Federal Court of Appeal | Cour d'appel fédérale

Date: 20250124

Docket: A-296-23

Citation: 2025 FCA 21

CORAM: **WEBB J.A.**
MONAGHAN J.A.
WALKER J.A.

BETWEEN:

ETHEL MABEL ARACIL-MORIN, ESPANA ARACIL-MORIN AND REMEDIOS GARRITY

Appellants

and

ENOCH CREE NATION

Respondent

Heard at Edmonton, Alberta, on October 21, 2024.
Judgment delivered at Ottawa, Ontario, on January 24, 2025.

REASONS FOR JUDGMENT BY: WALKER J.A.

CONCURRED IN BY: WEBB J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

WALKER J.A.

I. Overview

[1] The appellants, Ethel Mabel Aracil-Morin, and her children, Remedios Garrity and Espana Aracil-Morin, appeal a judgment of the Federal Court (*Aracil-Morin v. Enoch Cree First Nation*, 2023 FC 1309) (the FC Decision) dismissing their application for judicial review of two

membership appeal decisions made by the Chief and Council of Enoch Cree Nation (ECN). In their decisions, the Chief and Council denied the band membership applications of Ms. Garrity and Mr. Aracil-Morin in reliance on section 4.2 of the 2004 ECN Membership Code (the 2004 Code).

[2] The material facts relevant to this appeal are not in dispute.

[3] Ethel Aracil-Morin was originally a member of ECN, a Treaty 6 First Nation in Alberta. Upon her marriage in 1966 to a man from Kehewin Cree Nation (Kehewin), her membership in ECN transferred to Kehewin by operation of section 14 of the *Indian Act*, S.C. 1951, c. 29 (*Indian Act* 1951). Ethel divorced her first husband in 1971 but remained a member of Kehewin. Four years later, she married a non-Indigenous man, thereby losing her Indian status pursuant to paragraph 12(1)(b) of the *Indian Act* 1951.

[4] Ethel's daughter, Remedios, was born in 1973 and her son, Espana, was born in 1983.

[5] In 1985, Parliament enacted *An Act to Amend the Indian Act*, R.S.C. 1985, c. 32 (1st Supp.) (*Indian Act*) in an effort to remedy the discriminatory provisions of the *Indian Act* 1951 that disenfranchised women and their children.

[6] Ethel Aracil-Morin regained Indian status in 1987 and was registered to Kehewin, her band membership when she lost status, pursuant to paragraph 11(1)(c) of the *Indian Act*. As a

result, her children also became members of Kehewin even though they have never lived in Kehewin and have no other ties to Kehewin.

[7] Also in 1987, ECN enacted its first membership code (the 1987 Code). The 1987 Code allowed an individual to transfer their band membership from another band to ECN if they surrendered their membership in the other band and satisfied certain other conditions. In December 2002, Ethel Aracil-Morin's application for ECN membership was approved and her band membership reinstated.

[8] ECN subsequently adopted the 2004 Code, section 4.2 of which provides that: "A Person who is, or has been, a member or an Indian of another Band is not entitled to membership".

[9] On May 9, 2021, Ms. Garrity and Mr. Aracil-Morin applied for membership in ECN. The following month, the ECN membership clerk denied their applications in reliance on section 4.2 of the 2004 Code.

[10] Ms. Garrity and Mr. Aracil-Morin appealed the clerk's decisions and argued their appeals before the ECN Chief and Council in February 2022. The Chief and Council voted to deny both appeals in March 2022 and issued their decisions on August 17, 2022.

[11] The Chief and Council's decisions are identical but for their references to the individual appellants. The relevant paragraphs are:

> Your appeal was heard by Enoch Cree Nation Chief and Council.
>
> We regret to inform you that your appeal Application for Membership was *denied*. Under the current Membership Code of Enoch Cree Nation effective, April 4, 2004, s 4.0 Persons Not Eligible for Membership, s 4.[2] states "*A person who is, or has been a member, or an Indian of another Band is not entitled to membership.*" [Italics in original decisions]
>
> […]
>
> The decision was made to uphold the current Membership Code of Enoch Cree Nation. If you have any questions or require further information please contact the Enoch Cree Nation Membership Department.

