Federal Court of Appeal | Cour d'appel fédérale

Date: 20230130

Docket: A-94-22

Citation: 2023 FCA 17

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

BETWEEN:

MARY LINDA WHITFORD and ALICIA MOOSOMIN

Appellants

and

JASON CHAKITA, MANDY CUTHAND, LUX BENSON, DANA FALCON, HENRY GARDIPY, SAMUEL WUTTUNEE, SHAWN WUTTUNEE, and RED PHEASANT FIRST NATION

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 appellants and the individual respondents are all members of the respondent Red Pheasant First Nation (RPFN). The appellants, Mary Linda Whitford and Alicia Moosomin, challenged the results of an election for Chief and Councillors of the RPFN, alleging that the individual respondents, amongst others, had engaged in various contraventions of the *First*

Nations Election Act, S.C. 2014, c. 5 (*FNEA*) and various forms of serious electoral fraud, including vote buying.

[2] In a decision reported as 2022 FC 436, the Federal Court concluded that six of the seven individual respondents had engaged in contraventions of the *FNEA* and electoral fraud in the course of the election. While satisfied that their misconduct was serious, the Court nevertheless concluded that it did not warrant the disenfranchisement of the individuals who had voted for them. Consequently, the Federal Court declined to annul their elections as Councillors of the RPFN. The present appeal pertains to this aspect of the Federal Court's decision.

[3] The Federal Court did, however, annul the election of Clinton Wuttanee as Chief of the RPFN as well as Gary Nicotine's election as Councillor. This latter aspect of the Federal Court's judgment is the subject of two other appeals (A-97-22 and A-98-22) and a separate decision (2023 FCA 18).

[4] For the reasons that follow, I am of the view that it was open to the Federal Court to decline to annul the elections of the individual respondents as Councillors of the RPFN, and that it did not err in doing so. Consequently, I would dismiss this appeal.

I. Background

[5] The RPFN held an election for Chief and Councillors on March 20, 2020. The individual respondents ran for positions as Councillors, as part of a slate of candidates known as “Team Clinton”. They were all successful in being elected to the positions that they sought.

[6] The facts of this matter are no longer in dispute. In a lengthy, detailed and careful decision, the Federal Court found that all of the individual respondents, with the exception of Dana Falcon, had engaged in serious electoral fraud, including, in some cases, contraventions of subsection 16(*f*) of the *FNEA*, much of which related to vote buying or the misuse of mail-in ballots.

[7] Subsection 16(*f*) of the *FNEA* 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.

[8] In particular, the Federal Court found that Lux Benson committed a single contravention of the *FNEA* and that he was directly involved in one instance of serious electoral fraud relating to vote buying using RPFN funds. The Federal Court found this to be “particularly grave electoral fraud”.

[9] Jason Chakita was also found to have committed one contravention of the *FNEA* and one instance of serious electoral fraud relating to vote buying. Unlike Lux Benson, however, RPFN funds were not used by Jason Chakita to purchase the vote in question.

[10] The Federal Court found that Mandy Cuthand had been directly involved in two instances of serious electoral fraud relating to vote buying, but that the fraud in which he had engaged did not involve the use of band money.

[11] Insofar as Henry Gardipy was concerned, the Federal Court found that he was directly involved in a single instance of serious electoral fraud relating to vote buying, but that this was not a fraud that involved the use of band money to purchase the vote of a band member.

[12] The Federal Court found that Samuel Wuttunee committed three contraventions of the *FNEA*, and that he was directly involved in three instances of serious electoral fraud relating to vote buying, although band money was not used to buy votes.

[13] Shawn Wuttunee was found to have committed one contravention of the *FNEA*, and to have also been directly involved in one instance of serious electoral fraud relating to vote buying that did not involve the use of band money to buy the vote in question.

[14] Finally, the Federal Court concluded that it had not been established that Dana Falcon had committed any contraventions of the *FNEA*, or that he had been directly involved in any other form of electoral fraud.

