Federal Court of Appeal | Cour d'appel fédérale

Date: 20170606

Docket: A-155-16

Citation: 2017 FCA 123

CORAM: **WEBB J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

GARNET MEECHES

Appellant

and

GEORGE ASSINIBOINE, MARVIN DANIELS, BARB ESAU, ROBERT FRANCIS, GEORGE MEECHES, LIZ MERRICK, HAROLD MYERION, ANNETTE PETERS, DENNIS PETERS, MARSHALL PRINCE, THERESA SANDERSON, CHRIS YELLOWQUILL and LONG PLAIN INDIAN BAND NO. 287 also known as LONG PLAIN FIRST NATION

Respondents

Heard at Winnipeg, Manitoba, on February 16, 2017.

Judgment delivered at Ottawa, Ontario, on June 6, 2017.

REASONS FOR JUDGMENT BY: SCOTT J.A.

CONCURRED IN BY: WEBB J.A.
GLEASON J.A.

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Respondents

REASONS FOR JUDGMENT

SCOTT J.A.

[1] In a judgment reported at 2016 FC 427, McDonald J. (the Judge) of the Federal Court dismissed Mr. Garnet Meeches' (the appellant) application for judicial review of a decision rendered by the Long Plain First Nation Election Appeal Committee (the EAC) on May 12,

2015, (the Decision) regarding the results of an election held by the Long Plain First Nation (Long Plain) on April 9, 2015. I would dismiss this appeal, but, as is more fully discussed below, arrive at this conclusion for reasons different from those of the Judge.

I. Background

A. *The Parties*

[2] Long Plain is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, governed by a council composed of a Chief and four councillors (the Council). Council members are elected for a three-year term pursuant to the *Long Plain First Nation Election Act* (the Act), which is the Long Plain's custom election code.

[3] The last election was held on April 9, 2015. The respondents Liz Merrick, Barb Esau, Marvin Daniels, and George Meeches were elected as councillors. The appellant was an unsuccessful candidate for the position of councillor.

[4] Long Plain and other unsuccessful candidates in the election, Dennis Peters, Robert Francis, George Assiniboine, Theresa Sanderson, Marshall Prince, Annette Peters, Harold Myerion, and Chris Yellowquill are also respondents in this appeal.

B. *The Act*

[5] Article 3.1 of the Act specifies eligibility criteria for those who hold office with the tribal government. Those requirements are summarized as follows:

a) The candidate has not been and is not disqualified by virtue of the Act;

b) The candidate has not been found guilty of an indictable offence in the previous eight years from the date of the conviction within Canada or the United States;

c) The candidate has successfully passed a drug test;

d) The candidate has a minimum grade 12 education level and/or "at least a minimum of five years' experience garnered from community involvement, including a letter of reference from another tribal member"; and

e) The candidate has paid a non-refundable fee of $250.

[6] Under Articles 9.5 and 9.6 of the Act, not less than 14 days before a nomination meeting, each potential candidate must provide to the electoral officer a confirmation that he or she has passed a drug test, a criminal record check, and a child abuse registry check in accordance with Article 3.1(c.):

> 9.5 The candidate shall provide a completed criminal record check and a child abuse registry check and shall have completed a drug test in accordance with the provisions of Article 3.1(c.) of this Election Act.
>
> 9.6 The Electoral Officer or Deputy Electoral Officer within two (2) days of the nomination meeting shall confirm the nomination upon issuing a 'Nomination Paper Receipt' pursuant to Schedule "A – Part Two" of this Election Act.
>
> a. Criminal Record Checks that have not expired, Child Abuse Registry Checks, and drug testing results must be submitted to the Electoral Officer 14 days prior to nominations. NO EXCEPTIONS.

[7] Article 12 of the Act provides for the determination of nomination appeals whereas Article 17 defines the procedures related to election appeals. These articles are reproduced in the appendix of this decision.

C. *The 2015 Election*

[8] The facts pertaining to this case all occurred in 2015. On February 15, a notice was issued by an electoral officer of Long Plain inviting members to nominate candidates at a nomination meeting to be held on March 19 for the forthcoming April 9 election. On March 5, 14 days prior to the meeting, Mr. Yellowquill submitted his nomination application. However, it was rejected by the electoral officer on March 13 for failure to provide evidence of the necessary background checks and to pay the $250 application fee.

