Federal Court  Cour fédérale

Date: 20191218

Docket: T-1339-18

Citation: 2019 FC 1627

Ottawa, Ontario, December 18, 2019

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KELVIN BOUCHER-CHICAGO

Applicant

and

FRED PORTER, PAULA HYSLOP and LAC DES MILLE LACS FIRST NATION

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, of the decision of the Electoral Adjudicator [Adjudicator] dated June 14, 2018 [Decision]. The Adjudicator dismissed the Applicant's appeal of an Electoral Officer's [Officer] decision to reject the Applicant's nomination to run for the position of Chief in the 2018 band council election.

[2] For the reasons that follow, this application for judicial review is allowed. The Decision does not fall within the range of possible, acceptable outcomes.

II. Background

[3] The Anishinaabe of the Nezaadiikaang/Lac Des Mille Lacs First Nation [First Nation] ratified a Custom Leadership Selection Code [Code] in 2009. The Code provides for the removal of office-holders based on a list of enumerated grounds. Section 8 of the Code reads as follows:

> 8. REMOVAL FROM OFFICE
>
> A. A Chief or Councillor shall be removed from office for any of the following:
>
> a) Conviction of an indictable criminal offence;
>
> […]
>
> B) A Chief or Councillor who is removed from office by operation of any of the above in Section 8, shall be disqualified from holding office for life, with the exception of (d).

[4] The Code also obliges candidates to provide a security clearance and criminal reference check. Section 12 of the Code provides that:

> 12. NOMINATIONS
>
> A. Nominations for the position of Chief or Councillor shall require the submission to the Electoral Officer of nomination papers enclosing the evidence of support for the candidate of at least ten (10) voters, and the acceptance by the candidate of the nomination for Chief or Councillor, and evidence of a current security clearance/criminal record check.

[5] Section 8A. a) of the Code has been a source of confusion in the past. Prior to the 2015 nomination process, the Electoral Officer at the time requested a legal opinion to determine whether a nomination could be denied due to a candidate's criminal record. Legal counsel for the First Nation acknowledged that the Code is silent on the denial of nominations based on criminal records, but stated that the intention of the community was clearly to exclude individuals who have been convicted of indictable offences from holding office. As a result, legal counsel for the First Nation stated that a nomination could be denied if a candidate had been convicted of an indictable offence.

[6] The First Nation passed a band council resolution on February 5, 2018 confirming that the First Nation election would be held on June 8, 2018. Paula Hyslop was appointed as Electoral Officer and was directed to supervise the electoral process in accordance with the Code. Fred Porter was appointed as the Adjudicator. The role of the Adjudicator is to deal with elections complaints and appeals in accordance with the Code.

[7] The Applicant submitted his nomination package for the position of Chief on April 25, 2018. The nomination package contained the required number of supporting voters, his acceptance of the nomination, and a copy of his criminal reference check. The Officer informed the Applicant that she would need to seek legal advice in relation to his criminal reference check.

[8] The Applicant has a lengthy, but dated criminal record. Most recently, in 2001, the Applicant was charged with assault under section 266 of the *Criminal Code* (RSC, 1985, c C-

46). The Applicant was given a suspended sentence and 12 months' probation. Prior to 2001, the Applicant was charged with fourteen offences under the *Criminal Code*.

[9] The Officer contacted the Band Administrator and requested a legal opinion in relation to the Applicant's nomination in light of his criminal record. The First Nation's legal counsel provided an opinion on April 27, 2018 that the Applicant was ineligible for nomination due to his three convictions for indictable offences. The Officer decided that a proper interpretation of the Code prohibits individuals who have been convicted of indictable offences from being nominated to run for office. The Applicant visited the electoral office on April 27, 2018 and was informed by the Officer that his nomination was denied because of his convictions for indictable offences. Later that day, the Officer sent an email to the candidates which stated that Chief Whitecloud had been acclaimed.

[10] The Officer sent a letter to the Applicant on April 30, 2018 which confirmed that his nomination for the position of Chief was denied because of his convictions for indictable offences. The Officer provided further information to the Applicant via email on April 30, 2018. The Officer referenced sections 8A and 8B of the Code and stated that:

> In my judgement, it is the intent of the members not to permit someone whom has indictable offences especially the most serious indictable offences, to run for and/or hold a position on Chief and Council and for those reasons I did not accept your nomination.

[11] The Applicant's counsel responded to the Officer on April 30, 2018 and argued that she had misinterpreted the Code. Specifically, the Applicant's counsel identified two errors with the Officer's decision. Firstly, sections 8A and 8B of the Code apply only to individuals who are

currently serving as Chief or a Councillor. Secondly, the offences in question were hybrid and proceeded summarily. The Officer responded on May 1, 2018 confirming her initial decision and expanding on her reasons. The Officer cited section 12 of the Code and stated that the Applicant "would not have current security clearance as he has a criminal record".

