

Federal Court



Cour fédérale

Date: 20200221

Docket: T-1710-18

Citation: 2020 FC 286

Ottawa, Ontario, February 21, 2020

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**BRANDON LEE ENGSTROM AND
AMBER RACHEL RAGAN**

Applicants

and

**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**

Respondents

JUDGMENT AND REASONS

[1] The Applicants to this proceeding challenge decisions made by the Peters First Nation Band Council (Council) on August 24, 2018 rejecting their respective applications for band membership. This is their second application for judicial review seeking relief in connection

with the denial of their memberships. Their first application was granted by Justice Simon Fothergill in a decision rendered on May 25, 2018: see *Peters v Peters First Nation Band*, 2018 FC 544, 293 ACWS (3d) 226. Justice Fothergill declined to express an opinion about the merits of the Council's decision denying membership to Mr. Engstrom and Ms. Ragan. However, he found that the Council had acted unfairly by failing to inform them in advance of the factors that would be taken into account in deciding their applications. He was also concerned by the Council's failure to provide substantive reasons for its decision. In sending the matters back for redetermination, Justice Fothergill directed the Council to decide the applications in a fair and reasonable matter. He also noted that, if the applications were again rejected, an appeal to the members of the Band was a potential option.

[2] The matters were accordingly remitted to Council for reconsideration. Once again, the applications were refused with the following reasons:

1. We reject the application of Brandon Engstrom for membership in the Peters First Nation for the following reasons:
 - a. He was an adult when he applied for membership. In our view, the correct interpretation of the Peters First Nation's Membership Code is that only children who have not attained the age of 18 and who have a parent whose name is registered on the Peters First Nation Membership List meet the criteria set forth in Part III subsection 1 E of the Peters First Nation Membership Code. In order to meet the principles of the promotion of harmony set forth in the introduction to the Peters First Nation Membership Code, we take the position that a child who is applying for the membership must have the consent of both parents.
 - b. Brandon Engstrom appealed our previous decision denying him membership in of the Peters First Nation. In a meeting held on November 6, 2016, the membership voted against Brandon Engstrom becoming a member of the Peters First Nation. Pursuant to Part V section 3 of the Peters First Nation Membership Code, that decision is final. In addition, we as a Council stand behind our community's decision as we are of the opinion that they are best

able to judge whether a person applying for membership will fit in with our community and contribute to the goals and aspirations of our First Nation and its members.

c. As we believe that we also have to consider the principles set forth in the introduction to the Peters First Nation Membership Code, we are of the opinion that admitting Brandon Engstrom as a member of the Peters First Nation will not "promote harmony and the common good". Brandon Engstrom retained as his agent, Darryl Kipp who has been very aggressive and threatened and harassed members of Council and the Administration, presumably either at the behest of Brandon Engstrom or with his consent. In our view, this has created disharmony and division within the Peters First Nation community.

2. We reject the application of Amber Ragan for membership in the Peters First Nation for the following reasons:

a. She was an adult when she applied for membership. In our view, the correct interpretation of the Peters First Nation's Membership Code is that only children who have not attained the age of 18 and who have a parent whose name is registered on the Peters First Nation Membership List meet the criteria set forth in Part III subsection 1 E of the Peters First Nation Membership Code. In order to meet the principles of the promotion of harmony set forth in the introduction to the Peters First Nation Membership Code, we take the position that a child who is applying for membership must have the consent of both parents.

b. Amber Ragan appealed our previous decision denying her membership in the Peters First Nation. In a meeting held on November 6, 2016, the membership voted against Amber Ragan becoming a member of the Peters First Nation. Pursuant to Part V section 3 of the Peters First Nation Membership Code, that decision is final. In addition, we as a Council stand behind our community's decision as we are of the opinion that they are best able to judge whether a person applying for membership will fit in with our community and contribute to the goals and aspirations of our First Nation and its members.

c. As we believe that we also have to consider the principles set forth in the introduction to the Peters First Nation Membership Code, we are of the opinion that admitting Amber Ragan as a member of the Peters First Nation will not "promote harmony and the common good". Amber retained as her agent, Darryl Kipp who has been very aggressive and threatened and harassed members of Council and the Administration, presumably either at the behest of

Amber or with her consent. In our view, this has created disharmony and division within the Peters First Nation community.

[3] It is apparent from the above reasons that Mr. Engstrom's and Ms. Ragan's memberships were rejected on three and, perhaps, four grounds:

- (a) that, having applied for membership after reaching the age of 18, the Applicants were no longer eligible;
- (b) that the band membership had voted against the Applicants' membership in an appeal from the Council's first decision and thereby rendered a final decision that bound the Council on the ordered reconsideration;
- (c) that the Applicants' agent had been aggressive and threatening in representing their interests creating disharmony and division within the Band; and, possibly,
- (d) that the Applicants failed to prove the consent of their mothers to their membership.

