

Federal Court



Cour fédérale

Date: 20131021

Docket: T-1351-13

Citation: 2013 FC 1055

Ottawa, Ontario, October 21, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**GARNET WOODHOUSE, TED WOODHOUSE,
BRIAN SANDERSON AND JOHN SANDERSON**

Applicants

And

**THE ATTORNEY GENERAL OF CANADA AND
THE HONOURABLE BERNARD VALCOURT,
IN HIS CAPACITY AS THE MINISTER OF
ABORIGINAL AFFAIRS AND NORTHERN
DEVELOPMENT CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2011, the applicants were elected as Chief and councillors of Pinaymootang First Nation. On an appeal of the election, and after an investigation into allegations of corruption, the Minister of Aboriginal Affairs and Northern Development Canada removed the applicants from office and

disqualified them from running again for two years. Based on an interim order, the applicants have been reinstated and permitted to run in the next election on October 23, 2013.

[2] The applicants raised a number of grounds challenging the Minister's decision. However, as I am satisfied that the decision must be overturned because it was out of keeping with the legal framework governing the Minister's role, I will confine my reasons to that issue alone.

II. The Legal Framework

[3] An elector or candidate can appeal an election if he or she believes that "there was a corrupt practice in connection with the election," there was a violation of the law "that might have affected the result," or a candidate "was ineligible" for election (s 12, *Indian Band Election Regulations*, CRC, c 952 (1978) – see Annex for enactments cited).

[4] In response to an appeal, the Minister can initiate an investigation "in such manner as he deems expedient" (s 13). After the investigation, if it "appears" that there was wrongdoing, the Minister must make a report to the Governor in Council (s 14). If the Minister reports that he or she is "satisfied" that the grounds of appeal have been made out, the Governor in Council may set aside the election (s 79, *Indian Act*, RSC 1985, c I-5).

[5] If, in the Minister's "opinion," a person holding an elected office is "guilty" of corrupt practice, the Minister may declare the person's position to be vacant (s 78(2)(b)(iii)) and declare the person ineligible to be a candidate in future elections for up to six years (s 78(3)).

[6] Under the Act and Regulations, therefore, there are clearly defined roles for the Minister and the Governor in Council. The Minister must make a report to the Governor in Council if there is an appearance of corrupt practice. If the Minister is satisfied that a corrupt practice has taken place, the Governor in Council may set aside the election. If the Minister declares a particular person guilty of corrupt practice, the Minister can remove the guilty party from his or her office, and prevent the person from running in future elections for up to six years.

III. Was the Minister's decision made in keeping with the legal framework?

[7] The Minister can only remove a person from office or disqualify a person running for election after having declared the person guilty of corrupt practice. Without that finding, the Minister has no authority to remove or disqualify a person.

[8] Here, the Minister did not declare that anyone was guilty of corrupt practice. In his decision, the Minister merely stated that there was "sufficient information to support a finding that the corrupt practice of vote buying occurred in connection with" the election of the applicants and "to connect" the applicants to it. The Minister did not specifically attribute responsibility to any particular individuals for the alleged wrongdoing and made no finding of guilt. Yet, the Minister issued declarations removing the applicants from office and disqualifying them from future elections. In my view, he did not have that authority.

[9] The applicants argue that the Minister could make a finding of guilt only if he was satisfied on a criminal standard – proof beyond a reasonable doubt – that the applicants were involved in corrupt practice. In my view, s 78 is clearly not a criminal provision. It provides administrative sanctions for participation in corrupt practice. “Guilt” is used in its broad sense to connote fault or responsibility, rather than criminal culpability. The sanctions – removal from office and ineligibility – are not punitive in the criminal sense. While serious, they represent administrative measures within the regulatory framework of the statute and regulations, not criminal penalties (see *McEwing v Canada (Attorney General)*, 2013 FC 525, at para 69).

[10] The Minister argues that his decision was based on the civil standard of the balance of probabilities. I agree that that would be the appropriate standard of proof in this context. However, it is not clear what, if any, standard the Minister applied.

[11] In a briefing note to the Minister, departmental staff recommended that the Minister declare the applicants guilty of corrupt practice. However, the actual wording of the decision, as noted above, does not go that far. The decision is consistent with “an appearance” of corrupt practice, which is not the proper standard of proof under s 78.

[12] In my view, the ordinary civil standard of proof is most apt for s 78. It is not a criminal provision. But it certainly requires more than the mere appearance of impropriety, which is sufficient only to trigger a report to the Governor in Council under s 14 of the Regulations.

[13] The Minister's declaration of guilt must, therefore, be based on his being satisfied on the balance of probabilities that an elected official has committed a corrupt practice. Only then can a person be removed from office and rendered ineligible for future elections.

