Federal Court  Cour fédérale

Date: 20150910

Docket: T-1999-13

Citation: 2015 FC 1063

Ottawa, Ontario, September 10, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ALEX HOWSE

Applicant

and

ATTORNEY GENERAL OF CANADA AND FEDERATION OF NEWFOUNDLAND INDIANS

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of the November 6, 2013 decision of the Enrolment Committee established by the Agreement for the Recognition of the Qalipu Mi'kmaq Band [EC Agreement] to deny the Applicant's application for enrolment for invalidity.

I. Background

[2] In 1949, Newfoundland joined confederation with no provision made in the Terms of Union for the recognition of Aboriginal peoples of the province.

[3] In 1972, the Federation of Newfoundland Indians [FNI] was formed to seek recognition of the Mi'kmaq people in Newfoundland and Labrador.

[4] Following failed negotiations, and an action being filed against the Federal government, further negotiations were conducted for the creation of a band of Mi'kmaq peoples, which led to the signing of the EC Agreement on June 23, 2008.

[5] The EC Agreement established the Enrolment Committee to review and evaluate applications for membership based on the criteria established in section 4.1. Enrolment was to proceed in two phases: phase one beginning November 30, 2008, to continue for twelve months and resulting in the first list of Founding Members; phase two was to begin immediately after the first and continue for thirty-six months (until November 30, 2012), and establish a second Founding Members list.

[6] The Qalipu Mi'kmaq First Nation was created by an Order in Council on September 22, 2011.

[7] Pursuant to the EC Agreement, the Founding Members lists were to be forwarded to the Registrar responsible for the Registry under the *Indian Act*, RSC 1985, c I-5, whereupon the Minister of Indian Affairs and Northern Development was required to recommend an Order in Council to be issued establishing those listed as a body comprising a Band of Indians under the *Indian Act*, as well as register them as Indians.

[8] Individuals were encouraged to research their ancestry and heritage and apply for Band membership. Community assistants and enrolment clerks were made available to help some applicants with their applications. Guidelines and checklists were produced for applicants, and hard copies of the applications were made available to help them in the process.

[9] Given the high volume of applications, the Enrolment Committee was unable to evaluate them all within the prescribed time periods in the EC Agreement. A supplemental agreement [the Supplemental Agreement] was signed, without consultation of the applicants, by the Federal Government and the FNI, and was announced on July 4, 2013. It made a number of retroactive changes to the EC Agreement. Of particular note is that applicants were no longer able to appeal certain decisions of the Enrolment Committee, and that all applications for membership except those previously rejected would be evaluated under the revised criteria in the Supplemental Agreement.

[10] The deadline to apply in the second phase of the above process was November 30, 2012.

[11] The Applicant submitted his application for Band membership on November 26, 2012.

[12] In the application, there were two places requiring the Applicant's signature: the first is on page two in the section entitled "Statements/Privacy and Applicant", the second is at page 8 in the section entitled "Full and Final Release". The Applicant signed page 8 but not page 2 of his application, as he interpreted page 2 to require signature only if he was a current member of the Mi'kmaq Group of Indians of Newfoundland, as defined in the Agreement.

[13] After his submission he did not receive any communication from the Federal Government, the FNI, Qalipu Mi'kmaq Chief and Council, or the Enrolment Committee until receiving his rejection letter on November 6, 2013. The letter also outlined that the Applicant is unable to appeal the decision in any way or submit further documentation to support his application.

[14] The Enrolment Committee determined that the Applicant's application was invalid due to it lacking a required signature by the Applicant or his legal guardian on page 2. The Committee considered his application to be incomplete and therefore invalid. He was not given an opportunity to submit further documentation or to appeal this decision.

II. Issues

[15] The issues are:

A. Does the Federal Court have jurisdiction to review the impugned decision?

B. Was the Applicant provided adequate procedural fairness?

C. Were there obligations owed to the Applicant arising from fiduciary duty or the honour of the Crown?

D. Was the Enrolment Committee's decision unreasonable?

III. Standard of Review

[16] The appropriate standard of review for determining jurisdiction and procedural fairness is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 79). In determining the level of procedural fairness to be given to the Applicant, the Court will consider the factors set out in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-27; as set out below in the analysis.

[17] Answers to the questions of mixed fact and law made by the Enrolment Committee should be reviewed on the standard of reasonableness.

IV. Analysis

A. *Is the Enrolment Committee's decision subject to judicial review by the Federal Court?*

[18] The Applicant and Respondent Attorney General do not challenge the jurisdiction of the Federal Court in this matter, albeit for different reasons. The FIN does challenge this Court's jurisdiction, on the basis that the Enrolment Committee's power stems from the EC Agreement and "not pursuant to federal legislation or from an order made pursuant to a prerogative power of the Crown", thus rendering it "not a federal board, commission or tribunal".

[19] While the Enrolment Committee is an independent body created by the EC Agreement, contextually the Enrolment Committee's power is derived from the process that leads to

recognition of individual members of the Qalipu Mi'kmaq First Nation by the Governor-in-Council [GIC], under the *Indian Act* and *Qalipu Mi'kmaq First Nation Act* – clearly Acts of Parliament.

