SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN APPELLATE COURT

William A. SNOWDEN, et al. v. SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

No. 04-CA-1017 (Jan. 7, 2005)

Summary

The Appellate Court of the Saginaw Chippewa Indian Tribe of Michigan reverses the ruling of the Community Court holding that the implied constitutional power to disenroll tribal members is limited to matters of fraud and mistake, and that due process requires that the exercise of implied powers must be set out in an appropriate ordinance that defines the substantive grounds for disenrollment and complies with procedural guarantees of tribal law.

Full Text

Before VINCENTI, Chief Justice; PETOSKEY and POMMERSHEIM, Associate Justices

POMMERSHEIM, Associate Justice

Memorandum Opinion and Order

This case came before this Court upon a notice of appeal tendered by William Snowden and Robert Hinmon, et al., from a decision entered by the Community (Trial) Court. This court accepted the appeal and set the matter for oral argument. Having fully considered the arguments, briefs, and the record below, this Court now enters a modified judgment in favor of the Plaintiffs-Appellants, William Snowden and Robert Hinmon, et al.

I. Introduction and Background

For the past decade, if not longer, the Saginaw Chippewa Indian Tribe has been embroiled in extensive political and legal conflict over issues of membership. While the cause of these disputes is deeply rooted in various *federal*[1] moves relative to membership, it has been left to the Tribe to resolve these often painful issues. This case is one example. It focuses on the issue of disenrollment.[2]

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[1]These include, for example, federal certification at various times of potentially underinclusive base rolls for membership, as well as limiting the opportunity for enrollment by requiring the inclusion of the 18-month window for descendary enrollment set out in the 1986 Saginaw Chippewa Tribal Constitution. *See, e.g.*, Saginaw Chippewa Tribe Constitution at Art. III Sec. 1(c).

[2]The complementary issue in the area of membership is that of enrollment. *See, e.g., Bryant v. Saginaw Chippewa Tribal Clerk*, Case No. 04-CA-1016 (decision pending). The case at bar and the *Bryant* case are complementary, but they are not identical or symmetrical. Both cases are about the cultural and legal aspects of membership and belonging, but they are about different aspects of that process, and the application of different standards. The *Bryant* case is about enrollment. This case is about disenrollment. The *Bryant* case involves review of the trial court's *individualized* determination of the enrollment eligibility of twenty-six named plaintiffs. The case at bar involves *no* review of any determination whether to disenroll a particular individual but rather is an appeal requesting that this Court determine the *tribal* constitutional standard as to the *implied substantive* grounds, if any, for possible disenrollment. Both cases—one in the concrete, one more generally—involve tribal constitutional adjudication and interpretation.

The consolidated cases in this appeal grow out of an attempt by the Tribe to disenroll two deceased tribal members, Malinda Hinmon and Mary Lee (Tipkey) Snowden and their descendants. The descendants include two members of a prior Tribal Council, as well as a former Chief Judge of the Tribal Court.

On August 9, 2001, final administrative decisions were made under the authority of the Peters Tribal Council stripping Malinda Hinmon and Mary Lee (Tipkey) Snowden (who were both deceased by that time) of their membership. These proceedings did *not* provide any of the meaningful elements of due process. As a result, the descendants of Ms. Hinmon and Ms. Snowden sought judicial review of these disenrollment decisions in Tribal Court.

When a new Tribal Council, generally referred to as the Kaghebab Tribal Council, was elected, it pursued a different approach to the issue of disenrollment. It established a new Office of Administrative Hearings (OAH) and authorized the Office, *inter alia*, to rehear cases in which disenrollment decisions had been previously made. On June 20, 2003, the Kaghebab Council and the Hinmon and Snowden descendants filed with the Tribal Court joint motions asking the Community Court to vacate the adverse actions taken against Malinda Hinmon and Mary Lee (Tipkey) Snowden and to remand the cases to the OAH for new hearings. However, the parties also asked the Tribal Court to first resolve the predicate question of the extent of the Tribal Council's authority to initiate disenrollment proceedings within the limits of the Tribal Constitution.

