Federal Court of Appeal  Cour d'appel fédérale

Date: 20211220

Docket: A-86-20

Citation: 2021 FCA 243

CORAM: **PELLETIER J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

PETERS FIRST NATION BAND COUNCIL, NORMA WEBB IN HER CAPACITY AS CHIEF OF PETERS FIRST NATION, DAVID PETERS IN HIS CAPACITY AS COUNCILLOR OF PETERS FIRST NATION and VICTORIA PETERS IN HER CAPACITY AS COUNCILLOR OF PETERS FIRST NATION

Appellants

and

BRANDON LEE ENGSTROM and AMBER RACHEL RAGAN

Respondents

Heard at Vancouver, British Columbia, on December 2, 2021.

Judgment delivered at Ottawa, Ontario, on December 20, 2021.

REASONS FOR JUDGMENT BY: RENNIE J.A.

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

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The Peters First Nation Band Council appeals from the judgment of the Federal Court (2020 FC 286, *per* Barnes J.) allowing the respondents' application for judicial review and

ordering that the Band take all necessary steps to grant the respondents membership in the Peters First Nation Indian Band.

[2] The appellants appeal on two grounds.

[3] The Band contends that the Federal Court erred in concluding that the respondents were eligible for membership under the Membership Code of the Peters First Nation. The Federal Court held that, having regard to the text of the Membership Code and the evidence surrounding its application by the Band, the only reasonable interpretation was that the definition of "natural child" included persons claiming membership who were the biological children of band members, regardless of age.

[4] The Band also challenges the order of the Federal Court that the Band grant membership to the respondents forthwith, contending that the question of membership ought to have been remitted to the Band for reconsideration.

[5] I see no merit in either of these arguments. However, some context is necessary to understand why I have reached this conclusion.

[6] In December 2015, the respondents submitted applications for membership in the Band. In July 2016, the Band Council issued decision letters rejecting the respondents' applications. The decision letters did not provide reasons, merely stating that under the Membership Code they were not entitled to become members.

[7] The respondents filed a notice of appeal and, as provided by the Membership Code, the Band Council convened a general meeting of the Band to vote on both appeals. The respondents' appeals were voted on as a single question and were dismissed by a 19 to 18 vote. The Chief and two councillors who made the original decision, appellants in this proceeding, also voted.

[8] The respondents then brought an application for judicial review of the decision to deny them membership.

[9] The Federal Court granted the application (*Peters v. Peters First Nation Band*, 2018 FC 544, 2018 CarswellNat 2702 [*Peters*]), finding the decisions unreasonable and procedurally unfair. The decisions refusing membership were set aside and the matter was remitted to the Band Council for redetermination.

[10] Three months later the Band Council again rejected the respondents' applications for membership. In refusing membership, the Band concluded that the respondents would "not promote harmony and the common good" of the First Nation, that they were not under the age of 18 and that the consent of both parents was required.

[11] Again, the respondents appealed. However, the Band Council refused to convene a general meeting to vote on the appeals, reasoning that the previous decision to reject the previous appeals was "final".

[12] Again, the respondents sought judicial review in the Federal Court, resulting in the judgment that is the subject of this appeal.

[13] The governing standard of review is as expressed in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] 12 W.W.R. 1 at paragraph 12. The question before this Court is whether the Federal Court adopted the correct standard of review and applied it correctly. The Federal Court judge's discretionary decision not to remit the question to the Band Council is reviewable on a standard of palpable and over-riding error.

[14] The Federal Court correctly selected reasonableness as the standard of review of the decisions refusing membership (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*]) and correctly applied the reasonableness standard to the Band Council's interpretation of "natural child". I see no error in the judge's discretionary decision not to return the question of membership to the Band.

Was the Band Council's interpretation of the Membership Code reasonable?

