by counsel and as to Horace Yeltatzie, he is in no different position in respect of s. 23 than any other individual member of the band. The right to participate, as I view it, is that of the Masset Band Council.

The next question is whether a writ of certiorari ought to issue to quash the proceedings of the inquest. I have held that the coroner was in error in refusing the request but a wrong decision in itself does not necessarily entitle the applicants to their order. This is not the type of case in which the error is such as to demand the issue of the writ.

There are two features of this case which persuade me that I ought to exercise the discretion which I have against the making of the order.

The first is that it has not been shown that the decision of the jury was other than the proper one. There is no material to suggest that the jury's decision ought to have been other than what it was or that there would have been evidence led which might have resulted in recommendations by the jury.

The second is that the verdict of the jury was given on 3rd December 1975. Even though the applicants have been able to explain the delay I am conscious of the fact that to set aside the verdict and order a new inquest may serve no useful purpose but may rekindle grief among the close relatives of the three deceased men which one would expect the passage of time to abate. I think they are entitled to have those expectations respected.

For these reasons I am of the opinion that there ought not to be an order for the issue of a writ of certiorari.

cerned with the powers of a magistrate as therein defined and deals both with preliminary procedure and procedure at trial when the accused has elected trial before a magistrate, but in both cases the first inquiry must be into the charge itself (s. 463) to determine whether or not it is one over which a magistrate has absolute jurisdiction and ensure that it is not one of those offences mentioned in s. 427 [am. 1972, c. 13, s. 33(1) and (2)]. This first step is essential whether the subsequent procedures are conducted before a Part XV 'justice' or a Part XVI 'magistrate', and in my opinion in both cases it is a part of the inquiry contemplated in s. 465(1)(*b*) which cannot be adjourned for more than eight days without the consent of the accused."

I conclude that the Provincial Judge did not lose jurisdiction when he failed to put the accused person to his election on the first appearance in court and did not lose jurisdiction subsequently. It follows that I need not deal with the question of regaining jurisdiction.

I would dismiss the appeal.

MANITOBA COURT OF APPEAL

Guy, Matas and O'Sullivan JJ.A.

Mintuck v. Valley River Band No. 63A et al.

Torts — Intimidation — Lessee of Crown land harassed by members of Indian band — Lessee unable to enjoy benefit of lease — Damages against band — Indian band as legal entity — Doctrine of adoption of a tort — Court of Queen's Bench having jurisdiction — The Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 17(2).

APPEAL from the judgment of Solomon J., [1976] 4 W.W.R. 543, who awarded damages of $10,000 against the defendant Indian band and the individual defendants who were members of the band council; judgment was based on the principle of law that interference by a third party with contractual relations between two other parties is actionable. The trial judge found the band was not a body corporate capable of being sued as a person but did find the band was a legal entity and a representation order was made against the band members.

The plaintiff, a treaty Indian and a member of and resident of the Valley River Band 63A reserve, leased, from Her Majesty, represented by the Minister of Indian affairs and Northern Development, and with approval of the band, a 480-acre farm on the reserve; he later in 1969 leased additional land for a ten-year period, which lease was again approved by the band. Following a band election the personal defendants were elected as chief and council and passed a resolution in 1972 purporting to rescind the resolution or recom-

mendation passed by their predecessors relating to the plaintiff's lease of additional land in 1969, which was intended to cancel the plaintiff's lease and prevent him from farming the land as provided in the lease. The plaintiff had not been in breach of any terms of the lease; however the minister, who held the land as trustee for the cestui que trust, the band, would not take action to reinstate the plaintiff under the lease without the consent of the band, which was not forthcoming. From the time of the election in 1970 until the council's resolution in 1972 the plaintiff encountered harassment and interference by members of the band in attempting to farm the area covered by the second lease.

The defendants argued the Court of Queen's Bench did not have jurisdiction as exclusive jurisdiction was with the Federal Court.

On appeal, *held*, the appeal was dismissed. The plaintiff was not seeking damages or any relief against the federal Crown; his claim was in tort against the defendants and was not the kind of action which comes within the meaning of "arises out of" in s. 17(2) of the Federal Court Act.

The judgment should not be based on the tort of unlawful interference with contractual relations but rather is properly based on the tort of intimidation and unlawful interference with economic interests.

J. T. Stratford & Son Ltd. v. Lindley, [1965] A.C. 269, [1964] 2 All E.R. 209, reversed [1965] A.C. 307, [1964] 3 All E.R. 102 referred to.

[Note up with 6 C.E.D. (West. 2nd) *Courts*, ss. 40A, 50; 13 C.E.D. (West. 2nd) *Indians*, ss. 2, 4, 20; 21 C.E.D. (West. 2nd) *Torts*, s. 44.]

R. K. Vohora, for appellants.

A. C. Matthews, Q.C., for respondent.

B. J. Meronek, for Attorney General of Canada.

10th February 1977. GUY J.A.:—This was a long and difficult and, indeed, tragic case. The learned trial judge, Solomon J., at the conclusion of the trial awarded $10,000 damages to the plaintiff, payable by the Valley River Band [[1976] 4 W.W.R. 543]. He achieved this by making an order pursuant to Queen's Bench R. 58, which reads:

"58 Where there are numerous persons having the same interest one or more may sue or be sued, or may be authorized by the court to defend on behalf of, or for the benefit of, all."

The effect of this was to make the chief and members of council of the Valley River Band No. 63A representatives to defend the band. The order was made because of the possibility that the band itself could not be properly described as a suable entity.

I would think that on the basis of the judgment of the Supreme Court of Canada in *International Brotherhood of*

Teamsters, Local 213 v. Therien, [1960] S.C.R. 265 at 277-78, 22 D.L.R. (2d) 1, the band could well be a suable entity. Locke J. said at the pages quoted above:

"I agree with the opinions expressed by the learned judges of the Court of Appeal in the cases to which I have above referred. The granting of these rights, powers and immunities to these unincorporated associations or bodies is quite inconsistent with the idea that it was not intended that they should be constituted legal entities exercising these powers and enjoying these immunities as such. What was said by Farwell J. in the passage from the judgment in *Taff Vale Ry. Co. v. Amalgamated Society of Ry. Servants*, [1901] A.C. 434, which is above quoted appears to me to be directly applicable. It is necessary for the exercise of the powers given that such unions should have officers or other agents to act in their names and on their behalf. The legislature, by giving the right to act as agent for others and to contract on their behalf, has given them two of the essential qualities of a corporation in respect of liability for tort since a corporation can only act by its agents.

"The passage from the judgment of Blackburn J. delivering the opinion of the judges which was adopted by the House of Lords in *Mersey Docks Trustees v. Gibbs; Mersey Docks Trustees v. Penhallow* (1866), L.R. 1 H.L. 93, 11 E.R. 1500, referred to by Farwell J. states the rule of construction that is to be applied. In the absence of anything to show a contrary intention — and there is nothing here — the legislature must be taken to have intended that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. *Qui sentit commodum sentire debet et onus.*"

Likewise, there is the statement by Lord Atkin in *Donoghue (or M'Alister) v. Stevenson*, [1932] A.C. 562 at 580, which is well known:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Lord Atkin said in the same case at p. 583:

"I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong."

In short, I agree with the conclusion reached by the learned trial judge that the council of the Valley River Band represented the band and that the band is capable of suing and being sued through its councillors or agents.

The facts in this case were set out by the learned trial judge as follows [pp. 544-45]:

"Plaintiff, a treaty Indian, resides on the reserve of the Valley River Band No. 63A ('the band'). The personal defendants, Clifford Lynxleg, Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos, are all members of the band and reside on the said reserve. Clifford Lynxleg is the chief, and Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos are members of the band council, duly elected in accordance with the constitution of the band as provided for by the Indian Act, R.S.C. 1970, c. I-6 ('the Act').

"In accordance with the provisions of the Act, and pursuant to the agreement made between plaintiff and Her Majesty Queen Elizabeth II, represented by the Minister of Indian Affairs and Northern Development ('the Minister'), and with approval of the band, plaintiff rented and was operating a 480-acre farm on the reserve. On 22nd May 1969 Her Majesty Queen Elizabeth II, represented by the Minister as lessor, entered into a lease with plaintiff by which the lessor rented to him additional land situated within the Valley Indian Reserve and being N.E. 4-26-25-W.1 in Manitoba. Before the lessor executed this lease in favour of plaintiff, the chief and council of the band, by a resolution duly passed, recommended to the lessor that the lease in question be entered into. The lease was for a term commencing 1st May 1969 and ending 31st December 1979. Under it the plaintiff was to receive the use of the land for the years 1969 to 1973 inclusive, rent free, and was to pay the lessor a one-third share of the crop in 1974 and continue doing so until the end of the term.

"Plaintiff is an excellent farmer and according to knowledgeable independent witnesses is a good manager of his farming operations. He has given every indication of being a progressive individual with a keen desire to succeed. He was doing

well on his 480-acre farm but agricultural consultants for the Department of Indian Affairs were of opinion that he should have more land if his operations were to be conducted economically. Following their advice, plaintiff rented this additional 160 acres for a ten-year period and started to develop this new land in order to bring it up to the standard of his other farm property.

"Shortly after signing the lease for this additional land, plaintff started to experience some difficulties with operations on the newly acquired property. It was situated approximately two miles away from his other land and he was obliged to commute daily between the two properties during the farming seasons. The only road to the new farm was through the reserve. Many times plaintiff found it blocked with different vehicles and was not able to get through with farm equipment needed for his operations. Occasionally when he got to the farm he discovered that stray cattle had been allowed to roam freely over his crops, doing considerable damage to them. Sometimes he found members of the band driving trucks over the farm under the pretext they were hunting game, and on occasion plaintiff and his family were intimidated by firearms. Finally, even the band chief, Clifford Lynxleg, entered into the picture with harassment. It was obvious eventually that all this interference with farming operations, and harassment of plaintiff and his family, was aimed at getting him to abandon his rights to the lease he had to the new farm.

"The leasing of the new farm to plaintiff was approved by the former council and chief of the band. Shortly after the lease was executed on 22nd May 1969, the incumbent chief and council of the band were defeated in an election and Clifford Lynxleg was elected chief and the other personal defendants were elected to council. Harassment and intimidation of plaintiff and his family, and interference with his farming operations, started shortly after this election and continued until the chief and council finally passed a resolution which effectively terminated the lease with plaintiff in respect of the new farm."

He then gave his judgment in favour of the plaintiff against the Valley River Band in the sum of $10,000.

There are two points in the reasons for judgment of Solomon J. which require clarification. The first is this: The Valley River Band council passed a resolution purporting to terminate the lease that the plaintiff Mintuck had with Her Majesty the Queen. They did *not* terminate that lease, as the learned trial

judge stated, because, of course, they *could not* in law, not being either lessor or lessee named in the lease.

What I think the learned trial judge was emphasizing was the fact that the band resolution gave formal approval on behalf of the band to all the harassment which ended in the plaintiff giving up his struggle to reap the benefits of his lease.

The second point relates to the duty owed by the band to the plaintiff and the breach of that duty. *It must be noted* that following the first five years of the ten-year lease plaintiff was to pay the proceeds of one-third of the share of his crop *not* to the lessor (as found by the learned trial judge) but to "the Valley River Band". The eighth covenant of the lessee in the said lease reads:

"8. That the one-third (⅓) crop share from the 1974, 1975, 1976, 1977, 1978 and 1979 crops shall be marketed, and payment made to the Valley River Band."

This is a most important point and, I think, effectively deals with the problem as to what duty was owed by the band as such to the plaintiff. The well-known legal maxim quoted by Locke J. in the *Therien* case, supra, must surely apply to the case before us: "Qui sentit commodum sentire debet et onus; et e contra." (He who enjoys the benefit ought also to bear the burden; and vice versa.)

The Valley River Band, being a beneficiary of the work done by the plaintiff to develop and cultivate the land and market the crops, must see to it that nothing is done to hinder or prevent the fulfilment of the contract and cannot, with impugnity, deprive him of his rights which were legally granted to him by the lease. This they did and they must pay for it.

Thus, without reference to *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749, I reach the same conclusion as did the learned trial judge. I do not quarrel with his assessment of damage and I would dismiss the appeal with costs.

MATAS J.A.:—This is an appeal from a judgment of Solomon J. awarding damages of $10,000 to plaintiff for wrongful interference with his rights as lessee under a lease of a one-quarter section of land [[1976] 4 W.W.R. 543].

The land is located on the reserve of Valley River Band No. 63A. The reserve falls within the definition under s. 2 of the Indian Act, R.S.C. 1970, c. I-6 ("the Act"), which reads:

"2. (1) In this Act . . .

" 'reserve' means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band".

Plaintiff and personal defendants are members of the band and live on the reserve. At all material times Clifford Lynxleg was the chief and Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos were members of the band council, duly elected in accordance with the constitution of the band as provided for by the Act.

The lease, dated 22nd May 1969, is for a ten-year term from 1st May 1969 to 31st December 1979. It was entered into between the federal Crown, as lessor, on the recommendation of a differently constituted band council, and Mr. Mintuck, as lessee. Under its terms the lessor was to receive a one-third share of crop excluding the first five crops, which were to belong to Mintuck, but the proceeds of the one-third share for the years 1974-79, inclusive, were to be paid to the band.

In his reasons for judgment Solomon J. said [at p. 545]:

"Shortly after signing the lease . . . plaintiff started to experience some difficulties with operations on the newly acquired property. It was situated approximately two miles away from his other land and he was obliged to commute daily between the two properties during the farming seasons. The only road to the new farm was through the reserve. Many times plaintiff found it blocked with different vehicles and was not able to get through with farm equipment needed for his operations. Occasionally when he got to the farm he discovered that stray cattle had been allowed to roam freely over his crops, doing considerable damage to them. Sometimes he found members of the band driving trucks over the farm under the pretext they were hunting game, and on occasion plaintiff and his family were intimidated by firearms. Finally, even the band chief, Clifford Lynxleg, entered into the picture with harassment. *It was obvious eventually that all this interference with farming operations, and harassment of plaintiff and his family, was aimed at getting him to abandon his rights to the lease he had to the new farm.*" (The italics are mine.)

As part of the program of harassment there were threats of damage to be done to Mintuck's property and threats of serious physical harm to him and his family unless Mintuck

desisted from working the land. The threats were made in person and by telephone. The grave nature of the threats may be gleaned from some of the reactive steps taken by Mintuck. He complained on several occasions to the R.C.M.P. and to the Department of Indian Affairs. He had his telephone number delisted but that did not help so he had the telephone taken out. His children were sent to a different school. On several occasions the police escorted Mintuck to his land to ensure safe conduct.

Interference with plaintiff's farming operations extended from 1970 through to 1971, with greater severity in 1971. Clifford Lynxleg was elected chief in 1971.

Plaintiff operated the farm during the years 1969-71. He did not do any fall work on the land in 1971 but he did some work in the latter part of May 1972. He was threatened again in 1972 and was warned to stay off the land.

A letter dated 27th June 1972 was sent to Mintuck by the band council, stating that he had not been farming his land in accordance with the lease and giving him ten days "to make improvements" to the land (Ex. 3). Mintuck said at the trial that in light of all that had taken place and on the advice of his lawyer, he did not return to working the land.

On 14th September 1972 the band council passed a resolution purporting to cancel the lease (Ex. 11). Notice of the resolution was sent to Mintuck by registered mail but he refused to accept delivery. He became aware of the resolution sometime later.

The Department of Indian Affairs made some efforts to solve the problem Mintuck was having, but without success. At one stage it was suggested that a meeting be held of Mintuck, the band council and representatives of the department, with the R.C.M.P. in attendance. The council refused to have the police present; the meeting was not held.

The band hired other people to work the land in 1972 and in subsequent years. At the trial, held on 21st January 1976, chief Lynxleg said, in direct examination, that as of that date the band was in possession of the land.

At the opening of the trial counsel for plaintiff moved that para. 2 of the statement of claim be amended by adding, at the end of the paragraph, "and the same is a band to which Section 74 of the said Act applies." Paragraph 2 would then read:

"2. The Defendant, Valley River Band No. 63A, hereinafter referred to as the 'Band', is a body of Indians declared by the Governor in Council of the Government of Canada to be a Band under the provisions of the Indian Act, R.S., Chapter 149, and the same is a band to which Section 74 of the said Act applies."

Counsel for defendants moved:

1. That the statement of defence be amended by an allegation that plaintiff's claim for damages is barred by The Limitation of Actions Act, R.S.M. 1970, c. L150; and

2. That a further amendment to the statement of defence be made alleging that "the Defendant Valley River Band No. 63A is not a legal entity, and the Plaintiff's action against it as such is improperly constituted and is not maintainable".

All the amendments were allowed but none of the amendments was noted on the record as should have been done under Queen's Bench R. 159. Nor do the amendments appear in the record filed as part of the appeal book in this court.

After the amendments were ordered by the learned trial judge, counsel for defendants moved to have the statement of claim struck out. Counsel said to the court that:

"The proper way for the plaintiff to have brought this action, my Lord, should have been to sue members of the band on their behalf and on behalf of the rest of the members as a representative action. I am referring to Queen's Bench R. 58 that permits you to do that".

The motion was dismissed on the ground that evidence would have to be heard before the motion could be considered. The motion was renewed during the trial and was reserved.

Counsel for defendants did not present any submission in this court in respect of The Limitation of Actions Act. I will not deal with this defence.

At the conclusion of the trial, plaintiff abandoned (1) his claim for possession of the land, and (2) his claim for damages against the personal defendants and the band for damage to his crops. On the latter point, the learned trial judge said at pp. 545-46:

"Despite the continuous harassment and interference by members of the band, plaintiff continued to operate the farm during 1969, 1970 and 1971. His crops were damaged by the actions of some members of the band, but there was no evi-

83

dence before the Court that the defendants, in their personal capacity, were in any way responsible for such damage, nor could the band be held liable for those actions."

Plaintiff continued his claim for damages arising "from the cancellation of the Lease and depriving the Plaintiff of possession of the land."

The learned trial judge held that [p. 546]:

"The personal defendants, acting in their capacities as chief and members of council of the band duly elected to represent the band in accordance with its constitution established pursuant to the Indian Act, wrongly passed the resolution rescinding the original approval of the lease and effectively terminating the lease because this action prevented plaintiff from operating his farm as provided for in the lease."

It is my respectful opinion that the learned trial judge was in error if he meant to say that it was the resolution of 14th September 1972 which cancelled the lease and dispossessed plaintiff. Standing alone, it did not. Clearly, only the lessor could cancel the lease; the resolution was treated by the lessor only as a recommendation for cancellation and was not acted on.

I will consider later the connection between the harassment of plaintiff and the actions of the band council.

There are two points of procedure which should be dealt with before considering the merits.

Jurisdiction

Counsel for defendants and counsel for Department of Justice argued that Court of Queen's Bench did not have jurisdiction in this matter but that exclusive jurisdiction lies in the Federal Court of Canada. Section 17(2) of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), reads:

"(2) Without restricting the generality of subsection (1), the Trial Division has exclusive original jurisdiction, except where otherwise provided, in all cases in which the land, goods or money of any person are in the possession of the Crown or in which the claim arises out of a contract entered into by or on behalf of the Crown, and in all cases in which there is a claim against the Crown for injurious affection."

Under that section the Federal Court would have exclusive jurisdiction:

1. In all cases in which the land, goods or money of any person are in the possession of the Crown; or

2. Where the claim arises out of a contract entered into by or on behalf of the Crown; and

3. In all cases in which there is a claim against the Crown for injurious affection.

Items 1 and 3 do not have any application to the case at bar. The only basis for claiming exclusive jurisdiction in the Federal Court would be that a claim in this case "arises out of a contract entered into by or on behalf of the Crown".

I agree with the submission of counsel for the Department of Justice that the question of cancellation of the lease to which the federal Crown is a party is a question within the jurisdiction of the Federal Court. Any pronouncement to that end would, in effect, be a finding in respect of Her Majesty and thus within the jurisdiction of that court: *Re Smith and Best* (1974), 54 D.L.R. (3d) 627 at 631 (Y.T.). But Mintuck is not seeking damages or any relief against the federal Crown.

Mintuck has made a claim against defendants who, he alleges, have wrongfully interfered with his contractual relations with the federal Crown and deprived him of his rights as a lessee, causing damage to him. This is a claim in tort against defendants, falling squarely within the jurisdiction of Court of Queen's Bench. To include this kind of action within the meaning of "arises out of", as those words appear in s. 17(2), would be an unreasonable extension of their meaning. Obviously, if there had never been a lease there could not have been a claim. But not every action, because of a relationship with a federal contract, becomes ipso facto a matter within the exclusive jurisdiction of the Federal Court. I have concluded that the learned trial judge was correct in his rejection of counsel's jurisdictional argument.

Parties

The learned trial judge found that the band is not a suable entity and made a nunc pro tunc representation order under Queen's Bench R. 58. The rule reads:

"58 Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the court to defend, on behalf of, or for the benefit of, all."

Counsel for defendants argued that the judgment was correct in finding that the band was not a suable entity but erred

in making the order because a representation order should not be made in an action in tort.

Doubt has been expressed in the authorities whether the rule should ever be applied to actions in tort: Clerk and Lindsell on Torts, 14th ed., pp. 110-11, para. 196, quoting *Mercantile Marine Service Assn. v. Toms*, [1916] 2 K.B. 243, and other English cases. The same thought is expressed in Holmsted & Gale, Ontario Judicature Act and Rules of Practice, vol. 1, p. 718, para. 31, where reference is made to the impossibility of suing individuals in a representative capacity for damages for tort. The practice in respect of unincorporated associations is referred to in Holmested at p. 721, para. 45, where the following statement is made:

"In certain circumstances it may be possible to obtain an order for representation under this rule, provided the claim made against the association is of an equitable nature: see *Barrett v. Harris* (1921), 51 O.L.R. 484 at 491, 69 D.L.R. 503, where Middleton J., after reviewing the English and Canadian cases, said 'The result in my opinion, is, that in an action to recover damages for tort the Rule cannot be invoked unless it is intended to be alleged that the unincorporated body is possessed of a trust-fund, and such circumstances exist as entitle the plaintiff to resort to that fund in satisfaction of his claim. In such case the trustees may be appointed to represent the general membership in defending the fund . . . Where there are many tort-feasors, the plaintiff has an adequate remedy by suing those whom he can shew to be wrongdoers, and from whom he may expect to levy the amount of any recovery.'

"Before making a representation order, the court should have all relevant facts before it to enable it to determine that the case is a proper one for a representation order, and the mere statement that the plaintiffs intend to allege the existence of a trust fund is not sufficient: *Body v. Murdoch*, [1954] O.W.N. 658."

The nature of this principle was referred to in Williston and Rolls, The Law of Civil Procedure, vol. 1, p. 217, where the following statement appears:

"It has been held in a number of cases that a representation order cannot be made in a tort action unless it is intended to allege that the association is possessed of a trust fund and that the persons whom it is sought to name as defendants are the trustees of it . . .

"The requirement of the existence of a trust fund is somewhat illogical. In a case in contract it can easily be argued that members only intended to authorize the pledging of their credit up to the limit of a certain fund. In an action in tort there can be no such implied restriction. The only question should be whether the members are personally or vicariously responsible. It is hard to see how the existence of such a fund can be of any assistance in answering either of these questions. The rule seems too strongly established in Ontario, however, to be easily overruled."

Counsel for Mintuck argued that although the Act does not say that a band is a legal entity capable of being sued, it does not say it cannot be sued. By implication, the argument goes, the court must find that since a band is recognized as a legal entity for some purposes under the Act it must be a legal entity for all purposes.

After analyzing the structure, assets and functions of a band, Solomon J. said at p. 554:

"The band and its chief and council are the defendants in plaintiff's statement of claim and all filed defences. The chief and members of council were examined for discovery. During the hearing the personal defendants gave evidence in support of their personal defences and in support of the defence of the band. In a word, all defendants were represented by counsel during the hearing, all participated in opposing plaintiff's claim and the Court heard all evidence adduced on their behalf.

"Plaintiff was certain the band was a legal entity capable of being sued without an order under Queen's Bench R. 58. No order was asked for under R. 58, nor did the Court make one before the hearing of this matter. I feel, however, the Court has power to make such order now. Queen's Bench R. 156 provides:

" 'A proceeding shall not be defeated by any formal objection, but all necessary amendments may be made on proper terms as to costs or otherwise to secure the advancement of justice, the determining the real matter in dispute, and the giving of judgment according to the very right and justice of the case.'

"Under R. 156, this Court has the power to grant necessary amendments to the pleadings and make all necessary orders required by Queen's Bench Rules in order to render a judgment according to the rights of parties and justice of the case.

I am accordingly granting all necessary amendments and am making nunc pro tunc an order under R. 58 that Clifford Lynxleg, Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos, who are chief and council respectively of the band, represented and defended on behalf of all other members of the band except plaintiff, as well as on their own behalf, and that all other members of the band except plaintiff, as well as individual defendants, are bound by the judgment and proceedings in this action."

I agree with the conclusion of Solomon J. and would hold that the representation order was made correctly.

I should add that the style of cause in the copies of pleadings filed in this court are in the same form as they were when the action was started.

Merits

Solomon J. based the finding of liability on the authority of *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749; *Temperton v. Russell*, [1893] 1 Q.B. 715, and *Posluns v. Toronto Stock Exchange*, [1964] 2 O.R. 547, 46 D.L.R. (2d) 210. I prefer to rest the liability of the band on the tort of intimidation and unlawful interference with economic interests and the doctrine of "adoption" of a tort.

There is a useful discussion in Clerk and Lindsell at pp. 414-20 as part of a general discussion of the several shadings in the categories of the general tort of procuring a breach of contract. O'Sullivan J.A., in giving judgment of this court, discussed these principles in the recent case of *Gershman v. Man. Vegetable Producers' Marketing Bd.*, [1976] 4 W.W.R. 406, 69 D.L.R. (3d) 114 at 119, et seq. The law with respect to the tort of intimidation is summarized in *Huljich v. Hall*, [1973] 2 N.Z.L.R. 279 at 285-86, where the following comment is made:

"The action for intimidation has had recent confirmation in the judgment of the House of Lords in *Rookes v. Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367. *Rookes v. Barnard*, as is well known, was an example of the use of unlawful threats made to the plaintiff to interfere with the liberty of action of a third person with resulting damage to the plaintiff. But there can be intimidation by threats to interfere with the liberty of action of the plaintiff himself. As *Salmond* says (*Salmond on Torts* (14th ed.) 528) 'Although there seems to be little authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby

loss accrues to him'. But essential to the definition of this tort is the intention on the part of one person to compel another to take a particular course of action. 'Threat' in this connection means 'an intimation by one to another that unless the latter does or does not do something the former will do something which the latter will not like': *Hodges v. Webb*, [1920] 2 Ch. 70 at 89, per Peterson J. Two recent cases emphasise this requirement of an intention to compel a particular course of action: *J. T. Stratford & Son Ltd. v. Lindley*, [1965] A.C. 269, [1964] 2 All E.R. 209, reversed [1965] A.C. 307, [1964] 3 All E.R. 102 (in the judgments of the members of the Court of Appeal), and more recently in *Morgan v. Fry*, [1968] 2 Q.B. 710, [1968] 3 All E.R. 452, where Lord Denning said:

" 'According to the decision in *Rookes v. Barnard* the tort of intimidation exists, not only in threats of violence, but also in threats to commit a tort or a breach of contract. The essential ingredients are these: there must be a threat by one person to use unlawful means (such as violence or a tort or a breach of contract) so as to compel another to obey his wishes: and the person so threatened must comply with the demand rather than risk the threat being carried into execution. In such circumstances the person damnified by the compliance can sue of intimidation'."

In discussing the tort of unlawful interference with economic interests, the learned editors of Clerk and Lindsell put the matter in this way, at p. 425:

"There exists a tort of uncertain ambit which consists in one person using unlawful means with the object and effect of causing damage to another. In such cases, the plaintiff is availed of a cause of action which is different from those so far discussed. For example, in *J. T. Stratford & Son Ltd. v. Lindley* [supra] two of their Lordships gave, as an alternative ground of their decision that an injunction should lie, the fact that the defendants had used unlawful means to interfere with the business of the plaintiffs. 'In addition to interfering with existing contracts the respondents' action made it practically impossible for the appellants to do any new business with the barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed [*Stratford*, at p. 106].' Such 'interference with business' does not require proof that existing contracts have been broken or interfered with; but the cause of action exists only when the defendant has brought about the damage by use of unlawful means. As in the torts earlier discussed, damage is clearly

essential to the cause of action and such damage must be shown to have been, or to be about to be, caused by the unlawful interference."

The facts outlined earlier in these reasons support the finding by the learned trial judge that individual members of the band were guilty of harassment of Mintuck and interference with his operation of the farm. In my view, these acts constitute the tort of intimidation and unlawful interference with Mintuck's economic interests. If the band council had not entered the dispute in its official capacity, the band could not be held liable for damages suffered by Mintuck as a result of the earlier tortious acts. Nor could the participation of chief Lynxleg, as a party to the harassment, make the band liable. But the band took official actions which had the effect of adopting the tortious acts of its members. It sent the letter of June 1972, passed the resolution of September 1972, did not meet with Mintuck, and took possession of the land.

