

Adams Lake Indian Band Community Panel

NOTICE TO THE COMMUNITY

SUMMARY OF LEGAL OPINION REGARDING  
PROPOSED CHANGES TO CODE REGARDING THE COMMUNITY PANEL

1. Proposed Amendments Are Not Legal

- all law and legislation, including the ALIB Election Rules, (the “Rules”) remains in force until any changes to them are ratified. This is well established at law as well as in the Rules. (section 28 page 27)
- Amendments cannot be implemented when in draft form. (Rules section 28 page 27)
- The last Election was held on February 28, 2015. This means that the deadline for the commencement of processes to amend the Rules would have been February 28, 2016. The time for bringing forth amendments to the Rules expired in February 2016. ANY amendments, at this time, are illegal as they are contrary to Section 28 at page 26 of the ALIB Rules.
- Election Date, according to the Rules “*Means the date set for the election of Band Council as referred to in these rules.*”. There is a different definition in the Rules for a by-election.

2. Proposed Amendments Remove Impartial Decision Making Regarding Petitions and Appeals

- In the new amendments, the Council appoints the person who decides the appeal or petition. This is like the Council deciding petitions and appeals themselves. This creates an obvious reasonable apprehension of Bias.

3. The Existing Panel retains jurisdiction until a new Panel is elected. (The Rules; Appendix E page 34)

- The term of the existing community panel does not expire until a new community panel is elected in keeping with the procedure as outlined in the Rules.

#### 4. Federal Court of Appeal Decision has no impact on the Panel's Jurisdiction

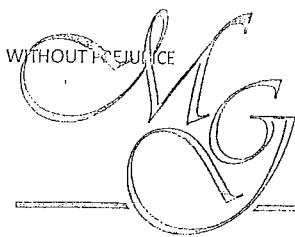
- The Federal Court of Appeal did NOT dismantle the Community Panel or find that the Community panel was without jurisdiction.
- Further, the Court recognized that it is within the Panel's jurisdiction to re-hear the petitions if it so decides.
  
- The only way a Court decision can remove the jurisdiction of the Panel, is if finds the entire Election Code to be illegal or if it specifically states that the Panel is without jurisdiction. The Court does neither.

#### 5. Federal Court Decision Regarding Paul Michel

- Paul Michel's application for judicial review was defeated on every point raised. First and foremost, the Court found at paragraph 59 that:

*“Indeed, the evidence demonstrates that the Panel was acting in the best interests of the Band and simply doing its job—namely, holding a hearing and making a decision in response to a petition. The Panel, subsequently reviewing the FCA decisions in both Johnny and Johnny and Jules, recognized defects in its decision-making process. So it issued the Nullification Letter.”*

- The panel withdrew its decision regarding Paul Michel so there was no decision before the Court to decide.
- The Court said it can't interfere with the decisions of the Panel when no decision exists.
- The Court said that the Panel was not biased against Paul Michel.
- Legal costs were ordered partially against Paul Michel. This is rare for the courts to do and usually when the party has wasted the Court's time.



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Legal & Mediation Services

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By email and Hand Delivered  
WITHOUT PREJUDICE

October 27, 2017

Adams Lake Community Panel  
Chase, BC

Dear Panel Members:

Re: **Standing of the Community Panel and  
Proposed Amendments to the 2014 Adams Lake Secwepemc Election Rules**

You have asked me to provide a legal opinion with respect to the current standing of the Community Panel to hear petitions and appeals and the impact of the revisions to the 2014 Adams Lake Secwepemc Election Rules (the "Election Rule") that is being brought before the Band Membership purportedly for ratification October 30, 2017. That opinion and my invoice is attached.

I hope you find this useful.

Yours very truly,  
MICHELLE GOOD & COMPANY

Per:

Michelle Good

OPINION WITH RESPECT TO THE CURRENT STANDING  
OF THE ADAMS LAKE COMMUNITY PANEL  
AND THE LEGALITY OF PROPOSED AMENDMENTS TO THE  
ADAMS LAKE SCEWPEMC ELECTION RULES

October 27, 2017

1. The Current Law Stands

- a) First, it is important to emphasize that the law generally accepts that common law and legislation remain in force until any changes to them are ratified. The reason for this is that a jurisdictional vacuum is created if a law is declared not to apply before another law has been developed to take its place. This is true general speaking and it is specifically so with the Election Rules.

Section 28 at page 27 provides that:

*The existing ALIB Election Rules will remain in force until rescinded by the new ALIB Election Rules.*

- b) Section 28 of the Election Rules provides that until amendments are made according to the processes prescribed by the Election Rules, and then subsequently ratified by way of a BCR, the current version of the Election Rules govern.

This means that every process, procedure, role, definition, and function as described in the Election Rules remains unchanged and in full force.

- c) Importantly, if amendments are made in a manner that is not in accordance with the Election Rules, they are of no effect, and the provisions of the 2014 Election Rules stand.

