Federal Court of Appeal  Cour d'appel fédérale

Date: 20191106

Docket: A-58-19

Citation: 2019 FCA 275

CORAM: **DAWSON J.A.**
STRATAS J.A.
MACTAVISH J.A.

BETWEEN:

WHITEFISH LAKE FIRST NATION #459

Appellant

and

JAMES GREY

Respondent

Heard at Edmonton, Alberta, on November 6, 2019.

Judgment delivered from the Bench at Edmonton, Alberta on November 6, 2019.

REASONS FOR JUDGMENT OF THE COURT BY: MACTAVISH J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Edmonton, Alberta, on November 6, 2019).

MACTAVISH J.A.

[1] The appellant appeals from the order of the Federal Court dated January 22, 2019 in Court file number 18-T-79 extending the time for the respondent to commence an application for judicial review of the decision of an Election Appeal Arbitrator affirming the results of the election of the Chief of the appellant First Nation.

[2] The appellant asserts that the Court erred in law in extending the time for the respondent to commence his application for judicial review by restricting its analysis to the four factors set out in *Canada (Attorney General) v. Hennelly* (1999), 244 N.R. 399 at para. 3, 89 A.C.W.S. (3d) 376 (F.C.A), and in failing to consider other factors that are relevant to this case. The appellant further asserts that the Court erred in the standard that it used in evaluating the strength of the respondent's case, and in accepting the explanation provided by the respondent for his delay in challenging the Arbitrator's decision.

[3] The decision to grant or refuse an extension of time in which to bring an application for judicial review is a discretionary one typically based on the four factors identified by this Court in *Hennelly.* The *Hennelly* factors are not, however, to be applied in a rigid fashion, and it is not always necessary that the party seeking the extension of time be able to satisfy all four factors. The overriding consideration is whether it is in the interests of justice that the extension of time be granted.

[4] The appellant asserts that the Federal Court erred in failing to consider the fact that the respondent's election appeal and subsequent application for judicial review seek to have a Chief, whose eligibility and integrity have not been questioned, removed from office on the basis of allegations that the fourth place candidate was ineligible for election and had engaged in corrupt practices.

[5] It is true that while the Court stated that it had considered all of the material adduced by the parties, it did not make specific reference to this argument in its order. That said, the failure

of a trial judge to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence: *Housen v. Nikolaisen,* 2002 SCC 33 at para. 39, [2002] 2 S.C.R. 235.

[6] The appellant further submits that in finding that there was "substantial merit" to the respondent's claim, the Court erred in the standard that it used in evaluating the strength of the case. According to the appellant, the Court should have determined whether the respondent's case had a "reasonable chance of success".

[7] The Federal Court expressly stated that it had considered the four *Hennelly* factors in coming to its decision in this case, which would necessarily have included an evaluation of the strength of the respondent's case. What the appellant takes issue with is not the test that was applied by the Court, but rather its finding that there was "substantial merit" to the respondent's case. This finding is sufficient to satisfy both the "reasonable chance of success" and the "some merit" tests.

[8] Finally, the appellant argues that the Federal Court erred in accepting the explanation provided by the respondent for his delay in challenging the Arbitrator's decision, and in finding that this explanation was reasonable.

[9] There was, however, evidence before the Federal Court that the respondent had understood that any such challenge had to be brought in the Alberta Courts, and that he had in

fact commenced an application challenging the Arbitrator's decision in the Court of Queen's Bench of Alberta within the time permitted for the bringing of such applications in that province.

[10] The appellant has not demonstrated that the Federal Court committed a palpable and overriding error in concluding that the respondent had provided a reasonable explanation for his delay in commencing his application in the Federal Court. Rather, the appellant is essentially asking us to reweigh evidence that was before the Federal Court and to come to a different conclusion on this point.

[11] At the end of the day, the Federal Court was satisfied that notwithstanding the fact that there would be some "inconvenience and uncertainty" for the appellant as a result of the respondent's delay in commencing his application, it was nevertheless in the interests of justice that the extension of time be granted. The appellant has not persuaded us that the Court erred in law in coming to this conclusion, or that it committed a palpable and overriding error in its appreciation of the facts of this case. Consequently, the appeal will be dismissed, with costs.

"Anne L. Mactavish"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-58-19
STYLE OF CAUSE:	WHITEFISH LAKE FIRST NATION #459 v. JAMES GREY
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	NOVEMBER 6, 2019
REASONS FOR JUDGMENT OF THE COURT BY:	DAWSON J.A. STRATAS J.A. MACTAVISH J.A.
DELIVERED FROM THE BENCH BY:	MACTAVISH J.A.
DATED:	NOVEMBER 6, 2019

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