Both parties agreed that resolution of the tribal constitutional question was pivotal to the entire issue of disenrollment. On June 20, 2003, the Community Court entered an order vacating the disenrollment decisions against Malinda Hinmon and Mary Lee (Tipkey) Snowden and remanded these cases for new administrative hearings but retained jurisdiction to first rule on the scope of the Tribal Council's constitutional authority to disenroll.

After a hearing in the Community Court, Judge Patrick Shannon issued a short four-page decision on December 10, 2003 that ruled in favor of the Tribal Council.[3] The decision recognized extensive Tribal Council constitutional power to disenroll. This appeal followed. Oral argument was heard before this Court on May 15, 2004.

II. Issue

This appeal raises a single issue, namely, whether the Tribal Council's power to disenroll currently enrolled members is limited to the narrow grounds *expressly* identified in the Tribal Constitution and if not, what are the tribal constitutional boundaries in establishing (substantive) grounds for disenrollment.

III. Discussion

This case is not just about the meaning of the Saginaw Chippewa Tribal Constitution of 1986, but it is also a story about a People and a Tribe enmeshed in the coils of an unknowing and meddlesome Bureau of Indian Affairs and Federal Government. This destabilizing federal force is amply demonstrated in the history leading up to the adoption of the first Saginaw Chippewa Tribal Constitution in 1937. The Saginaw Chippewa Tribe of Michigan came into specific *legal* existence as a result of the Indian Reorganization Act (IRA) of 1934 and the adoption of the first Tribal Constitution in 1937. As is well known, the thrust of the IRA was to encourage tribes to formally adopt the Act through a tribal referendum[4] and then adopt a constitution as provided by Sec. 16 of the Act[5] as well as a business charter as provided in Sec. 17 of the Act.[6]

Many local tribal leaders and people were interested in the possibilities offered by the IRA. In fact, even before the referendum on the IRA itself, a Business Committee headed by Elijah Elk was established to meet with various tribal communities and to begin drafting a tribal constitution. The work of this committee resulted in a (draft) constitution that was sent to Secretary of Interior Harold Ickes on Nov. 27, 1934 for his approval.[7]

The draft constitution is noteworthy in several respects that are directly pertinent to this litigation. The proposed constitution's preamble began, "We, the members of the Saginaw, Swan Creek, and Black River Bands of Chippewa Indians...."[8] The proposed Tribal Council recognized four districts—three of which were outside the boundaries of the Isabella Reservation —three representatives from Mt. Pleasant (i.e. Isabella Reservation), three from Bay City, one from Caro, and three from Hubbard Lake.[9]

Action on this proposed Constitution was slowed as a result of BIA Commissioner John Collier's direction to Elijah Elk that no action could be taken until the formal referendum to accept the IRA took place.[10] As a result, energy shifted away from the draft constitution toward developing a list of eligible voters to vote in the IRA referendum. The list that was compiled by tribal individuals and BIA special agent George Blakeslee contained the names of many tribal people living outside the boundaries of the Isabella Reservation. The referendum was held on June 17, 1935 and included at least two off reservation voting places.[11] The referendum passed.

With the successful referendum accomplished, attention returned to the Constitution itself. The Tribe's desire to include all of its communities within its constitution—even those communities outside the Isabella Reservation—met strong resistance from Assistant Commissioner of Indian Affairs, William Zimmerman. Commissioner Zimmerman took the position that a tribe could only organize under the IRA if it had a reservation and its only members could be tribal people residing on the Reservation.[12]

With this dubious interpretation at the forefront of his review of the proposed Constitution, he changed the preamble to read "We, the Indians residing on the Isabella Reservation in the State of Michigan...."[13] In addition, he changed the proposed Tribal Council representation to require all council members be elected from within the Reservation,[14] and required that all tribal members *reside* on the Reservation.[15] Commissioner Zimmerman further advised the Tribe that subsequent to the referendum to accept the constitution the Tribe could "adopt" those individuals living off the reservation.[16] In fact, this "adoption"

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[3]The Community Court's decision on the meaning of the Constitution is reviewed *de novo* by this Court. This is a core ingredient of appellate review. The Community Court's opinion in this case rests mostly on conclusionary observations without detailed analysis.

