Federal Court of Appeal | Cour d'appel fédérale

**Date: 20191002**

**Docket: A-105-18**

**Citation: 2019 FCA 245**

**CORAM:** **WEBB J.A.**
**NEAR J.A.**
**BOIVIN J.A.**

**BETWEEN:**

**RODNEY BRASS, SIDNEY KESHANE, ANGELA DESJARLAIS AND GLEN O'SOUP**

**Appellants**

**and**

**CLARENCE PAPEQUASH, CLINTON KEY AND GLENN PAPEQUASH**

**Respondents**

Heard at Regina, Saskatchewan, on September 25, 2019.

Judgment delivered at Ottawa, Ontario, on October 2, 2019.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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## REASONS FOR JUDGMENT

**BOIVIN J.A.**

[1] Rodney Brass et al. (the appellants) appeal a judgment of Barnes J. of the Federal Court (the Judge) dated March 21, 2018 (2018 FC 325).

## I. Background

[2] In his judgment, the Judge allowed the application for judicial review that Clarence Papequash et al. (the respondents) brought under sections 31 and 35 of the *First Nations Elections Act*, S.C. 2014, c. 5 (the FNEA) and set aside the election of the Key First Nation Band held on October 1, 2016.

[3] The Judge also dismissed the appellants' appeal from an order of Prothonotary Milczynski striking their affidavits. The appellants do not challenge this portion of the judgment before our Court.

[4] The Judge awarded costs against the appellants, jointly and severally, by way of a subsequent order dated October 2, 2018, assessing the costs at the high end of Column V in an all-inclusive amount of $86,170.00. The appellants do not challenge the Judge's determination on costs.

## II. Preliminary objections raised by the parties

[5] The respondents raised two preliminary objections to the appeal. They asserted that (i) the appeal was not properly constituted because the grounds identified in the Notice of Appeal were insufficiently precise and (ii) the Notice of Appeal was not properly served.

[6] In addressing the objections, the Court recalls that pursuant to Rule 56 of the *Federal Courts Rules*, S.O.R./98-106 (Federal Courts Rules), non-compliance with a rule does not *per se*

invalidate a proceeding, step, or order. Rather, it constitutes an irregularity that may be corrected. Pursuant to this underlying principle, the Court may allow parties to remedy irregularities and dispense with compliance in special circumstances provided the appeal proceeds in a fair and orderly manner (Rules 55, 58-60).

[7] Bearing this principle in mind in the present case, and while the appellants' Notice of Appeal can indeed be described as "vague" and hence non-compliant with the requirements of Rule 337(*d*) which requires *inter alia* "a complete and concise statement of the grounds intended to be argued", I am of the view that the respondents should nonetheless have brought a challenge by way of motion at an earlier stage of the proceedings. Moreover, the irregularity at issue is not determinative of the outcome of this case. Likewise, the respondents' objection to the effect that the appellants failed to serve the Notice of Appeal on all of the required recipients is not sufficient in the circumstances to invalidate this appeal. Although the Key First Nation Band, as a party before the Federal Court, should have been served with the Notice of Appeal pursuant to Rule 339(*c*), this irregularity has no bearing on the outcome of this appeal and should in any event have been raised earlier in the proceeding.

[8] As for the appellants, they raised a preliminary objection regarding the evidence before the Court. Specifically, in their memorandum of fact and law at paragraphs 20 and 50, they submit that several affidavits were improperly commissioned because the jurats did not identify the year in which the affidavits were sworn. However, the appellants subsequently indicated at the hearing that they were no longer pursuing this objection.

## III. Issue

[9] The sole issue is whether the Judge committed an error justifying the intervention of this Court.

## IV. Relevant statutory provisions

[10] The relevant provisions of the FNEA are included in the appendix.

