Federal Court of Appeal | Cour d'appel fédérale

Date: 20230130

Dockets: A-97-22
A-98-22

Citation: 2023 FCA 18

CORAM: **LOCKE J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

Docket: A-97-22

BETWEEN:

CLINTON WUTTUNEE

Appellant

and

MARY LINDA WHITFORD AND ALICIA MOOSOMIN

Respondents

Docket: A-98-22

AND BETWEEN:

GARY NICOTINE

Appellant

and

MARY LINDA WHITFORD AND ALICIA MOOSOMIN

Respondents

Heard at Toronto, Ontario, on November 29, 2022.

Judgment delivered at Ottawa, Ontario, on January 30, 2023.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: LOCKE J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] The question raised by these two appeals is whether it was open to the Federal Court to annul the election of two individuals found to have engaged in serious electoral fraud in the absence of a finding that the actions of these individuals had affected the winners of the election for Chief and Councillors of the Red Pheasant First Nation (RPFN).

[2] The Federal Court did, however, find that Clinton Wuttunee and Gary Nicotine had engaged in multiple contraventions of the *First Nations Election Act*, S.C. 2014, c. 5 (*FNEA*) and serious electoral fraud such that the integrity of their elections had been corrupted. For the reasons that follow, I am of the view that in light of these findings, it was open to the Federal Court to annul their election as Chief and Councillor of the RPFN, and that it did not err in doing so in the circumstances of this case. Consequently, I would dismiss their appeals.

I. Background

[3] The RPFN held an election for Chief and Councillors on March 20, 2020. Clinton Wuttunee was the incumbent Chief, and was one of the candidates running for Chief of the RPFN and Gary Nicotine ran for a Councillor position. Both ran as part of a slate of candidates known as “Team Clinton”, and both were successful in being elected to the positions that they sought.

[4] A total of 1084 ballots were cast for the position of Chief, with six ballots being rejected at the ballot box. Chief Wuttunee received 648 votes with the next runner-up receiving 424 votes. 1084 ballots were also cast for Councillor positions, with one ballot being rejected. Councillor Nicotine received 599 votes, and the next two successful candidates received 597 and 585 ballots, respectively. The runners-up received 252 votes, 238 votes and 234 votes. Thus, Chief Wuttunee and Councillor Nicotine each won their elections by a significant margin over unsuccessful candidates.

[5] The respondents, Mary Linda Whitford and Alicia Moosomin are electors and members of the RPFN. They challenged the election of Chief Wuttunee and Councillor Nicotine, amongst others, alleging that they had engaged in various contraventions of the *FNEA* and other forms of electoral fraud, including vote buying. The Federal Court agreed and annulled Chief Wuttunee and Councillor Nicotine's elections in a decision reported as 2022 FC 436.

[6] Chief Wuttunee and Councillor Nicotine have each appealed from the Federal Court's judgment (A-97-22 and A-98-22), and these reasons pertain to those appeals. Ms. Whitford and Ms. Moosomin also challenged the election of the other members of Team Clinton, and although the Federal Court found that most of these individuals had engaged in electoral misconduct, their elections were not annulled. This aspect of the Federal Court's judgment is the subject of a separate appeal (A-94-22) and a separate decision (2023 FCA 17).

[7] The facts of this matter are no longer in dispute. In a lengthy and careful decision, the Federal Court found that Chief Wuttunee and Councillor Nicotine had each engaged in multiple

instances of serious electoral fraud, as well as several contraventions of the *FNEA*, including vote buying and related activities, such that the integrity of each of their elections had been corrupted.

a) Chief Wuttunee's Misconduct

[8] Insofar as Chief Wuttunee was concerned, the Federal Court found that he was an untruthful witness, and that he repeatedly lied about his involvement in corrupt electoral practices. The Federal Court further found that Chief Wuttunee committed two contraventions of subsection 16(*f*) of the *FNEA*. This provides that "[a] person must not, in connection with an election … 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". The full text of subsection 16(*f*) of the Act and the other statutory provisions referred to in these reasons is attached as an appendix to this decision.

[9] The Federal Court further found that Chief Wuttunee was directly involved in five instances of serious electoral fraud relating to vote buying or attempted vote buying, and that in at least some instances, the funds used to purchase votes belonged to the RPFN.

