

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120417

Docket: A-349-11

Citation: 2012 FCA 115

**CORAM: PELLETIER J.A.
GAUTHIER J.A.
STRATAS J.A.**

BETWEEN:

MIKE ORR

Appellant

and

**JIM BOUCHER, RAYMOND POWDER, DAVID BOUCHIER,
AND FORT MCKAY FIRST NATION**

Respondents

Heard at Edmonton, Alberta, on April 16, 2012.

Judgment delivered at Edmonton, Alberta, on April 17, 2012.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

PELLETIER J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment of the Federal Court (*per* Justice Russell): 2011 FC 1035. The Federal Court dismissed an application for judicial review brought by Mr. Orr. In that judicial review, Mr. Orr sought to set aside a decision of the returning officer concerning an election held in the Fort McKay First Nation in April 2011.

[2] Under the First Nation's Election Code, complaints about the election can be made and can be appealed to an appeal arbitrator. From there, parties are at liberty to bring an application for judicial review to the Federal Court.

[3] In this case, Mr. Orr raised a number of complaints concerning the election. His complaints can be grouped into two categories. He pursued each category of complaint in a different way:

- *Complaints about voter ineligibility and failures to produce identification.* Mr Orr pursued these complaints by way of appeal to the appeal arbitrator, using the prescribed form under the Election Code and paying the requisite fee.
- *Complaints about the nomination and eligibility of the individual respondents to stand as candidates.* Mr. Orr pursued these complaints by way of an application for judicial review directly to the Federal Court. Then he appealed to this Court. This is the present appeal.

[4] The Federal Court dismissed Mr. Orr's application for judicial review because, on the facts, Mr. Orr had an adequate and effective avenue available to him to redress the returning officer's ruling: the appeal to the appeal arbitrator under the Election Code. Mr. Orr did not pursue that avenue.

[5] On the evidence before it, the Federal Court found that a qualified appeal arbitrator was “in place well before the election and the declaration of election result” and that Mr. Orr “had the opportunity to put forward [the grounds of complaint] using the appeal process” (at paragraph 65). This was shown by the fact that, as previously mentioned, Mr. Orr did launch appeals to the appeal arbitrator concerning other complaints.

[6] The Federal Court recognized that its decision was a discretionary one, so it considered other relevant factors. It underscored the need for election disputes in the First Nation to be resolved quickly, the First Nation’s choice to insert a quick appeal process in its Election Code in order to achieve that end, and the importance of ensuring that that process “not be undermined by allowing an alternative process to run parallel to [that process]” (at paragraphs 59-60). In the end, the Federal Court exercised its discretion against Mr. Orr proceeding by way of judicial review.

[7] Based as it is on an exercise of discretion, the judgment of the Federal Court can only be set aside if Mr. Orr shows that there was a palpable and overriding error in the Federal Court’s findings of fact or a fundamental legal error. Mr. Orr has not shown this.

[8] The Federal Court had an ample factual basis for the exercise of its discretion. Further, it exercised its discretion consistently with the principles set out in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 and *Laurent v. Fort McKay First Nation*, 2009 FCA 257. Absent well-recognized exceptions, parties must pursue any adequate and effective recourse available to them before bringing an application for judicial review.

[9] Mr. Orr advanced two particular submissions during oral argument in this Court.

[10] First, Mr. Orr submitted that the Federal Court was wrong to find that he did not appeal to the appeal arbitrator. Mr. Orr referred us to a letter that he sent to the returning officer. He submitted that this was, in effect, a notice of appeal to the appeal arbitrator. He also pointed to some documents that show that the returning officer did regard the letter as if it were an appeal. He added that if the letter were not in proper form and the requisite fee had not been paid, the returning officer should have told him. The Federal Court rejected these submissions, finding that the letter did not qualify as an appeal to the appeal arbitrator (at paragraph 46).

[11] On this, there is no basis to interfere with the Federal Court's finding. In order to appeal to the appeal arbitrator, one must file with the returning officer a notice of appeal in proper form and the requisite fee: Election Code, section 83.1. Mr. Orr's letter is not a notice of appeal in proper form, and he did not pay the fee. In addition, I do not agree that in these circumstances the returning officer was under some obligation to advise Mr. Orr that his letter was not a notice of appeal and that he had not paid the requisite fee. Equally, it could be said that Mr. Orr should have approached the returning officer and inquired into why his appeal was not being processed. But he did not do so, choosing instead to bring his application for judicial review to the Federal Court without pursuing the appeal route that was available under the Elections Code.

[12] Second, Mr. Orr submitted that he could not appeal to the appeal arbitrator. In his view, the subject-matter of his complaint – the returning officer’s acceptance of the allegedly invalid nomination papers filed by the individual respondents – was governed by section 13.4 of the Election Code. He says that under the Election Code no appeals lie from that.

[13] I disagree. If the returning officer misinterpreted or misapplied section 13.4 of the Election Code, an appeal to the appeal arbitrator would lie under section 81.1. Under that section, an appeal may be brought if “the returning officer made an error in the interpretation or application of the Code which affected the outcome of the election.”

[14] Therefore, for the foregoing reasons, I would dismiss the appeal, with costs.

"David Stratas"

J.A.

“I agree.

J.D. Denis Pelletier J.A.”

“I agree.

Johanne Gauthier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-349-11

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE RUSSELL
DATED SEPTEMBER 1, 2011, DOCKET NO. T-507-11**

STYLE OF CAUSE: Mike Orr v. Jim Boucher et al.

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: April 16, 2012

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: PELLETIER,
GAUTHIER J.J.A.

DATED: April 17, 2012

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