[9] On March 13, a letter was sent on behalf of the electoral officer confirming his ruling that Mr. Yellowquill could not participate in the nomination meeting because he had not paid the required application fee in time. The letter did not, however, address Mr. Yellowquill's omission to fulfill all the necessary background checks (Appeal Book, Tab 4.f.viii at pages 88-89). At the nomination meeting held on March 19, Mr. Yellowquill provided the electoral officer with the following: i) the application fee; ii) a confirmation that he had successfully passed a drug test; iii) a release of results of his criminal record check which indicated that his name potentially matched a registered criminal record and thus required further fingerprint analysis; and iv) a letter supported by a receipt indicating that he had applied for a child abuse registry check.

[10] Mr. Yellowquill appealed the electoral officer's March 13 decision to the EAC on March 20, on the basis that the electoral officer had erred in disqualifying his nomination for failing to pay the application fee in time.

[11] In between the ruling on that appeal and the EAC's decision on that matter, the electoral officer issued on March 22, the receipt for the nomination papers providing Mr. Yellowquill a provisional confirmation of eligibility until a cleared criminal record check and a child abuse registry check were received and approved. As a result of this decision, Mr. Yellowquill was able to run as a candidate for the office of Councillor but could not take up a position on Council unless he satisfied the Act's eligibility requirements under Article 3.1.

[12] On March 23, the appellant was made aware of the EAC's decision to allow Mr. Yellowquill, in his appeal against the electoral officer's March 13 decision, to run in the election despite the fact that he had not provided the $250 application fee to the electoral officer in time. The EAC's March 23 decision only dealt with Mr. Yellowquill's failure to pay the $250 application fee on time, it did not, however, rule on the issue of his incomplete criminal records check or the absence of the child abuse registry check. The fulfillment of these two eligibility requirements remains, to this day, an unresolved issue.

[13] Mr. Yellowquill was not elected. He obtained 90 votes. The appellant ranked fifth in the election. Only one vote separated him from the fourth-ranked elected councillor – Mr. George Meeches.

D. *The Second Decision of the EAC*

[14] Following his defeat in the election, the appellant appealed the results of the April 9 election to the EAC, pursuant to Article 17 of the Act, arguing that the results of the election were invalid because Mr. Yellowquill, an ineligible candidate in the opinion of the appellant, had

been allowed to run as a candidate in the election, which contravened the Act's election practices.

[15] On May 12, the EAC ruled that the prescribed timelines were too narrow and created an unfair disadvantage for tribal members wishing to run for Council because the Act required the issuance of a notice 32 days prior to the nomination meeting and because a nominee had to fulfill the prescribed background checks 14 days before the nomination meeting. It determined that the Act essentially created an obligation for nominees to complete the required background checks and verifications, prior to the nomination process.

[16] Turning to Mr. Yellowquill's situation, the EAC came to the conclusion that, by accepting a receipt for the record checks as proof that criminal record verifications were underway, the electoral officer's decision preserved a fair electoral participation process. Regardless of the eligibility issue, the EAC found that the voting process and the outcome of the election were not affected, given Mr. Yellowquill's defeat. It also stated that if a candidate had been elected without fulfilling the eligibility requirements, this person would have been removed.

[17] For those reasons, the EAC confirmed the election results and affirmed the electoral officer's decision regarding the eligibility of Mr. Yellowquill, a matter which in its view had been already settled by the March 23 decision. It also recommended that the Act be amended to provide for child abuse registry checks within a timeframe to which nominees could adhere.

II. The Judgment under Appeal

[18] In dismissing the appellant's application for judicial review, the Judge applied the standard of reasonableness and held that the EAC's Decision rendered on May 12 was reasonable.

[19] The Judge rejected the respondents' argument that the application for judicial review dealt primarily with Mr. Yellowquill's eligibility, which was settled by the EAC's decision on March 23 and was thus filed beyond the 30-day filing deadline set out in subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the *Federal Courts Act*). The Judge found that candidates' eligibility and approval of candidates by the electoral officer necessarily affect the outcome of an election and fell within the concept of electoral practices as contemplated by the Act. According to her, an appeal pursuant to Article 17 of the Act did not exclude candidates' eligibility as a ground of appeal, especially as subsequent facts about a candidate's ineligibility could arise after the nomination stage of the election process. Given that only Mr. Yellowquill had standing to bring a nomination appeal under Article 12 of the Act, the Judge concluded that this matter was appealable by the appellant under Article 17 of the Act, as it fell under the umbrella of election practices that could contravene the Act.

