Federal Court  Cour fédérale

Date: 20151109

Docket: T-740-15

Citation: 2015 FC 1258

Ottawa, Ontario, November 9, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ROBB CAMPRE

Applicant

and

FORT MCKAY FIRST NATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On April 10, 2015, the Fort McKay First Nation held a general election to appoint the members of its council. Under the Election Code of the Fort McKay First Nation [the Election Code], the council consists of one Chief and four Councillors.

[2] Robb Campre was an unsuccessful candidate for council in the general election. He appealed the outcome of the election under the Election Code. In his Notice of Appeal, Mr. Campre made the following allegations:

> The corrupt election practice was that numerous persons (43) from Fort McKay, were flown to Edmonton or drove from Fort McMurray into Edmonton where they stayed at the Chateau Nova and/or Chateau Louis (paid for by or on behalf of Fort McKay First Nation Chief) and were observed to be voting at the Edmonton polling station. Following voting these persons from Fort McKay were attending an event paid for by or on behalf of Fort McKay First Nation Chief at the Chateau Louis across the street from the Chateau Nova where the voting was held.

[3] Mr. Campre's appeal was heard by Frank R. Foran, QC, who was appointed as the Election Appeal Arbitrator [the Arbitrator]. The Arbitrator found that Mr. Campre had fallen "far short" of demonstrating a corrupt election practice as alleged in the Notice of Appeal.

[4] Mr. Campre has brought an application for judicial review of the Arbitrator's decision pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c 41. For the reasons that follow, I have found that the Arbitrator reasonably concluded that Mr. Campre did not adduce sufficient evidence to support an inference that the general election was marred by a corrupt election practice. The application for judicial review is therefore dismissed.

II. Background

[5] On April 10, 2015, the same day as the Fort McKay First Nation's general election, an organization called Public Interest Alberta held a celebration in Edmonton of the life of former

Chief Dorothy McDonald. Ms. MacDonald was the first woman to become Chief of the Fort McKay First Nation, and is regarded by the First Nation as someone who served her community with great distinction during a period of enormous change. A multi-media presentation with music called "On the River" was developed in her honour and performed at the Chateau Louis in Edmonton.

[6] Numerous individuals from the Fort McKay First Nation travelled to Edmonton to attend the celebration. Many of these individuals also voted in the Fort McKay First Nation's general election at a polling station in Edmonton located directly across the street from the Chateau Louis.

[7] As a result of the general election, Jim Boucher was re-elected as Chief. He received 215 votes. The other candidate for Chief, Cecilia Fitzpatrick, received 188 votes. The four Councillors elected were Raymond Powder with 239 votes, Gerald Gladue with 179 votes, Crystal McDonald with 163 votes, and Mary Peggy Lacorde with 160 votes. Mr. Campre received 91 votes and was not elected.

[8] The Arbitrator heard Mr. Campre's appeal on April 29, 2015. Mr. Campre submitted his own affidavit and that of his sister, Ms. Annette Campre, and both testified in person. The Fort McKay First Nation did not call any witnesses, but submitted three documents from Public Interest Alberta's website to demonstrate that the Fort McKay First Nation was neither a sponsor nor a supporter of "On the River".

[9] In a decision dated May 4, 2015, the Arbitrator rejected Mr. Campre's appeal on the ground that he had not presented sufficient evidence to support an inference that a corrupt electoral practice had occurred.

III. The Election Code

[10] A candidate or an elector who voted in the election may appeal on the basis of one or more of five enumerated grounds in s 81.1 of the Election Code. Mr. Campre appealed under s 81.1.5:

> 81.1.5 a candidate was guilty of a corrupt election practice or benefited from and consented to a corrupt election practice.

