Federal Court  Cour fédérale

Date: 20190111

Docket: T-1681-17

Citation: 2019 FC 41

Ottawa, Ontario, January 11, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

PATRICK CHIPESIA, CLARENCE APSASSIN, GABRIEL HARVEY, SYLVESTER APSASSIN, ANGELA APSASSIN, SUSAN DUMAS, AMANDA APSASSIN, TRACY PAQUETTE, VANESSA APSASSIN, ANTHONY POUCE-COUPE, HENRY APSASSIN, JOSEPH APSASSIN, MALCOLM APSASSIN, RUSSELL APSASSIN AND WALTER APSASSIN

Applicants

and

BLUEBERRY RIVER FIRST NATIONS AND CHIEF MARVIN YAHEY SR., SHAWN DAVIS, SHERRY DOMINIC, DEREK GREYEYES, WAYNE YAHEY AS CHIEF AND COUNCIL REPRESENTATIVES OF THE BLUEBERRY RIVER FIRST NATIONS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are members of the Blueberry River First Nations [BRFN or the Band], a band formed in 1978 with traditional territories in the Upper Peace River Region in the province of British Columbia. The BRFN has approximately 499 members, including 326 who were eligible voters during the times material to this application. The Applicants include members living on and off-reserve and have various backgrounds and relations to each other.

[2] On November 2, 2017, the Applicants filed a Notice of Application seeking judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], of an election code [Election Code] that was adopted by the membership of the BRFN through a ratification vote and "was enacted in August 2017 by resolutions" of the Respondents, Chief and Council of the BRFN [Band Council]. The Election Code implements a new system of governance and elections based on Family Groups within the BRFN.

[3] The Applicants allege that they have been arbitrarily placed into a large group of 152 electors bearing 41 different family names. Although this group comprises almost half of the Band's electors, it is only allowed to elect one of five councillors to the Band Council.

[4] By way of relief, the Applicants request an order setting aside the Band Council Resolution [BCR] and any other related resolution giving effect to the Election Code or bringing it into force. Alternatively, they ask that the Court issue an order striking section 2 (definition of "Family Councillor" and "Family Group"), and sections 8, 9, 11, 12, 13, 14, 15 and all other

references to "Family Group" or "Family Councillor" in the Election Code [the Impugned Provisions]. The provisions of the Election Code that relate to the division of members of the BRFN into Family Groups and the election of family councillors representing each Family Group read as follows:

> Definitions
>
> 2. For the purposes of this By-law:
>
> […]
>
> "Family Councillor" means a Blueberry River member included in a Family Group who is elected to the office of Family Councillor by the elector in that respective family group in accordance with this By-Law
>
> "Family Group" means:
>
> (a) Family Group 1, the late Daniel Apsassin Family;
>
> (b) Family Group 2, the late Edward Apsassin Family;
>
> (c) Family Group 3, the late Pete Davis Family;
>
> (d) Family Group 4, the late Jack Wolf family; and
>
> (e) Family Group 5, the late Charlie Yahey and late Jack Appaw family.
>
> […]
>
> 8. Blueberry River must be governed by a Council consisting of
>
> (a) one (1) Chief; and
>
> (b) five (5) Family Councillors (one from each Family Group).
>
> 9. A person may only be a candidate for Chief of Family Councillor in any election, but not both.
>
> […]
>
> 11. Family Councillors must be nominated by electors included in their respective Family Group by written petition signed by at least two (2) electors in that Family Group and submitted to the electoral officer at a Nomination Meeting. An elector may

> nominate or second no more than one candidate for the office of Family Councillor.
>
> 12. One (1) Family Councillor shall be elected for each Family Group by secret ballot having obtained the highest number of votes among all candidates cast by electors in his/her respective Family Group.
>
> 13. Family Councillors must be:
>
> (a) included in the Family Group List for the respective Family Group that elects them;
>
> (b) at least eighteen (18) years of age; and
>
> (c) registered on the Blueberry River Band List.
>
> 14. The Chief must be nominated by written petition signed by at least two (2) electors and submitted to the electoral officer at a Nomination Meeting. An elector may nominate or second no more than one candidate for the office of Chief.
>
> 15. The Chief must be elected by secret ballot having obtained the highest number of votes among the Family Councillors at a Chief election meeting in accordance with Part 15.