## V. Standard of review

[11] In this appeal, this Court must adopt the standard of appellate review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. The standard for findings of law is correctness. Findings of fact and mixed fact and law are subject to the standard of palpable and overriding error. The latter is a high and difficult standard to meet as expressed by our Court in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286. at paragraph 46 [*Yukon Forest*]:

> "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

## VI. Analysis

[12] In support of their appeal, the appellants point to a number of the respondents' affidavits for the purpose of arguing that the Judge's decision is replete with factual inconsistencies. They contend that the conclusions the Judge drew from the affidavits demonstrate that he had a

"closed mind". Specifically, the appellants take issue with the Judge's finding that there was "clear evidence" of vote buying, notwithstanding the appellants' alleged "errors and inconsistencies" in the evidence. I disagree. The appellants' contentions in this regard amount to no more than a disagreement with the Judge's assessment of the evidence. In so doing, the appellants are asking this Court to reweigh the evidence. This is not our role.

[13] It bears emphasis that the Judge thoroughly reviewed the filed affidavits, which, for the most part remained unchallenged. The Judge also considered the relevant sections in the FNEA and correctly applied the jurisprudence in the context of this case (*Gadwa v. Kehewin First Nation*, 2016 FC 597, [2016] F.C.J. No. 569 (QL), aff'd 2017 FCA 203; *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76). On the basis of the record before him, it was open to the Judge to make a finding of "widespread and openly conducted vote buying activity" and to conclude that "the integrity of the Key First Nation Band election conducted on October 1, 2016 was sufficiently corrupted by the misconduct of Rodney Brass, Glen O'Soup, Sidney Keshane, and Angela Desjarlais" to order that the election be set aside (Judge's reasons at paras 39 and 40).

[14] In support of their appeal, the appellants also contend that the Judge failed to expressly address particular elements of the evidence. This contention is likewise unfounded. As observed by the respondents, there exists a well-entrenched presumption that the entirety of the evidence was considered by the Judge and the fact that certain elements are not mentioned in the reasons does not mean that the evidentiary record was not fully considered (*Housen* at para 46; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R 344 at paras 66-68).

[15] In addition, the appellants submit that the Judge erred in his consideration of the cross-examination of certain affiants by stating at paragraph 39 of his reasons that "[n]one of the several affiants who witnessed" vote buying were "cross-examined and their evidence stands unchallenged". The appellants rightly point out that, to the contrary, some of the affiants at issue were indeed cross-examined. While this amounts to an error, it is in no way dispositive of the case. A review of the cross-examination transcripts does not cast doubt on the Judge's finding that vote-buying occurred in the circumstances.

[16] Finally, in their Notice of Appeal, the appellants alleged bias against the Judge but have failed to substantiate this contention. During the hearing, counsel for the appellants admitted that there was no basis upon which to assert bias. Before alleging bias in a Notice of Appeal, counsel should ensure that there is a basis for such an allegation. In the circumstances, the Notice of Appeal should have been promptly amended in order to withdraw such a serious and unsubstantiated allegation. The appellants failed to do so. Rather, not only did the appellants fail to withdraw the allegation from their Notice of Appeal, but they also subsequently dressed it up as an allegation of the Judge having a "closed mind" (Appellants' memorandum of facts and law at paras 75-83). To do so in the absence of any basis for the allegation of bias was entirely inappropriate.

[17] The Supreme Court of Canada recently reiterated that there exists a strong presumption of judicial impartiality *(Yukon Francophone School Board, Education Area # 23 v. Yukon (Attorney General*), 2015 SCC 25, [2015] 2 S.C.R. 282). Allegations of judicial bias are extremely serious as they attack the integrity of the entire administration of justice in general and

the reputation of the judge at issue, in particular. For these reasons, unfounded allegations of bias may fall, in some instances, under the ambit of the doctrine of abuse of process (*Abi-Mansour v. Canada (Aboriginal Affairs)*, 2014 FCA 272, [2014] F.C.J. No. 1145 (QL); *Joshi v. Canadian Imperial Bank of Commerce*, 2015 FCA 105, 474 N.R. 215).