[10] In addition, the Federal Court found that Chief Wuttunee had accessed and exploited confidential electoral information from the RPFN's Electoral Officer, or from officials within his office, including election lists naming electors whose Requests for Mail-in Ballots were accepted, and those whose requests were not accepted.

[11] In light of these findings, the Federal Court concluded that the election of Chief Wuttunee should be annulled. In coming to this conclusion, the Court noted that the Chief of a First Nation should be "one of the bulwarks of First Nations democracy", and that while Chief Wuttunee was expected to occupy a leadership role as the Chief of the RPFN, he had failed to do so. The Court further found that the RPFN's Electoral Officer was entitled to accept requests for mail-in ballots from the Chief of the RPFN in good faith, and that Chief Wuttunee had "seriously disappointed" in this regard.

[12] The Federal Court also considered the fact that in addition to two contraventions of the Act, Chief Wuttunee had also engaged in five instances of serious electoral fraud such that the integrity of his election had been seriously corroded and compromised. The Court additionally found that the use of band money to pay for the votes of band members was "particularly grave electoral fraud[.]"

[13] The Court recognized that the number of ballots that had been shown to have been corrupted by Chief Wuttunee's misconduct was not sufficient to change the winner of the election, and that annulling his election would result in the disenfranchisement of the votes of those who supported him. The Court nevertheless concluded that Chief Wuttunee's misconduct was sufficiently corrosive to the integrity of the process that his election should be annulled.

b) Councillor Gary Nicotine's Misconduct

[14] The Federal Court was also satisfied that the conduct of Councillor Nicotine was such that his election should be annulled.

[15] In coming to this conclusion, the Federal Court found that Councillor Nicotine had engaged in three contraventions of subsection 16(*f*) of the *FNEA*, and that he was directly involved in seven instances of serious electoral fraud relating to vote buying.

[16] As was the case with Chief Wuttunee, the Federal Court observed that RPFN Councillors were expected to fulfill a leadership role in elections and to be bulwarks of First Nation democracy, and that Councillor Nicotine had failed to fulfill the duties of this important role. Similarly, the Electoral Officer was entitled to accept requests for mail-in ballots from Councillor Nicotine in good faith and that here, Councillor Nicotine "seriously disappointed".

[17] The Federal Court further had regard to the number of instances of serious electoral fraud and contraventions of the Act committed by Councillor Nicotine, as well as the fact that he had been involved in the purchase of at least one vote using RPFN funds. This led the Court to conclude that Councillor Nicotine's misconduct was "on a par and only slightly less egregious than that of Chief Wuttunee", and that it seriously corroded the integrity of his election. The Court observed that "[s]uch conduct must not be met with impunity" and that the election of Councillor Nicotine should therefore be annulled.

II. The Issue and the Standard of Review

[18] As noted earlier, Chief Wuttunee and Councillor Nicotine have not challenged any of the factual findings made by the Federal Court. Their sole argument is that having failed to find that their misconduct was likely to have had an impact on the winners of the election, it was not open to the Federal Court to annul their elections.

[19] Given that this case involves two appeals from a judgment of the Federal Court, the standard of review is that articulated by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33: *Papequash v. Brass*, 2019 FCA 245 at para. 11 (*Papequash* FCA). That is, questions of law are to be reviewed on the standard of correctness. Findings of fact and inferences of fact are to be reviewed on the basis of palpable and overriding error unless an extricable legal error can be demonstrated, in which case such error is to be reviewed on the correctness standard.

[20] I agree with the parties that the issue raised by these appeals involves a question of law, and is thus subject to review on the standard of correctness.

III. The Legislative Framework

[21] The *FNEA* was enacted in 2014, creating a statutory code governing the election of chiefs and councillors of participating First Nations. Amongst other things, it was intended to move away from the “antiquated and paternalistic” approach to First Nations’ governance that existed

under the *Indian Act*, R.S.C., 1985, c. I-5. Under the *Indian Act* regime, disputed election appeals were heard by the Minister of Indian Affairs and Northern Development and ultimately decided by the Governor in Council: Senate, *Debates of the Senate (Hansard)*, 2nd Session, 41st Parliament, Vol. 149, No. 29 (January 29, 2014) at pp. 269a-270a.

[22] The *FNEA* does not apply automatically to all First Nations elections – individual First Nations must agree to be governed by this regime. First Nations opt into the regime by having their council provide the Minister of Indigenous Services with a resolution requesting that the First Nation be added to the list of participating First Nations attached as a schedule to the Act. The RPFN is a participating First Nation.

