Federal Court  Cour fédérale

Date: 20100827

Docket: T-1080-08

Citation: 2010 FC 854

Vancouver, British Columbia, August 27, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

CHARLES EIKLAND JR.

Applicant

and

DAVID JOHNNY SR., ANGELA DEMIT, STACY ASP, DAVID JOHNNY JR. AND ROSEMARIE VANDERMEER-BROEREN, IN THEIR OWN CAPACITIES AND AS PURPORTED CHIEF AND COUNCIL OF THE WHITE RIVER FIRST NATION

Respondents

REASONS FOR ORDER AND ORDER

[1] Mr. Eikland Jr. ran against David Johnny Sr. for Chief of the White River First Nation in the 2008 election for chief and council. He lost. He has moved to have the election results set aside. His major bone of contention is that Americans who are not status Indians within the meaning of our *Indian Act* were allowed to vote.

[2] Although it is not disputed that the names of non-status Indians were on the electoral list, in their defence the respondent Chief and Council point out that the White River First Nation is a custom election band and that the list was maintained in accordance with the custom of the band as reflected in its written constitution.

[3] Nevertheless, and irrespective of the legitimacy of the current constitution and the election results, the parties agree that their difference of opinion as to eligible voters (Mr. Eikland has his supporters) should be resolved politically within the band.

[4] The Band Chief and Council, with Mr. Eikland's concurrence, propose that the issue be put to the band members by way of referendum. This plan of action raises some difficulties. The current constitution has an amending formula which does not contemplate a referendum, advance polls or mail-in ballots. Another issue is that only Indians within the meaning of the *Indian Act* would be allowed to vote.

[5] The parties are of the view that it is not necessary to follow the current constitutional amending formula or to have a ruling one way or another as to whether the current constitution is legal, as long as a "broad consensus" is reached.

[6] The parties are to be commended for taking advantage of s. 18.3(1) of the *Federal Courts Act* which allows a federal board, commission or other tribunal, at any stage, to "refer any question

or issue of law, or jurisdiction or of practice and procedure to the Federal Court for hearing and determination."

[7] The question put to the Court is whether the proposed referendum process described in an agreed statement of facts will be a legally effective and valid method for ascertaining a "broad consensus" of the membership of the White River First Nation that is necessary to determine voter eligibility rules and certain voting procedures for future custom elections for chief and council, and at band meetings.

[8] The answer is "yes".

I. Background

[9] The White River First Nation is a band under the *Indian Act*. Its traditional territory is in the Yukon. Although it has no reserve, its centre is Beaver Creek, a small community tight against the Alaskan border. It is a "custom election band" that conducts its elections for Chief and Council "according to the customs of the band." Thus, sections 74 to 80 of the *Indian Act* and the provisions of the *Indian Band Election Regulations* are not applicable.

[10] As agreed in the statement of facts, traditionally the White River people spoke two Athabaskan languages, Upper Tanana and Northern Tutchone, and were based in the region around Snag and Scottie Creek, extending southeast to the Fort Selkirk area, which includes the area where the Canada-US border is now located.

[11] The two language groups were merged by the Government of Canada into a single Snag Indian Band in or about the 1950s. In or about 1961, the Government of Canada relocated the Snag people to Burwash Landing, Yukon, and the Snag Indian Band was amalgamated with the Kluane Indian Band as a single band under the *Indian Act*.

[12] In or about 1991, the Snag people regained their autonomy, separated from Kluane, and were constituted as a distinct White River Band under the *Indian Act*, based in Beaver Creek, Yukon (and known today as the White River First Nation).

[13] The controversy which led to this judicial review, and without prejudice to Mr. Eikland's position as to the validity of the 2008, and for that matter, earlier elections, and to this reference as a step leading to a broad consensus in the future, goes back to the 1990s. The band became engaged in land claims negotiations with the governments of Canada and the Yukon. If successful, the process would have led to a comprehensive land claims agreement under section 35 of the *Constitution Act, 1982*.

[14] In 1993, the Yukon First Nations, including White River, signed what was called an "Umbrella Final Agreement" with the governments of Canada and of the Yukon. Both that agreement and the *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35, provided for enrolment of individuals having sufficient connection to the first nation. Such individuals have been referred to as "beneficiaries".

[15] In the context of ongoing land negotiations, the White River Band, and others, prepared what has become known as the “Red Constitution” which included a “citizenship code”. One could be a citizen even though not a status Indian or a registered member of the band within the meaning of the *Indian Act*.

[16] The Red Constitution provides that every citizen of the band, 16 years of age or older, is entitled to attend meetings of the general assembly and to vote in elections for the Chief and Council. Certain details are in place to account for the two language groups within the band, the Northern Tutchone Group and the Upper Tanana Group.

[17] In order to amend the constitution at least 51% of all eligible voters must vote at a general assembly, including ten members of each linguistic group. At least 75% of the eligible voters present must approve.

[18] While the parties disagree as to whether the rules and procedures set out in the Red Constitution for the conduct of Chief and Council elections comprised valid custom election rules, circumstances are now such that it is unlikely that a sufficient number of electors would come together in Beaver Creek in order to amend the Constitution.

