

SMITH v. THE QUEEN IN RIGHT OF CANADA ET AL.

(1972), 28 D.L.R. (3d) 93 (also reported: [1972] F.C. 561)

Federal Court Trial Division, Kerr J., 5 May 1972

Indians -- Band elections -- Chief elected after previous election set aside -- Whether term of office two years or just completion of unexpired term of previous chief -- Indian Act (Can.), s. 78(1), (4).

Pursuant to s. 79 of the *Indian Act*, R.S.C. 1970, c. I-23, the Governor in Council set aside an election at which one M.S. was elected Chief of the Annapolis Valley Band of Indians for a term to expire on November 29, 1971. In consequence thereof a special election was held pursuant to s. 78(4) of the *Indian Act* pursuant to which the plaintiff was elected chief in September 29, 1970. Near the conclusion of the term that would have been served by M.S., had the election not been set aside, the defendant, M, an electoral officer appointed by the Minister of Indian Affairs and Northern Development, gave notice of an election for, *inter alia*, the office of chief. The plaintiff sought an injunction restraining the holding of the election and a declaratory order confirming that her term of office ran for a period of two years commencing on the date of her election, September 29, 1970. The election was held and the plaintiff was elected chief. In an action for a declaratory judgment defining the original term of office of the plaintiff, *held*, the term was the unexpired term of M.S. Section 78 (4) of the *Indian Act* contemplates general elections periodically to elect an entire council with special elections to fill vacancies that occur more than three months before the next general election would ordinarily be held and the term of office of a person elected at a special election does not carry over beyond the next general election.

ACTION for a declaratory judgment defining the term of office of a chief of an Indian band elected under the *Indian Act* (Can.).

R. P. Muttart, for plaintiff.

J. M. Bentley, for defendants.

KERR, J.:--The parties in this action presented a stated case to the Court, which reads as follows:

STATED CASE(1) Pursuant to Rule 475, Federal Court Rules, SOR/71-68. The references in the stated case and argument are to sections of the *Indian Act*, R.S.C. 1970, c. I-6, which are not significantly different from the corresponding sections of the *Indian Act*, R.S.C. 1952, c. 149.

WHEREAS the Plaintiff did commence this action against the Defendants by filing with the Court at Halifax a Statement of Claim on the 7th day of December, 1971;

AND WHEREAS on the said 7th day of December, 1971 the Plaintiff moved, *ex parte*, for an interim restraining order to restrain the Defendants, their servants or agents from causing, conducting, holding or so in any way aiding or abetting the conduct or holdings (*sic*) of an election for the office of Chief of the Annapolis Valley Band of Indians until such date as the Learned Judge might set for the hearing for an application for an interlocutory injunction; and the said motion was dismissed with reservation of the disposition of costs on the motion, by order of His Lordship Mr. Justice Kerr dated December 13, 1971;

AND WHEREAS a Defence was filed herein on behalf of the Defendants on the 12th day of January, 1972.

AND WHEREAS a Reply was filed herein subsequent to the filing of the aforesaid Defence;

AND WHEREAS the parties hereto are mutually agreed upon the following statement of facts for the consideration of the Court:

1) The Plaintiff is a married woman residing at Bishopville Road in the County of Kings and Province of Nova Scotia and at all times material to this action was and is the duly elected Chief of the Annapolis Valley Band of Indians.

2) The Defendant, M. H. Manzer, is an employee and agent of the Department of Indian Affairs and Northern Development and at all times material to this action is the electoral officer appointed by the Minister of Indian Affairs and Northern Development pursuant to the regulations under and by virtue of the Indian Act of Canada.

3) M. H. Manzer was, at all material times, acting within the scope of his duty or employment as a servant of the Crown.

4) On the 22nd day of October, 1969, one Marshall Smith was elected Chief of the Annapolis Valley Band.

5) On or about the 30th day of June, 1970 the election of Marshall Smith was set aside by order-in-council.

6) A special election was held pursuant to Section 78(4) of the Indian Act pursuant to which the Plaintiff Rita Maud Smith was elected Chief of the Annapolis Valley Band on the 29th day of September, 1970.

7) By letter dated October 8, 1971 over the signature of V. M. Gran, Chief, Band Management Division, and under the letterhead of the Department of Indian Affairs and Northern Development, it was stated that the term of office of the Plaintiff, Rita Maud Smith, was limited to the unexpired term of Marshall Smith, and further stated that the Plaintiff's term of office would expire on November 29, 1971. This letter was presented to the Plaintiff by the Defendant M. H. Manzer and adopted by him as his instruction to the Plaintiff.

