Federal Court Cour fédérale

Date: 20240221

Docket: T-2520-22

Citation: 2024 FC 283

Ottawa, Ontario, February 21, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

WILLIAM HOUSE

Applicant

and

DREW SHAW, ONE FEATHER, DELORES G. RAIN AND PAUL FIRST NATION

Respondents

JUDGMENT AND REASONS

[1] When the ballots were first counted in the last election for the Council of Paul First Nation, two candidates, Mr. House and Ms. Rain, were tied. Upon a recount, Ms. Rain won by one vote. It later came to light that certain mail-in ballots were not counted in the recount. The Electoral Officer refused to perform a further recount, as the results had already been formally proclaimed when the issue was discovered. Mr. House now contests the result of the election. I am granting his application, because the votes were not properly counted and the result of the

election is affected. The adequate remedy is to order a judicial recount of the votes cast for Ms. Rain and Mr. House.

I. Background

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

[3] The initial count of the ballots revealed a tie between Mr. House and Ms. Rain, each obtaining 116 votes. Pursuant to subsection 24(2) of the *First Nations Elections Regulations*, SOR/2015-86 [the Regulations], the Electoral Officer recounted the votes for Mr. House and Ms. Rain. According to this recount, Ms. Rain received 116 votes and Mr. House received 115 votes. Mr. House, who had arrived at the polling station during the recount, asked the Electoral Officer to perform a further recount. The Electoral Officer agreed to do a further recount of Mr. House's votes only, which again tallied 115.

[4] Soon afterwards, Mr. House learned that four mail-in votes were likely not counted during the first and second recounts. He wrote to the Electoral Officer to explain the situation and to request a further recount. Ms. Rain opposed this request. The Electoral Officer was initially inclined to perform a further recount, but changed his mind because he was of the view

that the Act and Regulations did not allow him to change the results after he had formally proclaimed them.

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

[6] Another candidate, Ronald Larry House, is also challenging the election for different reasons. I am issuing judgment with respect to his application concurrently with this judgment: *House v Paul First Nation*, 2024 FC 282.

II. Preliminary Issue: Service on all Candidates

[7] Paul First Nation brings a preliminary objection. It says that candidates other than Ms. Rain were not served with the application for judicial review, contrary to section 34 of the Act. It brought a motion to strike the application on that basis, but it was agreed that the motion would be decided together with the merits of the application.

[8] Section 34 of the Act reads as follows:

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.

[9] Mr. House argues that section 34 should be interpreted as requiring service only on the candidate whose election is contested, in this case, Ms. Rain. He submits that while the term

"election" could refer to all candidates, the term "contested election" has a narrower meaning. I am unable to agree. The wording of section 34 simply cannot bear the interpretation put forward by Mr. House. The "candidates who participated" cannot refer only to the candidate who was elected. A "contested election" refers to the whole process. It does not have a narrower meaning than "election," especially when Parliament added the expression "all the candidates who participated." Thus, Mr. House had to serve his application on all candidates who participated in the election for the position of councillor.

[10] It may be inconvenient and costly to comply with section 34. This, however, is not a reason to disregard Parliament's will. I note that Mr. House can himself serve certain candidates, especially those who reside on the reserve. He can also ask for leave to use substitute means of service pursuant to rule 136 of the *Federal Courts Rules*, SOR/98-106.

[11] Non-compliance with section 34, however, does not necessarily lead to the rejection of the application. For example, in *Brass v Papequash*, 2019 FCA 245, the Federal Court of Appeal rejected the argument that the failure to serve one party with the notice of appeal invalidated the proceeding. It noted, at paragraph 7 of its decision:

> Likewise, the respondents' objection to the effect that the appellants failed to serve the Notice of Appeal on all of the required recipients is not sufficient in the circumstances to invalidate this appeal. Although the Key First Nation Band, as a party before the Federal Court, should have been served with the Notice of Appeal pursuant to Rule 339(c), this irregularity has no bearing on the outcome of this appeal and should in any event have been raised earlier in the proceeding.

