

Federal Court



Cour fédérale

Date: 20240221

Docket: T-2528-22

Citation: 2024 FC 282

Ottawa, Ontario, February 21, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

RONALD LARRY HOUSE

Applicant

and

**DREW SHAW (ELECTORAL OFFICER)
AND PAUL FIRST NATION, CASEY BIRD,
FARON BULL, DWIGHT PAUL, DARREN S
RAIN, DELORES RAIN AND JASON
SAULTEAUX**

Respondents

JUDGMENT AND REASONS

[1] Mr. House applies to this Court to set aside the elections for the Council of Paul First Nation, because the Electoral Officer wrongly omitted his name on the ballot. I agree that Mr. House's name should have been on the ballot, as he complied with the requirements to perfect his candidacy within the statutory time limits. However, I am dismissing his application, because he failed to seek the rectification of this omission as soon as he learned of it.

I. Background

[2] The elections for the chief and council of Paul First Nation, which is located in Alberta, are governed by the *First Nations Elections Act*, SC 2014, c 5 [the Act]. The last election was held on November 2, 2022. The respondent Drew Shaw was the Electoral Officer. He acted through a firm called One Feather, the office of which is located in Victoria, British Columbia.

[3] At the nomination meeting held on September 26, 2022, Mr. House was nominated to be a candidate for the position of councillor. Pursuant to section 9 of the *First Nations Elections Regulations*, SOR/2015-86 [the Regulations], Mr. House had to remit his candidacy fee to the Electoral Officer before 6 p.m. on the third day after the nomination meeting, that is, on September 29, 2022. However, the various notices prepared by the Electoral Officer stated that the deadline was at 4 p.m. on September 29, 2022. Mr. House remitted his candidacy fee after 4 p.m., but before 6 p.m., on that day.

[4] Mr. House's name was not on the final candidates' list nor on the ballot.

[5] Mr. House now applies to contest the result of the election pursuant to section 31 of the Act.

[6] Another candidate, William House, is also challenging the election for different reasons. I am issuing judgment with respect to his application concurrently with this judgment: *House v Paul First Nation*, 2024 FC 283 [*William House*].

II. Preliminary Issue: Service on all Candidates

[7] Paul First Nation brings a preliminary objection. It says that Mr. House failed to serve his notice of application on the candidates who were not elected, contrary to section 34 of the Act. He only named as respondents, and served, the candidates who were elected.

[8] For the reasons given in my judgment in the *William House* matter, at paragraphs 7 to 14, I find that Mr. House's failure to comply with section 34 does not invalidate his application. Paul First Nation's motion is accordingly dismissed.

III. Analysis

[9] I am dismissing Mr. House's application. Although I find that the Electoral Officer contravened the Act and Regulations, there is little evidence of the impact of this contravention on the result of the election. Moreover, given Mr. House's failure to inquire into the issue in a timely manner, I am exercising my discretion to dismiss his application.

[10] The statutory framework for deciding contested elections under the Act is reviewed in *William House*, at paragraphs 16 to 20. It involves three steps: (1) whether there was a contravention of the Act or Regulations; (2) whether the contravention affected the result of the election; and (3) whether the Court should exercise its discretion to set aside the election.

A. *Contravention of the Act*

[11] I find that the omission of Mr. House's name from the ballot was a contravention of the Act, because he had complied with the requirements of the Regulations to perfect his candidacy.

[12] The evidence shows that Mr. House attended at TD Bank on September 29, 2022 and deposited \$250 in cash in One Feather's bank account at 4:51 p.m. In my view, this constituted "cash, certified cheque, money order or electronic transfer payable to the Electoral Officer" within the meaning of paragraph 9(1)(b) of the Regulations. The Electoral Officer was not present in the community to accept cash payments. Instead, he arranged for Paul First Nation employees to provide One Feather's bank account information to candidates. In my view, transferring money to this account complied with the Regulations.

[13] While Paul First Nation questioned whether the Electoral Officer actually received the money, the cross-examination of Ms. Shalanna Rain shows that he did. She said that the Electoral Officer received Mr. House's candidacy fee after 4 p.m. on September 29, 2022.

[14] I am of the view that Mr. House complied with the Regulations by making his payment before 6 p.m., the deadline indicated in the Regulations. The Electoral Officer did not have the power to change that deadline by indicating a different time in various notices. The fact that other candidates complied with the 4 p.m. deadline is immaterial.

[15] As a result, Mr. House complied with all the requirements to become a candidate. His name should have been on the ballot. Because it was not, there was a contravention of the Act.

B. *Effect on Outcome*

[16] It is difficult to ascertain the impact, if any, of this contravention on the results of the election. One must bear in mind more than 30 candidates were vying for five councillor positions. The last successful candidate had 116 votes; many candidates obtained between 50 and 110 votes.

[17] The “magic number” test is often used in election cases to determine if the outcome was affected by an irregularity. In simple terms, if the number of tainted votes is equal or greater to the margin of victory, the result is affected: *Opitz v Wrzesnewskyj*, 2012 SCC 55 at paragraph 71, [2012] 3 SCR 76.