These acts of the band council must be considered in relation to the earlier events. The earlier wrongful acts of individual band members were supported and reinforced by the council. The effect of the council's actions must have been expected. Plaintiff, by the conjunction of the acts of the band members and the acts of the council, was precluded from asserting his rights under the lease.

The suggestion by defendants that Mintuck is still the lessee and could therefore use the land if he chose has a hollow ring in view of the history of the relationship between the parties. The court is obliged to look at the factual situation and to determine the applicable legal principles in light of these facts; we cannot decide the case in a vacuum. It is true that the contract between Mintuck and the federal Crown was not breached in a strict legal sense; Mintuck is still the lessee. But to all intents and purposes, as a result of harassment by band members, he has lost the benefit of the lease by being prevented from using the land. The effect is exactly the same as if he were no longer the lessee.

There is a discussion of the ancient doctrine of ratification of torts in P. S. Atiyah, Vicarious Liability in the Law of Torts. After discussing this concept in relation to the modern law of torts the learned author, at p. 314, refers to *Sedleigh-Denfield v. O'Callaghan*, [1940] A.C. 880, [1940] 3 All E.R. 349 (a case of nuisance), as an example of liability in tort resting on the adoption of an act of another where no question of agency arises, and makes the comment: " . . . but such lia-

bility has never been rested on ratification though clearly it has affinities with it."

At pp. 904-905 in *Sedleigh-Denfield* Lord Wright said:

"Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it."

I see no reason, in principle, to limit the doctrine to cases of nuisance. I believe the proposition may be applicable to the torts under consideration in the case at bar, if the facts warrant it. In my opinion, under the circumstances here, the actions of the band council make the doctrine applicable to the band.

Did the council have knowledge of the harassment when it took official action? All the councillors lived on the reserve. Chief Lynxleg was a party to the harassment and was aware of complaints of interference made by Mintuck to the R.C.M.P. Lawrence Ironstand, one of the councillors, acknowledged that when he was on the council complaints were received from Mintuck about interference with working the land. It is a reasonable conclusion that the councillors knew of the harassment. It was with the possession of that knowledge that the letter of 27th June was sent to Mintuck, calling on plaintiff to work the land.

There was no apparently valid reason for sending the letter. The learned trial judge found (and the evidence supported that finding) that Mintuck is an excellent farmer and a good manager of his farming operations. In the absence of inter-

ference, it is reasonable to infer that he would have performed his duties as lessee and there would not have been any need to advise Mintuck on how to farm the land. Nor was there any true need for the band to assume the responsibility of maintaining the land. The letter and the taking over of maintenance of the land served as official sanction for the harassment which, up to that point, had merely been the actions of individual members of the band. The prejudicial position of the band was compounded by the refusal of the band council to meet with Mintuck.

The resolution in September, although it did not come to the attention of Mintuck immediately and had no effect on him, neutralized the Department of Indian Affairs, who were placed in the invidious position of not being able to help Mintuck because of the official stance taken by the band; and the resolution constituted evidence supporting the finding of the learned trial judge that the chief and council of the band had "endorsed" the harassment of plaintiff.

These acts of the council can only be explained on the basis that the council was adopting the prior tortious acts of band members and impliedly approving those acts: see *Harrisons & Crossfield Ltd. v. London & North Western Ry. Co.*, [1917] 2 K.B. 755 at 758. By virtue of these official acts of its duly elected council, the band became liable for the torts of intimidation and unlawful interference with Mintuck's economic interests. Plaintiff suffered deprivation of his rights and the band became responsible for damages ensuing from that deprivation.

I would dismiss the appeal of defendants from the award of damages.

Because of that conclusion, it is not necessary to consider the nature and effect in damages of the taking of possession of the land by the band council.

Cross-appeal

Plaintiff cross-appealed, alleging error on the part of the learned trial judge in not finding that the band is a legal entity or body corporate capable of being sued and in not allowing a higher amount for damages. Appellant also appealed the quantum, alleging errors in law and in fact, on the part of the learned trial judge in making the allowance of $10,000.

I have dealt with the status of the band earlier in these reasons.

The learned trial judge said that the evidence on quantum was "not very good". I agree with that statement.

Solomon J. mentioned two factors in particular — loss of profit for a seven-year period (which he discounted substantially) and loss of money by plaintiff on the balance of his operations because his expenses had to be met solely from the receipts from his other land, a much smaller acreage. He then said that "taking all factors into consideration" he would allow $10,000 by way of damages.

The rights of the lessee and thus his economic interests have been adversely affected by the torts of defendants which prevented Mintuck from using the land. The extent of that effect cannot be determined with precision. Although there may be arithmetical errors in the method used by the learned trial judge and there may be arguable bases for increasing or decreasing the quantum, I am satisfied that the figure allowed is a reasonable one. It is not one which calls for interference by an appellate court.

In the result, I would dismiss the appeal with costs and would dismiss the cross-appeal without costs.

O'SULLIVAN J.A.:—I agree that the appeal and the cross-appeal should be dismissed but I am unable to agree entirely with some of the opinions expressed by the learned trial judge or those expressed by my brothers Guy and Matas.

The facts are set out in their reasons for judgment.

The learned trial judge awarded to the plaintiff $10,000 in damages basing himself on "the principle of law that interference by a third party with contractual relations between two other parties is actionable" [[1976] 4 W.W.R. 543 at 547].

He relied on *Lumley v. Gye* (1853), 2 E. & B. 216, 118 E.R. 749; *Temperton v. Russell*, [1893] 1 Q.B. 715, and *Posluns v. Toronto Stock Exchange*, [1964] 2 O.R. 547, 46 D.L.R. 210.

With respect I think the learned trial judge erred in basing himself on interference with contractual relations.

The lease between the plaintiff and The Queen has not been cancelled in law or in fact. There has been no breach whatever of the plaintiff's contractual relationship with The Queen. Legally the plaintiff has always been entitled to go to his farm and work it.

As the editors of Clerk and Lindsell on Torts, 14th ed., para. 794, say: " . . . on principle, if no breach eventuates, there should be no tort".

I am aware of the dicta of Lord Denning, M.R. in *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 2 Ch. 106 at 138, [1969] 1 All E.R. 522:

"The time has come when the principle should be further extended to cover 'deliberate and direct interference with the execution of a contract without that causing any breach.' "

Lord Denning's dicta have been mentioned with apparent approval in a number of Canadian cases, including *Einhorn v. Westmount Investments Ltd.* (1970), 69 W.W.R. 31, 6 D.L.R. (3d) 71, affirmed 73 W.W.R. 161, 11 D.L.R. (3d) 509 (C.A.), by Disbery J. of the Saskatchewan Court of Queen's Bench, and *Mark Fishing Co. v. United Fishermen & Allied Workers' Union*, [1972] 3 W.W.R. 641, 24 D.L.R. (3d) 585, by Maclean J.A. and Robertson J.A. of the British Columbia Court of Appeal. That judgment was affirmed on further appeal to the Supreme Court of Canada: [1973] 3 W.W.R. 13, 38 D.L.R. (3d) 316.

Nevertheless I would not be prepared to follow Lord Denning's view without a decision to do so by the Supreme Court of Canada. I think the law in Canada is that expressed by Lord Donovan in *J. T. Stratford & Son Ltd. v. Lindley*, [1965] A.C. 269 at 340, [1964] 3 All E.R. 102:

" . . . the argument that there is a tort consisting of some undefinable interference with business contracts, falling short of inducing a breach of contract, I find as novel and surprising as I think the members of this House who decided *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*, [1942] A.C. 435, [1942] 1 All E.R. 142, would have done."

To like effect are the dicta of Viscount Simonds for the Judicial Committee of the Privy Council in *A.G. New South Wales v. Perpetual Trustee Co.*, [1955] A.C. 457 at 483-84, [1955] 1 All E.R. 846:

"It does not appear to their Lordships that *Lumley v. Gye* [supra] throws much light on the problem to be solved in the present case. If the law had developed in all respects logically, that case would be an authority for saying that, if Miss Wagner had not been maliciously enticed from the service of the plaintiff but had been by battery or otherwise wrongfully prevented from serving him, the plaintiff would

have had a good cause of action against the wrongdoer. But it has never been suggested that that is the law."

In any event, I do not think that it is appropriate to invoke the tort of unlawful interference with contractual relations when a defendant acts directly against the plaintiff. If The Queen were to sue the defendants on the ground that the defendants by their actions against Mintuck interfered with his carrying out of his contract with The Queen, thereby causing damage to The Queen, that would be a case for considering the tort of interfering with contractual relations. Again, if The Queen in this case had broken the lease or otherwise ceased to carry out her obligations under the lease and if Mintuck sued the defendants for damages arising therefrom, that also would be a case requiring consideration of the tort of interference with contractual relations.

On the facts of the case before us, however, it seems to me that for the plaintiff to recover against the defendants he must establish what is sometimes called a "two-party" tort.

There is no doubt that the plaintiff suffered damage in 1970 and 1971 as a result of harassment on the part of certain band members aimed, as the learned trial judge said, "at getting [the plaintiff] to abandon his rights to the lease he had to the new farm" [p. 545].

I am unable to see, however, how this harassment was adopted by the band through the band council.

I agree with the learned trial judge on this branch of the case. As he said [at p. 546]:

" . . . there was no evidence before the Court that the defendants, in their personal capacity, were in any way responsible for such damage, nor could the band be held liable for those actions."

Indeed, counsel for the plaintiff recognized this when he abandoned the claim for damage by individual members of the band.

What the learned trial judge awarded damages for was the loss which the plaintiff sustained as a result of not being able to enjoy his leasehold interest in the farm. He held that the plaintiff had lost approximately $2,000 per year for seven years, the years 1973-1979 inclusive, and he capitalized this loss at the round figure of $10,000.

The damages awarded by the learned trial judge are, therefore, damages for loss of use of the leasehold land. The plain-

95

tiff has not farmed the land since 1972 and he therefore suffered damage.

I think the reasons that the plaintiff did not farm the land since 1972 are twofold. On the one hand, he was afraid to do so because of the acts of intimidation and personal violence on the part of individual band members. If this were the only reason he would have no cause of action against the band itself and he has, in any event, abandoned this aspect of his claim.

But another reason for his not farming the land is that the band itself dispossessed him. Such dispossession was wrongful.

The chief of the band, Clifford Lynxleg, said on his examination for discovery:

"164. Q. Do I understand you to say that the Valley River Band has retained possession of this quarter section of land, namely, NE ½ of 4 from sometime in the summer of 1972 until the present time? A. Yes."

I therefore think that there was evidence to justify a finding that the band was guilty of the two-party torts of intimidation and unlawful interference with economic interests. I also think the facts justify a finding of trespass quare clausum fregit.

The damages flowing from the torts, which resulted in dispossession by the band, must be limited to the years 1972, 1973, 1974, 1975 and perhaps 1976. In 1976, at the time of the trial, the plaintiff could have recovered possession of the farm but chose not to do so. He cannot attribute his failure to enjoy the farm in 1977 to 1979 to the torts of the band.

The learned trial judge gave damages for the years 1973-79. I think it was error for him to do so but, when confronted with the question of what amount should be awarded, I am faced with the problem that the damages are not susceptible of precise quantification.

There is no doubt that the plaintiff sustained a significant loss. It may be that he did not do all he could to mitigate his damages, but that was for the respondent to plead and prove.

Far from pleading mitigation, far from offering to the plaintiff to cease their unjustified dispossession, the defendant band admitted in their statement of defence that the band had can-

celled the plaintiff's lease by its resolution of 14th September 1972 and claimed to be justified in so doing. It was only at the trial in 1976 that the defendants submitted that the lease in fact had not been cancelled and that the plaintiff could resume possession.

Under all the circumstances, I would not interfere with the global sum at which the learned trial judge assessed the damages.

On the questions of the band's suability and the jurisdiction of Manitoba's courts, I agree with the conclusions reached by by brothers and by the learned trial judge.

I do not think that the band is an artificial person but the funds of the group can be got at in a proper case by naming individuals to represent the band and by giving judgment, as was done here, with the right of execution limited to the assets of the band.

While normally a nunc pro tunc order should be made only in rare cases, I agree there were special circumstances in the case before us, where counsel moved for the first time at trial to dispute a matter which had been admitted in the statement of defence.

Subject to proper amendments being made on the record, I accordingly agree that the appeal should be dismissed with costs and the cross-appeal should be dismissed without costs.

SASKATCHEWAN DISTRICT COURT

McIntyre D.C.J.

Regina v. Palomar Developments Corporation

Trade and commerce — Company entering into contracts with individuals for purpose of building dwellings and then selling for a profit — Contracts not securities subject to The Securities Act — The Securities Act, 1967 (Sask.), c. 81, s. 2(1)(z)(viii), (xiii).

APPEAL from the judgment of Bence P.M., [1976] 3 W.W.R. 423, who found the accused guilty under ss. 42 and 143 of The Securities Act.

The accused corporation, through a salesman, negotiated with a number of individuals agreements in which it was agreed that the accused would construct fourplex private dwellings on land owned by it in return for a fixed amount per fourplex dwelling from the individuals; and if the parties agreed the accused would proceed to register the development as a condominium with the

MANITOBA QUEEN'S BENCH

Solomon J.

Mintuck v. Valley River Band No. 63A et al.

Indians — Lease of reserve land to resident member of band cancelled by band resolution — Resolution intra vires band but no grounds for cancellation — Band and members of council liable for interfering with contractual relations between plaintiff as lessee and Her Majesty as lessor.

The plaintiff, a treaty Indian and a member of and resident of the Valley River Band 63A reserve, leased from Her Majesty represented by the Minister of Indian Affairs and Northern Development and with approval of the band a 480-acre farm on the reserve; he later in 1969 leased additional land for a ten-year period, which lease was again approved by the band. Following a band election the personal defendants were elected as chief and council and passed a resolution in 1972 purporting to rescind the resolution or recommendation passed by their predecessors relating to the plaintiff's lease of additional land in 1969, which had the effect of cancelling the plaintiff's lease and prevented him from farming the land as provided in the lease. The plaintiff had not been in breach of any terms of the lease; however the Minister, who held the land as trustee for the cestui que trust, the band, would not take action to reinstate the plaintiff under the lease without the consent of the band, which was not forthcoming. From the time of the election in 1970 until the council's resolution in 1972 the plaintiff encountered harassment and interference by members of the band in attemping to farm the area covered by the second lease.

The plaintiff commenced an action against the band and against the personal defendants as members of the band council for damages suffered as a result of the cancellation of the lease and dispossession from the land. The defendants argued the Court had no jurisdiction to hear the matter as the Federal Court had exclusive jurisdiction when a claim arose out of a contract entered into by or on behalf of the Crown; the defendants also argued the band was not a legal entity and could not sue or be sued as a body corporate.

Held, judgment for the plaintiff. The plaintiff's claim did not arise out of a contract entered into by or on behalf of the Crown. His action against the defendants was based on the principle of law that interference by a third party with contractual relations between two other parties is actionable. The plaintiff claimed there was a valid lease between himself and Her Majesty represented by the Minister as lessor and that defendants without justification proceeded to interfere with his contractual relation. The plaintiff as a result of interference and harassment by members of the band was prevented from fully benefiting from the land during the years 1969 to 1971 when he was operating it. By passing the resolution of cancellation of the lease, the chief and the council of the band were in fact endorsing the harassment of plaintiff by other members of the band and prevented the plaintiff from having the use of the land he was legally entitled to under the terms of the lease. *Lumley v. Gye*, [1843-60] All E. Rep. 208, 118 E.R. 749, 2 El. & Bl. 216; *Temperton v. Russell*, [1893] 1 Q.B. 715; *Posluns v. Toronto Stock Exchange*, [1964] 2 O.R. 547, 46 D.L.R. (2d) 210 applied.

The band has practically all the powers of a municipal corporation and like a municipal corporation is subject to the provisions of

The Municipal Act, 1970 (Man.), c. 100 (also C.S.M., c. M225); the band discharges its duties and obligations subject to the Indian Act, R.S.C. 1970, c. I-6. The band has many more powers than most corporations. The band, which owns property, has bank accounts, signs cheques, pays wages, and receives money, is not a loosely organized body composed of members but is a closely-knit entity banded together for the benefit of its members and has a character of its own different from its members. The band has power to enter into and to terminate contracts, providing such actions are done in accordance with the provisions of the Indian Act. Although the band discharges many corporate functions without feeling the lack of corporate status it is not a body corporate capable of being sued as a person under the Queen's Bench Rules; however it is a legal entity, and the necessary order was made that the band and the individual defendants were bound by the judgment of $10,000 in favour of the plaintiff.

Tunney v. Orchard, 15 W.W.R. 49, [1955] 3 D.L.R. 15, varied [1957] S.C.R. 436, 8 D.L.R. (2d) 273 applied.

[Note up with 13 C.E.D. (West. 2nd) *Indians*, ss. 2, 4, 20.]

A. C. Matthews, Q.C., for plaintiff.
R. K. Vohora, for defendants.

23rd April 1976. SOLOMON J.:—Plaintiff, a treaty Indian, resides on the reserve of the Valley River Band 63A ("the band"). The personal defendants, Clifford Lynxleg, Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos, are all members of the band and reside on the said reserve. Clifford Lynxleg is the chief, and Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos are members of the band council, duly elected in accordance with the constitution of the band as provided for by the Indian Act, R.S.C. 1970, c. I-6 ("the Act").

In accordance with the provisions of the Act, and pursuant to the agreement made between plaintiff and Her Majesty Queen Elizabeth II, represented by the Minister of Indian Affairs and Northern Development ("the Minister"), and with approval of the band, plaintiff rented and was operating a 480-acre farm on the reserve. On 22nd May 1969 Her Majesty Queen Elizabeth II, represented by the Minister as lessor, entered into a lease with plaintiff by which the lessor rented to him additional land situated within the Valley River Indian Reserve and being NE 4-26-25-W1 in Manitoba. Before the lessor executed this lease in favour of plaintiff, the chief and council of the band, by a resolution duly passed, recommended to the lessor that the lease in question be entered into. The lease was for a term commencing 1st May 1969 and ending 31st December 1979. Under it the plaintiff was to receive the use of the land for the years 1969 to 1973 inclusive, rent free, and was to pay the lessor a one-third share of the crop in 1974 and continue doing so until the end of the term.

Plaintiff is an excellent farmer and according to knowledgeable independent witnesses is a good manager of his farming operations. He has given every indication of being a progressive individual with a keen desire to succeed. He was doing well on his 480-acre farm but agricultural consultants for the Department of Indian Affairs were of opinion that he should have more land if his operations were to be conducted economically. Following their advice, plaintiff rented this additional 160 acres for a ten-year period and started to develop this new land in order to bring it up to the standard of his other farm property.

Shortly after signing the lease for this additional land, plaintiff started to experience some difficulties with operations on the newly acquired property. It was situated approximately two miles away from his other land and he was obliged to commute daily between the two properties during the farming seasons. The only road to the new farm was through the reserve. Many times plaintiff found it blocked with different vehicles and was not able to get through with farm equipment needed for his operations. Occasionally when he got to the farm he discovered that stray cattle had been allowed to roam freely over his crops, doing considerable damage to them. Sometimes he found members of the band driving trucks over the farm under the pretext they were hunting game, and on occasion plaintiff and his family were intimidated by firearms. Finally, even the band chief, Clifford Lynxleg, entered into the picture with harassment. It was obvious eventually that all this interference with farming operations, and harassment of plaintiff and his family, was aimed at getting him to abandon his rights to the lease he had to the new farm.

The leasing of the new farm to plaintiff was approved by the former council and chief of the band. Shortly after the lease was executed on 22nd May 1969, the incumbent chief and council of the band were defeated in an election and Clifford Lynxleg was elected chief and the other personal defendants were elected to council. Harassment and intimidation of plaintiff and his family, and interference with his farming operations, started shortly after this election and continued until the chief and council finally passed a resolution which effectively terminated the lease with plaintiff in respect of the new farm.

Despite the continuous harassment and interference by members of the band, plaintiff continued to operate the farm during 1969, 1970 and 1971. His crops were damaged by

the actions of some members of the band, but there was no evidence before the Court that the defendants, in their personal capacity, were in any way responsible for such damage, nor could the band be held liable for those actions. At the conclusion of the hearing, plaintiff abandoned his claim against the band personal defendants for damage done by other members of the Band. However, he did not abandon his claim against the personal defendants, as members of the band council, for damages arising from cancellation of the lease and dispossession. In other words, plaintiff claims damages against Valley River Band 63A, and against the personal defendants as members of council of the band, for damages suffered as a result of the cancellation of the lease and dispossession of the said lands.

Defendants claim that plaintiff, in the spring of 1972, was served with a notice asking him to remedy a breach of the terms of the lease but he did not take heed and consequently the band, through its chief and council, passed a resolution on 14th September 1972 cancelling the lease. If the band was not satisfied with plaintiff's farming methods, it, as cestui que trust under the provisions of the Indian Act, could have recommended to the Minister to take action against plaintiff for the purpose of remedying the breach or terminating the lease. Both defendants and the Minister, however, knew that plaintiff had not committed any breach of the terms of the lease. The Minister knew that plaintiff was a good farmer and was conducting his farming operations in a husband-like manner, and also knew there were no legal grounds for terminating the lease and did not want to associate himself with defendants' actions. The personal defendants, acting in their capacities as chief and members of council of the band duly elected to represent the band in accordance with its constitution established pursuant to the Indian Act, wrongly passed the resolution rescinding the original approval of the lease and effectively terminating the lease because this action prevented plaintiff from operating his farm as provided for in the lease.

I am satisfied that plaintiff, as a result of interference and harassment by members of the band, was prevented from fully benefiting from the land during the years 1969 to 1971 when he was still operating it. The chief and the council of the band, by passing the resolution of cancellation of the lease, were, in fact, endorsing the harassment of plaintiff by other members of the band and prevented plaintiff from having the use of the land he was legally entitled to under the terms of the lease. Plaintiff unquestionably suffered some damages

because he was not able to use the subject land after spending time and energy in bringing it up to the standard of his own property. Evidence on the question of quantum of damages actually suffered by plaintiff as a result of the cancellation of the lease and dispossession is not very good. The Court, however, was told by at least one knowledgeable witness that plaintiff lost a clear annual profit of approximately $13 per acre by losing the use of the land. The farm had 150 acres under cultivation, which means he lost about $2,000 annually. The ten-year term under the lease did not expire until 31st December 1979, and plaintiff has lost some seven years' profit by reason of non-use of the land. He also lost money on the balance of his operations as well because maintenance of machinery and other general expenses had to be met from the receipts of a much smaller acreage. During the hearing the Court was informed that plaintiff is no longer interested in being reinstated as a tenant under the said lease. Taking all factors into consideration, I find that plaintiff has suffered at least a $10,000 loss as a result of the cancellation of the lease.

Defendants questioned the Court's jurisdiction to hear this matter on the ground that plaintiff's action against the band is based on a lease entered into between Her Majesty the Queen and plaintiff. Defendants argued that under the provisions of s. 17(2) of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), which provides:

"(2) Without restricting the generality of subsection (1), the Trial Division has *exclusive original* jurisdiction, except where otherwise provided, in all cases in which the land, goods or money of any person are in the possession of the Crown or *in which the claim arises out of a contract entered into by or on behalf of the Crown,* and in all cases in which there is a claim against the Crown for injurious affection" (the italics are mine),

it would appear that this Court has no jurisdiction to entertain plaintiff's claim arising out of the lease.

I do not share defendants' interpretation of this section nor of the nature of the claim. Plaintiff's claim does not arise out of a contract entered into by or on behalf of the Crown. His action against defendants is based on the principle of law that interference by a third party with contractual relations between two other parties is actionable. He claims there was a valid lease between himself and Her Majesty Queen Elizabeth II represented by the Minister as lessor and that defendants, without justification, proceeded to interfere with

its contractual relations. This principle of law was first established in 1853 by the decision in the well known case of *Lumley v. Gye*, [1843-60] All E. Rep. 208, 118 E.R. 749, 2 El. & Bl. 216, in which Crompton J., speaking for the Court, said at p. 211:

"Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue, and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties. I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service not actually continuing, can make any difference. The wrong and injury are surely the same, whether the wrongdoer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service. I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists."

Subsequently, in the case of *Temperton v. Russell*, [1893] 1 Q.B. 715, the Court extended that principle of law to include interference by a third party who prevents the other two parties from entering into a contract. Lord Esher M.R. at p. 728 said:

"The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff

can be sustained, and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable."

In 1964, Gale J. (as he then was) of the Ontario High Court, in the case of *Posluns v. Toronto Stock Exchange,* [1964] 2 O.R. 547, 46 D.L.R. (2d) 210, dealt rather fully with the question of liability of a third party for interfering with contractual relations of two other parties, and at p. 261 summarized as follows:

"While a contract cannot impose the burden of an obligation on one who is not a party to it, a duty is undoubtedly cast upon any person, although extraneous to the obligation, to refrain from interfering with its due performance unless he has a duty or a right in law to so act. Thus, if a person without lawful justification knowingly and intentionally procures the breach by a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong. That wrong does not rest upon the fact that the intervenor has acted in order to harm his victim, for a bad motive does not *per se* convert an otherwise lawful act into an unlawful one, but rather because there has been an unlawful invasion of legal relations existing between others.

"This has been established in our jurisprudence by an ever-developing body of authority which had its origin in the great case of *Lumley v. Gye* [supra]. Most, if not all, of the relevant judgments following it were cited and thoroughly discussed with me during the course of the argument at trial, but there is no point in analyzing them individually or collectively at this stage. It will surely be enough to say that while some of the judgments are not susceptible of easy interpretation, perhaps because in many instances they were so elaborate, and others give the appearance of irreconcilability, there can be no doubt that our law recognizes as tortious any unjustifiable and unlawful violation of economic interests which causes harm."

Plaintiff had a valid subsisting lease with Her Majesty Queen Elizabeth II represented by the Minister as lessor and himself as lessee. Under the provisions of the Indian Act, the Minister is the trustee of the lands covered by the lease for the cestui que trust, the Valley River Band. There were no breaches of the terms of the lease and the band had no right in law to prevent plaintiff from reaping the fruits of the provisions of the lease. The band, by a resolution duly passed by the personal defendants in their capacities as chief and members of the band council, cancelled the lease without any justification for such interference. Defendants by their actions deprived plaintiff from quiet possession of the lands as provided in the lease. I, therefore, reject defendants' first objection as to the Court's jurisdiction.

Defendants' second objection was based on the ground that the band is not a legal entity and cannot sue or be sued as a corporate body. Plaintiff, on the other hand, argued that the band is a legal entity and he can proceed against it in the same manner as against a body corporate. I reserved my decision on this question and the hearing proceeded on the merits of the issues involved.

The band in the case at bar enjoys very wide powers to perform varied actions and discharge many responsibilities with all the facility of a corporation. The band entered into a treaty with Her Majesty the Queen by which it acquired many benefits and, conversely, assumed many responsibilities for its members — it can levy taxes, enter into contracts, create debts, construct public works on the reserve and legislate by passing binding orders on all members of the band. In a word, the band has practically all the powers of a municipal corporation and like a municipal corporation is subject to the provisions of The Municipal Act, 1970 (Man.), c. 100 (also C.S.M., c. M225); the band discharges its duties and obligations subject to the Indian Act. Obviously, the band has many more powers than most corporations. I am satisfied that the band, which owns property, has bank accounts, signs cheques, pays wages, and receives money, is not a loosely organized body composed of members scattered all over the world. It is a closely knit entity banded together for the benefit of its members. The band has a character of its own different from its members. "When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law but from the very nature of things differs

from individuals of whom it is constituted." (Professor Dicey, 17 Harvard Law Review, p. 513). In discharging its many duties within the framework of the Indian Act, the band discharges them without feeling lack of corporate status.

Tritschler J. (as he then was), sitting ad hoc in the Appeal Court of Manitoba in the case of *Tunney v. Orchard,* 15 W.W.R. 49, [1955] 3 D.L.R. 15, was dealing with the question of the liability of an unincorporated association (which is an entity in fact) for the wrongs it commits. On pp. 86-87, speaking for the Court, he said:

"The present state of the law may be attributed to a failure to recognize differences in fact among voluntary, unincorporated associations, a failure to see that some are entities in fact and some are not. There is a real distinction in fact between, on the one hand, a carefully constituted union or a well established club, and, on the other hand, a loosely associated religious order of 1800, whose members are scattered throughout the world (as in *Walker v. Sur,* [1914] 2 K.B. 930, 83 L.J.K.B. 1188) or a propertyless, vaguely organized association to advance the interests of merchants in a section of Toronto (as in *Barrett v. Harris* (1921), 51 O.L.R. 484). In the former there may be an entity in fact appart from its membership, with assets which can and ought to be applied to the satisfaction of obligations incurred.