[23] The *FNEA* provides a statutory mechanism whereby elections may be contested. Of particular relevance to this case is section 30 of the Act, which provides that the validity of an election for the Chief or a Councillor of a participating First Nation may only be contested in accordance with sections 31 to 35 of the Act. Also relevant is section 31 of the Act, which states that electors of a participating First Nation may 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*" [emphasis added]. Finally, subsection 35(1) of the Act states that a court may set aside a contested election "if the ground referred to in section 31 is established".

[24] The question for determination is the meaning of the phrase "*is likely to have affected the result*" in section 31 of the *FNEA*. That is, does the Act require a finding that the number of

votes tainted by the misconduct of Chief Wuttunee and Councillor Nicotine likely exceeded the plurality of votes cast, such that the winner of the election is in doubt, before their election can be annulled? Or is it sufficient that the vote count be affected by the electoral misconduct for the election to be annulled?

[25] To answer this question it is necessary to review the jurisprudence dealing with the *FNEA* and similar legislation. Before doing so, however, it is first necessary to have a fuller understanding of Chief Wuttunee and Councillor Nicotine's argument.

IV. Chief Wuttunee and Councillor Nicotine's Argument

[26] According to Chief Wuttunee and Councillor Nicotine, the *FNEA* does not confer discretion on a reviewing judge to annul an election unless it is first established that the contraventions of the Act (or the *First Nations Elections Regulations*, SOR/2015-86) were likely to have affected the winners of their elections.

[27] As the Federal Court did not find that that their contraventions of the *FNEA* were likely to have affected the winners of their elections in this case, Chief Wuttunee and Councillor Nicotine say that the Federal Court erred in law in annulling their elections as Chief and Councillor of the RPFN.

[28] Establishing that the number of rejected votes is equal to or larger than the successful candidate's margin of victory (the so-called "magic number" test) is one way to demonstrate that

the results of an election have been affected by the conduct in issue. However, Chief Wuttunee and Councillor Nicotine acknowledge that it is not the only way to satisfy the requirements of section 31 of the *FNEA*.

[29] They note that in *Papequash* FC, the Federal Court recognized that a more permissive approach may be necessary in cases of corruption or fraud where the true extent of the misconduct may be impossible to ascertain, or the conduct may be mischaracterized. This is particularly so where allegations of vote buying are raised, where both parties to the transaction are culpable and often prone to secrecy: at para. 34.

[30] According to Chief Wuttunee and Councillor Nicotine, there was a finding in *Papequash* that there had been widespread fraud that would likely have affected the results of an election, even if the formal "magic number" test had not been met. They further contend that the Federal Court was not creating an independent, "stand-alone" basis for annulling an election on the basis of fraud, regardless of its impact on the results of the election.

[31] In support of their contention that annulling an election is only proper where the result of the election is in doubt, Chief Wuttunee and Councillor Nicotine cite the decision in *Cyr v. McNabb*, 2016 SKQB 357, aff'd, in part, 2017 SKCA 27 (*Cyr* SKCA). There, the Court noted that annulment would disenfranchise the vote of every elector in the election. Accordingly, courts should exercise their discretion to annul an election only in circumstances where the applicant has satisfied the Court that the results would likely have been different but for the non-compliance with the Act or Regulations: at para. 40.

[32] Chief Wuttunee and Councillor Nicotine further submit that courts should avoid imputing too much power to themselves to annul elections. In addition to disenfranchising voters, it "increases the potential for future litigation; undermines the certainty in the democratic outcomes; and, may lead to disillusionment and voter apathy": *Flett v. Pine Creek First Nation*, 2022 FC 805, at para. 17.

[33] This is especially so, they say, in the context of First Nations' elections, where an outside institution is being asked to interfere in the democratic process of a First Nation. While recognizing that the *FNEA* permits this, Chief Wuttunee and Councillor Nicotine nevertheless contend that it does so only in narrow circumstances, where the presumption of regularity has been rebutted, thus respecting the autonomy of First Nations in governance matters.

[34] With this understanding of Chief Wuttunee and Councillor Nicotine's position, I turn now to review the governing jurisprudence.