[15] The Federal Court also found that there had been serious electoral misconduct on the part of several individuals who are not parties to this appeal. Specifically, the Court found that agents of the individual respondents had been engaged in electoral misconduct on their behalf, and that, in addition, the misconduct of Chief Wuttunee and Councillor Nicotine had corrupted the integrity of the election. The Federal Court noted that RPFN had been named as a respondent in this matter solely for the purposes of a potential costs order.

[16] As noted earlier, while the Federal Court found that the misconduct of the six candidates identified above was serious, it decided not to annul their elections. In coming to this conclusion, the Court held that their misconduct did not warrant the disenfranchisement of the individuals who had voted for them.

II. The Appellants' Position

[17] The appellants submit that having concluded that the six above-named individual respondents and their agents had engaged in contraventions of the *FNEA* and serious electoral fraud related to vote buying, the Federal Court was required to annul their elections.

[18] The appellants acknowledge that the Federal Court has substantial discretion to decline to annul an election where contraventions of the *FNEA* or other forms of electoral fraud have not been personally committed by a candidate or an agent of a candidate. They say, however, that no such discretion exists where a successful candidate or their agent or agents personally engage in

serious electoral fraud such as vote buying, and that in such cases, their election must be annulled.

[19] Citing paragraph 38 of the Federal Court's decision in *Papequash v. Brass*, 2018 FC 325 (*Papequash* FC), aff'd 2019 FCA 245 (*Papequash* FCA), the appellants contend that vote buying is "an affront to democracy" that does not just corrode the integrity of an election. It is, rather, the most direct and deliberate attack upon the integrity of an election, and is an insidious practice that corrodes and undermines the integrity of the electoral process. Vote buying is, moreover, "antithetical to the existence of democracy and self-governance".

[20] In this case, eight of the nine members of Team Clinton (including Chief Wuttunee and Councillor Nicotine) were found to have contravened subsection 16(*f*) of the *FNEA* and/or had been involved in serious electoral fraud. The Federal Court further found that these individuals had personally engaged in instances of vote buying, and that their conduct had seriously corroded and compromised the integrity of the election. The Federal Court also found that some members of Team Clinton had accessed and exploited confidential electoral information from the RPFN's Electoral Officer.

[21] The appellants say that elections tainted by vote buying must be annulled in all but the most exceptional cases, whether or not the successful candidate's margin of victory exceeded the actual number of votes purchased by the candidate: *Gadwa v. Kehewin First Nation*, 2016 FC 597 at paras. 87-89 (*Gadwa* FC), aff'd in *Joly v. Gadwa*, 2017 FCA 203 (*Gadwa* FCA).

[22] The Federal Court also found that agents of Team Clinton committed multiple acts of serious electoral fraud. The appellants note that the Supreme Court of Canada held in *Sideleau v. Davidson (Controverted election for the Electoral District of Stanstead),* [1942] S.C.R. 306, that candidates bear the consequences of the acts of those to whom they have entrusted their fate: at para. 36. See also *Brassard et al. v. Langevin*, 1 S.C.R. 145.

[23] According to the appellants, upon finding that the integrity of the 2020 election had been seriously corroded, the Federal Court erred in law and in principle in declining to annul the elections of all of the successful candidates, and annulling only those of Chief Wuttunee and Councillor Nicotine. The election was either conducted with integrity or it was not. Having concluded that the integrity of the election had been called into question, it followed that the results of the entire election should have been annulled, and the Federal Court erred by considering issues of individual culpability in deciding whether the election of specific candidates should be annulled.

