Federal Court  Cour fédérale

Date: 20160705

Docket: T-1313-15

Citation: 2016 FC 750

Ottawa, Ontario, July 5, 2016

PRESENT: The Honourable Mr. Justice Boswell

IN THE MATTER OF an application made pursuant to section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended;

and

AND IN THE MATTER of section 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5, as amended;

and

AND IN THE MATTER of an Application for a Reference by Chief Brian Francis on behalf of the Abegweit First Nation Band Council and Abegweit First Nation of questions or issues of the constitutional validity of the custom rules governing elections for the Chief and Council of the Abegweit First Nation Band;

BETWEEN:

CHIEF BRIAN FRANCIS ON BEHALF OF THE ABEGWEIT FIRST NATION BAND COUNCIL AND ABEGWEIT FIRST NATION

Applicants

JUDGMENT AND REASONS

[1] Chief Brian Francis, on behalf of the Abegweit First Nation Band Council and the Abegweit First Nation, brings this application for a reference pursuant to section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F.-7. In particular, the Applicants request that the Court determine the following question:

> Do the rules governing elections for the Chief and Council of the Abegweit First Nation Band contravene section 15(1) of the *Canadian Charter of Rights and Freedoms* [Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 1 [the *Charter*]] in that they do not allow for voting by off reserve Band members?

[2] For the reasons that follow, I have determined that the Court lacks the jurisdiction to grant this request and, as a result, the question posed by the Applicants will not be answered. Accordingly, the Applicants' amended notice of application is dismissed.

I. Background

[3] The Abegweit First Nation is a band, as defined under the *Indian Act*, R.S.C. 1985, c. I-5, located on Prince Edward Island. It consists of some 180 members and encompasses three reserves: Scotchfort, Rocky Point, and Morrel. As of July 31, 2015, 110 Band members resided on one of these three reserves and the other 70 members resided off-reserve.

[4] For the purposes of electing a Chief and Band Council, the Abegweit First Nation [the Band] is considered a "Custom Band", in that its elections are governed by the Band's own election law, not the *Indian Act*: namely, the "Election Regulations of Abegweit Band Custom System for Election of Chief and Council" [the Election Regulations]. Section 2 of the Election Regulations states that in order to be eligible to vote at Band elections an elector must be "a

Band member of the full age of 18 years who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day."

[5] In 2009, the Band Council embarked on the process to amend the Election Regulations to bring them in line with two recent court decisions which had determined it was unconstitutional to restrict voting in band elections only to band members living on a reserve. In June 2009, a community engagement session was held for Band members to provide relevant information and address questions about the issue of off-reserve voting. On November 19, 2009, the Band held a plebiscite vote, open to all Band members, to consider whether the Election Regulations should be amended to allow Band members living off-reserve to vote at Band elections. Only 81 Band members voted in this plebiscite, 39 of whom voted to extend voting rights to Band members residing off-reserve and 41 of whom voted to maintain the reserve residency restriction on voting rights (there was one spoiled ballot). The Court inquired at the hearing of this matter as to how many reserve versus off-reserve Band members voted in the 2009 plebiscite, but this breakdown is unknown.

[6] Section 22 of the Election Regulations stipulates that: "These election regulations may be amended with the support of 75% of the votes cast in a plebiscite held for the purpose of seeking approval of such proposed amendments." The Applicants believe off-reserve Band members should be entitled to vote at elections but, at the hearing of this matter, indicated it is unlikely that this 75% threshold for an amendment to the Election Regulations to remove the reserve residency requirement could be obtained. Accordingly, in addition to the request to determine the question set forth above, the Applicants also seek an order from the Court declaring that the

words, "who has resided on one of the Abegweit Band Reserves on a full-time basis for at least six consecutive months immediately preceding election day", contained in section 2 of the Election Regulations are null and void and of no force or effect. However, because the Court has determined that the proposed reference question should not be answered in this application, no such order will be made.

II. Issues

[7] This application presents two issues: first, it must be determined whether the Court in fact possesses the jurisdiction to hear the proposed reference pursuant to subsection 18.3(1) of the *Federal Courts Act*. Only if this preliminary question is answered in the affirmative will the Court then proceed to the second issue and determine whether section 2 of the Election Regulations contravenes section 15(1) of the *Charter* by excluding Band members who reside off-reserve as eligible voters at Band elections.