[12] In this case, Paul First Nation filed its motion to strike on September 7, 2023, nine months after the notice of application was filed, and after witnesses were cross-examined and the applicant filed his application record. There is no explanation for the delay in raising this issue.

[13] Moreover, I cannot imagine how non-compliance with section 34 in this case could have caused prejudice to anyone. I appreciate that the purpose of section 34 is to inform all candidates that the election is being challenged, so that any of them may seek to intervene in the proceeding if they feel they have an interest in the matter. Candidates who are not notified are deprived of the opportunity of making their views known. Nevertheless, I note that the successful candidates are named as respondents in the *Ronald House* matter and are represented by the same lawyer who is representing Ms. Rain in this matter. One can assume that they are aware of this application. As to the unsuccessful candidates, in the circumstances of this case, I fail to see what interest they may have in this matter and what prejudice they may suffer from non-compliance with section 34.

[14] Therefore, the failure to comply with section 34 in this case does not invalidate Mr. House's application. Accordingly, Paul First Nation's motion to strike is dismissed.

III. Analysis

[15] I am allowing Mr. House's application. After laying out the framework for deciding contested elections under the Act, I describe the two contraventions of the Act and Regulations that occurred in this case. The first deals with the failure to count certain votes and the second deals with the failure to give notice of the election to certain members residing off-reserve. I then

explain why the first of these contraventions, but not the second, affected the result of the election. Lastly, I explain why the appropriate remedy is to order a further recount.

A. *Statutory Framework*

[16] The contestation of an election is governed by sections 31 and 35 of the Act:

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.
35 (1) After hearing the application, the court may, if the ground referred to in section 31 is established, set aside the contested election.	**35 (1)** Au terme de l'audition, le tribunal peut, si le motif visé à l'article 31 est établi, invalider l'élection contestée.

[17] These provisions were considered by the Saskatchewan Court of Appeal and the Federal Court of Appeal in *McNabb v Cyr*, 2017 SKCA 27 [*McNabb*]; *Whitford v Chakita*, 2023 FCA 17 [*Whitford*]; *Wuttunee v Whitford*, 2023 FCA 18 [*Wuttunee*]. A useful summary of the principles governing the application of these provisions may be found in *Flett v Pine Creek First Nation*, 2022 FC 805 at paragraph 17. The decision of the Supreme Court of Canada in *Opitz v Wrzesnewskyj*, 2012 SCC 55, [2012] 3 SCR 76 [*Opitz*], which dealt with the *Canada Elections Act*, SC 2000, c 9, is also relevant. These decisions confirm that the application of sections 31 and 35 of the Act obeys a three-step framework.

[18] At the first step, the applicant must establish, on a balance of probabilities, a contravention of the Act or Regulations. This is explicitly required by section 31. At this stage, there is a presumption of regularity: *McNabb*, at paragraphs 25–27. In other words, absent proof to the contrary, it is presumed that an election took place in conformity with the Act and Regulations.

[19] At the second stage, the applicant must show that the contravention is "likely to have affected the result" of the election. Again, this requirement flows from the explicit language of section 31. Where the number of votes affected by an irregularity can be ascertained, the "magic number" test is often used. If the number of tainted votes is greater than the margin of victory, then the outcome of the election is likely to be affected. In *Opitz*, at paragraphs 71–73, the Supreme Court noted that the magic number test has its shortcomings and has a tendency to favour the challenger. In some cases, there may be more appropriate manners of ascertaining whether the outcome was affected: see, for instance, *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraphs 52–57, [2018] 4 FCR 467. Moreover, where fraud has been established, it is not necessary to satisfy the magic number test; rather, it is enough to show that the integrity of the election has been seriously compromised: *Wuttunee*, at paragraphs 48–62.