[12] Before the Federal Court, the appellants argued that section 4.2, and related sections 3.1 and 5, of the 2004 Code breach, on the basis of gender, subsection 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. 11 (the Charter). They submitted that the historical and discriminatory treatment suffered by Ethel Aracil-Morin in losing her band status upon marriage is perpetuated by the impugned provisions of the 2004 Code. The appellants requested a declaration that the three sections are unconstitutional.

[13] The appellants also argued that the Chief and Council's decisions were arbitrary and unreasonable but the Federal Court disagreed and found that the decisions were reasonable based on the clear wording of the 2004 Code. The appellants do not contest this conclusion on appeal.

[14] In assessing the appellants' Charter claim, the Federal Court applied the two-part test for breach of subsection 15(1) as restated by the Supreme Court of Canada in *R. v. Sharma*, 2022 SCC 39 at paragraph 28 (*Sharma*). The Federal Court agreed with the appellants that there is a

causal relationship between the historical discrimination suffered by Ethel Aracil-Morin and the provisions of the 2004 Code that prevented Ms. Garrity and Mr. Aracil-Morin from becoming members of ECN (FC Decision at para. 50):

> In this case, it is not disputed that the Applicants, Espana and Remedios, are members of Kehewin because of their Mother's membership in Kehewin, by operation of the discriminatory provisions of the *Indian Act* 1951. It is also not disputed that Espana and Remedios were denied membership in ECN because of their membership in Kehewin. Accordingly, there is a cause and effect relationship between the discrimination suffered by Ethel and the inability of her children to become members of her home community.

[15] Although section 4.2 of the 2004 Code does not create an apparent distinction based on gender, it perpetuated the historical discrimination faced by Ethel Aracil-Morin in losing her band membership on marriage such that the first part of the *Sharma* test was met (FC Decision at para. 51).

[16] The Federal Court next concluded that the appellants had provided no evidence establishing that the impugned 2004 Code provisions impose a burden on or deny a benefit to Ms. Garrity and Mr. Aracil-Morin in a manner sufficient to meet the second prong of the *Sharma* test (FC Decision at paras. 56-57). It is this latter conclusion that the appellants contest on appeal.

II. Standard of review

[17] The sole issue in this appeal is the Federal Court's assessment of the appellants' evidence in support of the second part of the *Sharma* test for breach of subsection 15(1), a question of mixed fact and law.

[18] By way of background, the Federal Court disagreed with the respondent's argument that the Court should not consider the appellants' Charter argument as it was being raised for the first time on judicial review. Although the appellants did not specifically raise a section 15 Charter argument before the ECN Chief and Council, the Federal Court was satisfied that the issue of discrimination had been raised in their appeals (FC Decision at para. 28). In addition, the Federal Court rejected the respondent's request that she not consider the full evidentiary record, determining that the evidence filed in support of the appellants' Charter argument was background information and admissible within a recognized exception: FC Decision at para. 30, citing *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para. 20.

[19] It is well established that, in most appeals of decisions of the Federal Court sitting in judicial review, this Court determines whether the Federal Court identified the proper standard of review and whether it correctly applied that standard. In effect, we step into the shoes of the Federal Court and focus on the decision under review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47 (*Agraira*); *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10-12 (*Horrocks*).

[20] However, in oral submissions, the respondent argued that the Federal Court acted as a decision-maker of first instance when addressing the appellants' section 15 argument. Accordingly, in the respondent's view, it is appropriate for this Court to apply the *Housen* appellate standard of palpable and overriding error to its review of the Federal Court's evidentiary findings on the second stage of the *Sharma* test: *Horrocks* at para. 12; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10 and 36 (*Housen*); *Gordillo v. Canada (Attorney General)*, 2022 FCA 23 at para. 59, leave to appeal to SCC refused, 40152 (January 12, 2023).