[4]25 U.S.C. § 478.

[5]25 U.S.C. § 476.

[6]25 U.S.C. § 477.

[7]Charmaine Benz, Editor, *Diba Jimooyung: Telling Our Story* (2003) 92.

[8]*Id.*

[9]*Id.*

[10]*Id.*

[11]*Id.*

[12]*Id.* at 92-93.

[13]*Id.* at 92; *see* Preamble, 1937 Constitution of the Saginaw Chippewa Indian Tribe of Michigan.

[14]*Id.* at 92-93; *see* Art. IV, Sec. 2, 1937 Constitution of the Saginaw Chippewa Indian Tribe of Michigan.

[15]*Id.*; *see* Art. III, 1937 Constitution of the Saginaw Chippewa Indian Tribe of Michigan.

[16]*Id.*

language appears in Sec. 2 of Art. III—Membership of the 1937 Constitution.

All these "recommendations" were accepted by the Business Committee and incorporated in the proposed Tribal Constitution that was voted on and accepted by tribal members on March 27, 1937. Unfortunately, the 1937 Constitution—whatever its intent—sowed the seeds of membership confusion and discontent that yielded the bitter harvest at the core of this most challenging, even heart wrenching, litigation about the cultural and legal aspects of tribal belonging.

The shortcomings of the membership provisions of the 1937 Constitution were apparent from the beginning. The problems caused by severe land loss, conflicting allotment procedures, and artificial residency requirements virtually insured a confusing, inconsistent approach to enrollment. This flawed and inadequate patchwork approach was capped by Congress' insistence that as part of the settlement of the Saginaw Chippewa Tribe's successful land claim against the United States that a new Tribal Constitution—approved by Congress—be adopted by a vote of the members of the Saginaw Chippewa Tribe. The Constitution so adopted by majority vote was the Saginaw Chippewa Tribal Constitution of 1986 which contains the membership and other relevant sections at issue in this case.

The most essential ingredient of tribal sovereignty is the ability of tribes "to maintain or establish [their] own form of government." Felix S. Cohen, *Handbook of Federal Indian Law* 247 (1982). Indeed, "[t]his power is the first element of sovereignty." *Id.* Tribes accordingly allocate authority to their elected officials in the manner that they view as most conducive to the effective functioning of their political communities. "Tribal government ... may reflect the tribe's determination as to what form best fits its needs based on practical, cultural, historical, or religious considerations." *Id.*; *see also Holmes v. St. Croix Casino*, 26 Indian L. Rep. 6089, 6092 (St. Croix. App. Ct. 1999) ("The first element of sovereignty ... is the power of the tribe to determine and define its own form of government. *Such powers include the right to define the power and duties of its officials....*") (emphasis added); *Coin v. Mowa*, 25 Indian L. Rep. 6208, 6210 (Hopi App. Ct. 1997) ("In the federal scheme, the Tribe retains any power not abrogated by the federal government. *The Tribe exercises its retained sovereignty by allocating this power as it sees fit.*" (citation omitted and emphasis added).

Tribal constitutions frequently serve as the vehicle that tribes use to define the allocation of power to their governing institutions, *see Terry-Carpenter v. Las Vegas Paiute Tribal Council*, 29 Indian L. Rep 6041, 6043 (Las Vegas Paiute Ct. App. 2002), and, as this Court stressed in *Chamberlain*, in constitutional systems it is often the solemn responsibility of the tribal courts to ensure that the tribe's governing bodies do not exceed the bounds thereby placed on their authority. *Chamberlain*, 27 Indian L. Rep. at 6089 ("'Among the most important functions of courts are constitutional interpretation and the closely connected power of determining whether law and acts of the legislature comport with the provisions of the Constitution. Courts were created to serve these purposes.'") (quoting *Moran v. Council of the Confederated Salish & Kootenai Tribes*, 22 Indian L Rep. 6149, 6155 (C.S. & KT. Ct. App. 1995).