[20] As for the reasonableness of the EAC's May 12 Decision, the Judge found that any ambiguity in the Act should be interpreted purposively to foster enfranchisement and fair participation in the election process. The Judge determined that the EAC rightly found that prescribed timelines in the Act created unfair constraints for unseasoned candidates, as opposed

to previously elected Council members. The Judge concluded that the EAC did not err when it found that the electoral officer had the discretion to deviate from the strict requirements related to the nominating procedures in the Act for the purpose of enabling Mr. Yellowquill's candidacy.

III. Issues

[21] While the parties have raised several issues, it is only necessary that I consider one, namely whether the appellant's application for judicial review was timely. For the reasons that follow, I am of the view that the Judge erred in finding the application timely. The application thus ought to have been dismissed for untimeliness and not for the reasons given by the Judge. This conclusion is, on its own, sufficient to dispose of the present appeal and there is therefore no need to address the reasonableness of the EAC's May 12 Decision.

IV. Standard of Review

[22] As the Judge's decision regarding the timeliness of the appellant's application for judicial review is a question of mixed fact and law, it is to be reviewed on a standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 473 N.R. 283 at paragraphs 37-39; *Long Plain v. Canada*, 2015 FCA 177, 388 D.L.R. (4th) 209 at paragraph 88; *Apotex Inc. v. Canada*, 2012 FCA 322, 443 N.R. 291 at paragraph 9).

V. Position of the Parties

A. *The Appellant*

[23] In his application for judicial review of the EAC's May 12 Decision, the appellant's arguments incidentally challenge the March 22 and March 23 decisions permitting Mr. Yellowquill to run for a council position in the April 9 election on the basis that these were election practices that contravened the Act. It appears from the appellant's factum that he views both the electoral officer's March 22 decision and the EAC's March 23 decision as express rulings on Mr. Yellowquill's eligibility.

[24] On the issue of whether the application for judicial review was filed within the 30-day time limit, the appellant's counsel acknowledged at the hearing that his client was aware, on March 23, that Mr. Yellowquill had not completed all the required checks. He nonetheless reiterated his position that the March 22 decision addressing the issue of eligibility was not final in nature, since it only granted a provisional status to Mr. Yellowquill without having all the required evidence to formally establish and subsequently challenge his actual eligibility. Moreover, the appellant underlined that he did not have standing to dispute the electoral officer's decision to accept Mr. Yellowquill's candidacy under Article 12 of the Act.

[25] In considering the impact of the EAC's March 23 decision on Mr. Yellowquill's eligibility to run for office, the appellant further claims that he had no reason to seek judicial review of the EAC's March 23 decision because he could not assess, at that time, whether it had any impact on the outcome of the election. It is only when the outcome of the election was

known and considered by him to be unacceptable that he assessed the material effect of the March 23 decision and appealed the results of the election before the EAC. Therefore, he claims that he filed his application for judicial review of the EAC's May 12 Decision within the statutory period.

B. *The Respondents*

[26] In the respondents' view, the matter the appellant is asking this Court to review is not the EAC's May 12 Decision regarding the election results under Article 17 of the Act, but rather the March 22 and March 23 decisions. They claim that the appellant is likely contesting Mr. Yellowquill's eligibility after the election for the sole purpose of upsetting the results.

[27] The respondents reiterated before this Court that no one sought judicial review of the electoral officer's March 22 decision, nor of the EAC's March 23 decision allowing Mr. Yellowquill to participate in the election, even though these constituted, in their view, binding and final rulings on that candidate's eligibility within the meaning of Article 12.5 of the Act. They argue, however, that both these decisions have been indirectly impugned under the appellant's appeal, as Mr. Yellowquill's eligibility lies at the core of the present challenge.

[28] The respondents also claim that the appellant was aware of these two decisions when they were rendered and that Mr. Yellowquill had yet to satisfy the Act's eligibility requirements by March 23.

