



Buffalo v. Canada (Registrar of Indian and Northern Affairs), 2005 ABQB 372 (CanLII)

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Court of Queen's Bench of Alberta

Citation: Buffalo v. Canada (Registrar of Indian and Northern Affairs), 2005 ABQB 372

Date: 20050608

Docket: 9803 04631

Registry: Edmonton

Between:

**Chief Florence Buffalo, Dolphus Buffalo, Victor Buffalo, Emil Cutknife,
Lena Cutknife, Frances Green, Barbara B. Louis, Jim Omeasoo,
Claude Saddleback, Rose Saddleback, Vern Saddleback,
Trevor Swampy, Nancy Yellowbird,
duly elected Chief and Council of the Cree Nation and the
Samson Cree Nation**

Appellant

- and -

Registrar of Indian and Northern Affairs Canada

Respondent

- and -

Vincent Randall Greg Rainbow Cross the Land Boczek

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice Eric F. Macklin**

I Introduction

[1] This is an appeal by the Samson Cree Nation of a decision by the Acting Registrar of Indian and Northern Affairs Canada to register Vincent Randall Greg Rainbow Cross The Lands Boczek in the Indian Register and the Band membership list of Samson Cree Nation.

II Facts

[2] The Respondent Vincent Randall Greg Rainbow Cross The Lands Boczek (“Boczek”) was born on September 24, 1971. His natural mother, Betty Lou Johnson, was born on November 27, 1946. Neither Betty Johnson nor the natural father of Boczek was an Indian as defined by the *Indian Act*, R.S.C. 1970, c. I-6 at the time of Boczek’s birth.

[3] Betty Johnson divorced Boczek’s natural father and on October 8, 1981, she married Percy Noel Johnson, a registered Indian and a member of the Samson Cree Nation (“Samson”). Pursuant to the *Indian Act* as it then was, Betty Johnson acquired Indian status and Samson Band membership at the time of marriage.

[4] On May 7, 1996, and pursuant to the *Adult Adoption Act*, S.A. 1994, c. A-2.3 of Alberta, Percy Johnson adopted Boczek. At that time, Boczek was 24 years old. On June 3, 1996, Boczek advised the Acting Registrar of Indian and Northern Affairs Canada (“Registrar”) that he was the adopted son of Percy Johnson and wished to be added to the Samson membership list.

[5] By letter dated September 13, 1996, the Registrar advised Boczek that because his adoption was finalized after he had reached the age of majority, it was necessary to confirm that he had been “in the custody of, brought up and supported by [his] adoptive parents as their own child while [he was] a minor and that this relationship continued until [he] became self-supporting” before consideration could be given to his entitlement to registration under the *Indian Act*. The Registrar advised Boczek that the following documentation was required:

1. Affidavits completed by his mother (Betty Johnson) and adoptive father (Percy Johnson) in which they state whether they raised Boczek as their own child while he was under the age of 18.
2. Affidavits from at least two close friends, relatives or neighbours of his mother and adoptive father who could state of their own knowledge whether he was in the care and custody of his mother and adoptive father while still a minor and whether they raised and supported him as their own child while he was a minor.

[6] The Registrar’s request for further information was in accordance with the policy of Indian and Northern Affairs Canada regarding *de facto* adoptions. The policy was stated to be followed by the Adoption Unit of the Indian Registration and Band Lists Directorate when processing applications for registration under the *Indian Act* received from individuals who were adopted through the courts as adults. That policy states in part:

Most children are adopted while they are still minors. In some cases they are adopted in all practical senses of the term while they are minors but the formal court process is delayed

until they are adults. These are frequently referred to as *de facto* adoptions. The effect in law is the same as the adoption of persons while they are still minors.

There is no longer a universal requirement in provincial law that judges granting an Adoption Order to an adult adoptee must be satisfied that a *de facto* adoption situation existed. Therefore, before individuals who are adopted as adults can acquire entitlement to Indian status and band membership through adoption, it must be established that the adoptee was adopted in all practical senses of the term by the adoptive parents while still a minor. This is consistent with the policy in custom adoption situations where the adoptee must be under the age of majority at the date of the adoption.

A *de facto* adoption will be considered to have occurred if,

the adoptee has been in the custody of, brought up and supported by the adoptive parents as their own child while the adoptee was a minor and this relationship continued until the adoptee became self-supporting . . .

[7] On February 26, 1997, Boczek provided very brief Statutory Declarations from the following persons:

1. Percy Noel Johnson (adoptive father)
2. Betty Lou Johnson (natural mother and spouse of adoptive father)
3. Gordon Lee (friend of Percy Johnson)
4. Elmer Baptiste (friend of Percy Johnson)
5. Emil Johnson (brother of Percy Johnson)
6. Lilly Webb (sister of Betty Johnson)
7. Diane de Lamarre (friend of Betty Johnson)

The Statutory Declarations of Percy Johnson and Betty Johnson were identical on all substantive facts and the remaining Statutory Declarations were also identical on all substantive facts.

[8] The Statutory Declarations confirmed that Boczek came to live with his mother and adoptive father as their own child and was always in their care and control as a minor. They also confirmed that he lived with them, was raised by them and was supported by them as their own child from 1979 or 1980 until he reached the age of majority.