[5] In the further alternative, the Applicants seek a declaration that the Impugned Provisions are invalid and of no force and effect.

[6] The Applicants claim that: (a) the Election Code does not reflect community consensus; (b) the notice given to the BRFN members of the vote held on August 17, 2017 to ratify the Election Code was inadequate and unfair, both in timing and content; (c) the Impugned Provisions of the Election Code are discriminatory, arbitrary, unfair and contrary to the requirements of administrative law; and (d) the Impugned Provisions of the Election Code are contrary to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*,

Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] and are not justified under section 1.

[7] For the reasons set out below, I conclude that the entire application, including the *Charter* argument, is not properly before the Court. The application is accordingly dismissed.

II. Background Facts

[8] The BRFN was historically joined with the Doig River people as the Fort St. John Indian Band, a signatory to Treaty 8. In 1977, the Fort St. John Band was dissolved and the BRFN and Doig River First Nations became independent Bands.

[9] The BRFN has two reserves near Fort St. John, British Columbia. Approximately 250 members live on the reserves. The majority of on-reserve members reside at Blueberry River Indian Reserve No. 205, where the BRFN's offices and community hall are located. A smaller number of members live on the southern half of Beaton River Indian Reserve No. 204.

[10] The BRFN is composed of descendants from both Cree-speaking tribes and from descendants of the Dane-zaa people. Over time, the ancestry of members has created, or has been used as a basis for, division in the community. These divisions, however, have not dictated the historical voting patterns of Band members. In past elections, where each adult member of the Band had a vote, council members and chiefs were elected from both "sides" since at least 1991.

[11] Since the formation of the BRFN in 1978 and pursuant to the Order in Council P.C. 1978-593 of March 2, 1978 issued under subsection 74(1) of the *Indian Act*, RSC 1985, c I-5 [*Indian Act Election Order*], the elections of Chief and Council have been governed by the *Indian Act*, and the *Indian Band Election Regulations*, CRC, c 952. Over the years, members of the BRFN have discussed moving to a community or custom election code model, but the discussions did not result in any consensus.

[12] In applying to convert to such a model, a draft code was circulated in June 2008. It proposed to employ a Family Group system of representation with four Family Groups, a method for determining who would be placed in each Family Group, and the election of the Chief by the membership at large to hold a fifth vote on Council. The 2008 draft election code failed to pass a referendum vote.

[13] Another draft election code was circulated in or around 2012 that again employed a Family Group system of representation. The 2012 code was also abandoned as no consensus was reached as to its terms.

[14] In 2016, in response to various ongoing issues with the management of the BRFN's affairs and the health of the Band and its members, the Band Council retained consultants to lead a series of community mediation sessions. The consultants produced a report entitled "The Blueberry River First Nation Community Mediation Report and Recommendations" [Mediation Report].

[15] The Mediation Report was the product of mediation sessions held over six days with input from 78 different members representing nine different families. It identified several problems in the community, namely that two-year terms of office, as imposed by section 78 of the *Indian Act*, inhibit political stability. The Mediation Report also found that family voting patterns result in some families going without political representation. To address these issues, the Mediation Report recommended the BRFN to develop and implement a custom election code. However, the Mediation Report cautioned that the report was "not attempting to define or qualify normative facts" and that its recommendations "should not be interpreted as having the full support of the community or leadership".

[16] In February 2017, the Band Council proposed that an election code be enacted by the BRFN to replace the election process under the *Indian Act*. This required, among other things, the development, through meaningful consultation with the members, of an election code that had the support of the community as a broad consensus. It would also require the Minister [Minister] of Indigenous and Northern Affairs Canada [INAC] to issue an order under subsection 74(1) of the *Indian Act* repealing the *Indian Act Election Order* and removing BRFN from the operation of that section.