"The question is simple enough. Can a union, or other voluntary, unincorporated association which is an entity in fact, be made to answer in the courts for wrongs or for breach of contract or for debts contracted? If it cannot that ends the matter but if, as I think, it can, it must not escape the accounting because of a want of ability in the courts to devise a suitable form of judgment. The form of the judgment is but a means to achieve the end of imposing responsibility upon the union and of making it possible for the plaintiff to realize his judgment out of the assets of the union. The form of judgment to be adopted is not all-important so long as the intended result is reached. The method adopted by the learned trial judge seems to me satisfactory. Another method is that followed in the *Metallic Roofing* case (1900), 12 O.L.R. 200, particularly the inclusion of a declaration that the property and assets of the union are liable to satisfy the plaintiff's claim. A third method is that suggested by the learned Chief Justice of this court."

Tunney v. Orchard was appealed to the Supreme Court of Canada [1957] S.C.R. 436, 8 D.L.R. (2d) 273, and that Court

varied the judgment of the Manitoba Court of Appeal, but on the question of whether an unincorporated entity can be held responsible for the wrongs of the association, Rand J., speaking for the Court, on p. 446 commented as follows:

"The executive board here is vested with authority to require the employer to comply with the terms of the union contract, including the feature of the closed or union shop. The board, purporting to act within the scope of its authority, may, by way of analogy with a corporation commit either an *ultra vires* act, that is, one that does not become an act of the membership body, or an act *intra vires* that brings about a breach of contract through an improper exercise of authority.

"That distinction is pointed out by Farwell J. in *Taff Vale Ry. Co. v. Amalgamated Society of Ry. Servants,* [1901] A.C. 426, where at p. 433 he uses the following language:

" 'I have already held that the society are liable for the acts of their agents to the same extent that they would be if they were a corporation and it is abundantly clear that a corporation under the circumstances of this case would be liable. See, for example, *Ranger v. Great Western Ry. Co.* (1854), 10 E.R. 824, 5 H.L.Cas. 86, where Lord Cranworth points out that although a corporation cannot in strictness be guilty of fraud, there can be no doubt that if its agents act fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation. It is not a question of acting *ultra vires,* as in *Chapleo v. Brunswick Permanent Building Society* (1881), 6 Q.B.D. 696, but of improper acts in the carrying out of the lawful purposes of the society.'

"This is as applicable to the labour union here as it was to the partly recognized society with which he was dealing."

The Minister of Indian Affairs and Northern Development holds the land in the Indian reserve as trustee for cestui que trust, the Valley River Band No. 63A, and under the provisions of the Indian Act and pursuant to an agreement between Her Majesty the Queen and the cestui que trust the trustee would not sign a lease in respect of lands on the reserve without recommendation from the cestui que trust. The chief of the band and his council passed a resolution recommending the trustee execute the lease in favour of the plaintiff covering

the land in question. After the trustee received the recommendation from the band, the lease was executed as recommended. One year later an election was held at the band reserve and the personal defendants were elected as chief and council. Shortly after the election, in the fall of 1972, the personal defendants in their capacity as chief and members of council passed a new resolution purporting to rescind the resolution of recommendation passed by their predecessors a few years earlier. By this action the chief and council effectively stopped plaintiff from using the land, as he had every right to do, because the trustee did not want to take any action to reinstate the plaintiff under the lease without consent of the band.

The band has power to enter into and to terminate contracts providing such actions are done in accordance with the provisions of the Indian Act. The personal defendants in their capacities as chief and council of the band have power to pass resolutions requesting the trustee (the Minister of Indian Affairs and Northern Development) to cancel a lease, which resolution would effectively terminate the lease providing there was factual justification for such action. From the evidence before me it becomes quite obvious that there were no grounds for the cancellation of the lease with plaintiff. The personal defendants, in their capacity as chief and council of the band, without any grounds passed the resolution of cancellation and by so doing exercised their authority improperly and wrongfully. This is not a case of passing an ultra vires resolution of cancellation, but one of passing an intra vires resolution wrongfully in order to deprive the plaintiff of the use of the land. I therefore find the band and the personal defendants liable for the damages plaintiff suffered as a result of the cancellation of his use of the land.

This action was instituted by plaintiff against the band and against the four personal defendants who are its chief and council respectively. Under Manitoba Queen's Bench Rules, parties who can be sued as persons include a body corporate and politic, trade unions and employers' organizations. A body corporate and politic can only be created by statute, by special charter or pursuant to statutory provisions under which specific corporations or bodies politic are established. Although the band discharges many corporate functions without feeling the lack of corporate status, I was unable to find any record which would disclose that it is a body corporate capable of being sued as a person under Queen's

103

Bench Rules. However, there are provisions in the Queen's Bench Rules how such unincorporated bodies can be sued and R. 58 provides:

"Where there are numerous persons having the same interest one or more may sue or be sued, or may be authorized by the court to defend on behalf of, or for the benefit of all."

The band and its chief and council are the defendants in plaintiff's statement of claim and all filed defences. The chief and members of council were examined for discovery. During the hearing the personal defendants gave evidence in support of their personal defences and in support of the defence of the band. In a word, all defendants were represented by counsel during the hearing, all participated in opposing plaintiff's claim and the Court heard all evidence adduced on their behalf.

Plaintiff was certain the band was a legal entity capable of being sued without an order under Queen's Bench R. 58. No order was asked for under R. 58, nor did the Court make one before the hearing of this matter. I feel, however, the Court has power to make such order now. Queen's Bench R. 156 provides:

"A proceeding shall not be defeated by any formal objection, but all necessary amendments may be made on proper terms as to costs or otherwise to secure the advancement of justice, the determining the real matter in dispute, and the giving of judgment according to the very right and justice of the case."

Under R. 156, this Court has the power to grant necessary amendments to the pleadings and make all necessary orders required by Queen's Bench Rules in order to render a judgment according to the rights of parties and justice of the case. I am accordingly granting all necessary amendments and am making nunc pro tunc an order under R. 58 that Clifford Lynxleg, Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos, who are chief and council respectively of the band, represented and defended on behalf of all other members of the band except plaintiff, as well as on their own behalf, and that all other members of the band except plaintiff, as well as individual defendants, are bound by the judgment and proceedings in this action.

Plaintiff shall have judgment for $10,000 and costs against the individual defendants personally and against all other mem-

bers of Valley River Band No. 63A (except plaintiff) to the extent of their interest in the funds of the band, and the property and assets of the band are liable to satisfy this judgment and for that purpose are subject to execution.

Although Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development as Trustee for Valley River Band No. 63A, is the lessor of the lands in question, the trustee was not made a party to this action. I wish to make it clear that disposition of the action between the plaintiff and the defendants in this suit should not be construed as a bar to any action the plaintiff might have against the trustee.

ALBERTA SUPREME COURT

D. C. McDonald J.

Regina v. Proscow

Criminal law — Peremptory date set for preliminary inquiry — On date set adjournment requested by Crown — Adjournment granted where circumstances very special and urgent.

The setting of a date for a preliminary inquiry and referring to the date as peremptory means no further adjournments will be granted and the matter must proceed on the date set unless very special and urgent circumstances are shown justifying a further adjournment. Where a preliminary inquiry date had been set peremptorily against the Crown and on the date set the Crown was granted an adjournment to another peremptory date because of the absence of a witness and the illness of another witness and on the second peremptory date a further adjournment was granted as two witnesses who had been subpoenaed did not appear, such adjournments were considered a proper exercise of the presiding Judge's discretion as the circumstances were very special and urgent.

Falck v. Axthelm (1889), 24 Q.B.D. 174 applied.

[Note up with 7 C.E.D. (West. 2nd) *Criminal Law (General)*, s. 249.]

J. Watson, for the Crown.

B. Mitchell, for applicant. (Edmonton)

11th May 1976. D. C. McDonald J.:—The applicant is charged with a count of breaking and entering and theft of a television set of a value of more than $200, a count of theft of a camera of a value of more than $200, a count of possession of stolen goods (the same camera), and a count of posses-

T-4562-76

Raymond Viateur Beauvais (*Applicant*)

v.

Andrew Delisle, Annie White, Frank Melvin Jacobs, June Delisle and the Minister of Indian and Northern Affairs (*Respondents*)

Trial Division, Dubé J.—Montreal, November 22; Ottawa, November 23, 1976.

Jurisdiction—Application for injunction under Federal Court Act, s. 18—Whether Court has jurisdiction—Whether need for injunction proved—Indian Act, R.S.C. 1970, c. I-6, s. 93—Federal Court Act, s. 18.

APPLICATION.

COUNSEL:

Guy C. Gervais for applicant.
H. Salmon for respondents Andrew Delisle, Annie White, Frank Melvin Jacobs and June Delisle.
Gaspard Côté for respondent Minister of Indian and Northern Affairs.

SOLICITORS:

Guy C. Gervais, Montreal, for applicant.
Cerini, Jamieson, Salmon, Findlay, Watson, Squaid & Harris, Montreal, for respondents Andrew Delisle, Annie White, Frank Melvin Jacobs and June Delisle.
Deputy Attorney General of Canada for respondent Minister of Indian and Northern Affairs.

The following is the English version of the reasons for order rendered by

DUBÉ J.: Applicant has not shown that the Trial Division has jurisdiction to issue an injunction against the members of an Indian band council, as section 18 of the *Federal Court Act* provides for this extraordinary remedy to be issued against "any federal board, commission or other tribunal" and not against individuals. Even if it had this jurisdiction this Court would not allow the application, for the following reasons:

T-4562-76

Raymond Viateur Beauvais (*Requérant*)

c.

Andrew Delisle, Annie White, Frank Melvin Jacobs, June Delisle et le ministre des Affaires indiennes et du Grand Nord (*Intimés*)

Division de première instance, le juge Dubé—Montréal, le 22 novembre; Ottawa, le 23 novembre 1976.

Compétence—Demande d'injonction en vertu de l'art. 18 de la Loi sur la Cour fédérale—La Cour a-t-elle compétence?—La nécessité d'accorder l'injonction a-t-elle été démontrée?—Loi sur les Indiens, S.R.C. 1970, c. I-6, art. 93—Loi sur la Cour fédérale, art. 18.

REQUÊTE.

AVOCATS:

Guy C. Gervais pour le requérant.
H. Salmon pour les intimés Andrew Delisle, Annie White, Frank Melvin Jacobs et June Delisle.
Gaspard Côté pour l'intimé le ministre des Affaires indiennes et du Grand Nord.

PROCUREURS:

Guy C. Gervais, Montréal, pour le requérant.
Cerini, Jamieson, Salmon, Findlay, Watson, Squaid & Harris, Montréal, pour les intimés Andrew Delisle, Annie White, Frank Melvin Jacobs et June Delisle.
Le sous-procureur général du Canada pour l'intimé le ministre des Affaires indiennes et du Grand Nord.

Voici les motifs de l'ordonnance rendus en français par

LE JUGE DUBÉ: Le requérant n'a pas démontré que la Division de première instance a compétence pour émettre une injonction contre des membres d'un conseil de bande d'Indiens, l'article 18 de la *Loi sur la Cour fédérale* prévoyant l'émission de ce recours extraordinaire contre «tout office, toute commission ou tout autre tribunal fédéral» et non contre des sujets individuels. Même en admettant la compétence, le tribunal n'accueille pas la requête pour les motifs suivants:

(1) applicant did not establish or even allege in his affidavit or application that his losses would be irreparable if the injunction were not granted;

(2) applicant did not conclusively establish that he had fulfilled all the conditions allowing him to remove minerals from the reserve, contrary to section 93 of the *Indian Act*[1];

(3) applicant did not show that respondents themselves intimidated him, his employees or his customers;

(4) applicant did not establish that the Federal Court had jurisdiction to enjoin the Caughnawaga police, who in this case were the Quebec Police Force, and he did not serve a notice of application on the aforementioned police officers, whose names do not appear on the title;

(5) applicant did not show that the aforementioned police officers were acting unlawfully when they distributed to truck drivers, who were customers of applicant, "promises to appear", under section 93 of the *Indian Act*.

ORDER

For these reasons the application is dismissed with costs.

[1] R.S.C. 1970, c. I-6.

1. Le requérant n'a pas établi ni même allégué dans son affidavit ou sa requête que ses pertes seraient irréparables si l'injonction n'était pas accordée,

2. Le requérant n'a pas établi de façon définitive qu'il avait rempli toutes les conditions lui permettant d'enlever de la réserve des minéraux contrairement à l'article 93 de la *Loi sur les indiens*[1],

3. Le requérant n'a pas démontré que les intimés eux-mêmes intimidaient le requérant, ou ses employés, ou ses clients,

4. Le requérant n'a pas établi que la Cour fédérale avait la compétence d'enjoindre les policiers de Caughnawaga en l'occurrence les membres de la Sûreté du Québec, et n'a pas signifié d'avis de requête aux dits policiers dont les noms n'apparaissent pas à l'intitulé,

5. Le requérant n'a pas démontré que lesdits policiers agissaient illégalement alors qu'ils distribuaient aux camionneurs, clients du requérant, des «promesses de comparaître» sous l'empire de l'article 93 de la *Loi sur les indiens*.

ORDONNANCE

Par ces motifs la requête est rejetée avec dépens.

[1] S.R.C. 1970, c. I-6.

T-796-77

Louis Gabriel, Crawford Gabriel, Norman Simon, Richard Gabriel, Lawrence Jacobs, Mavis Etienne, Ronald Bonspille, all duly registered as the owners of "Kanesatakeronon Indian League for Democracy" (*Plaintiffs*)

v.

Peter Canatonquin, Hugh Nicholas, Peter Etienne, Kenneth Simon, John Montour, Wesley Nicholas, Edward Simon, Joe Nelson, Haslem Nelson, carrying on illegally under the name "Six Nations Iroquois Confederacy" (Six Nations Traditional Hereditary Chiefs) (*Defendants*)

and

The Queen (*Mis-en-cause*)

Trial Division, Thurlow A.C.J.—Montreal, May 4; Ottawa, May 12, 1977.

Jurisdiction — Application for leave to file conditional appearance objecting to jurisdiction of the Court — Dispute re legality of Indian band council — Traditional chiefs or elected council — Whether council of Indian band a "federal board, commission or other tribunal" — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 18.

In an application for declaratory relief and injunction brought under section 18 of the *Federal Court Act*, the defendants brought an application for leave to file a conditional appearance for the purpose of objecting to the jurisdiction of the Court. At the hearing of the latter application and at the adjourned hearing, it was indicated by counsel for the plaintiffs as well as the defendants that the matter should be dealt with on the merits of the objections. The defendants' objection to the Court's jurisdiction questions whether the council of an Indian band is a "federal board, commission or other tribunal" as defined in section 2(1) of the *Federal Court Act*.

Held, the application for leave to file a conditional appearance is dismissed, time to file statement of defence is extended and paragraphs 13 and 14 and paragraphs (iii) and (iv) of the prayer for relief of the amended statement of claim are struck out. Until the point has been resolved at a higher level the proper course is to adopt the view that exclusive jurisdiction in a case such as this resides in this Court and rule that the council of a band is a "federal board, commission or other tribunal" within the meaning of the definition.

The Attorney General of Canada v. Lavell [1971] S.C.R. 1349; *Rice v. Council of the Band of Iroquois of Caughnawaga*, February 13, 1975, unreported, Superior Court of Quebec, No. 500 05-015 993-742 and *Diabo v Mohawk*

T-796-77

Louis Gabriel, Crawford Gabriel, Norman Simon, Richard Gabriel, Lawrence Jacobs, Mavis Etienne, Ronald Bonspille, tous dûment enregistrés sous le nom de «Kanesatakeronon Indian League for Democracy» (*Demandeurs*)

c.

Peter Canatonquin, Hugh Nicholas, Peter Etienne, Kenneth Simon, John Montour, Wesley Nicholas, Edward Simon, Joe Nelson, Haslem Nelson, agissant illégalement sous le nom de «Six Nations Iroquois Confederacy» (chefs héréditaires traditionnels des six nations) (*Défendeurs*)

et

La Reine (*Mise-en-cause*)

Division de première instance, le juge en chef adjoint Thurlow—Montréal, le 4 mai; Ottawa, le 12 mai 1977.

Compétence — Demande visant à obtenir la permission de déposer un acte de comparution conditionnelle afin de soulever une objection quant à la compétence de la Cour — Contestation portant sur la légalité du conseil de bande — Chefs traditionnels ou conseil élu — Un conseil de bande est-il un «office, une commission ou ... un autre tribunal fédéral»? — Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), c. 10, art. 18.

A la suite d'une demande où les demandeurs cherchent à obtenir un jugement déclaratoire et une injonction en vertu de l'article 18 de la *Loi sur la Cour fédérale*, les défendeurs sollicitent la permission de déposer un acte de comparution conditionnelle afin de soulever une objection quant à la compétence de la Cour. A l'audition de cette dernière demande et à la reprise de l'audience, les avocats des parties ont indiqué que la question serait jugée sur le fond des objections. L'objection des défendeurs quant à la compétence de la Cour repose sur la question de savoir si le conseil de bande est un «office, une commission ou ... un autre tribunal fédéral» au sens de l'article 2(1) de la *Loi sur la Cour fédérale*.

Arrêt: la demande visant à obtenir la permission de déposer un acte de comparution conditionnelle est rejetée, le délai de dépôt de la défense est prorogé et les paragraphes 13 et 14 et les paragraphes (iii) et (iv) de la demande de redressement de la déclaration sont radiés. Jusqu'au règlement de la question par un tribunal d'instance supérieure, il faut adopter le point de vue voulant que l'affaire en l'espèce soit de la compétence exclusive de la présente cour et la règle selon laquelle le conseil d'une bande est un «office, une commission ou ... un autre tribunal fédéral» aux termes de sa définition.

Arrêts analysés: *Le Procureur général du Canada c. Lavell* [1974] R.C.S. 1349; *Rice c. Le conseil de la bande des Iroquois de Caughnawaga*, 13 février 1975, non publié, Cour supérieure de Québec, nº 500 05-015 993-742 et

Council of Kanawake, October 3, 1975, unreported, Superior Court of Quebec, No. 05-013331-754, discussed.

APPLICATION.

COUNSEL:

Cyril E. Schwisberg, Q.C., for plaintiffs.

James A. O'Reilly for defendants.

SOLICITORS:

Schwisberg, Golt, Benson & Mackay, Montreal, for plaintiffs.
O'Reilly, Hutchins & Caron, Montreal, for defendants.

The following are the reasons for order rendered in English by

THURLOW A.C.J.: This is an application for:

... an order granting leave to Defendants, Peter Canatonquin, Hugh Nicholas, Peter Etienne, Kenneth Simon, John Montour, Wesley Nicholas, Edward Simon, Joe Nelson and Haslem Nelson, to file a conditional appearance for the purpose of objecting to the jurisdiction of the Court in respect of the proceedings as set out in the Declaration dated the 25th day of February, 1977, and filed the 25th day of February, 1977, in the Registry of the Federal Court of Canada, and for the purpose of objecting to irregularities in the commencement of the proceedings and if leave be granted for an Order striking out the Declaration and dismissing the proceedings on the basis that there is no jurisdiction in the Court to entertain the said Declaration or, alternatively, that no reasonable cause of action exists or in the alternative for an Order extending the time within which Defendants must file an appearance and a defence to the said Declaration or for such further and other order as may be just.

On the hearing of the application following discussion of the need for a conditional appearance, the merits of the defendants' objections to the jurisdiction and to the statement of claim were argued and, at the adjourned hearing, it was indicated by counsel for the plaintiffs as well as for the defendants that the matter should be dealt with on the merits of the objections raised and on the basis of the amended statement of claim filed in the interval during which the application stood adjourned.

The plaintiffs allege that they are members of a band of Indians residing on a reserve at Oka. In summary, they assert that the system of electing the council of the band was illegally changed in or

Diabo c. Le conseil Mohawk de Kanawake, 3 octobre 1975, non publié, Cour supérieure de Québec, n° 05-013331-754.

DEMANDE.

AVOCATS:

Cyril E. Schwisberg, c.r., pour les demandeurs.
James A. O'Reilly pour les défendeurs.

PROCUREURS:

Schwisberg, Golt, Benson & Mackay, Montréal, pour les demandeurs.
O'Reilly, Hutchins & Caron, Montréal, pour les défendeurs.

Ce qui suit est la version française des motifs de l'ordonnance rendus par

LE JUGE EN CHEF ADJOINT THURLOW: La présente demande cherche à obtenir:

[TRADUCTION] ... une ordonnance accordant la permission aux défendeurs Peter Canatonquin, Hugh Nicholas, Peter Etienne, Kenneth Simon, John Montour, Wesley Nicholas, Edward Simon, Joe Nelson et Haslem Nelson, de déposer un acte de comparution conditionnelle afin de soulever une objection quant à la compétence de la Cour relativement aux procédures dont il est fait mention dans la déclaration datée du 25 février 1977 et déposée le 25 février 1977 au greffe de la Cour fédérale du Canada et quant à des irrégularités commises au début des procédures et, si la permission est accordée, une ordonnance de radiation de la déclaration et d'arrêt du procès aux motifs que la Cour n'a pas compétence pour recevoir ladite déclaration ou, subsidiairement, qu'il n'y a aucune cause raisonnable d'action ou, au choix, une ordonnance étendant le délai accordé aux défendeurs pour déposer un acte de comparution et une défense à ladite déclaration, ou toute autre ordonnance, comme il peut être juste.

A l'audition de la demande, après un échange de vues relatifs à la nécessité d'une comparution conditionnelle, on a entamé une discussion sur le mérite des objections des défendeurs portant sur la compétence et la déclaration et, à la reprise de l'audience, les avocats des parties ont indiqué que la question serait jugée sur le fond des objections soulevées et en s'appuyant sur la déclaration amendée déposée pendant l'ajournement.

Les demandeurs allèguent qu'ils sont membres d'une bande indienne résidant dans la réserve d'Oka. En résumé, ils soutiennent que le mode d'élection du conseil de bande a été illégalement

about the year 1969 and that the defendants have been illegally elected as hereditary chiefs and are illegally acting as the council of the band. The relief sought includes a declaration that the election of the band council and of its members as hereditary chiefs with lifelong tenure on the council is illegal, null, and void. The plaintiffs also claim an injunction enjoining the defendants from calling themselves "hereditary chiefs" or acting as such and from using the name of the Six Nations of the Iroquois Confederacy and an order that a new election take place within six months.

Under section 18 of the *Federal Court Act*[1]:

18. The Trial Division has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

The expression "federal board, commission or other tribunal" is defined in section 2 as meaning

2. ...

... any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*.

The substantial question that arises as to the jurisdiction of the Court is whether the council of an Indian band is a "federal board, commission or other tribunal" within the meaning of that expression as so defined. If so, it appears to me that the proceeding is one for relief of a kind referred to in section 18; being a proceeding for declaratory relief with respect to the validity of the constitution of the council within the meaning of paragraph 18(*a*) and also as being a proceeding for relief in the nature of relief of the kind obtainable

[1] R.S.C. 1970 (2nd Supp.), c. 10.

modifié vers 1969, et que c'est illégalement que les défendeurs ont été élus chefs héréditaires et qu'ils agissent à titre de conseil de bande. Le redressement qu'on cherche à obtenir comprend une déclaration que l'élection du conseil de la bande et de ses membres comme chefs héréditaires à vie est illégale, nulle et de nul effet. Les demandeurs réclament également l'émission d'une injonction interdisant aux défendeurs de se désigner eux-mêmes comme «chefs héréditaires», d'agir à ce titre et d'utiliser le nom Six Nations of the Iroquois Confederacy et d'une ordonnance de procéder à une nouvelle élection dans les six mois.

En vertu de l'article 18 de la *Loi sur la Cour fédérale*[1]:

18. La Division de première instance a compétence exclusive en première instance

a) pour émettre une injonction, un bref de *certiorari*, un bref de *mandamus*, un bref de prohibition ou un bref de *quo warranto*, ou pour rendre un jugement déclaratoire, contre tout office, toute commission ou tout autre tribunal fédéral; et

b) pour entendre et juger toute demande de redressement de la nature de celui qu'envisage l'alinéa *a*), et notamment toute procédure engagée contre le procureur général du Canada aux fins d'obtenir le redressement contre un office, une commission ou à un autre tribunal fédéral.

L'expression «office, commission ou autre tribunal fédéral» désigne, selon la définition de l'article 2,

2. ...

... un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada ou sous le régime d'une telle loi, à l'exclusion des organismes de ce genre constitués ou établis par une loi d'une province ou sous le régime d'une telle loi ainsi que des personnes nommées en vertu ou en conformité du droit d'une province ou en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique, 1867*;

La question principale soulevée au sujet de la compétence de la Cour est celle de savoir si un conseil de bande est un «office, une commission ou ... un autre tribunal fédéral» au sens donné à cette expression. S'il en est ainsi, il m'apparaît que la procédure de redressement est d'une nature visée par l'article 18, une procédure en vue d'obtenir un redressement déclaratoire relativement à la validité de la constitution du conseil au sens de l'alinéa 18*a*) et également une procédure de redressement qui peut être obtenue au moyen d'un bref de *quo*

[1] S.R.C. 1970 (2e Supp.), c. 10.

by writ of *quo warranto* within the meaning of paragraph 18(*b*).

Subsection 2(1) of the *Indian Act*[2] contains a definition of the expression "council of the band" and throughout the Act there are provisions which refer to the council and confer on it rights and powers. These include section 9, which gives the council certain rights to object to entries on the band register, section 13, which makes admissions to the band subject to the consent of the council, and sections 18, 20, 58, 59 and 64, which confer rights in connection with the use and allotment of land in the reserve and with respect to other property of the band. In addition, section 81 provides that:

81. The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:

(*a*) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

(*b*) the regulation of traffic;

(*c*) the observance of law and order;

(*d*) the prevention of disorderly conduct and nuisances;

(*e*) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;

(*f*) the construction and maintenance of water courses, roads, bridges, ditches, fences and other local works;

(*g*) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any such zone;

(*h*) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

(*i*) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

(*j*) the destruction and control of noxious weeds;

(*k*) the regulation of bee-keeping and poultry raising;

(*l*) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

(*m*) the control and prohibition of public games, sports, races, athletic contests and other amusements;

[2] R.S.C. 1970, c. I-6.

Le paragraphe 2(1) de la *Loi sur les Indiens*[2] contient une définition de l'expression «conseil de la bande» et un peu partout dans la Loi, on trouve des dispositions qui ont trait au conseil et lui accordent droits et pouvoirs. C'est le cas de l'article 9, qui donne au conseil certains droits de s'opposer à des inscriptions au registre de la bande, de l'article 13 qui assujettit l'admission au sein de la bande au consentement du conseil et des articles 18, 20, 58, 59 et 64 qui accordent des droits relatifs à l'emploi et à l'attribution de terres dans la réserve ainsi qu'à d'autres biens de la bande. De plus, l'article 81 prévoit que:

81. Le conseil d'une bande peut établir des statuts administratifs, non incompatibles avec la présente loi ou un règlement édicté par le gouverneur en conseil ou le Ministre, pour l'une ou la totalité des fins suivantes, savoir:

a) l'adoption de mesures relatives à la santé des habitants de la réserve et les précautions à prendre contre la propagation des maladies contagieuses et infectieuses;

b) la réglementation de la circulation;

c) l'observation de la loi et le maintien de l'ordre;

d) la répression de l'inconduite et des incommodités;

e) la protection et les précautions à prendre contre les empiétements des bestiaux et autres animaux domestiques, l'établissement de fourrières, la nomination de gardes-fourrières, la réglementation de leurs fonctions et la constitution de droits et redevances pour leurs services;

f) l'établissement et l'entretien de cours d'eau, routes, ponts, fossés, clôtures et autres ouvrages locaux;

g) la division de la réserve ou d'une de ses parties en zones, et l'interdiction de construire ou d'entretenir une catégorie de bâtiments ou d'exercer une catégorie d'entreprises, de métiers ou de professions dans une telle zone;

h) la réglementation de la construction, de la réparation et de l'usage des bâtiments, qu'ils appartiennent à la bande ou à des membres de la bande pris individuellement;

i) l'arpentage des terres de la réserve et leur répartition entre les membres de la bande, et l'établissement d'un registre de certificats de possession et de certificats d'occupation concernant les attributions, et la mise à part de terres de la réserve pour usage commun, si l'autorisation à cet égard a été accordée aux termes de l'article 60;

j) la destruction et l'enrayement des herbes nuisibles;

k) la réglementation de l'apiculture et de l'aviculture;

l) l'établissement de puits, citernes et réservoirs publics et autres services d'eau du même genre, ainsi que la réglementation de leur usage;

m) la réglementation ou l'interdiction de jeux, sports, courses et concours athlétiques d'ordre public et autres amusements du même genre;

[2] S.R.C. 1970, c. I-6.

(*n*) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

(*p*) the removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prescribed purposes;

(*q*) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(*r*) the imposition on summary conviction of a fine not exceeding one hundred dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

Further powers including a power to raise money by taxation are also provided for in section 83 but these are applicable only when the Governor in Council declares that the band has reached an advanced stage of development.

There are also provisions in sections 78 and 79 for the disqualification and removal from office of a chief or councillor on certain defined grounds.

