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	October 26, 2023 26 octobre 2023		
	Meriah Breckenridge		
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Court File No.

**FEDERAL COURT OF APPEAL**

**BETWEEN:**

**ETHEL MABEL ARACIL-MORIN, ESPANA ARACIL-MORIN  
and REMEDIOS GARRITY**

Appellants

- and -

**ENOCH CREE NATION**

Respondent

**NOTICE OF APPEAL**

**TO THE RESPONDENT:**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Edmonton.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules, information concerning the local offices of the Court and other necessary information may be obtained on request to the

Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE, WITHOUT FURTHER NOTICE TO YOU.

October 26, 2023

Issued by: \_\_\_\_\_

Federal Court of Appeal  
Edmonton Local Office  
Suite 530, Tower 1, Scotia Place  
10060 Jasper Avenue  
EDMONTON, AB T5J 3R8 9

TO:

Enoch Cree Nation (Respondent)  
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## APPEAL

THE APPELLANTS APPEAL to the Federal Court of Appeal from the Order of the Honourable Justice Ann Marie McDonald, dated September 28, 2023 in Court File T-2025-22 and reported as 2023 FC 1309, by which the Court dismissed the Appellants' application for judicial review (the "Decision").

THE APPELLANTS ASK that the Federal Court of Appeal:

- i. Set aside the Federal Court's Decision on the application for judicial review and provide the remedies sought by the Appellants in the Federal Court, including:
  - (a) An Order in the nature of *certiorari* quashing and setting aside the Decision of the Enoch Chief and Council for failure to exercise their discretion judicially, and rendering a decision that is discriminatory, arbitrary, unreasonable and unlawful and constitutes a jurisdictional error;
  - (b) An Order in the nature of *certiorari* quashing and setting aside the Decision of the Enoch Chief and Council for lack of procedural fairness, bias and reasonableness;
  - (c) An Order or Declaration that sections 3.1, 4.2, and 5 of the Membership Code of the Enoch Cree Nation, as amended ("Code") are discriminatory as being based on or incorporating provisions of the *Indian Act*, RSC 1985, c I-5 which are unconstitutional and in breach of sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("Charter");
  - (d) An Order or Declaration that the Applicants Espana Aracil-Morin and Remedios Garrity are entitled to membership in Enoch, and compelling the Respondents to recognize said membership and to add the Applicants to the Enoch Membership List;
- ii. In the alternative, set aside the Federal Court's Decision and order a new trial;
- iii. Award costs of this appeal to the Appellants;
- iv. Issue any other order that this Honourable Court considers fair and appropriate.

THE GROUNDS OF APPEAL are as follows:

1. In first instance, the Appellants applied for judicial review seeking to quash or set aside a Decision of the Enoch Chief and Council dated August 17, 2022 (“Decision”) which denied the appeal by the Appellants Espana Aracil-Morin and Remedios Garrity of a decision of the Membership Clerk refusing their application for membership in the Enoch Cree Nation (“Enoch”).
2. The Appellants submit that the Decision denying their application for membership in Enoch is based on provisions of the Membership Code of Enoch Cree Nation that discriminate on the basis of gender in breach of s. 15 the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (“*Charter*”) and are not saved by s. 1, and are therefore unconstitutional.
3. Specifically, the grounds for unconstitutionality of the impugned provisions of the Code are that they are based on or incorporate provisions of former versions of the *Indian Act*, RSC 1985, c I-5 which had the combined effect of creating a situation of gender discrimination.
4. The Applicants further submit that in making the Decision, the Enoch Chief and Council failed to exercise their discretion judicially or at all, and rendered a decision that is discriminatory, arbitrary, unreasonable, unlawful.
5. The Federal Court Decision dismissed the Appellants’ application for judicial review on the basis that: there was insufficient evidence in support of the claim that the 2004 ECN Membership Code provisions are discriminatory and contrary to s. 15 of the Charter; the Appellants had provided no evidence to establish that the denial of

membership in ECN reinforces, perpetuates, or exacerbates disadvantage; and there was no evidence of economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion.

6. However, the Appellants in fact provided the trial court with extensive submissions addressing the history of the relevant provisions of the *Indian Act* and their role in producing the discriminatory effect complained of by the Appellants. Those submissions are not discussed or even mentioned in the Federal Court's Decision. It is respectfully submitted that the Honourable Justice McDonald erred in law by failing to consider the Appellants' submissions on an issue going to the heart of the complaint under adjudication, which justifies setting aside the Decision.
7. In addition, the Honourable Justice McDonald ignored, misapprehended, misconceived or otherwise failed to take into account evidence submitted by the Appellants that the law required her to consider in assessing discrimination under section 15, including evidence that being denied membership in their mother's home community reinforces, perpetuates, or exacerbates disadvantage for the Appellants Espana and Remedios. The omission to consider that evidence is an error in law and warrants setting aside the decision.
8. Further and in light of the above omissions, it is respectfully submitted that the reasons of the Honourable Justice McDonald lack transparency, fail to undertake informed consideration of the grounds raised by the Appellants, do not do justice to the record, and are inadequate to justify the result reached, all of which warrant setting aside the Decision.
9. Finally, it is respectfully submitted that if this Honourable Court considers that the provisions of the 2004 ECN Membership Code provisions are discriminatory and contrary to s. 15 of the *Charter*, then the conclusion that the Respondent's decision to

deny the Appellants' request for membership was reasonable is itself unreasonable and should also be set aside by this Honourable Court.

Date: October 26, 2023

A handwritten signature in black ink, appearing to read "D. Callihoo", written over a horizontal line.

Dennis Callihoo K.C. #380,  
10403 - 172 Street  
Edmonton, Alberta, T5S 1K9  
Counsel for the Appellants, Ethel  
Aracil-Morin, Espana Aracil-Morin and  
Remedios Garrity