[15] The primary legal constraint on the reasonableness of a decision like the present is the legal and evidentiary framework (*Vavilov* at para. 120). A decision-maker must interpret the law, regulations and rules that apply to the matter before it in a way that is consistent with the text, context and purpose of the relevant provision. Where the words employed are precise and unequivocal, their ordinary meaning will usually be determinative. In such situations, it is not open to the decision-maker to adopt an inferior interpretation merely because it is plausibly available or expedient.

[16] The legal framework governing the Band Council's decision-making is the Membership Code. The relevant section of the Code provides:

> Part III – Membership Criteria
>
> 1. Membership in the Peters Indian Band shall consist of the following persons:
>
> …
>
> E. everyone who is a natural child of a parent whose name is registered on the Band List;
>
> …

[17] It is undisputed that the respondents are the biological children of a father who was at the relevant time registered as a member on the Band List.

[18] The term "natural child" has an ordinary meaning. Now more commonly referred to as a "biological child", it references descendancy or the biological relationship between the offspring and parent, and its usage is not limited to only people under a certain age. The term natural child contrasts with the term adopted child, a distinction reflected in the jurisprudence (see, *e.g.*, *In Re Gage*, [1962] S.C.R. 241, 1962 CanLII 2 (SCC); *Hope v. Raeder Estate*, 1994 CanLII 2185 (BCCA), [1994] 2 B.C.L.R. (3d) 58 (BCCA); *Podolsky v. Podolsky*, 1980 CanLII 2438 (MBCA), [1980] 111 D.L.R. (3d) 159 (MBCA); *Plut v. Plut Estate*, 1991 CanLII 1329 (BCCA), [1991] B.C.J. No. 942; *Strong v. Marshall Estate*, 2009 NSCA 25, 309 D.L.R. (4th) 459).

[19] Black's Law Dictionary (11th ed., 2019) defines natural child as "[a] child by birth, as distinguished from an adopted child."

[20] The context of Article 1.E also supports the view that the term “natural child” is not restricted by age. Membership in Peters First Nation shall “consist of” … “everyone” who is a natural child of a band member. This suggests that membership automatically follows paternal and maternal lineage.

[21] The reasonableness of a decision may also be constrained by other factors, in addition to the legal framework. Of particular pertinence to this case, these include the facts and evidence before the decision maker, past practice and policies and the impact of the decision on an individual.

[22] Here, the evidentiary context casts doubt on the reasonableness of the Band Council’s interpretation of the term. The applicants’ membership applications were not summarily screened out on the basis of age. No mention of an age requirement was made in the first decision refusing membership, nor was age mentioned during the general meeting to consider the appeals. The appellants were questioned about their character and whether they had criminal records, but not about their age. During cross-examination on an affidavit filed in the first judicial review, one of the councillors who made the decision to refuse membership could not point to any document or prior decision of the Band suggesting that age was a requirement.

[23] The age requirement first appears in the Band’s memorandum of argument on the first judicial review, prompting the Federal Court judge to observe that “the various rationales subsequently provided by the Band Council were developed *ex post facto*” and that the “justifications were offered in piecemeal fashion long after the decisions had been

communicated to the Applicants" (*Peters* at para. 51). I agree with this characterization of the evidence.

[24] The Band submits that the Membership Code must be read to take into account the effects that an increase in membership will have on the governance and the economic well-being of current Band members. Again, this consideration is neither mentioned in the Membership Code nor in the deliberations of Band Council. The Band's economic situation cannot be used to read requirements into the Membership Code that do not exist or are contrary to the plain meaning of the Membership Code.

[25] Lastly, the Band points to the decision *Norris v Matsqui First Nation*, 2012 FC 1469, [2013] 1 C.N.L.R. 227 [*Norris*], contending that the Membership Code in *Norris* is analogous to its Membership Code and that this Court should adopt the same interpretation of the Code as the Code in *Norris.* It is sufficient to observe that the Membership Code in *Norris* had key differences from the Code at issue. The Code in *Norris* contained an explicit provision governing the age of a "child" and specific membership criteria for children.