[18] Here, a review of the hearing transcript yields absolutely nothing, even remotely, suggesting bias on the part of the Judge. He conducted an impartial and fair hearing for all those concerned and, in particular, gave the appellants just as much time to present their arguments as he did for the respondents and did so in a polite and respectful manner (Transcripts of the proceedings before the Judge: Appeal Book, vol. II, Tab 28, at pages 23, 52, 57, 70, 77, 111, 114, 139, 162-63, 172, 200, 210-211). The appellants' contention, whether labelled as "closed mind" or bias, is devoid of any merit whatsoever.

## VII. Conclusion

[19] In the end, the appellants have failed to establish any error on the part of the Judge that would justify the intervention of this Court. In the words of the *Yukon Forest* case, while the appellants have pulled at the leaves and branches, the tree remains standing. I would accordingly dismiss the appeal and, given the circumstances, fix the costs at the high end of Column V of the Tariff B of the *Federal Courts Rules*.

"Richard Boivin"

J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
D. G. Near J.A."

## APPENDIX

| ***First Nations Elections Act*, S.C. 2014, c. 5** | ***Loi sur les élections au sein de premières nations*, L.C. 2014, ch. 5** |
|---|---|
| **Prohibition — any person** | **Interdictions générales** |
| 16 A person must not, in connection with an election, | 16 Nul ne peut, relativement à une élection : |
| (*a*) vote or attempt to vote knowing that they are not entitled to vote; | *a*) voter ou tenter de voter sachant qu'il est inhabile à voter; |
| (*b*) attempt to influence another person to vote knowing that the other person is not entitled to do so; | *b*) inciter une autre personne à voter sachant que celle-ci est inhabile à voter; |
| (*c*) knowingly use a forged ballot; | *c*) faire sciemment usage d'un faux bulletin de vote; |
| (*d*) put a ballot into a ballot box knowing that they are not authorized to do so under the regulations; | *d*) déposer dans une urne un bulletin de vote sachant qu'il n'y est pas autorisé par règlement; |
| (*e*) by intimidation or duress, attempt to influence another person to vote or refrain from voting or to vote or refrain from voting for a particular candidate; or | *e*) par intimidation ou par la contrainte, inciter une autre personne à voter ou à s'abstenir de voter, ou encore à voter ou à s'abstenir de voter pour un candidat donné; |
| (*f*) offer money, goods, employment or other valuable consideration in an attempt to influence an elector to vote or refrain from voting or to vote or refrain from voting for a particular candidate. | *f*) offrir de l'argent, des biens, un emploi ou toute autre contrepartie valable en vue d'inciter un électeur à voter ou à s'abstenir de voter, ou encore à voter ou à s'abstenir de voter pour un candidat donné. |

**Contestation of election**

31 An elector of a participating First Nation may, by application to a competent court, contest the election of the chief or a councillor of that First Nation on the ground that a contravention of a provision of this Act or the regulations is likely to have affected the result.

**Contestation**

31 Tout électeur d'une première nation participante peut, par requête, contester devant le tribunal compétent l'élection du chef ou d'un conseiller de cette première nation pour le motif qu'une contravention à l'une des dispositions de la présente loi ou des règlements a vraisemblablement influé sur le résultat de l'élection.

**Court may set aside election**

35 (1) After hearing the application, the court may, if the ground referred to in section 31 is established, set aside the contested election.

**Décision du tribunal**

35 (1) Au terme de l'audition, le tribunal peut, si le motif visé à l'article 31 est établi, invalider l'élection contestée.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-105-18 |
| **STYLE OF CAUSE:** | RODNEY BRASS, SIDNEY KESHANE, ANGELA DESJARLAIS AND GLEN O'SOUP v. CLARENCE PAPEQUASH, CLINTON KEY AND GLENN PAPEQUASH |
| **PLACE OF HEARING:** | REGINA, SASKATCHEWAN |
| **DATE OF HEARING:** | SEPTEMBER 25, 2019 |
| **REASONS FOR JUDGMENT BY:** | BOIVIN J.A. |
| **CONCURRED IN BY:** | WEBB J.A.<br>NEAR J.A. |
| **DATED:** | OCTOBER 2, 2019 |

**APPEARANCES:**

| | |
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