[18] However, the magic number test is more difficult to apply in situations where a candidate’s name was wrongfully omitted from the ballot, because there is no way of knowing how many votes that candidate would have obtained and, more fundamentally, because the number of votes tainted by the irregularity cannot be ascertained. Moreover, the assumption underlying the magic number test, namely, that the tainted votes would be in favour of the runner-up, is less likely where the election is for multiple positions and the vote is spread among a large number of candidates: *Pastion v Dene Tha’ First Nation*, 2018 FC 648 at paragraph 53, [2018] 4 FCR 467.

[19] Mr. House argues that his absence from the ballot deprived him of the possibility of voting for himself, with the result that another candidate would have lost one vote. Other electors could also have voted for him instead of another candidate. As the magic number in this case is one, he suggests that it would follow that the outcome is affected.

[20] I am unable to agree with this submission. While it is highly probable that Mr. House would have voted for himself, we do not know from which candidate this vote would have been subtracted, whether this would have resulted in a tie or whether it would have otherwise affected the results. There is no way of knowing how many other votes he would have received.

[21] It is also misleading to say that the magic number in this case is one. The elected candidates obtained 171, 164, 147, 117 and 116 votes, respectively. Even if Mr. House's presence on the ballot had resulted in fewer votes for each of them, the first three candidates won by significant margins and it is highly speculative to assert that the result of their election would have been affected.

[22] In theory, the election of the candidates who obtained 117 and 116 votes can more easily be affected, because the runner-up obtained 115 votes. However, any votes that Mr. House would have obtained had his name been on the ballot could have been subtracted from those of any of the 36 other candidates. Therefore, there is only a highly remote possibility that the order of these three candidates would have been different.

[23] In the specific circumstances of this case, the evidence is insufficient to conclude that the results of the election are affected.

C. *Remedy*

[24] In any event, I would exercise my discretion not to set aside the election, because Mr. House did not act in a timely manner to rectify his omission from the list of candidates.

[25] On cross-examination, Mr. House alluded to the fact that he was part of a team of candidates. It appears that he heavily relied on the candidates in his team with respect to compliance with the requirements to become a candidate. The team also benefited from the legal advice of Mr. House's current counsel.

[26] While Mr. House initially stated that he learned of the omission of his name from the ballot only on election day, he admitted in cross-examination that he was informed of his absence from the list of candidates at an earlier time. He also admitted that two of his sisters tried to raise this issue with the Electoral Officer, but that they received no answer. He stated that he did not take measures to rectify the situation because he assumed that the Electoral Officer would realize that he had made a mistake.

[27] Moreover, the evidence reveals that the Electoral Officer allowed certain candidates to provide their declaration of acceptance or their candidacy fee after the deadline of 6 p.m. on September 29, 2022. The next day, the Electoral Officer issued a purportedly final list of candidates showing 31 candidates for the position of councillor. On October 3, 2022, however,

he issued a revised list showing 36 candidates. According to Shalanna Rain's testimony in cross-examination, the list was revised to include candidates who had contacted the Electoral Officer to perfect their nomination after the deadline.

[28] As the Electoral Officer did not provide an affidavit, I have no evidence explaining why he did not include Mr. House's name on the list of candidates, even though he included additional candidates after the deadline had passed. Nevertheless, this tends to show that the Electoral Officer was ready to allow candidates to correct deficiencies in their candidacy documents.

[29] In my view, Mr. House did not act as a diligent candidate, in failing to verify whether his name was on the list of candidates and to take immediate steps to correct the situation. On cross-examination, he asserted that others learned of the situation and took steps on his behalf. However, his evidence remains vague and he did not file affidavits from these persons. Mr. House's lack of diligence weighs heavily against overturning the results of the election. Quite simply, a candidate who becomes aware that their name was omitted from the candidates list cannot wait until after the election to raise the issue.

IV. Disposition

[30] Even though omitting Mr. House's name from the candidates list and the ballot was a breach of the Act, I am exercising my discretion not to order any remedy because Mr. House failed to take steps to correct the omission as soon as he became aware of it. Accordingly, the application will be dismissed.

[31] At the hearing, the respondents stated that they were seeking costs in the amount of \$1000. I am of the view that this amount is reasonable in the circumstances.

JUDGMENT in T-2528-22

THIS COURT'S JUDGMENT is that:

1. Paul First Nation's motion to strike the present application is dismissed.
2. The application is dismissed.
3. The applicant is condemned to pay \$1000 in costs to the respondents, inclusive of disbursement and taxes.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2528-22

STYLE OF CAUSE: RONALD LARRY HOUSE v DREW SHAW
(ELECTORAL OFFICER) AND PAUL FIRST
NATION, CASEY BIRD, FARON BULL, DWIGHT
PAUL, DARREN S RAIN, DELORES RAIN AND
JASON SAULTEAUX

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: JANUARY 10, 2024

JUDGMENT AND REASONS: GRAMMOND J.

DATED: FEBRUARY 21, 2024

APPEARANCES:

Dipesh C. Mistry FOR THE APPLICANT

Will Willier FOR THE RESPONDENTS
Darin Gette

SOLICITORS OF RECORD:

Dipesh C. Mistry FOR THE APPLICANT
Barrister and Solicitor
Edmonton, Alberta

Willier and Company FOR THE RESPONDENTS
Barristers and Solicitors
Edmonton, Alberta