The scheme thus disclosed by the statute, as it seems to me, resembles that of a somewhat restricted form of municipal government by the council of and on the reserve and, were there no expressions of judicial opinion on the point in question, I would conclude that such a council was a "federal board, commission or other tribunal" within the meaning of the *Federal Court Act*.

However, in *The Attorney General of Canada v. Lavell*[3], Laskin J. (as he then was), with whom three other judges of the Court concurred, expressed doubt that a band council fell within the definition. He said at page 1379:

I share the doubt of Osler J. whether a Band Council, even an elected one under s. 74 of the *Indian Act* (the Act also envisages that a Band Council may exist by custom of the Band), is the type of tribunal contemplated by the definition in s. 2(*g*) of the *Federal Court Act* which embraces "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada". A Band Council has some resemblance to the board of directors of a corporation, and if the words of s. 2(*g*) are taken literally, they are broad enough to

[3] [1974] S.C.R. 1349.

n) la réglementation de la conduite et des opérations des marchands ambulants, colporteurs ou autres personnes qui pénètrent dans la réserve pour acheter ou vendre des produits ou marchandises, ou en faire un autre commerce;

o) la conservation, la protection et la régie des animaux à fourrure, du poisson et du gibier de toute sorte dans la réserve;

p) l'expulsion et la punition des personnes qui pénètrent sans droit ni autorisation dans la réserve ou la fréquentent pour des fins interdites;

q) la suite à donner à toute question découlant de l'exercice des pouvoirs prévus par le présent article, ou y accessoire; et

r) l'imposition, sur déclaration sommaire de culpabilité, d'une amende n'excédant pas cent dollars ou d'un emprisonnement d'au plus trente jours, ou de l'amende et de l'emprisonnement à la fois, pour violation d'un statut administratif établi aux termes du présent article.

D'autres pouvoirs, y compris celui de réunir des fonds par imposition, sont également prévus à l'article 83 mais ces dispositions s'appliquent uniquement lorsque le gouverneur en conseil déclare qu'une bande a atteint un haut degré d'avancement.

Les articles 78 et 79 envisagent également les cas d'inhabilité au poste de chef ou de conseiller et de destitution de ces postes pour des motifs déterminés.

Le cadre tracé par la loi ressemble, me semble-t-il, à une forme limitée de gouvernement municipal exercé par le conseil de la réserve sur cette dernière et, puisque aucune opinion judiciaire n'a été formulée sur cette question, je conclurais qu'un seul conseil constitue un «office, une commission ou . . . un autre tribunal fédéral» au sens de la *Loi sur la Cour fédérale*.

Cependant, dans *Le Procureur général du Canada c. Lavell*[3] le juge Laskin (alors juge puîné), dont l'opinion était partagée par trois autres juges de la Cour, mettait en doute le fait qu'un conseil de bande réponde à cette définition. Il dit à la page 1379:

Je partage le doute exprimé par le Juge Osler sur la question de savoir si un conseil de bande, même s'il a été élu en vertu de l'art. 74 de la *Loi sur les Indiens* (la Loi prévoit aussi qu'un conseil de bande peut être établi par coutume de la bande), est la forme de tribunal envisagée dans la définition contenue à l'al. *g*) de l'art. 2 de la *Loi sur la Cour fédérale* qui comprend «un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada.» Un conseil de bande ressemble quelque peu à un conseil d'administration d'une

[3] [1974] R.C.S. 1349.

embrace boards of directors in respect of powers given to them under such federal statutes as the *Bank Act*, R.S.C. 1970, c. B-1, as amended, the *Canada Corporations Act*, R.S.C. 1970, c. C-32, as amended, and the *Canadian and British Insurance Companies Act*, R.S.C. 1970, c. I-15, as amended. It is to me an open question whether private authorities (if I may so categorize boards of directors of banks and other companies) are contemplated by the *Federal Court Act* under s. 18 thereof. However, I do not find it necessary to come to a definite conclusion here on whether jurisdiction should have been ceded to the Federal Court to entertain the declaratory action brought by Mrs. Bédard against the members of the Band Council. There is another ground upon which, in this case, I would not interfere with the exercise of jurisdiction by Osler J.

On the other hand in *Rice v. Council of the Band of Iroquois of Caughnawaga*[4], the Superior Court of Quebec declined jurisdiction to issue an injunction against the council of a band on the ground that the council was a "federal board, commission or other tribunal" within the meaning of the *Federal Court Act*. Bisaillon J., after referring to sections 18 and 2 of the *Federal Court Act*, said at page 3 of his reasons:

[TRANSLATION] It is therefore necessary to determine whether the "Band Council of the Caughnawaga Iroquois" constitutes such an organization, subject to the right of review of the Federal Court.

The Indian Act, R.S., c. 149, in sections 2, 13, 20, 28, 39, 58, 59, 64, 66, 73, 81 and 83 *inter alia*, defines band council and lists its powers.

A reading of these sections leaves no doubt that the band council is a group of people exercising administrative powers which are conferred on it by the Indian Act, and constitutes an organization over which this Court has no jurisdiction to issue an injunction and for which the Federal Court is henceforth the sole tribunal with jurisdiction to hear appeals for review, among them the issuance of an injunction.

In *Diabo v. Mohawk Council of Kanawake*[5], Aronovitch J. of the same Court expressed a similar view when he said at page 4:

It does not seem to be a point of contestation between the parties that the Defendant is a "federal board commission or other tribunal" within the meaning of this Section. In any event, the definitions in Section 2 of the Act make it clear that Defendant is such a body.

[4] February 13, 1975, unreported, Superior Court of Quebec No. 500 05-015 993-742.

[5] October 3, 1975, unreported, Superior Court of Quebec No. 05-013331-754.

compagnie, et si on donne un sens littéral aux termes de l'al. *g*) de l'art. 2, ils sont assez larges pour comprendre les conseils d'administration en ce qui concerne les pouvoirs qui leur sont donnés en vertu de lois fédérales comme la *Loi sur les banques*, S.R.C. 1970, c. B-1, modifiée, la *Loi sur les Corporations canadiennes*, S.R.C. 1970, c. C-32, modifiée, et la *Loi sur les compagnies d'assurance canadiennes et britanniques*, S.R.C. 1970, c. I-15, modifiée. En ce qui me concerne, on peut se demander si les organismes privés (s'il m'est permis de classer ainsi les conseils d'administrations des banques et des autres compagnies) sont visés par la *Loi sur la Cour fédérale* en son art. 18. Cependant, je ne crois pas qu'il soit nécessaire de tirer une conclusion définitive ici sur la question de savoir s'il aurait fallu céder à la Cour fédérale le pouvoir de connaître d'une action déclaratoire intentée par M^me^ Bédard contre les membres du conseil de bande. Dans la présente affaire, il y a un autre motif pour lequel je n'interviendrais pas dans l'exercice de compétence du Juge Osler.

D'autre part, dans *Rice c. Le conseil de la bande des Iroquois de Caughnawaga*[4], la Cour supérieure de Québec a décliné sa compétence à émettre une injonction contre le conseil de la bande au motif que celui-ci constituait un «office, une commission ou ... un autre tribunal fédéral» aux termes de la *Loi sur la Cour fédérale*. Le juge Bisaillon, après avoir évoqué les articles 18 et 2 de la *Loi sur la Cour fédérale*, a dit à la page 3 de ses motifs:

Il s'agit donc de déterminer si le «Conseil de la Bande des Iroquois de Caughnawaga» constitue tel organisme soumis, au droit de revision de la Cour fédérale.

La Loi sur les Indiens, S.R., c. 149, entre autres aux articles 2, 13, 20, 28, 39, 58, 59, 64, 66, 73, 81 et 83 définit conseil de bande et énumère ses attributions.

A la lecture de ces articles, il ne fait aucun doute que le conseil de bande est un groupe de personnes exerçant des pouvoirs administratifs qui lui viennent de la Loi sur les Indiens et constitue un organisme contre qui la présente Cour n'a pas juridiction pour émettre une injonction et pour lequel la Cour fédérale est désormais le seul tribunal compétent à entendre les pourvois en revision, dont l'injonction.

Dans *Diabo c. Le conseil Mohawk de Kanawake*[5], le juge Aronoviteh, de la même Cour, formulait un point de vue semblable en disant, à la page 4:

[TRADUCTION] Les parties ne semblent pas contester que le défendeur soit un «office, une commission ou ... un autre tribunal fédéral» au sens de cet article. En tout état de cause, les définitions contenues à l'article 2 de la Loi prouvent clairement que le défendeur constitue un tel corps.

[4] 13 février 1975, non publié, Cour supérieure de Québec, n° 500 05-015 993-742.

[5] 3 octobre 1975, non publié, Cour supérieure de Québec, n° 05-013331-754.

It does not appear from the reasons in either of these cases that the doubt expressed in the *Lavell* case was brought to the attention of the Court.

With due respect for the doubt expressed and the reason given therefor, but bearing in mind that the point was left open and that the Superior Court of Quebec has declined jurisdiction because of its view that exclusive jurisdiction in a case such as this resides in this Court, I think that until the point has been resolved at a higher level the proper course is to adopt that view and rule that the council of a band is a "federal board, commission or other tribunal" within the meaning of the definition. It follows that this Court has jurisdiction to entertain the proceeding in so far as it is brought for a declaration that the defendants have been illegally elected and are illegally acting as the council of the band.

I shall not set out in detail the several allegations of the amended statement of claim but, while some of them are of dubious relevance and others are not models of pleading, I am not satisfied that the amended statement of claim does not disclose a reasonable cause of action against the named defendants for such a declaration.

On the other hand, I know of no basis on which it can properly be held that the Court has jurisdiction to entertain the claim against the defendants for an injunction to restrain them from calling themselves "hereditary chiefs" or from using the name of the Six Nations of the Iroquois Confederacy or to order a new election. In short, it appears to me that the jurisdiction of the Court in the matter is simply to determine the right of the defendants to exercise the statutory functions of the band council and, if the plaintiffs should succeed, to declare that the defendants are not the chief and councillors of the band, thus rendering the offices vacant and leaving it to the appropriate authority to arrange for a legally selected council. In my opinion, therefore, paragraphs 13 and 14 of the amended statement of claim and paragraphs (iii) and (iv) of the prayer for relief should be struck out.

In the circumstances, no costs of the application will be awarded against any party.

Il ne semble pas, à la lecture des motifs de ces causes, que le doute exprimé dans l'arrêt *Lavell* ait été porté à l'attention de la Cour.

En tout respect pour le doute exprimé et les raisons qui le motivent, mais gardant à l'esprit que la question n'est pas tranchée et que la Cour supérieure de Québec s'est déclarée incompétente, estimant que l'affaire était de la compétence exclusive de la présente cour, je pense que, jusqu'au règlement de la question par un tribunal d'instance supérieure, il faut adopter le point de vue et la règle voulant que le conseil de la bande constitue un «office, une commission ou ... un autre tribunal fédéral» aux termes de cette définition. Il s'ensuit que la présente cour a compétence pour connaître de l'action dans la mesure où celle-ci vise à obtenir une déclaration que c'est illégalement que les défendeurs ont été élus et agissent à titre de conseil de bande.

Je n'exposerai pas en détail les nombreuses allégations de la déclaration amendée mais, même si quelques-unes sont d'une pertinence douteuse et que d'autres ne sont pas des modèles de conclusions, je ne suis pas convaincu que ladite déclaration amendée ne révèle aucune cause raisonnable d'action contre les défendeurs y désignés.

D'autre part, je ne vois aucun fondement étayant l'opinion selon laquelle la Cour a compétence pour connaître d'une action visant à obtenir contre les défendeurs une injonction leur interdisant de se désigner eux-mêmes comme «chefs héréditaires» ou d'utiliser le nom Six Nations of the Iroquois Confederacy, ou pour ordonner la tenue d'une nouvelle élection. En résumé, il m'apparaît qu'en l'espèce la Cour est compétente seulement pour déterminer le droit des défendeurs à exercer les fonctions statutaires du conseil de la bande et, si les demandeurs ont gain de cause, à déclarer que les défendeurs ne sont pas chef et conseillers de la bande; les postes deviendraient alors vacants et l'autorité concernée devrait faire en sorte qu'un conseil soit légalement choisi. A mon avis, cependant, les paragraphes 13 et 14 de la déclaration amendée et les paragraphes (iii) et (iv) de la demande de redressement devraient être radiés.

En l'espèce, il n'y aura aucune adjudication des dépens de la demande.

ORDER

Paragraphs 13 and 14 and paragraphs (iii) and (iv) of the prayer for relief of the amended statement of claim are struck out.

The time for filing a defence is extended thirty days from the date of this order.

In other respects the defendants' application is dismissed.

No costs of the application are payable by any party to any other party.

ORDONNANCE

Les paragraphes 13 et 14 et les paragraphes (iii) et (iv) de la demande de redressement de la déclaration sont radiés.

Le délai de dépôt d'une défense est prorogé de trente jours à compter de la date de la présente ordonnance.

A tous autres égards, la demande des défendeurs est rejetée.

Aucune partie n'aura à payer à une autre les dépens de la demande.

T-796-77

Louis Gabriel, Crawford Gabriel, Norman Simon, Richard Gabriel, Lawrence Jacobs, Mavis Etienne, Ronald Bonspille, all duly registered as the owners of "Kanesatakeronon Indian League for Democracy" (*Plaintiffs*)

v.

Peter Canatonquin, Hugh Nicholas, Peter Etienne, Kenneth Simon, John Montour, Wesley Nicholas, Edward Simon, Joe Nelson, Haslem Nelson, carrying on illegally under the name "Six Nations Iroquois Confederacy" (Six Nations Traditional Hereditary Chiefs) (*Defendants*)

and

The Queen (*Mis-en-cause*)

Trial Division, Thurlow A.C.J.—Montreal, May 4; Ottawa, May 12, 1977.

Jurisdiction — Application for leave to file conditional appearance objecting to jurisdiction of the Court — Dispute re legality of Indian band council — Traditional chiefs or elected council — Whether council of Indian band a "federal board, commission or other tribunal" — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 18.

In an application for declaratory relief and injunction brought under section 18 of the *Federal Court Act*, the defendants brought an application for leave to file a conditional appearance for the purpose of objecting to the jurisdiction of the Court. At the hearing of the latter application and at the adjourned hearing, it was indicated by counsel for the plaintiffs as well as the defendants that the matter should be dealt with on the merits of the objections. The defendants' objection to the Court's jurisdiction questions whether the council of an Indian band is a "federal board, commission or other tribunal" as defined in section 2(1) of the *Federal Court Act*.

Held, the application for leave to file a conditional appearance is dismissed, time to file statement of defence is extended and paragraphs 13 and 14 and paragraphs (iii) and (iv) of the prayer for relief of the amended statement of claim are struck out. Until the point has been resolved at a higher level the proper course is to adopt the view that exclusive jurisdiction in a case such as this resides in this Court and rule that the council of a band is a "federal board, commission or other tribunal" within the meaning of the definition.

The Attorney General of Canada v. Lavell [1974] S.C.R. 1349; *Rice v. Council of the Band of Iroquois of Caughnawaga*, February 13, 1975, unreported, Superior Court of Quebec, No. 500 05-015 993-742 and *Diabo v. Mohawk*

T-796-77

Louis Gabriel, Crawford Gabriel, Norman Simon, Richard Gabriel, Lawrence Jacobs, Mavis Etienne, Ronald Bonspille, tous dûment enregistrés sous le nom de «Kanesatakeronon Indian League for Democracy» (*Demandeurs*)

c.

Peter Canatonquin, Hugh Nicholas, Peter Etienne, Kenneth Simon, John Montour, Wesley Nicholas, Edward Simon, Joe Nelson, Haslem Nelson, agissant illégalement sous le nom de «Six Nations Iroquois Confederacy» (chefs héréditaires traditionnels des six nations) (*Défendeurs*)

et

La Reine (*Mise-en-cause*)

Division de première instance, le juge en chef adjoint Thurlow—Montréal, le 4 mai; Ottawa, le 12 mai 1977.

Compétence — Demande visant à obtenir la permission de déposer un acte de comparution conditionnelle afin de soulever une objection quant à la compétence de la Cour — Contestation portant sur la légalité du conseil de bande — Chefs traditionnels ou conseil élu — Un conseil de bande est-il un «office, une commission ou . . . un autre tribunal fédéral»? — Loi sur la Cour fédérale, S.R.C. 1970 (2e Supp.), c. 10, art. 18.

A la suite d'une demande où les demandeurs cherchent à obtenir un jugement déclaratoire et une injonction en vertu de l'article 18 de la *Loi sur la Cour fédérale*, les défendeurs sollicitent la permission de déposer un acte de comparution conditionnelle afin de soulever une objection quant à la compétence de la Cour. A l'audition de cette dernière demande et à la reprise de l'audience, les avocats des parties ont indiqué que la question serait jugée sur le fond des objections. L'objection des défendeurs quant à la compétence de la Cour repose sur la question de savoir si le conseil de bande est un «office, une commission ou . . . un autre tribunal fédéral» au sens de l'article 2(1) de la *Loi sur la Cour fédérale*.

Arrêt: la demande visant à obtenir la permission de déposer un acte de comparution conditionnelle est rejetée, le délai de dépôt de la défense est prorogé et les paragraphes 13 et 14 et les paragraphes (iii) et (iv) de la demande de redressement de la déclaration sont radiés. Jusqu'au règlement de la question par un tribunal d'instance supérieure, il faut adopter le point de vue voulant que l'affaire en l'espèce soit de la compétence exclusive de la présente cour et la règle selon laquelle le conseil d'une bande est un «office, une commission ou . . . un autre tribunal fédéral» aux termes de sa définition.

Arrêts analysés: *Le Procureur général du Canada c. Lavell* [1974] R.C.S. 1349; *Rice c. Le conseil de la bande des Iroquois de Caughnawaga*, 13 février 1975, non publié, Cour supérieure de Québec, nº 500 05-015 993-742 et

Council of Kanawake, October 3, 1975, unreported, Superior Court of Quebec, No. 05-013331-754, discussed.

APPLICATION.

COUNSEL:

Cyril E. Schwisberg, Q.C., for plaintiffs.

James A. O'Reilly for defendants.

SOLICITORS:

Schwisberg, Golt, Benson & Mackay, Montreal, for plaintiffs.
O'Reilly, Hutchins & Caron, Montreal, for defendants.

The following are the reasons for order rendered in English by

THURLOW A.C.J.: This is an application for:

... an order granting leave to Defendants, Peter Canatonquin, Hugh Nicholas, Peter Etienne, Kenneth Simon, John Montour, Wesley Nicholas, Edward Simon, Joe Nelson and Haslem Nelson, to file a conditional appearance for the purpose of objecting to the jurisdiction of the Court in respect of the proceedings as set out in the Declaration dated the 25th day of February, 1977, and filed the 25th day of February, 1977, in the Registry of the Federal Court of Canada, and for the purpose of objecting to irregularities in the commencement of the proceedings and if leave be granted for an Order striking out the Declaration and dismissing the proceedings on the basis that there is no jurisdiction in the Court to entertain the said Declaration or, alternatively, that no reasonable cause of action exists or in the alternative for an Order extending the time within which Defendants must file an appearance and a defence to the said Declaration or for such further and other order as may be just.

On the hearing of the application following discussion of the need for a conditional appearance, the merits of the defendants' objections to the jurisdiction and to the statement of claim were argued and, at the adjourned hearing, it was indicated by counsel for the plaintiffs as well as for the defendants that the matter should be dealt with on the merits of the objections raised and on the basis of the amended statement of claim filed in the interval during which the application stood adjourned.

The plaintiffs allege that they are members of a band of Indians residing on a reserve at Oka. In summary, they assert that the system of electing the council of the band was illegally changed in or

Diabo c. Le conseil Mohawk de Kanawake, 3 octobre 1975, non publié, Cour supérieure de Québec, n° 05-013331-754.

DEMANDE.

AVOCATS:

Cyril E. Schwisberg, c.r., pour les demandeurs.
James A. O'Reilly pour les défendeurs.

PROCUREURS:

Schwisberg, Golt, Benson & Mackay, Montréal, pour les demandeurs.
O'Reilly, Hutchins & Caron, Montréal, pour les défendeurs.

Ce qui suit est la version française des motifs de l'ordonnance rendus par

LE JUGE EN CHEF ADJOINT THURLOW: La présente demande cherche à obtenir:

[TRADUCTION] ... une ordonnance accordant la permission aux défendeurs Peter Canatonquin, Hugh Nicholas, Peter Etienne, Kenneth Simon, John Montour, Wesley Nicholas, Edward Simon, Joe Nelson et Haslem Nelson, de déposer un acte de comparution conditionnelle afin de soulever une objection quant à la compétence de la Cour relativement aux procédures dont il est fait mention dans la déclaration datée du 25 février 1977 et déposée le 25 février 1977 au greffe de la Cour fédérale du Canada et quant à des irrégularités commises au début des procédures et, si la permission est accordée, une ordonnance de radiation de la déclaration et d'arrêt du procès aux motifs que la Cour n'a pas compétence pour recevoir ladite déclaration ou, subsidiairement, qu'il n'y a aucune cause raisonnable d'action ou, au choix, une ordonnance étendant le délai accordé aux défendeurs pour déposer un acte de comparution et une défense à ladite déclaration, ou toute autre ordonnance, comme il peut être juste.

A l'audition de la demande, après un échange de vues relatifs à la nécessité d'une comparution conditionnelle, on a entamé une discussion sur le mérite des objections des défendeurs portant sur la compétence et la déclaration et, à la reprise de l'audience, les avocats des parties ont indiqué que la question serait jugée sur le fond des objections soulevées et en s'appuyant sur la déclaration amendée déposée pendant l'ajournement.

Les demandeurs allèguent qu'ils sont membres d'une bande indienne résidant dans la réserve d'Oka. En résumé, ils soutiennent que le mode d'élection du conseil de bande a été illégalement

about the year 1969 and that the defendants have been illegally elected as hereditary chiefs and are illegally acting as the council of the band. The relief sought includes a declaration that the election of the band council and of its members as hereditary chiefs with lifelong tenure on the council is illegal, null, and void. The plaintiffs also claim an injunction enjoining the defendants from calling themselves "hereditary chiefs" or acting as such and from using the name of the Six Nations of the Iroquois Confederacy and an order that a new election take place within six months.

Under section 18 of the *Federal Court Act*[1]:

18. The Trial Division has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

The expression "federal board, commission or other tribunal" is defined in section 2 as meaning

2. ...

... any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*.

The substantial question that arises as to the jurisdiction of the Court is whether the council of an Indian band is a "federal board, commission or other tribunal" within the meaning of that expression as so defined. If so, it appears to me that the proceeding is one for relief of a kind referred to in section 18; being a proceeding for declaratory relief with respect to the validity of the constitution of the council within the meaning of paragraph 18(*a*) and also as being a proceeding for relief in the nature of relief of the kind obtainable

[1] R.S.C. 1970 (2nd Supp.), c. 10.

modifié vers 1969, et que c'est illégalement que les défendeurs ont été élus chefs héréditaires et qu'ils agissent à titre de conseil de bande. Le redressement qu'on cherche à obtenir comprend une déclaration que l'élection du conseil de la bande et de ses membres comme chefs héréditaires à vie est illégale, nulle et de nul effet. Les demandeurs réclament également l'émission d'une injonction interdisant aux défendeurs de se désigner eux-mêmes comme «chefs héréditaires», d'agir à ce titre et d'utiliser le nom Six Nations of the Iroquois Confederacy et d'une ordonnance de procéder à une nouvelle élection dans les six mois.

En vertu de l'article 18 de la *Loi sur la Cour fédérale*[1]:

18. La Division de première instance a compétence exclusive en première instance

a) pour émettre une injonction, un bref de *certiorari*, un bref de *mandamus*, un bref de prohibition ou un bref de *quo warranto*, ou pour rendre un jugement déclaratoire, contre tout office, toute commission ou tout autre tribunal fédéral; et

b) pour entendre et juger toute demande de redressement de la nature de celui qu'envisage l'alinéa *a*), et notamment toute procédure engagée contre le procureur général du Canada aux fins d'obtenir le redressement contre un office, une commission ou à un autre tribunal fédéral.

L'expression «office, commission ou autre tribunal fédéral» désigne, selon la définition de l'article 2,

2. ...

... un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada ou sous le régime d'une telle loi, à l'exclusion des organismes de ce genre constitués ou établis par une loi d'une province ou sous le régime d'une telle loi ainsi que des personnes nommées en vertu ou en conformité du droit d'une province ou en vertu de l'article 96 de l'*Acte de l'Amérique du Nord britannique, 1867*;

La question principale soulevée au sujet de la compétence de la Cour est celle de savoir si un conseil de bande est un «office, une commission ou ... un autre tribunal fédéral» au sens donné à cette expression. S'il en est ainsi, il m'apparaît que la procédure de redressement est d'une nature visée par l'article 18, une procédure en vue d'obtenir un redressement déclaratoire relativement à la validité de la constitution du conseil au sens de l'alinéa 18*a*) et également une procédure de redressement qui peut être obtenue au moyen d'un bref de *quo*

[1] S.R.C. 1970 (2e Supp.), c. 10.

by writ of *quo warranto* within the meaning of paragraph 18(*b*).

Subsection 2(1) of the *Indian Act*[2] contains a definition of the expression "council of the band" and throughout the Act there are provisions which refer to the council and confer on it rights and powers. These include section 9, which gives the council certain rights to object to entries on the band register, section 13, which makes admissions to the band subject to the consent of the council, and sections 18, 20, 58, 59 and 64, which confer rights in connection with the use and allotment of land in the reserve and with respect to other property of the band. In addition, section 81 provides that:

81. The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:

(*a*) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

(*b*) the regulation of traffic;

(*c*) the observance of law and order;

(*d*) the prevention of disorderly conduct and nuisances;

(*e*) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;

(*f*) the construction and maintenance of water courses, roads, bridges, ditches, fences and other local works;

(*g*) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any such zone;

(*h*) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

(*i*) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

(*j*) the destruction and control of noxious weeds;

(*k*) the regulation of bee-keeping and poultry raising;

(*l*) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

(*m*) the control and prohibition of public games, sports, races, athletic contests and other amusements;

[2] R.S.C. 1970, c. I-6.

warranto, aux termes de l'alinéa 18*b*).

Le paragraphe 2(1) de la *Loi sur les Indiens*[2] contient une définition de l'expression «conseil de la bande» et un peu partout dans la Loi, on trouve des dispositions qui ont trait au conseil et lui accordent droits et pouvoirs. C'est le cas de l'article 9, qui donne au conseil certains droits de s'opposer à des inscriptions au registre de la bande, de l'article 13 qui assujettit l'admission au sein de la bande au consentement du conseil et des articles 18, 20, 58, 59 et 64 qui accordent des droits relatifs à l'emploi et à l'attribution de terres dans la réserve ainsi qu'à d'autres biens de la bande. De plus, l'article 81 prévoit que:

81. Le conseil d'une bande peut établir des statuts administratifs, non incompatibles avec la présente loi ou un règlement édicté par le gouverneur en conseil ou le Ministre, pour l'une ou la totalité des fins suivantes, savoir:

a) l'adoption de mesures relatives à la santé des habitants de la réserve et les précautions à prendre contre la propagation des maladies contagieuses et infectieuses;

b) la réglementation de la circulation;

c) l'observation de la loi et le maintien de l'ordre;

d) la répression de l'inconduite et des incommodités;

e) la protection et les précautions à prendre contre les empiétements des bestiaux et autres animaux domestiques, l'établissement de fourrières, la nomination de gardes-fourrières, la réglementation de leurs fonctions et la constitution de droits et redevances pour leurs services;

f) l'établissement et l'entretien de cours d'eau, routes, ponts, fossés, clôtures et autres ouvrages locaux;

g) la division de la réserve ou d'une de ses parties en zones, et l'interdiction de construire ou d'entretenir une catégorie de bâtiments ou d'exercer une catégorie d'entreprises, de métiers ou de professions dans une telle zone;

h) la réglementation de la construction, de la réparation et de l'usage des bâtiments, qu'ils appartiennent à la bande ou à des membres de la bande pris individuellement;

i) l'arpentage des terres de la réserve et leur répartition entre les membres de la bande, et l'établissement d'un registre de certificats de possession et de certificats d'occupation concernant les attributions, et la mise à part de terres de la réserve pour usage commun, si l'autorisation à cet égard a été accordée aux termes de l'article 60;

j) la destruction et l'enrayement des herbes nuisibles;

k) la réglementation de l'apiculture et de l'aviculture;

l) l'établissement de puits, citernes et réservoirs publics et autres services d'eau du même genre, ainsi que la réglementation de leur usage;

m) la réglementation ou l'interdiction de jeux, sports, courses et concours athlétiques d'ordre public et autres amusements du même genre;

[2] S.R.C. 1970, c. I-6.

(*n*) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

(*p*) the removal and punishment of persons trespassing upon the reserve or frequenting the reserve for prescribed purposes;

(*q*) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(*r*) the imposition on summary conviction of a fine not exceeding one hundred dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

Further powers including a power to raise money by taxation are also provided for in section 83 but these are applicable only when the Governor in Council declares that the band has reached an advanced stage of development.