[24] The appellants also argue that the Federal Court failed to have regard to pertinent factual considerations in exercising its discretion not to annul the entire election. In support of this contention, the appellants note that members of Team Clinton ran as a team, supporting each other's elections. When Chief Wuttunee and Councillor Nicotine, their agents and the other members of Team Clinton purchased votes or engaged in other acts of serious electoral corruption, they did not merely do so on their own behalf. They did so as members of a team, and the votes that they purchased likely benefitted the remaining members of the team. Thus, the

Federal Court erred, the appellants say, in failing to give consideration to the fact that members of Team Clinton and their agents worked in concert to achieve their respective elections.

[25] The appellants further submit that the annulment of the election of Councillor Nicotine to one of the Councillor positions had an impact on the election of other candidates that was not considered by the Federal Court. Councillor Nicotine received 599 votes, which was 385 votes more than the votes received by the first runner-up, while the plurality of votes received by the Councillor elected with the fewest votes was 333 over the first runner-up. According to the appellants, the Federal Court should have considered the impact of the annulment of Councillor Nicotine's election in determining whether the elections of the remaining seven candidates should be annulled.

[26] The appellants argue that an election appeal is not a contest as between the parties, but is, rather, a determination concerning the public interest. The guilt or innocence of an individual candidate is of secondary importance to the determination as to whether the election was conducted with integrity. Having found that the integrity of the 2020 election had been compromised by serious electoral fraud that included vote buying, the Federal Court was required to annul the entire election.

III. The Issue and the Standard of Review

[27] As noted earlier, the appellants do not challenge any of the factual findings made by the Federal Court. They argue, however, that having found that six of the individual respondents

(along with Chief Wuttunee, Councillor Nicotine and agents of Team Clinton) had engaged in serious electoral fraud, including, in some cases, contraventions of the *FNEA*, such that the integrity of the 2020 election had been corrupted, the Federal Court was required by law to annul the entire election.

[28] Given that this is an appeal 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* FCA, at para. 11. 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.

[29] While the decision whether or not to annul an election is discretionary, and as such is reviewable on the palpable and overriding error standard, the Federal Court must correctly understand and apply the correct legal principles governing the exercise of its discretion: *Canada v. Paletta*, 2022 FCA 86, at para. 32.

IV. The Legislative Framework

[30] The *FNEA* was enacted in 2014, creating a statutory code governing the election of chiefs and councillors of participating First Nations. Amongst other things, the enactment of the *FNEA* 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.

[31] 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 Band 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.

[32] 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.

[33] Also relevant is section 31 of the *FNEA*, 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". 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". The *FNEA* does not contain any conditions or limitations that make annulment mandatory in any case.

[34] The question for determination is thus whether, having found that the integrity of the 2020 election had been corrupted, it was open to the Federal Court to decline to annul the election of the six respondents who had been found to have engaged in electoral misconduct, or whether the entire election had to be annulled.

V. Analysis

[35] In order to situate the issue to be determined in its legislative context, it is necessary to start by reiterating what the *FNEA* says with respect to the Federal Court's remedial powers in contested election cases. Subsection 35(1) of the *FNEA* provides, in its entirety, that "[a]fter hearing the application, the court *may*, if the ground referred to in section 31 is established, set aside the contested election" [my emphasis].

[36] The appellants acknowledge that Parliament's use of the word "may" in the text of subsection 35(1) suggests that the decision whether or not to annul an election in a given case is a discretionary one. They further acknowledge that the *FNEA* does not provide any guidance as to the principles that should inform the Court's exercise of discretion in cases where breaches of section 31 have been found to have occurred.

[37] The appellants contend, however, that this does not mean that the Court's discretion is untrammeled, asserting that it must be exercised in accordance with the common law and what they call the "gradations of liability". Moreover, citing this Court's decision in *Porter v. Boucher-Chicago*, 2021 FCA 102, the appellants say that the Court should not adopt an

interpretation of electoral legislation such as the *FNEA* that would undermine Parliament's intent in enacting the legislation.

[38] The appellants have, however, provided only limited information as to Parliament's purpose in enacting the *FNEA*, including the extract from *Hansard* referred to earlier in these reasons. They have also provided an excerpt from the proceedings of the Standing Committee on Aboriginal Affairs and Northern Development, November 7, 2013, at 1110 when the *FNEA* was under consideration.