[17] Members of the BRFN were consulted about the creation of a community election code. Feedback was gathered from certain members regarding its content. A series of meetings were organized and took place at various locations. Meetings were organized in Family Groups within the BRFN, with the assistance of individual group coordinators who assembled members of their designated Family Groups. The Band Council also organized meetings with off-reserve members

in Calgary, Edmonton, Prince George, Kelowna and Vancouver. The BRFN members were notified of these meetings either by postings at the Band Office, on the BRFN's website or Facebook page, or by individual phone calls. It is common ground that attendance at the meetings was generally low. Moreover, as reflected later in these reasons, the parties disagree on the sufficiency of the consultation process.

[18] Ultimately, the Band Council settled on a proposed election code that divides BRFN members into five Family Groups and provides that each of these Family Groups is to elect a family councillor to serve as their representative on Band Council. However, the proposed election code does not include a process for the placement of individual Band members into a Family Group. The family councillors are in turn responsible for selecting the Chief by way of a majority vote among them.

[19] On June 20, 2017, the BRFN retained Rosie Holmes, a non-member residing in Sooke on Vancouver Island, to serve as the Band's electoral officer for a ratification vote of the proposed election code, scheduled to be held on August 17, 2017 [Ratification Vote].

[20] Four methods were used by Ms. Holmes to communicate the contents of the draft election code and the date on which the Ratification Vote was being held. Ms. Holmes arranged for hand delivery of a package to on-reserve electors containing a document with instructions on how to vote, along with a voter declaration form and a document entitled "Notice of Vote" announcing the date and place of the Ratification Vote, as well as details about an information meeting scheduled on August 1st, 2017. A similar package was sent by mail to off-reserve

members. The Notice of Vote was also posted at the Band Office, as required by the *Referendum Regulations*, CRC, c 957 [*Referendum Regulations*] for referendums held under subparagraph 39 (1)(b)(iii), subsection 39(2) or section 39.1 of the *Indian Act*, and on the BRFN's website and Facebook page.

[21] The Band Council held additional meetings in July and August of 2017 to explain the Election Code and respond to questions from Band members.

[22] On August 18, 2017, the day after the Ratification Vote was held, the Band Council reported on the Band's website that of the 191 electors that voted, 101 voted in favour of the Election Code and 90 voted against it, representing a majority of 52 percent of the electors, with a voting turnout of 58%. The impugned BCR was passed the same day. The preamble states that the BRFN developed a community election code and that a majority of the electors voted in favour of the Band's removal from the election provisions under the *Indian Act*. It concludes with a request by Band Council that the Minister make an order removing the BRFN from the application of the election provisions of the *Indian Act*.

[23] The Band Council subsequently submitted the BCR and the Election Code to the Department of Indigenous Affairs [Department]. On September 13, 2017, the Minister issued an order pursuant to subsection 74(1) of the *Indian Act* [s 74(1) Order], which was registered on September 15, 2017 and published in the Canada Gazette on October 4, 2017.

[24] The s 74(1) Order was made in accordance with a policy entitled Conversion to Community Election System Policy [Policy], which sets out specific preconditions to the Minister making an order exempting a Band from subsection 74(1) of the *Indian Act*. These include, among other requirements, a community election system in a clear, written format that includes provisions for election appeals and amendments, follows principles of natural justice, is consistent with the *Charter*, has been reviewed by and is satisfactory to the Department, and has received the support of the community. The Policy further provides that the election code will be considered approved by the community if a majority of electors (50 percent +1) vote by secret ballot to approve it, or if the community approves it in such other manner as the First Nation and the Department agree upon. It also provides that the Band must take steps to provide the electors with reasonable notice of the right to participate in the approval process and the content of the code.

[25] On September 18, 2017, Councillor Sherry Dominic prepared lists of the names of electors of the Band in each of the five Family Groups established under the Election Code. A cover letter was also prepared which indicated that the lists were in draft form, that the Band Council wished to ensure that the lists were accurate, and that members were invited to contact the Band Office with any questions or concerns. The material was delivered to all members who reside on the reserve and mailed out to off-reserve members.