[11] The Election Code defines a "corrupt election practice" as follows:

> 1.1.10 "corrupt election practice" means
>
> > 1.1.10.1 attempting or offering money or other valuable consideration in exchange for:
> >
> > > 1.1.10.1.1 an elector's vote

[12] Under the Election Code, the Arbitrator had the following powers:

> 88.1.1 to determine questions of law arising in the course of the appeal hearing;
>
> 88.1.2 to rule on any objections made in the appeal hearing;
>
> 88.1.3 to order production of documents which are material and relevant to the appeal;

> 88.1.4 to determine the procedure to be followed having regard for fairness and equality between the parties to the hearing;
>
> 88.1.5 to determine the manner in which evidence is to be admitted and the appeal arbitrator is not bound by rules of evidence, and, within the limits prescribed by subsection 84.2 has the power to determine admissibility, relevance and weight of any evidence;
>
> 88.1.6 to determine the time, place, and date of the appeal hearing; and
>
> 88.1.7 to determine whether the appeal hearing is open to members and who may or may not attend the appeal hearing.

[13] The Arbitrator did not have the power:

> 88.2.1 to subpoena any witness or compel any person to give evidence at an appeal hearing excepting that the returning officer is a compellable witness; and
>
> 88.2.2 to order any relief not specifically permitted by this Code.

IV. Issues

[14] This application for judicial review raises the following issues:

A. Are affidavits containing evidence that was not before the Arbitrator admissible in this application for judicial review?

B. What is the appropriate standard of review?

C. Was the Arbitrator wrong to dismiss the appeal due to insufficient evidence?

V. Analysis

A. *Are affidavits containing evidence that was not before the Arbitrator admissible in this application for judicial review?*

[15] Mr. Campre and the Fort McKay First Nation both filed affidavit evidence that was not before the Arbitrator.

[16] Mr. Campre filed his own affidavit, in which he deposed, among other things, that he had spoken to Don Bouzek, who operates Ground Zero Productions and produced "On the River".Mr. Campre swore that Mr. Bouzek had told him that the Band Council had provided tickets to more than 200 people, and had paid for the transportation and accommodation of those who attended the performance. Mr. Campre also swore that Dwayne Grandjambe, a member of the Fort McKay First Nation, was paid $1,500 to vote for Jim Boucher and to put a campaign sign in front of his house.

[17] The Fort McKay First Nation filed the affidavit of Mr. Bouzek. Mr. Bouzek described the information attributed to him in Mr. Campre's affidavit as "completely inaccurate". He deposed that the Fort McKay First Nation had nothing whatsoever to do with the performance of "On the River" in Edmonton on April 10, 2015. Mr. Bouzek had no knowledge of anyone being provided with tickets or transportation and hotels for the performance.

[18] Counsel for Mr. Campre cross-examined Mr. Bouzek on his affidavit, and the transcript of the cross-examination was filed with the Court. In his cross-examination, Mr. Bouzek

acknowledged that there had not been much "pick-up" of tickets for the April 10, 2015 performance of "On the River", and that he was subsequently informed by Mr. Campre that the Fort McKay First Nation had invited people to attend.

[19] The Fort McKay First Nation also filed the affidavit of Dayle Hyde, a member of the Fort McKay First Nation and the daughter of former Chief McDonald. Ms. Hyde deposed that the Fort McKay First Nation, its Chief and Councillors, had nothing whatsoever to do with the April 10, 2015 performance of "On the River" in Edmonton, and that they did not pay for any travel, accommodation or other expenses for anyone attending the performance.

[20] Finally, the Fort McKay First Nation filed the affidavit of Mr. Grandjambe. Mr. Grandjame deposed that the information attributed to him by Mr. Campre was false, and that he was not paid or offered any money by anyone to put a sign by his house or to vote for any particular candidate.

[21] As a general rule, in an application for judicial review the evidentiary record before the Court is restricted to the evidentiary record that was before the Arbitrator (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Association of Universities and Colleges*] at para 19). The essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court (*Association of Universities and Colleges* at para 19, citing *Gitxsan Treaty Society v Hospital*

Employees' Union, [2000] 1 FC 135 (FCA) at pages 144-45; *Kallies v Canada*, 2001 FCA 376 at para 3; and *Bekker v Canada*, 2004 FCA 186 at para 11).