III. Analysis

A. *Does the Court have jurisdiction to determine this matter pursuant to subsection 18.3(1) of the Federal Courts Act?*

[8] Subsection 18.3(1) of the *Federal Courts Act* allows for a federal board, tribunal or commission to refer a question of law, jurisdiction or procedure to the Federal Court for determination "at any stage of its proceedings". The subsection provides as follows:

Reference by federal tribunal	**Renvoi d'un office fédéral**
18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination. [emphasis added]	18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure. [soulignement ajouté]

[9] The Applicants submit, and I agree, that a band Council – either created under the *Indian Act* or by a First Nation's own customary authority – is a "federal board, commission or other tribunal" for the purposes of the *Federal Courts Act*, and is therefore able to refer a question to this Court for determination pursuant to subsection 18.3(1): *Gamblin v. Norway House Cree Nation Band Council*, 2012 FC 1536 at para. 40, 424 F.T.R. 125.

[10] The Applicants further submit that this application for a reference concerns a pure issue or question of law – namely, whether section 2 of the Election Regulations violates section 15(1) of the *Charter* – and that it is therefore an appropriate question for determination under subsection 18.3(1). Specifically, the Applicants argue that there is no dispute regarding the factual underpinnings of this application for a reference, since the evidence is clear that the Election Regulations bar members of the Band who reside off-reserve from voting in Band elections.

[11] At the hearing of this matter, the Applicants submitted that this application for a reference arises out of the on-going governance of the Band, which the Applicants argue is a proceeding for the purposes of subsection 18.3(1). The Applicants argued, moreover, that the

short time lines for conducting elections weighs against determining the question at issue during an election period. They further noted that this is a novel application, inasmuch as it is the Band and its Council, not an individual Band member, challenging the reserve residency requirement for voting at Band elections. According to the Applicants, the question they are proposing that this Court determine is not academic and, unlike the case in *Clifton v. Hartley Bay (Electoral Officer)*, 2005 FC 1030, [2006] 2 F.C.R. 24 [*Clifton*], does not include a request to set aside an election because the voting rights of off-reserve band members were denied.

[12] The Applicants therefore submit that the Court does in fact have jurisdiction to hear and determine this matter as a reference under subsection 18.3(1) of the *Federal Courts Act*.

[13] I do not agree. In my view, the Court does not have jurisdiction to hear and determine this matter pursuant to subsection 18.3(1) for two reasons: first the question the Applicants want the Court to determine does not originate from any specific proceeding that is presently ongoing, and second, the application lacks a proper factual basis necessary to appropriately determine the issue.

[14] In order for this Court to exercise its jurisdiction under subsection 18.3(1) of the *Federal Courts Act*, the Federal Court of Appeal has held that the question proposed for determination must result from a live controversy and cannot be simply academic or speculative. In *Alberta (Attorney General) v. Westcoast Energy Inc.* (1997), 208 N.R. 154 at para. 16 (F.C.A.), [1997] F.C.J. No. 77, the Court of Appeal stated as follows:

> 16 This Court has unequivocally rejected the possibility of a tribunal filing under section 18.3 and subsection 28(2) of the

> *Federal Court Act* a Reference which, as in this case, would only have a life of its own - the answer to the question posed being susceptible of no immediate and direct effect in any proceeding below. The Court is not empowered to determine academic questions of law or to engage in speculation; its role is to determine as opposed merely to consider [see *Re Public Service Staff Relations Board* (1973), 38 D.L.R. (3d) 437 (F.C.A.); *Martin Service Station Ltd.*, [1974] 1 F.C. 398; *In re Canadian Arctic Gas Pipeline Ltd. et al*, [1976] 2 F.C. 20, reversed on other grounds [1978] 1 S.C.R. 369].

[15] In this case, there is no underlying proceeding, such as an election, now pending before the Band or any other current dispute that the Band Council is attempting to resolve. There is no evidence that any member of the Band has challenged section 2 of the Election Regulations, nor is there any evidence that any member of the Band – including the Applicants – attempted to challenge the results of the 2015 election on the basis that off-reserve Band members were not eligible to vote in that election. The next Band election is not scheduled to take place until August 2019. At best, the proposed reference is premature until that election occurs.