[9] On March 11, 1997, the Registrar registered Boczek as an Indian in the Indian Register under Registry No. 4440319801 and as a member of the Samson Band in accordance with subsections 6(1)(f) and 11(2)(b) of the *Indian Act*.

[10] On May 2, 1997, Samson Cree Nation's Council passed Band Council Resolution BCR No. 1997-98-774-03 authorizing a protest of the addition of Boczek (and his sister, Angela Alphonse, who is not a party to this appeal) to the Samson Band List. The resolution is prefaced,

in part as follows:

AND WHEREAS it would appear that neither of these individuals are entitled to membership or status;

AND WHEREAS the Department of Indian Affairs and Northern Development will not release to the Samson Cree Nation any information concerning these individuals or other persons added to the Samson Cree membership list;

AND WHEREAS each of the aforesaid individuals would appear to have been adopted as

adults for the sole purpose of gaining status and membership into the Samson Cree Nation . . .

[11] On May 28, 1997, Samson submitted a formal protest to the addition of Boczek to the Samson Band List pursuant to s. 14.2 of the *Indian Act*. The grounds of protest were stated as follows:

1. Boczek is not entitled to be added to the Indian Register and therefore is not entitled to be added to the Samson Band List as neither of his parents are of Indian ancestry.
2. Provincial legislation, being the *Adult Adoption Act* (Alberta), can have no effect on the status of an Indian pursuant to the *Indian Act* (Canada).
3. Section 6(1)(f) of the *Indian Act* (Canada) refers to “parents”, not “adoptive parents”.
4. Boczek was adopted as an adult, being over the age of 18 years; and accordingly, is not included in the definition of “child” in s. 2 of the *Indian Act* as the use of the word in that section is synonymous with the word “infant” or “minor”.

[12] On June 11, 1997, Samson provided the Registrar with a brief in support of its filed protest and setting out its position in respect of Boczek’s entitlement to Samson Band membership. On June 16, 1997, the Registrar confirmed that she had accepted the protest as valid and would conduct an investigation and render a decision after the evidence had been considered. She also forwarded a copy of the department’s policy entitled *Adult De Facto Adoptions*. The Registrar indicated in her letter to counsel for Samson:

Should you have any questions or evidence which is relevant, please do not hesitate to write to me including the copies of any documents which will assist in the determination of this protest. . .

[13] Samson did not respond to the letter of June 16, 1997 from the Registrar.

[14] By letter dated June 26, 1997, the Registrar informed Samson of the results of her investigation. The letter states that Boczek was added to the Samson Band List in accordance with s. 11(2)(b) of the *Indian Act* as the child of two parents who had Band membership with the Samson Band. It also confirmed the following:

- a) Boczek was adopted by Percy Noel Johnson pursuant to an Adoption Order dated May 7, 1996;
- b) Betty Johnson remained a parent following the adoption;
- c) Boczek’s name was added to the Samson Band List on March 11, 1997;
- d) The Registrar had evidence on file that Boczek was in custody of, brought up and supported by his adoptive parents as their own child while he was a minor and their relationship continued until he became self-supporting;
- e) The Registrar was satisfied that, for all intents and purposes, Boczek became the adopted child of Percy and Betty Johnson as a minor and that his legal adoption in 1996 was a recognition of the parent-child relationship which existed between him and his parents.

[15] The letter from the Registrar further states:

Therefore, based on the evidence outlined above, I am satisfied that Vincent Randall Greg Rainbow Cross The Lands Boczek . . . [was] correctly added to the Samson Band List. Consequently, I do not propose to uphold the Samson Band’s protest.

[16] The letter further provided that before rendering a final decision relative to the protest, the Registrar would afford Samson an opportunity to refute any or all of the points mentioned in her letter. She delayed her

final decision for 60 days stating that if she did not hear from Samson within that time, she would proceed to render her decision relative to the protest.

[17] By letter of July 30, 1997, counsel for Samson made further submissions to the Registrar. Samson's counsel submitted that one cannot gain Indian status by the provisions of provincial legislation, the definition of "child" in the *Indian Act* excludes an adopted adult, and provincial legislation cannot be referred to in determining who is a "parent" under the *Indian Act*. Further, Samson's counsel submitted that it would be impossible for the Registrar to determine that anyone was subject to "custom adoption" without inquiring as to Samson's "custom" concerning adoption. No further factual evidence or documents were provided by Samson but counsel noted that the policy regarding *de facto* adoptions appeared to require Affidavits in support of the Registrar's position of "custom adoption", and a request was made from the Registrar for copies of the "information and evidence submitted to the Registrar in support of the application [by Boczek] for registration and membership in the Samson Cree Nation."

[18] On September 25, 1997, the Registrar stated in a letter to Samson's counsel:

I agree that if an individual's band membership is based upon custom adoption, it would be necessary to consult the band to determine whether [sic] a parent/child relationship exists. However, in the case of...Vincent, the parent/child relationship has been established [sic] by a court of law. Therefore, we are satisfied that consultation with the Samson Cree Nation was not required in this present case.

