Federal Court Cour fédérale

Date: 20130222

Docket: T-619-12
T-620-12
T-621-12
T-633-12
T-634-12
T-635-12

Citation: 2013 FC 183

Ottawa, Ontario, February 22, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

T-619-12

SANDRA MCEWING AND BILL KERR

Applicants

and

ATTORNEY GENERAL OF CANADA,
MARC MAYRAND
(THE CHIEF ELECTORAL OFFICER),
JOHANNA GAIL DENESIUK (RETURNING OFFICER FOR WINNIPEG SOUTH CENTRE),
JOYCE BATEMAN,
ANITA NEVILLE,
DENNIS LEWYCKY, JOSHUA MCNEIL,
LYNDON B. FROESE, MATT HENDERSON

Respondents

AND BETWEEN:

T-620-12

KAY BURKHART

Applicant

and

ATTORNEY GENERAL OF CANADA,
MARC MAYRAND
(THE CHIEF ELECTORAL OFFICER),
DIANNE CELESTINE ZIMMERMAN
(RETURNING OFFICER FOR
SASKATOON-ROSETOWN-BIGGAR),
KELLY BLOCK, LEE REANEY,
VICKI STRELIOFF, NETTIE WIEBE

Respondents

AND BETWEEN:

T-621-12

JEFF REID

Applicant

and

ATTORNEY GENERAL OF CANADA,
MARC MAYRAND
(THECHIEF ELECTORAL OFFICER),
LAUREL DUPONT
(RETURNING OFFICER FOR
ELMWOOD-TRANSCONA),
JIM MALOWAY, ILONA NIEMCZYK,
LAWRENCE TOET, ELLEN YOUNG

Respondents

AND BETWEEN:

T-633-12

KEN FERANCE
AND
PEGGY WALSH CRAIG

Applicants

and

ATTORNEY GENERAL OF CANADA,
MARC MAYRAND
(THE CHIEF ELECTORAL OFFICER),
DIANNE JAMES MALLORY
(RETURNING OFFICER FOR
NIPISSING-TIMISKAMING),
JAY ASPIN, SCOTT EDWARD DALEY, RONA
ECKERT, ANTHONY ROTA

Respondents

AND BETWEEN:

T-634-12

YVONNE KAFKA

Applicant

and

ATTORNEY GENERAL OF CANADA,
MARC MAYRAND
(THE CHIEF ELECTORAL OFFICER),
ALEXANDER GORDON (RETURNING
OFFICER FOR VANCOUVER
ISLAND NORTH), JOHN DUNCAN,
MIKE HOLLAND, RONNA-RAE LEONARD,
SUE MOEN, FRANK MARTIN,
JASON DRAPER

Respondents

AND BETWEEN:

T-635-12

THOMAS JOHN PARLEE

Applicant

and

ATTORNEY GENERAL OF CANADA,
MARC MAYRAND
(THE CHIEF ELECTORAL OFFICER),
SUSAN J. EDELMAN
(RETURNING OFFICER FOR YUKON),
RYAN LEEF, LARRY BAGNELL,
KEVIN BARR, JOHN STREICKER

Respondents

REASONS FOR ORDER AND ORDER

[1] These Reasons for Order and Order refer to the applicants' motion filed on January 24, 2013, requesting leave to file the affidavit of Sasha Hart sworn January 24, 2013, pursuant to Rule 312(a) of the *Federal Courts Rules*, SOR/98-106 [the Rules], and requesting the costs of the motion. Attached to the affidavit in question is an "Information to Obtain" (ITO) sworn by John B. Dickson, an investigator from the Office of the Commissioner of Canada Elections. An ITO is a sworn document permitting an investigator to obtain a production order for evidence in the course of an investigation.

[2] The underlying application, heard on December 10-14, 2012, seeks to set aside the results of the 41st General Election of 2011 in six ridings pursuant to section 524 of the *Canada Elections Act*, SC 2000, c 9 due to alleged electoral fraud.

[3] As of January 24, 2013, the respondent Chief Electoral Officer, the three respondent Liberal electoral candidates, the six respondent New Democrat Party electoral candidates, and the respondent independent candidate Mr. Matt Henderson did not oppose the motion. The six respondent Parliamentarians oppose it. The respondent Attorney General had not advised the Court of his view by January 24th.

