Federal Court of Appeal | Cour d'appel fédérale

Date: 20210526

Docket: A-17-20

Citation: 2021 FCA 102

CORAM: **DE MONTIGNY J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

FRED PORTER, PAULA HYSLOP AND LAC DES MILLE LACS FIRST NATION

Appellants

and

KELVIN BOUCHER-CHICAGO

Respondent

Heard by online video conference hosted by the Registry on April 20, 2021.

Judgment delivered at Ottawa, Ontario, on May 26, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

I. Overview

[1] This is an appeal of a decision of the Federal Court dated December 18, 2019, allowing an application for judicial review brought by Kelvin Boucher-Chicago (the respondent) against a decision of the Electoral Adjudicator (the Adjudicator). The Adjudicator, in a decision dated

June 14, 2018, dismissed the respondent's appeal of a decision made by an Electoral Officer (the Officer) to reject his nomination for the position of Chief in the 2018 Band Council election of the Lac des Mille Lacs First Nation (the First Nation). The Adjudicator concurred with the Officer's interpretation of the First Nation's *Custom Leadership Selection Code* (the Election Code) to the effect that individuals who have been convicted of indictable offences, such as the respondent, are prohibited from being nominated to run for office. Sitting in judicial review, the Federal Court quashed the Adjudicator's decision on the basis that his interpretation of the Election Code fell outside the permitted range of possible, acceptable outcomes. The Court further ordered that a new election for the position of Chief be held with the respondent on the ballot.

[2] The appellants Fred Porter, Paula Hyslop and the First Nation (collectively, the appellants) contend before this Court that the Adjudicator's decision was reasonable and should be reinstated.

[3] For the reasons that follow, I am of the view that the appeal should be allowed.

II. Factual and Procedural Context

A. *The Election Code*

[4] The First Nation conducts its elections in accordance with the Election Code, which was amended in June 2009. Some of the 2009 amendments, namely those brought to sections 8 and 12 of the Election Code, are directly relevant to this appeal.

[5] Section 8 of the Election Code, which provides for the removal of office-holders based on a list of enumerated grounds, including conviction for an indictable criminal offence, reads as follows:

> 8. REMOVAL FROM OFFICE
>
> A. A Chief or Councillor shall be removed from office for any of the following:
>
> a) Conviction of an indictable criminal offence;
>
> […]
>
> B) A Chief or Councillor who is removed from office by operation of any of the above in Section 8, shall be disqualified from holding office for life, with the exception of (d).

[6] Section 12 of the Election Code, on the other hand, details the nomination process for the position of Chief or Councillor, and the provision of a "current security clearance/criminal reference check":

> 12. NOMINATIONS
>
> A. Nominations for the position of Chief or Councillor shall require the submission to the Electoral Officer of nomination papers enclosing the evidence of support for the candidate of at least ten (10) voters, and the acceptance by the candidate of the nomination for Chief or Councillor, and evidence of a current security clearance/criminal reference check.

[7] It is important to note that both provisions went through significant changes in 2009, upon ratification of the amendments to the Election Code. Prior to these amendments, the only convictions for which a Chief or Councillor could be removed from office were for an indictable offence "directly related to their duties and responsibilities as a member of Council". The 2009 amendments removed this condition and broadened the type of offences to <u>any</u> indictable offences. Moreover, the requirement for candidates to provide a security clearance/criminal

reference check was added by the 2009 amendments as part of the nomination process governed by section 12.

B. *The 2012 and 2015 Elections*

[8] In 2012, the respondent sought a nomination to run for a Council position, which was rejected by the then electoral officer on the basis of incomplete nomination materials. On appeal from that decision, the appellant Fred Porter (who acted as the Adjudicator) did not consider or adjudicate the offences on the respondent's criminal reference check, and it was not one of the reasons for denying his nomination in that election.