There are also provisions in sections 78 and 79 for the disqualification and removal from office of a chief or councillor on certain defined grounds.

The scheme thus disclosed by the statute, as it seems to me, resembles that of a somewhat restricted form of municipal government by the council of and on the reserve and, were there no expressions of judicial opinion on the point in question, I would conclude that such a council was a "federal board, commission or other tribunal" within the meaning of the *Federal Court Act*.

However, in *The Attorney General of Canada v. Lavell*[3], Laskin J. (as he then was), with whom three other judges of the Court concurred, expressed doubt that a band council fell within the definition. He said at page 1379:

I share the doubt of Osler J. whether a Band Council, even an elected one under s. 74 of the *Indian Act* (the Act also envisages that a Band Council may exist by custom of the Band), is the type of tribunal contemplated by the definition in s. 2(*g*) of the *Federal Court Act* which embraces "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada". A Band Council has some resemblance to the board of directors of a corporation, and if the words of s. 2(*g*) are taken literally, they are broad enough to

[3] [1974] S.C.R. 1349.

n) la réglementation de la conduite et des opérations des marchands ambulants, colporteurs ou autres personnes qui pénètrent dans la réserve pour acheter ou vendre des produits ou marchandises, ou en faire un autre commerce;

o) la conservation, la protection et la régie des animaux à fourrure, du poisson et du gibier de toute sorte dans la réserve;

p) l'expulsion et la punition des personnes qui pénètrent sans droit ni autorisation dans la réserve ou la fréquentent pour des fins interdites;

q) la suite à donner à toute question découlant de l'exercice des pouvoirs prévus par le présent article, ou y accessoire; et

r) l'imposition, sur déclaration sommaire de culpabilité, d'une amende n'excédant pas cent dollars ou d'un emprisonnement d'au plus trente jours, ou de l'amende et de l'emprisonnement à la fois, pour violation d'un statut administratif établi aux termes du présent article.

D'autres pouvoirs, y compris celui de réunir des fonds par imposition, sont également prévus à l'article 83 mais ces dispositions s'appliquent uniquement lorsque le gouverneur en conseil déclare qu'une bande a atteint un haut degré d'avancement.

Les articles 78 et 79 envisagent également les cas d'inhabilité au poste de chef ou de conseiller et de destitution de ces postes pour des motifs déterminés.

Le cadre tracé par la loi ressemble, me semble-t-il, à une forme limitée de gouvernement municipal exercé par le conseil de la réserve sur cette dernière et, puisque aucune opinion judiciaire n'a été formulée sur cette question, je conclurais qu'un seul conseil constitue un «office, une commission ou . . . un autre tribunal fédéral» au sens de la *Loi sur la Cour fédérale*.

Cependant, dans *Le Procureur général du Canada c. Lavell*[3] le juge Laskin (alors juge puîné), dont l'opinion était partagée par trois autres juges de la Cour, mettait en doute le fait qu'un conseil de bande réponde à cette définition. Il dit à la page 1379:

Je partage le doute exprimé par le Juge Osler sur la question de savoir si un conseil de bande, même s'il a été élu en vertu de l'art. 74 de la *Loi sur les Indiens* (la Loi prévoit aussi qu'un conseil de bande peut être établi par coutume de la bande), est la forme de tribunal envisagée dans la définition contenue à l'al. *g*) de l'art. 2 de la *Loi sur la Cour fédérale* qui comprend «un organisme ou une ou plusieurs personnes ayant, exerçant ou prétendant exercer une compétence ou des pouvoirs conférés par une loi du Parlement du Canada.» Un conseil de bande ressemble quelque peu à un conseil d'administration d'une

[3] [1974] R.C.S. 1349.

embrace boards of directors in respect of powers given to them under such federal statutes as the *Bank Act*, R.S.C. 1970, c. B-1, as amended, the *Canada Corporations Act*, R.S.C. 1970, c. C-32, as amended, and the *Canadian and British Insurance Companies Act*, R.S.C. 1970, c. I-15, as amended. It is to me an open question whether private authorities (if I may so categorize boards of directors of banks and other companies) are contemplated by the *Federal Court Act* under s. 18 thereof. However, I do not find it necessary to come to a definite conclusion here on whether jurisdiction should have been ceded to the Federal Court to entertain the declaratory action brought by Mrs. Bédard against the members of the Band Council. There is another ground upon which, in this case, I would not interfere with the exercise of jurisdiction by Osler J.

On the other hand in *Rice v. Council of the Band of Iroquois of Caughnawaga*[4], the Superior Court of Quebec declined jurisdiction to issue an injunction against the council of a band on the ground that the council was a "federal board, commission or other tribunal" within the meaning of the *Federal Court Act*. Bisaillon J., after referring to sections 18 and 2 of the *Federal Court Act*, said at page 3 of his reasons:

[TRANSLATION] It is therefore necessary to determine whether the "Band Council of the Caughnawaga Iroquois" constitutes such an organization, subject to the right of review of the Federal Court.

The Indian Act, R.S., c. 149, in sections 2, 13, 20, 28, 39, 58, 59, 64, 66, 73, 81 and 83 *inter alia*, defines band council and lists its powers.

A reading of these sections leaves no doubt that the band council is a group of people exercising administrative powers which are conferred on it by the Indian Act, and constitutes an organization over which this Court has no jurisdiction to issue an injunction and for which the Federal Court is henceforth the sole tribunal with jurisdiction to hear appeals for review, among them the issuance of an injunction.

In *Diabo v. Mohawk Council of Kanawake*[5], Aronovitch J. of the same Court expressed a similar view when he said at page 4:

It does not seem to be a point of contestation between the parties that the Defendant is a "federal board commission or other tribunal" within the meaning of this Section. In any event, the definitions in Section 2 of the Act make it clear that Defendant is such a body.

[4] February 13, 1975, unreported, Superior Court of Quebec No. 500 05-015 993-742.

[5] October 3, 1975, unreported, Superior Court of Quebec No. 05-013331-754.

compagnie, et si on donne un sens littéral aux termes de l'al. *g*) de l'art. 2, ils sont assez larges pour comprendre les conseils d'administration en ce qui concerne les pouvoirs qui leur sont donnés en vertu de lois fédérales comme la *Loi sur les banques*, S.R.C. 1970, c. B-1, modifiée, la *Loi sur les Corporations canadiennes*, S.R.C. 1970, c. C-32, modifiée, et la *Loi sur les compagnies d'assurance canadiennes et britanniques*, S.R.C. 1970, c. I-15, modifiée. En ce qui me concerne, on peut se demander si les organismes privés (s'il m'est permis de classer ainsi les conseils d'administrations des banques et des autres compagnies) sont visés par la *Loi sur la Cour fédérale* en son art. 18. Cependant, je ne crois pas qu'il soit nécessaire de tirer une conclusion définitive ici sur la question de savoir s'il aurait fallu céder à la Cour fédérale le pouvoir de connaître d'une action déclaratoire intentée par M^me^ Bédard contre les membres du conseil de bande. Dans la présente affaire, il y a un autre motif pour lequel je n'interviendrais pas dans l'exercice de compétence du Juge Osler.

D'autre part, dans *Rice c. Le conseil de la bande des Iroquois de Caughnawaga*[4], la Cour supérieure de Québec a décliné sa compétence à émettre une injonction contre le conseil de la bande au motif que celui-ci constituait un «office, une commission ou ... un autre tribunal fédéral» aux termes de la *Loi sur la Cour fédérale*. Le juge Bisaillon, après avoir évoqué les articles 18 et 2 de la *Loi sur la Cour fédérale*, a dit à la page 3 de ses motifs:

Il s'agit donc de déterminer si le «Conseil de la Bande des Iroquois de Caughnawaga» constitue tel organisme soumis, au droit de revision de la Cour fédérale.

La Loi sur les Indiens, S.R., c. 149, entre autres aux articles 2, 13, 20, 28, 39, 58, 59, 64, 66, 73, 81 et 83 définit conseil de bande et énumère ses attributions.

A la lecture de ces articles, il ne fait aucun doute que le conseil de bande est un groupe de personnes exerçant des pouvoirs administratifs qui lui viennent de la Loi sur les Indiens et constitue un organisme contre qui la présente Cour n'a pas juridiction pour émettre une injonction et pour lequel la Cour fédérale est désormais le seul tribunal compétent à entendre les pourvois en revision, dont l'injonction.

Dans *Diabo c. Le conseil Mohawk de Kanawake*[5], le juge Aronovitch, de la même Cour, formulait un point de vue semblable en disant, à la page 4:

[TRADUCTION] Les parties ne semblent pas contester que le défendeur soit un «office, une commission ou ... un autre tribunal fédéral» au sens de cet article. En tout état de cause, les définitions contenues à l'article 2 de la Loi prouvent clairement que le défendeur constitue un tel corps.

[4] 13 février 1975, non publié, Cour supérieure de Québec, n° 500 05-015 993-742.

[5] 3 octobre 1975, non publié, Cour supérieure de Québec, n° 05-013331-754.

It does not appear from the reasons in either of these cases that the doubt expressed in the *Lavell* case was brought to the attention of the Court.

With due respect for the doubt expressed and the reason given therefor, but bearing in mind that the point was left open and that the Superior Court of Quebec has declined jurisdiction because of its view that exclusive jurisdiction in a case such as this resides in this Court, I think that until the point has been resolved at a higher level the proper course is to adopt that view and rule that the council of a band is a "federal board, commission or other tribunal" within the meaning of the definition. It follows that this Court has jurisdiction to entertain the proceeding in so far as it is brought for a declaration that the defendants have been illegally elected and are illegally acting as the council of the band.

I shall not set out in detail the several allegations of the amended statement of claim but, while some of them are of dubious relevance and others are not models of pleading, I am not satisfied that the amended statement of claim does not disclose a reasonable cause of action against the named defendants for such a declaration.

On the other hand, I know of no basis on which it can properly be held that the Court has jurisdiction to entertain the claim against the defendants for an injunction to restrain them from calling themselves "hereditary chiefs" or from using the name of the Six Nations of the Iroquois Confederacy or to order a new election. In short, it appears to me that the jurisdiction of the Court in the matter is simply to determine the right of the defendants to exercise the statutory functions of the band council and, if the plaintiffs should succeed, to declare that the defendants are not the chief and councillors of the band, thus rendering the offices vacant and leaving it to the appropriate authority to arrange for a legally selected council. In my opinion, therefore, paragraphs 13 and 14 of the amended statement of claim and paragraphs (iii) and (iv) of the prayer for relief should be struck out.

In the circumstances, no costs of the application will be awarded against any party.

Il ne semble pas, à la lecture des motifs de ces causes, que le doute exprimé dans l'arrêt *Lavell* ait été porté à l'attention de la Cour.

En tout respect pour le doute exprimé et les raisons qui le motivent, mais gardant à l'esprit que la question n'est pas tranchée et que la Cour supérieure de Québec s'est déclarée incompétente, estimant que l'affaire était de la compétence exclusive de la présente cour, je pense que, jusqu'au règlement de la question par un tribunal d'instance supérieure, il faut adopter le point de vue et la règle voulant que le conseil de la bande constitue un «office, une commission ou ... un autre tribunal fédéral» aux termes de cette définition. Il s'ensuit que la présente cour a compétence pour connaître de l'action dans la mesure où celle-ci vise à obtenir une déclaration que c'est illégalement que les défendeurs ont été élus et agissent à titre de conseil de bande.

Je n'exposerai pas en détail les nombreuses allégations de la déclaration amendée mais, même si quelques-unes sont d'une pertinence douteuse et que d'autres ne sont pas des modèles de conclusions, je ne suis pas convaincu que ladite déclaration amendée ne révèle aucune cause raisonnable d'action contre les défendeurs y désignés.

D'autre part, je ne vois aucun fondement étayant l'opinion selon laquelle la Cour a compétence pour connaître d'une action visant à obtenir contre les défendeurs une injonction leur interdisant de se désigner eux-mêmes comme «chefs héréditaires» ou d'utiliser le nom Six Nations of the Iroquois Confederacy, ou pour ordonner la tenue d'une nouvelle élection. En résumé, il m'apparaît qu'en l'espèce la Cour est compétente seulement pour déterminer le droit des défendeurs à exercer les fonctions statutaires du conseil de la bande et, si les demandeurs ont gain de cause, à déclarer que les défendeurs ne sont pas chef et conseillers de la bande; les postes deviendraient alors vacants et l'autorité concernée devrait faire en sorte qu'un conseil soit légalement choisi. A mon avis, cependant, les paragraphes 13 et 14 de la déclaration amendée et les paragraphes (iii) et (iv) de la demande de redressement devraient être radiés.

En l'espèce, il n'y aura aucune adjudication des dépens de la demande.

ORDER

Paragraphs 13 and 14 and paragraphs (iii) and (iv) of the prayer for relief of the amended statement of claim are struck out.

The time for filing a defence is extended thirty days from the date of this order.

In other respects the defendants' application is dismissed.

No costs of the application are payable by any party to any other party.

ORDONNANCE

Les paragraphes 13 et 14 et les paragraphes (iii) et (iv) de la demande de redressement de la déclaration sont radiés.

Le délai de dépôt d'une défense est prorogé de trente jours à compter de la date de la présente ordonnance.

A tous autres égards, la demande des défendeurs est rejetée.

Aucune partie n'aura à payer à une autre les dépens de la demande.

which extended beyond the boundaries of the regional area, when it turned its mind to dealing with the certificate for the licence that was subsequently issued it lost jurisdiction. We find it unnecessary to decide this in view of our decision on the earlier points.

In view of the foregoing, we have come to the conclusion that the application should be allowed and that the decision of the Board should be set aside. In the circumstances we also consider that we should grant the declaration sought, namely, that the Minister lacked jurisdiction to issue the public vehicle operating licence of August 21, 1973, to Voyageur Colonial Limited, the decision of the Board being a nullity and the issue of the licence in any event being contrary to the exclusive right conferred by s. 67*c*(1).

There will be no order as to costs.

Application granted.

[COURT OF APPEAL]

Isaac et al. v. Davey et al*

SCHROEDER, JESSUP AND ARNUP, JJ.A. 4TH OCTOBER 1974.

Indians — Government of Indian bands — Orders in Council directing that Council of Six Nations Band be elected according to Indian Act — Whether Orders in Council applicable to Six Nations Indians — Whether Six Nations Indians a "band" — Whether lands a "reserve" — Effect of Haldimand Treaty, 1784 and Simcoe Grant, 1793 — Indian Act (Can.), s. 2(1)(a).

Real property — Indian lands — Royal Proclamation of 1763 reserving fee in Indian reserve lands in Crown — Whether effect of Haldimand Treaty, 1784 and Simcoe Grant, 1793 to grant fee to Six Nations Indians.

Civil rights — Equality before the law — Indian Act treating Indians, qua Indians, differently from others — Whether entire Act inoperative — Canadian Bill of Rights.

Injunctions — Bars — Inequitable acts — Alleged inequitable acts of Crown said to taint members of Indian Band Council — Whether inequitable acts — Whether members of band agents of Crown.

The plaintiffs are (or, in some cases, were) members of the elected Council of the Six Nations Band having been elected under the provisions of the *Indian Act*, R.S.C. 1970, c. I-6, which were originally extended to the Six Nations by Order in Council, P.C. 1629 in 1924, and confirmed by Order in Council, P.C. 6015 in 1951. The defendants, who are

---

*A motion for leave to appeal to the Supreme Court of Canada was granted (Laskin, C.J.C., Judson and Spence, JJ.) January 29, 1975.

members of the band, seek a return to the traditional system of government by hereditary chiefs. In pursuit of that object they obstructed the plaintiffs in their use of the Council House on the Six Nations Reserve. An action by the plaintiffs for a permanent injunction to restrain the defendants was dismissed. On appeal, *held*, the appeal should be allowed.

The *Indian Act* and in particular the sections of the Act which provide for the government of Indian bands by elected Councils is not inoperative by reason of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, since there is no discrimination under those sections of the kind contemplated by the latter Act. Accordingly, those of the plaintiffs who are the current elected members of the Council have standing to maintain the action. Moreover, despite some of the language in the Haldimand Proclamation of 1784 and the so-called Simcoe Patent of 1793 which might otherwise be apt to create an estate in fee simple, the intention of both documents was to confer upon the Crown's subjects who were members of the Six Nations Confederacy and who came to Upper Canada after 1783 the same rights as were enjoyed by other Indians who were resident in Upper Canada at that time. That right is "a personal and usufructuary right, dependent upon the good will of the Sovereign", subject to the Crown's paramount estate. The two documents merely implemented the policy of the Royal Proclamation of 1763, which gave to the Indians in Upper Canada such a right of occupation subject to the reservation of the fee in the Crown. Since the land is thus still vested in the Crown subject to such right of occupation, the land in question falls within the definition "reserve" and the Six Nations are within the definition of "band" in s. 2(1) of the *Indian Act* and its predecessors, and accordingly the 1924 and 1951 Orders in Council, which extended the elective form of government to the Six Nations, were *intra vires*. Finally, the members of the Six Nations are not agents of the Crown and thus are not tainted by any alleged inequitable acts of the Crown so as to bar them from obtaining the injunction sought.

[*R. v. St. Catharines Milling & Lumber Co.* (1885), 10 O.R. 196; affd 13 O.A.R. 148, 13 S.C.R. 577; affd 14 App. Cas. 46; *Logan v. A.-G. Can.*, [1959] O.W.N. 361, 20 D.L.R. (2d) 416 *sub nom. Logan v. Styres et al.*; *Bedard v. Isaac et al.*, [1972] 2 O.R. 391, 25 D.L.R. (3d) 551; revd *sub nom. A.-G. Can. v. Lavell; Isaac et al. v. Bedard*, 38 D.L.R. (3d) 481, 23 C.R.N.S. 197, 11 R.F.L. 333; *Re Lavell and A.-G. Can.*, [1972] 1 O.R. 390, 22 D.L.R. (3d) 182; revd [1972] 1 O.R. 396*n*, 22 D.L.R. (3d) 188, [1971] F.C. 347, 14 *Crim. L.Q.* 236; revd *sub nom. A.-G. Can. v. Lavell; Isaac et al. v. Bedard*, 38 D.L.R. (3d) 481, 23 C.R.N.S. 197, 11 R.F.L. 333, folld; *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, 10 C.R.N.S. 334, 71 W.W.R. 161; *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399; *Sunmonu v. Disu Raphael*, [1927] A.C. 881; *Sakariyawo Oshodi v. Moriamo Dakolo et al.*, [1930] A.C. 667; *Oyekan et al. v. Adele*, [1957] 2 All E.R. 785, refd to]

APPEAL from the judgment of Osler, J., [1973] 3 O.R. 677, 38 D.L.R. (3d) 23, dismissing an action for an injunction to restrain the defendants from interfering with the plaintiffs' use of the Council House on the Six Nations Reserve.

Burton H. Kellock, Q.C., and *Paul D. Amey*, for plaintiffs, appellants.

John Sopinka and *Alan Millward*, for defendants, respondents, except Joseph Logan.

Malcolm Montgomery, Q.C., for defendant, respondent, Joseph Logan.

L. R. Olsson, Q.C., and *James Beckett*, for Attorney-General of Canada.

The judgment of the Court was delivered by

ARNUP, J.A.:—This action requires the resolution of a dispute between two groups of Indians of the Six Nations residing on the Six Nations Reserve near Brantford. The plaintiffs, who are or were members of the elected Council of the Six Nations Band, support the form of government by elected Council pursuant to the *Indian Act*, R.S.C. 1970, c. I-6, and claim that the Council is lawfully entitled to govern the reserve. The defendants support the traditional form of government by hereditary chiefs and claim that the hereditary chiefs are still the lawful government of the Six Nations Confederacy, which they assert owns in fee simple the lands occupied by its members.

This bald and over-simplified statement of the issues must be broken down into a whole series of interwoven issues that must be separately examined after the long history has been stated, since they cannot otherwise be formulated or understood.

The present proceedings began after the defendants and their supporters asserted their alleged rights by padlocking the Council House at Ohsweken on several occasions in June and July, 1970, thereby preventing the elected Council from using the building for its meetings and administration. This resulted in some tense situations, but rather than permit or provoke confrontations and violence, the plaintiffs sensibly resorted to the Courts to settle the rights of the contending parties. In referring to some of the historical background of the Six Nations Reserve, I preface my résumé of it by pointing out that the hereditary chiefs do not base their claims upon Indian or native title. The nature of native title is relevant only as a background to the interpretation of the so-called "Simcoe Deed", which the defendants assert conferred an estate in fee simple upon the Six Nations. I list some of the bibliography on Indian title in Appendix "D" [see Appendices, pp. 624-8, *infra*].

I begin the historical background with the Treaty of Paris of February 10, 1763, entered into after the defeat in 1760

of the French in Canada by the British, and the acquisition by conquest of much of French North America. By Royal Proclamation of George III dated October 7, 1763 (R.S.C. 1970, Appendices, p. 123), four "distinct and separate Governments" were established, one of which was Quebec. The stated boundaries of the new area called Quebec did not include much of what is now Ontario. The lands west of the westerly boundary of Quebec, although containing some white settlers, were largely inhabited by Indians other than the Six Nations.

The Proclamation contained several paragraphs dealing with Indians and the lands inhabited by them. These provisions are set out in Appendix "A". Herein occur the phrases "Lands ... reserved to the ... Indians" and

> to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as well as all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

British subjects were forbidden from making any purchases of land so reserved, or from taking possession thereof, and if any subjects had already "seated themselves" upon lands so reserved, they were ordered "to remove themselves" forthwith. Finally, where any Indians desired to dispose of reserved lands, purchase could be made only by the Crown, at a public meeting of the Indians.

The Royal Proclamation of 1763 was superseded in 1774 by the Imperial Statute, 14 Geo. III, c. 83, the *Quebec Act*. That Act was intended to provide for the permanent government of the newly acquired domain and extended the boundaries set out in the Proclamation "by fixing the interior boundaries on the lines now established as the western limit of Ontario" (*per* Boyd, C., in *R. v. St. Catharines Milling & Lumber Co.* (1885), 10 O.R. 196 at p. 204).

The Six Nations resided south of the Great Lakes, primarily in what are now the States of New York, Pennsylvania and Ohio. In 1775, war broke out between the American colonies and Britain. Many (but not all) of the Six Nations Indians fought for the British. Some tried to maintain neutrality. Some campaigned with the Americans. As it became increasingly clear that the British were losing the war, their allies from the Six Nations became increasingly anxious as to what would happen after the war, despite reassurances from Sir Guy Carleton, Governor of Quebec, and his successor (from

1778 to 1786), Sir Frederick Haldimand. There is little doubt that some of these assurances were intended to bolster the morale of the Indian supporters of the British cause at a time when their anxiety was justified.

The war ended in September, 1783. The treaty of peace contained no definitive provisions concerning the territorial rights of the Six Nations. Those Indians who had fought with the British, or even remained neutral, rightly discerned that they could no longer remain in what was now to be American territory. (The new boundary, as negotiated, was the middle of the Great Lakes.)

Joseph Brant, a highly intelligent, educated and influential Mohawk chief who had ably supported the British during the war, pressed the Governor and ultimately the authorities in Britain for definitive action implementing the promises made to the Six Nations that their loyalty would be rewarded. Consideration was given to creating an Indian settlement in the Cataraqui District, but ultimately Brant gave priority to the valley of the Grand River. (A minority in fact chose to go to the allotted site at the Bay of Quinte.)

I omit many of the ancillary events. In May, 1784, Haldimand on behalf of the Crown purchased from the Mississagas a large tract roughly described as six miles deep on either side of the Grand River from Lake Erie to the head of the river. On October 25, 1784, he issued the "Haldimand Proclamation" (Appendix "B").

Brant interpreted the Haldimand Proclamation as having two effects:

(i) — as being full national recognition of the Six Nations as an independent national community;

(ii) — as a grant of the Grand River lands to the Six Nations in fee simple.

The British Government firmly resisted both propositions, and the Crown's position has never changed. At least some members of the Six Nations have perpetuated Brant's position. (The allegation of national sovereignty was made in this very action but abandoned at trial.)

Western Quebec was reorganized by the *Constitutional Act* of 1791 [R.S.C. 1970, Appendices, p. 139] as Upper Canada. In that year Colonel John Graves Simcoe was made Lieutenant-Governor of Upper Canada. He clashed almost at once with Brant over disposal by the Indians of any part of the Grand River lands. On January 14, 1793, Simcoe issued what is most

often described as "Simcoe's Patent" (Appendix "C"). The defendants herein choose to call it the "Simcoe Deed".

It is a matter of history that Brant always refused to recognize the Simcoe Patent. He asserted it had no effect because the Haldimand Proclamation had already conveyed the fee simple to the Six Nations. Professor Johnston (see Appendix "D") states (p. xlvi, footnote 8) that "the Six Nations, it would appear, have never recognized the so-called 'Simcoe Deed' ". It may be thought ironical that after 180 years, the hereditary chiefs take the position in this action that the very "deed" Brant and his successors repudiated is now said to have given the fee simple to the Six Nations. (It has long ago been authoritatively decided by the Courts that the Haldimand Proclamation did not do so.)

The Six Nations continued to be governed by the hereditary chiefs, chosen according to ancient customs and usages said to date from the 14th century. Over the years substantial portions of the lands originally purchased by the Crown and reserved for the use of the Six Nations have been surrendered to the Crown and conveyed to others, until the original very large tract is reduced to its present size. As of 1969, there were approximately 10,000 members of the Six Nations, of whom about half were in actual residence on the tract (I use this neutral word purposely).

On March 20, 1923, Lieutenant-Colonel Andrew T. Thompson, K.C., was appointed a Commissioner by federal Order in Council to investigate and inquire generally into the affairs of the Six Nations Indians. As a result of his report dated September 15, 1924, the Governor in Council on September 17, 1924, passed Order in Council P.C. 1629 which provided that from and after its date, Part II of the *Indian Act* [then R.S.C. 1906, c. 81], should apply to the Six Nations Band of Indians. The Six Nations Indian reserve was divided into six sections as shown on an attached plan, and it was provided that two councillors should be elected to represent each of the six sections. A new *Indian Act* having been passed, P.C. 1629 was revoked and replaced on November 12, 1951, by P.C. 6015, which did not change the substance of what had been enacted in 1924, but changed the electoral districts.

It was shown at the trial that only a small percentage of the members of the Band entitled under the *Indian Act* to vote for councillors have exercised that right. In effect, the majority of the Six Nations living on the reserve have refused to recognize the application of the *Indian Act* to them and to the reserve.

In 1959, an action brought by Mrs. Verna Logan, the wife of the defendant Joseph Logan in this action, was tried by the late Mr. Justice King (*Logan v. A.-G. Can.*, [1959] O.W.N. 361, 20 D.L.R. (2d) 416 *sub nom. Logan v. Styres et al.*). In that action she asserted the existence of the Six Nations as a Sovereign State. That contention failed. In the course of his judgment King, J., specifically found that P.C. 6015 was not *ultra vires*.

I now come to the issues raised by the respective parties. I state first those raised by the defendants:

(1) The Simcoe Deed granted the Grand River valley lands to the Six Nations Confederacy in fee simple.

(2) That deed is not void by reason of any uncertainty as to the grantees.

(3) It contains a condition subsequent which is invalid as offending the rule against perpetuities, or which, alternatively, is repugnant to the grant and therefore invalid.

(4) The deed was never disclaimed in law by the Six Nations.

(5) The lands are not a "reserve" within the meaning of the *Indian Act*, and the Six Nations are not a "band" under that Act.

(6) The plaintiffs do not have an interest that entitles them to an injunction even if they are validly elected as councillors, and even if the Six Nations do not hold the land in fee simple.

(7) The judgment in the *Logan* case does not create estoppel by record.

(8) The Crown has dealt so unfairly with the Six Nations and particularly with trust funds belonging to them that its conduct constitutes "unclean hands", and since the plaintiffs claim by virtue of a federal statute to be the elected councillors, the plaintiffs are "tainted" with unclean hands which they bring into a Court of equity seeking equitable relief.

The defendant Logan, an advocate of a form of government other than that under the *Indian Act*, asserted in his statement of defence that the entire *Indian Act* was inoperative by reason of the *Canadian Bill of Rights*, 1960, c. 44. Alternatively he pleaded that all but three sections of the *Indian Act* were inoperative. In argument counsel for Logan expanded upon his pleaded defence and asserted that the appropriate Minister had never authorized the use of the Council House; that the "Haldimand Deed" did not have the Great Seal on it

and accordingly could convey nothing in law; nevertheless, the Haldimand pledge of 1779 was a "solemn and binding treaty", which Parliament had not overridden by enacting the *Indian Act*. He further asserted, under the heading of "he who seeks equity must do equity" that the Government, in enacting P.C. 6015, had overlooked that the hereditary chiefs were religious leaders and their ouster was therefore "inequitable". He receded in argument from his position that the entire Act was inoperative to the position that those sections which set up a system of government by councillors was inoperative.

The submission of Mr. Kellock for the plaintiffs may be summarized thus:

(1) The title of the Six Nations to the reserve is and always has been the same as Indian title elsewhere in Canada. Neither the Haldimand Proclamation nor the Simcoe Deed conveyed a legal title in fee simple to the Six Nations Band.