[39] There, the Minister of Aboriginal Affairs and Northern Development again noted the paternalism of the process under the *Indian Act*. The Minister also stated that while the *Indian Act* allowed for the removal of elected officials from office if they were guilty of engaging in corrupt election practices, it did not create any offences or penalties for election-related abuses. The Minister observed that the *FNEA* would rectify this legislative gap and would create defined offences and penalties with respect to fraudulent activities such as vote buying, using intimidation and obstructing the electoral process. The criminal offences created by the *FNEA* are not, however, in issue in this case.

[40] The appellants have also not identified any other provisions of the *FNEA* that would provide contextual support for limiting the discretionary power conferred on courts by subsection 35(1) of the Act in the manner they have suggested.

[41] Had Parliament intended that every election found to have been tainted by serious electoral fraud, corruption or illegality be annulled, it would have been open to it to have said so explicitly: see, for example, the *Election Act*, L.R.Q. c E-3 at issue in *Thérien c. Pellerin*, 1997 CanLII 10408, [1997] R.J.Q. 816 (C.A.).

[42] That said, as was noted earlier, subsection 35(1) of the *FNEA* has been the subject of some, albeit fairly limited, judicial consideration. Indeed, the appellants rely on past decisions to argue that courts have no discretion to decline to annul elections in cases where contraventions of the *FNEA* and vote buying have occurred, such that the integrity of an election was corrupted. This jurisprudence will be considered next.

VI. The Jurisprudence with respect to the Annulment of Elections in Cases of Serious Electoral Fraud

[43] I agree with the appellants that the jurisprudence they have cited could have supported a finding by the Federal Court that the entire 2020 election should be annulled. The misconduct committed by the members of Team Clinton (other than Dana Falcon) and their agents was serious, and it reflected very poorly on the state of democratic governance within the RPFN.

[44] Indeed, the Federal Court did not disagree with the appellants on this point. At paragraph 17 of its reasons, the Federal Court expressly noted that the electoral misconduct of Councillors Lux Benson, Jason Chakita, Mandy Cuthand, Henry Gardipy, Samuel Wuttunee, and Shawn

Wuttunee was such that it could have annulled their elections, but that the Court was nevertheless exercising its discretion not to do so.

[45] However, the question for determination is not whether it would have been open to the Federal Court to annul the 2020 election in its entirety, but whether the Court erred in law or committed a palpable and overriding error in declining to do so with respect to the election of the individuals identified above.

[46] In answering this question, the starting point for the Court's analysis is the decision of the Supreme Court of Canada in *Opitz v. Wrzesnewskyj*, 2012 SCC 55. While *Opitz* was a case decided under the *Canada Elections Act*, S.C. 2000, c. 9 (*CEA*), portions of the *CEA* closely mirror those found in the *FNEA*.

[47] In describing the basis for the exercise of judicial discretion to annul elections in *Opitz*, the Supreme Court stated that where it is determined that an elected candidate was ineligible to run for office, a court *must* declare the election null and void: in such circumstances, it is as if no election had been held. However, where there are irregularities, fraud or corrupt or illegal practices that affected the result of the election, "a court *may* annul the election" [my emphasis]. The Court went on in *Opitz* to state that in such cases, the Court must decide whether the election was compromised in such a way as to justify its annulment: at para. 22.

[48] It is noteworthy that while the Supreme Court stated in *Opitz* that elections must be annulled in ineligibility cases, courts *may* annul elections where there has been fraud or corrupt

or illegal practices. Importantly, the Supreme Court did not state that courts must annul elections in every case where serious electoral fraud or contraventions of the relevant electoral legislation have been identified.