[19] As of April 2008, there were 232 eligible voters listed on the voters’ list of which only about 111 were status Indians under the *Indian Act*. The remainder were not status Indians and many were simply enrolled as citizens of the band because they met the criteria for enrolment under the

Umbrella Final Agreement. Furthermore, of those 232 eligible voters about 138 were residents of Alaska. Of those Alaskan residents, approximately 50 were status Indians under the *Indian Act*, while the others were not. Some band members live in Vancouver or the lower 48.

[20] The mandate for land claims negotiations between the band and the governments of Canada and the Yukon ended in 2005 without the conclusion of a land claims agreement or a self-government agreement, as contemplated in the *Yukon's First Nations Self-Government Act*. Had all this come to fruition, the White River First Nation would no longer have been covered by the *Indian Act*, but rather by the *Yukon First Nations Self-Government Act* and may have had greater autonomy in determining its membership.

II. Issues

[21] There are three issues. The first is whether entitlement to vote in the referendum may be limited to registered status members of the band. The second is whether a broad consensus can be reached without following the amending formula in the constitution. The third is whether the results of a referendum, assuming the procedure set out in the agreed statement of facts is followed, would reflect a broad consensus.

III. Exclusion of Citizens

[22] Although it might appear at first glance that it is inappropriate to disenfranchise "citizens" who are not status Indians, I have no difficulty concluding that the exclusion is appropriate.

[23] This matter has been case managed by Prothonotary Lafrenière and through his direction notice of the reference was given to all citizens who not only had the right to comment, but whose comments were to be brought to the attention of the Court. Any individual also had the opportunity to seek leave to intervene.

[24] A number of persons commented. None of those were of the view that it was wrong to exclude non-status citizens, and none sought to intervene. No comments were received from non-status Alaskan citizens.

[25] Furthermore, assuming, without deciding, that the Red Constitution reflected a broad consensus within the band, that consensus was in the expectation that the band would be freed from the *Indian Act*. That has not happened. An "Indian" within the meaning of the *Indian Act* is a person who is either registered or entitled to be registered as an Indian. A "band" is a body of Indians, with certain attributes.

[26] Thus the broad consensus which is necessary for change is a consensus within a band of Indians, not a group which includes non-Indians.

IV. The Amending Formula

[27] The issue is not whether a referendum, with allowance for advance polls, polling stations in more than one locale and mail-in ballots is fair, if agreed by members of the band. The question is whether a broad consensus may be reached other than in accordance with the amending formula.

In my opinion, it may. The Red Constitution and its amending formula cannot be compared to the Constitution Acts. As noted by Madam Justice Reed in *McLeod Lake Indian Band v. Chingee* (1998), 165 D.L.R. (4th) 358, custom by its nature is not frozen in time. It can and does change in response to changed circumstances. A band may choose to depart from oral tradition and set down its custom in written form, it may move from a hereditary to an electoral system and so on.

[28] She referred to *Bigstone v. Big Eagle* [1993] 1 C.N.L.R. 25 where Mr. Justice Strayer held the practices for the choice of a council are those which are generally acceptable to members of the band upon which there is broad consensus.

[29] The circumstances have changed. It would be wrong to fetter the band and tie it to a formula which is no longer relevant.

V. Will There Be a Broad Consensus?

[30] The proposal is that every person who is a registered status member of the band under the *Indian Act* who is 16 years of age or older will be eligible to vote. They will be eligible to vote at polling stations in Beaver Creek and Whitehorse, in advance polls, or on the date of the referendum, or by mail-in ballot.

[31] A majority vote either in favour or against each referendum question will be deemed to indicate a “broad consensus” for the purpose of determining the rules for conducting future elections for Chief and Council. It is a requirement that at least 60% of all eligible voters vote,

including at least ten members of each of the Northern Tutchone and Upper Tanana linguistic groups.

[32] Provided the referendum is conducted fairly (and the procedure outlined in the Agreed Statement of Facts is a fair one) the results would reflect a broad consensus.

ORDER

UPON motion by the Respondents for a reference pursuant to section 18.3 of the *Federal Courts Act* for a hearing and determination of the following question of law:

> Will the proposed referendum process described in the Agreed Statement of Facts attached hereto as Schedule A be a legally effective and valid method for ascertaining the "broad consensus" of the membership of the White River First Nation ("WRFN") that is necessary to determine voter eligibility rules and certain voting procedures for future custom elections for WRFN's Chief and Council, in accordance with paragraph (b) of the definition of "council of the band" under section 2(1) of the *Indian Act* and the decisions of this Court in *McLeod Lake Indian Band v. Chingee* (1998), 165 D.L.R. (4th) 358 and *Awashish v. Opitciwan Atikamekw Band Council*, 2007 FC 765?

THIS COURT ORDERS that:

1. The answer is "yes".

2. Further directions as to the timing of the reference and other details pertaining thereto are to be sought from Prothonotary Lafrenière as case manager.

3. There shall be no order as to costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1080-08
STYLE OF CAUSE:	EIKLAND JR. v. JOHNNY ET AL.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	August 25, 2010
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	August 27, 2010

APPEARANCES:

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