(2) If the Simcoe Deed was operative to convey legal title, it had been disclaimed by the Six Nations.

(3) The lands occupied by the Six Nations constituted in 1924 and subsequently a "reserve" within the meaning of the *Indian Act*.

(4) The Six Nations Confederacy constituted a "band" within the meaning of that Act. The Crown held trust funds on behalf of the band.

(5) The *Indian Act*, and particularly those sections relevant to this case, were not rendered inoperative by the enactment of the *Canadian Bill of Rights*.

Counsel for the Attorney-General supported, in a separate argument, the submission of Mr. Kellock that the Six Nations was a "band", although urging that the question was not open on the pleadings. He also argued that there was a trust fund, held by the Crown for the band, and supported the argument that the legal title to the land had at all times been in the Crown and that the Simcoe Deed did not have the effect contended for by the defendants. He also supported the argument of Mr. Kellock on the *Canadian Bill of Rights*.

Other issues raised and discussed on the argument of the appeal were:

(1) The Haldimand Proclamation was not under the Great Seal; it was said that the Great Seal was first placed on the document in 1834 by Sir John Colborne. The Simcoe Patent or Deed was under the Great Seal of Upper

Canada. The argument was that the Haldimand instrument could not be given common law effect as a deed, whereas the Simcoe instrument could.

(2) The "Simcoe Deed" could not as a matter of law create a fee simple interest because the alleged grantees were an unincorporated group, incapable in law of taking title.

(3) The "invalid condition subsequent" argument is irrelevant because the rule against perpetuities does not apply against the Crown.

(4) The plaintiffs had no right to sue in a representative capacity as they purported to do.

Osler, J., in a considered judgment ([1973] 3 O.R. 677, 38 D.L.R. (3d) 23), reached the following conclusions:

(1) The "Simcoe grant" of 1793 was effective to pass title to all members of the Six Nations Band in fee simple. Accordingly, the entire tract, less those parts disposed of by the band since 1793, has at all time been held by the Six Nations in fee simple.

(2) P.C. 1629 of 1924 and P.C. 6015 of 1951 were both *ultra vires* as unauthorized by the *Indian Act* as it stood at each of the relevant dates. The Six Nations were not a "band" because the legal title to the reserve was not vested in the Crown, and the so-called Six Nations Reserve was not a "reserve" within the meaning of the *Indian Act*, for the same reason. He found further support for this conclusion by stating there was no evidence that at the time of the passage of the *Indian Act* of 1951, c. 29, moneys were held by His Majesty for the use and benefit of the Six Nations, and further that there had been no declaration that the Six Nations was a band for the purposes of the Act, as contemplated by the then s. 2(1)(*a*)(iii).

(3) If not duly elected, the plaintiffs could not sue in a representative capacity on behalf of themselves and all other members of the Six Nations Band except the defendants, because it was conclusively shown that the plaintiffs represented only a small fraction of the Indian population on the reserve.

(4) The entire *Indian Act* was inoperative by reason of the *Canadian Bill of Rights*.

It is convenient to deal with the last point first. When Osler, J., gave his judgment on July 11, 1973, he relied, quite properly, on his own judgment in *Bedard v. Isaac et al.*, [1972] 2 O.R. 391, 25 D.L.R. (3d) 551, in which he had held that

s. 12(1)(*b*) of the *Indian Act* was inoperative. Not long before, judgment had been given by the Federal Court of Appeal in the case of *Re Lavell and A.-G. Can.*, [1972] 1 O.R. 396*n*, 22 D.L.R. (3d) 188, [1971] F.C. 347, reversing the decision of Grossberg, Co.Ct.J., [1972] 1 O.R. 390, 22 D.L.R. (3d) 182. Since the delivery of the judgment of Osler, J., the Supreme Court of Canada has dealt with both matters: *A.-G. Can. v. Lavell; Isaac et al. v. Bedard*, 38 D.L.R. (3d) 481, 23 C.R.N.S. 197, 11 R.F.L. 333, deciding concurrently both an appeal from the Federal Court and a direct appeal from the judgment of Osler, J. In both cases the appeals were allowed in a 5-4 decision.

Since the Supreme Court has held that s. 12(1)(*b*) of the *Indian Act* is not inoperative, it is obviously wrong to hold the entire Act inoperative, but in addition, the reasoning of the majority in these two cases makes it perfectly clear that those sections of the *Indian Act* which are relevant to the decision of this case are not inoperative by reason of the enactment of the *Canadian Bill of Rights*. I do not find even in the dissenting judgment of Laskin, J., with whom Abbott, Hall and Spence, JJ., concurred, any support for the proposition that the entire *Indian Act* is now inoperative. Reading all of the judgments against the background of *R. v. Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, the respondents' contention must be rejected. Considering the powers of Parliament to legislate in relation to Indians and lands reserved for Indians under head 24 of s. 91 of the *British North America Act, 1867*, I find no provision in the *Indian Act* relevant to this case that is rendered inoperative by the kind of discrimination to which the *Canadian Bill of Rights* relates. In particular, its provisions for the election of councillors and for government of the band by the elected Council are in my opinion valid and operative.

It follows that the plaintiffs, or some of them, have status as elected members of the Council to maintain this action and to claim to represent the band. I say "or some of them" because the action began in July, 1970, and as new councillors have been elected they have been added as plaintiffs, without objection from the defendants; four new members of the Council were added at the opening of the appeal, on consent, and the formal order issued in this case should so provide.

I turn next to the contention that the Simcoe Deed conveyed an absolute title in fee simple to the Six Nations Confederacy. This submission is based upon extracting from the

Simcoe Patent certain words which are terms of art in the law of real property of England and Canada and urging that the common law effect of the extracted words should be applied to the document so as to interpret it as a deed in fee simple. The task of the Court is to construe the Simcoe Patent to determine what it was meant to do. In this task the Court must not only look at the words used in the document, but must construe those words against the background of the history and the facts existing at the time it was executed.

The nature of Indian title in Ontario, and the policy of the British Crown in relation to Indians and their rights has been authoritatively determined in a series of cases, in which much of the historical background is recounted, particularly in those cases decided when the events of the last 15 years of the 18th century were still present in the minds of living persons in the middle of the 19th century, and were recorded in documents available to the Judges of that time. As Osler, J., did, I find the judgment at trial of Chancellor Boyd — a most learned, accurate and respected Judge — in *R. v. St. Catharines Milling & Lumber Co.*, to be of great assistance. It is reported in (1885), 10 O.R. 196. The history of public lands is dealt with at pp. 203-6, and the colonial policy of Great Britain concerning the aboriginal populations in America is dealt with at length commencing at p. 206. The judgment was affirmed, 13 O.A.R. 148, 13 S.C.R. 577, and by the Privy Council, 14 App. Cas. 46. Other cases dealing with various aspects of the history of the times, and certain books and articles on Indian title are listed in Appendix "D".

For the purposes of this case, it is sufficient to say that Indian title in Ontario has been "a personal and usufructuary right, dependent upon the good will of the Sovereign". Indian lands were reserved for the use of the Indians, as their hunting grounds, under the Sovereign's protection and dominion. The Crown at all times held a substantial and paramount estate underlying the Indian title. The Crown's interest became absolute whenever the Indian title was surrendered or otherwise extinguished. These are the words of the Privy Council (*per* Lord Watson) in *St. Catharines Milling & Lumber Co. v. The Queen*, at pp. 54-5, and this statement of the legal position has been followed ever since.

Osler, J., recognized that the proposition of fee simple ownership involved finding that the Six Nations had had conferred upon them by the British Crown a type of Indian interest which was unique, or virtually unique, in North Ameri-

ca. Prior to 1784 the Six Nations had not been in occupation of any of the Grand River valley. In my opinion the intention of the Haldimand Proclamation and of the Simcoe Deed was the same. It was to confer upon the loyal subjects of the Crown within the Six Nations Confederacy who had come to Upper Canada the same rights as were enjoyed by those Indians who had always been there. Both documents were in accord with and implemented the policy enunciated in the Proclamation of 1763.

The Simcoe Patent was not intended to be a conveyance of land, in the English sense and the English form, using the English conveyancing language. The words used in it ("given and granted", "do give and grant", "and their heirs for ever", "to and for the sole use and behoof of them and their heirs for ever freely and clearly of and from all and all manner of Rents, fines and services whatever to be rendered by them") were not intended to create, and did not create a unique interest in the Six Nations which no other Indians in Canada enjoyed. They are consistent with what Boyd, C., and the Privy Council stated to be the policy and intention of the Crown. That intention is in accord with other language in the patent, such as "to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages of them the said Chiefs Warriors Women and people of the Six Nations", and with the immediately succeeding language that the true intent and meaning of the patent is for the purpose of assuring the said lands to the Indians and their heirs "and of securing to them the free and undisturbed possession and enjoyment of the same".

The words of the Simcoe Patent prohibiting alienation by the Indians to anyone not of the band are also in keeping with the policy of the times and the understanding of both the Indians and the Crown even prior to the Haldimand Proclamation, and enunciated in 1763. The Haldimand Proclamation, much shorter and with less recital of the reason for the gratitude of the Crown, was expressed in terms of His Majesty "authorizing and permitting (the Mohawk Nation and other of the Six Nations Indians) to take possession of and settle upon the banks of the river . . .". That Proclamation concluded: "which them & their Posterity are to enjoy for ever". The intention of the last quoted language was the same as the language of the Simcoe Deed "to them and their heirs for ever".

This approach to a document dealing with natives and their rights is in accord with the approach taken in several 20th

century cases which I list without discussion: *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at p. 402; *Sunmonu v. Disu Raphael*, [1927] A.C. 881; *Sakariyawo Oshodi v. Moriamo Dakolo et al.*, [1930] A.C. 667; *Oyekan et al. v. Adele*, [1957] 2 All E.R. 785 at p. 789. Useful reference may also be made to Prof. Smith's article "The Concept of Native Title" (see Appendix "D").

This conclusion eliminates from further consideration a whole series of issues much canvassed upon the argument, including the significance of lack of seals, whether there was a condition subsequent which was void either as being in derogation of the grant or as offending the rule against perpetuities, whether the rule against perpetuities binds the Crown, whether the deed itself created the Six Nations as a corporation, and if not, whether the deed was invalid as a deed because of the unincorporated nature of the alleged grantees, and whether the deed had been disclaimed by the Indians.

The finding further destroys the basis upon which Osler, J., found that the two Orders in Council were invalid. When P.C. 1629 of 1924 was passed, its statutory basis was s. 173 of the *Indian Act*, R.S.C. 1906, c. 81, and the ancillary provisions of ss. 174, 176, 177 and 182. In summary, Part II of the Act could be made applicable to a "band of Indians". "Band" was defined in s. 2(*d*) as meaning:

> (*d*) ... any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown ...

"Reserve" was defined [in s. 2(*i*)] as meaning:

> (*i*) ... any tract or tracts of land set apart by treaty ... for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart ...

(For the later definitions of "band" and "reserve" see 1951 (Can.), c. 29, s. 2(1)(*a*), carried into R.S.C. 1952, c. 149, and R.S.C. 1970, c. I-6.) To be a "reserve" a tract of land had to be vested in the Crown. Similar vesting in the Crown was required for a body of Indians to be a statutory "band".

Mr. Sopinka's clients alleged and Osler, J., found that since the tract in question was vested in the Six Nations and not in the Crown, the Six Nations could not be a "band" under the *Indian Act* nor could the tract be a "reserve". It would follow that the Act could not be made to apply. Osler, J., accordingly held that both Orders in Council were *ultra vires*.

Since I have concluded that the tract in question is still

vested in the Crown, subject to the exercise of traditional Indian rights, the land at both relevant dates was within the definition of "reserve" and the Six Nations were within the definition of "band". Therefore, the 1925 Order in Council was authorized by the statute then in force, and so also was P.C. 6015 of 1951.

It is therefore unnecessary to consider the argument that the judgment of King, J., in *Logan v. A.-G. Can.* (*supra*, and Appendix "D") operates as an estoppel by record against the defendants in respect of the validity of these Orders in Council.

It remains to deal with one defence to the claim for an injunction, which is put thus by Mr. Sopinka in his factum:

> ... The members of the Six Nations Band Council are agents of the Crown and are the representatives and amanuenses of the Crown ... Because the members of the Band Council are agents of the Crown any inequitable acts of the Crown bar the Band Council from seeking the equitable remedy of an injunction.

The point is without merit. No express provision of the *Indian Act*, and no implied underlying policy of that Act make the members of an elected Council agents of the Crown. Without expressing any opinion as to whether there have been any inequitable acts on the part of the Crown, the plaintiffs could not be "tainted" by them.

The only relief claimed in the action is an injunction. If an injunction is granted against the defendants, their servants and agents, I do not think it is necessary to enjoin in terms "any persons acting under their instructions and any other persons having notice of the order", as requested in the prayer for relief. In view of the pronouncements made in these reasons, and having regard to the availability of existing remedies against persons who breach an injunction after notice of it, no wider form of injunction is required.

I would therefore allow the appeal, set aside the judgment of Osler, J., and in place thereof direct that judgment issue for a permanent injunction restraining the defendants, their servants and agents:

> (i) — from watching, besetting or attempting to watch or beset at or adjacent to the Council House in the Village of Ohsweken on the Six Nations reserve in the County of Brant;
>
> (ii) — from obstructing or interfering with the plaintiffs, their servants, agents, employees or any other persons seeking lawful entrance to or exit from the said Council House;
>
> (iii) — from obstructing or interfering with the lawful use by the plaintiffs, their servants, agents, employees or any other person of the said Council House;

(iv) — from ordering, aiding, abetting, counselling or encouraging in any manner whatsoever any person to commit the acts mentioned in clauses (i), (ii) and (iii).

The plaintiffs are entitled to their costs of this appeal and of the trial against all of the defendants.

Appeal allowed.

APPENDIX "A"
EXCERPTS FROM THE ROYAL PROCLAMATION
FOLLOWING THE TREATY OF PARIS
No. 1
THE ROYAL PROCLAMATION
October 7, 1763

BY THE KING, A PROCLAMATION
GEORGE R.

Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to our Crown by the late Definitive Treaty of Peace, concluded at Paris, the 10th Day of February last; and being desirous that all Our loving Subjects, as well of our Kingdom as of our Colonies in America, may avail themselves with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce, Manufactures, and Navigation, We have thought fit, with the Advice of our Privy Council, to issue this our Royal Proclamation, hereby to publish and declare to all our loving Subjects, that we have, with the Advice of our Said Privy Council, granted our Letters Patent, under our Great Seal of Great Britain, to erect, within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada, and limited and bounded as follows, viz.

First—The Government of Quebec bounded on the Labrador Coast by the River St. John, and from thence by a Line drawn from the Head of that River through the Lake St. John, to the South end of the Lake Nipissim; from whence the said Line, crossing the River St. Lawrence, and the Lake Champlain, in 45. Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St. Lawrence to Cape Rosieres, and from thence crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John.

. . . . . .

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds —We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida,

do presume, upon any pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose; And we do, by the Advice of our Privy Council. declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and also give Security to observe such

Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

. . . . . .

Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.

GOD SAVE THE KING

APPENDIX "B"

THE HALDIMAND PROCLAMATION, 1784

Whereas His Majesty having been pleased to direct that in Consideration of the early Attachment to His Cause manifested by the Mohawk Indians, & of the Loss of their Settlement they thereby sustained that a Convenient Tract of Land under His protection should be chosen as a Safe & Comfortable Retreat for them & others of the Six Nations who have either lost their Settlements within the Territory of the American States, or wish to retire from them to the British—I have, at the earnest Desire of many of these His Majesty's faithfull Allies purchased a Tract of Land, from the Indians situated between the Lakes Ontario, Erie, & Huron and I do hereby in His Majesty's name authorize and permit the said Mohawk Nation, and such other of the Six Nation Indians as wish to settle in that Quarter to take Possession of, & Settle upon the Banks of the River commonly *called Ours* [Ouse]-or Grand River, running into Lake Erie, allotting to them for that Purpose Six Miles deep from each Side of the River beginning at Lake Erie, & extending in that Proportion to the Head of the said River, which them & their Posterity are to enjoy for ever.

Given under my Hand & Seal &c &c
25th Oct. 1784
(Signed) Fred: Haldimand

APPENDIX "C"

THE SIMCOE PATENT, 1793

J. GRAVES SIMCOE.

George the third by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith and so forth. To all to whom these presents shall come Greeting—Know ye that whereas the attachment and fidelity of the Chiefs, Warriors and people of the Six Nations to Us and our Government has been made manifest on divers occasions by their spirited and zealous exertions and by the bravery of their conduct and We being desirous of showing our approbation of the same and in recompense of the losses they may have sustained of providing a convenient Tract of Land under our protection for a safe and comfortable Retreat for them and their posterity Have of our special Grace certain Knowledge and mere motion given and granted and by these presents Do Give and Grant to the Chiefs, Warriors, Women and people of the said Six Nations and their heirs for ever All that District or Territory of Land being parcel of a certain District lately purchased by us of the Mississague Nation lying and being in the Home District of Our Province of Upper Canada, beginning at the mouth of a certain River formerly known by the name of Ours or Grand River now called the River Ouse,

where it empties itself into Lake Erie and running along the Banks of the same for the space of six miles on each side of the said River or a space co-extensive therewith conformably to a certain survey made of the said Tract of Land and annexed to these presents and continuing along the said River to a place called or known by the name of the forks and from thence along the main stream of the said River for the space of six miles on each side of the said stream or for a space equally extensive therewith as shall be set out by a survey to be made of the same to the utmost extent of the said River as far as the same has been purchased by Us and as the same is bounded and limited in a certain Deed made to us by the Chiefs and people of the said Mississague Nation, bearing date the seventh day of December in the year of our Lord one thousand seven hundred and ninety-two to Have and to Hold the said District or Territory of Land so bounded as aforesaid of Us our Heirs and successors to them the Chiefs Warriors Women and people of the Six Nations and to and for the sole use and behoof of them and their heirs for ever freely and clearly of and from all and all manner of Rents, fines and services whatever to be rendered by them or any of them to Us or Our Successors for the same and of and from all conditions stipulations and agreements whatever except as hereinafter by Us expressed and declared Giving and Granting and by these presents confirming to the said Chiefs Warriors Women and people of the Six Nations and their heirs the full and entire possession Use benefit and advantage of the said District or Territory to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages of them the said Chiefs Warriors Women and people of the said Six Nations Provided always and be it understood to be the true intent and meaning of these presents that for the purpose of assuring the said Lands as aforesaid to the said Chiefs Warriors Women and people of the Six Nations and their heirs and of securing to them the free and undisturbed possession and enjoyment of the same.

IT IS OUR ROYAL WILL AND PLEASURE that no transfer, alienation conveyance sale gift exchange lease property or possession shall at any time be made or given of the said District or Territory or any part or parcel thereof by any of the said Chiefs Warriors Women or people person or persons whatever other than among themselves the said Chiefs Warriors Women and people, but that any such transfer alienation conveyance sale gift exchange lease or possession shall be null and void and of no effect whatever. And that no person or persons shall possess or occupy the said District or Territory or any part or parcel thereof by or under pretence of any such alienation Title or conveyance as aforesaid or by or under any pretence whatever under pain of our severe displeasure And that in case any person or persons other than them the said Chiefs Warriors Women and people of the said Six Nations shall under pretence of any such title as aforesaid presume to possess or occupy the said District or Territory or any part or parcel thereof that it shall and may be lawful for us our Heirs and Successors at any time hereafter to enter upon the Lands so occupied and possessed by any person or persons other than the people of the said Six Nations and them the said intruders thereof and therefrom wholly to dispossess and evict and to resume the part or parcel so occupied to Ourselves, our heirs and successors Provided always that if at any time the said Chiefs Warriors Women and people of the said Six Nations should be inclined to dispose of and surrender their use and interest in the said District or Territory or any part thereof the

same shall be purchased for Us, our Heirs and Successors at some public meeting or assembly of the Chiefs Warriors and people of the said Six Nations to be holden for that purpose by the Governor, Lieutenant-Governor or person administering Our Government in our Province of Upper Canada, IN TESTIMONY whereof, We have caused these our Letters to be made patent and the great seal of our said Province to be hereunto affixed.

Witness, John Graves Simcoe, Esquire, Lieutenant-Governor and Colonel commanding our forces in Our said Province.

Given at Our Government House at Navy Hall this fourteenth day of January in the year of our Lord, One thousand seven hundred and ninety-three, in the thirty-third year of Our Reign.

APPENDIX "D"

BIBLIOGRAPHY AND BACKGROUND CASES

"The Valley of the Six Nations", Charles M. Johnston, 1964, The Champlain Society (for the Government of Ontario), University of Toronto Press. (Many further historical books and writings are listed in the footnotes to the Introduction.)

"The Indian Title Question in Canada", Lysyk (1973), 51 *Can. Bar Rev.* 450.

"The Concept of Native Title", Prof. J. C. Smith (1974), 24 U of T L.J. 1.

Bown v. West (1846), 1 Gr. E. & A. 117.

Doe dem. Jackson v. Wilkes (1851), 4 U.C.Q.B. (O.S.) 142.

Doe dem. Sheldon v. Ramsay et al. (1853), 9 U.C.Q.B. 105.

R. v. St. Catharines Milling & Lumber Co. (1885), 10 O.R. 196; affd 13 O.A.R. 148, 13 S.C.R. 577; affd 14 App. Cas. 46.

Calder v. A.-G. B.C., [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1.

Sero v. Gault (1921), 50 O.L.R. 27, 64 D.L.R. 327.

Logan v. Styres et al. (1959), 20 D.L.R. (2d) 416 (noted [1959] O.W.N. 361 *sub nom. Logan v. A.-G. Can.*).

The King v. Lady McMaster et al., [1926] Ex. C.R. at p. 72.

Johnson and Graham's Lessee v. McIntosh (1823), 8 Wheaton 543, 21 U.S. 240 (U.S.S.C.).

A.-G. Que. et al. v. A.-G. Can. et al., [1921] 1 A.C. 401.

The *Indian Act*, R.S.C. 1906, c. 81.

The *Indian Act*, 1951 (Can.), c. 29.

The *Indian Act*, R.S.C. 1970, c. I-6.

[COURT OF APPEAL]

Royal Bank of Canada v. Wild

KELLY, EVANS AND ARNUP, JJ.A. 10TH OCTOBER 1974.

Bills and notes — Cheques — Holder in due course — Bank crediting cheque to customer's account — Cheque dishonoured — Bank debiting customer's account — Whether bank entitled to proceed as holder in due course against drawer — Bills of Exchange Act, R.S.C. 1970, c. B-5, s. 165(3).

Ackland Davey *et al.* (*Defendants*) *Appellants*;

and

Richard Isaac *et al.* (*Plaintiffs*) *Respondents.*

1976: October 25, 26; 1977: May 31.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTRARIO

Indians — Land governed by elected chiefs — Hereditary chiefs obstructing use of council house — Injuntion to prevent obstruction — Validity of elective system — The Indian Act, 1951 (Can.), c. 29, ss. 2, 73 — Order in Council, P.C. 6015, November 12, 1951.

Respondents constituted the elected council of the Six Nations Indian Band. Appellants, also members of the same Band of Indians, were advocates of a form of government other than that obtaining under *The Indian Act* and in particular a return of the former system of government by persons referred to as "Hereditary Chiefs". On the instructions of the Hereditary Chiefs the Council House on the reserve was padlocked as part of an effort to achieve control by the Hereditary Chiefs of conveyances of land on the reserve. The elected council sought á permanent injunction restraining the defendants and any persons under their instructions from obstructing or interfering with the lawful use of the Council House by the plaintiffs, their servants, agents; employees or any other person. The action was dismissed at trial but allowed by the Court of Appeal.

Held: The appeal should be dismissed. Appellants' essential submission was against the validity of the Orders in Council which had provided for the selection of the Council of the Band by elections in accordance with *The Indian Act*. The authority for the Order in question, P.C. 6015, was s. 73 of *The Indian Act*, 1951 (Can.), c. 29 (consolidated as R.S.C. 1952, c. 149, s. 73 and R.S.C. 1970, c. I-6, s. 74) which provided that "whenever he deems it advisable for the good government of a band, the Governor in Council may declare by Order that—the council of the band—shall be selected by elections to be held in accordance with this Act". Appellants contended that the Six Nations Indians did not constitute "a band" within the definition of s. 2(1)(*a*) of the Act. However as there was clear evidence,

Ackland Davey *et autres* (*Défendeurs*) *Appelants*;

et

Richard Isaac *et autres* (*Demandeurs*) *Intimés.*

1976: les 25 et 26 octobre; 1977: le 31 mai.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Indiens — Terre administrée par des chefs élus — Chefs héréditaires empêchant l'utilisation du siège du Conseil — Injonction visant à interdire que l'on en gêne l'accès — Validité du système électif — Loi sur les Indiens, 1951 (Can.), c. 29, art. 2, 73 — Décret du Conseil, P.C. 6015, du 12 novembre 1951.

Les intimés formaient le Conseil élu de la bande indienne des Six-Nations. Les appelants, également membres de la même bande, préconisaient une autre forme d'administration que celle prévue par la *Loi sur les Indiens* et, notamment, un retour à l'ancien système gouvernemental, qui avait à sa tête des personnes appelées les «chefs héréditaires». Sur les instructions des chefs héréditaires, le siège du Conseil a été cadenassé comme partie d'un plan visant à faire contrôler par les chefs héréditaires tout transfert de biens-fonds sur la réserve. Le Conseil élu a demandé une injonction définitive interdisant aux défendeurs et à toute personne sous leurs ordres d'empêcher ou de gêner l'utilisation légale du siège du Conseil par les demandeurs, leurs représentants, agents, employés ou par toute autre personne. L'action a été rejetée en première instance mais a été accueillie par la Cour d'appel.

Arrêt: Le pourvoi doit être rejeté. Les appelants ont invoqué essentiellement l'invalidité des décrets du Conseil prévoyant le mode d'élection du Conseil de la bande en conformité de la *Loi sur les Indiens*. Le décret en question, C.P. 6015, a été édicté en vertu de l'art. 73 de la *Loi sur les Indiens*, 1951 (Can.), c. 29 (codifiés dans S.R.C. 1952, c. 149, art. 73 et S.R.C. 1970, c. I-6, art. 74). Ces articles prévoient que «lorsqu'il le juge utile à la bonne administration d'une bande, le gouverneur en conseil peut déclarer par arrêté—que le conseil d'une bande—sera formé au moyen d'élections tenues selon la présente loi». Les appelants ont soutenu que les Indiens de la bande des Six-Nations ne constituaient pas une «bande» selon la définition de l'al. 2(1)*a*) de la Loi. Toutefois, comme il a été clairement prouvé par les

introduced by the appellants, that moneys are held by the Crown for the use and benefit of the Indians of the Six Nations, the validity of the Order could be founded on s. 2(1)(*a*)(ii) of the Act alone: 'A "band" means a body of Indians for whose use and benefit in common moneys are held by His Majesty'. While there was no evidence that at the time of the passage of the Act of 1951 these moneys were held by the Crown, in the absence of evidence to the contrary it appeared from "Indian Treaties and Surrenders", vol. I, Queen's Printer, 1891, and particularly from a copy of an indenture therein between the "Sachems or Chiefs and Principal Men of The Six Nations Indians" and William IV, that the trust fund must have arisen before Confederation and well before the enactments of the Orders in Council. In any event when the Order, P.C. 6015 was produced and, by consent, made an exhibit at trial there was a presumption as to its validity and the onus rested on appellants to prove that it was invalid. If appellants sought to rely on the non-existence of a fund administered by the Crown it was for them to plead the fact and to establish it in evidence. Any difficulty that may have arisen by the question as to whether there is a "reserve" unless the title to the land is in the Crown is overcome by s. 36 of the Act.

APPEAL from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from a judgment of Osler J.[2] at trial dismissing an application for an injunction. Appeal dismissed.

John Sopinka, Q.C., and *Allan Millward*, for the appellants.

B. H. Kellock, Q.C., and *P. R. Corless*, for the respondents.

G. W. Ainslie, Q.C., and *L. R. Olsson, Q.C.*, for the Attorney General of Canada.

Paul Williams, for the Union of Ontario Indians.