[9] In his completed report sent to the respondent on July 3, 2012 (which has been filed as Exhibit "B" to the affidavit of the respondent before the Federal Court), however, we find the Adjudicator's notes of an interview with the Chief and Council. It appears from those notes that an opinion had been formed as to the denial of nominations for those who have been convicted of indictable offences, and that Council members were of the view that a candidate would not qualify for nomination if a criminal conviction appeared on his or her criminal reference check. At the hearing before us, counsel for the respondent submitted that these notes were hearsay evidence and should not be considered. Counsel for the appellants responded that they were introduced in evidence by the respondent himself and should therefore not be excluded. Whatever the merits of this objection, it is too late on appeal to raise it. It is well established that, at least in a civil case, objections to the admissibility of evidence must be made at the time the evidence is first tendered: Sidney N. Lederman, Alan W. Bryant & Michelle Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto : LexisNexis Canada,

2018) at §2.109. Since the respondent did not object to the admissibility of the Adjudicator's notes before the Federal Court, I shall decline to rule on that objection. In any event, nothing turns on the disputed evidence.

[10] In 2015, prior to the nomination process for the next election, the appellant Fred Porter, acting as the electoral officer at that time, sought a legal opinion to determine whether a nomination could be denied due to a candidate's criminal record. The legal opinion he received advised that the Election Code precluded those with indictable offence convictions from running for Chief and Council. While acknowledging that the Election Code is silent on the denial of nominations based on criminal records, the legal opinion went on to state that the obvious intention of the community had been to exclude those with indictable offence convictions from holding office. This was the reason, in practice, for candidates to provide a security clearance/criminal reference check with their nomination materials.

C. *The 2018 Election*

[11] On February 5, 2018, the First Nation Chief and Council passed a Band Council Resolution calling for the next election to take place on June 8, 2018. The appellant Paula Hyslop, the appointed Officer, was in charge of supervising the electoral process in accordance with the Election Code. The appellant Fred Porter, the appointed Adjudicator, was to deal with election complaints and appeals in accordance with the Election Code.

[12] The respondent, looking to be elected as Chief, submitted his complete nomination package on April 25, 2018. Upon receiving the materials, the Officer promptly requested a legal

opinion in relation to the respondent's criminal reference check as she did not know whether or not any of the listed offences were indictable.

[13] The legal opinion, issued on April 27, 2018, expressed the view that the respondent was ineligible for nomination due to his three convictions for indictable offences. On the same day, having settled on an interpretation of the Election Code which would prohibit individuals who have been convicted of indictable offences from being nominated, the Officer advised the respondent of her decision to deny his nomination. Shortly thereafter, the Officer announced that the only nominee left, known as Chief Whitecloud, had been acclaimed.

[14] On April 30, 2018, the Officer wrote the respondent a follow-up letter explaining the reason for denying his nomination. The Officer relied on sections 8A and 8B of the Election Code for holding that "it is the intent of the members to not permit someone whom has indictable offences especially the most serious indictable offences, to run for and/or hold a position on Chief & Council" (April 30, 2018 E.O. Letter, Exhibit "H" to Chicago Affidavit; Appeal Book, tab 5H, p. 96). In a subsequent letter to the respondent's then counsel, the Officer expanded on her reasons by citing section 12A of the Election Code and holding that the respondent would not have current security clearance because of his criminal record. She therefore restated her reasons succinctly as follows: "Therefore, based on Section 12A., along with supporting clauses of 8A. a) and B., any person who has a criminal record does not meet the eligibility requirements to (i) run for a position on council OR (ii) remain on council" (May 1, 2018 E.O. Letter, Exhibit "K" to Chicago Affidavit; Appeal Book, tab 5K, p. 107).

[15] On May 8, 2018, the respondent appealed the Officer's decision to deny his nomination. While the appeal before the Adjudicator was pursued under several grounds, it was only the question of the proper interpretation of the Election Code that became the subject of the Federal Court decision.

III. Decisions Below

A. *The Adjudicator Decision*

[16] In a decision dated June 14, 2018, the Adjudicator dismissed the appeal of the Officer's decision on the basis that, having relied on the legal advice from 2015 and 2018, the Officer "acted fairly and exercised due diligence".