[49] This point was discussed in *Papequash* FC, a case decided under the *FNEA*. There, the Federal Court observed that while serious electoral fraud can vitiate an election result, "what must not be overlooked, however, is the Court's admonition [in *Opitz*] that a reviewing court retains a discretion to decline to annul an election even in situations involving fraud or other forms of corruption": *Papequash* FC, at para. 36. The Federal Court's decision in *Papequash* FC was subsequently affirmed by this Court in *Papequash* FCA. While this Court did not specifically address this point, it did say that the Federal Court had "correctly applied the jurisprudence in the context of this case": at para. 13.

[50] The Court went on in *Papequash* FC to observe that at paragraph 81 of *McEwing v. Canada (Attorney General)*, 2013 FC 525 (another case decided under the *CEA*), the Federal Court had noted that *Opitz* does not provide authority for the proposition that the Court may overturn election results in every case in which electoral fraud, corruption or illegal practices have been demonstrated. The corollary to this is that a court is not required to do so in every case involving electoral fraud, corruption or illegal practices.

[51] The Federal Court went on in *McEwing* to observe that the majority in *Opitz* had cautioned that annulling an election disenfranchises not only those persons whose votes were disqualified, but every elector who voted in the riding. It is true that the Federal Court went on in

McEwing to state that courts should only exercise their discretion to annul an election where there is serious reason to believe that the results would have been different but for the fraud, or when an electoral candidate or agent is directly involved in the fraud: at para. 82. The Court did not, however, state that the courts must do so in such cases.

[52] In *Good v. Canada (Attorney General)*, 2018 FC 1199, the Federal Court reiterated that the Court retains discretion not to overturn elections, even in cases involving fraud or other forms of corruption: at para. 55. There are numerous other decisions to the same effect: see, for example, *Flett v. Pine Creek First Nation*, 2022 FC 805 at para. 17; *Bird v. Paul First Nation*, 2020 FC 475 at para. 31; *Paquachan v. Louison*, 2017 SKQB 239 at paras. 20, 25.

[53] It is true that that the Federal Court came to the opposite conclusion in *Gadwa v. Kehewin First Nation*, 2016 FC 597. There, the Court observed that candidates who engage in vote buying are attempting to corrupt the election process. Consequently, regardless of the number of votes that the candidate purchased, or attempted to purchase, and regardless of whether the candidate wins the election by a greater margin than the number of votes that were purchased, this cannot save the candidate and his or her election must still be vitiated: at para. 88.

[54] It is also true that the Federal Court's decision in *Gadwa* was affirmed by this Court in *Gadwa* FCA, without comment on this point.

[55] It must be noted, however, that *Gadwa* was not a case decided under the *FNEA*. The election in issue had been carried out under the provisions of the Kehewin First Nation's custom election act, and the Federal Court's comments must be read with this in mind.

[56] Indeed, the Federal Court judge deciding *Gadwa* came to the opposite conclusion in a case governed by the *FNEA*. That is, in *Flett*, the judge concluded that the Court does indeed have discretion under section 35(1) of the *FNEA* to decline to annul an election in cases where electoral fraud, corruption or illegal practices have been demonstrated: at para. 17.

[57] From this, I am satisfied that, as a matter of law, the Federal Court ultimately retains discretion as to whether to order a new election, even in cases involving fraud or other forms of electoral corruption. What remains to be determined is whether the Court made any palpable and overriding errors in declining to annul the election of the six respondents who had been found to have engaged in serious electoral fraud in this case.

[58] Before addressing this question, however, it is important to note that while protecting the right to vote and maintaining the integrity of the electoral process are unquestionably important considerations, there are a range of other, oftentimes competing, democratic values that may be factored into the Court's analysis in deciding whether an election should be annulled in a given case.

VII. Other Relevant Considerations

[59] As noted earlier, annulling an election has broad and serious consequences, disenfranchising not only those whose votes were disqualified (or bought, in this case), but the votes cast by all of the electors, including those who voted without contravening electoral legislation: *Opitz*, at para. 48.