[22] As the Federal Court of Appeal held in *Association of Universities and Colleges* at para 20, "[t]here are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker." Three exceptions recognized by the Court of Appeal are (i) an affidavit that provides general background in circumstances where that information might assist the court in understanding the issues relevant to the judicial review; (ii) an affidavit that is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker; and (iii) an affidavit that highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding.

[23] In this case, the additional affidavit evidence submitted by the parties is primarily directed towards questions that Mr. Campre maintains were not adequately canvassed in the evidence before the Arbitrator. The affidavit evidence is not admissible for this purpose. Nor does it change, in any material way, the evidence that was considered by the Arbitrator.

[24] Mr. Campre argued that the additional affidavit evidence might be admissible to establish a breach of procedural fairness. He complained of the short time-period in which to commence

the appeal and the Arbitrator's inability to compel persons, other than the returning officer, to give evidence.

[25] There is nothing to suggest that the additional affidavit evidence filed in this application for judicial review could not have been adduced before the Arbitrator. Furthermore, the Arbitrator had the power under s 88.1.3 of the Election Code to order production of documents which were material and relevant to the appeal. More fundamentally, the Arbitrator had the power under s 88.1.4 of the Election Code to determine the procedure to be followed, having regard for fairness and equality between the parties. This power was potentially broad enough to grant the parties sufficient time to obtain affidavit evidence similar to what they filed in these proceedings or to call additional witnesses.

[26] I am therefore not satisfied that the additional affidavit evidence establishes that the provisions of the Election Code resulted in a breach of procedural fairness, or that the Arbitrator applied the provisions of the Election Code unfairly.

B. *What is the appropriate standard of review?*

[27] The parties do not agree on the standard of review that this Court should apply to the Arbitrator's decision. Mr. Campre says that the interpretation of the Election Code is a pure question of law, and the Arbitrator's decision is therefore subject to review by this Court against the standard of correctness. The Fort McKay First Nation says that the Arbitrator's determination that there was insufficient evidence to allow the appeal is a question of mixed fact and law, and it therefore attracts the standard of reasonableness.

[28] In *Fitzpatrick v Boucher*, 2012 FC 294, which involved a challenge to the Fort McKay First Nation's 2011 general election, the parties agreed that the applicable standard of review was correctness. However, the Federal Court of Appeal declined to endorse this standard, and upheld the appeal arbitrator's decision on the ground that it was both correct and reasonable (*Fitzpatrick v Boucher*, 2012 FCA 212 at para 21).

[29] In *Ferguson v Lavallee*, 2014 FC 569 at paras 62 and 63, Justice Heneghan held that when the substantive issue in an application involves the interpretation of an election code and the application of that interpretation to the facts, this is a question of mixed fact and law and attracts the reasonableness standard of review.

[30] Most recently, in *Orr v Peerless Trout First Nation*, 2015 FC 1053 at para 44, a case that is currently under appeal, Justice Strickland concluded that the reasonableness standard applied to the interpretation of the election regulations by the arbitrator who was appointed to hear the election appeal.

[31] The Election Code at issue in this case confers upon the Arbitrator a power to interpret law. It also contains a privative clause. This is a strong indication of review pursuant to the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 52). The Arbitrator's interpretation and application of the Election Code is not a question of law that is of central importance to the legal system or outside the specialized area of expertise of the administrative decision-maker, another indication that the reasonableness standard applies (*Dunsmuir* at para 70).

[32] I therefore conclude that the Arbitrator's interpretation of the Election Code and his application of that interpretation to the facts are subject to review by this Court against the standard of reasonableness. I note, however, that the range of reasonable interpretations to be given to a particular provision of the Election Code may be narrow *(Canada (Attorney General) v Canada (Human Rights Commission),* 2013 FCA 75 at paras 13-14*).*

C. *Was the Arbitrator wrong to dismiss the appeal due to insufficient evidence?*

[33] The Arbitrator acknowledged that certain conduct will permit an inference of a corrupt election practice to be drawn (*Sideleau v Davidson,* 1942 SCR 306 [*Sideleau*]), and that it is not necessary for there to be direct evidence of explicit efforts to buy votes. The Arbitrator also accepted that someone may be found to have engaged in a corrupt election practice even if he or she was involved only indirectly.

