Federal Court  Cour fédérale

Date: 20250115

Docket: T-2557-23

Citation: 2025 FC 82

Ottawa, Ontario, January 15, 2025

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

LANA RACETTE
AND CLARENCE SUMNER

Applicants/
Responding Party

and

KURVIS ANDERSON
AND ELSIE THOMPSON

Respondents/
Moving Party

JUDGMENT AND REASONS
(Delivered orally from the Bench on December 16, 2024.
Edited for syntax and grammar.)

[1] The Respondents/Moving Party have brought a motion to strike the Applicants' originating application and supporting affidavits. The Respondents assert that the Applicants' application fails to comply with sections 31 and 34 of the *First Nations Elections Act*, SC 2014, c 5 [*FNEA*]. The Applicants seek to judicially review the Pinaymootang First Nation ("Pinaymootang") General Election for Chief and Council held on October 31, 2023 ("2023

Election"), due to allegations of vote buying, contrary to subsection 16(f) of the *FNEA*, (the "Application").

I. Background

[2] Pinaymootang is a registered band under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] and located in central Manitoba. Its elections are governed by the *FNEA*.

[3] The Applicants are Lana Racette and Clarence Sumner. It is unclear from the record, however, it appears that both Applicants were candidates in the 2023 Election that is the subject of the Application. The Respondents are Kurvis Anderson and his cousin, Elsie Thompson. It is unclear from the record, but it is my understanding that Mr. Anderson is Chief of Pinaymootang. It is also my understanding, but again it is unclear from the record, that Ms. Thompson is not a councillor of Pinaymootang nor was she a candidate in the 2023 Election.

[4] The Applicants filed their originating application to challenge the 2023 Election on November 30, 2023. They allege the Respondent Ms. Thompson, acting for Mr. Anderson, offered money, goods, or other valuable consideration to persons for the purpose of influencing them to vote in a manner that likely affected the outcome of the 2023 Election, contrary to subsection 16(f) of the *FNEA*.

[5] The electoral officer for the 2023 Election was Mr. Burke Ratte ("Electoral Officer"). There is no evidence that the Electoral Officer was properly served with a copy of the Application as there is no affidavit of service in the record for these proceedings.

[6] Mr. Ratte did not file a notice of appearance and, in response to inquires made by counsel for the Respondents in February 2024, he advised that he would not provide information

regarding the alleged tainted ballots from the 2023 Election. On March 4, 2024, counsel for the Respondents advised Applicants' counsel of their intention to strike the Application, in the event the Applicants do not withdraw it by March 8, 2024, as the Applicants had not complied with section 34 of the *FNEA*. Applicants' counsel responded on March 8, 2024, and advised their clients would not be withdrawing the Application.

[7] On April 4, 2024, the Applicants filed their Rule 309 record in the Application, including two duly served Rule 306 affidavits from alleged witnesses Sharon Hall (sworn November 29, 2023) and Valentina Sumner (sworn November 27, 2023) (*Federal Courts Rules*, SOR 98-106 [*Rules*]).

[8] On April 23, 2024, the Respondents filed their responding submissions to the Application, thereby perfecting the record for the hearing. At the same time, the Respondents filed their motion to strike the Application and the affidavits of Sharon Hall and Valentina Sumner in support of the Application ("Strike Motion"). The Strike Motion challenges the Application and supporting affidavits of Sharon Hall and Valentina Sumner on the grounds that:

a. The Applicants failed to establish that either of the co-Applicants are qualified to bring the Application, pursuant to section 31 of the *FNEA*;
b. The Applicants failed to serve the Application on the Electoral Officer and all candidates who participated in the contested election, pursuant to section 34 of the *FNEA*;
c. The affidavit of Sharon Hall fails to comply with Rule 80(2.1) of the *Rules*; and
d. The affidavit of Valentina Sumner fails to comply with Rules 80(1) and 81(1) of the *Rules*.