V. The *Canada Elections Act* Cases

[35] The starting point of this review must be the decision of the Supreme Court of Canada in *Opitz v. Wrzesnewskyj*, 2012 SCC 55. While *Opitz* involved a challenge to an election conducted under the provisions of the *Canada Elections Act*, S.C. 2000, c. 9 (*CEA*), that Act uses similar language to that in issue here. That is, paragraph 524(1)(*b*) of the *CEA* provides that an elector or candidate may contest an election on the grounds that "there were irregularities, fraud or corrupt or illegal practices that affected the result of the election".

[36] It should be noted that the electoral challenge in *Opitz* was based on administrative errors. There were no allegations of fraud, corruption or illegal practices or any other wrongdoing by a candidate or political party, and the Court's comments must be understood with this in mind.

[37] The Supreme Court stated in *Opitz* that where there were irregularities, fraud or corrupt or illegal practices that affected the result of the election, a court may annul the election. Under these circumstances, a court must decide whether the election was compromised in such a way as to justify its annulment: at para. 22.

[38] In deciding whether to annul an election in a given case, the Supreme Court stated that "an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election *or whether the irregularities are such as to call into question the integrity of the electoral process*": *Opitz*, at para. 23, [my emphasis].

[39] In considering the meaning of the phrase "that affected the result of the election", the Supreme Court stated that "'[a]ffected the result' asks whether someone not entitled to vote, voted". The Court went on to state that "[m]anifestly, if a vote is found to be invalid, it must be discounted, thereby altering the vote count, and in that sense, affecting the election's result": *Opitz*, at para. 25.

[40] After considering the centrality of the constitutional right to vote, the enfranchising purpose of the *CEA*, the text and context of section 524 and the competing democratic values

engaged, the Supreme Court concluded that an "irregularit[y] ... that affected the result" of an election "is a breach of statutory procedure that has resulted in an individual voting who was not entitled to vote". The Court observed that "[s]uch breaches are serious because they are capable of undermining the integrity of the electoral process": all quotes from *Opitz*, at para. 51. The Court recognized, however, that a declaration that an election is annulled is "the ultimate public consequence of violating provisions of the Act, and accordingly should be reserved for serious cases": *Opitz*, at para. 70.

[41] The Supreme Court went on to observe that the test used by Canadian courts in assessing contested election applications was the "magic number" test. As noted earlier, this test provides that an election must be annulled if the number of rejected votes is equal to or larger than the successful candidate's margin of victory: *Opitz*, at para. 71. This is an approach advocated by Chief Wuttunee and Councillor Nicotine.

[42] The Supreme Court nevertheless recognized that there were shortcomings to the "magic number" test in that it favours the challenger as it assumes that all of the rejected votes were cast for the successful candidate, which is highly improbable. That said, no alternative test had been developed that would be reliable and that would not compromise the secrecy of the ballot: *Opitz*, at para. 72. Consequently, while the Supreme Court applied the "magic number" test in *Opitz*, it did not rule out the possibility that a "more realistic method for assessing contested election applications might be adopted by a court in a future case": *Opitz*, at para. 73.

[43] Like *Opitz*, *McEwing v. Canada (Attorney General)*, 2013 FC 525, involved an electoral challenge brought under the *CEA*. The applicants in *McEwing* sought the annulment of the results of a general election in six electoral districts because of efforts to suppress votes.

[44] The Federal Court stated in *McEwing* that the phrase "that affected the result of the election" required that one or more votes be improperly cast or denied in a riding and that this had an effect on the outcome in that riding: at para. 71. Where an election is marred by procedural irregularities or electoral fraud, even one invalid or suppressed vote could, in principle, affect the result. However, this may not justify the annulment of the election: *McEwing*, at para. 72.

[45] Observing that in *Opitz*, the Supreme Court had not foreclosed the use of a test other than the "magic number" test, the Federal Court noted that the question had been left open as to whether irregularities calling into question the integrity of an electoral process could justify the annulment of the election. According to the Federal Court, this was more likely to be the case where there was electoral fraud, corruption or illegality: *McEwing*, at para. 76.

[46] The Court went on to state that the assessment as to whether fraud affecting the result of the election is sufficient to warrant annulling the election result is a matter that falls within the judge's discretion: *McEwing*, at para. 79. In exercising this discretion, the Court observed that in *Opitz*, the Supreme Court had cited *Cusimano v. Toronto (City)*, 2011 ONSC 7271, [2011] OJ No 5986 (QL) at para. 62 as authority for the proposition that an election will only be annulled where the irregularity "*either violates a fundamental democratic principle or* calls into question

whether the tabulated vote actually reflects the will of the electorate": *Opitz*, at para. 43 [my emphasis].