[21] The appellants do not refer to the *Agraira*/*Horrocks* framework in their submissions. They focus rather on the FC Decision. The appellants submit that the Federal Court erred in law by failing to consider relevant evidence, by misapprehending certain evidence in the record and by failing to conclude that the provisions of the 2004 Code violate subsection 15(1) of the Charter. The appellants argue that each of these errors is reviewable on appeal for correctness.

[22] The respondent's argument that the Federal Court weighed the appellants' evidence on the section 15 argument as a decision-maker of first instance is persuasive. There is no reference by the Chief or Council to subsection 15(1) of the Charter in their decisions or in the transcripts from the Band meetings of February 16, 2022 and March 7, 2022 that addressed the appellants' membership applications. Further, the Federal Court does not refer to the decisions of the Chief and Council in the course of its analysis of the appellants' Charter arguments. Therefore, I will review the Federal Court's evidentiary findings on the second stage of the *Sharma* test for palpable and overriding error as the appellants' arguments raise questions of mixed fact and law, and not errors of law.

[23] I do note that, regardless of the standard of review the Court applies in this case, there is no basis for this Court's intervention.

III. Alleged breach of subsection 15(1) of the Charter

[24] The Federal Court made no error in identifying and applying the two-part test applicable to a section 15 challenge established by the Supreme Court in *Sharma* at paragraph 28: A claimant must establish that the impugned law "(a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage" [Citations omitted].

[25] As noted above, the Federal Court determined that sections 3.1, 4.2 and 5 of the 2004 Code have a disproportionate impact on Ms. Garrity and Mr. Aracil-Morin and so create a distinction that can be traced to the historical discrimination faced by their mother based on her gender (FC Decision at paras. 50-53). This finding is not in dispute.

[26] The Federal Court then found that the appellants had not satisfied their evidentiary burden of demonstrating, at the second step of the *Sharma* test, that the denial of ECN band membership due to the provisions of the 2004 Code had caused them harm (FC Decision at para. 56):

> Here, other than being denied membership in their Mother's home community, the Applicants have not provided any evidence to establish that the denial of membership in ECN reinforces,

> perpetuates, or exacerbates disadvantage (*Sharma* at para 28). There is no evidence that the Applicants are prevented from visiting their family members at ECN. Nor is there any evidence that they are unable to participate in ECN community and cultural activities. They also did not offer any evidence that there are differences in the membership benefits between Kehewin and ECN. Finally, there is no evidence of economic exclusion or disadvantage, social exclusion, psychological harms, physical harms or political exclusion.

[27] The Federal Court concluded that the appellants had provided "no evidence that they have been denied a benefit sufficient to satisfy the second prong of the section 15 *Charter* test" (FC Decision at para. 57).

[28] The appellants argue on appeal that the Federal Court erred in concluding that they had provided no evidence that the denial of their membership in ECN reinforces or perpetuates the disadvantage they suffer due to section 4.2 of the Code. They rely not only on their affidavit evidence but also on the minutes of the Band council meetings at which their membership applications were considered and decided, and at which the appellants, Band and Council members acknowledged the importance of band membership and its relationship to identity and to the historical discrimination of Indigenous peoples.

[29] Although the evidentiary burden at the second step of the *Sharma* test is not unduly demanding, the appellants are required to provide evidence that demonstrates the adverse impacts or effects on them of their exclusion from ECN membership (*Sharma* at para. 52). Such impacts or harm may include economic exclusion or disadvantage, social or political exclusion, and psychological or physical harms: *Sharma* at para. 52, citing *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 76.

[30] Each of the appellants filed an affidavit. The affidavits contain a factual chronology of events similar to that I have set out at the beginning of these reasons. In addition, Ms. Garrity's affidavit speaks to the 2004 Code and states that the Band and Council have inadvertently discriminated against her and her brother "by relying upon sections of the [2004] Code that are based on or incorporate provisions of the *Indian Act* that discriminated against my mother because of her gender" (Affidavit of Remedios Garrity dated November 25, 2022, at para. 27).

