Federal Court of Appeal  Cour d'appel fédérale

Date: 20200116

Docket: A-70-19

Citation: 2020 FCA 9

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

PATRICK CHIPESIA, CLARENCE APSASSIN, GABRIEL HARVEY, SYLVESTER APSASSIN, ANGELA APSASSIN, SUSAN DUMAS, AMANDA APSASSIN, TRACY PAQUETTE, VANESSA APSASSIN, ANTHONY POUCE-COUPE, HENRY APSASSIN, JOSEPH APSASSIN, MALCOLM APSASSIN, RUSSELL APSASSIN and WALTER APSASSIN

Appellants

and

BLUEBERRY RIVER FIRST NATIONS and CHIEF MARVIN YAHEY SR., SHAWN DAVIS, SHERRY DOMINIC, DEREK GREYEYES, WAYNE YAHEY as Chief and Council representatives of the BLUEBERRY RIVER FIRST NATIONS

Respondents

Heard at Vancouver, British Columbia, on January 13, 2020.

Judgment delivered at Vancouver, British Columbia, on January 16, 2020.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GLEASON J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] This is an appeal from the Federal Court's Judgment (*per* Lafrenière J.) dated January 11, 2019 (2019 FC 41) dismissing the appellants' application for judicial review concerning the Blueberry River First Nations' adoption of a custom election code (the "Code").

[2] The Code introduced a new election system based on family groups within the Blueberry River First Nations (the "BRFN"). Prior to the Code, the *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*] and the *Indian Band Election Regulations*, C.R.C. c. 952 had governed the elections of the BRFN since the BRFN's formation in 1978. The new Code stipulates that the Band Council shall be composed of one Chief and five Family Councillors. There are five family groups, each of which is supposed to elect one Family Councillor, while the Family Councillors are supposed to elect the Chief by secret ballot.

[3] The Code came into force as follows. After a series of community mediation sessions and consultations, the BRFN Band Council passed a Band Council Resolution (a "BCR") on August 18, 2017 that approved the Code and asked the Minister of Indian Affairs and Northern Development (the "Minister") to remove the BRFN from the application of the *Indian Act* election provisions. On September 13, 2017, the Minister issued the requested order under subsection 74(1) of the *Indian Act*, it was registered on September 15, 2017 and published in the *Canada Gazette* on October 4, 2017 (S.O.R./2017-193).

[4] The appellants challenge the Code because they have been placed in one family group comprised of almost half of the BRFN's electors. They note that notwithstanding the size of their family group as compared to others, they are still only permitted to elect one Family Councillor. The result, they allege, is that the voting power of their family group members is diluted compared to that of members in other family groups. The appellants maintain that the Code does not reflect a consensus among the BRFN's members, that there were procedural flaws in the adoption of the Code, and that it is discriminatory.

[5] The Federal Court dismissed the appellants' application for their failure to challenge the Minister's order under subsection 74(1) of the *Indian Act.* In its view, it was the Minister's decision to remove the BRFN from the *Indian Act* elections scheme that was operative in the circumstances, not the August 2017 BCR or any related BCR that gave effect to the Code.

[6] At the hearing before our Court, the appellants abandoned their argument that the Code contravenes section 15 of the *Canadian Charter of Rights and Freedoms*, section 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [Charter], as well as their argument that the Code is arbitrary under administrative law principles. As such, the issues raised before this Court include whether the Code represents a consensus among the BRFN's members, whether there were any procedural flaws in the adoption of the Code, whether the appellants were out of time to challenge the adoption of the Code, whether the Code is discriminatory under administrative law principles, and whether the BCR adopting the Code is a reviewable order.

[7] I agree with the Federal Court that the appellants' failure to challenge the Minister's subsection 74(1) order is determinative of the issues by virtue of this Court's decision in *Taypotat v. Taypotat*, 2013 FCA 192, 447 N.R. 352 [*Taypotat*].

