Federal Court of Appeal | Cour d'appel fédérale

Date: 20150623

Docket: A-232-14

Citation: 2015 FCA 152

CORAM: **RYER J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

BROTHER KORNELIS KLEVERING

Appellant

and

ATTORNEY GENERAL OF CANADA, MARC MAYRAND (CHIEF ELECTORAL OFFICER), ANN BUDRA (RETURNING OFFICER FOR THE RIDING OF GUELPH), FRANK VALERIOTE, MARTY BURKE, BOBBI STEWART, JOHN LAWSON, PHILIP BENDER, KAREN LEVENSON, DREW GARVIE

Respondents

Heard at Toronto, Ontario, on June 15, 2015.

Judgment delivered at Ottawa, Ontario, on June 23, 2015.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RYER J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The Appellant is appealing the Order of Hughes J dated April 22, 2014 (Docket T-1254-12). Hughes J dismissed the Appellant's motion appealing the decision of Prothonotary

Milczynski rendered on September 19, 2013. The Prothonotary allowed the motion of Frank Valeriote, one of the Respondents, and dismissed the Appellant's Application that he had filed under section 524 of the *Canada Elections Act*, S.C. 2000, c.9 (the Act).

[2] The Appellant had brought an application contesting the results of the May 2, 2011 federal election for the riding of Guelph. The Appellant alleged that there numerous automated telephone calls that purported to be from Elections Canada and which "misdirected [voters] to non-existing polling stations" (paragraph 2(c) of his Application).

[3] The Prothonotary dismissed the Appellant's Application on the basis that she was "satisfied that it plain and obvious that it is a foregone conclusion that the [Appellant] cannot establish on the record he has filed that those voter suppression efforts had an impact on the election results in the riding of Guelph or on the integrity of the election such that there is even the slightest chance that the results would be annulled and the electorate in Guelph put through a by-election".

[4] The Prothonotary also found that the Appellant had not filed his Application within the time period for doing so as set out in section 527 of the *Act*. As a result, she stated that she would also dismiss his Application for this reason.

[5] In *Norton v. Via Rail Canada Inc.* 2005 FCA 205, [2005] F.C.J. No. 978, the originating notices of application under section 77 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) were struck by the Prothonotary. On appeal, a Judge of the Federal Court confirmed the

decision of the Prothonotary. On appeal to this Court, Sharlow JA described the role of this Court as follows:

> **14** According to the jurisprudence of this Court, the Judge was required to reconsider the motion anew because a question raised in the motion was vital to the final issue of the case (see *Merck & Co., Inc. v. Apotex Inc.* (F.C.A.), [2004] 2 F.C.R. 459, at paragraph 19). The role of this Court on appeal is to determine whether the Judge erred in upholding the Prothonotary's decision.

[6] Frank Valeriote's motion also raised a question that was vital to the final issue of this case as his motion was a motion to dismiss the Appellant's Application.

[7] Hughes J provided brief reasons for dismissing the Appellant's appeal:

> **AND UPON** determining that, if this motion is an Appeal from the decision of Prothonotary Milczynski dated September 19, 2013 the motion has been filed well out of time and no reasonable excuse for the delay has been made out;
>
> **AND UPON** determining that the motion is otherwise an attempt to re-litigate the matter finally determined by Prothonotary Milczynski and is therefore improper;

[8] In the Appellant's motion, which was considered by Hughes J, the Appellant stated that he was "appealing the Decision of Madame Prothonotary Milczynski, dated September 19th, 2013". The only reason cited for dismissing this appeal is that it was not filed within the time for doing so. However, by an Order of the Federal Court dated March 25, 2014, the time for filing a motion to appeal the order of Prothonotary Milczynski had been extended to ten (10) days from the date of that Order. Since the Appellant then filed his motion on April 3, 2014, it was filed within the extended time period as permitted by the Order dated March 25, 2014. Therefore, it should not have been dismissed on the basis that it was "filed well out of time".

[9] The Appellant's motion filed on April 3, 2014 should be considered to be filed within the extended time granted for filing this motion and the Federal Court Judge should have reconsidered Frank Valeriote's motion anew. Since the Federal Court Judge did not do this, in the circumstances of this case, it seems to me that it would be appropriate for this Court to reconsider Frank Valeriote's motion anew.

[10] In reconsidering this motion, in my view, the first issue that should be addressed is whether the Appellant filed his Application within the time period for doing so as provided in the Act.

[11] Section 527 of the Act provides as follows:

527. An application based on a ground set out in paragraph 524(1)(b) must be filed within 30 days after the later of (a) the day on which the result of the contested election is published in the Canada Gazette, and (b) the day on which the applicant first knew or should have known of the occurrence of the alleged irregularity, fraud, corrupt practice or illegal practice.	527. La requête en contestation fondée sur l'alinéa 524(1)b) doit être présentée dans les trente jours suivant la date de la publication dans la Gazette du Canada du résultat de l'élection contestée ou, si elle est postérieure, la date à laquelle le requérant a appris, ou aurait dû savoir, que les irrégularité, fraude, manoeuvre frauduleuse ou acte illégal allégués ont été commis.