2. The Existing Community Panel Retains Jurisdiction

- a) The Community Panel takes its jurisdiction from the provisions of Part Nine of the Election Rules, wherein its role is defined as being the singular body that is in place to decide election appeals and petitions for removal. Its roles and responsibilities are further clarified in Appendix E of the Election Rules. Notably, Appendix E is specific that any amendment to the roles and responsibilities of the Community Panel is to be

undertaken by way of the Election Rules' amendment processes. This appears at page 34 of the Election Rules wherein it states:

10. *Amendments*

*Such amendments shall be part of the ALIB Election Rules amendment process.*

- b) The use of the word SHALL in this provision is interpreted at law as making this a mandatory provision. The provision does not say may, can, could, should or might which all represent discretionary language. The provision says SHALL which means that it is mandatory that amendments to the roles and responsibilities of the Community Panel must be undertaken in keeping with the process defined by the Election Rules for amending the Election Rules.
- c) Further, item 4 of Appendix E specifically provides that term of the Community Panel does not expire until new members are elected to the Community Panel, and this of course must be done in accordance with the Election Rules.

**3. Federal Court of Appeal Decision has no impact on the Panel's Jurisdiction**

- a) In the decision of the Federal Court with respect to the appeal of Councillors Georgina Johnny, Brandy Jules, and Ronald Jules, the Court did NOT dismantle the Community Panel or find that the Community panel was without jurisdiction. The only way a Court decision can remove the jurisdiction of the Panel, is if finds the entire Election Code to be illegal or if it specifically states that the Panel is without jurisdiction. The Court does neither.
- b) What the Court did find was that with respect to primary principles of administrative law, procedural fairness and reasonable apprehension of bias, the Community Panel made errors in how they resolved the petitions for removal that were before them.
- c) In this context, the word *apprehension* means to *understand or perceive*. It is important to understand that in legal principles there is a vast difference between reasonable apprehension of bias and *actual* bias. The Court did NOT find that the panel was biased in its handling of the petitions. The Court found that how the Panel went about hearing and deciding the appeal COULD give the APPEARANCE of bias. That is, a reasonable observer could reasonably understand or perceive the process to be biased and thus those decisions must not stand. There is an exceptionally high burden of proof to prove actual bias and it was neither claimed nor found in this decision of the Court.
- d) Further, the Court recognized that it is within the Panel's jurisdiction to re-hear the petitions if it so deems. The panel is a quasi-judicial tribunal which means it has the power to render legally binding decisions within the jurisdiction provided to it by the

Election Rules. If it were not a quasi-judicial tribunal, then its decisions could not be reviewed and decided on by the Federal Court. As with any Tribunal, the Panel is entitled to make its own procedural rules within the principles of administrative law and within the context of its governing jurisdiction which in this case is the Election Rules.

- e) The impact of the Court of Appeal is not to render the Panel defunct, but rather to recognize its procedural deficiencies, nullify the orders rendered by it as it pertains to the Councillors who brought the appeal in Federal Court. Specifically, the Court states at paragraph 55 of its Decision that:

*“If the petition to remove the appellant is to be pursued, the petition should be returned to the Community Panel for redetermination in accordance with this Court’s reasons. For clarity, if allegations related to the Appellant’s dealings with Norma Manuel are to be pursued, Member Kenoras is to take no part in the decision-making process. Similarly if allegations related to the transition of the existing security staff to the staff of the Adams Lake Indian Band are to be pursued, Member Yarama is to take no part in the decision making process.”*

- f) This is to say that if Valerie Michel chooses to submit her petition for re-hearing, it is within the jurisdiction of the Community Panel to hear it and decide it in keeping with the guidelines prescribed by the Court.
- g) The Panels right to re-hear petitions is further upheld at paragraph 17 of the Federal Court’s decision in the Paul Michel judicial review where it describes his application as academic “until the Panel confirms whether it will rehear the petitions and what the content of any such rehearing would be.”

#### **4. Federal Court Decision Regarding Paul Michel**

- a) Paul Michel’s application for judicial review was defeated on every point raised. First and foremost, the Court found at paragraph 59 that:

*“Indeed, the evidence demonstrates that the Panel was acting in the best interests of the Band and simply doing its job—namely, holding a hearing and making a decision in response to a petition. The Panel, subsequently reviewing the FCA decisions in both Johnny and Johnny and Jules, recognized defects in its decision-making process. So it issued the Nullification Letter.”*

- b) This finding by the Court makes it perfectly clear that the Community Panel was in no way acting in bad faith and is, in fact a very strong statement that the Panel was acting in good faith and did the right thing in withdrawing its decision.