[4] A decision has not yet been issued in the applications on the merits in the present case. The evidence before the Court at the December 2012 hearing included three other ITOs sworn by Mr. Dickson and two other investigators from the Office of the Commissioner of Canada Elections, all of which were admitted subject to the Court's decision on how to weigh and assess them. This new ITO deals with records obtained from Rogers Communications and will be referred to as the "Rogers ITO". It is possible, although unknown at this time, that a fifth ITO exists and may become public at an unknown date; this potential document would deal with records obtained from Bell Canada and will be described as a "Bell ITO". The previous ITO by Mr. Dickson dealt with records obtained from Shaw Cablesystems and will be described as the "Shaw ITO".

[5] The Rogers ITO attached to the Sasha Hart affidavit of January 24th was made a matter of public record on January 10, 2013, subsequent to the December hearing. Upon becoming aware of this, the applicants contacted counsel for Elections Canada and were provided with an electronic copy of the Rogers ITO on January 16, 2013. The present motion was filed in Federal Court on January 24, 2013.

[6] The Rogers ITO is of the same nature as the previous ITOs. If admitted, it would be subject to the same objections as were made concerning the other ITOs and would be weighed in the same manner by the Court.

[7] Rule 312 provides that a party may file additional affidavits with leave of the Court. While in practice this has been taken to refer to a filing with leave between the close of written pleadings and cross-examinations and the hearing, rather than after the oral hearing, the test established by the jurisprudence sets only five requirements in order to permit additional affidavits. *Janssen-Ortho Inc v Apotex*, 2010 FC 81 at para 33 gives these as follows:

> (1) The evidence to be adduced will serve the interests of justice;
> (2) The evidence will assist the Court;
> (3) The evidence will not cause substantial or serious prejudice to the other side; and
> (4) The evidence must not have been available at an earlier date.
> (5) The evidence will not unduly delay the proceeding.

[8] In *Murray v Canada (Attorney General)*, 2013 FC 49 at para 6 the parties consented to a slightly different test:

> **6** The parties agreed that the three-part test summarized in *Whyte v Canadian National Railway*, 2010 CHRT 6 [*Whyte*], which followed that used in *Vermette v Canadian Broadcasting Corporation*, [1994] CHRD 14, should be used. The test is the following:
>
> > 1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial;
> >
> > 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
> >
> > 3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[9] The above-mentioned *Whyte* case, heard before the Canadian Human Rights Tribunal (*Whyte v Canadian National Railway*, 2010 CHRT 6 [*Whyte*]) noted at para 31:

> **31** The Tribunal in *Vermette* also referred to other decisions dealing with an application to reopen a case. It noted:
>
> > Where an application to re-open is received after a decision has been rendered, the principles that should guide the exercise of this discretion are described by Sopinka and Lederman, The Law of Evidence in Civil Cases in the following manner at page 542:
> >
> > > "Except in the case of fraud or surprise, the evidence must be newly discovered evidence which reasonable diligence could not have discovered during the trial, and it must be of such a character that it would have formed a determining factor in the result."
> >
> > Where the application to reopen is received prior to a decision being rendered, a broader discretion to reopen has been recognized. Sopinka and Lederman, The Law of Evidence in Civil Cases at page 541 suggest that a case may be reopened "where the interest of justice requires it". Among the cases cited by Sopinka and Lederman is Sunny Isle Farms Ltd. v. Mayhew (1972), 27 D.L.R. (3d) 323 (P.E.I.S.C.). In that case Nicholson J. adopted the statement by Boyle J. in Sales v. Calgary Stock Exchange, [1931] 3 W.W.R. 392 at 394 (Alta. S.C.) where he said:
> >
> > > "It is in my view a serious matter to open up a trial after all the evidence has been taken, and it should never be done unless it seems imperative in the interest of justice that the case should be reopened for further evidence."

[10] In the present case, the newly presented Rogers ITO provides evidence from ridings not covered by Mr. Dickson's previous Shaw ITO. It includes a declaration by an elector that he was deceived by a misleading telephone call, went to the wrong location and then did not vote, and declarations by other electors that they received misleading telephone calls and went to incorrect polling locations as a result. The applicants argue that this goes to proving that widespread electoral fraud indeed occurred.