[16] Although the Applicants clearly believe that section 2 of the Election Regulations violates subsection 15(1) of the *Charter* and desire that the election scheduled for 2019 be held consistent with the *Charter*, subsection 18.3(1) of the *Federal Courts Act* does not allow federal boards, commissions or tribunals to seek determinations of a question of law simply because they would like clarity on an issue. Rather, subsection 18.3(1) is only intended to resolve questions that stem from an actual, pending proceeding before a federal board, commission or tribunal. This is not the case here, and on this basis alone the Court must decline to determine the Applicants' proposed reference question.

[17] Moreover, the Applicants have failed to establish that the proposed reference satisfies the requirements for a reference as set out in *Reference re Immigration Act* (1991), 137 N.R. 64 at para. 2 (F.C.A.), [1991] F.C.J. No. 1155, where the Federal Court of Appeal stated:

> 2 The Court's jurisprudence clearly establishes that a question of law, jurisdiction or procedure may not be the subject of a reference under subsection 28(4) of the *Federal Court Act* [now subsection 18.3(1)] unless the following conditions are fulfilled:
>
> 1. the issue must be one for which the solution can put an end to the dispute that is before the tribunal;
>
> 2. the issue must have been raised in the course of the action before the tribunal that makes the reference;
>
> 3. the issue must result from facts that have been proved or admitted before the tribunal; and
>
> 4. the issue must be referred to the Court by an order from the tribunal that, in addition to formulating the issue, shall relate the observations of fact that gave rise to the reference.

[18] The proposed reference would clearly not put an end to any proceeding now pending before the Band because there is no such proceeding to be ended. Similarly, the question has not been raised during the course of any specific proceeding, notably an election, nor is it one based on facts that have been proven or admitted during the course of any such proceeding.

[19] The Applicants' argument that the relevant proceedings at issue on this application are their on-going governance of the Band is not persuasive. In my view, the reference to "at any stage of its proceedings" in subsection 18.3(1) of the *Federal Courts Act* means at any juncture during the course of a *specific* proceeding before a federal board, commission or tribunal before that proceeding has come to an end. In the present context, this would encompass an issue arising

during and before the end of a Band election and the expiration of any appeals as contemplated by section 17 of the Election Regulations.

[20] In addition, the Applicants' argument that the short time lines for conducting Band elections militates against the question at issue being considered during an election period is also not persuasive. The question could certainly be raised after a band election as was the case in *Clifton*, where the Court was presented with an application for judicial review of various decisions or orders of the band's electoral officer subsequent to the election in that case in which off-reserve band members were not permitted to vote.

[21] While this is sufficient to dispose of the Applicants' application for a reference, in my view this application should also be dismissed because the proposed question for determination lacks a proper factual basis on which the question can be appropriately resolved: see *Re Air Canada* (1999), 163 F.T.R. 278 at para. 13 (C.A.), 241 N.R. 157; *Canada (Registrar of the Indian Register, Indian and Northern Affairs) v. Sinclair*, 2003 FCA 265 at para. 5, [2004] 3 F.C.R. 236. The material evidence provided by the Applicants is simply this: (1) section 2 of the Election Regulations prohibits Band members residing off-reserve from voting in Chief and Council elections; and (2) there are Band members who reside off-reserve. The Applicants have provided no evidence as to how the interests of off-reserve Band members are affected by the Band's elected leadership or showing how section 2 of the Election Regulations in fact results in any discriminatory effects on off-reserve Band members.

[22] Instead, the Applicants appear to rely entirely upon the Supreme Court's findings in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 [*Corbiere*], to establish that section 2 of the Election Regulations is discriminatory. In particular, the Applicants rely on the Supreme Court's determination in *Corbiere* (at para. 18) that section 77 of the *Indian Act*, like section 2 of the Election Regulations, perpetuates a stereotype that members of a band who live off-reserve are not interested in maintaining a relationship with their aboriginal identity or their community and its future.

[23] The difficulty with this approach is that the findings in *Corbiere* (at paras. 17 and 19) were based upon evidence that showed how the interests of band members living off-reserve were impacted by the decisions of the band's leadership, particularly in relation to the use of the band's traditional territory and the expenditures of benefits for all band members. There is no such evidence in this case. It is therefore not possible for the Court to properly determine if the interests of Band members, whether residing on or off-reserve, are impacted in the same manner as found in *Corbiere* or if the Supreme Court's findings are applicable in this case or should be distinguished.