[31] I agree with the Federal Court that the affidavits do not speak to the harms suffered by the appellants or the impacts (adverse or otherwise) they experience due to band membership in Kehewin and not ECN. Ms. Garrity refers to the 2004 Code as discriminatory but she provides no evidence of any economic or social disadvantage, or any psychological harm, she and her brother endure due to their exclusion from ECN band membership, other than being prevented from joining their mother's home community. Borrowing the words of the Supreme Court in describing the evidence required to meet the second part of the *Sharma* test, the appellants' affidavits do not demonstrate how the impugned provisions of the 2004 Code impose a burden or harm that perpetuates or reinforces their disadvantage. Exclusion from ECN band membership (the distinction) is not alone sufficient to establish a breach of subsection 15(1) of the Charter (*Sharma* at para. 51).

[32] During the appeal meeting before the Chief and Council, the appellants and certain ECN members voiced their disagreement or disappointment with the exclusion of Ms. Garrity and Mr. Aracil-Morin from band membership and spoke to the complexities in amending the 2004 Code, then in place for 18 years. At the subsequent Chief and Council meeting, a number of Council

members expressed dismay at the exclusion of Ethel's daughter and son but voted to uphold the denial of their membership applications based on section 4.2 of the 2004 Code. As one Councillor noted, they were required to follow the law that is written and that ECN members agreed to in 2004.

[33] The minutes of the two Chief and Council meetings bring into clear relief the emotional circumstances of the decision at issue. Band members and Councillors reflected on the historical discrimination that, in this case, is perpetuated by the particular sections of the 2004 Code. The Federal Court agreed with the appellants that there is a causal relationship between the provisions of the 2004 Code, the historical discrimination suffered by Ethel Aracil-Morin and the inability of her children to become members of ECN. The existence of this causal relationship formed the basis of the Federal Court's conclusion that the first part of the *Sharma* test for breach of subsection 15(1) (the adverse discriminatory treatment) had been met. However, the Federal Court concluded the causal relationship did not also satisfy the evidentiary requirements of the second step. I find that the Federal Court committed no reviewable error in so concluding.

[34] The second step in the *Sharma* test requires evidence of the impact or effect of the adverse discriminatory treatment. The acknowledgements by some Council members of the importance of band membership and the historical context of the 2004 Code provisions reflect the appellants' clear desire to be ECN members but are not, in my view, evidence of psychological harm or political exclusion. Those same acknowledgements must be weighed against statements by Council members that they must uphold the 2004 Code put in place by

Band members. The Council members' expressions of deep sympathy do not, when read in conjunction with the affidavit evidence of the appellants, undermine the FC Decision.

[35] In his oral submissions, counsel for the appellants emphasized the domestic abuse to which Ethel Aracil-Morin had been subjected while a member of Kehewin. He stated that the continued membership of Ms. Garrity and Mr. Aracil-Morin in Kehewin has a psychological impact on them as it is a reminder of that abuse. Ms. Garrity and Mr. Aracil-Morin do not mention the abuse in their affidavits. They do refer to their mother's abuse during the first Chief and Council meeting in February 2022 but they do not speak to its impact on them or connect the abuse to any psychological harm arising from their continued membership in Kehewin.

[36] Counsel was effectively giving testimony when raising the issue of abuse and, therefore, the Court will not consider these submissions. In addition, when questioned, counsel did not clarify how the abuse is relevant to the second part of the *Sharma* analysis.