[8] In *Taypotat*, the appellant had similarly challenged the validity of the process leading to the adoption of the custom election code his Band adopted upon being removed from the *Indian Act* elections scheme pursuant to a subsection 74(1) order by the Minister. Writing for the Court, Mainville J.A. found that the appellant could not contest the validity of the vote leading to the Minister's order and the adoption of the custom election code because he failed to challenge the Minister's subsection 74(1) order (*Taypotat* at paras. 21-22). He nonetheless went on to consider the election code's validity in response to the appellant's claim that it violated section 15 of the Charter. While the Supreme Court of Canada overturned the decision of the Federal Court of Appeal on the basis that there was insufficient evidence and argument from the parties to have found a breach of section 15 in the circumstances, it did not address any of the Court's other findings (*Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 at paras. 29, 31, 34 [*Taypotat SCC*]). In fact, the Supreme Court noted from the outset that the only issue before it was the constitutional challenge (*Taypotat SCC* at para. 2). I therefore cannot agree with the appellants that *Taypotat* is not binding on our Court or that it should be overturned, absent any grounds for departing from it. I decline to do so in the circumstances.

[9] Ultimately, the Minister's subsection 74(1) order represents the culmination of the process through which the BRFN adopted its first election code after having held elections under the *Indian Act* scheme and was therefore the operative decision for the appellants to challenge.

This is particularly so in light of the fact the August 2017 BCR requested that the Minister remove the BRFN from the *Indian Act* elections scheme and that the Code itself states it only takes effect upon the Minister issuing a subsection 74(1) order. It is the Minister's order that brought the Code into force and the appellants' failure to challenge it is fatal to their claims concerning the process through which the Code was adopted and whether it is supported by a community consensus. As the appellants' claims bring the validity of the Code as a whole into question, I share Mainville J.A.'s concern that addressing such claims without also addressing the Minister's subsection 74(1) order could create a legal vacuum in the circumstances. Indeed, as the subsection 74(1) order remains in place and the *Indian Act* election scheme no longer applies to the BRFN, a finding that would impugn the Code would cause confusion as to how the BFRN should select its Band Council moving forward.

[10] As for the appellants' claim regarding unauthorized discrimination on administrative law grounds, I find that it is either misplaced or a collateral attack on the Minister's decision. According to principles of administrative discrimination, a regulation or municipal bylaw may discriminate in the sense of making a distinction between entities or persons only if the enabling statute allows for such a distinction (*Montréal v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, 58 N.R. 339 at pp. 404 and 413, *R. v. Sharma*, [1993] 1 S.C.R. 650, 149 N.R. 161 at pp. 667-668). Here, however, the Code is not a piece of delegated legislation authorized under an enabling statute. Instead, the respondents allege that it reflects the BRFN's custom for choosing its leaders. Even if the principles of administrative discrimination were applied by analogy on the understanding that the BRFN could authorize discrimination just like an enabling statute, this would require the Court to determine whether the Code reflects the true custom of the BRFN—

that is, whether it is supported by a consensus among the BRFN's members. This is precisely the issue this Court refused to consider in *Taypotat* because the appellant did not challenge the Minister's subsection 74(1) order. I am not prepared to allow the appellants to address indirectly what they should have addressed directly: the Minister's subsection 74(1) order bringing the Code into force.

[11] For all of these reasons, it is unnecessary to address the Federal Court's analysis regarding: (a) subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7; (b) the procedure leading to the adoption of the Code; (c) any community consensus supporting the Code; and (d) section 15 of the Charter. These reasons should not be read as endorsing the Federal Court's analysis on those matters.

[12] In light of the foregoing, I would dismiss the appeal with costs.

"Richard Boivin"

J.A.

"I agree.
Mary J.L. Gleason"

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-70-19
STYLE OF CAUSE:	PATRICK CHIPESIA, CLARENCE APSASSIN, GABRIEL HARVEY, SYLVESTER APSASSIN, ANGELA APSASSIN, SUSAN DUMAS, AMANDA APSASSIN, TRACY PAQUETTE, VANESSA APSASSIN, ANTHONY POUCE-COUPE, HENRY APSASSIN, JOSEPH APSASSIN, MALCOLM APSASSIN, RUSSELL APSASSIN and WALTER APSASSIN v. BLUEBERRY RIVER FIRST NATIONS and CHIEF MARVIN YAHEY SR., SHAWN DAVIS, SHERRY DOMINIC, DEREK GREYEYES, WAYNE YAHEY as Chief and Council representatives of the BLUEBERRY RIVER FIRST NATIONS
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REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	GLEASON J.A. RIVOALEN J.A.
DATED:	JANUARY 16, 2020

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