[20] Moreover, in making the Qalipu Mi'kmaq First Nation Band Order and its Schedule, which identifies individuals who comprise First Nations' membership, the GIC has purported to act "pursuant to paragraph (c) of the definition of "band" in subsection 2(1) of the Indian Act and subsection 73(3) of that Act" (Qalipu Mi'Kmaq First Nation Band Order, SOR/2011-180).

[21] Therefore, in purposefully considering the contextual scheme of the formation of the Enrolment Committee, to recognize members of the Qalipu Mi'kmaq First Nation under both the *Indian Act* and *Qalipu Mi'kmaq First Nation Act*, I find that this Court has jurisdiction to consider this judicial review.

B. *Was the Applicant provided adequate procedural fairness?*

[22] The Enrolment Committee is a public authority exercising an administrative decision having a significant impact on the rights, privileges and interests of individuals seeking to be recognized as members of the Qalipu Mi'kmaq First Nation – procedural fairness is required, given:

i. the decision is a final decision;
ii. the decision involves a public law actor; and
iii. the decision affects an individual's rights.

Knight v Indian Head School Division No 19 (1990), 1 SCR 653 at para 28.

[23] The Enrolment Committee's decision is final, as it denied the Applicant's membership, providing no opportunity to submit additional information or a right of appeal. The decision is also of a public nature, as the Committee derives its power from the Agreement, which is between the Federal Government and the FNI. The Enrolment Committee's power was delegated to it pursuant to the Crown's prerogative power to constitute new Bands and decide on Band membership and Indian status.

[24] While the quantum of procedural fairness varies with the circumstances, in considering the relevant factors as outlined in *Baker*, above, the decision falls towards the higher end of the spectrum of procedural fairness: one must consider:

a. the nature of the decision being made and the process followed in making it;
b. the nature of the statutory scheme and terms of the statute under which the body operates;
c. the importance of the decision to the individual;
d. the legitimate expectation of the person; and
e. the choices made by the agency itself.

Baker v Canada (Citizenship and Immigration), [1992] 2 SCR 817 at paras 23-27; *Canadian Pacific Railway Co v Vancouver (City)*, 2006 SCC 5.

[25] The Respondents argue that the Enrolment Committee was performing a non-adjudicative administrative function when reviewing applications to determine qualification as a member of the Qalipu Mi'kmaq First Nation, and as such the Applicant is owed less procedural protection. The Applicant submits the nature of the decision was judicial, given that he was required to file an application and provide evidence, including sworn affidavit evidence, in support of his application, and the decision was final, affecting his substantive rights.

[26] In my view, the situation is not one of adjudication of rights in an adversarial context. However, it is also not a highly discretionary or policy-based decision, which generally affords less procedural fairness.

[27] The nature of the statutory scheme provides insight into the level of procedural fairness to be afforded to the Applicant. While the decision is more regulatory and administrative than it is adjudicative, given the Applicant's substantive aboriginal rights at stake and determination of his status as a member of the Qalipu Mi'kmaq Band (factors (a) and (c) of the *Baker* decision above), and the fact that the decision is final, with no right of appeal (factor (b) of *Baker*), the duty of fairness weighs in favour of higher procedural protection.

[28] Moreover, as stated in *Baker*, at para 28:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[29] The EC Agreement provided that the Enrolment Committee was allowed to request information if an application were deficient (section 4.2.9). This contemplates that a certain level of fairness is to be afforded to administratively deficient applications by providing some form of notice and opportunity to be heard before a final determination is made. On the other hand, it was a discretionary and not a mandatory provision. It is important that the agreement be interpreted in light of building relationships for the future as much as it is settling longstanding grievances – it is not to be treated as a commercial contract (*Little Salmon/Carmacks First*

Nation v Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources), 2010 SCC 53 at para 10).

[30] The Supplemental Agreement mandated that deficient applications would be found invalid and removed any right of appeal. However, a determination of an invalid application was "without prejudice to the ability to submit a new application form properly completed and signed" (section 8.3). Thus, applicants were given the opportunity to submit a new application if there had been previous errors.

[31] The Attorney General rightly points out that the Enrolment Committee had no discretion to consider applications failing to meet the minimum requirements, nor were they given discretion to extend the time in which to submit an application. They were, however, given the discretion to notify applicants whose applications were incomplete, under section 4.2.9.

[32] The inclusion of these avenues for recourse in the EC Agreement and in the Supplemental Agreement, to correct administrative errors, supports the Applicant's position that the EC Agreement was intended to be fair and guard against a situation such as the present one, where an individual, who may meet all the requisite criteria for obtaining Indian status and membership in the band, is precluded from doing so due to a technical or administrative error.

[33] The Enrolment Committee's procedure was defined by the terms of the EC Agreement. As above noted, the EC Agreement gave the Enrolment Committee discretion to request

additional evidence to complete an assessment of the criteria in section 4.1. The EC Agreement did not require the Enrolment Committee to notify applicants of deficiencies.