[24] There are, of course, several decisions in which *Corbiere* has been cited for the proposition that barring band members who reside off-reserve from voting in band elections is inherently discriminatory: see, e.g., *Thompson v. Leq'á:mel First Nation Council*, 2007 FC 707 at para. 17, 333 F.T.R. 17; *Cockerill v. Fort McMurray First Nation No. 468*, 2010 FC 337 at para. 33, 363 F.T.R. 213; *Joseph v. Dzawada'enuxw (Tsawataineux) First Nation Band Council*, 2013 FC 974 at paras. 43-48, 57-58, 439 F.T.R. 226. These cases suggest it is unnecessary for a

claimant to establish how a provision which bars off-reserve band members from voting in band elections impacts those members' interests because such bans are inherently discriminatory; in that they perpetuate the stereotype that band members residing off-reserve have chosen to assimilate into non-Aboriginal society and are therefore less worthy of consideration by the band.

[25] However, these cases should be distinguished, not only because they did not concern a proposed reference under section 18.3(1) of the *Federal Courts Act*, but also because they do not accord with the Supreme Court's more recent jurisprudence on section 15 of the *Charter*. In *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras. 20-21, 34, [2015] 2 S.C.R. 548 [*Kahkewistahaw*], the Supreme Court determined that claimants who allege their rights under section 15 of the *Charter* have been violated must provide a sufficient evidentiary basis to establish a *prima facie* case that the impugned action or law is discriminatory in its effects. While the evidentiary burden for section 15 claims need not be onerous, it does require "more than a web of instinct" (*Kahkewistahaw* at para. 34).

[26] Although the Applicants have provided some evidence that they furnish programs, services and benefits for both on-reserve and off-reserve Band members, albeit not necessarily on an identical basis, there is no evidence whatsoever in the record as to how section 2 of the Election Regulations affects off-reserve Band members save for the mere fact that the express words of that section preclude them from being an eligible voter at Band elections. The Applicants offer only an inference that section 2 of the Election Regulations must be unconstitutional because the Supreme Court has already determined that other identically worded

provisions violate section 15(1) of the *Charter*. An inference though is not a fact or any evidence to establish a fact. There is simply not a sufficient factual basis on which to determine the Applicants' proposed question because it provides no insight into how the impugned provision actually impacts the lives and interests of off-reserve Band members. Indeed, if anything, the results of the 2009 plebiscite suggest there may be not only some apathy with respect to the proposed question, but also division among Band members about off-reserve Band members being eligible to vote in Band elections. In this regard, it is telling that while notification of the application and the opportunity to intervene was posted at the Band's office, on its website, and also published in the local newspaper, no persons availed themselves of such opportunity.

[27] In view of the foregoing reasons, therefore, the Court concludes that it lacks the jurisdiction to determine and decide the Applicants' proposed reference under subsection 18.3(1) of the *Federal Courts Act*.

B. *Does section 2 of the Election Regulations contravene section 15(1) of the Charter by excluding Band members who reside off-reserve as eligible voters at Band elections?*

[28] Because it is my view that the Court does not have jurisdiction to determine the Applicants' proposed reference question, there is no need to address this issue.

IV. Conclusion

[29] In conclusion, the Court dismisses the application for a reference on the basis that it lacks the jurisdiction to determine the matter under subsection 18.3(1) of the *Federal Courts Act*.

JUDGMENT

THIS COURT'S JUDGMENT is that: the amended application for a reference pursuant to section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F.-7, is dismissed; and that there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1313-15
STYLE OF CAUSE:	IN THE MATTER OF AN APPLICATION FOR A REFERENCE BY CHIEF BRIAN FRANCIS ON BEHALF OF THE ABEGWEIT FIRST NATION BAND COUNCIL AND ABEGWEIT FIRST NATION
PLACE OF HEARING:	CHARLOTTETOWN, PRINCE EDWARD ISLAND
DATE OF HEARING:	JUNE 14, 2016
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JULY 5, 2016

APPEARANCES:

John W. Hennessey, Q.C. Donald K. MacKenzie	FOR THE APPLICANTS

SOLICITORS OF RECORD:

McInnes Cooper Barristers and Solicitors Charlottetown, Prince Edward Island Mi'kmaq Confederary of PEI Polyclinic Charlottetown, Prince Edward Island	FOR THE APPLICANTS