Bruce Clark, for Gary Potts *et al.*

The judgment of the Court was delivered by

MARTLAND J.—This appeal is concerned with an action brought by the respondents as plaintiffs

[1] (1974), 5 O.R. (2d) 610.
[2] [1973] 3 O.R. 677.

appelants que la Couronne détenait des fonds à l'usage et au profit des Indiens des Six-Nations, la validité du décret pouvait être établie en vertu du seul sous-al. 2(1)*a*)(ii) qui prévoit que: «Le mot «bande» signifie un groupe d'Indiens à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent». Bien qu'il n'y eût pas de preuves qu'à l'époque de la promulgation de la Loi de 1951, ces sommes d'argent étaient détenues par la Couronne, en l'absence d'une preuve contraire, il résultait du volume I, du document intitulé «Indian Treaties and Surrenders», publié par l'Imprimeur de la Reine en 1891, et plus particulièrement de la copie d'un contrat synallagmatique conclu entre les «Sachems ou chefs et les anciens des Indiens des Six-Nations» et le roi Guillaume IV, que la constitution du fonds était antérieure à la Confédération et bien antérieure à la date de promulgation des décrets du Conseil. Quoi qu'il en soit, lorsque le décret C.P. 6015 a été produit et a été, sur consentement, déposé au dossier, il était présumé valide et il incombait aux appelants d'apporter la preuve de son invalidité. Si les appelants voulaient fonder leur argumentation sur la non-existence d'un fonds administré par la Couronne, il leur incombait de plaider ce fait et de le prouver. Toute difficulté qui a pu résulter de la question de savoir s'il y a une «réserve» quand le titre sur les bien-fonds n'est pas dévolu à la Couronne, est réglé par l'art. 36 de la Loi.

POURVOI à l'encontre d'un arrêt de la Cour d'appel de l'Ontario[1] accueillant un appel interjeté contre le rejet par le juge Osler[2], en première instance, d'une demande d'injonction. Pourvoi rejeté.

John Sopinka, c.r., et *Allan Millward*, pour les appelants.

B. H. Kellock, c.r., et *P. R. Corless*, pour les intimés.

G. W. Ainslie, c.r., et *L. R. Olsson, c.r.*, pour le procureur général du Canada.

Paul Williams, pour l'Union of Ontario Indians.

Bruce Clark, pour Gary Potts et autres.

Le jugement de la Cour a été rendu par

LE JUGE MARTLAND—Ce pourvoi porte sur une action intentée par les intimés, demandeurs en

[1] (1974), 5 O.R. (2d) 610.
[2] [1973] 3 O.R. 677.

against the appellants as defendants for an order for a permanent injunction. The facts giving rise to the action are stated in the judgment at trial of Osler J. whose reasons for judgment have been reported in [1973] 3 O.R. at p. 677. They are as follows:

This action was commenced ... by the plaintiffs who then constituted the elected council of the Six Nations Band within the meaning of the Indian Act. They sued on behalf of themselves and all other members of the Six Nations Band except the defendants.

. . .

The defendants are adherents of a group of Indians, members of the Six Nations Band, who advocate a form of government other than that obtaining under the Indian Act and in particular, a return of the former system of government by persons referred to as "Hereditary Chiefs".

. . .

The relief claimed in the action is a permanent injunction restraining the defendants and any persons acting under their instructions from watching or besetting at or adjacent to the Council House in the Village of Ohsweken on the Six Nations Reserve, from obstructing or interfering with the plaintiffs or any other persons seeking entrance to or exit from the Council House and from obstructing or interfering with the lawful use of the Council House by the plaintiffs, their servants, agents, employees or any other person.

By admission filed as exhibit no. 4, it is established that the doors of the Council House were padlocked during the period between June 25th, 1970 and July 10th, 1970 and between July 12th, 1970 and July 16th, 1970 by or on the express instructions of the defendants other than Joseph Logan and that the said defendants attended upon the Council House grounds and encouraged other Indians to attend upon the Council House grounds during that period. Such acts were carried out for the purpose of denying to the plaintiff the use of the Council House and the defendants other than Joseph Logan offered to refrain from such acts provided that an arrangement was made whereby the Confederacy Council, being the group to which I have already referred as the "Hereditary Chiefs", be allowed to control all conveyances of land upon the lands commonly known as the Six Nations Reserve.

Joseph Logan does not admit responsibility for the acts described but on the evidence, I find that by virtue of his concurrence in a resolution passed by the council meeting of the Hereditary Chiefs on June 25th, he must

première instance, contre les appelants, défendeurs en première instance, en vue d'obtenir une injonction définitive. Les faits à l'origine de l'action sont exposés comme suit dans les motifs de jugement de première instance du juge Osler, publiés à [1973] 3 O.R. à la p. 677:

[TRADUCTION] Cette action a été introduite ... par les demandeurs qui formaient alors le Conseil élu de la bande indienne des Six-Nations, au sens de la Loi sur les Indiens. Ils ont intenté cette action en leurs noms et au nom de tous les autres membres de la bande des Six-Nations, à l'exception des défendeurs.

. . .

Les défendeurs font partie d'un groupe d'Indiens, membres de la bande des Six-Nations, qui préconise une autre forme d'administration que celle prévue par la Loi sur les Indiens et notamment un retour à l'ancien système gouvernemental qui avait à sa tête des personnes appelées les «chefs héréditaires».

. . .

On demande une injonction définitive interdisant aux défendeurs et à toute personne sous leurs ordres de cerner ou de surveiller le siège du Conseil du village de Ohsweken sur la réserve des Six-Nations ou ses alentours, d'empêcher ou de gêner l'accès des demandeurs ou de toute autre personne à ces lieux et d'empêcher ou de gêner l'utilisation légale de ces lieux par les demandeurs, leurs représentants, agents, employés ou par toute autre personne.

Dans une reconnaissance de faits déposée comme pièce n° 4, il est établi que les défendeurs, à l'exception de Joseph Logan, ont cadenassé, ou ont donné l'ordre de cadenasser, les portes du siège du Conseil qui ont ainsi été fermées du 25 juin 1970 au 10 juillet 1970 et du 12 juillet 1970 au 16 juillet 1970 et que lesdits défendeurs ont occupé lesdits lieux et ont encouragé d'autres Indiens à en faire autant pendant lesdites périodes. Ces actes visaient à empêcher les demandeurs d'utiliser le siège du Conseil; les défendeurs, à l'exception de Joseph Logan, ont proposé de ne plus se livrer à ces actes, à la condition que l'on parvienne à une entente permettant au Conseil confédératif, soit le groupe des chefs héréditaires que j'ai déjà mentionné, de contrôler tout transfert des biens-fonds communément appelés réserve des Six-Nations.

Joseph Logan n'admet aucune responsabilité pour les actes décrits ci-dessus mais, d'après la preuve, je conclus que puisqu'il a souscrit à la résolution adoptée à la réunion du Conseil des chefs héréditaires tenue le 25

be held responsible and is equally liable to be enjoined if judgment is to go against the other defendants.

The action was dismissed at trial but the judgment was reversed by the Court of Appeal, whose reasons are reported in 5 O.R. (2d) (1975) at p. 610.

When the appeal to this Court was heard some of the points raised by the appellants and discussed in the courts below were abandoned. The appellants' essential submission to this Court was that the orders in council which had provided for the selection of the Council of the Six Nations Indian Band by elections in accordance with *The Indian Act* were invalid. These orders in council are P.C. 1629 made on September 17, 1924, and P.C. 6015 made on November 12, 1951. The earlier order was revoked by the later order, which was to the same effect. We are, therefore, concerned with P.C. 6015. It reads as folows:

His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration and pursuant to the powers conferred by section seventy-three of The Indian Act, is pleased to order as follows:

1. It is hereby declared that after the fifteenth day of November, 1951, the Council of the Six Nations Indian Band in the Province of Ontario, consisting of a Chief and Councillors, shall be selected by elections to be held in accordance with The Indian Act;

2. The Chief of the said Indian Band shall be elected by a majority of the votes of the electors of the Band, and the Councillors of the said Indian Band shall be elected by a majority of the votes of the electors of the section in which the candidate for election resides and which he proposes to represent on the Council;

3. The Reserve of the said Six Nations Indian Band shall for voting purposes be divided into six electoral sections, each containing as nearly as may be an equal number of Indians eligible to vote; two councillors shall be elected to represent each of the said sections; and the said electoral sections shall be as set forth on a map of the Reserve marked "32/3-5 Electoral Sections—Tuscarora Indian Reserve" dated October 29, 1951, of record in the Indian Affairs Branch of the Department of Citizenship and Immigration;

juin, il doit être tenu responsable au même titre que les autres défendeurs, si jugement est rendu contre eux.

L'action a été rejetée en première instance, mais la Cour d'appel, dont les motifs sont publiés à 5 O.R. (2d) (1975) à la p. 610, a infirmé ce jugement.

A l'audition du pourvoi par la présente Cour, les appelants ont abandonné certains de leurs arguments plaidés devant les tribunaux d'instance inférieure. Ils invoquent essentiellement devant cette Cour l'invalidité des décrets du Conseil prévoyant le mode d'élection du Conseil de la bande indienne des Six-Nations en conformité de la *Loi sur les Indiens*. Il s'agit en l'espèce des décrets C.P. 1629, du 17 septembre 1924 et C.P. 6015, du 12 novembre 1951. Le premier décret a été révoqué par le second, qui avait le même effet. Il suffit donc d'examiner le décret C.P. 6015 dont voici le texte:

Sur avis conforme du ministre de la Citoyenneté et de l'Immigration et en vertu des pouvoirs conférés par l'article soixante-treize de la Loi sur les Indiens, il plaît à Son Excellence le Gouverneur général en conseil de rendre le décret suivant:

1. Le présent décret déclare qu'après le quinzième jour de novembre 1951, le Conseil de la bande indienne des Six-Nations dans la province d'Ontario, lequel se compose d'un chef et de conseillers, sera choisi au moyen d'élections tenues en conformité de la Loi sur les Indiens.

2. Le chef de ladite bande indienne sera élu par la majorité des votes des électeurs de la bande, et les conseillers de ladite bande indienne seront élus par la majorité des votes des électeurs de la section dans laquelle réside le candidat à l'élection et dont il se propose d'être le représentant dans le Conseil.

3. Pour les fins de votation, la réserve de ladite bande indienne des Six-Nations sera divisée en six sections électorales, chacune renfermant autant que possible un nombre égal d'Indiens admis à voter. Deux conseillers seront élus pour représenter chacune desdites sections; et les sections électorales en question devront être conformes aux indications apparaissant sur une carte de la réserve marquée «32/3-5 Sections électorales—Réserve indienne Tuscarora», datée du 29 octobre 1951 et déposée aux archives de la Division des Affaires indiennes au ministère de la Citoyenneté et de l'Immigration.

4. Order in Council P.C. 1629 of 17th September 1924, relating to elections to the Council of the Six Nations Band of Indians, is hereby revoked.

The authority for making this order is stated in it to be s. 73 of *The Indian Act*, which was enacted in 1951 as c. 29. It provided as follows:

73. (1) Whenever he deems it advisable for the good government of a band, the Governor in Council may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

The appellants contend that the Governor in Council lacked authority to enact P.C. 6015 because the Six Nations Indians did not constitute a "band" within the definition of that word in s. 2(1)(*a*) of *The Indian Act*, which provided as follows:

2. (1) In this Act,

(*a*) "band" means a body of Indians

(i) for whose use and benefit in common, lands, the legal title to which is vested in His Majesty, have been set apart before or after the coming into force of this Act,

(ii) for whose use and benefit in common, moneys are held by His Majesty, or

(iii) declared by the Governor in Council to be a band for the purposes of this Act;

The word "reserve" is defined in s. 2(1)(*o*) of the Act as meaning "a tract of land, the legal title to which is vested in His Majesty, that has been set apart by His Majesty for the use and benefit of a band".

The main issue at trial and on the argument before the Court of Appeal was in respect of para. (i), the contention of the appellants being that legal title to the lands occupied by the Six Nations was not vested in the Crown because the patent of the Grand River lands to the Six Nations executed by Governor Simcoe, in the name of George III on January 14, 1793, was effective to pass title to the lands to all members of the Six Nations Band in fee simple. This submission was accepted by the judge at trial. His conclusion was, however, reversed by the Court of Appeal, which held that the tract of land in question was still vested in the

4. Est par les présentes révoqué le décret C.P. 1629 du 17 septembre 1924 relatif aux élections du Conseil de la bande indienne des Six-Nations.

Ce décret a été édicté en vertu de l'art. 73 de la *Loi sur les Indiens*, promulguée en 1951 (c. 29 des Statuts). Cet article prévoit:

73. (1) Lorsqu'il le juge utile à la bonne administration d'une bande, le gouverneur en conseil peut déclarer par arrêté qu'à compter d'un jour y désigné le conseil d'une bande, comprenant un chef et des conseillers, sera formé au moyen d'élections tenues selon la présente loi.

Les appelants soutiennent que le gouverneur en conseil n'avait pas le pouvoir d'édicter le décret C.P. 6015 parce que les Indiens de la bande des Six-Nations ne constituent pas une «bande» au sens de la définition de ce mot à l'al. 2(1)*a*) de la *Loi sur les Indiens*, qui dispose:

2. (1) Dans la présente loi, l'expression

a) «bande» signifie un groupe d'Indiens,

(i) à l'usage et au profit communs desquels, des terres, dont le titre juridique est attribué à Sa Majesté, ont été mises de côté avant ou après l'entrée en vigueur de la présente loi,

(ii) à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent, ou

(iii) que le gouverneur en conseil a déclaré être une bande aux fins de la présente loi;

Aux termes de l'al. 2(1)*o*) de la Loi, le mot «réserve» signifie «une parcelle de terrain dont le titre juridique est attribué à Sa Majesté et qu'Elle a mise de côté à l'usage et au profit d'une bande».

En première instance et en Cour d'appel, la principale question portait sur le sous-al. (i); les appelants soutiennent que le titre juridique des terres occupées par la bande des Six-Nations n'a pas été attribué à la Couronne parce que la concession des terres de la Grande Rivière, accordée par le gouverneur Simcoe au nom de George III le 14 janvier 1793, conférait la pleine propriété des terres à tous les membres de la bande indienne des Six-Nations. Le juge de première instance a retenu cet argument. La Cour d'appel a cependant infirmé son jugement et a conclu que les terres en question appartiennent toujours à Sa Majesté, sous

Crown subject to the exercise of traditional Indian rights.

Without wishing to cast any doubt on the conclusion reached by the Court of Appeal I do not think it is necessary in the present case to make a final decision on the matter of title to the lands because, in my opinion, the validity of P.C. 6015 can be founded on para. (ii) of s. 2(1)(*a*) which provides that a "band" means a body of Indians "for whose use and benefit in common, moneys are held by His Majesty".

The statement of defence of the defendant Logan admitted that "the plaintiffs are an elected council of the Six Nations Band elected pursuant to *The Indian Act* by sections 73, 74, 75, 76, 77, 78 and 79". The statement of defence of the other defendants contained the following paragraph:

11. By virtue of the sale of certain lands belonging to the Six Nations Indians to the British Government and by virtue of the sale of certain mineral, oil, gas and timber rights on Indian Reserves, a trust fund was set up for the benefit of the Six Nations Indians of the proceeds of the above-mentioned sales, with the Federal Government of Canada acting as Trustee. To date the Six Nations Indians have never received an accounting by the Federal Government of Canada with respect to the use of these trust funds.

The appellants introduced into evidence, as a part of their case, questions and answers from the examination for discovery of the respondent, Isaac, who was examined on behalf of all the respondents. The following question was put to Mr. Isaac by counsel for the appellants and his reply follows:

Mr. Isaac, I understand that certain funds are held in trust for the Six Nations Indians by the Federal Government, is that correct?

Yes.

Similar evidence was given, on cross-examination, by the respondent Staats.

There is thus clear evidence, introduced by the appellants, that moneys are held by the Crown for the use and benefit of the Indians of the Six Nations. The trial judge dealt with this issue in the following passage in his reasons for judgment:

réserve de l'exercice par les Indiens de leurs droits traditionnels.

Sans vouloir jeter un doute sur la conclusion de la Cour d'appel, je ne pense pas qu'il soit nécessaire de trancher de façon définitive la question du droit de propriété des terres parce que, à mon avis, le décret C.P. 6015 pouvait validement être établi en vertu du sous-al. 2(1)*a*)(ii) qui prévoit que le mot «bande» signifie un groupe d'Indiens «à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent».

Logan admet dans sa défense que [TRADUCTION] «les demandeurs forment le Conseil de la bande indienne des Six-Nations, élu en conformité des articles 73, 74, 75, 76, 77, 78 et 79 de la *Loi sur les Indiens*». La défense produite par les autres défendeurs contient le paragraphe suivant:

[TRADUCTION] 11. En vertu de la vente au gouvernement britannique de certaines terres appartenant aux Indiens des Six-Nations et en vertu de la vente de certains droits sur les minerais, le pétrole, le gaz et l'exploitation forestière dans les réserves indiennes, un fonds de fiducie a été créé pour détenir le produit desdites ventes au profit des Indiens des Six-Nations, le gouvernement du Canada en étant fiduciaire. A ce jour, le gouvernement du Canada n'a jamais rendu compte aux Indiens des Six-Nations de l'utilisation de ces fonds en fiducie.

Les appelants ont produit en preuve, à l'appui de leur argumentation, les questions et réponses de l'interrogatoire préalable de l'intimé Isaac, interrogé au nom de tous les défendeurs. Voici la question posée par l'avocat des appelants à M. Isaac et la réponse de ce dernier:

[TRADUCTION] M. Isaac, le gouvernement du Canada détient-il en fiducie certains fonds, au profit des Indiens des Six-Nations?

Oui.

Le témoignage de l'intimé Staats en contre-interrogatoire, est au même effet.

La preuve produite par les appelants indique donc clairement que la Couronne détient effectivement des sommes d'argent à l'usage et au profit des Indiens des Six-Nations. Le juge de première instance a traité de cette question dans l'extrait suivant de ses motifs de jugement:

... For reasons already given, the Six Nations group of Indians do not comprise a band by virtue of their landholdings, there is no evidence that at the time of the passage of the Indian Act of 1951 moneys were held by Her Majesty for their use and benefit and it could only be said that the Act applied to this group if it was declared to be a band for the purposes of the Act as contemplated in section 2(1)(*a*)(iii).

He then went on to hold that P.C. 6015 did not constitute a declaration within the requirements of para. (iii) of s. 2(1)(*a*).

The Court of Appeal, in view of its decision that title to the tract of land in question was vested in the Crown, did not have to deal with the application of para. (ii).

In Volume I of the publication entitled "Indian Treaties and Surrenders", which covers the period from 1680 to 1890, published by the Queen's Printer in 1891, there appears a copy of an indenture dated April 2, 1835, made between a group of people described as "Sachems or Chiefs and Principal Men of the Six Nations Indians" and King William the Fourth, under the terms of which there was surrendered to King William the Fourth a portion of the lands on the banks of the Ouse or Grand River, which had been the subject matter of the grant by King George the Third. The lands were surrendered for the purpose of being sold and the moneys arising therefrom to be applied for the use and benefit of the Six Nations Indians and their posterity. In the absence of evidence to the contrary, I think I am entitled to presume that these are the lands referred to in para. 11 of the statement of defence of the defendants other than Logan, the proceeds of the sale of which form a part of the trust fund mentioned in that paragraph. That trust fund must have arisen before Confederation and well before orders in council P.C. 1629 and 6015 were enacted.

In any event, I am not in agreement with the view expressed by the trial judge that the absence of evidence as to the time when the Crown commenced to hold the trust funds for the use and benefit of the Indians of the Six Nations would be decisive of this issue. It is necessary to consider the circumstances which gave rise to the present pro-

[TRADUCTION] ... Pour les motifs que j'ai déjà donnés, le groupe des Indiens des Six-Nations ne forme pas une bande par suite de sa tenure sur certaines terres et il n'y a pas de preuve qu'à l'époque de la promulgation de la Loi sur les Indiens de 1951, Sa Majesté détenait des sommes d'argent à l'usage et au profit de celui-ci. On peut seulement dire que la Loi s'appliquerait à ce groupe s'il avait été déclaré être une bande aux fins de la Loi, en conformité du sous-al. 2(1)*a*)(iii).

Il a ensuite conclu que le décret C.P. 6015 ne constituait pas une déclaration au sens du sous-al. 2(1)*a*)(iii).

Compte tenu de sa conclusion selon laquelle les terres en question appartiennent à la Couronne, la Cour d'appel n'a pas examiné la question de l'application du sous-al. (ii).

Le volume I du document intitulé «Indian Treaties and Surrenders», qui couvre la période allant de 1680 à 1890, publié par l'Imprimeur de la Reine en 1891, contient la copie d'un contrat synallagmatique daté du 2 avril 1835 et conclu entre un groupe de personnes appelées les [TRADUCTION] «Sachems ou chefs et les anciens des Indiens des Six-Nations» et le roi Guillaume IV. Ce contrat stipulait la cession d'une partie des terres situées sur les rives de la Grande Rivière (ou Rivière Ouse) qui avaient fait l'objet d'une concession par le roi George III. Les terres ont été cédées pour être vendues et le produit de la vente devait être réservé à l'usage et au bénéfice des Indiens des Six-Nations et de leurs descendants. En l'absence d'une preuve à l'effet contraire, je pense pouvoir présumer que ces terres sont celles mentionnées au par. 11 de la défense produite par les défendeurs, à l'exception de Logan, et que le produit de la vente de ces terres constitue en partie le fonds de fiducie y mentionné. La constitution de ce fonds est antérieure à la Confédération et en conséquence bien antérieure à la date de promulgation des décrets C.P. 1629 et 6015.

Quoi qu'il en soit, je ne partage pas l'opinion du juge de première instance selon laquelle l'absence de preuve quant à la date à laquelle la Couronne a commencé à détenir des fonds en fiducie à l'usage et au bénéfice des Indiens des Six-Nations suffit pour trancher ce litige. Il ne faut pas oublier les circonstances à l'origine des présentes procédures

ceedings and the nature of the relief sought. The case arose because of the padlocking by the appellants of the Council House which had been occupied and used by the respondents in their capacity as the elected council of the Six Nations Band. What was sought by the respondents was an injunction to restrain the appellants from obstructing the respondents and others from seeking entrance to the Council House and from making use of it.

The statement of defence of the appellants, other than the appellant Logan, denied that the respondents had any status to maintain the action, alleging that the Six Nations were by right a sovereign and independent nation. There was no allegation in the pleadings that P.C. 1629 and P.C. 6015 were invalid and no request for a declaration that they were invalid. The allegation of sovereignty and independence was later abandoned. The contention that the Six Nations was not a band within the definition in *The Indian Act* was developed at the trial.

In my opinion, when P.C. 6015 was produced, and was, by consent, made an exhibit at the trial, there was a presumption as to its validity and, if the appellants sought to attack it, the onus rested upon them to prove that it was invalid. This necessitated proof that the Six Nations were not a band, which, in turn, required the appellants to show that the Six Nations were not a body of Indians within para. (i) or para. (ii) or para. (iii) of s. 2(1)(*a*).

Insofar as para. (ii) is concerned it was the appellants, other than Logan, who pleaded the existence of a trust fund administered by the Crown and who adduced evidence to establish that fact. If the appellants desired to rely upon the non-existence of that fund when P.C. 6015 was enacted it was for them to plead that fact and also to establish it in evidence.

In view of the conclusion which I have expressed with respect to the application of para. (ii), it is not necessary to reach a firm conclusion as to the application of para. (iii). On this point the trial judge said:

et la nature du redressement demandé. Cette affaire a commencé lorsque les appelants ont cadenassé les portes du siège du Conseil dont se servaient les intimés, en leur qualité de membres du Conseil élu de la bande indienne des Six-Nations. Les intimés demandent une injonction interdisant aux appelants de les empêcher ou d'empêcher toute autre personne d'entrer dans la salle de réunion du Conseil et de s'en servir.

Dans leur défense, les appelants, à l'exception de Logan, soutiennent que les intimés n'ont pas qualité pour agir, puisque, selon eux, la réserve des Six-Nations forme une nation souveraine et indépendante. Ils n'ont pas prétendu dans leurs plaidoiries que les décrets C.P. 1629 et C.P. 6015 étaient invalides et n'ont pas demandé qu'ils soient déclarés invalides. L'allégation de souveraineté et d'indépendance a par la suite été abandonnée. Cependant, la prétention que les Indiens des Six-Nations ne constituent pas une bande au sens de la *Loi sur les Indiens*, a été développée au procès.

A mon avis, lorsque le décret C.P. 6015 a été produit et a été, sur consentement, déposé au dossier, il était présumé valide et, si les appelants voulaient le contester, il leur incombait d'apporter la preuve de son invalidité. Pour cela, il leur fallait d'abord démontrer que les Indiens des Six-Nations ne constituent pas une bande et ensuite établir que les Indiens des Six-Nations ne forment pas un groupe d'Indiens au sens des sous-al. 2(1)*a*)(i), (ii) ou (iii).

En ce qui concerne le sous-al. (ii), ce sont les appelants eux-mêmes, à l'exception de Logan, qui ont invoqué dans leur plaidoirie l'existence d'un fonds de fiducie géré par la Couronne et qui ont avancé des preuves à l'appui. Si les appelants voulaient fonder leur argumentation sur la non-existence de ce fonds à l'époque de la promulgation du décret C.P. 6015, il leur incombait de plaider ce fait et de le prouver.

Compte tenu de l'opinion que j'ai exprimée relativement à l'application du sous-al. (ii), je n'ai pas à trancher définitivement la question de l'application du sous-al. (iii). A ce sujet, le juge de première instance a déclaré:

The Order-in-Council is, in my view, a plain exercise of the power contemplated by section 73(1) to apply certain portions of the Act to an existing band. It does not, however, constitute a declaration that a certain body of Indians is a band for the purposes of this Act as contemplated by section 2(1)(*a*)(iii). That declaration must be separately made and cannot be implied simply because action is taken under section 73(1).

[TRADUCTION] Le décret du Conseil a été pris, à mon avis, en vertu du pouvoir conféré par le par. 73(1) d'appliquer certaines parties de la Loi à une bande existante. Il ne s'agit toutefois pas d'une déclaration qu'un groupe déterminé d'Indiens constitue une bande aux fins de la Loi et au sens du sous-al. 2(1)*a*)(iii). Cette déclaration doit être distincte et le simple exercice du pouvoir conféré au par. 73(1) ne permet pas de déduire qu'elle a été faite.

Paragraph (iii) of s. 2(1)(*a*) states that a band means a body of Indians "declared by the Governor in Council to be a band for the purposes of this Act". P.C. 6015 declares that after November 15, 1951, the Council of the Six Nations Band shall be selected by elections to be held in accordance with *The Indian Act*, and it recites the authority of s. 73 of that Act. It is certainly arguable that, in view of the above declaration, the Six Nations are, by P.C. 6015, declared to be a band for the purposes of the Act.

Le sous-alinéa 2(1)*a*)(iii) précise que le mot «bande» signifie un groupe d'Indiens «que le gouverneur en conseil a déclaré être une bande aux fins de la présente loi». Le décret C.P. 6015 déclare qu'après le 15 novembre 1951, le Conseil de la bande indienne des Six-Nations sera choisi au moyen d'élections tenues en conformité de la *Loi sur les indiens* et renvoie à l'art. 73 de la Loi. On peut certainement soutenir que, par cette déclaration, le décret C.P. 6015 a eu l'effet de déclarer que les Indiens des Six-Nations constituent une bande aux fins de la Loi.

In my opinion the order in council, P.C. 6015, was valid. It provided for the election of a Council of the Six Nations Indian Band. In para. 3 of the order in council provision is made for six electoral sections and it is stated that "The Reserve" is divided into those sections. It might be objected that there is no "reserve" unless the title to the land is vested in the Crown. In my view, any difficulty in this regard is overcome by s. 36 of the Act, which provides:

A mon avis, le décret C.P. 6015 est valide. Il prévoit le mode d'élection du Conseil de la bande indienne des Six-Nations. Le par. 3 du décret prévoit que «la Réserve» sera divisée en six sections électorales. Or on ne peut soutenir qu'il n'y a pas de «Réserve» si le titre sur les biens-fonds n'est pas dévolu à la Couronne. A cet égard, l'art. 36 de la Loi règle, à mon avis, toute difficulté d'interprétation possible. Il prévoit:

36. Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in His Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.

36. Lorsque des terres ont été mises de côté à l'usage et au profit d'une bande et que le titre juridique y relatif n'est pas dévolu à Sa Majesté, la présente loi s'applique comme si les terres étaient une réserve, selon la définition qu'en donne cette loi.

As the elected council of the Six Nations Band, the respondents were properly entitled to use the Council House, the property of the Band for council purposes. I do not think it was necessary to enact a by-law under s. 80(*h*) of the Act to assert that use. In any event, the appellants were not lawfully entitled to prevent the use of the Council House by the elected council.

En tant que Conseil élu de la bande des Six-Nations, les intimés avaient le droit d'utiliser le siège du Conseil qui appartient à la bande et est réservé aux travaux de ce dernier. Je ne pense pas qu'il était nécessaire d'édicter un règlement en vertu du par. 80*h*) de la Loi pour confirmer ce droit. Quoi qu'il en soit, les appelants n'avaient pas le droit d'empêcher le Conseil élu d'utiliser lesdits lieux.

The other points raised in argument by the appellants before this Court were disposed of by the Court of Appeal and I agree with their disposition.

I would dismiss the appeal with costs. There should be no costs payable by or to the Attorney General of Canada or any of the intervenants.

Appeal dismissed with costs.

Solicitors for the appellants: Fasken & Calvin, Toronto.

Solicitors for the respondents: Waterous, Holden, Kellock & Kent, Brantford.