[12] The Applicant submitted an appeal of the Officer's decision on May 8, 2018. The Applicant argued that his offences were not indictable, but were instead hybrid in nature and proceeded summarily. The Applicant requested that the Adjudicator reconsider the Officer's decision to deny his nomination.

III. Decision under Review

[13] The Adjudicator issued his Decision on June 14, 2018. The Adjudicator began by setting out the process used to arrive at his decision. The Adjudicator reviewed the appeal documents, met with the Officer, considered the Officer's decision-making process, and reviewed the 2015 legal opinion.

[14] The Adjudicator noted the opinion provided by the First Nation's legal counsel that the intention of the First Nation is to exclude individuals who have been convicted of indictable offences from holding office as Chief or Councillor. This is why nominees must provide a security clearance/criminal reference check. The legal opinion also states that it would be discriminatory to remove a Chief or Councillor who is convicted of an indictable offence while allowing those who have already been convicted of an indictable offence to take office.

[15] The Adjudicator considered the Applicant's argument that the legal advice received by the Officer was not independent because the counsel who provided the advice serves the Chief and Council. The Adjudicator dismissed this argument on two grounds. Firstly, the legal opinion was initially provided in 2015 prior to the nomination process. Secondly, the Officer redacted personal information and did not identify the candidate when she requested an updated opinion.

[16] The Adjudicator considered the Applicant's argument that the offences listed in his criminal record were hybrid in nature and proceeded summarily. The Adjudicator noted, however, that the legal opinion provided to the Officer characterized the offences as indictable.

[17] The Adjudicator concluded that

> Ms. Hyslop relied on legal advice from 2015 and updated in 2018 to reach her decision to disallow Mr. Chicago's nomination. Thus, in my opinion, she acted fairly and exercised due diligence.

[18] The Adjudicator dismissed the appeal of the Officer's decision.

IV. Issues

[19] The following issues are relevant to this application for judicial review:

A. What is the standard of review?

B. Was the Decision reasonable?

V. Standard of Review

[20] A standard of reasonableness generally applies to the review of a decision by a First Nation election appeal body which is tasked with interpreting an election code (*Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 20 [*Pastion*]). The Applicant is correct that an exception to the standard of reasonableness may be made where the decision-maker fails to engage in any interpretation of the election code (*Lower Nicola Indian Band v York*, 2013 FCA 26 at para 6). This exception will apply only in extraordinary situations where there is no interpretation available to show deference to. The Applicant argues that the Adjudicator did not attempt to interpret the Code.

[21] As stated by Justice Grammond in *Pastion* at para 27: "The presumption in favour of reasonableness is rebutted only in exceptional circumstances". I am unable see any exceptional circumstances in this case. Accordingly, this Court will review the Decision on a standard of reasonableness.

VI. Was the Decision Reasonable?

[22] I find that the Adjudicator's Decision is unreasonable because the Adjudicator ignored the plain meaning of the words of the Code.

[23] The Applicant and the Respondents essentially argue the same points but from different vantage points. They both argue interpretive principles apply to this case.

[24] The Applicant argues that the Code does not disqualify individuals with past indictable offences from running as candidates in the First Nation's elections. He submits that the Code's only requirement is to provide a criminal record check as part of the nomination process. He argues that the Adjudicator's interpretation (and the Officer's) would lead to absurd results.

[25] The Respondents argue that the Officer and the Adjudicator concluded from their review of the Code that the First Nation members intended to prevent members with indictable offence convictions from running in the First Nation's elections. They say that any contrary interpretation would lead to absurd results. They argue that the Adjudicator's interpretation of the Code is both reasonable and correct.

[26] Both parties acknowledge that *Rizzo & Rizzo Shoes Ltd., Re,* [1998] 1 SCR 27 [*Rizzo*] is the governing case on statutory interpretation. Iacobucci J wrote at paragraph 21:

> [21] Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[27] However, our Supreme Court in *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54 at paragraph 10 has stated that, "when the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process."

[28] I take the above to mean that where the words of a provision are clear and unambiguous, the meaning that naturally flows from them should be given a high degree of weight in the interpretive process. To rebut such a meaning, it will take considerable evidence that the ordinary

meaning cannot be harmonious with the law in question unless the Court adopts a different meaning.

[29] The Federal Court of Appeal has ruled that Custom Election Codes enacted by First Nations are to be interpreted using this approach: *Boucher v Fitzpatrick*, 2012 FCA 212 at para 25.

[30] I am of the view that section 8 of the Code is capable of only one reasonable interpretation. For convenience, I reproduce the words of the Code below:

> 8. REMOVAL FROM OFFICE
>
> A. A Chief or Councillor shall be removed from office for any of the following:
>
> a) Conviction of an indictable criminal offence;
>
> […]
>
> B) A Chief or Councillor who is removed from office by operation of any of the above in Section 8, shall be disqualified from holding office for life, with the exception of (d).
>
> [Emphasis added.]