[4] The Applicants continue to be aggrieved by the Council's approach to their requests for Band membership. They argue that Council has, throughout the membership application process, acted in bad faith by ignoring their clear entitlement to membership as set out in the Band's Membership Code. The Council's decision, they say, was unreasonable because it attempted to justify the denial of membership by applying arbitrary prerequisites that were not authorized by the Membership Code or by any custom, practice or tradition. Council does not deny that its reliance on age and parental consent restrictions is not supported by the express language of the Membership Code. It says, however, that it has an inherent authority to control membership to the Band supported by long standing practice and by the introductory statements in the Membership Code recognizing the Band's traditions and customs and the overarching need to promote harmony and the common good. In effect, the Council contends that it has a

broad discretion to consider any relevant evidence bearing on the suitability of an applicant for membership. The membership criteria that are contained in the Membership Code, it says, are merely non-exhaustive guidelines. One of the additional factors that counsel for the Council asserted in argument was that access to Band resources was a concern. Needless to say, this justification is nowhere to be found in the Council's decision and it cannot now be relied on to support the denial of memberships to Mr. Engstrom and Ms. Ragan. Even if this justification was relevant to my assessment of the Council's decision, it would not assist its case. Indeed, it suggests that the reasons Council gave for denying membership were invalid and that what actually motivated the decision was an unwillingness to share Band resources.

[5] On the record before me, I am not able to ascertain the exact motives of the Council for denying Band memberships to Mr. Engstrom and Ms. Ragan. What I can do is assess the Council's stated reasons for denying those memberships to determine whether those reasons bear the mark of rationality, intelligibility and justification.

[6] The focus of judicial review is on the reasons provided by the decision-maker in support of its decision. According to the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] SCJ No 65 (QL), reasonableness review "must be on the decision actually made", not the reasons that could have been made. Robust judicial review is about outcomes and a decision-maker's reasoning process in getting to an outcome. Both must be reasonable in light of the legal and factual constraints that bear on the decision. A primary legal constraint is the governing statutory scheme. It is not open to a

decision-maker to disregard the applicable rules. There is no such thing as absolute or untrammelled discretion: see *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689.

[7] According to *Vavilov*, a decision-maker may have some room to interpret the rules that apply to a matter before it but that exercise “must be consistent with the text, context and purpose of the provision” [para 120]. 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 and expedient. The role of the decision-maker is to discern meaning and not to “reverse-engineer” to get to a desired outcome [para 121].

[8] The express governing rules that apply to the Council’s membership decisions are contained in the Peters Indian Band Membership Code [Code]. The Code was adopted by the Band in 1990 and replaced the band membership provisions that had been previously contained in the *Indian Act*, RSC, 1985, c. I-5. Under Part III of the Code, Band membership was said to be available to any of the following persons:

- A. everyone whose name appeared on the Band List on April 17, 1985;
- B. everyone who became entitled to have his or her name registered on the Peters Band List in accordance with Section 6 paragraph 2 of the *Indian Act*, as amended, by the date the Membership Code is adopted by the Band;
- C. everyone who became entitled to have his or her name registered on the Peters Band List in accordance with Section 6 paragraph 1(f) of the *Indian Act*, as amended, by the date the Membership Code is adopted by the Band;
- D. everyone who is granted Band Membership Status pursuant to part IV and V of this Membership Code.

E. everyone who is a natural child of a parent whose name is registered on the Band List;

[Emphasis added.]

[9] It is article “E” above, that is relied upon by Mr. Engstrom and Ms. Ragan on the basis that they are the indisputable natural children of a father (Robert Dwayne Peters) who is and was at the relevant time, registered as a member on the Band List.

[10] In rejecting the applications of Mr. Engstrom and Ms. Ragan, it is clear that Council did not consider itself bound by the membership criteria set out in the Code. This is a surprising and indefensible position. It was not open to the Council to make up its own membership rules to supplement the explicit criteria that were adopted in 1990 when the Band took control of its memberships.

[11] Presumably the Band had its reasons for adopting a “one parent” rule for membership but having done so without reservation the Band left no room for denying memberships on other grounds. This seems to have been understood by Council because there have been unsuccessful attempts to amend the Code to impose additional membership criteria (including age restrictions). Such amendments would not be required if Council had the broad authority it claimed for itself in denying memberships to Mr. Engstrom and Ms. Ragan.

[12] Council’s argument is further belied by the content of several exchanges between legal counsel for the parties. Throughout those discussions Mr. Engstrom and Ms. Ragan asserted their right to membership based on the one-parent rule. At no time did counsel for the Band

assert that they were ineligible based on their ages. If this was a well-known understanding within the Band, as is now maintained by the Council's affiants, one would expect the issue to have been raised in these communications. Instead, counsel for the Band referred only to the supposed requirement for dual parental consent and alluded vaguely to the Council's discretion to go beyond the Code "guidelines".¹ It is also of concern that at other times Council refused to entertain these applications because they had not been presented in person at the Band office and because they were submitted along with others and not individually². I would add to this that, insofar as Council took into account the alleged conduct of the Applicants' agent, it was acting irrationally and, therefore, unreasonably. Whatever the agent supposedly did was of no relevance to the issue Council had to resolve.