[9] On May 2, 2024, counsel for the Applicant advised both this Court and the Respondents via letter that they "anticipated filing the Applicant's Responding Motion Record on or before May 24, 2024."

[10] This hearing was scheduled by Order of this Court on July 11, 2024.

[11] On November 27, 2024, a Registry Officer contacted counsel inquiring as to the status of the Applicants' responding motion record in light of the May 24, 2024 letter.

[12] On December 2, 2024, I issued an oral direction that the Applicants were to file their responding motion record by December 6, 2024, and include submissions for a request for an extension of time. The Respondents were granted leave to file submissions responsive to the extension request by December 10, 2024.

[13] On December 5, 2024, the Applicants filed their responding motion record, which included four new affidavits from Clarence Sumner (affirmed May 9, 2024); Janice Finnson (affirmed May 9, 2024); Tony Thompson (affirmed September 13, 2024); and Jayden Sumner (affirmed October 3, 2024) ("Late Affidavits"). The Applicants did not seek leave of the Court to file new evidence by way of Rule 312.

[14] In the Respondents' reply submissions filed December 10, 2024, they also included two new affidavits, from Blair Thompson and John Sanderson. The Respondents did not seek leave of the Court to file new evidence by way of Rule 312.

[15] The issues on the Strike Motion are dipositive of the Application, therefore, I will address that matter first.

A. *First Nations Elections Act and Regulations*

[16] The established framework for challenging elections is set out at sections 30–35 of the *FNEA*:

Contested Elections	***Contestation de l'élection***
Means of contestation	**Mode de 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.	**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 of election	**Contestation**
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.	**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.
…	[…]
Service of application	**Signification**
34 An application must be served by the applicant on the electoral officer and all the candidates who participated in the contested election.	**34** Le requérant signifie sa requête au président d'élection et aux candidats ayant participé à l'élection contestée.
Court may set aside election	**Décision du tribunal**
35 (1) After hearing the application, the court may, if the ground referred to in	**35 (1)** Au terme de l'audition, le tribunal peut, si le motif

section 31 is established, set aside the contested election.	visé à l'article 31 est établi, invalider l'élection contestée.
Duties of court clerk	**Transmission de la décision**
(2) If the court sets aside an election, the clerk of the court must send a copy of the decision to the Minister.	**(2)** Lorsque le tribunal invalide une élection, le greffier expédie un exemplaire de la décision au ministre.

[17] Also of importance is section 25 of the *First Nations Elections Regulations*, SOR/2015-86 [*FNER*]:

Disposal of Ballots and Election Documents	***Destruction des bulletins de vote et des documents électoraux***
Retention of documents	**Période de conservation**
25 (1) The electoral officer must deposit all ballots in envelopes, seal them and ensure their safekeeping along with other election documents, for a period of 120 days following the election.	**25 (1)** Le président d'élection insère les bulletins de vote dans des enveloppes, scelle ces enveloppes et veille à ce qu'elles soient gardées, avec les autres documents liés à l'élection, en lieu sûr pour une période de cent vingt jours après le jour de l'élection.
Destruction of documents	**Destruction**
(2) At the end of the period set out in subsection (1), the electoral officer must destroy the ballots and election documents, unless they are served, in accordance with section 34 of the Act, with an application to contest the election.	**(2)** À moins qu'une requête en contestation ne lui ait été signifiée en application de l'article 34 de la Loi, le président d'élection détruit les bulletins de vote et les documents à la fin de la période établie au paragraphe (1).

II. Issues

[18] The issues on the Strike Motion are:

A. Should the Applicants' request for an extension of time in filing their responding motion materials be granted?

B. Should the Late Affidavits be admitted as new evidence?

C. Should the Application be struck for prejudicial non-compliance with sections 31 and 34 of the *FNEA*?

D. Should the Application be struck for failing to establish a *prima facie* case?

E. Should the affidavits of Sharon Hall and Valentina Sumner be struck?

F. What is the appropriate remedy?

III. Analysis

A. *Should the Applicants' request for an extension of time in filing their responding motion materials be granted?*

[19] The Applicants argued that in the absence of a court-imposed deadline, an extension of time request is not necessary because the deadline for filing their responding motion record was 2:00 pm on Thursday, December 12, 2024, pursuant to Rule 365(1). Even if an extension of time was required, the Applicants argued it should be granted because it would serve the interests of justice to hear their arguments in adjudicating this issue.