[26] The legislative history of the Code also supports the interpretation of the term "natural child" to include all persons born of a band member.

[27] In September 2016, a proposal was brought forward to the general band membership that the Peters First Nation Code be amended to include an age requirement. The proposed new Membership Code defined child as "a child under the age of 18", whether biological or legally

adopted. The proposed Code stated that a person "who has status as an Indian and is a Child of a Parent whose name is registered on the Membership List is eligible to apply for Membership and shall automatically be accepted … ". Persons between the ages of 19 and 30 and with Indian status with at least one parent who is a member would be eligible to apply for membership. Membership would be determined by a vote.

[28] The proposed amendment was a matter of debate and controversy and was ultimately rejected by the Band. However, the proposed, and rejected Code reflects the interpretation of the current Code the Band Council advanced in the Federal Court and now in this Court.

Did the Federal Court err in the remedy granted?

[29] The Supreme Court has consistently held there will be circumstances where the ordinary tools of statutory interpretation will make it clear that there is only one reasonable interpretation (see, *e.g.*, *Vavilov* at para. 124; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770 at para. 35; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 64; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 38). This Court, and other appellate courts across Canada have also recognized that reasonableness encompasses situations where there is only one possible interpretation (see, *e.g.*, *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, 2019 CarswellNat 14755 at para. 61; *English v. Richmond (City)*, 2021 BCCA 442, 2021 CarswellBC 3665 at para. 120; *Ontario Nurses' Association v. Participating Nursing Homes*, 2021 ONCA 148, 154 O.R. (3d) 225 at para. 84).

[30] For the reasons outlined above, the term “natural child” can only have one reasonable meaning. This is not a term for which there is a range of reasonable outcomes.

[31] Given that there is only one reasonable interpretation of the term, the Federal Court did not err in ordering the Band Council to grant the respondents’ membership. The Membership Code stated that the membership *shall* consist of the following persons: “everyone who is a natural child of a parent whose name is registered on the Band List”. *Shall* is not discretionary and as the criteria is met, the only conclusion is that the respondents satisfy the conditions for band membership. The undisputed fact of paternity combined with the express terms of the Membership Code are sufficient to support an order that the respondents are entitled to membership in Peters First Nation.

[32] Counsel for the Band argues that the question of band membership, particularly in a small band like the Peters First Nation, is critical to maintaining social cohesion, cultural traditions and values. Membership, it is argued, is essential to identity.

[33] I do not question this argument or the legitimacy of any of these considerations, and in the ordinary course the Federal Court would return questions of Band membership to a Band for redetermination. However, in the circumstances of this case, these arguments also weigh in favour of an order directing the respondents to be granted membership. Given the importance of Band membership to an individual’s sense of identity, culture and values, rules governing membership must survive reasonableness review and the requirements of procedural fairness.

[34] As is apparent from the lengthy history of this matter, it was open to the Federal Court to have concluded that the interests of justice were not served by having this question return to the Band Council for a third time. Nearly six years have passed since the first applications for membership were made, during the course of which the respondents' rights to procedural fairness were breached on two occasions and there has been ample evidence of bad faith on the part of Band Council. Fairness and efficiency also support the decision not to return the question to the Band for a third time. Reconsideration should be avoided where the outcome is inevitable and remitting the case would serve no useful purpose.

[35] I would dismiss the appeal with costs to the respondents, which I would fix at $30,000.00.

"Donald J. Rennie"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	PETERS FIRST NATION BAND COUNCIL, NORMA WEBB IN HER CAPACITY AS CHIEF OF PETERS FIRST NATION, DAVID PETERS IN HIS CAPACITY AS COUNCILLOR OF PETERS FIRST NATION and VICTORIA PETERS IN HER CAPACITY AS COUNCILLOR OF PETERS FIRST NATION v. BRANDON LEE ENGSTROM and AMBER RACHEL RAGAN
PLACE OF HEARING:	Vancouver, British Columbia
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REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	PELLETIER J.A. GLEASON J.A.
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