[34] The Arbitrator found that the testimony of Mr. Campre and his sister demonstrated, at most, that they had observed a number of people from Fort McKay vote at the Edmonton polling station on election day, and that some of those voters had also attended "On the River" in the evening. Ms. Campre said that over 20 people had come from Fort McKay to Edmonton to vote, but she could not say how many had attended the performance. Mr. Campre estimated that 30 people had travelled from Fort McKay to vote at the Edmonton polling station.

[35] There was no evidence before the Arbitrator that the Fort McKay First Nation had sponsored, or was it in any way involved with, the performance of "On the River" in Edmonton on April 10, 2015. Nor was there any evidence that the Fort McKay First Nation had paid for the

travel expenses of any of the persons who attended the performance. Even if it were appropriate for me to consider the additional affidavits and the transcript of cross-examination filed in this application for judicial review, they would tend to support these conclusions.

[36] The Arbitrator noted that Mr. Campre had not adduced any evidence to show that the election was scheduled to coincide with the day of the concert. Even if this had been proved, the Arbitrator held that this was insufficient, in and of itself, to suggest that the Fort McKay First Nation, its Chief, its previous council or any of the successful candidates had engaged in a corrupt election practice. I agree.

[37] Mr. Campre says that, pursuant to *Sideleau*, the evidence he presented was sufficient to permit the Arbitrator to infer that the Fort McKay First Nation had engaged in a corrupt electoral practice. He maintains that the Fort McKay First Nation failed to rebut this presumption because it did not submit any evidence to refute it.

[38] Mr. Campre appears to have confused the legal burden of proof and the proper application of an evidentiary principle regarding inferences that may be drawn from the evidence presented. Mr. Campre had the burden of proving on a balance of probabilities that the Fort McKay First Nation had engaged in a corrupt election practice (*Wrzesnewskyj v Canada (Attorney General)*, 2012 SCC 55 at paras 52-53). The law allows for certain conduct to lead to an inference of a corrupt election practice, but this does not mean that the burden of proof has been reversed.

[39] The Arbitrator referred explicitly to the evidentiary principles found in *Sideleau*. However, the Arbitrator found that the evidence in the appeal was "sparse" and that the law did not permit him to draw an inference of a corrupt election practice based on "mere speculation".

[40] An inference may be drawn from the evidence only in certain circumstances. For example, in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, the Supreme Court of Canada held that a Grade 12 requirement for candidates who wished to be Chief or a Band Councillor did not support an inference that older members of the community were disproportionately affected. In *Québec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, the Supreme Court held that a refusal to issue a security clearance to a man of Pakistani origin did not support the inference that racial profiling was to blame.

[41] Similarly, evidence that a significant number of people travelled from Fort McKay to Edmonton and then voted in the Fort McKay First Nation's general election before attending a performance of "On the River" does not support the inference that a corrupt election practice occurred. Mr. Campre presented very little evidence in support of his appeal. It was therefore reasonable for the Arbitrator to conclude that the mere presence of individuals from Fort McKay at an event in Edmonton did not support the inference that those individuals accepted bribes from, or on behalf of, the Chief or anyone else to vote in a particular way.

[42] I can find no error in the Arbitrator's decision that warrants this Court's intervention. The application for judicial review is therefore dismissed.

VI. Costs

[43] Both parties requested an opportunity to address the Court in writing regarding costs. The Fort McKay First Nation will file its written submissions, not exceeding seven pages, within five business days of the issuance of this decision. Mr. Campre will provide written submissions in response, not exceeding seven pages, within five business days of receipt of the Fort McKay First Nation's written submissions.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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