A. Structure of the Saginaw Chippewa Tribal Constitution of 1986

A central element in this process of establishing a constitutional government is the allocation of power between the Tribal Government and the "people."[17] In determining what is the *constitutional* range of the Tribe's power to disenroll individuals who currently are legally recognized as *Tribal* members, it is helpful to review the overall structural design of the 1986 Constitution. The essential historical types of constitutions in Indian Country are the "plenary" model in which all power is expressly granted to the Tribal Council or the enumerated or "limited" powers model in which the Tribal Council is provided a limited set of *enumerated* powers with a reservation of all such non-enumerated powers to "the people." An example of the former is the Grand Traverse Band of Ottawa and Chippewa Indians Constitution at Art. IV:

> The Tribal Council ... shall be vested with all of the sovereign governmental executive and legislative powers of the Tribe not inconsistent with any provision(s) of the Constitution or federal law. *Such powers shall include, but not be limited to, the following* ... (emphasis added).

An example of the latter is the Turtle Mt. Band of Chippewa Indians Constitution at Art. X:

> Any right [or] power heretofore vested in the [Band], but not expressly referred to in the Constitution shall remain in the Band, and may be exercised by the [Band] or by the Tribal Council through the adoption of appropriate constitutional amendment if that be the wishes of the people.[18]

Needless to say the Constitution of the United States is also an enumerated powers constitution. *See, e.g.*, Amendment Ten reserving powers to both the states and "the people."

The 1986 Saginaw Chippewa Constitution is clearly an enumerated powers Constitution at Art. VI (Powers of the Tribal Council) Sec. 2:

> The Tribal Council may exercise such further powers as may in the future be *delegated to it by members of the Tribe* (emphasis added).

Since Sec. 1 of Art. VI enumerates the powers of the Tribal Council, there is no doubt that Sec. 2 is a direct limitation of Tribal Council authority to those powers specifically identified in Sec. 1.

B. Express Constitutional Power to Disenroll

Sec. 1(m) of Art. VI of the Constitution expressly addresses issues of membership by recognizing Tribal Council authority:

> To enact resolutions or ordinances not inconsistent with Art. III of this Constitution governing adoptions and abandonment of membership.

This language does not reflect any extensive or generalized power to disenroll. At best, it is reasonable to interpret the language as including Tribal Council authority to enact ordinances relevant to disenrollment in the context of "adoption" or "abandonment of membership." Apparently no such ordinances have ever been adopted and therefore Art. VI, Sec. 1(m) is not relevant to the case at hand.

Art. III of the Constitution deals directly with membership. Sec. 1 deals with the qualifications for enrollment. (In fact, Sec. 1, and more particularly Sec. 1(c), is the constitutional core of the *Bryant* case.) Sec. 1 provides no authority to the Tribal Council to legislate in the area of enrollment except as to "adoption." Sec. 1 contains no express powers of disenrollment.

Secs. 2 and 3 deal expressly with disenrollment and basically track the language of Art. VI Sec. (1)(m) about "abandonment" and "adoption." Sec. 2 mandates disenrollment if a tribal member becomes "an enrolled member of any other federally recognized tribe." Sec. 3 involves the potential disenrollment of an

[17]Depending on the tribe, power may be reserved to the community, the clan, the *tiyospaye* (extended family) or more generally "the people."

[18]*See also* Art IV (Powers of the Rosebud Sioux Tribal Council) of the Rosebud Sioux Tribal Constitution (1935) in which Section 1 refers to the "enumerated powers" of the Tribal Council and Sec. 3 to "reserved powers." Section 3 states in its entirety: "Any rights, and powers heretofore vested in the Rosebud Sioux Tribe but not expressly referred to in this Constitution shall not be abridged by this article, but may be exercised by *the People* of the Rosebud Sioux Tribe through the adoption of appropriate by-law and constitutional amendments." (Emphasis added.)