She advised that she was satisfied that Boczek was "legally adopted and therefore entitled to Band membership that comes from [his] adoptive parents." She then stated that:

In light of the above and based on the details of my investigation outlined in my letter of June 26, 1997, my decision is to not uphold the Samson Cree Nation's protest.

[19] The Registrar also advised that she would not release the evidence and documents in support of her decision as the information was protected under the *Privacy Act*.

[20] On September 26, 1997, the Registrar advised Boczek that:

In accordance with subsection 14.2(5) of the *Indian Act* I have rendered a decision on September 25, 1997 which was to not uphold the Band's protest.

Therefore, your name will remain on the Indian Register and on the Samson Cree Nation Band List.

[21] On March 17, 1998, Samson issued a Notice of Appeal from the decision of the Registrar pursuant to s. 14.3 of the *Indian Act*.

[22] On July 29, 1998 the Registrar filed the record of proceedings with the Court of Queen's Bench of Alberta as required by s. 14.3(3) of the *Indian Act*. The record included all documentary evidence considered by the Registrar in arriving at her decision, including the Statutory Declarations referred to in paragraph 7 above. A complete copy of the record was then provided to Samson or its counsel in August 1998.

III Issues

- [23] A. What is the standard of review on an appeal from a decision of the Registrar pursuant to the *Indian Act*?
- B. Is the appeal by Samson limited to the issue of Boczek's Band membership as distinct from

his registration as an Indian?

- C. Can an adult adoption by an Indian of a non-Indian pursuant to provincial legislation be the basis for granting Indian status and Band membership under the *Indian Act*?
- D. Did the Registrar deny Samson natural justice and procedural fairness by refusing to release evidence and documents provided by Boczek and in failing to consult with Samson regarding Boczek's application for membership?

IV Discussion

A. Standard of Review

[24] Samson appeals the decision of the Registrar pursuant to s. 14.3 of the *Indian Act*, R.S.C. 1985, c. I-5. The relevant provisions of that section provide:

14.3(1) Within six months after the Registrar renders a decision on a protest under s. 14.2,

(a) in the case of a protest in respect of the Band List of a band, the council of the band, the person by whom the protest was made, or where the person in respect of whose name the protest was made or that person's representative, or

(b) in the case of a protest in respect of the Indian Register, the person in respect of whose name the protest was made or that person's representative,

may, by notice in writing, appeal the decision to a court referred to in subsection (5).

(2) Where an appeal is taken under this section, the person who takes the appeal shall forthwith provide the Registrar with a copy of the notice of appeal.

(3) On receipt of a copy of a notice of appeal under subsection (2), the Registrar shall forthwith file with the court a copy of the decision being appealed together with all documentary evidence considered in arriving at that decision and any recording or transcript of any oral proceedings related thereto that were held before the Registrar.

(4) The court may, after hearing an appeal under this section,

(a) affirm, vary or reverse the decision of the Registrar; or

(b) refer the subject matter of the appeal back to the Registrar for reconsideration or further investigation.

(5) An appeal may be heard under this section

...

(b) in the Province of . . . Alberta, before the Court of Queen's Bench . . .

[25] On its plain meaning, s. 14.3 provides that an appeal from the Registrar is in the nature of a true appeal and not a hearing *de novo*. The material to be considered by the Court is that which is contained in the record filed by the Registrar pursuant to s. 14.3(3). As a true appeal, findings of fact will generally not be set aside unless they are proven to be clearly wrong or unreasonable as the Registrar is entitled to curial deference due to her particular expertise. She is often "required to make findings of fact, some of which are complex, which undoubtedly draw upon her technical knowledge and accumulated experience. . . ." (*Wilson*

v. Canada (Indian Registry, Registrar) 1999 CanLII 5333 (BC S.C.), (1999), 71 B.C.L.R. (3d) 145 at para. 20 (S.C.).

[26] The standard of review with respect to matters of law and the application of law to the facts is the standard of correctness (*Tuplin v. Canada (Indian and Northern Affairs)*, 2001 PESCTD 89 (CanLII), [2002] 1 C.N.L.R. 350 (P.E.I.S.C.T.D.)).

2. Standing

[27] The Registrar says that the *Indian Act* does not provide Samson with the standing to protest the addition of Boczek's name to the Indian Register. Further, as that is the only basis for Samson's protest in respect of his addition to the Band List, Samson has no standing to protest his inclusion or addition to the Band List either.

[28] The Registrar relies upon s. 14.2 of the *Indian Act*, which provides:

- 14.2 (1) **Protests** – A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds therefor.
- (2) **Protest in respect of Band List** – A protest may be made under this section in respect of the Band List of a band by the council of the band, any member of the band or the person in respect of whose name the protest is made or that person's representative.
- (3) **Protest in respect of Indian Register** – A protest may be made under this section in respect of the Indian Register by the person in respect of whose name the protest is made or that person's representative.

[29] The Registrar concludes that a protest may be made in respect of the Band List by the band, and in respect of the Indian Register by the person in respect of whose name the protest is made.

[30] The Registrar further argues that Samson has no standing to appeal a decision from the Registrar as a result of s. 14.3 of the *Indian Act*, set out above, which uses similar language.