[20] Third, even if the conditions in section 31 are met, the Court retains the discretion not to annul an election: *Whitford*, at paragraph 57. This flows from the use of the word "may" ("*peut*") in section 35. At this stage, the Court must keep in mind that electoral law is meant to give effect to the right to vote, while protecting the integrity of the election: *Opitz*, at paragraph 38. Overturning an election disenfranchises all voters and casts a doubt over the integrity of the

process: *Opitz*, at paragraph 48. Electoral law should not be applied in a way that increases the potential for litigation and external intervention in a First Nation's affairs: *Whitford*, at paragraphs 60, 62. The Court is also entitled to consider the degree of seriousness of the breach of the Act: *Whitford*, at paragraphs 76–81.

B. *Contravention of the Act*

[21] The evidence reveals two contraventions of the Act and Regulations: first, with respect to the failure to count certain votes and, second, with respect to the failure to give notice to certain electors residing outside the reserve.

(1) The Vote Count

[22] The first contravention alleged by Mr. House revolves around what the parties have called the "Victoria votes." When the Electoral Officer came to Paul First Nation to hold the election, he brought with him the mail-in ballots that had been received so far at his office in Victoria. These votes were added to the ballot box, pursuant to section 22 of the Regulations. Mail-in ballots, however, may be received until the close of the polls. In this case, four mail-in ballots were received at One Feather's offices in Victoria after the Electoral Officer departed for Paul First Nation. One Feather's staff opened these four ballots and conveyed their contents to the Electoral Officer by electronic means.

[23] Before starting to count the votes, the Electoral Officer explained the situation to everyone present and added the votes in question to the candidates' tally sheets. No one objected to this manner of proceeding.

[24] Mr. House alleges that the Electoral Officer failed to count the Victoria votes upon the first and second recounts. He states that he learned of the existence of these votes only the day after the election, when someone who watched the livestream of the vote count explained the issue to him.

[25] Mr. House's allegations are based on two sources of information. First, in his affidavit, he provides hearsay evidence that certain persons who watched the livestream of the recount or were physically present told him that the Victoria votes were not counted. On an application, however, rule 81 prohibits the use of hearsay evidence.

[26] The second source of information is an exchange of emails with the Electoral Officer or his staff. Upon learning that certain votes may not have been counted, Mr. House wrote to the Electoral Officer to ask for a further recount. Ms. Rain opposed this request. On November 7, 2022, Ms. Angela Talarico, a One Feather employee, wrote to Mr. House and Ms. Rain as follows:

> Further to the message left today, I would like to inform you that there will be a recount of ballots tomorrow at a time to be determined.
>
> It was brought to Electoral Officer Drew Shaw's attention that there may have been an error in the recount that took place on November 2nd following the poll.

> The ballots from the Victoria poll were left out and Drew has decided that a recount would be the best course of action.
>
> We apologize for the inconvenience this may cause.

[27] However, Ms. Rain and another candidate objected to a further recount. On November 9, 2022, Ms. Talarico informed the candidates that:

> I apologize for the delay and mis-communication around this decision.
>
> Once this matter was escalated a decision to not move forward with the count was made.
>
> Unfortunately, under the FNEA once results are announced the only recourse is a Judicial Review.
>
> I apologize for any inconvenience this has caused.

[28] These communications can only be read as an admission, on the part of the Electoral Officer, that he had failed to include the Victoria votes in the recounts held on election night and that a further recount was required to ensure that all ballots were properly counted.

[29] The respondents provided little evidence in response. Ms. Rain provided a short affidavit in which she states that she is aware of the Victoria votes. However, she does not say whether these votes were counted during the recounts. She simply expresses her belief that she won the election and that the results should not be disturbed. She does not say whether she was personally present on election night. She writes that she was told about what transpired, which suggests that her evidence is hearsay. Moreover, the Electoral Officer did not provide any evidence contradicting or nuancing the contents of Ms. Talarico's emails quoted above.

[30] At the hearing, the respondents suggested that the numbers provided by Mr. House do not add up. In his communications to the Electoral Officer, Mr. House stated that he had learned that the Victoria votes included two votes in his favour and one vote for Ms. Rain. Thus, failing to count them transformed a tie into a one-vote victory for Ms. Rain. This, say the respondents, is incoherent, because the number of Ms. Rain's votes remained constant between the first count and the first recount, while the number of Mr. House's votes decreased by only one. However, we do not have clear evidence of the contents of the Victoria votes. Other mistakes may have been made on the initial count, explaining the apparent discrepancy. Given the paucity of the evidentiary record, I am unable to draw an inference that the Victoria votes were, in fact, counted.