[47] Finally, the Federal Court noted in *McEwing* that in *Opitz*, the Supreme Court had observed that annulling an election would disenfranchise not only those persons whose votes were disqualified (in the context of an irregularities case), but every elector who voted in the riding: *McEwing*, at para. 82, citing *Opitz*, at para. 43. Consequently, the Federal Court stated that a court should only exercise its discretion to annul an election where there is serious reason to believe that the results would have been different but for the fraud, *or* where an electoral candidate or agent is directly involved in the fraud: *McEwing*, at para. 83.

VI. The *First Nations Elections Act* Cases

[48] The meaning of the phrase "likely to have affected the result" has also been considered in the context of challenges to elections conducted under the *FNEA*. The most relevant of these cases for our purposes are the decisions of the Federal Court in *Papequash v. Brass*, 2018 FC 325 (*Papequash* FC) and of this Court in *Papequash* FCA.

[49] The *Papequash* cases involved an application for judicial review brought under sections 31 and 35 of the *FNEA*. The applicants sought to set aside an election held by the Key First Nation Band on the basis that there had been widespread unethical election practices, including the misuse of Band funds to purchase votes or to persuade candidates not to run for the election.

[50] In deciding that the election should be annulled, the Federal Court observed that not every contravention of the Act or regulations will justify the annulment of a band election, and that a distinction should be made between cases involving technical procedural irregularities and those involving fraud or corruption. A mathematical approach (such as the "magic number" test) may be appropriate to establish the likelihood of a different outcome where there are procedural irregularities. Where, however, an election has been corrupted by fraud such that the integrity of the electoral process is in question, an annulment may be justified regardless of the proven number of invalid votes: *Papequash* FC, at para. 34.

[51] The Federal Court explained a stricter approach should be taken in cases of electoral corruption because the true extent of the misconduct may be impossible to ascertain or the conduct may be mischaracterized. This is especially so where allegations of vote buying are raised, where both parties to the transaction are culpable and often prone to secrecy: *Papequash* FC, at para. 34, citing *Gadwa v. Kehewin First Nation*, 2016 FC 597 (*Gadwa* FC), aff'd in *Joly v. Gadwa*, 2017 FCA 203 (*Gadwa* FCA). Moreover, electoral corruption conducted by a candidate or agent ought generally to be treated more strictly: *Papequash* FC, at para. 37. See also *Gadwa* FC, at para. 88.

[52] The Federal Court further observed in *Papequash* FC that the Supreme Court had held that a Court may annul an election where there is fraud or corrupt or illegal practices that affected the result of the election or where the irregularity violates a fundamental democratic principle: citing *Opitz*, at para. 43.

[53] According to the Federal Court, attempts by electoral candidates to purchase the votes of constituents involves "an insidious practice that corrodes and undermines the integrity of any electoral process": *Papequash* FC, at para. 38. In such cases, the court must decide whether the election held was compromised in such a way as to justify its annulment: *Papequash* FC, at para. 35, citing *Opitz*, at para. 22.

[54] From this, the Federal Court was satisfied that serious electoral fraud could vitiate an election result. Whether it was appropriate to annul a specific election depended on the facts of the individual case: *Papequash* FC, at para. 36, citing *McEwing*, at para. 81.

[55] In deciding whether to do so, however, a Court must keep in mind that annulling an election disenfranchises not only those persons whose votes were disqualified (or bought in this case), but every elector who voted in the election. As a consequence, a Court should only exercise its discretion to annul an election where, amongst other things, there is serious reason to believe that an electoral candidate or agent is directly involved in the fraud: *Papequash* FC, at para. 36, citing *McEwing*, at para. 82. See also *Opitz*, at para. 48.

[56] The Federal Court found in *Papequash* FC that there was clear evidence of widespread and openly conducted vote buying activity carried out by several individuals. The Court was further satisfied that the integrity of the Key First Nation Band election had been sufficiently corrupted by the misconduct of candidates such that the election had to be annulled and a new election conducted: at paras. 39, 40. Importantly, nowhere in the decision does the Federal Court

find that the number of votes affected by the corrupt practices in issue were sufficient to have changed the winners of the election.

[57] This Court subsequently found that the Federal Court had considered the relevant sections of the *FNEA* in *Papequash* FC and that it had correctly applied the jurisprudence in the context of the case. Consequently, this Court dismissed the appeal by the candidates whose conduct was in issue: *Papequash* FCA.