"adopted member" of the Tribe "by reason of marriage" wherein said marriage is dissolved by either annulment or divorce and said individual neither maintains Reservation residence nor remarries another tribal member within twelve months. An "adopted" tribal member is also subject to potential disenrollment by "re-establishing tribal relations with the tribe from which they are descendants by blood." Disenrollment under Sec. 2 is mandatory (i.e. "shall"). Disenrollment under Sec. 3 is discretionary (i.e. "may").

In sum, the only *express* constitutional authority to disenroll is limited to certain situations involving "adopted" tribal members and tribal members who "abandon" Saginaw Chippewa Tribal membership by enrolling in another federally recognized tribe.

C. Implied Constitutional Power to Disenroll

Both sides presumably do not dispute any of the above, which merely establishes the background and context for examining the pivotal issue whether there are any *implied* powers of disenrollment and if so, what they are. The fact that the Constitution is an enumerated powers constitution with limited express powers of disenrollment does *not* automatically foreclose the possibility of some limited—presumably very limited—implied powers of disenrollment.

Before examining such possibilities, it is necessary to address the Tribe's observation that this Court has made an "unwarranted assumption ... that all persons listed on the tribal rolls had, in fact, been admitted to membership after first proving that they in fact and in law actually met the Tribe's constitutional membership criteria." (Appellee's Brief at 15.) This Court's "assumption" is indeed warranted and required by both legal and cultural norms of integrity. If someone has achieved a legal status (even if erroneously), they are entitled to that status until the government *proves* adequately to the contrary. The Tribe would have us *assume* the "guilt" rather than the "innocence" of Appellants. Such an approach would necessarily taint and even erode this Court's bedrock commitment to due process and cultural respect.

No constitutional text is completely transparent or self-disclosing and no constitution is beyond the necessity of interpretation. In fact, that is the request of the parties in this litigation, that the Court engage in constitutional adjudication. In this regard, the Tribe makes rather extensive claims that it has wide-ranging implied powers to disenroll that flow from Art. VI, Secs. (e), (j), (n), and (o).

The core of the Tribe's argument is that the interplay of Art. VI Secs. (e), (j), (n), and (o) particularly the "general welfare" clauses of Secs. (j) and (o) along with the "economic affairs" clause of Sec. (e), provide the Tribal Council with authority "essentially unrestricted as to *subject matter* so long as the Council's legislation can be fairly said to promote the Tribe's "general welfare" or "economic affairs" ... so long as that legislation does not contravene any other explicit limitation on the Council's powers." (Appellee's Brief at 19.) This claim is rather bold, if not extravagant, in that it seeks to convert an enumerated powers constitution into a plenary powers constitution with an overwhelming presumption in favor of *any and all* Tribal Council action that would put the burden on the non-Tribal Council party to show "explicit limitation on the Council's power." This goes too far and would necessarily unhinge Tribal Council authority from the history and text of the Constitution.

The "general welfare" clauses at Secs. (j) and (o) are primarily related to matters of "tribal property ... natural resources ... to cultivate Indian arts, crafts" (sec. j) and "regulating the conduct of trade and the use and disposition of property" (sec. o). Neither of these enumerations, whether using the statutory interpretation maxims of *ejusdem generis* or *noscitur a sociis*[19] or ordinary common sense, appear related to issues of membership and more particularly to issues of disenrollment, and therefore they do not support any wide-ranging Tribal Council power to disenroll.

The Appellants' argument goes too for in the other direction. They claim that a limited powers constitution—such as the one at bar—contains no implied powers whatsoever and the power to disenroll is limited to the express power to disenroll relative to "adoption" and "abandonment" as set out at Art. III Secs. 2 and 3 and Art. VI Sec. 1(m). For the Appellants, these limited express grounds for disenrollment negate any implied grounds for disenrollment.

