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2011 CarswellNat 4781, 2011 FCA 317

Bellegarde v. Poitras

Alma Poitras, Leo Desnomie, Lambert Stonechild, Inez Dieter, Gloria, Dieter, Elaine Pinay, Elwood Oscar Pinay, Delma Poitras, Freda Evelyn Desnomie, Gregory Brass, Aven Ross, Evelyn Poitras, Martine Desnomie, Howard Desnomie, Enoch Poitras and Gerald Desnomie, Appellants and Chief Beverly Bellegarde, Respondent

Federal Court of Appeal

Carolyn Layden-Stevenson J.A., J.D. Denis Pelletier J.A., John M. Evans J.A.

Heard: November 14, 2011
Judgment: November 18, 2011
Docket: A-450-09

Proceedings: Affirmed, 2009 CarswellNat 2990, 2009 CarswellNat 4820, 352 F.T.R. 290 (Eng.), 2009 FC 968, 2009 CF 968 (F.C.)

Counsel: Christopher N.H. Butz, for Appellant

Nathalie Whyte, for Respondent

Subject: Civil Practice and Procedure; Public

Aboriginal law.

Civil practice and procedure.

***Carolyn Layden-Stevenson J.A.*:**

1 The respondent applied for judicial review after being removed as Chief of the Peepeekisis First Nation (First Nation) and prohibited from holding office for 10 years. Justice Zinn of the Federal Court (the judge) allowed the application and by judgment dated September 30, 2009, ordered, among other things, that the respondent be reinstated as Chief. The judge's reasons for judgment are published as 2009 FC 968. The appellants appeal from that judgment. For the reasons that follow, I would dismiss the appeal.

2 The respondent was first elected Chief in a by-election on September 10, 2005 and was subsequently re-elected in a regular election on December 17, 2006. Her term expired on December 16, 2010. She did not run for re-election. The respondent submits that the matter is moot because a decision from this Court will not resolve

any controversy between the parties and will not have any practical effect on their rights. The appellants agree that the matter is "technically moot" but request that the Court address the merits of the appeal as a matter of principle.

3 I agree with the respondent that the matter is moot insofar as it relates to the removal of the respondent as Chief. However, the 10-year prohibition and the costs awarded by the judge remain live issues. At the hearing, the respondent's counsel conceded this point.

Background

4 The factual background is detailed in the judge's reasons and need not be repeated. Suffice it to say that the crux of the matter involves competing claims as to the constitution of the Council of Elders (the Council) as defined in Article 1.3 of the Peepeekisis First Nation Customs Election Act (the Election Act). The definition reads:

> "Council of Elders" means the body of persons recognized by Tradition in the Community for their wisdom and ability by reason of their age and experience.

The Federal Court Decision

5 The judge concluded that there was insufficient evidence to establish that either of the two purported Councils satisfied the criteria of the Election Act, or custom. Consequently, the appellants' Council (responsible for the removal and prohibition) was not properly constituted (judge's reasons, paras. 38-45). Even if it were otherwise, the judge found that procedural fairness and natural justice were not observed for three reasons. First, the respondent was not given notice prior to the removal. Second, the appellants' Council had already reviewed and commented on the removal, thus effectively pre-judging the matter (the subsequent meeting could not cure the deficiency as there was no evidence that the appellants' Council was prepared to reconsider the removal). Third, only some Elders were provided with notice of the meeting when the respondent was removed (judge's reasons at paras. 46-50).

The Allegations of Error

6 The appellants assert that the judge erred in failing to find:

> 1) the respondent ought to have engaged the internal election appeal procedure;
>
> 2) the appellants' proposed Council is the appropriate Council as defined by the Election Act, as a result of custom;
>
> 3) the respondent was not entitled to relief because she did not come to the court with "clean hands".

The appellants also take issue with the judge's costs award.

Analysis

Internal Election Appeal Procedure

7 It is not clear from the record whether this specific argument was made to the judge. The appellants claim that an appeal process is provided in the Election Act and it was incumbent on the respondent to exhaust that

process before turning to the Court. As stated, the judge found that neither of the purported Councils was properly constituted. In my view, for reasons that are discussed under the next subheading, on the basis of the record, the judge's conclusion is unassailable. It necessarily follows that there could be no legitimate appeal process to an improperly constituted Council. Moreover, by its terms, the appeal process in the Election Act appears to be limited to disputes regarding election results. Finally, even if Article 8 applies, the judge retains discretion to entertain the application: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3. This argument therefore must fail.

The Council as defined by custom

8 It appears to be common ground that "Council of Elders" is so broadly defined that its application must be determined by custom. The judge's reasons set out in considerable detail the various difficulties associated with each of the proposed Councils (judge's reasons, paras. 18-24, 38-42). I need not reiterate the judge's reasons. A few examples will suffice.