[29] They argue that the appellant had thirty days from March 23 to file a notice of application for judicial review before the Federal Court to contest Mr. Yellowquill's eligibility. He was nonetheless silent on this issue, until after the election results were known, and waited until June 12 to file his notice of application and challenge Mr. Yellowquill's ability to participate in the April 9 election.

[30] Consequently, the respondents reasserted their argument presented to the Judge that the appellant brought his application for judicial review beyond the 30-day time limit prescribed by subsection 18.1(2) of the *Federal Courts Act*. They submitted that this appeal ought to be dismissed on this basis.

VI. Analysis

[31] In my view, the Judge committed a palpable and overriding error when she rejected the respondents' argument that the appellant's application for judicial review was filed outside the 30-day time limit, as prescribed in subsection 18.1(2) of the *Federal Courts Act*.

A. *The Time Limitation to File an Application for Judicial Review*

[32] Subsection 18.1(2) of the *Federal Courts Act* states that a party who wishes to challenge a final decision or order of a federal administrative tribunal which affects its interests must file a notice of application for judicial review within thirty days of having knowledge of that decision (*Roberts v. Union of Canadian Correctional Officers*, 2014 FCA 42, 461 N.R. 264 at paragraph 5; *Hudgins v. Canada (Attorney General)*, 2012 FCA 185, [2012] F.C.J. No. 877 (QL) at

paragraph 5; *Powell v. United Parcel Service*, 2010 FCA 286, [2010] F.C.J. No. 1336 (QL) at paragraph 2 [*Powell*]; *Canada (Attorney General) v. Trust Business Systems*, 2007 FCA 89, 361 N.R. 53 at paragraph 25; *Pharmascience Inc. v. Canada (Commissioner of Patents)*, 2000 CanLII 15188 (FCA), 181 F.T.R. 79 at paragraph 4; *Bullock v. Canada*, 1997 CanLII 5830 (FCA) at paragraph 8 [*Bullock*]).

[33] If a party fails to meet the mandatory filing time limit prescribed in the *Federal Courts Act*, it runs the risk of being barred from having the disputed decision judicially reviewed by the Federal Court. Allowing an application for judicial review to be filed outside the statutory period therefore constitutes a breach of the *Federal Courts Act*, unless a judge exercises his or her discretion to extend this limitation in appropriate circumstances and upon a motion to that effect. (*Nanavaty v. Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 323 at paragraph 10; *Neis v. Baksa*, 2002 FCA 230, [2002] F.C.J. No. 832 (QL) at paragraph 2).

B. *The Timeliness of the Application for Judicial Review*

[34] In this appeal, this Court must determine which decision constitutes the final decision under challenge within the meaning of subsection 18.1(2) of the *Federal Courts Act*. Given that the entire delay must be satisfactorily accounted for (*Bullock* at paragraph 8), I must therefore turn my attention to identifying the pertinent decision, and determining whether the underlying application for judicial review was filed within thirty days of that decision (*Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 at paragraph 63 [*Larkman*]).

[35] This case involves, in its essence, complaints about Mr. Yellowquill being allowed to run as a candidate by the electoral officer, despite not having fulfilled all the requirements prescribed under the Act. The appellant is essentially challenging the eligibility of Mr. Yellowquill to be a candidate in the April 9 election.

[36] In their facta, the parties appear to conflate the subject matter of the March 22 and March 23 decisions when they mischaracterize the nature of the EAC's March 23 decision as being a ruling on Mr. Yellowquill's eligibility. As mentioned earlier, the EAC's March 23 decision only addressed Mr. Yellowquill's failure to pay the $250 application fee in time and did not expressly make a ruling on his eligibility, namely the successful fulfillment of the Act's background check requirements. Conversely, the electoral officer's March 22 decision constitutes the final and binding decision addressing Mr. Yellowquill's eligibility, which remains the sole contentious issue challenged by the appellant in this appeal.

[37] In my view, based on a fair reading of the appellant's Notice of Application for Judicial Review and Notice of Appeal, the decision taken by the electoral officer in respect of Mr. Yellowquill's candidacy on March 22 is at the core of the appellant's application for judicial review challenging Mr. Yellowquill's eligibility.