[31] In other words, the Registrar says that the Samson Band is not “the person in respect of whose name the protest is made or that person's representative” and the Registrar had no jurisdiction to accept the protest as “valid”. The Registrar submits that the acceptance by the Registrar of the protest as “valid” referred only to the validity of the procedural steps taken and not to the substantive nature of the protest. Nevertheless, the Registrar accepted the letter of protest from Samson for the purposes of initiating an investigation.

[32] Although the addition of Boczek's name to the Indian Register forms the basis for Samson's protest in respect of the Band List, the Registrar argues that Samson should not be entitled to do indirectly what it is not entitled to do directly, that being to challenge the addition of Boczek's name to the Indian Register.

[33] Samson did not have control of its Band List in 1997. The *Indian Act* provides in s. 9:

- 9.(1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

...

- (3) The Registrar at any time may add to or delete from a Band List maintained in the

Department 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 the List.

[34] Samson argues that a determination of its standing to protest both the registration of Boczek as an Indian and his addition to the membership list of Samson necessitates a consideration of s. 11(2)(b) of the *Indian Act*. That section provides:

11.(2) . . . where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band . . .

(b) if that person is entitled to be registered under paragraph 6(1)(f) . . . and a parent referred to in that provision is entitled to have his name entered in the Band List . . .

[35] Accordingly, argues Samson, the fact that the registration of Boczek pursuant to s. 6(1)(f) entitles him to have his name entered on the Samson Band List for no reason other than his registration allows Samson to attack directly the addition of Boczek in the Indian Register in order to protest his addition to the Band membership list.

[36] In my view, Samson should and does have standing to protest the addition of Boczek's name on the Indian Register in order to protest his inclusion on the Band List. Quite simply, and while it certainly appears to give Samson a method by which it can indirectly protest that which it cannot protest directly, the opposite conclusion would render the words "the inclusion or addition of the name of a person" in s. 14.2 (1) meaningless. In other words, a determination of the rights of Samson by a restrictive interpretation of s. 14 without any consideration for the balance of the Act and particularly s. 11, would result in a successful application for addition to the Indian Register by Boczek being immune from challenge under the *Indian Act* by anyone who would realistically wish to challenge it, with the consequent result being an inability by Samson to challenge his addition to the Band List, even though entitlement to registration is the basis for inclusion on the List.

[37] Further, the interpretation proposed by the Registrar would not ensure the attainment of the legislation's objects. The addition of an individual's name to the Band List may have significant impact on the Band and impose a myriad of obligations on it respecting the "new" member. It would be manifestly unfair and contrary to the interests of justice to prohibit a challenge to the addition of that person's name to the Indian Register or a Band List by a party with a vested interest in, and possible obligations arising from the ultimate result.

[38] Therefore, in the limited circumstances of this case, being the registration of an individual pursuant to s. 6(1)(f) and the resulting inclusion of that person on a Band List, the band must have the standing to protest the addition of that person's name to the Indian Register. In my view, s. 14.2(2) is ambiguous in this respect and should be interpreted so as to give meaning to the entire section.

[39] Accordingly, it is my view that Samson does have standing to protest the addition of Boczek's name to the Indian Register as the basis for the addition of his name to the Band List.

[40] Following the same reasoning, I would hold that Samson has standing to appeal a decision of the Registrar notwithstanding the wording of s. 14.3(1)(b) of the *Indian Act* which also restricts the right of appeal to the person in respect of whose name the protest was made in respect of the Indian Register. That is, Samson is entitled to appeal the decision of the Registrar pursuant to s. 14.3(1)(a) with respect to the addition of Boczek's name to the Band List on the grounds that the Registrar erred in adding his name to the Indian Register.

[41] The Quebec Court of Appeal recently heard a case with some similar facts to the one at bar in *Innu Takuaiikan Uashat mak Mani-Utenam v. Noël*, 2004 CanLII 1230 (QC C.A.), [2004] 4 C.N.L.R. 66. In that case, the Registrar added the name of Noël to the Band List of the Uashat Band. The Band protested the

addition of the name to its list pursuant to s. 14.2 of the Act contending that Noël's adoption resulted from false statements. The Registrar rejected the Band's protest. The appeal by the Band from the decision of the Registrar and the affirming judgment of the superior court was allowed on the basis that the adoption judgment of Noël was obtained by fraud. As in the case at bar, Noël was an adult at the time of the adoption judgment and the Registrar conducted an investigation to confirm that a *de facto* adoption had occurred when he was a minor. The Quebec Court of Appeal allowed the appeal and referred the matter back to the Registrar stating that her refusal to hear evidence from the Band as to the legitimacy of the adoption and essentially hiding behind the adoption judgment amounted to a failure to exercise the jurisdiction conferred upon her by the legislation to conduct a complete investigation.

[42] The Court stated in that case at para. 50:

There is no doubt that the addition of Jean-Guy Noël's name to the Band List resulted in obligations for the Band and that the legislator gave it recourse - a protest - to enable it to contest the irregular addition of a person's name to the Band List. If, as the Uashat Band claims, the adoption judgment was obtained on the basis of false statements, it would be wholly unfair and even contrary to the interests of justice to prohibit a challenge to it, for the purposes of the application of the Act.