[37] The appellants ask this Court to take judicial notice of the history of colonialism and its adverse impact on Indigenous peoples, and of the importance of band membership. They cite *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (*McIvor*), leave to appeal to SCC refused, 33201 (November 5, 2009); *Descheneaux c. Canada (Procureur Général)*, 2015 QCCS 3555 (*Descheneaux*); and *McCallum v. Canoe Lake Cree First Nation*, 2022 FC 969 (*McCallum*). In *McCallum*, the Federal Court found that the band membership code of Canoe Lake Cree First Nation "freezes in place" the gender-based discriminatory provisions

of the *Indian Act* that infringed section 15 of the Charter, as found in *McIvor* and *Descheneaux* in the context of Indian status (*McCallum* at paras. 100-102).

[38] I do not find the appellants' submissions regarding judicial notice persuasive. First, the appellants did not raise the issue of judicial notice and the importance of band membership before the Federal Court. As a result, the Federal Court cannot be said to have erred in this regard.

[39] Second, the threshold for taking judicial notice is strict. The asserted facts must be "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" (*R. v. Find*, 2001 SCC 32 at para. 48 (*Find*); *Berenguer v. SATA Internacional – Azores Airlines, S.A.*, 2021 FCA 217 at para. 54).

[40] The Supreme Court in *Sharma* at paragraph 55 indicates that judicial notice can play a role at step 2: "a court may take judicial notice of notorious and undisputed facts […]. Of note here, the Court has taken judicial notice of the history of colonialism and how it translates into higher levels of incarceration for Indigenous peoples". The appellants state that Indian status and membership are tied together and that the effects of their denial are both notorious and undisputed. I do not question the importance of band membership but the appellants have not provided evidence of the impacts of its denial in this case nor do I accept that the denial of band membership in a particular band results in adverse impacts that are either universal or notorious.

[41] Third and most importantly, the appellants effectively seek to establish the second step of the *Sharma* test through judicial notice. The Supreme Court cautions that the taking of judicial notice is nuanced and will depend, in part, on the roles the facts in question will play in the disposition of a case: “the more they become dispositive of an issue in dispute, the more pressing it is to meet the two Morgan [or *Find*] criteria” (*R. v. Le*, 2019 SCC 34 at para. 85, citing *R. v. Spence*, 2005 SCC 71 at para. 65).

[42] I am of the view that the appellants’ broad assertion of the importance of band membership does not warrant the application of the doctrine of judicial notice. Specifically, the appellants have not established that the prejudicial effects of the denial of ECN membership are so notorious that the Court should dispense with the need for evidence of its impact on the appellants. The importance of ECN band membership to the appellants does not satisfy the second part of the *Sharma* test for a breach of subsection 15(1) of the Charter. The Federal Court found that the appellants had provided no evidence of harm suffered due to the exclusion of Ms. Garrity or Mr. Aracil-Morin from the ECN community or from community events, or any other social exclusion, nor had the appellants provided any evidence of economic or political exclusion. They had not shown differences in the membership benefits between ECN and Kehewin. I agree.

[43] In summary, I find that the appellants have established no error in the FC Decision that necessitates this Court’s intervention. The Federal Court considered the appellants’ evidence in the record and explained clearly its conclusions regarding the absence of evidence of the adverse impacts and effects of the denial of ECN band membership. The Federal Court’s omission of

reference to the Chief and Council minutes in the context of its *Sharma* analysis is not an error because those minutes do not speak to such impacts or effects. They reflect only the frustration of the appellants and Council members in the consequences of section 4.2 of the 2004 Code for Ms. Garrity and Mr. Aracil-Morin.

[44] The Court acknowledges the very difficult circumstances of this appeal. We note the Chief and Council's expressions of understanding and sympathy. Counsel for the respondent informed the Court at the conclusion of his oral submissions that ECN is undertaking a consultation process to consider amendments to the 2004 Code. The appellants understandably want immediate action via this appeal but, in the absence of reviewable error, the Court cannot intervene and will respect the right of ECN members to address any amendments to their membership code.

IV. Conclusion and costs

[45] I would dismiss the appeal and, in the circumstances of this case, I would not award costs.

"Elizabeth Walker"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
K.A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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