[13] The inference I draw from the evidence before me is that Council has strayed far beyond its allowed mandate and has used an unjustified and evolving array of excuses to evade its obligation to Mr. Engstrom and Ms. Ragan.

[14] All of this is not to say that the Band cannot control its own membership. If the Band wants to apply "character" considerations or any other lawful limitations to membership, it can do so with appropriate amendments to the Code. It is questionable, however, that an age limitation would be justified because it is *prima facie* discriminatory.

¹ What Council considers to be "guidelines" are, in fact, stated to be "rules" under section 10 of the *Indian Act*.

² Ms. Ragan also applied for membership before reaching the age of 18 but that application appears to have been denied on the basis that she had not signed an individual application. When she reapplied, she had reached the age of 18 and was denied on that basis.

[15] Councils' further argument that it was entitled to consider past practice and band customs to supplement its discretion is untenable. The Code leaves no room for such matters; but even if it did, the evidence presented on behalf of the Council does not establish the existence of any such practice or custom. Past practices or band customs may be available where gaps exist in an applicable code that must be filled to give operational effect to a regime or process: see *Beardy v Beardy*, 2016 FC 383, 266 ACWS (3d) 527. This is most commonly seen in band election codes where not every exigency is provided for. Even at that, the establishment of customary practice requires evidence that shows that the practice was "firmly established, generalized and followed consistently and conscientiously by the majority of the community, thus evidencing a broad consensus" (*Francis v Mohawk Council of Kanesatake*, 2003 FCT 115, at para 36, [2003] 4 FC 1133): see *Gadwa v Kehewin First Nation*, 2016 FC 597, [2016] FCJ No 569 (QL). Based on the affidavits provided by both parties, such is not the case here. Further, as Justice McVeigh stated in *Shirt v Saddle Lake Cree Nation*, 2017 FC 364, at para 32, 279 ACWS (3d) 2: "For example, a majority of a band's members must recognize the custom, not just Chief and Council. The band members must not only agree as a community to the new custom, the community must know they have agreed".

[16] The affidavits filed on behalf of the Council state only that it was common knowledge that only those 17 years of age or younger could become members of Peters. At the same time those affiants acknowledge that from 1990 to the point of Mr. Engstrom's and Ms. Ragan's membership applications no one over the age of 17 had ever applied. The fact that all of the intervening applications were made and approved before the applicants turned 18 does not establish a custom, practice or understanding that anyone older was ineligible for membership.

Much stronger evidence than that presented by the self-interested members of the Council would be required to prove the existence of such a customary practice. Indeed, if an age limitation to membership was as notorious as those affiants now suggest, the supporting evidence ought to have come from disinterested band members and, most notably, from respected and neutral elders. In this case, no such evidence was presented. Instead, what the Court is left with are conclusory statements about the existence of a customary practice from members of the Council, countered by other evidence denying that such a practice or understanding was in place after 1990. On this record, the Council has abjectly failed to establish an expanded discretion to apply age or maternal consent eligibility limitations to these applications.

[17] I am satisfied on the record before me that Council has acted unlawfully, unfairly and in bad faith in rejecting the membership applications of Mr. Engstrom and Ms. Ragan. That conduct has been aggravated by Council's refusal to submit their applications to the Band members in accordance with the direction of Justice Fothergill and in accordance with the Code. Justice Fothergill quashed Council's first decision and it was therefore a legal nullity. It was not open to the Council to treat the appeal from that null decision as though Mr. Engstrom's and Ms. Ragan's rights of appeal had been exhausted. They were entitled to an appeal and it was wrongfully denied by the Council.

[18] In my view, this is an appropriate case to direct Council to take all the steps necessary to grant full Band memberships to the Applicants. Council has repeatedly shown itself to be unfit to decide these matters and there is no reasonable expectation that fairness and reason will now prevail. Furthermore, the Applicants have clear and unqualified rights to be members of the

Band based on their father's membership in Peters Indian Band. There is no room for some other determination. To quote from *Vavilov*, a reviewing court should not countenance "an endless merry-go-round of judicial reviews and subsequent reconsiderations". This is particularly the case where the outcome is inevitable such that remitting the case would serve no useful purpose.

[19] The parties requested the opportunity to make further submissions on costs. I will allow each party ten days to make submissions in writing not to exceed ten pages in length.

JUDGMENT in T-1710-18

THIS COURT'S JUDGMENT is that this application is allowed and the Respondents are ordered to forthwith take all steps necessary to grant full Band memberships to the Applicants.

"R.L. Barnes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1710-18

STYLE OF CAUSE: BRANDON LEE ENGSTROM AND AMBER RACHEL RAGAN v PETERS FIRST NATION BAND COUNCIL AND OTHERS

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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