[43] Clearly, the protest by the Band on the basis that the adoption judgment was obtained by fraud was a protest that went directly to the issue of Noël's status to be added to the Indian Register and ultimately, to the Band List. As in the case at bar, the Registrar did require Noël to provide evidence in addition to the adoption judgment establishing that he had been the object of a *de facto* adoption by his parents. Of note, there was no apparent dispute in Noël as to the standing of the Band to protest or appeal the addition of Noël to the Band List.

[44] Accordingly, Samson does have standing to protest the addition of Boczek's name on the Indian Register as the basis for inclusion on the Band List as well as the right to appeal an unfavourable decision of the Registrar.

C. Did the Registrar err in allowing the addition of Boczek's name to the Indian Register and the Band list?

[45] Samson argues that the decision of the Registrar was wrong. Essentially, it says that the adoption of Boczek as an adult cannot confer upon him those rights conferred upon either natural Indians or upon Indians adopted when they are infants or minors.

[46] Boczek was adopted pursuant to the provisions of the *Adult Adoption Act* of Alberta. Section 6(1)(f) of the *Indian Act* provides that a "person" is entitled to have his name included in the Indian Register if that person is a person both of whose "parents" are entitled to be registered under this section.

[47] The *Adult Adoption Act* s. 9(1) provides that when an adoption order is made, the petitioner is the parent of the adopted person as if the adopted person had been born to the petitioner.

[48] However, Samson argues that provincial legislation cannot supercede federal legislation, and since there is no definition of "parent" in the *Indian Act*, "parent" in s. 6(1)(f) must be interpreted in keeping with the definition of "child" contained in s. 2(1):

2.(1) 'child' includes a legally adopted child and a child adopted in accordance with Indian custom . . .

[49] The essence of Samson's argument is that the phrase "legally adopted child" in the *Indian Act* does not include a person adopted as an adult. Samson argues that the word "child" in s. 2 is synonymous with the word "infant" or "minor", either of which term defines a person under the age of 18 in Alberta. In other words, Samson says that a "legally adopted child" in s. 2 of the *Indian Act* actually refers to a legally adopted

infant or minor and not an adult adoptee like Boczek.

[50] The *Adult Adoption Act* was proclaimed in Alberta on January 1, 1995. Prior to that time, a person over the age of 18 years could not be adopted. The legislation governing adoptions prior to the proclamation of the *Adult Adoption Act* (the *Child Welfare Act* and its successor, the *Child, Youth and Family Enhancement Act*) only permitted adoptions of children under the age of 18 years and defined children as persons under the age of 18 years.

[51] Samson argues that the change in provincial legislation to allow for adoptions of adults (persons 18 years of age or older) cannot have the effect of changing the meaning of the phrase “legally adopted child” in the *Indian Act*. That is, until January 1, 1995, a legally adopted child under the *Indian Act* could only mean someone under the age of 18 in Alberta.

[52] Samson relies upon the decision of the Alberta Court of Appeal in the case of *Broddy v. Alberta (Director of Vital Statistics)*, [1982] A.J. No. 544. In *Broddy*, Kerans J. stated at paragraph 34:

And, in Canada, one level of government cannot impose its choice of meaning on a statute which was enacted by the other level, because this would amount to an amendment to, and therefore an express contradiction of, that statute.

[53] Kerans J. went on to emphasize in paragraph 38 that provinces “do not define words in federal law unless that is the federal legislative intention.” In other words, provincial law is considered in the context of federal legislation when intended so by Parliament. He cites as a possible example a recent legislative use by Parliament of the word “child” which may be construed to include an adopted child as defined by provincial law.

[54] Indeed, I believe this distinction to be important but not for the reason suggested by Samson. Different provinces across Canada define the term “child” in legislation in various ways. For example, pursuant to British Columbia’s adoption legislation, a child is an unmarried person under the age of 19 (*Adoption Act*, R.S.B.C. 1996, c. 5, s. 1, “child”). Clearly, the federal *Indian Act* was intended to apply across the country and, by necessity, a legally adopted “child” under that legislation according to the definition asserted by Samson may be different depending upon the province considering the section. Furthermore, definitions in various provinces change as legislators view the requirements at a particular point in time. In my view, it was never intended that the *Indian Act* be read so as to restrict its applicability to provincial legislative definitions as they existed at the time of proclamation of the *Indian Act* or only in situations where new legislation does not amend or contradict it. Had Parliament intended that the term “child” be restricted to particular age ranges by reference to provincial legislation existing at that time, it could easily have incorporated such a provision into the definition of “child” in s. 2(1).

[55] In any event, Parliament avoided disparate treatment based on age by using the term “person” without qualification in s. 6(1)(f). The term “child” is used throughout the Act, but not in s. 6. This would suggest that the federal legislators considered the relationship of the parties to be the sole criterion, regardless of the age of the person seeking to be registered.

[56] Further, it is not unusual for legislation dealing with the status of adopted persons to refer to them as “children”, regardless of age. For example, the Alberta *Adoption Act* uses the term “child” to refer to the adopted person (see for example, s. 9) which, by reference to the whole of the Act, can mean only an adult child.