[31] An ordinary reading of this provision provides that: (1) it only applies to a "Chief" or "Councillor" and (2) that a Chief or Councillor shall be *removed* for a conviction of an indictable criminal offence. This wording requires that a Chief or Councillor become elected in order to be holding an office from which they can be removed.

[32] Of course, the use of the word “conviction” constitutes a problem, as there is no temporal information contained within that word—does “conviction” mean *any* conviction, past, present, or future?

[33] As the parties both submitted, any reasonable interpretation of this provision must avoid absurd results (*Rizzo* at para 27). Where there is only one reasonable interpretation, that is the one that must be applied, irrespective of the level of deference (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38). If the word “conviction” includes *past* convictions, then such an absurd result will occur. This is because it might lead to a scenario where a Chief is elected with a past conviction, then immediately removed from office upon election. If the word “conviction” is read to include only convictions that occur while the Chief or Councillor is in office, then Section 8A does not lead to absurd results. Thus, the latter interpretation is the only reasonable one.

[34] The Adjudicator’s interpretation (and the Officer’s) falls outside a reasonable interpretation of Section 8A because it mischaracterizes the interpretive process—the goal is to find a way in which Article 8A can be read into the Code while avoiding absurd results.

[35] I find that the language in Section 8A is meant to apply only to a Chief or Councillor who is in office, and it is related to “convictions” of indictable offences. The only non-absurd (i.e. reasonable) interpretation of these words is that “convictions” only refers to convictions made while in elected office. Additional words cannot be simply read into the Code to make alternate interpretations possible, as both the Officer and Adjudicator have done.

[36] I am also mindful that there is *some* evidence that supports an intent otherwise, such as the requirement for a criminal record check for all prospective nominees. I find that it may support an intent to exclude nominees that have been convicted of indictable offences. However, if this is so, then the Code must be worded carefully to reflect the intent of the members of the First Nation.

[37] I find that this evidence of intent is not sufficient to override the plain wording of the Code.

[38] Therefore, I find that the interpretation of 8A of the Code was outside the range of possible interpretations because it was not in accord with basic interpretive principles. It is only in extraordinary circumstances that "reading in" words to an Act or Code is possible.

[39] Because the interpretation of 8A of the Code was outside the range of possible interpretations, decisions flowing from this interpretation are also outside of the permitted range of possible, acceptable outcomes. For this reason, I find that this decision is unreasonable.

VII. Conclusion & Remedy

[40] I am persuaded by the Applicant's argument that there is little point in remitting this matter back to the Adjudicator.

[41] In oral argument the Respondents suggested that if I was inclined to grant the application for judicial review then an appropriate remedy would be to have an election between the

Applicant and the acclaimed Chief. In reply submissions the Applicant agreed that this would be an appropriate remedy.

[42] This Court has previously declined to order new elections where there is an upcoming election (*Clifton v Hartley Bay (Electoral Officer)*, 2005 FC 1030 at para 60) or where the election law doesn't permit a tribunal to do so (*Cowessess First Nation no. 73 v Pelletier*, 2017 FC 692). With that said, The Court is also entitled to fashion a remedy that is appropriate in the circumstances (*Ballantyne v Nasikapow*, 2000 CanLII 16594 (FC) at para 79, [2000] FCJ No 1896).

[43] As such, I will endorse the approach suggested by the parties in oral argument which is to order that a new election for the position of Chief be held only as between the Applicant and the acclaimed Chief.

[44] At the hearing the parties also jointly submitted that the successful party should be awarded costs in the amount of $20,000 plus H.S.T.

[45] In exercising my discretion to award costs I am guided by Rule 400 that sets out various factors for me to consider. I view the Respondent's submission at the hearing (and the Applicant's agreement) to have a remedy of a new election as a positive development. Taking into account this positive factor and bearing in mind that it will also cost the First Nation to hold another election, I am exercising my discretion to award costs in the amount of $10,000 plus H.S.T. to the Applicant.

JUDGMENT in T-1339-18

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is allowed and the Decision is quashed;
2. The Court endorses the approach argued by the parties and orders that a new election be held with only the Applicant and the acclaimed Chief as candidates for the position of Chief in accordance with the Code. The new election for Chief is to be called within 30 days of the date of this Order.
3. The Applicant is granted costs in the amount of $10,000 plus H.S.T.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1339-18
STYLE OF CAUSE:	KELVIN BOUCHER-CHICAGO v FRED PORTER, PAULA HYSLOP AND LAC DES MILLE LACS FIRST NATION
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	APRIL 24, 2019
JUDGMENT AND REASONS:	FAVEL J.
DATED:	DECEMBER 18, 2019

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