[34] The more discretion provided to the Enrolment Committee to determine their rules of procedure, the less procedural fairness afforded. In the present situation, the Enrolment Committee was not given full reign to determine their procedure; in fact, they were provided with very little discretion, other than to notify applicants of deficiencies. This tends to weigh in favour of higher procedural protection.

[35] The fact that community assistants and enrolment clerks were hired by the Enrolment Committee to assist applicants demonstrates that parties to the EC Agreement contemplated the possibility of technical or administrative errors or omissions, that such a situation warranted providing assistance, and to prevent an irregularity in the application process from necessarily resulting in a loss of band membership. That the Applicant did not actually seek assistance is not determinative; the fact that assistants were provided demonstrates that the Enrolment Committee recognized the importance of the interests at stake.

[36] In *Baker,* above, at para 22, Madam Justice L'Heureux-Dube highlighted the central purpose of participatory rights:

> I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker [Emphasis added].

[37] As the Applicant points out, the list of *Baker* factors is not exhaustive (para 28). Although I do not find that the Applicant was owed a fiduciary duty or that the honour of the Crown is engaged in these circumstances (for the reasons provided below), the fact that the Agreement stems from the GIC's prerogative power to create new bands under the *Indian Act* – a higher level of procedural fairness is warranted. At a very minimum, this requires notice.

[38] Applicants for membership in the Qalipu Mi'kmaq First Nation were made aware of the case to meet; through the EC Agreement, FNI's Guidelines and the application form. However, the Applicant was provided no notice of the deficiency in his application and was provided no opportunity to respond and correct it. A reasonable person, apprised of these facts, would view the decision as unfair.

[39] Had Mr. Howse submitted his application even days earlier than he did, under the Supplementary Agreement (even without a right of appeal), he would have had an opportunity to submit a new application properly completed and signed (Supplemental Agreement, section 8.3), and would have met the requirements of section 4.1 – which will have enduring and significant substantive consequences to his status as a band member.

[40] The lack of notice and thus any form of recourse for an applicant who has made an honest error in their application, is not fair. It is not fair considering the statutory, institutional, and especially the social context of the EC Agreement, the Supplementary Agreement, the purpose of the Enrolment Committee, and the fact that the Enrolment Committee's decision has long-term consequences for the Applicant's personal identity, inclusion in his community, the

entitlement of his descendants, access to certain programs and services and constitutionally protected rights.

[41] As part of the procedural fairness analysis, the Applicant argues that there was a legitimate expectation that procedurally the Applicant would be told if his application was incomplete. The test, as set out in *Agraira v Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36 at paras 94-95, is that the practice, conduct or promise said to give rise to a legitimate expectation must be clear, unambiguous and unqualified and must not conflict with a statutory duty. That test is not met by the facts of this case – the EC Agreement provided the Enrolment Committee with the discretion of requesting information if an application was deficient, which does not constitute a duty to do so in clear and unambiguous or unqualified terms.

C. *Were there obligations owed by the Crown to the Applicant arising from a fiduciary duty or the honour of the Crown?*

[42] A fiduciary relationship exists between Aboriginal peoples and the Crown. However, outside the framework of section 35 of the *Constitution Act, 1982*, a fiduciary duty requires the identification of a cognizable Aboriginal interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty". Here, where no Aboriginal or treaty right is invoked, a fiduciary duty must be tied to an identified Indian interest, such as reserve lands (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at pars 81-85).

[43] As argued by the Respondent Attorney General, the Applicant has not identified any cognizable Aboriginal interest on which he bases his assertion that a fiduciary duty is owed to him. He provides no evidence regarding the practices, customs and traditions of the specific Aboriginal collective from which the asserted fiduciary duty arises, or indeed the basis on which he can claim status or non-status rights.

[44] I also agree with the Respondent Attorney General that any fiduciary duty, if owed, would be to the Aboriginal collective, *i.e.*, the Mi'kmaq Group of Indians of Newfoundland, as represented in negotiations by the FNI, or its successor by way of the implementation of the Agreement, the Qalipu Mi'kmaq First Nation. The honour of the Crown rests with ensuring that the Agreement, as negotiated between the government of Canada and the Aboriginal collective, was implemented as agreed. In the same vein, the Crown's duty to deal honourably with the Aboriginal collective requires that the Agreement be interpreted and implemented in light of its purpose and within its social and historical context.

[45] I find that there was no breach of any fiduciary duty, which the Applicant failed to prove was owed to him, or any breach of the honour of the Crown towards the Applicant, given neither was engaged for the Applicant in the circumstances here.

D. *Was the Enrolment Committee's decision unreasonable?*

[46] For the same reason that I find that the decision of the Enrolment Committee was procedurally unfair, I also find that it was unreasonable: there was no reasonable notice or even

attempt at such notice provided to the Applicant to allow him to correct the deficiency in his application for recognition as a member of the Qalipu Mi'kmaq First Nation.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The decision of the Enrolment Committee declaring the Applicant's application for membership to the Qalipu Mi'kmaq Band to be invalid is set aside;
2. The Enrolment Committee shall evaluate the Applicant's application and eligibility for membership in the Qalipu Mi'kmaq Band in accordance with section 4.1 of the Agreement;
3. Costs to the Applicant.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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