[58] It bears repeating that one of the principles applied by the Federal Court in *Papequash* FC and approved by this court in *Papequash* FCA was that a distinction had to be made between cases involving technical procedural irregularities and those involving fraud or corruption. While a strictly mathematical approach may be appropriate where there are procedural irregularities, an annulment may be justified, regardless of the proven number of invalid votes, where an election has been corrupted by fraud such that the integrity of the electoral process is in question: *Papequash* FC, at para. 34.

[59] Before concluding this section of these reasons, it is also worth mentioning an observation made in *Cyr* SKCA, another case decided under the *FNEA*. There, the Saskatchewan Court of Appeal noted the Supreme Court's statement in *Opitz* that in deciding whether to annul an election, an important consideration is "whether the number of impugned votes is sufficient to cast doubt on the true winner of the election *or* whether the irregularities are such as to call into question the integrity of the electoral process": at para. 44 [my emphasis].

[60] The conduct at issue in *Cyr* SKCA involved irregularities resulting from negligence or inadvertence, and there was no evidence of fraud or bad faith or any other questions as to the integrity of the election process in that case. As a result, the Court was satisfied that use of the "magic number" test was appropriate. The Court nevertheless went on in *Cyr* SKCA to refer to the extract from *Opitz* quoted in the previous paragraph, observing that the majority decision in *Opitz* also stated that "whether the overall integrity of the electoral process had been called into question by proven irregularities" was also "an important consideration" in deciding whether an election should be annulled. However, because of the finding in *Cyr* SKCA that the application of the "magic number" test was appropriate, the Saskatchewan Court of Appeal held that this second consideration "had no bearing on the exercise of judicial discretion" in that case: at para. 49.

[61] The Saskatchewan Court of Appeal thus appears to have understood paragraph 23 of *Opitz* to identify two separate considerations relevant to the exercise of the Court's discretion to annul an election. The first of these is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election, and the second is whether the irregularities in the election were such as to call into question the integrity of the electoral process.

[62] From all of this, I understand that the result of an election may well be affected where the misconduct in question is sufficiently severe that the integrity of the election was seriously corroded and compromised.

VII. The Application of these Principles in this Case

[63] Subsection 35(1) of the *FNEA* confers discretion on the Federal Court to annul elections where it is of the view that it is appropriate to do so, provided that the contravention(s) of the Act or the Regulations are likely to have affected the result of the election. As is evident from the above review of the governing jurisprudence, it is not necessary that the number of affected votes be sufficient to have affected the winner of the election. In cases of serious electoral fraud, it is sufficient if the conduct of the candidates affects the vote count and corrupts the overall integrity of their elections.

[64] In this case, the Federal Court was aware that it had such discretion and it carefully considered whether it was appropriate to annul the elections of Chief Wuttunee and Councillor Nicotine. In doing so, the Court identified the relevant legal principles, and it explained why it had concluded that it was appropriate to annul the elections of both individuals.

[65] The Federal Court understood that elections benefit from a "presumption of regularity", and that consequently, the legal burden of proof was on those challenging an election to demonstrate that facts existed that would justify the annulment of an election: *Opitz*, at paras. 52-53; *Cyr* SKCA, at para. 23.

[66] The Federal Court explicitly recognized that the number of ballots that had been shown to have been corrupted by Chief Wuttunee and Councillor Nicotine's misconduct was not sufficient to satisfy the "magic number" test as it related to their election as Chief and Councillor,

respectively. The Court further acknowledged that annulling the elections of Chief Wuttunee and Councillor Nicotine would result in the disenfranchisement of those individual electors who had legitimately supported them.

[67] At the same time, the Federal Court identified several aggravating factors making the conduct of Chief Wuttunee and Councillor Nicotine all the more egregious.

[68] The Court found that the actions of Chief Wuttunee and Councillor Nicotine "went far beyond acceptable conduct" and that both were directly involved in multiple instances of serious electoral fraud. The Court also found that they had engaged several contraventions of the *FNEA*, including vote buying and related activities, and of the *First Nations Elections Regulations*, relating to mail-in votes.

[69] The Court further found that the conduct of Chief Wuttunee and Councillor Nicotine was such that the integrity of their elections had been corrupted.