[57] Samson referred to a number of cases where courts have held that the Indian status of Indian children adopted by non-Indian parents is not affected by provincial adoption legislation. I do not find these cases to be applicable or helpful. The issue in the present case is not loss of Indian status, but entitlement to registration.

[58] Regardless of Boczek's age, he remained the child of Betty Johnson. When he was legally adopted by Percy Johnson in accordance with the provisions of the *Adult Adoption Act* of Alberta, he became the lawful child of both Percy Johnson and Betty Johnson.

[59] While the most important factor in the determination by the Registrar was that Boczek had been legally adopted by Percy Johnson, the policy on adult adoptees required her to also consider whether a *de facto* adoption of him had occurred while he was a minor. The Registrar required Boczek to provide evidence that he had been in the custody of, brought up and supported by his adoptive parents as their own child while he was a minor and that the relationship continued until he became self-supporting. She required him to provide supporting affidavits.

[60] The Registrar did obtain the requisite supporting documentation from Boczek and upon being satisfied that there had been a *de facto* adoption of Boczek while he was a minor, she allowed his application to be added to the Indian Register and the Band List, based on his legal adoption. Contrary to the early submissions of Samson to the Registrar, it was not relevant to her whether there had been a "custom adoption" of Boczek by Percy Johnson nor was it important for her to consult Samson as to its custom concerning adoptions. The Registrar was satisfied that an actual legal adoption had occurred and her investigation into whether a *de facto* adoption existed while Boczek was a minor was to ensure that the actual adoption was not a fraudulent attempt to gain benefits from band membership that Boczek would not otherwise be entitled to obtain. Such a result would have been contrary to the purposes of the *Indian Act*.

[61] Finally, it should also be noted that the *Noël* case involved an adult adoption in the province of Quebec. There appeared to be no dispute as to the entitlement of an adult adoptee to be added to a Band List but only whether a fraud had been perpetrated in the adoption procedure.

[62] I find that the Registrar did not err in adding Boczek to the Indian Register on the basis of his status as a person who had been legally adopted by Percy Johnson.

D. Procedural Fairness

[63] While this application is in the nature of a true appeal and therefore restricted to a review of the Registrar's record, an appellate court can always address matters of procedural fairness before a tribunal on matters of procedure and process (*Tuplin*, supra, at para. 16).

[64] Samson submits that the Registrar breached her duty of procedural fairness in failing to provide to Samson copies of the Statutory Declarations she had received, prior to rendering her decision.

[65] Boczek submitted his application to be added to the Indian Register and the Band List by letter dated June 3, 1996. As mentioned above, the Registrar noted that the adoption was finalized after Boczek reached the age of majority and advised Boczek of the necessity for him to provide evidence that he was in the custody of, brought up and supported by his adoptive parents as their own child while he was a minor and that the relationship continued until he became self-supporting. He was told that affidavit evidence was required from his mother and adoptive father as well as two close friends, relatives or neighbours who could verify the information provided by Boczek, his mother and adoptive father. The requirement by the Registrar was in accordance with the existing written policy of Indian and Northern Affairs Canada regarding adult *de facto* adoptions.

[66] The Registrar received six Statutory Declarations relating to the application by Boczek. She satisfied herself that a *de facto* adoption existed when Boczek was a minor and he could be registered as an Indian in the Indian Register and as a member of the Samson Band. Samson protested the addition of Boczek to the Samson membership list.

[67] The essence of Samson's protest was that Boczek was not entitled to be added to the Indian Register as neither of his parents was of Indian ancestry, and his adult adoption could not give him status.

[68] Through its legal counsel, Samson submitted a legal brief to the Registrar on June 11, 1997 supporting its position and by return on June 16, 1997, the Registrar advised that she would "conduct an investigation in due course and render a decision after the evidence has been considered." She provided a copy of the Department's policy on adult *de facto* adoptions which spelled out the information or evidence required from Boczek to support his application and further indicated that any questions or relevant evidence could be forwarded to her for her consideration. In a follow-up letter dated June 26, 1997, the Registrar clearly indicated the nature of the evidence she had received in support of Boczek's application and stated that the Department had evidence that Boczek was in the custody of, brought up and supported by his adoptive parents as their own child while he was a minor and that the relationship continued until he became self-supporting. She then indicated that the evidence satisfied her that Boczek was correctly added to the Samson Band List. However, she again gave Samson a 60 day window of opportunity to provide any further information that may be relevant to the issues.

[69] By letter dated July 30, 1997, counsel for Samson responded and issued a "demand that [Samson] receive copies of all of the information and evidence submitted to the Registrar in support of the application of [Boczek] for registration and membership in the Samson Cree Nation". Samson further accused the Registrar of failing to make any inquiries of Samson as to its "custom" concerning adoption and complained of its refusal to supply Samson with the evidence relied upon by Boczek.

[70] In response, the Registrar advised that she felt it unnecessary to consult the Band regarding the "parent/child relationship" as Boczek's Band membership was not based upon custom adoption. It was based upon the fact that Boczek was legally adopted and therefore entitled to Band membership. With respect to the evidence and documents requested by Samson, the Registrar took the position that "the information is protected under the *Privacy Act*. Therefore, it cannot be released."