[12] Since the Appellant's Application was "based on a ground set out in paragraph 524(1)(b)", that Application had to be filed within 30 days of the later of the days set out in paragraphs 527(a) and (b). Frank Valeriote, in his notice of motion, noted that the results for the electoral district of Guelph for the election held on May 2, 2011 were published in the *Canada Gazette* on May 19, 2011. The Appellant does not dispute this publication date.

[13] The date required by subsection 527(b) of the Act is the date that the Appellant knew or should have known about the alleged activity. The Appellant, in his affidavit, indicated that he has regularly resided in Canada for half of the year and for the other half of the year he has resided on a remote island in Thailand. In his affidavit he also stated that:

> 5. During the election, I became aware that some voters had received phone calls directly them toward non-existent polling stations. The callers claimed to be representatives from Elections Canada. For the most part, I dismissed these complaints as nothing more than possible errors on the part of Elections Canada.
>
> 6. I left for Thailand again on October 31st, 2011. While there, and on one of my supply runs to Ranong (in March, 2012), a [sic] received a few emails from friends in Canada informing me of an on-going Elections Canada investigation into possible fraudulent, but also legal, robo calls released in Guelph on, and before, Election Day.
>
> 7. In response, I sent a letter to the editor of the Guelph Mercury (March 12th, 2012), which promoted calls for a by-election, to be held free from the corrupting influence of robo calls. I did not know, nor could have known, that a massive robo automated fraud had been committed in Guelph on Election Day or that these calls formed part of an organized campaign to suppress the vote on a nation-wide scale.
>
> 8. Anyway, I re-entered Canada on May 28th, 2012 to start work at the GLBC [Guelph Lawn Bowling Club]. I now began speaking to Guelph residents about their own experience with the fraud perpetrated on May 2nd, 2011. I then spent several weeks researching media accounts detailing an unfolding Elections Canada investigation. I read back issues of newspapers and came across media reports involving a certain 'Pierre Poutine', a person possibly connected to the Conservative Party in Guelph, a person likely to have knowledge about an orchestrated campaign to defraud the electorate nationwide.
>
> 9. I also read, for the first time, the Chief Electoral Officer's (CEO) testimony given to Parliament on March 29, 2012, which confirmed media speculation about the extent of the robo fraud in Guelph. In fact, the CEO testified that over 6,700 false robo calls had been released *en masse* in the Guelph riding on Election Day.

[14] Paragraph 527(b) of the Act is not restricted to determining the date on which the Appellant actually knew about the activity in question but is also triggered by the date that he

should have known of the alleged activity. As noted by Mosley J in *McEwing v. Canada (Attorney General)*, 2013 FC 525, [2013] F.C.J. No. 558, at paragraph 92, "[t]he words 'or should have known' impose an objective standard".

[15] In my view it is more likely than not that the Appellant should have known about the activity upon which his Application is based, at the time (if not earlier) when the Chief Electoral Officer testified on March 29, 2012 as his testimony would then have been in the public domain (as confirmed by the Appellant's reading about this testimony in the newspapers). While the Appellant's circumstances of being on a remote island with limited access to information would affect the date on which he actually knew, it should not affect the date that he should have known about the alleged activity. Otherwise, the limitation period could be extended indefinitely depending on an individual's personal circumstances.

[16] The Appellant did not file his Application until June 26, 2012, which was more than 30 days after March 29, 2012. As a result, I would quash his Application since it was not filed within the time period for making such an application as provided in the Act. Since I would quash the Appellant's Application, there is no need to address the merits of his Application. Although the Prothonotary dismissed his Application and I would quash it, nothing turns on this point.

[17] It should also be noted that the Prothonotary's order was in response to the motion of one of the Respondents, Frank Valeriote, to dismiss the Appellant's Application. Frank Valeriote brought that motion before he had filed his affidavits and documentary exhibits. Even if the

Appellant were to be successful in this appeal, the result would be that his Application would be reinstated and would then proceed to a hearing. It is unlikely that any such hearing could be concluded before there is another general federal election, which would render his request to annul the 2011 election in Guelph moot.

[18] As a result, I would dismiss the appeal, without costs.

"Wyman W. Webb"

J.A.

"I agree

C. Michael Ryer J.A."

"I agree

Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-232-14
STYLE OF CAUSE:	BROTHER KORNELIS KLEVERING v. ATTORNEY GENERAL OF CANADA, MARC MAYRAND (CHIEF ELECTORAL OFFICER), ANN BUDRA (RETURNING OFFICER FOR THE RIDING OF GUELPH), FRANK VALERIOTE, MARTY BURKE, BOBBI STEWART, JOHN LAWSON, PHILIP BENDER, KAREN LEVENSON, DREW GARVIE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 15, 2015
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RYER J.A. RENNIE J.A.
DATED:	JUNE 23, 2015

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