[17] Upon discussing the respondent's submission that the Officer erred in her interpretation of section 8, the Adjudicator cited the following excerpt from the 2015 legal opinion, which was said to address the issue:

> It is obvious that the intention of the community is to exclude people who have convictions for such offences from serving in office. This, in my view, is the reason for the requiring of a current security clearance/criminal reference check upon filing nomination papers as set out in Article 12(A) of the Code. Further, it would be discriminatory to allow someone to serve office who was historically convicted of an indictable offence from before an election over someone who gets convicted of an indictable offence after being elected. The consistent and fair interpretation is that all those with indictable criminal convictions on their record may not serve.
>
> Appeal Book, at p. 124-125

[18] The Adjudicator considered two other issues that were not further discussed in the context of the judicial review proceedings. He first dismissed the respondent's argument that the

legal advice received by the Officer was not independent, having been provided by counsel who also advised the Chief and Council. He then relied on the same legal opinion for confirmation that the offences listed in his criminal record had been characterized as indictable, rather than hybrid in nature and proceeded summarily, as contended by the respondent.

B. *The Federal Court Decision*

[19] The Federal Court first determined that it would review the Adjudicator's decision on a standard of reasonableness, as it is the standard that generally applies when a reviewing court is tasked with interpreting an election code of a First Nation (Reasons at paras. 20-21). While acknowledging that the presumption in favour of reasonableness may be rebutted where the decision maker fails to engage in any interpretation of the relevant election code, the Court held that there were no such exceptional circumstances in this case.

[20] Turning to the merits of the Adjudicator's decision, the Federal Court held that the decision was unreasonable since it ignored the plain meaning of the words of the Election Code (Reasons at para. 22). Drawing on statutory interpretation principles laid out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1988] 1 S.C.R. 27, 154 D.L.R. (4th) 193 [*Rizzo*] and *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 [*Canada Trustco*], the Court emphasized the "high degree of weight" to be given, in the interpretative process, to the meaning that naturally flows from the clear and unambiguous words of a provision (Reasons at para. 28). The Court further saw only one reasonable interpretation of section 8 of the Election Code, as its wording clearly requires a Chief or Councillor to be holding office in order to be removed from it (Reasons at paras. 30-31).

[21] With regard to the use of the word “conviction” in section 8, the Court held that it ought to be read as including only convictions that occur while in office (Reasons at para. 33). Every other interpretation that includes past convictions would lead to absurd results. The Court, in this respect, evoked the absurdity of having a Chief elected with a past conviction and then immediately being subject to removal from office upon election.

[22] Having determined that the only reasonable interpretation of section 8 is that it disqualifies a sitting Chief or Councillor from holding office if they are convicted of an indictable offence while in office, the Court turned its mind to the requirement found in section 12 of the Election Code that prospective nominees must provide their criminal reference check. While recognizing that this element may support an intent to preclude those who have been convicted of indictable offences from becoming nominees, the Court found this to be insufficient to override the plain wording of the Election Code (Reasons at paras. 36-37). It was simply not open for the Adjudicator, nor for the Officer, to read additional words into the Election Code in order to make alternate interpretations possible; in brief, only extraordinary circumstances would allow such “reading in” (Reasons at paras. 35-38).

[23] Since the Adjudicator’s interpretation of section 8A of the Election Code was deemed to fall outside the range of possible interpretations, it followed that the decision itself was not one of the possible, acceptable outcomes (Reasons at para. 39). Having found the decision to be unreasonable, the Court ordered that a new election for the position of Chief be held only as between the respondent and the acclaimed Chief (Reasons at para. 43). Such an election has not taken place, presumably as a result of the Notice of Appeal, and the parties agree that there is no

need to deal further with this issue as a regular election is scheduled to take place in August 2021.

IV. Issues

[24] The appellants submit that the Federal Court erred in two discrete ways by failing (1) to interpret and consider the Election Code as a whole; and (2) to exercise judicial restraint while applying the reasonableness standard. To the extent that these two issues are interrelated and touch upon the same question, namely whether the Federal Court erred in finding that the Adjudicator's decision was unreasonable, I will consider them jointly in my analysis.

V. Standard of Review

[25] It is well established that on appeal from a decision of the Federal Court sitting in judicial review of an administrative decision, this Court must "step into the shoes" of the Federal Court, and determine whether it appropriately selected and properly applied the standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47.

[26] In this case, although the Supreme Court decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*] had not yet been issued at the time, the parties are in agreement that the Federal Court selected the appropriate standard of review. Indeed, reasonableness is presumed to be the applicable standard of review, except when the legislature has explicitly signalled that it intended another standard to apply or where the rule

of law requires that the standard of correctness be applied for consistency and finality purposes. Such is not the case here. On the contrary, the presumption of reasonableness applies to an administrative decision maker's interpretation of its enabling statute – in this case, the Election Code, as well as to every other aspect of his decision: *Vavilov* at paras. 24-25; *Barreau du Québec v. Québec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488 at para. 15.