[20] The Respondents stated that while counsel for the Applicants undertook to file their responding submissions by May 24, 2024, they do not object to the extension of time because there is no substantial prejudice to them. The Respondents do, however, object to the admission of the Late Affidavits and arguments based upon them.

[21] I agree that the Applicants did not require an extension of time to file their response to the Strike Motion. I will address the Late Affidavits and related arguments later in these reasons.

B. *Should the Late Affidavits be admitted as new evidence?*

[22] The Applicants submit that the affidavits of Clarence Sumner and Janice Finnson ought to be admitted as new evidence because they purport to bring the Application into compliance with sections 31 and 34 of the *FNEA*, akin to correcting a prior oversight in earlier affidavits (*Larson-Radok v Canada (Minister of National Revenue)*, 2000 CanLII 15241 (FC) at para 7).

[23] The Applicants argued that the affidavits of Tony Thompson and Jayden Sumner ought to be admitted as new evidence because they corroborate evidence previously tendered, will assist the Court in adjudicating the Strike Motion and Application, and that it is in the interest of justice that the Late Affidavits be admitted into the record.

[24] The Respondents argued that the attempt to file the Late Affidavits is expressly prohibited by Rule 84(2). They also pointed out that the Applicants did not bring a Rule 312 motion to seek leave of the Court to justify the case splitting.

[25] Rule 84(2) of the *Rules* is clear that "[a] party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court."

[26] For this Court to grant leave, a party must make an application pursuant to Rule 312 and must satisfy two preliminary requirements that: (i) the evidence is admissible on the application for judicial review; and (ii) the evidence must be relevant to an issue that is properly before the reviewing court (*Forest Ethics Advocacy Assn v National Energy Board*, 2014 FCA 88).

[27] When a party is requesting leave to file additional affidavits, the Court will consider whether the evidence to be adduced will serve the interests of justice, assist the Court, not cause substantial or serious prejudice to the other side, and was not available prior to the cross-examination of the opponent's affidavits (*Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 [*Atlantic Engraving*]).

[28] It is important to note that Rule 312 is not intended to allow a party to split its case. A party must put its best case forward at the first opportunity (*Atlantic Engraving*). The process set out at Rule 312 is the only way to request the inclusion of additional evidence in the record. This Court has cautioned against case splitting and has highlighted that the introduction of new evidence that could have and should have been included in the initial application ought not be permitted as this is improper case splitting (*Merck-Frosst v Canada (Health)*, 2009 FC 914 [*Merck-Frosst*] at para 25).

[29] The Applicants did not seek leave of this Court, either through a Rule 312 application or any other method, to file the four new Late Affidavits included in their responding materials to the Strike Motion. This is a direct contradiction of the Rules and accordingly the affidavits are inadmissible on this ground. However, for the sake of thoroughness, I will address each affidavit individually.

(1) Affidavit of Clarence Sumner

[30] Clarence Sumner, one of the named Applicants in this matter, did not file evidence to support the Application in advance of perfecting it. In response to the Strike Motion, Mr. Sumner swore an affidavit on May 9, 2024. This affidavit was not shared with the Respondents or the Court until it was served on December 5, 2024.

[31] In his affidavit, Mr. Sumner attempts to repair two fundamental defects within the Application. First, he deposed that he is an elector of Pinaymootang and therefore entitled to contest the 2023 Election. He tendered a similar hearsay statement on Ms. Racette's behalf. It appears Ms. Racette has not had the opportunity to swear her own affidavit since these proceedings began in November 2023.