[14] Counsel for the Minister referred to cases where courts appeared to conclude that a threshold of proof below the civil standard applied to decisions under s 78. In my view, despite appearances, those cases do not support the Minister's position.

[15] In 2011, Justice Douglas Campbell overturned a decision of the Minister because the wrong evidentiary standard had been applied in *Keeper v The Queen*, 2011 FC 307. In that case, however, the Minister was acting under s 14 of the Regulations where only an appearance of impropriety is required for the Minister to make a report to the Governor in Council. Instead, in refusing to make a report, the Minister appeared to apply a standard of a balance of probabilities. Justice Campbell did not make any reference to s 78 or the standard of proof required for the exercise of the Minister's authority under that provision. On appeal, the Federal Court of Appeal found the case to be moot and expressed no views on the soundness of Justice Campbell's decision (2012 FCA 90).

[16] Subsequently, Justice John O'Keefe relied on *Keeper* for the proposition that the standard of proof under s 14 of the Regulations is a mere appearance of wrongdoing in *Dedam v Canada (Attorney General)*, 2012 FC 1073. Justice O'Keefe also concluded that, on the facts of that case, the Minister's decision under s 78(2)(b)(ii) of the Act removing certain persons from elected office was reasonable, as it was based on sufficient cogent evidence of corrupt practice on the part of those

individuals. It does not appear that the question of the standard of proof under s 78(2)(b)(ii) was specifically in issue.

[17] Here, the Minister made no declaration of the applicants' guilt and did not state what, if any, standard of proof he was applying. The Minister simply stated that there was sufficient information that a corrupt practice had taken place during the election of the applicants. He made no declaration that the applicants were personally responsible for, or guilty of, anything.

[18] In the circumstances, therefore, I must conclude that the Minister's decision was out of keeping with the legal framework governing his role under the *Indian Act*. On that basis, I will grant this application for judicial review and order the Minister to reconsider whether the applicants should be removed from office and prevented from running in future elections.

IV. Conclusion and Disposition

[19] Before removing the applicants from office and disqualifying them from running for re-election, the Minister was required to conclude on the balance of probabilities that they were guilty of corrupt practice. He did not make that finding. Therefore, he had no legal authority to issue the declarations he did. I must, therefore, allow this application for judicial review and order the Minister to re-determine the matter.

[20] The applicants are entitled to costs. Should the parties be unable to agree on the quantum, I will consider any written submissions on that issue filed within 20 days of this judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter returned to the Minister for redetermination;
2. The applicants are entitled to costs; in the absence of an agreement on the quantum, written submissions may be filed within 20 days.

“James W. O’Reilly”

Judge

Annex

Indian Band Election Regulations, CRC, c 952

Règlement sur les élections au sein des bandes d'Indiens, CRC, ch 952

ELECTION APPEALS

APPELS À L'ÉGARD DE L'ÉLECTION

12. (1) Within 45 days after an election, a candidate or elector who believes that

12. (1) Si, dans les quarante-cinq jours suivant une élection, un candidat ou un électeur a des motifs raisonnables de croire :

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

a) qu'il y a eu manœuvre corruptrice en rapport avec une élection,

(b) there was a violation of the Act or these Regulations that might have affected the result of the election, or

b) qu'il y a eu violation de la Loi ou du présent règlement qui puisse porter atteinte au résultat d'une élection, ou

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

c) qu'une personne présentée comme candidat à une élection était inéligible,

may lodge an appeal by forwarding by registered mail to the Assistant Deputy Minister particulars thereof duly verified by affidavit.

il peut interjeter appel en faisant parvenir au sous-ministre adjoint, par courrier recommandé, les détails de ces motifs au moyen d'un affidavit en bonne et due forme.

(2) Where an appeal is lodged under subsection (1), the Assistant Deputy Minister shall forward, by registered mail, a copy of the appeal and all supporting documents to the electoral officer and to each candidate in the electoral section in respect of which the appeal was lodged.

(2) Lorsqu'un appel est interjeté au titre du paragraphe (1), le sous-ministre adjoint fait parvenir, par courrier recommandé, une copie du document introductif d'appel et des pièces à l'appui au président d'élection et à chacun des candidats de la section électorale visée par l'appel.

(3) Any candidate may, within 14 days of the receipt of the copy of the appeal, forward to the Assistant Deputy Minister by registered mail a written answer to the particulars set out in the appeal together with any supporting documents relating thereto duly verified by affidavit.

(3) Tout candidat peut, dans un délai de 14 jours après réception de la copie de l'appel, envoyer au sous-ministre adjoint, par courrier recommandé, une réponse par écrit aux détails spécifiés dans l'appel, et toutes les pièces s'y rapportant dûment certifiées sous serment.