- c) At the moment the Panel withdrew its decision regarding Paul Michel, there was no decision and therefore no decision for the Federal Court to review. The Court specifically states this at paragraph 21- 23 of its judgment.
- 21 The fact that the issues raised by the Petition may indeed be reheard by the Panel does not assist Chief Michel. To the contrary, his request is premature: the administrative process is not yet complete and, in fact, it has not even begun. Absent exceptional circumstances, parties cannot proceed to the Courts until the administrative process is over (*Canada (Border Service Agency) v CB Powell Limited*, 2010 FCA 61 CanLII at para 31 [*Powell*]). The rule against prematurity prevents the fragmentation of the administrative process and avoids the “waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway” (*Powell* at para 32). Jurisdictional issues, like those advanced by Chief Michel, have been held to not constitute “exceptional circumstances” justifying premature application to this Court (*Powell* at paras 33, 39-40).
- 22 **Going back to the basics then, fundamental administrative review principles do not allow the Court to intervene in this case. The Removal Decision is “null and void” according to the Panel itself, so there is no administrative decision for this Court to review. Furthermore, the record also shows that Chief Michel’s jurisdictional arguments were never put to the Panel.**
23. The Court cannot intervene in the affairs of an administrative decision-maker, on administrative law grounds when no administrative decision exists.
- d) Further the Court found that the Panel was not biased with respect to the petition regarding Paul Michel. It finds at paragraph that with First Nations communities the concept of reasonable apprehension of bias must be considered in the reality of small communities with significant interrelation social and political contexts.
- 34 In short, looking through the prism of a small First Nations community, the mere fact that a member of an administrative body may have a family or work connection to others touched in some way by matters at issue, does not lead directly or invariably to a reasonable apprehension of bias. This is exactly the situation that we find ourselves in here: every one of the Panel members is tied either through work or family to sitting

members of Chief and Council, or Band administration. Tribunal members serving small Bands cannot avoid having friends and relatives involved in Band administration and/or Council, and the fact of such ties alone does not raise a reasonable apprehension of bias. *Rather, what is needed to breach that threshold is an actual conflict, such as a financial interest in the outcome of the dispute, or close family members directly linked to the allegations at issue.*

- e) The Court nonetheless decided to hear the question of Reasonable Apprehension of Bias given that the Community Panel advised the Court that they would appreciate the direction of the Court on the issue of bias. In its analysis of Paul Michel's claim the Court found there was no reasonable apprehension of bias with any of the Panel members and none of them should have been disqualified from hearing the petition and none should be disqualified from the rehearing. The Court found as follows:[39] Here, I conclude that, unlike the specific context in *Johnny and Jules*, Chief Michel *has not established that the Panel members should be disqualified because of a reasonable apprehension of bias...*
- f) It is very significant that in part costs were ordered against Mr. Michel in his personal capacity. This is rarely done by the Court's and generally signals that the action I question was vexatious or as in this case, premature and wholly unnecessary.
- g) In summary, not one of the matters brought before the Court by Paul Michel were decided in his favour. The Court gave clear reasons as to why the law does not support Mr. Michel's claims and has pointed to the waste of judicial resources in seeking the determination of moot issues.

## 5. Proposed Amendments Are Not Legal

- a) In my legal opinion, ANY amendments, at this time, are illegal. Section 28 at page 26 of the ALIB Election Rules ("the Rules") provides the rules and mechanisms for amending the Rules and states that:

*Amendments to the ALIB Election Rules may be initiated no later than one year after the Election Date.*

*Election Date* is defined in the Rules at page 5 that it:

*"Means the date set for the election of Band Council as referred to in these rules."*



*Band Council* is defined in the Rules at page 4 that it:

*“Means the Chief and Councillors elected according to the ALIB Election Rules, as amended.”*

*By-Election* is also defined in the Rules at page 4 that it:

*“Means a special election held to fill a position on Band Council that has become vacant.”*

- b) The last Election was held on February 28, 2015. This means that the deadline for the commencement of processes to amend the Rules would have been February 28, 2016. The time for bringing forth amendments to the Rules expired in February 2016.
- c) The Rules are specific that the time for amendments is tied to the Election Date, not by-election Dates each of which are formally defined and defined differently in the Election Rules.
- d) Section 28 at page 27 further provides that “the existing ALIB Election Rules will remain in force until rescinded by the new ALIB Election Rules”. So even if the amendments were legal, and in my opinion, they are not, they can not be implemented while in draft form.

#### **6. Proposed Amendments to Code Regarding Petitions and Appeals are Worrisome**

- a) Having said that these amendments are and will be without the force of law, what is being proposed with respect to how petitions and appeals will be dealt with is in my opinion, quite concerning. The amendments do away with the idea of an impartial, independent body deciding petitions and appeals. Instead, the amendments, in effect give the power to decide petitions and appeals to the Chief and Council. In the new amendments, the Council appoints the person who decides the appeal or petition. From the outset, this creates an obvious reasonable apprehension of Bias.

Prepared By:

MICHELLE GOOD & COMPANY

Per:



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