[32] The remainder of Mr. Sumner's affidavit purports to remedy the significant error that the Application had not been served on the other candidates in the 2023 Election or the Electoral Officer. There are no exhibits attached to his affidavit or proof of service filed to corroborate any of the attested service events.

[33] I find that the affidavit of Clarence Sumner (sworn May 9, 2024) is inadmissible.

[34] First, the Applicants did not bring a Rule 312 application nor did they seek any other instruction from this Court regarding the addition of new evidence. Second, the entirety of Mr. Sumner's affidavit attempts to remedy the Application's non-compliance with sections 31 and 34 of the *FNEA*. This is wholly improper.

[35] I agree with the Respondents that the Applicants are attempting to split their case. As this Court has held, "if it [the evidence] could have been anticipated earlier… then it is being offered in an attempt to strengthen one's position… Such evidence is not proper… as the party proposing to file it is splitting his case" (*Merck-Frosst* at para 25).

[36] Further, the Applicants have not provided submissions as to why Mr. Sumner could not have included this vital information prior to perfecting the Application. In my view, there was ample opportunity to alert the Respondents and the Court to the discovery, or creation, of the

new evidence. It does not appear there was any attempt to address this issue in advance of the hearing of the Strike Motion and Application. I agree with the Respondents, that but for my earlier direction, it appears that the Applicants were employing ambush tactics.

[37] Mr. Sumner's evidence is extremely prejudicial to the Respondents. The Respondents have had no opportunity to cross-examine this evidence and have limited time to gather rebuttal evidence. Therefore, it will not be admitted.

(2) Affidavit of Janice Finnson

[38] The affidavit of Ms. Janice Finnson (affirmed May 9, 2024), legal assistant to the solicitors of record for the Applicants, purports to be proof of attempted service of the Application on the Electoral Officer through his lawyer. Ms. Finnson's affidavit was also not provided to the Respondents or the Court until December 5, 2024.

[39] I note that Ms. Finnson's email to counsel for the Electoral Officer is dated February 26, 2024; 89 days after the Application was filed and two weeks after the Respondents filed their Rule 307 evidence. Further, Ms. Finnson did not depose to have personally served the Electoral Officer nor was proof of service filed pursuant to Rule 304(3). As an application is an originating document, the Applicants were required to personally serve the Electoral Officer. Personal service cannot be effected by email to a third party (Rule 127(1); *Atas v Canada (Attorney General)*, 2024 FC 241 at para 24); not withstanding that, there is an email from the Electoral Officer's counsel acknowledging receipt of the email and Notice of Application. In other words, Ms. Finnson's evidence does not demonstrate proof of service as set out in section 34 of the *FNEA*; accordingly, the Electoral Officer was not properly served with the Application.

[40] I will also note that prior to December 5, 2024, the Applicants did not disclose the attempts to serve the Electoral Officer to either the Respondents or the Court. Counsel for the Applicants was fully aware of the Respondents' concerns regarding the importance of securing the documents in the possession, power, and control of the Electoral Officer and their previous attempts to obtain the election materials. This is important evidence to assist in the determination of the issues in the Application. At no point during any communication between the parties did counsel for the Applicants notify counsel for the Respondents or the Court that they had attempted service on the Electoral Officer.

[41] Further, I agree with the Respondents that the Applicants' failure to properly serve the Electoral Officer and comply with the *FNEA* has likely resulted in the destruction of essential evidence as is required pursuant to section 25 of the *FNER*; in any event, that evidence is not part of the record for the Application before the Court.

[42] The Applicants' procedural error is fatal. By failing to serve the Electoral Officer, the Applicants have fundamentally inhibited this Court's ability to adjudicate this matter; essential evidence is not before the Court. The Applicants bear the burden of having all necessary evidence before the Court.