(4) All particulars and documents filed in accordance with the provisions of this section shall constitute and form the record.

(4) Tous les détails et toutes les pièces déposés conformément au présent article constitueront et formeront le dossier.

13. (1) The Minister may, if the material that has been filed is not adequate for deciding the

13. (1) Le Ministre peut, si les faits allégués ne lui paraissent pas suffisants pour décider de la

validity of the election complained of, conduct such further investigation into the matter as he deems necessary, in such manner as he deems expedient.

(2) Such investigation may be held by the Minister or by any person designated by the Minister for the purpose.

(3) Where the Minister designates a person to hold such an investigation, that person shall submit a detailed report of the investigation to the Minister for his consideration.

14. Where it appears that

(a) there was corrupt practice in connection with an election,

(b) there was a violation of the Act or these Regulations that might have affected the result of an election, or

(c) a person nominated to be a candidate in an election was ineligible to be a candidate,

the Minister shall report to the Governor in Council accordingly.

Indian Act, RSC 1985, c I-5

Tenure of office

78. (1) Subject to this section, the chief and councillors of a band hold office for two years.

Vacancy

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

(a) the person who holds that office

(i) is convicted of an indictable offence,

validité de l'élection faisant l'objet de la plainte, conduire une enquête aussi approfondie qu'il le juge nécessaire et de la manière qu'il juge convenable.

(2) Cette enquête peut être tenue par le Ministre ou par toute personne qu'il désigne à cette fin.

(3) Lorsque le Ministre désigne une personne pour tenir une telle enquête, cette personne doit présenter un rapport détaillé de l'enquête à l'examen du Ministre.

14. Lorsqu'il y a lieu de croire

a) qu'il y a eu manœuvre corruptrice à l'égard d'une élection,

b) qu'il y a eu violation de la Loi ou du présent règlement qui puisse porter atteinte au résultat d'une élection, ou

c) qu'une personne présentée comme candidat à une élection était inadmissible à la candidature,

le Ministre doit alors faire rapport au gouverneur en conseil.

Loi sur les Indiens, LRC 1985, ch. I-5

Mandat

78. (1) Sous réserve des autres dispositions du présent article, les chefs et conseillers d'une bande occupent leur poste pendant deux années.

Vacance

(2) Le poste de chef ou de conseiller d'une bande devient vacant dans les cas suivants :

a) le titulaire, selon le cas :

(i) est déclaré coupable d'un acte criminel,

(ii) dies or resigns his office, or

(ii) meurt ou démissionne,

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

(iii) est ou devient inhabile à détenir le poste aux termes de la présente loi;

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

b) le ministre déclare qu'à son avis le titulaire, selon le cas :

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

(i) est inapte à demeurer en fonctions parce qu'il a été déclaré coupable d'une infraction,

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

(ii) a, sans autorisation, manqué les réunions du conseil trois fois consécutives,

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

(iii) à l'occasion d'une élection, s'est rendu coupable de manœuvres frauduleuses, de malhonnêteté ou de méfaits, ou a accepté des pots-de-vin.

Disqualification

(3) The Minister may declare a person who ceases to hold office by virtue of subparagraph (2)(b)(iii) to be ineligible to be a candidate for chief or councillor of a band for a period not exceeding six years.

Privation du droit d'être candidat

(3) Le ministre peut déclarer un individu, qui cesse d'occuper ses fonctions en raison du sous-alinéa (2)b)(iii), inhabile à être candidat au poste de chef ou de conseiller d'une bande durant une période maximale de six ans.

Special election

(4) Where the office of chief or councillor of a band 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.

Élection spéciale

(4) Lorsque le poste de chef ou de conseiller devient vacant plus de trois mois avant la date de la tenue ordinaire de nouvelles élections, une élection spéciale peut avoir lieu en conformité avec la présente loi afin de remplir cette vacance.

Governor in Council may set aside election

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

Le gouverneur en conseil peut annuler une élection

79. Le gouverneur en conseil peut rejeter l'élection du chef ou d'un des conseillers d'une bande sur le rapport du ministre où ce dernier se dit convaincu, selon le cas :

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

a) qu'il y a eu des manœuvres frauduleuses à l'égard de cette élection;

(b) there was a contravention 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.

b) qu'il s'est produit une infraction à la présente loi pouvant influencer sur le résultat de l'élection;

c) qu'une personne présentée comme candidat à l'élection ne possédait pas les qualités requises.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1351-13

STYLE OF CAUSE: GARNET WOODHOUSE, TED WOODHOUSE, BRIAN SANDERSON AND JOHN SANDERSON v THE ATTORNEY GENERAL OF CANADA AND THE HONOURABLE BERNARD VALCOURT, IN HIS CAPACITY AS THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA

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AND JUDGMENT:** O'REILLY J.

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