[26] On September 19, 2017, the Band Administrator received an e-mail with an attached letter from Marc Boivin, Director of Governance and Implementation Policy Directorate, Aboriginal Affairs and Northern Development Canada, that reads as follows:

> I am pleased to inform you that an order was signed by the Minister of Indigenous and Northern Affairs Canada which removes the Blueberry River First Nations from the application of the election provisions of the *Indian Act*. As a result, the Blueberry River First Nations shall conduct future elections in accordance with the community's election system that was recently ratified. The order was registered by the Clerk of the Privy Council on September 14, 2017 under SOR/2017-193, and came into force on the day it was registered. A copy of the order is enclosed.
>
> However, given that the Chief and Councillors currently in office were elected under the *Indian Act* election system, the vacancy provisions of section 78 of the *Indian Act* continue to apply, as do the *Indian Band Council Procedure Regulations*. The community election rules begin to apply only at the time at which a first election process launches under these rules.
>
> I wish Blueberry First Nations all the best on its first election under the new election rules.

[27] A copy of Mr. Boivin's letter and attached documents was delivered or sent out to Band members on or about September 25, 2017.

[28] In October 2017, the Band Council posted on a private section of its website a Notice of Nomination Meeting stating that pursuant to the Election Code, a Council Election was scheduled to be held on December 14, 2017 and a "Chief Election" would be held on December 15, 2017. The Applicants contend that, contrary to the timelines set out in the Election Code, the Nomination Meeting was scheduled late, to be held on November 3, 2017. It appears that it took place beyond the 40 day window set out in Section 40 of the Election Code.

[29] According to the Band Administrator, no one contacted him or any other employee of the Band to express any disagreement with or request a change to their Family Group placement or otherwise discuss their placement prior to the election, which took place on December 14, 2017.

III. Issues to be Determined

[30] The Applicants submit that the application raises the following issues:

A. *Whether the Election Code, the Impugned Provisions, and the practices as stated therein represent a valid Band custom as reflected by a broad community consensus.*

B. *Whether the Election Code and/or the Impugned Provisions are invalid as being arbitrary and discriminatory, contrary to the principles of administrative law.*

C. *Whether the Election Code and/or Impugned Provisions of the Election Code are invalid as being discriminatory, contrary to the Charter.*

[31] The Respondents urge the Court to cast the issues differently. From their perspective, a preliminary issue is whether this Court has jurisdiction to deal with some or any of the matters in this application.

[32] Regardless how one casts the issues, the result is the same. The Applicants have neither challenged the s 74(1) Order nor named the Minister as a respondent. Consequently, their application must be dismissed.

IV. Analysis

[33] By this application, the Applicants seek judicial review of the process leading to the adoption of the Election Code, the manner in which the Election Code was put in place, the Election Code itself, and a subsequent decision placing members into Family Groups for the

purpose of the upcoming election. These are all separate matters, each raising different facts and issues, involving different players and attracting different standards of review.

[34] Eighteen affidavits were filed by the Applicants or other members of the BFRN in support of the application. The affiants assert that that there was no meaningful consultation regarding the development of the custom election code and notice of the Ratification Vote was insufficient and inadequate.

[35] The Applicants' challenge as to the sufficiency of the consultation process and notice of the Ratification Vote is clearly out of time. The Applicants knew or should be deemed to have known of the results of the Ratification Vote on August 18, 2017, when the Band Council posted the results on the Band website. It was up to the Applicants to challenge the subsequent BCR or the Ratification Vote in a timely manner, within the 30 day time limitation provided in subsection 18.1(2) of the *Federal Courts Act*, or to justify why they did not bring this application in a timely manner. Notwithstanding that judicial review of these matters is time-barred, for the sake of completeness, I will briefly address the issues raised by the Applicants.

A. *The Election Code's Development*

[36] The Applicants submit that the Band Council made little effort to consult with the members of the BRFN about the terms of the proposed election code and that the entire consultation process was rushed. Although the primary objective of these meetings was to engage the community and to hear what the members wanted to achieve out of the custom election code, the Applicants contend that notice of meetings was wholly inadequate, that

meetings were scheduled at inconvenient times, and that a significant portion of the members were not consulted. The Applicants claim that the planners hired by Band Council to assist with the development of a new code drafted the Election Code between April and June 2017 with substantive comments only from the representative of INAC and the Band Council.