[38] The EAC's March 23 decision was not expressly challenged by the appellant in his Notice of Application for Judicial Review and Notice of Appeal. The essence of the appellant's application for judicial review filed on June 12 was therefore to overturn the decision taken on that matter by the electoral officer on March 22 on the basis that it waived the Act's

requirements to provide a completed criminal record check and child abuse registry check, upon granting Mr. Yellowquill a provisional candidate status.

[39] At the hearing, counsel for the appellant acknowledged that his client was aware as of March 23 that Mr. Yellowquill had not completed the required checks when his name appeared on the list of eligible candidates and he was allowed to run in the election.

[40] This Court has previously ruled that the time period prescribed in subsection 18.1(2) of the *Federal Courts Act* begins to run the moment an applicant has knowledge of a final decision that he or she subsequently wishes to challenge (*Robertson v. Canada (Attorney General)*, 2016 FCA 30, 480 N.R. 353 at paragraph 7; *Larkman* at paragraphs 63 to 68; *Zündel v. Canada (Human Rights Commission)*, [2000] 4 F.C.R. 255, 2000 CanLII 17138 (FCA) at paragraph 17).

[41] In the circumstances of this case, I conclude that the appellant had knowledge of the electoral officer's March 22 decision as of March 23. Therefore, under subsection 18.1(2) of the *Federal Courts Act*, the appellant had thirty days from March 23 to file his notice of application (*Larkman* at paragraph 68). The appellant failed to do so as his notice was filed on June 12, well beyond the prescribed time limit. As the appellant did not obtain leave to commence his application beyond the 30-day timeframe, he was time-barred from challenging Mr. Yellowquill's eligibility (*Hallen v. Canada (Attorney General)*, 2014 FCA 229 at paragraph 3; *Canada (Attorney General) v. Trust Business Systems*, 2007 FCA 89, 361 N.R. 53 at paragraph 29).

[42] Given the foregoing conclusions with respect to the essence and timing of the appellant's application for judicial review, a further ruling by this Court on a party's ability to challenge a candidate's eligibility under Article 17 on the basis of election practices that contravene the Act is not warranted in light of the particular circumstances of this case.

[43] As a result, I conclude that the appellant's application for judicial review was not filed in accordance with subsection 18.1(2) of the *Federal Courts Act*. I would therefore dismiss the appeal, the whole with costs.

"A.F. Scott"

J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Mary J.L. Gleason J.A."

APPENDIX

Long Plain First Nation Election Act

12.0 Article Twelve NOMINATION APPEALS

12.1 If a candidate is found to be ineligible by the Electoral Officer, with respect to his/her nomination, he/she may appeal within two (2) days of the close of the nomination meeting.

12.2 That candidate must submit a letter, with supporting documentation, stating the reasons for his/her nomination appeal.

12.3 The Election Appeal Committee will immediately convene a meeting with the ineligible candidate appeal to present his/her nomination appeal.

12.4 The Election Appeal Committee will discuss and make a recommendation within three (3) days of the nomination meeting as to whether or not the ineligible candidate is to be re-instated

12.5 The decision of the Election Appeal Committee shall be binding and final.

17.0 Article Seventeen ELECTION APPEALS

The following procedures govern an appeal of the election results:

17.1 Any candidate or elector has the right to appeal the results of an election within seven (7) days from the date of the election.

17.2 Grounds for an appeal are restricted to election practices that contravene this Election Act.

17.3 An appeal must be in writing duly signed to the Electoral Officer and must contain details and supporting documentation as to the grounds upon which the appeal is being made and include a non-refundable deposit fee of $ 100.00 by certified cheque, money order, bank draft or cash and which monies are to be applied toward the appeal costs.

17.4 If it is determined that there is sufficient evidence to warrant an appeal hearing, the Election Appeal Committee shall schedule a formal meeting two (2) days after the election appeal deadline.

17.5 If it is determined that there is sufficient evidence to warrant an appeal hearing, the Election Appeal Committee shall schedule a formal meeting two (2) days after the election appeal deadline.

17.6 An appeal hearing will take the form of a formal meeting consisting of:

The Electoral Officer

The Election Appeal Committee

The candidate or elector making the appeal

17.7 The decision of the Election Appeal Committee shall be irrevocable, binding, and final. The decision must be made public within (2) days of the appeal hearing with the decision being posted at the Tribunal Government office, Administration office, and Keeshkeemaqua Conference Centre.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-155-16
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