9 The members of the Council proposed by the respondent emanate from a membership meeting on January 6, 2006, focussed on the role of the Council within the First Nation, its structure and its members (appeal book, vol. 1, p. 74). On cross-examination, the appellants acknowledged that the meeting was preceded by a survey of the First Nation and was designed to ascertain who was viewed as an Elder (appeal book, vol. 3, tab 20, pp. 895-896). On its face, this appears to represent an attempt to identify the members of the Council established in accordance with the traditional views of the First Nation. However, the names forwarded by the respondent to Indian and Northern Affairs Canada (INAC) as constituting the Council do not match exactly the list created following the meeting (appeal book, vol. 1, p. 80, compared to appeal book, vol. 1, p. 79). There was also evidence that the meeting was not a general band meeting (appeal book, vol. 2, p. 696). Additionally, there is affidavit evidence indicating that, according to custom, replacement members must be chosen by the recognized Council (appeal book, vol. 1, tab 7, p. 113).

10 The Council proposed by the appellants ostensibly obtained its authority from a Band meeting on October 25, 2008. The minutes of this meeting purport to appoint all Elders "who identify themselves as such" (appeal book, vol. 2, p. 453). Such a broad and general criterion appears to be inconsistent with the language of the Election Act, which envisages external criteria (such as traditional knowledge) being required. One appellant spoke of the cultural tradition of requiring grand-children before one could qualify as an Elder (appeal book, vol. 3, p. 896). The same appellant appeared to recognize a past practice of prior elders appointing their replacements (appeal book, vol. 3, p. 890). Such requirements appear to go beyond mere self-identification. More significantly, as the judge noted, even if the appellants' Council were accepted as legitimate, its power is limited to election appeals. This factual determination arises from the wording of the resolution relied upon by the appellants, which simply appoints elders to "take part in appeal if there is one" (appeal book, vol. 2, p. 453). At the meeting, a motion was tabled (ultimately not passed) to limit the Council's role to an advisory capacity.

11 In my view, the judge did not err in concluding that, on the record, neither of the proposed Councils was properly constituted. However, the appellants further assert that the judge should have limited his finding to a confirmation that custom dictates the composition of the Council and that he had insufficient evidence to make such determination. According to the appellants, had the judge confined his finding as suggested, there would be no ground upon which to set aside the decision of the appellants' proposed Council. With respect, I do not see how this can be. Since the appellants asserted their Council was the customary Council, it was essential that they provide sufficient evidence to enable the judge to conclude that this was so. In other words, it was incumbent

upon the appellants to establish that its Council was the properly constituted Council, in accordance with custom. This the appellants failed to do. Moreover, even if I were to assume that the appellants are correct in this respect, and I do not, the judge also concluded that there had been a breach of procedural fairness on the part of the appellants' Council. I will return to breach of procedural fairness later in these reasons.

Clean Hands

12 The appellants contend that the judge erred in failing to dismiss the application due to the respondent's lack of "clean hands." In this respect, the appellants refer to the respondent's alleged misconduct. This ground is problematic because the argument was not made to the judge when the application was heard. Consequently, the judge cannot be faulted for failing to do that which he was not asked to do. Moreover, and in any event, a court is not bound to dismiss an application for judicial review solely because the applicant does not have "clean hands": *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14. This argument also fails.

Procedural Fairness

13 The judge found that procedural fairness and natural justice were not observed with respect to the removal of the respondent as Chief. This, he reasoned, was sufficient, in and of itself, to set aside the decision, unless it could be established that it is the custom of the First Nation not to observe those principles (judge's reasons, para. 46). After examining the procedural protections contained in the Election Act, the judge concluded that no lesser standard was acceptable when proposing the removal of a duly elected Chief. The judge specifically identified a number of breaches (judge's reasons, paras. 47-50). The appellants have not taken issue with any of these findings. On this basis alone, the appellants' appeal must fail.

Costs

14 The appellants take issue with the judge's costs award, but provide no specific indication regarding error on the judge's part. The appellants merely request, without more, that the judge's order be reversed and that no costs be awarded on the appeal.

15 The appellants took no issue with the respondent's bill of costs submitted to the judge. The First Nation declined to make submissions notwithstanding the judge's invitation to it. An award of costs is a discretionary order: *Federal Courts Rules*, SOR/98-106, Rule 400(1). Absent an error of law or a wrongful exercise of discretion, an appellate court is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge: *Apotex Inc. v. Merck & Co. Inc.*, 2006 FCA 324. No error of law or wrongful exercise of discretion has been demonstrated. I would not disturb the judge's costs award.

16 Beyond the fact that the litigation has been and continues to be expensive, the appellants provide no justification for this Court to depart from the general rule that costs normally follow the event. I am not persuaded that this unfortunate reality warrants a departure from the general rule.

Conclusion

17 For the foregoing reasons, I would dismiss the appeal with costs.

***John M. Evans J.A.*:**

I agree

***J.D. Denis Pelletier J.A.*:**

I agree

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