[43] Pursuant to section 31 of the *FNEA*, applicants bear the burden of establishing a contravention of a provision of the *Act* or *Regulations* and that the alleged contravention is "likely to have effected the result of the election." Further, to set aside the results of an election, section 35 of the *FNEA* requires that the Applicants provide evidence that could convince this Court to exercise its discretion and set aside the results of an election. In my opinion, the evidence from the Electoral Officer concerning the 2023 Election is necessary for this Court to

adjudicate the issues in this Application. The failure to include this evidence in support of the Application is fatal.

[44] I find that the affidavit of Ms. Finnson is inadmissible.

(3) Affidavits of Tony Thompson and Jayden Sumner

[45] The affidavits of Tony Thompson and Jayden Sumner purport to repair or bolster the Applicants' case-in-chief in direct violation of Rule 84. The Applicants did not seek leave of this Court to adduce this new evidence. Additionally, the affidavits of Tony Thompson and Jayden Sumner are inadmissible because:

a. Their evidence is entirely corroborative and meant rebut evidence raised in cross-examination of the duly sworn affidavits of Ms. Sharon Hall and Ms. Valentina Sumner;
b. Their evidence is highly prejudicial as it impugns the Respondents' character while coming late enough in the proceeding to avoid being tested by cross-examination or rebutted by further responsive affidavits;
c. Their evidence related to the 2023 Election could have been obtained earlier and filed as a proper Rule 306 affidavit. The Applicants' failure to lead an adequate case-in-chief has led them to improperly attempt to backfill evidence on the eve of the hearing; and
d. The Applicants led no evidence and made no submissions on how they could not have located and led this evidence earlier than when it was created or discovered in September and October 2024). The failure to address this criterion is a sufficient basis to deny the evidence (*Holy Alpha and Omega Church of Toronto v Canada (Attorney General)*, 2009 FCA 101 at para 10).

[46] Accordingly, I find that the affidavits of Tony Thompson and Jayden Sumner are inadmissible.

(4) Affidavits of Blair Thompson and John Sanderson

[47] In their Strike Motion reply submissions, the Respondents included two new affidavits, from Blair Thompson and John Sanderson. They also did not seek to introduce new evidence by way of a Rule 312 application; therefore, these affidavits also will not be admitted. However, it is important to acknowledge what those affidavits attest to.

[48] Both Mr. Thompson and Mr. Sanderson were candidates in the 2023 Election. In Mr. Sumner's inadmissible affidavit, he deposed to have served both Mr. Thompson and Mr. Sanderson with copies of the Notice of Application, therefore bringing the Application into compliance with section 34 of the *FNEA*. However, both Mr. Thompson and Mr. Sanderson state that they were unaware of the Application until very recently, and were not served with a copy by Mr. Sumner nor did they receive by other means a copy of the Application.

[49] The affidavits of Mr. Thompson and Mr. Sanderson are concerning and bring into question the truthfulness of Mr. Sumner's evidence.

[50] I find the affidavits of Blair Thompson and John Sanderson to be inadmissible.

C. *Should the Election Application be struck for prejudicial non-compliance with sections 31 and 34 of the FNEA?*

[51] In my opinion, the underlying Application has two fatal flaws that strike the root of this Court's power to entertain the Application. Further, as I have deemed Mr. Sumner's affidavit to be inadmissible, there is no evidence of compliance with either sections 31 or 34 of the *FNEA*.

[52] First, the Applicants failed to file or lead any evidence to establish that they are electors of Pinaymootang, pursuant to section 31 of the *FNEA*. As noted above, the attempt to correct this error through affidavits filed in support of the motion to strike is an improper splitting of the case. I will also note that in oral argument the Applicants pointed to a portion of the cross-examination of the affiant Ms. Sumner, to demonstrate that the Respondents know that that Mr. Sumner is a proper elector of Pinaymootang. I agree with the submissions of the Respondents. This is not clear on the face of the Application, and the parties and the Court should not have to piece together the essential elements of the claim in this way. Further, it is not clear to me that Ms. Sumner has the authority or requisite knowledge to speak to if Mr. Sumner is an elector of Pinaymootang.