[31] Ms. Rain also submitted that the Victoria votes should not be counted because the only polling station was in Paul First Nation. As there was no other polling station, no one was entitled to vote in Victoria. This, however, is based on a misapprehension of what took place. The Victoria votes were mail-in ballots received on the day of the election or shortly before. No one voted at a polling station located in Victoria. Ms. Talarico's reference to the "Victoria poll" is obviously a mistake. Moreover, section 17(1)(f) of the Regulations does not require voters to use registered mail to deliver mail-in ballots to the Electoral Officer. Thus, Ms. Rain has not shown that the Victoria votes contravened the Act and Regulations.

[32] What we are left with is an uncontradicted statement made on behalf of the Electoral Officer, that a number of votes were not properly counted and that a further recount was

required. Because no such recount was held, I find, on a balance of probabilities, that there was a breach of section 23 of the Act and sections 22–24 of the Regulations.

(2) Notice to Off-Reserve Members

[33] Mr. House provided affidavits from two members of Paul First Nation, Ms. Meek and Ms. Bull, who do not reside on the reserve and who state that they did not receive the election notice required by section 5 of the Regulations. Both state that they had previously received other email communications from Paul First Nation.

[34] In my view, this gives rise to a breach of section 5 of the Regulations, which requires the Electoral Officer to send a notice of the nomination meeting to off-reserve electors. Ms. Meek's and Ms. Bull's affidavits strongly suggest that Paul First Nation possessed their email addresses.

[35] Section 4 of the Regulations requires a First Nation to provide a list of off-reserve electors to the Electoral Officer. The list must contain the last known postal and email address of each off-reserve elector. Moreover, pursuant to subsection 5(3) of the Regulations, the Electoral Officer must keep a record showing the names and addresses of electors to whom a notice is sent. Thus, where an elector alleges that they did not receive the notice required by section 5, the First Nation or the Electoral Officer should be in a position to prove that a notice was sent to the elector's last known postal or email address. The failure to bring such evidence in this case leaves Ms. Meek's and Ms. Bull's evidence uncontradicted.

[36] I attach little importance to Ms. Bull's admission, on cross-examination, that she does not check her email regularly. I assume that, in preparing her affidavit, she checked her email account to be in a position to make the statement that she did not receive the election notice.

C. *Effect on Outcome*

[37] Of the breaches of the Act and Regulations that occurred, only the first one, the failure to perform a further recount including the Victoria votes, had an effect on the result of the election.

(1) The Vote Count

[38] There is a difference of one vote between Ms. Rain and Mr. House in the final election results certified by the Electoral Officer. This is the magic number.

[39] There were four Victoria votes. The failure to count four votes certainly affects the outcome of an election decided by one vote. To apply the magic number test, we do not require evidence as to whom the problematic votes were for.

[40] If we accept the validity of Mr. House's statements to the Electoral Officer that two of these votes were in his favour and one was for Ms. Rain, this is sufficient to transform a one-vote win into a tie. When there is a tie, section 24 requires the Electoral Officer to conduct a draw. Therefore, the results would be affected, even in this hypothesis.

(2) Notice to Off-Reserve Members

[41] In the circumstances of this case, the failure to give notice to two off-reserve members did not affect the outcome.

[42] Ms. Bull states that despite not receiving formal notice, she learned of the election through Facebook and word of mouth. On cross-examination, she confirmed that she travelled to Paul First Nation on election day and voted. Thus, the lack of notice to Ms. Bull did not affect the result of the election.