[37] The Applicants say the provision of accurate and relevant information was not given or, if given, was not timely, such that persuasive input could not be made to influence the outcome of the draft election code. The Applicants have a point. The Mediation Report cautioned that development of a code requires an "enhanced membership engagement process" comprising a "prolonged engagement period" to overcome barriers of "lack of trust, community division and varied levels of education". Based on the evidence before me, the consultation process did not meet this goal. This was mostly due to the short time span imposed by the Band Council in which to receive, digest, and provide comments.

[38] Given all of that, the essential question is whether members of the BRFN had the opportunity to make timely submissions with respect to the proposed election code. I conclude that the consultation process, while far from perfect, was fundamentally procedurally fair. One must bear in mind that this is the third time that the BRFN has tackled the contentious issue of Family Grouping for elections in the past decade. The community is relatively small and members appear to be well engaged in matters of governance. Moreover, systems have been put in place by the Band Council to effectively communicate information to members both on and off-reserve.

[39] To confer jurisdiction on this Court to set aside the Election Code, the flaws in procedural fairness must be very significant, amounting to fundamental flaws, such as not being afforded the opportunity to be heard or not being given most or even some of the relevant information. None of that is apparent here.

[40] The process of consultation included mailings to members, meetings in different locations where members resided, distribution and display of information in some form at the meetings and the posting of information on the Band website and Facebook. Throughout the process, the planners, the Administrator and Band Council remained available to answer letters, e-mails or phone calls from concerned members. This was an essential part of the consultation process. These efforts, taken as a whole, afforded members a sufficient opportunity to ask questions, request and receive relevant information, and make their views known on issues which were of a concern to them. In the circumstances, I find that the essential element of a fair process in this context was present.

B. *Lack of Notice and Insufficiency of Notice of the Ratification Vote*

[41] A number of the Applicants' affiants declared that they received late or no notice of the contents of the Election Code that had been drafted or when the Ratification Vote was being held. The Respondents countered with evidence disputing these allegations.

[42] The Applicants' evidence regarding notice provided of the Ratification Vote and their knowledge of the substantive content of the proposed election code terms are of less interest for what they say than for what they do not say. None of them claim that they were completely

unaware that the BRFN was contemplating changes to the election code. Nor do they claim that information was not reasonably available to them. In fact, most of the affiants ultimately voted or chose not to participate in the Ratification Vote.

[43] Although three Band members who lived off-reserve at the time of the Ratification Vote did not receive a mail-out package and one more received a mail-out package late, there is no indication that the Band Council was at fault for the mail-out package not reaching them in time. On the contrary, Band Council kept a record of addresses and contact information of BRFN members living off-reserve. Those who wished to exercise their right to vote as Band members were responsible for updating this information (*Band Council of the Abenakis of Odanak* v *Canada (Ministre des Affaires indiennes & du Nord*, 2008 FCA 126, at paragraph 39). The evidence is clear that the Notice of Vote announcing the date and place of the Ratification Vote and the August 1st information meeting was delivered or mailed to electors, posted at the Band office on July 4, 2017, as required by the *Referendum Regulations*, and on the website and Facebook page on July 11, 2017.

[44] The Applicants submit that the low attendance at the consultation meetings and the Ratification Vote was due to lack of consultation or notice. However, the low turn-out rate is more likely attributable to voter fatigue or voter apathy given the repeated attempts by the BRFN to develop a custom election code.

[45] On the basis of the evidence before me, I am satisfied that sufficient notice of the Ratification Vote, as well as the content of the proposed election code, was provided to members of the BRFN.

C. *Challenge of the s 74 Order*

[46] The Applicants seek an order setting aside the BCR of August 18, 2017 approving the Election Code and any other related resolution giving effect to the Election Code or bringing it into force. However, the Election Code was not enacted by the BCR, but rather adopted by B and electors following a Ratification Vote and was put in place by the s 74(1) Order. In the present case, the Minister exercised her discretion to exempt the Band from holding further elections under the *Indian Act* because she determined that the Election Code had the requisite broad consensus.

[47] The Applicants were given notice of the s 74(1) Order on or about September 25, 2017. No explanation is provided why the Applicants did not seek to challenge the s 74(1) Order, which is clearly the operative decision, within the time provided in subsection 18.1(2) of the *Federal Courts Act*, or at all. Their failure to do so is fatal to their application in light of persuasive, if not binding jurisprudence.