Solicitor for the Attorney General of Canada: L. R. Olsson, Toronto.

Solicitor for the Union of Ontario Indians, intervenant: Paul Williams, Toronto.

Solicitor for Gary Potts et al., intervenants: Bruce A. Clark, Haileybury.

Je suis d'accord avec la façon dont la Cour d'appel a tranché les autres moyens plaidés par les appelants devant cette Cour.

Je suis d'avis de rejeter le pourvoi avec dépens. Ni le procureur général du Canada ni aucun des intervenants ne versera de dépens ni n'en touchera.

Pourvoi rejeté avec dépens.

Procureurs des appelants: Fasken & Calvin, Toronto.

Procureurs des intimés: Waterous, Holden, Kellock & Kent, Brantford.

Procureur du procureur général du Canada: L. R. Olsson, Toronto.

Procureur de l'Union of Ontario Indians, intervenant: Paul Williams, Toronto.

Procureur de Gary Potts et autres, intervenants: Bruce A. Clark, Haileybury.

Rita Maud Smith (*Plaintiff*)

v.

The Queen and M. H. Manzer (*Defendants*)

Trial Division, Kerr J.—Halifax, N.S., April 11; Ottawa, May 5, 1972.

Indians—Election of chief set aside—Special election of new chief—Term of office, duration of—Indian Act, R.S.C. 1970, c. I-6, secs. 78(4), 79.

The election of the chief of an Indian band was set aside pursuant to section 79 of the *Indian Act* and plaintiff was elected chief at a special election held to fill the vacancy pursuant to section 78(4).

Held, plaintiff's term of office was not for two years from the date of the special election but only for her predecessor's unexpired term.

ACTION.

R. P. Muttart for plaintiff.

J. M. Bentley for defendants.

KERR J.—The parties in this action presented a stated case to the Court, which reads as follows:

STATED CASE

WHEREAS the Plaintiff did commence this action against the Defendants by filing with the Court at Halifax a Statement of Claim on the 7th day of December, 1971;

AND WHEREAS on the said 7th day of December, 1971 the Plaintiff moved, ex parte, for an interim restraining order to restrain the Defendants, their servants or agents from causing, conducting, holding or so in any way aiding or abetting the conduct or holdings (*sic*) of an election for the office of Chief of the Annapolis Valley Band of Indians until such date as the Learned Judge might set for the hearing for an application for an interlocutory injunction; and the said motion was dismissed with reservation of the disposition of costs on the motion, by order of His Lordship Mr. Justice Kerr dated December 13, 1971;

AND WHEREAS a Defence was filed herein on behalf of the Defendants on the 12th day of January, 1972;

AND WHEREAS a Reply was filed herein subsequent to the filing of the aforesaid Defence;

AND WHEREAS the parties hereto are mutually agreed upon the following statement of facts for the consideration of the Court:

1) The Plaintiff is a married woman residing at Bishopville Road in the County of Kings and Province of Nova Scotia and at all times material to this action was and is

Rita Maud Smith (*Demanderesse*)

c.

La Reine et M. H. Manzer (*Défendeurs*)

Division de première instance, le juge Kerr—Halifax (N.-É.), le 11 avril; Ottawa, le 5 mai 1972.

Indiens—Annulation de l'élection du chef—Élection spéciale du nouveau chef—Durée du mandat—Loi sur les Indiens, S.R.C. 1970, c. I-6, art. 78(4) et 79.

L'élection du chef d'une bande d'Indiens ayant été annulée conformément à l'article 79 de la *Loi sur les Indiens*, la demanderesse a été élue chef lors d'une élection spéciale tenue pour remplir la vacance conformément à l'article 78(4).

Arrêt: la durée du mandat de la demanderesse n'était pas de deux ans à compter de la date de l'élection spéciale, mais seulement de la durée restant à courir du mandat de son prédécesseur.

ACTION.

R. P. Muttart pour la demanderesse.

J. M. Bentley pour les défendeurs.

LE JUGE KERR—Les parties à la présente action ont déposé devant la Cour un exposé des faits qui se lit comme suit:

[TRADUCTION] *EXPOSÉ DES FAITS*

ATTENDU QUE la demanderesse a engagé cette action contre les défendeurs en déposant une déclaration à la Cour à Halifax le 7 décembre 1971;

ET ATTENDU QUE, ce 7 décembre 1971, la demanderesse a adressé une demande *ex parte* en vue d'obtenir une ordonnance suspensive provisoire interdisant aux défendeurs, à leurs employés ou agents de provoquer, de conduire, de tenir, de participer ou de favoriser de quelque façon la conduite ou la tenue d'élections pour le poste de chef de la bande des Indiens de la vallée d'Annapolis, jusqu'à la date que le savant juge pourra déterminer pour l'audition d'une demande d'injonction interlocutoire; et que ladite demande a été rejetée par une ordonnance rendue par le juge Kerr le 13 décembre 1971, remettant à plus tard la question des dépens;

ET ATTENDU QUE, le 12 janvier 1972, une défense a été versée au dossier au nom des défendeurs;

*ET ATTENDU QU'*une réponse a été versée au dossier après la défense susmentionnée;

ET ATTENDU QUE les parties en cause se sont entendues pour soumettre à l'appréciation de la Cour l'exposé des faits suivants:

1) La demanderesse est mariée et habite Bishopville Road dans le comté de Kings (Nouvelle-Écosse) et, à tous les moments qui nous intéressent, était le chef dûment élu

the duly elected Chief of the Annapolis Valley Band of Indians.

2) The Defendant, M. H. Manzer, is an employee and agent of the Department of Indian Affairs and Northern Development and at all times material to this action is the electoral officer appointed by the Minister of Indian Affairs and Northern Development pursuant to the regulations under and by virtue of the Indian Act of Canada.

3) M. H. Manzer was, at all material times, acting within the scope of his duty or employment as a servant of the Crown.

4) On the 22nd day of October, 1969, one Marshall Smith was elected Chief of the Annapolis Valley Band.

5) On or about the 30th day of June, 1970 the election of Marshall Smith was set aside by order-in-council.

6) A special election was held pursuant to Section 78(4) of the Indian Act pursuant to which the Plaintiff Rita Maud Smith was elected Chief of the Annapolis Valley Band on the 29th day of September, 1970.

7) By letter dated October 8, 1971 over the signature of V. M. Gran, Chief, Band Management Division, and under the letterhead of the Department of Indian Affairs and Northern Development, it was stated that the term of office of the Plaintiff, Rita Maud Smith, was limited to the unexpired term of Marshall Smith, and further stated that the Plaintiff's term of office would expire on November 29, 1971. This letter was presented to the Plaintiff by the Defendant M. H. Manzer and adopted by him as his instruction to the Plaintiff.

8) Subsequently, notice was given by the Defendant M. H. Manzer of an election for the offices of Chief and Councillors of the Annapolis Valley Band; whereupon, the Plaintiff did commence an action against the Defendants claiming:

a) an interim restraining order; and

b) an interlocutory injunction; and

c) a declaratory order of the Court confirming the two year term of office of the Plaintiff from the date of her election on September 29, 1970.

9) The action commenced not having been disposed of prior to the election called by the Defendants, the Plaintiff was nominated as a candidate in the election held on the 21st day of December, 1971 and was elected Chief of the Annapolis Valley Band of Indians at that election.

NOW THEREFORE THE PARTIES HERETO respectfully submit the following questions to the Court for its consideration and decision:

A. Is the term of office of Rita Maud Smith two years from the date of her election on the 29th day of September, 1970?

B. If the term of office of Rita Maud Smith is not two years from the date of her election on the 29th day of

de la bande des Indiens de la vallée d'Annapolis, poste qu'elle détient toujours.

2) Le défendeur, M. M. H. Manzer, est employé et agent du ministère des Affaires indiennes et du Nord canadien et, à tous les moments qui nous intéressent, était le fonctionnaire électoral mandaté par le ministre des Affaires indiennes et du Nord canadien en vertu des règles édictées en conformité de la Loi sur les Indiens.

3) A tous les moments pertinents, M. M. H. Manzer agissait dans le cadre des responsabilités qui lui sont dévolues à titre de préposé de la Couronne.

4) Le 22 octobre 1969, un certain Marshall Smith a été élu chef de la bande des Indiens de la vallée d'Annapolis.

5) Le 30 juin 1970, ou vers cette date, l'élection de M. Marshall Smith a été déclarée nulle par décret.

6) Au cours d'une élection spéciale tenue le 29 septembre 1970 en application de l'article 78(4) de la Loi sur les Indiens, la demanderesse M^me^ Rita Maud Smith a été élue chef de la bande des Indiens de la vallée d'Annapolis.

7) Dans une lettre en date du 8 octobre 1971, portant la signature de M. V. M. Gran, chef de l'administration des bandes, et sous l'entête du ministère des Affaires indiennes et du Nord canadien, il était déclaré que le mandat de la demanderesse M^me^ Rita Maud Smith était limité à la partie restant à courir du mandat de M. Marshall Smith, ledit mandat prenant fin le 29 novembre 1971. Cette lettre a été présentée à la demanderesse par le défendeur M. M. H. Manzer, qui l'a identifiée comme étant la notification qu'il a adressée à la demanderesse.

8) Par la suite, le défendeur M. M. H. Manzer a donné avis d'une élection aux postes de chef et de conseillers de la bande des Indiens de la vallée d'Annapolis; sur quoi, la demanderesse a engagé une action contre les défendeurs, pour obtenir:

a) une ordonnance suspensive provisoire; et

b) une injonction interlocutoire; et

c) une ordonnance déclaratoire de la Cour confirmant le mandat de deux ans de la demanderesse à compter de la date de son élection, soit le 29 septembre 1970.

9) L'action n'ayant pas fait l'objet d'une décision avant l'élection organisée par les défendeurs, la demanderesse a soumis sa candidature à l'élection tenue le 21 décembre 1971 et a ainsi été élue chef de la bande des Indiens de la vallée d'Annapolis.

PAR CONSÉQUENT LES PARTIES EN CAUSE soumettent respectueusement les questions suivantes à l'appréciation et au jugement de la Cour:

A. Le mandat de M^me^ Rita Maud Smith est-il de deux ans à compter de la date de son élection, le 29 septembre 1970?

B. Si le mandat de M^me^ Rita Maud Smith n'est pas de deux ans à compter de la date de son élection, le 29

September, 1970, is her term of office the unexpired term of office of Marshall Smith?

C. If the answers to question A and question B are "no", what is the term of office given to Rita Maud Smith by virtue of her election on the 29th day of September, 1970?

THE PARTIES HERETO agree that the decision of the Court herein should be by way of declaratory judgment and that the costs of this entire action and stated case be awarded to the successful party.

WHEREAS the parties hereto do indicate their agreement to the submission of the within stated case this 22nd day of February, A.D., 1972:

septembre 1970, est-ce qu'il correspond au mandat restant à courir de M. Marshall Smith?

C. Si les questions A et B reçoivent une réponse négative, quelle est alors la durée du mandat confié à Mme Rita Maud Smith en vertu de son élection, le 29 septembre 1970?

LES PARTIES EN CAUSE conviennent que la décision de la Cour devrait être rendue par voie de jugement déclaratoire et que les dépens de toute cette action et de l'exposé devraient être accordés à la partie qui aura gain de cause.

PAR SUITE, les parties en cause indiquent par les présentes leur accord à la présentation de l'exposé susdit, ce 22 février 1972.

Notwithstanding her second election the plaintiff continued her action in this Court, contending that there is a real question as to what her tenure of office as chief is. In that respect counsel for the plaintiff made the following submission in argument:

We believe it is pertinent to set out the Plaintiff's reason for having commenced this action. As it is evident from a reading of the Stated Case, the Plaintiff was elected to the office of Chief of the Annapolis Valley Band to fill the vacancy created by the removal of a former Chief. The election of the former Chief had been irregular and the Minister exercised his prerogative in declaring that election invalid. The Indian Act contemplates such a contingency and provides the authority to conduct another election immediately. That election was held and the Plaintiff was duly elected on the 29th day of September, 1970, fully believing her term of office to be two (2) years as set out in Section 78 of the Indian Act. Subsequently, of course, the Defendant unilaterally concluded otherwise and caused another election to be held against the wishes of the Plaintiff. To mitigate her damages and to insure that the Annapolis Valley Band would be both in law and in fact represented by a Chief, she allowed her name to stand as a candidate in this election—all the while protesting the legality of the proceeding itself, but knowing full well the practical necessity of assuring the electorate that the affairs of the Band were being protected regardless of the legality of the proceeding. She had a reasonable certainty that she would be again elected in the illegal election and that the performance of her duties as Chief would be clothed with legality by virtue of her prior election, the term of which would not expire until September 29, 1972. Subsequent to that date, however, there looms large the question as to whether her continued administration would be legal. Hence, the importance of these proceedings.

Further, an important question of principle, a question of local autonomy and the fully national question of the degree to which the provisions of the Indian Act can be unilaterally manipulated by the Department comes into focus. These are

Nonobstant sa seconde élection, la demanderesse a continué son action devant cette Cour, soutenant qu'il existait un véritable litige quant à la durée de son mandat de chef. A ce sujet, l'avocat de la demanderesse a fait valoir les points suivants lors de son plaidoyer:

[TRADUCTION] Nous croyons pertinent d'exposer les motifs pour lesquels la demanderesse a engagé cette poursuite. Comme il ressort à la lecture de l'exposé, la demanderesse a été élue au poste de chef de la bande des Indiens de la vallée d'Annapolis pour remplir la vacance occasionnée par la révocation de l'ancien chef, dont l'élection s'était révélée illégale et avait été annulée par le Ministre dans l'exercice de ses prérogatives. La Loi sur les Indiens prévoit une telle éventualité ainsi que la tenue immédiate d'une nouvelle élection. Cette élection a été tenue et la demanderesse dûment élue le 29 septembre 1970. Par suite, la demanderesse croyait sincèrement que son mandat était de deux ans comme le prescrit l'article 78 de la Loi sur les Indiens. Par la suite, évidemment, le défendeur a unilatéralement décidé que ce n'était pas le cas et provoqué la tenue d'une nouvelle élection contre la volonté de la demanderesse. Dans le but de mitiger les désavantages de la situation et de s'assurer que la bande des Indiens de la vallée d'Annapolis serait toujours, en droit comme en fait, représentée par un chef, elle a accepté de se porter candidate à cette élection. Bien qu'elle contestât toujours la légalité de la procédure, elle était bien consciente de la nécessité d'assurer à l'électorat que les affaires de la bande seraient bien administrées quelle que soit la légalité de la procédure. Elle avait de bonnes raisons de croire qu'elle serait réélue au cours de cette élection illégale, l'accomplissement de ses devoirs en tant que chef restant revêtu de légalité jusqu'à l'expiration de son mandat le 29 septembre 1972, étant donné son élection antérieure. Après cette date, cependant, la question de savoir si la poursuite de son administration serait légale se poserait de façon aiguë. De là, l'importance de ces procédures.

De plus, se posent ici d'importantes questions de principe, la question de l'autonomie locale et la question d'intérêt national suivante, savoir jusqu'où le ministère peut utiliser unilatéralement et à ses propres fins les dispositions de la Loi sur les Indiens. Il s'agit là d'une question sur laquelle la

the issues to be determined by this Court; and they far surpass the purely local question of self-determination.

We are dealing with a Statute of the Parliament of Canada which purports to regulate a whole race of people. It is of paramount importance that these people be assured that the plain words of that statute shall and do prevail and that technical, bureaucratic interpretation will not frustrate them at every turn.

Relevant portions of the electoral sections of the Act are as follows:

74. (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

78. (1) Subject to this section, chiefs and councillors hold office for two years.

(2) The office of chief or councillor becomes vacant when

(*a*) the person who holds that office
  (i) is convicted of an indictable offence,
  (ii) dies or resigns his office, or
  (iii) is or becomes ineligible to hold office by virtue of this Act; or
(*b*) the Minister declares that in his opinion the person who holds that office
  (i) is unfit to continue in office by reason of his having been convicted of an offence,
  (ii) has been absent from meetings of the council for three consecutive meetings without being authorized to do so, or
  (iii) was guilty, in connection with an election, of corrupt practice, accepting a bribe, dishonesty or malfeasance.

. . .

(4) Where the office of chief or councillor becomes vacant more than three months before the date when another election would ordinarily be held, a special election may be held in accordance with this Act to fill the vacancy.

79. The Governor in Council may set aside the election of a chief or a councillor on the report of the Minister that he is satisfied that

(*a*) there was corrupt practice in connection with the election;
(*b*) there was a violation of this Act that might have affected the result of the election; or
(*c*) a person nominated to be a candidate in the election was ineligible to be a candidate.

Counsel for the plaintiff argued that section 78(1) is clear and unambiguous, and that the term of office of a chief is 2 years from the date

Cour devra se prononcer, et elle dépasse de beaucoup la question de l'autonomie, qui est d'intérêt purement local.

Nous traitons d'une loi du Parlement du Canada, laquelle entend régir toutes les personnes appartenant à une race donnée. Il est de la plus haute importance que ces personnes soient assurées que, maintenant et à l'avenir, seuls prévaudront les termes exprès de cette loi et que des subtilités techniques et bureaucratiques ne les priveront pas continuellement de leurs droits.

Les extraits pertinents des articles de cette Loi traitant d'élections se lisent comme suit:

74. (1) Lorsqu'il le juge utile à la bonne administration d'une bande, le Ministre peut déclarer par arrêté qu'à compter d'un jour y désigné le conseil d'une bande, comprenant un chef et des conseillers, sera formé au moyen d'élections tenues selon la présente loi.

78. (1) Sous réserve du présent article, les chefs et conseillers demeurent en fonction pendant deux années.

(2) Le poste de chef ou de conseiller devient vacant lorsque

a) le titulaire
  (i) est déclaré coupable d'un acte criminel,
  (ii) meurt ou démissionne, ou
  (iii) est ou devient inhabile à détenir le poste aux termes de la présente loi; ou
b) le Ministre déclare qu'à son avis le titulaire

  (i) est inapte à demeurer en fonction parce qu'il a été déclaré coupable d'une infraction,
  (ii) a, sans autorisation, manqué les réunions du conseil trois fois consécutives, ou

  (iii) à l'occasion d'une élection, s'est rendu coupable de faits de corruption, de malhonnêteté ou de méfaits, ou a accepté des pots-de-vin.

. . .

(4) Lorsque le poste de chef ou de conseiller devient vacant plus de trois mois avant la date de la tenue ordinaire de nouvelles élections, une élection spéciale peut avoir lieu en conformité de la présente loi afin de remplir cette vacance.

79. Le gouverneur en conseil peut rejeter l'élection d'un chef ou d'un conseiller sur le rapport du Ministre où ce dernier se dit convaincu

a) qu'il y a eu des faits de corruption à l'égard de cette élection;
b) qu'il s'est produit une infraction à la présente loi pouvant influer sur le résultat de l'élection; ou
c) qu'une personne présentée comme candidat à l'élection ne possédait pas les qualités requises en l'espèce.

L'avocat de la demanderesse a plaidé que l'article 78(1) est clair et sans équivoque et que le mandat d'un chef est de deux ans à compter

of that person's election, subject only to a shortening of such term in one or more of the circumstances set forth in section 78(2), none of which came into existence in so far as the plaintiff is concerned, therefore her term is 2 years from September 29, 1970.

Counsel for the plaintiff referred to certain statutes[2], applicable to elections, wherein the legislature expressly limited the term of office of an individual elected to fill a vacancy to the unexpired term of the person who vacated the office, and he argued that Parliament was aware of such provisions and avoided including a similar provision in the *Indian Act*; and that no such provision is in the Act by implication. Counsel also referred to statutes governing the terms of office of Members of the House of Commons and of Legislative Assemblies.

Counsel for the defendants submitted that the words "vacant" and "vacancy", as used in the *Indian Act*, have a technical meaning in the context of statutes respecting elections and relate only to the unexpired portion of a term of office. I do not accept that view. I think that the words are used in their ordinary and natural meaning, *i.e.*, the fact of an office becoming vacant.

Counsel for the defendants also contended that the relevant provisions of the *Indian Act* contemplate general elections to elect an entire "council . . . consisting of a chief and councillors" (section 74(1)), with special elections to fill vacancies where an office becomes vacant more than 3 months before the date when another election for the entire council would ordinarily be held (section 78(4)), without any provision or implication that a chief or councillor elected at such a special election can carry his term over and beyond the next general election; and that this is consistent with the form of government prevailing generally in Canada: also that any such carry over might result in a council consisting of several persons with staggered terms ending at different dates that would require a continuous series of elections to fill vacancies and lead to destruction of the periodical general election concept.

de la date de son élection, sauf révocation dans les quelques cas cités à l'article 78(2). Or, aucun de ces cas ne s'étant manifesté, en autant que la demanderesse est concernée, il s'ensuit que son mandat est de deux ans à compter du 29 septembre 1970.

L'avocat de la demanderesse a cité certaines lois[2], applicables aux élections, où la législature limite expressément le mandat d'une personne élue pour remplir une vacance à la durée du mandat en cours de la personne ayant quitté le poste. Il a prétendu que le Parlement, connaissant l'existence de telles dispositions, avait évité d'en inclure une semblable dans la *Loi sur les Indiens*; on ne peut pas dire non plus qu'une telle disposition est implicite dans la Loi. De plus, il a cité certaines lois régissant les mandats des membres de la Chambre des Communes et des Assemblées législatives.

L'avocat des défendeurs a prétendu que les mots «vacant» et «vacance», tels qu'utilisés dans la *Loi sur les Indiens*, ont, dans le cadre des lois sur les élections, un sens technique, c'est-à-dire qu'ils ne se rapportent qu'à la durée restant à courir d'un mandat. Je ne partage pas cette opinion. J'estime que les mots sont employés dans leur sens ordinaire et courant, c'est-à-dire le fait qu'un poste devienne vacant.

L'avocat des défendeurs a aussi affirmé que les dispositions pertinentes de la *Loi sur les Indiens* prévoyaient des élections générales pour tout un «conseil . . . comprenant un chef et des conseillers» (article 74(1)), de même que des élections spéciales lorsqu'un poste devient vacant plus de trois mois avant la date de la tenue ordinaire d'une nouvelle élection (article 78(4)), sans aucune disposition expresse ou implicite portant qu'un chef ou conseiller élu lors d'une telle élection spéciale puisse poursuivre son mandat au-delà de la prochaine élection générale; que cela est conforme au système de gouvernement qui prévaut généralement au Canada; et qu'une procédure différente pourrait contribuer à la formation d'un conseil de plusieurs personnes disposant de mandats échelonnés se terminant à des dates différentes, ce qui occasionnerait une série ininterrompue d'élections pour remplir les vacances et, de là, la disparition du concept d'élections générales périodiques.

The provision in section 78(1) that chiefs and councillors hold office for 2 years is subject to the other provisions of the section, including subsection (4) which provides for a "special election" to fill a vacancy where the office becomes vacant more than 3 months before "the date when another election would ordinarily be held." I think that this other election that would "ordinarily be held" means a general election to elect the council. I think that the Act contemplates general elections periodically to elect an entire council, with special elections to fill vacancies that occur more than 3 months before the next general election would ordinarily be held, and that the term of office of a person elected at any such special election does not carry over beyond the next general election. I also consider that the purpose of section 78(2) is not to prescribe or define the duration of the terms of office of chiefs or councillors, but is to declare situations in which the office becomes vacant. It is not an exhaustive section in that respect, for the office may become vacant, as it did in the present case, by action of the Governor in Council under section 79 setting aside an election. We must look to other provisions to find the duration of the terms of offices of the chief and councillors whose offices do not become vacant under section 78(2) or section 79.

The relevant provisions of the *Indian Act* respecting elections are not passed by Parliament in a vacuum, but in a framework of circumstances so as to deal with a known state of affairs. It is an Act that by virtue of the *Interpretation Act* shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The fact that Parliament did not include a provision expressly limiting the term of a chief or councillor, elected at a special election to fill a vacancy, to the unexpired portion of the term of the person who vacated the office, does not necessarily lead to a conclusion that the newly elected person's term will carry on beyond the next general election for the council of the band. Reading the sections in their context and

La disposition de l'article 78(1) selon laquelle les chefs et conseillers détiennent un mandat de deux ans est sujette aux autres dispositions de l'article, y compris le paragraphe (4) qui prévoit une «élection spéciale» afin de remplir une vacance lorsque le poste devient vacant plus de trois mois avant «la date de la tenue ordinaire de nouvelles élections». J'estime que cette autre élection qui serait ordinairement tenue signifie une élection générale pour tout le conseil. A mon avis, la Loi prévoit qu'il y aura des élections générales périodiques pour élire un conseil au complet, en plus d'élections spéciales pour remplir les vacances qui surviennent plus de trois mois avant la tenue des prochaines élections générales, et que le mandat d'une personne élue lors d'une élection spéciale ne s'étend pas au-delà de la prochaine élection générale. J'estime aussi que l'objet de l'article 78(2) n'est pas d'ordonner ou de fixer la durée des mandats des chefs ou des conseillers, mais de définir les cas où leurs postes deviennent vacants. A cet égard, ce n'est pas un article complet puisqu'un poste peut devenir vacant, comme dans la présente affaire, à la suite d'une décision du gouverneur en conseil, rendue en vertu de l'article 79, annulant une élection. Nous devons examiner d'autres dispositions afin de déterminer la durée des mandats du chef et des conseillers dont les postes ne deviennent pas vacants en vertu de l'article 78(2) ou de l'article 79.

Le Parlement n'a pas adopté les dispositions pertinentes de la *Loi sur les Indiens* relatives aux élections hors de tout contexte, mais dans un cadre donné et pour atteindre un but précis. En vertu de la *Loi d'interprétation*, c'est une Loi censée réparatrice et qui doit s'interpréter de la façon juste, large et libérale la plus propre à assurer la réalisation de ses objets.

Le fait que le Parlement n'ait pas prévu une disposition limitant expressément le mandat d'un chef ou d'un conseiller, élu par une élection spéciale pour remplir une vacance, à la durée restant à courir du mandat de la personne ayant quitté le poste, ne mène pas forcément à la conclusion que le mandat de la personne nouvellement élue se poursuivra au-delà de la prochaine élection générale tenue pour former

prevailing circumstances I think that Parliament intended to provide and did in the Act provide for a system of periodical general elections to elect an entire council, with special elections under section 78(4) to elect persons to fill vacancies.

In my view, this interpretation of the provisions is as consistent with the autonomy of local bands as is the plaintiff's contention that the term of her office as chief is 2 years from the date of her election on September 29, 1970.

Having regard to the claim in the statement of claim for a declaratory order confirming the two year term of office of the plaintiff from the date of her election on September 29, 1970, and the form of the questions in the stated case, which are related specifically to her said election on that date, my answers will be in respect of the term of office given to her by virtue of that election, and the answers are "no" to question A and "yes" to question B in the stated case.

As agreed by the parties, the costs of the entire action and stated case will be awarded to the defendants.

---

[1] Pursuant to Rule 475.

The references in the stated case and argument are to sections of the *Indian Act*, R.S.C. 1970, c. I-6, which are not significantly different from the corresponding sections of the *Indian Act*, R.S.C. 1952, c. 149.

[2] *Towns Act* of Nova Scotia, R.S.N.S. 1967, c. 309; *Municipal Act*, R.S.N.S. 1967, c. 192.

le conseil de la bande. Après lecture des articles dans leur contexte et compte tenu des circonstances, j'estime que le Parlement prévoyait, et il l'a établi par la Loi, élaborer un système d'élections générales périodiques pour élire un conseil en entier, ainsi que la tenue d'élections spéciales en conformité de l'article 78(4) pour élire des personnes qui rempliront les vacances.

A mon avis, cette interprétation des dispositions en cause cadre aussi bien avec l'autonomie des bandes locales que la prétention de la demanderesse selon laquelle son mandat au poste de chef est de deux ans à compter de la date de son élection, le 29 septembre 1970.

Considérant la demande contenue dans l'exposé relativement à une ordonnance déclaratoire confirmant le mandat de deux ans de la demanderesse à compter de la date de son élection, le 29 septembre 1970, et la formulation des questions de l'exposé qui se rapportent précisément à son élection à cette date, mes réponses porteront sur le mandat qui lui a été confié conformément à cette élection. Je réponds par la négative à la question A de l'exposé et par l'affirmative à la question B.

Comme l'ont convenu les parties, les dépens de l'action et de l'exposé sont accordés aux défendeurs.

---

[1] Conformément à la Règle 475.

Les références de l'exposé et du plaidoyer renvoient aux articles de la *Loi sur les Indiens*, S.R.C. 1970, c. I-6, qui sont très près des articles correspondants de la *Loi sur les Indiens*, S.R.C. 1952, c. 149.

[2] *Towns Act* of Nova Scotia, R.S.N.S. 1967, c. 309; *Municipal Act*, R.S.N.S. 1967, c. 192.

Re Wilson (1954) 12 W.W.R. (N.S.) 676 44

Indians - Right to be registered as member of Band - Name included in original Band Membership List as infant of female member of Band - Right also to be included as illegitimate child of such female - His own previous evidence of paternity without probative value.