[43] As to Ms. Meek, she admitted on cross-examination that she had never voted in Paul First Nation elections, even though she used to receive the mail-in ballot package. She does not say that she would have voted in the 2022 election had she received notice. The transcript of her cross-examination does not show a significant degree of interest in the political affairs of Paul First Nation. I am not satisfied on a balance of probabilities that she would have voted. Therefore, there is no evidence that the lack of notice to her affected the result of the election either.

D. *Remedy*

[44] Given the circumstances, a remedy is required. The proper counting of ballots is crucial to the integrity of the electoral process. Although the failure to count a few ballots may be inconsequential in other circumstances, it becomes decisive where the margin of victory is but

one. Quite simply, one cannot be assured that the results announced by the Electoral Officer truly reflect the democratic choice of the electors of Paul First Nation.

[45] Setting aside the election would not be an adequate remedy at this time. Upon setting aside an election pursuant to section 35 of the Act, the elected candidate ceases to hold office pursuant to paragraph 28(2)(d) and the council of the First Nation may then call a by-election pursuant to section 25. In this case, however, triggering a by-election would overshoot the mark. Nothing that took place before the close of the polls warrants the intervention of the Court. There is no need to order a new election to rectify the breach. Moreover, as a practical matter, if a further recount confirms Ms. Rain's election or if her name is drawn after a further recount results in a tie, it would be illogical to set aside her election.

[46] Rather, to remedy the breach of the Act and Regulations that I have identified, one need only perform what was not done properly, namely, conduct a further recount. In post-hearing submissions, the parties have confirmed that One Feather has kept the ballots in a sealed box. They also agree that, should the Court conclude that there has been a breach of the Act, a recount would be an appropriate remedy.

[47] Section 24 of the Regulations requires the Electoral Officer to conduct a recount in certain circumstances. Neither the Act nor the Regulations provides for a judicial recount. Nonetheless, in First Nation election matters, "much scope for creativity exists" with respect to remedies, provided that the general scheme of the relevant election legislation is respected: *Fond du Lac First Nation v Mercredi*, 2020 FCA 59 at paragraph 5. While the election in that case was

governed by the First Nation's election code, the above principle can be extended to elections held pursuant to the Act. By way of example, a judicial recount was ordered, on consent of the parties, in *Jackson v Whitefish Lake First Nation No 128*, T-1923-17, order of Justice Lafrenière (February 26, 2018). Ordering a judicial recount also minimizes judicial intervention in the election and the perception of disenfranchisement that may result from setting aside the election: *Opitz*, at paragraphs 48–49.

[48] I will therefore order a judicial recount. Both parties agree that the recount should be held in the presence of a judge of this Court. They also suggest that an Electoral Officer designated by One Feather should be present and proceed to the recount. I do not believe this is necessary. Mr. Shaw, the original Electoral Officer, is no longer available. Given the number of ballots involved, a judge of the Court, assisted by a registry officer, can perform the recount.

[49] To ensure that the recount includes the Victoria votes, the ballots will first be counted to ensure that their number corresponds to the number of ballots cast in the election. If there is a discrepancy, the judge will hear the parties' submissions with respect to the course to follow.

[50] The votes cast for Mr. House and Ms. Rain will then be counted anew, pursuant to a procedure adapted from the *Canada Elections Act* and set out in the schedule to this judgment. If the recount results in a tie, the judge will conduct a draw to determine the winner. If Ms. Rain is the winner, no further remedy will be issued. If Mr. House is the winner, Ms. Rain's election will be set aside and Mr. House will be declared the winner. The judge will retain full jurisdiction to address any issue that may arise during the recount.

[51] I limit the remedy that I am issuing to Ms. Rain's election for the following reasons. In his application, Mr. House named only Ms. Rain as respondent. While the other candidates would have been aware that the election was contested, as previously mentioned, they were not put on notice that their election was in jeopardy in this case. Most of them won by a significant margin compared to Ms. Rain and Mr. House. In his evidence and submissions, Mr. House focused on the fact that the first count resulted in a tie between him and Ms. Rain and that the recounts deprived him of the possibility of winning if a draw had been held to break the tie.