[70] In addition, the Federal Court found that both Chief Wuttunee and Councillor Nicotine had used RPFN funds to purchase votes, which the Court characterized as "particularly grave electoral fraud".

[71] The Federal Court also noted that Chief Wuttunee and Councillor Nicotine had occupied leadership positions within the RPFN, and that, as such, they were supposed to lead by example.

Instead of acting as “bulwarks of First Nation democracy”, however, they endeavoured to corrupt the democratic process.

VIII. Conclusion

[72] None of the above facts have been challenged by Chief Wuttunee and Councillor Nicotine, nor have they established that the Federal Court erred in law in exercising its discretion to annul their election as Chief and Councillor of the RPFN. Having concluded that it was open to the Federal Court to annul the elections of Chief Wuttunee and Councillor Nicotine in the absence of a finding that the “magic number” test had been satisfied, it follows that I would dismiss their appeal. In accordance with the request of the parties, I would not rule on the question of costs at this time, but would allow the parties to make submissions in writing on this issue.

[73] In accordance with subsection 35(2) of the *First Nations Elections Act*, the Court will send a copy of this decision to the Minister of Indigenous Services.

“Anne L. Mactavish”
J.A.

“I agree.
Locke J.A.”

“I agree.
Monaghan J.A.”

APPENDIX

First Nations Elections Act	*Loi sur les élections au sein de premières nations*
S.C. 2014, c. 5	**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.

…

Means of contestation

30 The validity of the election of the chief or a councillor of a participating First Nation may be contested only in accordance with sections 31 to 35.

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.

Time limit

32 An application must be filed within 30 days after the day on which the results of the contested election were announced.

Competent courts

33 The following courts are competent courts for the purpose of section 31:

(*a*) the Federal Court; and

(*b*) the superior court of a province in which one or more of the

[…]

Mode de contestation

30 La validité de l'élection du chef ou d'un conseiller d'une première nation participante ne peut être contestée que sous le régime des articles 31 à 35.

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.

Délai de présentation

32 La requête en contestation doit être présentée dans les trente jours suivant la date à laquelle les résultats de l'élection contestée sont annoncés.

Compétence

33 Pour l'application de l'article 31, constituent le tribunal compétent pour entendre la requête la Cour fédérale ou la cour supérieure siégeant dans la province où se trouve une ou plusieurs réserves de la première nation participante en cause.

participating First Nation's reserves are located.

Service of application

34 An application must be served by the applicant on the electoral officer and all the candidates who participated in the contested election.

Signification

34 Le requérant signifie sa requête au président d'élection et aux candidats ayant participé à l'élection contestée.

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.

Duties of court clerk

(2) If the court sets aside an election, the clerk of the court must send a copy of the decision to the Minister.

Transmission de la décision

(2) Lorsque le tribunal invalide une élection, le greffier expédie un exemplaire de la décision au ministre.

Canada Elections Act

S.C. 2000, c. 9

…

Loi électorale du Canada

L.C. 2000, ch. 9

[…]

Contestation of election

524 (1) Any elector who was eligible to vote in an electoral district, and any candidate in an electoral district, may, by application to a competent court, contest the election in that electoral district on the grounds that

Contestation

524 (1) Tout électeur qui était habile à voter dans une circonscription et tout candidat dans celle-ci peuvent, par requête, contester devant le tribunal compétent l'élection qui y a été tenue pour les motifs suivants :

(*a*) under section 65 the elected candidate was not eligible to be a candidate; or

(*b*) there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.

a) inéligibilité du candidat élu au titre de l’article 65;

b) irrégularité, fraude, manoeuvre frauduleuse ou acte illégal ayant influé sur le résultat de l’élection.

Exception

(2) An application may not be made on the grounds for which a recount may be requested under subsection 301(2).

Précision

(2) La contestation ne peut être fondée sur les motifs prévus au paragraphe 301(2) pour un dépouillement judiciaire.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-97-22
STYLE OF CAUSE:	CLINTON WUTTUNEE v. MARY LINDA WHITFORD AND ALICIA MOOSOMIN
AND DOCKET:	A-98-22
STYLE OF CAUSE:	GARY NICOTINE v. MARY LINDA WHITFORD AND ALICIA MOOSOMIN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 29, 2022
REASONS FOR JUDGMENT BY:	MACTAVISH J.A.
CONCURRED IN BY:	LOCKE J.A. MONAGHAN J.A.
DATED:	JANUARY 30, 2023

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