[11] The respondent Parliamentarians oppose the admission of this Rogers ITO on the grounds that it is irrelevant and constitutes inadmissible hearsay for which no admissibility exception has been demonstrated, and that the proceeding has concluded and no motion to re-open has been made. They argue that they permitted the introduction of the previous ITOs only for expediency and subject to their submissions on admissibility, weight, and relevance, upon which they continue to rely.

[12] They further argue that the applicants did not seek to reserve any right to bring fresh evidence at the close of the oral hearings. In addition, these ITOs do not contain any information concerning the six electoral districts at issue and thus are even more obviously irrelevant than the previous ones.

[13] In *Campbell v Electoral Canada*, [*sic*] 2008 FC 1080 at para 35, this Court said: "Evidence is relevant to an application for judicial review if it may affect the decision the Court will make. The relevance is determined by reference to the grounds of review set out in the originating notice of application."

[14] Without predetermining either the weight I will give to this evidence, or the inferences I will draw from it, I find that it may affect the decision that I will make. It will therefore serve the interests of justice and assist the Court for it to be admitted to the record. It is not disputed that it was not available at an earlier date and its admission will not unduly delay my decision. The admission of this Rogers ITO will not cause substantial prejudice to the respondents, as they have

had the opportunity to make submissions on ITO evidence generally, which will apply to this one as well.

[15] I will therefore grant the motion. In the circumstances, however, I will leave the question of costs to be determined in the cause.

ORDER

THIS COURT ORDERS that:

1. The motion is granted;
2. The affidavit of Sasha Hart sworn January 24, 2013 shall be filed; and
3. Costs shall be in the cause.

"Richard G. Mosley"

Judge

EDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-619-12 (T-620-12, T621-12, T-633-12 T-634-12, T-635-12)
STYLE OF CAUSE:	SANDRA MCEWING AND BILL KERR and ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), JOHANNA GAIL DENESIUK RETURNING OFFICER FOR WINNIPEG SOUTH CENTRE) JOYCE BATEMAN, ANITA NEVILLE, DENNIS LEWYCKY, JOSHUA MCNEIL, LYNDON B. FROESE, MATT HENDERSON
AND BETWEEN	KAY BURKHART and ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), DIANNE CELESTINE ZIMMERMAN (RETURNING OFFICER FOR SASKATOON-ROSETOWN-BIGGAR), KELLY BLOCK, LEE REANEY, VICKI STRELIOFF, NETTIE WIEBE
AND BETWEEN	JEFF REID and ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), LAUREL DUPONT (RETURNING OFFICER FOR ELMWOOD-TRANSCONA), JIM MALOWAY, ILONA NIEMCZYK, LAWRENCE TOET, ELLEN YOUNG

AND BETWEEN	KEN FERANCE AND PEGGY WALSH
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AND BETWEEN	YVONNE KAFKA
	and
	ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), ALEXANDER GORDON (RETURNING OFFICER FOR VANCOUVER ISLAND NORTH), JOHN DUNCAN, MIKE HOLLAND, RONNA-RAE LEONARD, SUE MOEN, FRANK MARTIN, JASON DRAPER
AND BETWEEN	THOMAS JOHN PARLEE
	and
	ATTORNEY GENERAL OF CANADA, MARC MAYRAND (THE CHIEF ELECTORAL OFFICER), SUSAN J. ELELMAN (RETURNING OFFICER FOR YUKON), RYAN LEEF, LARRY BAGNELL, KEVIN BARR, JOHN STREICKER

PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 24, 2013
REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	February 22, 2013

APPEARANCES:

Steven Shrybman Peter Engelmann Benjamin Piper	FOR THE APPLICANTS
Barbara McIsaac Marc Chenier	FOR THE RESPONDENT (Marc Mayrand, Chief Electoral Officer)
Arthur Hamilton Ted Frankel Jeremy Martin	FOR THE RESPONDENT (Responding Parliamentarians)
W. Thomas Barlow Nick Shkordoff	FOR THE RESPONDENT (Responding Market Group Inc)

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