[52] I am aware that, in his communications with the Electoral Officer, Mr. House suggested that properly counting the Victoria ballots could have resulted in a three-way tie involving a third candidate. That third candidate is not a respondent to this application. The evidence does not show, on a balance of probabilities, that the failure to count the Victoria votes properly affected the election of that third candidate. Accordingly, it is now too late to challenge the election of that candidate. I will not issue any remedy with respect to his election.

IV. Disposition

[53] For these reasons, Mr. House's application will be allowed. A judicial recount of the votes in favour of Mr. House and Ms. Rain will be held.

[54] Mr. House is entitled to the costs of this application. At the hearing, the parties agreed that an amount in the range of $4000 to $7500 would be appropriate. I will award costs in the amount of $6000. For greater certainty, this award does not depend on the outcome of the recount.

JUDGMENT in T-2520-22

THIS COURT'S JUDGMENT is that

1. Paul First Nation's motion to strike the present application is dismissed.
2. The application is granted.
3. A judicial recount of the votes cast for the applicant and the respondent Delores G. Rain will be held in the presence of a judge of the Federal Court, at 5th Floor, Tower 1, 10060 Jasper Avenue, Edmonton, Alberta, on a date and time to be set by the Judicial Administrator after consultation with the parties.
4. One Feather Mobile Technologies Ltd. is ordered to bring all the ballots for the Paul First Nation election for the position of councillor held on November 2, 2022, and all other materials in their possession regarding this election, to the registry of the Federal Court in accordance with directions given by the registry.
5. The recount will proceed according to the process set forth in the schedule to this judgment.
6. Costs in the amount of $6,000, inclusive of disbursement and taxes, are awarded to the applicant.
7. The Court retains jurisdiction to address any issue that may arise during or following the recount.

"Sébastien Grammond"

Judge

SCHEDULE

Procedure for judicial recount

1. The recount will be performed by the judge and a registry officer in the presence of one representative appointed by each candidate. Only the judge or the registry officer shall handle the ballots or the other materials provided by One Feather. The candidates and their legal counsel are also entitled to be present in the room where the recount takes place.

2. On the date and at the time and place established for a recount, the judge will open the relevant materials, including the sealed ballot box and the sealed envelopes containing the ballots.

3. The judge will count the ballots and compare this number to the original tally sheets to ensure that the number corresponds to the number of ballots cast in the election.

4. The judge will then examine each ballot, show it to the observers without allowing them to touch it, and determine whether there is agreement that the ballot is correctly classified as valid or invalid, and as containing a vote for either Mr. House or Ms. Rain, or both. If the ballot is not disputed, the judge will direct the registry officer to indicate the vote(s) for the relevant candidate(s) on the tally sheet. If the ballot is disputed, the judge will make a final determination.

5. When all the ballots have been counted, the judge will sign the tally sheets and declare to be elected the candidate having the highest number of votes.

6. In the case of a tie, the judge will conduct a draw to determine the winner.

7. The registry officer will then place the ballots in a suitable number of envelopes, seal and sign the envelopes, place the envelopes and the tally sheets in the ballot box, seal the ballot box and return it to the custody of One Feather.

8. The judge will issue an order stating the result of the recount and any additional orders contemplated in the reasons for judgment.

9. Within four days after completion of the recount,

    a. Paul First Nation will post, in a conspicuous place on the reserve, a copy of the order of the Court stating the result of the recount and any additional orders;

    b. The registry will send a copy of the order of the Court to the Department of Indigenous Services.

10. The judge may alter these procedures during the recount after giving Mr. House and Ms. Rain the opportunity to make submissions.

11. Any matter not dealt with in these procedures, and any question arising as to the application of these procedures, is to be determined by the judge.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2520-22
STYLE OF CAUSE:	WILLIAM HOUSE v DREW SHAW, ONE FEATHER, DELORES G. RAIN AND PAUL FIRST NATION
PLACE OF HEARING:	EDMONTON, ALBERTA
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APPEARANCES:

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Will Willier Darin Gette	FOR THE RESPONDENTS DELORES G. RAIN AND PAUL FIRST NATION

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