8) Subsequently, notice was given by the Defendant M. H. Manzer of an election for the offices of Chief and Councillors of the Annapolis Valley Band; whereupon, the Plaintiff did commence an action against the Defendants claiming:

- a) an interim restraining order; and
- b) an interlocutory injunction; and
- c) a declaratory order of the Court confirming the two year term of office of the Plaintiff from the date of her election on September 29, 1970.

9) The action commenced not having been disposed of prior to the election called by the Defendants, the Plaintiff was nominated as a candidate in the election held on the 21st day of December, 1971 and was elected Chief of the Annapolis Valley Band of Indians at that election.

NOW THEREFORE THE PARTIES HERETO respectfully submit the following questions to the Court for its consideration and decision:

A. Is the term of office of Rita Maud Smith two years from the date of her election on the 29th day of September, 1970?

B. If the term of office of Rita Maud Smith is not two years from the date of her election on the 29th day of September 1970, is her term of office the unexpired term of office of Marshall Smith?

C. If the answers to question A and question B are "no", what is the term of office given to Rita Maud Smith by virtue of her election on the 29th day of September, 1970?

THE PARTIES HERETO agree that the decision of the Court herein should be by way of declaratory judgment and that the costs of this entire action and stated case be awarded to the successful party.

WHEREAS the parties hereto do indicate their agreement to the submission of the within stated case this 22nd day of February, A.D., 1972:

Notwithstanding her second election the plaintiff continued her action in this Court, contending that there is a real question as to what her tenure of office as chief is. In that respect counsel for the plaintiff made the following submission in argument:

We believe it is pertinent to set out the Plaintiff's reason for having commenced this action. As it is evident from a reading of the Stated Case, the Plaintiff was elected to the office of Chief of the Annapolis Valley Band to fill the vacancy created by the removal of a former Chief. The election of the former Chief had been irregular and the Minister exercised his prerogative in declaring that election invalid. The Indian Act contemplates such a contingency and provides the authority to conduct another election immediately. That election was held and the Plaintiff was duly elected on the 29th day of September, 1970, fully believing her term of office to be two (2) years as set out in Section 78 of the Indian Act. Subsequently, of course, the Defendant unilaterally concluded otherwise and caused another election to be held against the wishes of the Plaintiff. To mitigate her damages and to insure that the Annapolis Valley Band would be both in law and in fact represented by a Chief, she allowed her name to stand as a candidate in this election -- all the while protesting the legality of the proceeding itself, but knowing full well the practical necessity of assuring the electorate that the affairs of the Band were being protected regardless of the legality of the proceeding. She had a reasonable certainty that she would be again elected in the illegal election and that the performance of her duties as Chief would be clothed with legality by virtue of

her prior election, the term of which would not expire until September 29, 1972. Subsequent to that date, however, there looms large the question as to whether her continued administration would be legal. Hence, the importance of these proceedings.

Further, an important question of principle, a question of local autonomy and the fully national question of the degree to which the provisions of the Indian Act can be unilaterally manipulated by the Department comes into focus. These are the issues to be determined by this Court; and they far surpass the purely local question of self-determination.

We are dealing with a Statute of the Parliament of Canada which purports to regulate a whole race of people. It is of paramount importance that these people be assured that the plain words of that statute shall and do prevail and that technical, bureaucratic interpretation will not frustrate them at every turn.

Relevant portions of the electoral sections of the *Indian Act*, R.S.C. 1970, c. I-6, are as follows:

74 (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

78 (1) Subject to this section, chiefs and councillors hold office for two years.

(2) The office of chief or councillor becomes vacant when

(a) the person who holds that office

(i) is convicted of an indictable offence,

(ii) dies or resigns his office, or

(iii) is or becomes ineligible to hold office by virtue of this Act; or

(b) the Minister declares that in his opinion the person who holds that office

(i) is unfit to continue in office by reason of his having been convicted of an offence,

(ii) has been absent from meetings of the council for three consecutive meetings without being authorized to do so, or

(iii) was guilty, in connection with an election, of corrupt practice, accepting a bribe, dishonesty or malfeasance.

(4) Where the office of chief or councillor becomes vacant more than three months before the date when another election would ordinarily be held, a special election may be held in accordance with this Act to fill the vacancy.