[60] Permitting elections to be overturned too lightly also increases the potential for future litigation. By extension, it undermines certainty in the democratic process, which has inherent value in its own right in a democracy: *Opitz*, at paras. 48, 49; *McEwing*, at para. 56; *Flett*, at para. 17.

[61] Furthermore, the Supreme Court observed in *Opitz* that ordering a new election "is not a perfect answer", as it "will always be colored by the perceived outcome of the election it superseded". New elections may also be inconvenient for voters, and there can be no guarantee that the new election will itself be free from additional problems, including fraud. In addition, frequent new elections undercut democratic stability by calling into question the security and efficiency of the voting mechanics, and this may lead to disillusionment or voter apathy: *Opitz*, at para. 48, citing Professor Steven F. Huefner, "Remedying Election Wrongs" (2007), 44 *Harv. J. on Legis*. 265, at pp. 295-96.

[62] There is another consideration that courts may take into account in challenges to elections involving First Nations. That is, the *FNEA* contemplates outside institutions (namely the courts)

being asked to interfere in the democratic process of First Nations. While this involvement was expressly contemplated by Parliament in enacting the *FNEA*, and while the RPFN expressly asked to have its elections governed by the *FNEA*, courts must nevertheless be mindful of the fact that one of the purposes of the *FNEA* was to move away from the "antiquated and paternalistic" approach to First Nations' governance that existed under the *Indian Act*.

[63] Having determined that the Federal Court has the discretion not to annul an election in cases involving fraud or other forms of electoral corruption, the question then is whether the Federal Court committed a palpable and overriding error in the exercise of its discretion in this case.

VIII. Did the Federal Court Err in Declining to Annul the Elections of the Six Respondents Involved in Serious Electoral Fraud?

[64] The assessment of whether the impact of electoral fraud is sufficient to warrant annulling an election result is a matter that falls within the judge's discretion: *McEwing*, at para. 79. The palpable and overriding error standard does not give this Court power to reweigh the evidence or retry the case: *Apotex Inc. v. Canada (Health)*, 2018 FCA 147 at para. 61. See also *Cree Nation of Eeyou Istchee (Grand Council) v. McLean*, 2019 FCA 185 at paras. 9-10.

[65] Appellate courts must presume that first-instance courts (such as the Federal Court) considered and assessed all of the evidence before them, absent proof to the contrary: *Housen*, at

para. 46; *Mahjoub*, at paras. 66-67. In the case before us, the appellants have not rebutted this presumption.

[66] The Federal Court was fully aware of the seriousness of the electoral misconduct committed by the individual respondents (other than Dana Falcon) – a matter made clear at the outset of the Court's lengthy and detailed reasons.

[67] Indeed, the Federal Court observed that "attempts by electoral candidates or their agents to purchase the votes of constituents are an insidious practice that corrodes and undermines the integrity of any electoral process": citing *Papequash* FC, at para. 38. The Court went on to note that candidates who engage in vote buying "are attempting to corrupt the election process", citing *Gadwa* FC, at para. 88.

[68] The Federal Court further observed that it does not matter how many votes a candidate may have purchased, or whether the candidate won the election by a greater margin than the number of votes purchased (the so-called "magic number test"). Because fraud, corruption and illegal election practices are serious, a candidate's election may, and in some cases must be, vitiated. The decision whether or not to annul an election is a matter within the Court's discretion.

[69] The Federal Court then found that various members of Team Clinton (including six of the individual respondents in this case) and their agents engaged in serious electoral fraud, namely

vote buying and related activities, such that the integrity of Team members' elections was corrupted.

[70] In particular, the Federal Court found that the actions of Chief Wuttunee and Councillor Nicotine "went far beyond acceptable conduct". They were both directly involved in multiple instances of serious electoral fraud, including contraventions of the *FNEA* such as vote buying and related activities, and of the *First Nations Elections Regulations*, SOR/2015-86 relating to mail-in votes.