The logic of this assertion is that the overall structure of the Constitution constrains any attempt to go beyond the express language of disenrollment. This argument is credible, but it is not compelling. The express grounds for disenrollment are really designed to cover a specific kind of disenrollment—disenrollment that comes into play *after* legitimate enrollment through the occurrence of a *condition subsequent* such as the divorce of an "adopted" tribal member or "abandonment" of membership by obtaining membership in another federally recognized tribe.

The Constitution is silent on the ability of the Tribal Council to disenroll someone who did not meet—at the front end—the basic conditions for enrollment set out in Art. III Sec. 1. To interpret this constitutional silence as an absolute bar to *potential* disenrollment of such individuals would create a constitutional anomaly that would, for example, put "fraud" in the membership context beyond the pale of the constitutional text. Such a reading would seem a clear failure of constitutional justice.

A survey of other tribal constitutions is informative and consistent in this regard. No tribal constitution cited by the parties or otherwise known by the Court contains any express provision to disenroll on such basic grounds like "fraud" and "mistake." This does not lead to the conclusion that such power does not exist in any Tribe, but rather that it is so basic and ingrained in the understanding of what is necessary to become a (legitimate) tribal member that there is a very, very limited *implied* power to disenroll on grounds of fraud and mistake that inheres in the right to enroll itself. To put it another way, there is a very, very limited, but necessary, constitutional corollary relative to disenrollment that is an ineluctable part of the constitutional mandate of enrollment itself. Without such implied constitutional power, the Tribe would be powerless to deal with fraud and mistake in the enrollment process. Such an interpretation of the constitutional text would improperly exalt form over substance.

No, the Tribe may not disenroll people for whatever "good" reasons it might identify. No, the Constitution does not (and cannot) condone any constitutional failure of justice that would potentially endorse (constitutional) fraud and mistake in obtaining membership. Beyond such quite limited constitutional authority to disenroll on grounds of fraud or mistake, there are *no* other *implied* grounds for disenrollment.[20]

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[19]These Latin phrases, staples of statutory interpretation, may be translated as follows: *ejusdem generis* means of the same kind or class and refers to the textual principle that "[w]here general words follow specific words in a [textual] enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Sutherland, *Statutes and Statutory Construction* § 47-17 (6th ed., Norman Singer, ed.). *Noscitur a sociis* literally means that something is known from its associates or more colloquially a word is known by the company it keeps. *See, e.g., Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575-76. These principles of statutory construction add up to the commonsensical notion that where the framers of a document group together a number of items in a particular textual enumeration, they do not do so randomly, but because they think of the items as related to one another and intend them to be read as such. *See, e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

[20]It is critical to remember that this case does *not* involve the review of any specific lower court decision to disenroll. The precise grounds

This Court has an unflagging duty to interpret the Constitution. That is, in fact, its highest calling. This duty and calling are never taken lightly and never confused with a mere review of policy. Tribal membership involves not only constitutional status, but also serves as the ultimate indication of cultural belonging. With this in mind, we urge the parties, as we did in the *Chamberlain* case, to place themselves in the heart of Native American jurisprudence by "healing, restoring balance and harmony, accomplishing reconciliation, and making social relations whole again." 27 Indian L. Rep. 6085, 6097 (2000).

for such potential disenrollment have *never* been established, much less applied. Identifying that relevant standard is what this case is about. Any actual case of disenrollment will be subject to the stringent due process and burden of proof standards of Ordinance 14 and subject to (potential) review by this Court.

IV. Conclusion

For all of the above stated reasons, the decision of Community Court is reversed. The *implied* constitutional power to disenroll is limited to matters of fraud and mistake.[21] Further, the guarantee of due process requires that exercise of such implied power must be set out in an appropriate ordinance that defines these substantive grounds for disenrollment and further complies with the procedural guarantees set out in Ordinance 14.

It is so Ordered.

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[21]The Constitution, of course, may be amended to make any further adjustments or changes. *See* Art. VII, Saginaw Chippewa Tribal Constitution.