[71] Samson now argues that the refusal by the Registrar to provide the evidence and information she relied upon in reaching her decision to add Boczek to the Indian Register and the Samson Band list was a breach of the principles of natural justice and procedural fairness. It acknowledges that the information contained in the Statutory Declarations of individuals attesting to the relationship between Boczek and his parents prior to the adoption was personal information as defined in the *Privacy Act* but argues that the personal information cannot be withheld where, to do so, would violate the principles of natural justice and where its disclosure would be with respect to the precise purpose for which it was obtained. That is, its disclosure would be for a use consistent with that purpose.

[72] Samson relies upon the provisions of the *Privacy Act*, [R.S.C. 1985, c. P-21](#) which provide:

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
- (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed:
 - (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
 - (b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

...

- (k) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada...

[73] Before considering any privacy constraints on the Registrar, or lack thereof, it is appropriate to consider the content of the duty of fairness on the Registrar in these circumstances.

[74] L'Heureux-Dubé J. set out a non-exhaustive list of factors to be considered in determining the content of the duty of fairness in the administrative context in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817: the nature of the decision, the statutory scheme, the importance of the decision to the individual or individuals affected, the legitimate expectations of the person challenging the decision, and the choices of procedure made by the agency itself (particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances).

[75] With respect to the first factor, the more the process resembles judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. For example, greater procedural protections are required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted. In this case, the process by which the Registrar made her decision was largely "administrative" in nature. Section 5 of the Act provides that an Indian Register will be maintained and ss. (3) provides that the Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled to have his name included in the Indian Register. Further, a protest triggers an investigation, not a hearing. The procedure does not resemble judicial decision making nor is there any hint of an adversarial court process.

[76] As for the statutory scheme, a protest may be made by a band within three years of the decision to add a name to the band list. When a protest is made, s. 14.2(5) provides that the Registrar shall "cause an investigation to be made into the matter and render a decision". The Registrar may receive evidence on oath, on affidavit or in any other manner, whether or not admissible in a court of law (ss. (6)). The Registrar is under no statutory duty to disclose information to the protestor, nor to base a decision on information provided by the interested parties. Although the decision is final and conclusive (ss. (7)), a right of appeal exists (s. 14.3). These provisions support the view that the Registrar's task is administrative in nature, and that the process was not intended to incorporate the protections of the trial model.

[77] It goes without saying that the decision made by the Registrar is of great personal importance to the applicant, going to the very core of his identity. While the band's definition of its community is affected, the most palpable effect on the band in most cases would be a communal economic one. The nature of the band's interests, in my view, does not mandate stringent procedural protections vis-à-vis the band.

[78] The band's legitimate expectation in terms of disclosure in these cases is to know the nature of the evidence relied on by the Registrar in her investigation. The Act is silent on disclosure, and the Registrar did not lead Samson to expect that it would receive more than that. The Band's legitimate expectations would also include an appreciation of the confidential nature of adoption-related information. At least two letters were sent by the Registrar to Samson, one of which included the Department's policy on adult *de facto* adoptions, informing Samson as to the nature of the evidence it had received. The correspondence did not indicate the names of the individuals from whom Statutory Declarations were received, though Samson must have known that two of the Statutory Declarations were from Percy Johnson and Betty Johnson (as required by the policy). Further, Samson was invited in both letters to provide any evidence that would be relevant to the determination of the issue by the Registrar before she rendered her final decision. Samson did not provide any information or evidence but rather submitted only its legal opinion.

[79] Finally, the statute in this case leaves to the Registrar great discretion to choose its own procedures.

The Registrar chose a procedure which would enable Samson to respond, while minimally infringing on, and thereby respecting, the privacy of Boczek and his family.

[80] As was stated in *Baker*, underlying all of these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[81] In my view, only minimal procedural protections in terms of disclosure to Samson were required for the Registrar's decision to be made in fair manner.

[82] Even if the Registrar did have a more than a minimal duty to disclose, I am not convinced that she breached the duty. In this case, Samson argues that it was the information or evidence contained in the Statutory Declarations that allowed the Registrar to determine that Boczek met the minimum requirements for registration on the Indian Register and the Samson membership list. In its notice of appeal from the decision of the Registrar filed on March 17, 1998, Samson identified the grounds of appeal as relating primarily to whether an adoption pursuant to the *Adult Adoption Act* of Alberta can provide a sufficient basis for an individual to be registered on the Indian Register; whether there was evidence of Boczek being adopted by custom; and the failure by the Registrar to make a proper inquiry of Samson as to its customs respecting adoptions.

[83] Therein lies the major difficulty with Samson's argument that it was denied natural justice or procedural fairness by the Registrar in her failing to provide copies of the Statutory Declarations supporting her decision. Those Statutory Declarations related to the issue of Boczek's legal adoption only insofar as they ruled out fraud. The Registrar accepted that the adoption was done properly and in accordance with the provisions of the *Adult Adoption Act*. It was a legal adoption. She was not concerned about whether a custom adoption occurred and, therefore, Samson's customs respecting adoptions were irrelevant.