79. The Governor in Council may set aside the election of a chief or a councillor on the report of the Minister that he is satisfied that

(a) there was corrupt practice in connection with the election;

(b) there was a violation of this Act that might have affected the result of the election; or

(c) a person nominated to be a candidate in the election was ineligible to be a candidate.

Counsel for the plaintiff argued that s. 78(1) is clear and unambiguous, and that the term of office of a chief is two years from the date of that person's election, subject only to a shortening of such term in one or more of the circumstances set forth in s. 78 (2), none of which came into existence in so far as the plaintiff is concerned, therefore her term is two years from September 29, 1970.

Counsel for the plaintiff referred to certain statutes (*Towns Act of Nova Scotia*, R.S.N.S. 1967, c. 309; *Municipal Act*, R.S.N.S. 1967, c. 192), applicable to elections, wherein the Legislature expressly limited the term of office of an individual elected to fill a vacancy to the unexpired term of the person who vacated the office, and he argued that Parliament was aware of such provisions and avoided including a similar provision in the *Indian Act*, and that no such provision is in the Act by implication. Counsel also referred to statutes governing the terms of office of Members of the House of Commons and of Legislative Assemblies.

Counsel for the defendants submitted that the words "vacant" and "vacancy", as used in the *Indian Act*, have a technical meaning in the context of statutes respecting elections and relate only to the unexpired portion of a term of office. I do not accept that view. I think that the words are used in their ordinary and natural meaning, *i.e.*, the fact of an office becoming vacant.

Counsel for the defendants also contended that the relevant provisions of the *Indian Act* contemplate general elections to elect an entire "council . . . consisting of a chief and councillors" (s. 74(1)), with special elections to fill vacancies where an office becomes vacant more than three

months before the date when another election for the entire council would ordinarily be held (s. 78 (4)), without any provision or implication that a chief or councillor elected at such a special election can carry his term over and beyond the next general election; and that this is consistent with the form of government prevailing generally in Canada; also that any such carry over might result in a council consisting of several persons with staggered terms ending at different dates that would require a continuous series of elections to fill vacancies and lead to destruction of the periodical general election concept.

The provision in s.78(1) that chiefs and councillors hold office for two years is subject to the other provisions of the section, including ss. (4) which provides for a "special election" to fill a vacancy where the office becomes vacant more than three months before "the date when another election would ordinarily be held". I think that this other election that would "ordinarily be held" means a general election to elect the council. I think that the Act contemplates general elections periodically to elect an entire council, with special elections to fill vacancies that occur more than three months before the next general election would ordinarily be held, and that the term of office of a person elected at any such special election does not carry over beyond the next general election. I also consider that the purpose of s. 78(2) is not to prescribe or define the duration of the terms of office of chiefs or councillors, but is to declare situations in which the office becomes vacant. It is not an exhaustive section in that respect, for the office may become vacant, as it did in the present case, by action of the Governor in Council under s. 79 setting aside an election. We must look to other provisions to find the duration of the terms of offices of the chief and councillors whose offices do not become vacant under s. 78 (2) or s. 79.

The relevant provisions of the *Indian Act* respecting elections are not passed by Parliament in a vacuum, but in a framework of circumstances so as to deal with a known state of affairs. It is an Act that by virtue of the *Interpretation Act*, R.S.C. 1970, c. I-23, shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The fact that Parliament did not include a provision expressly limiting the term of a chief or councillor, elected at a special election to fill a vacancy, to the unexpired portion of the term of the person who vacated the office, does not necessarily lead to a conclusion that the newly elected person's term will carry on beyond the next general election for the council of the band. Reading the sections in their context and prevailing circumstances I think that Parliament intended to provide and did in the Act provide for a system of periodical general elections to elect an entire council, with special elections under s. 78 (4) to elect persons to fill vacancies.

In my view, this interpretation of the provisions is as consistent with the autonomy of local bands as is the plaintiff's contention that the term of her office as chief is two years from the date of her election on September 29, 1970.

Having regard to the claim in the statement of claim for a declaratory order confirming the two-year term of office of the plaintiff from the date of her election on September 29, 1970, and the form of the questions in the stated case, which are related specifically to her said election on that date, my answers will be in respect of the term of office given to her by virtue of that election, and the answers are "no" to Q. A and "yes" to Q. B in the stated case.

As agreed by the parties, the costs of the entire action and stated case will be awarded to the defendants.

Judgment accordingly.