[27] Deference is particularly apposite when the Federal Court reviews decisions of First Nation election appeal bodies, and even more so when such decisions concern the interpretation of an electoral code. As this Court stated in many cases, the interpretation of an election code must be informed by the customs upon which it is based and by the general understanding in the community as to why it may deviate from those customs in some respect: see *D'Or v. St. Germain*, 2014 FCA 28, 459 N.R. 197 at paras. 5-7; *Fort McKay First Nation v. Orr*, 2012 FCA 269, 438 N.R. 379 at paras. 8-12; *Johnson v. Tait*, 2015 FCA 247 at para. 28; *Lavallee v. Ferguson*, 2016 FCA 11 at para. 19; *Cold Lake First Nations v. Noel*, 2018 FCA 72, 2018 CarswellNat 1425 at para. 24. See also the excellent discussion of this question by Justice Grammond in *Pastion v. Dene Tha' First Nation*, 2018 FC 648, [2018] 4 F.C.R. 467 at paras. 16-29.

[28] It goes without saying that electoral officers or adjudicators are better situated than this Court to opine on the proper interpretation of an election code. This is particularly true in the case at bar, where the appellant Fred Porter acted as the Adjudicator not only in the 2018 election but also in the 2012 election, as well as being an electoral officer in the 2015 election. As the Supreme Court cautioned in *Vavilov*:

> [93] …In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[29] While the Federal Court professed to apply the reasonableness standard, one cannot help but observe that this is far from what the Court really did in this case. Instead of focusing on the reasons of the Adjudicator with a view to determining whether the decision was based on an internally coherent chain of analysis and could be justified on the basis of the facts and the law, the Federal Court first proposed its own interpretation of section 8 of the Election Code and thereby set the standard of what was, in its own view, the "only reasonable" interpretation of the provision (Reasons at paras. 30-33). It is only after having established what, in its view, amounted to the correct interpretation of section 8A, that the Court measured the Adjudicator's interpretive process against that of its own and found that its result was outside the range of possible interpretations.

[30] In my view, this approach is antithetical to a well-understood application of the reasonableness standard and is not in conformity with the teachings of the Supreme Court in *Vavilov*. In that case, the Supreme Court made it clear that the reviewing court ought to focus on the decision of the decision maker, including both its underlying rationale and the outcome to which it led, rather than on the conclusion the reviewing court itself would have reached (*Vavilov* at para. 15). In other words, the reviewing court is not to make its own "yardstick" by which to measure the decision maker's decision (*Vavilov* at para. 83, citing *Delios v. Canada (Attorney*

General), 2015 FCA 117, 472 N.R. 171 at para. 28). As the Supreme Court emphatically stated (at para. 84):

> …where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[31] The Supreme Court went on to add (at para. 86), that "[a]ttention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process". In my view, this is precisely where the Federal Court erred: instead of refraining from forming a view about the proper interpretation of relevant portions of the Election Code, the Court considered the Adjudicator's decision through the lens of its own pre-emptive determination and overturned it on that basis.

VI. Analysis

[32] As previously mentioned, the focus of the Federal Court's discussion was on section 8 of the Election Code and its wording. In its view, the use of the words "removed from office" in section 8 solely disqualifies sitting members – and not prospective nominees – from holding office. A Chief or Councillor needs to have been elected in order to be holding an office from which they can further be "removed". Furthermore, the Court was of the view that sitting members ought to be disqualified only because of convictions while in office, rather than

because of past convictions. Otherwise, a Chief or Councillor could be elected but then immediately removed upon taking office as a result of a past conviction.

[33] In addition to having considered the Adjudicator's decision through the lens of its own pre-emptive determination, insisting on the prevalence of the clear and unambiguous text of section 8 over the possible intent behind section 12, the Federal Court failed to properly respond to the reasons set forth by the Adjudicator. By focusing almost exclusively on section 8 of the Election Code, the Court attempted, somewhat paradoxically, to counter a line of reasoning that was not evoked in the decision below.