[84] The purpose behind the policy of Indian and Northern Affairs Canada on *de facto* adoptions is to guide the Registrar in the proper investigation of an adult adoption when processing an application for registration to ensure that there was no fraudulent purpose behind the adoption and that the adoptee is legitimately entitled to registration as an Indian. In other words, the Registrar was obliged to ensure that a *de facto* adoption had occurred during the period in which the adoptee was a minor and that the formal adoption was not a sham done for the purpose of personal gain by the adoptee or others. As previously stated, at least two letters were sent by the Registrar to Samson, one of which included the Department's policy on adult *de facto* adoptions, informing Samson as to the nature of the evidence it had received. Samson did not indicate in any of its correspondence that it questioned the fact that Boczek had been raised by Percy and Betty Johnson. Accordingly, the documents in question need not have been disclosed by the Registrar pursuant to s. 8(2)(a) of the *Privacy Act* as the purpose for obtaining the evidence did not relate to the reasons why Samson wanted its production.

[85] Pursuant to s. 8(2)(k) of the *Privacy Act*, Samson could argue that the personal information must be disclosed to it for the purpose of "researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada . . ." In other words, because Samson was disputing the claim of Boczek that he was entitled to be added to the Indian Register and the Samson Band List, Samson was entitled to copies of the personal information under the control of the Registrar. Even assuming this section was intended to cover this situation, it is my view that the initial failure by the Registrar to comply with this section had no appreciable impact as she ultimately did provide disclosure well within the three year limitation for filing a protest and no further steps were taken by Samson to use the "new" information to further its protest or initiate a new protest on a different ground, such as fraud.

[86] Pursuant to s. 14.2(1) of the *Indian Act*, a protest may be made in respect of the addition of a name to the Indian Register or a Band List within three years after the addition. There is nothing in that section or the

Act to suggest that a prior unsuccessful protest will necessarily preclude a subsequent protest made on a new ground. In other words, should new information come to light relevant to the issues earlier determined by the Registrar, then there appears to be no reason why a new protest cannot be submitted within the three year window contemplated by s. 14.2 based on a new ground. In this case, Samson was provided with copies of all of the Statutory Declarations received by the Registrar when it was served with the Registrar's record in August 1998. At that point in time, it still had another two years within which to advance a new protest based on a new ground to the Registrar in respect of the addition of Boczek's name to the Indian Register and the Samson Band List.

[87] Finally, and while one can never be certain of obtaining leave to introduce further or new evidence in a matter that is considered as a true appeal and not a hearing *de novo* (see for example *Noël*, supra, at para. 30) and it cannot be expected that a party whose rights to natural justice and procedural fairness have been breached should be obligated to remedy the breach, it should be noted that this appeal was heard more than 7 years after the notice of appeal was filed and almost 7 years after the Registrar provided Samson with the record. No attempt was ever made to adduce further evidence nor was any suggestion made that further evidence was available at any time that might have been relevant to the issues decided by the Registrar. Nothing was provided on this appeal that would suggest the outcome might have been different had Samson had the Statutory Declarations prior to the decision being made.

[88] In the circumstances of this case, I find that there was no denial of Samson's right to natural justice or procedural fairness. The Registrar's duty of fairness did not extend to providing the Statutory Declarations to Samson. Even if it did, the duty was not breached as the basis of the decision by the Registrar was the valid legal adoption. Samson's "substantive" ground of protest was that the Registrar erred in law in adding Boczek on the basis of his legal adoption as an adult, or in failing to inquire as to Samson "custom" adoptions. I have found that the Registrar did not err on this basis. Any evidence of Band adoption custom would have been irrelevant to that issue, and she pointed this out to Samson in her correspondence. Her investigation into the *de facto* adoption was for the simple and proper purpose of ensuring that there was no fraud being perpetrated by the adoptee in applying to be added to the Indian Register or the Band membership list. In none of the communication between Samson and the Registrar prior to the appeal, nor in the material before this Court, did Samson suggest that the legal adoption of Boczek was a sham.

[89] In any event, if the information was relevant to the issues raised by Samson, in my view Samson had sufficient information to enable it to participate effectively had it desired to challenge the legal adoption on the basis that it was a sham. The correspondence of the Registrar would have left no doubt in this case that it had affidavits of the parents and at least two close friends, relatives or neighbours confirming that the parents raised Boczek as their own child when he was under the age of majority. Samson knew what it would have to provide to counter that evidence. I am not satisfied that Samson was denied effective participation on the facts of this case.

V Conclusion

[90] Samson Cree Nation has standing to protest and appeal the decision of the Registrar to add Boczek's name to the Indian Register and the Samson Cree Nation Band Membership List. The Registrar did not err in doing so and in the circumstances of this case, there was no denial of Samson's right to natural justice or procedural fairness.

Heard on the 11th day of May, 2005.

Dated at the City of Edmonton, Alberta this 8th day of June, 2005.

Eric F. Macklin
J.C.Q.B.A.

Appearances:

Lynn-Michelle Angotti
for the Samson Cree Nation

Janell Koch
for the Registrar of Indian and Northern Affairs

Angela Alphonse
for Vincent Randall Greg Rainbow Cross The Lands Boczek

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