[71] The Federal Court was satisfied that the magnitude of the electoral misconduct of Chief Clinton Wuttunee and Councillor Gary Nicotine was such that their elections should be annulled. In coming to this conclusion, the Federal Court identified several aggravating factors that made the conduct of Chief Wuttunee and Councillor Nicotine all the more egregious.

[72] The Court found that Chief Wuttunee and Councillor Nicotine's use of RPFN funds to purchase votes was "particularly grave electoral fraud".

[73] The Federal Court also 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.

[74] Another aggravating factor identified by the Federal Court was that Chief Wuttunee and Councillor Nicotine occupied leadership positions within the RPFN and 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.

[75] Additional information as to the nature and extent of the electoral misconduct committed by Chief Wuttunee and Councillor Nicotine is included in the decision dismissing their appeals released contemporaneously with this decision.

[76] The Federal Court found in this case that the respondent Councillors Lux Benson, Jason Chakita, Mandy Cuthand, Henry Gardipy, Samuel Wuttunee, and Shawn Wuttunee had also engaged in serious electoral fraud. It was, however, on a lesser scale than that committed by Chief Wuttunee and Councillor Nicotine. This led the Court to conclude that while it would have been open to it to annul the elections of these respondents, it was appropriate to exercise its discretion not to do so.

[77] In coming to this conclusion, the Federal Court was fully aware of the fact that the members of Team Clinton and their supporters promoted and supported other Team members, and that the group acted in concert to achieve their respective elections. The Court noted that Team members jointly posed for photographs, which were widely disseminated on Facebook, and promotional T-shirts were handed out during the campaign as part of an effort to create excitement about their platform and to advertise candidates. The Federal Court was also aware

that members of Team Clinton worked closely with other members and their supporters to commit serious electoral fraud and/or to contravene the *FNEA* and the Regulations.

[78] In considering whether to annul the elections of each of the six respondents found to have engaged in electoral misconduct, the Federal Court carefully reviewed the nature and extent of each individual's misconduct, demonstrating that it was fully aware of the seriousness of each of their misconduct. The Court concluded that the individual culpability of each of the six respondents was less than that of Chief Wuttunee and Councillor Nicotine, although it did acknowledge that Samuel Wuttunee had been involved in more serious electoral frauds than had the other five respondents.

[79] The Court also considered aggravating factors, such as the fact that, like Chief Wuttunee and Councillor Nicotine, most, if not all of the respondents held leadership positions within the RPFN, and that they failed in fulfilling their roles. The Court also observed that RPFN funds were used to purchase a single vote in one case.

[80] At the same time, the Court had regard to mitigating factors, including the fact that the respondents' misconduct was less egregious than that of Chief Wuttunee and Councillor Nicotine. The Court also noted that (unlike Chief Wuttunee and Councillor Nicotine) some respondents had not sent fraudulent documents to RPFN's electoral officer. In addition, with the exception of the one case noted earlier, none of the respondents had used band funds to purchase votes. The Federal Court also had regard to the fact that annulling the elections of the six respondents would disenfranchise the voters who had legitimately voted for them.

[81] After balancing the aggravating and mitigating factors, as it was required to do, the Federal Court exercised its discretion not to annul the elections of the six respondents. While the Court could have exercised its discretion differently, given the seriousness of the respondents' misconduct, the appellants have not established a palpable and overriding error on the part of the Federal Court in its exercise of discretion in this case. Consequently, I would dismiss the appeal.

[82] 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.

"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.

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.

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.

Signification

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

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.

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

…

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

Loi électorale du Canada

L.C. 2000, ch. 9

[…]

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-94-22
STYLE OF CAUSE:	MARY LINDA WHITFORD ET AL. v. JASON CHAKITA ET AL.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 29, 2022
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CONCURRED IN BY:	LOCKE J.A. MONAGHAN J.A.
DATED:	JANUARY 30, 2023

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