[48] In *Taypotat v Taypotat*, 2013 FCA 192 [*Taypotat*], the appellant challenged the Kahkewistahaw First Nation's Election Act which imposed a minimum education requirement to run for public office. The challenge was brought by way of an application for judicial review challenging the first election following the adoption of the new act. As in the present case, the

Kahkewistahaw Election Act was adopted through a process that led to a s 74(1) Order following a process under the Policy. The Federal Court of Appeal found that the appellant's failure to challenge the s 74(1) Order was not simply a procedural flaw, but a substantive problem. With the exception of the submissions based on subsection 15(1) of the *Charter* and on the principle of equality set out in the Kahkewistahaw Election Act itself, the Court concluded that all the other issues raised by the appellant may be dismissed without difficulty. At paragraph 21, Mr. Justice Robert Mainville wrote:

> First, the numerous issues raised by the appellant concerning the lack of a "broad consensus" with respect to the ratification of the *Kahkewistahaw Election Act* should be dismissed on the ground that the appellant did not challenge the Minister's decision to revoke the order under subsection 74(1) of the *Indian Act*. If the appellant was of the view that this decision was made without the required community consensus, he should have challenged it at the appropriate time or, at the very least, he should have included the Minister as a party to his judicial review proceedings.

[49] The Federal Court of Appeal concluded at paragraph 22 that since the revocation of the s 74(1) order was not at issue in the Federal Court, "the appellant's challenge to the validity of the vote leading to that order and to the adoption of the community election code could have resulted in a legal vacuum with respect to the election process of the Kahkewistahaw First Nation, with the attending confusion and disarray which such a vacuum would entail."

[50] Although the Federal Court of Appeal's decision in *Taypotat* was overturned by the Supreme Court of Canada on the *Charter* issues, the reasoning at paragraphs 21 and 22, which I consider sound and persuasive, was not disturbed. It is not open to the Applicants to collaterally attack an order made by the Minister. As the s 74(1) Order has not been challenged and the Minister has not joined as a respondent, the Court's intervention is not appropriate. Should the

Court find the Election Code to be invalid because it does not reflect broad community consensus, BRFN would find itself in a legal vacuum between the s 74(1) Order, exempting the Band from the election process provided in the *Indian Act*, and having no custom election law in effect. This situation cannot be remedied by the Court without the involvement of the Minister.

[51] I wish to add, however, that the question of what amounts to a broad consensus, which the Minister considered, is contextual (*McLeod Lake Indian Band* v *Chingee*, (1998), 153 FTR 257 at paragraph 19). While the consultation process was not without a few shortcomings, in the context of a Ratification Vote held in a relatively small community such as the BRFN, the evidence before me establishes the widespread knowledge of the Ratification Vote and the proposed changes to the election code in the community. In the present circumstances, given the results of the Ratification Vote (of the 326 eligible voters, 191 (or approximately 58%) voted, of which 101 (or approximately 53%) voted in favour of the Election Code) and the extent of the consultation process, I am satisfied that broad consensus among the Band membership has been demonstrated.

D. *Whether the Election Code and/or the Impugned Provisions are invalid as being arbitrary and discriminatory contrary to the principles of administrative law or the Charter*

[52] The Applicants submit that the Election Code must comply with the basic administrative principles of procedural fairness and natural justice. They refer to the direct and intended discriminatory treatment towards members who were placed in the Edward Apsassin Family Group because it imposes a disadvantage on the Applicants that does not exist within the other

Family Groups, such as their ability to contribute equally to the selection of the BRFN leadership.

[53] Further, the Applicants contend that the Election Code and the Impugned Provisions are arbitrary. The Applicants take issue with the absence of any provision in the Election Code allowing for a fair and impartial method of assigning members to the Family Groups. According to the Applicants, such a process should include consultation with members about whether he or she identifies with one particular Family Group and allow for members to challenge decisions concerning the group in which they are placed. In the absence of these rules, it opens the door for Chief and Council to arbitrarily and unilaterally designate the membership of each Family Group, allowing them to manipulate the outcome of the vote.

[54] These arguments are without merit.