[34] Indeed, the Adjudicator never suggested that section 8 alone creates a mechanism for disqualifying prospective nominees who, like the respondent, have been convicted of indictable offences. The Adjudicator rather endorsed the view that section 12, or section 12 in conjunction with section 8, constituted the actual basis for the ineligibility of convicted prospective nominees. He did so by quoting, with implicit approval, the excerpt from the 2015 opinion already reproduced in paragraph 17 of these reasons, to the effect that the requirement of a current security clearance/criminal reference check reflects the intention of the community to exclude people with convictions from running for office.

[35] In light of the above, the Federal Court failed to seriously engage with a key element of the Adjudicator's implicit reasoning, namely that section 8 and section 12 ought to be read together. The Court construed the provisions in a separate manner, on the erroneous premise that section 8 was determinative of the issue because it was supposedly "unambiguous".

[36] Had it considered section 8 and section 12 jointly, as was the approach taken by the Adjudicator, the Court ought to have found that its decision was reasonable. To use the language of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, which remains relevant post-*Vavilov*, the decision fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[37] In particular, the Adjudicator's interpretation of sections 8 and 12 conforms with the general principles of statutory interpretation and the modern approach set out in *Rizzo*, which apply to the interpretation of election codes (*Boucher v. Fitzpatrick*, 2012 FCA 212, 434 N.R. 199 at para. 25). The fact that the Adjudicator did not engage in a formalistic statutory exercise is not an impediment to a finding of reasonableness under the *Vavilov* framework (*Vavilov* at para. 119).

[38] In my view, the Adjudicator's decision, and its underlying interpretation of sections 8 and 12, are consistent with the text, context and purpose of these portions of the Election Code.

[39] On a textual level, it is undisputed that the Election Code does not explicitly state that prospective nominees who have been convicted of indictable offences are prohibited from running for office. However, the addition of a requirement to section 12, namely the provision of a current security clearance/criminal reference check, is a clear enough textual indicia of the community's intention to prohibit persons with convictions for indictable offences from holding office. To be given full effect, the procedural requirement of providing such information must necessarily translate into the substantive requirement of being free from any criminal record with

convictions for indictable offences. Why else would such a requirement have been added? This would be consistent with the well-known principle of statutory interpretation that every word of a statute, in this case the Election Code, must be given meaning: “A construction which would leave without effect any part of the language of a statute will normally be rejected” (P. St. J. Langan, ed., *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet and Maxwell, 1969) at 36).

[40] It is to be noted, moreover, that the Federal Court did state that the requirement for a criminal reference check “may support an intent to exclude nominees that have been convicted of indictable offences” (Reasons at para. 36). This should have been sufficient to uphold the reasonableness of the Adjudicator’s decision. Instead, the Federal Court criticized the drafting of the Election Code, and expressed the view that the Code should have been worded more carefully if this was the intent of the First Nation. I agree with the appellants that such a statement is unfortunate; courts should resist the temptation to impose on First Nations election laws the same exacting standard that we have come to expect from Parliament and legislatures in terms of drafting legislation.

[41] Finally, a reading of the Election Code which would entail no possible disqualification in the course of the nomination process would lead to absurd results that ought to be avoided (*Rizzo* at para. 27). Indeed, it appears completely absurd to allow the nomination of candidates who, once elected, will become ineligible to hold office due to their criminal records. I appreciate that the Federal Court attempted to circumvent a similar difficulty by holding that the removal of sitting members would occur only with regard to convictions while in office, and not past

convictions. However, the absurdity at play here is much broader and affects the internal coherence of the Election Code. It is fundamentally absurd to have different standards for those seeking office from those already in office, since nothing would justify such a distinction. Why would a person who has been convicted while holding office be disqualified for life, and the same standard not apply to a person convicted of the same offence but not holding office at the time of his or her conviction? This is at least as absurd a result as that noted by the Federal Court, and both can be resolved by reading sections 8 and 12 together in the same way as was done by the Adjudicator.

VII. Conclusion

[42] For all of the aforementioned reasons, I would allow the appeal, set aside the decision of the Federal Court, and reinstate the decision of the Adjudicator. Taking into account the agreement on costs reached by the parties before the Federal Court, I would fix them at an all-inclusive amount of $25,000.

"Yves de Montigny"
J.A.

“I agree
Mary J.L. Gleason J.A.”

“I agree
René LeBlanc J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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