[53] Second, the Applicants failed to personally serve the Electoral Officer and other candidates with the Notice of Application, as required, pursuant to section 34 of the *FNEA*.

[54] Section 25 of the *FNER*, sets out that the Electoral Officer must destroy election documents after 120 days following the election; except where they are properly served under section 34 of the *FNEA*. The failure to serve the Electoral Officer is a critical breach that fundamentally impairs this Court's ability to fully and fairly hear the Application. The Electoral Officer's evidence, and in particular *FNEA*-related documents, are essential to establish both a potential breach of the *FNEA* and to gauge the impact of that breach on the election results (*FNEA*, section 31; *Wuttunee v Whitford*, 2023 FCA 18 at para 23).

[55] Additionally, there is no evidence in the record as to what the actual results of the 2023 Election were. There is no evidence as to how many candidates ran for office, who ran for which position, the total eligible voters, the total amount of votes cast, how many votes were cast by

mail-in ballot, or who was successful. Without this important evidence concerning the actual election, which the Applicants were responsible for obtaining, there is no possible way to make a decision concerning the 2023 Election, the allegations of improper vote-buying, and how that tainted the overarching results of the election.

[56] This issue is dispositive of the Strike Motion. Accordingly, I will not address the issues regarding a *prima facie* case or the affidavits of Ms. Sharon Hall and Ms. Valentina Sumner.

D. *What is the appropriate remedy?*

[57] I am granting the Strike Motion and dismissing the underlying Application. For the reasons set out, in my view, the Application is fundamentally flawed and bereft of any chance of success as a result.

[58] Further, I am awarding costs of this motion in the amount of $2,500 to the Respondents payable by the Applicants forthwith.

[59] In striking the Application I want to be clear: the allegations of vote-buying are serious and concerning to me. However, as set out, in my opinion, necessary evidence that the Court would need to adjudicate this issue has been lost and the Application is bereft of any chance of success as a result.

[60] Generally on a judicial review, affidavit evidence is accepted for the truth of its contents absent contradictory evidence. Here on cross-examination, some issues with the veracity of the affidavits of Ms. Hall and Ms. Sumner have been raised. In addition, in response to the affidavit of Mr. Clarence Sumner, where he purports to have served all Pinaymootang 2023 Election

candidates with the Application, the Respondents have tendered two contradictory affidavits. I am troubled by this.

[61] Further, in the cross-examination of Ms. Hall, it became clear that she relied on assistance from Indigenous language speakers to aid her understanding of what was set out in the affidavit. However, there is no indication on the face of the affidavit that such services were provided, who provided those services, nor is there a jurat from the interpreter, as is required pursuant to Rule 80(2.1). The Applicants say this is only required where the affiant does not have capacity in either official language. I do not agree. It is clear that while Ms. Hall speaks some English, she is not fluent and needs the assistance of a translator. The affidavit does not comply with Rule 80(2.1).

[62] Finally, I will note that at every opportunity, the strategy of the Applicants has demonstrated a lack of collegiality and a willingness to proceed by way of ambush. There is no clear explanation for the significant delays in discovery or disclosure of evidence that the Applicants intended to rely on to support their Application. There is no explanation for why they did not take steps to ensure that necessary evidence from the Electoral Officer was preserved. With respect, they have the burden to provide the necessary evidence to prove all elements of their case. The failure to properly serve the Electoral Office means that this necessary evidence has been lost. Their actions have made it impossible for the Respondents to know the case that they must meet, and have deprived the Respondents of an opportunity to cross-examine affidavit evidence filed at the eleventh-hour.

JUDGMENT in T-2557-23

THIS COURT'S JUDGMENT is that:

1. The affidavits of Clarence Sumner, Janice Finnson, Tony Thompson, Jayden Sumner, Blair Thompson, and John Sanderson are inadmissible.

2. The Respondents' motion to strike the Application is granted.

3. The Respondents are awarded a lump sum of $2,500 in costs for this motion payable by the Applicants forthwith.

"Julie Blackhawk"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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