[55] The Applicants have once again failed to frame and challenge the proper matter. Pursuant to section 2 c) of the Policy, the Minister must ensure that the proposed community election code follows the basic principles of natural justice, before repealing section 74 of the *Indian Act*. The Applicants are essentially collaterally attacking the Minister's decision.

[56] Moreover, although the Election Code does not vest any person or body with the authority to determine Family Group memberships, each elector has the opportunity to confirm whether his or her family placement was correct pursuant to section 32 of the Election Code. The lack of a formal process for family placement does not render the Election Code discriminatory

or arbitrary. More importantly, the Applicants did not raise any of these concerns with the Band Administrator or Band Council after they were informed of their placement in the Edward Apsassin Family Group and did not specifically challenge the Band Councillor's decision in accordance with the provisions of the Election Code. No arbitrariness or unfairness has been established by the Applicants.

[57] The Applicants further submit that the Election Code and the Impugned Provisions are discriminatory, contrary to section 15 of the *Charter* and are not justified under section 1. This argument must be dismissed for two reasons.

[58] First, although a community election code adopted by a First Nation remains subject to *Charter* scrutiny (*Taypotat* at paragraph 37), the record before the Court is insufficient to conduct a proper *Charter* analysis. However, for the sake of completeness, I find that the Election Code does not, on its face, perpetuate disadvantage through prejudice or stereotyping. The Applicants' claim falls outside the bounds of what section 15 is intended to protect and thus no breach of section 15 has been established. At the first stage of the section 15(1) test, the Applicants must establish that the impugned law creates a distinction based on a ground enumerated in section 15 or an analogous ground. The case law has recognized only four analogous grounds: citizenship, marital status, sexual orientation and place of residence in the special case of residence on and off an Indian reserve. The Applicants ask this Court to accept a new analogous ground of "family status or lineage" and argue that the Election Code creates a distinction based on that ground by virtue of its provision for the election of one councillor for each Family Group. I decline to do so.

[59] There is no evidence that the Edward Apsassin Family Group is historically disadvantaged or has been historically discriminated against. On the contrary, the evidence indicates that members of that Family Group have frequently held positions of chief and councillor of the Band. Any distinction drawn by the Election Code is not based on stereotyping members of the Family Groups but rather based on the historical practice of family-based governance, the contemporary political role of the Family Groups within the community, and ensuring political representation for under-represented families.

[60] Secondly, the s 74(1) Order was made in accordance with the Policy which sets out specific preconditions to the Minister making an order exempting a band from subsection 74(1) of the *Indian Act*. This includes, among other things, a community election system that is consistent with the *Charter*. The Applicants are once again attempting to collaterally attack the decision of the Minister.

V. Conclusion

[61] In light of the reasons above, I conclude that the application should be dismissed.

[62] By making this finding, I am not leaving the Applicants without recourse**.** It is open for the Applicants to challenge the Election Code on *Charter* grounds by separate proceeding, based on a proper record. They can also request that they be placed in a different Family Group for the purpose of the next election should they disagree with their present placement. Moreover, they are always free to request amendments to the Election Code in accordance with section 203.

[63] Either party may take the initiative by delivering written submissions on the issue of costs, not exceeding 3 pages in length, within two weeks of the date of this Judgment, and the other party will have one week from receipt for their response, with a further one week for reply.

JUDGMENT IN T-1681-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The parties may address the Court on the issue of costs, if so advised.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1681-17
STYLE OF CAUSE:	PATRICK CHIPESIA, CLARENCE APSASSIN, GABRIEL HARVEY, SYLVESTER APSASSIN, ANGELA APSASSIN, SUSAN DUMAS, AMANDA APSASSIN, TRACY PAQUETTE, VANESSA APSASSIN, ANTHONY POUCE-COUPE, HENRY APSASSIN, JOSEPH APSASSIN, MALCOLM APSASSIN, RUSSELL APSASSIN AND WALTER APSASSIN v BLUEBERRY RIVER FIRST NATIONS AND CHIEF MARVIN YAHEY SR., SHAWN DAVIS, SHERRY DOMINIC, DEREK GREYEYES, WAYNE YAHEY AS CHIEF AND COUNCIL REPRESENTATIVES OF THE BLUEBERRY RIVER FIRST NATIONS
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