SUPREME COURT OF YUKON

Citation: *Yukon (Chief Electoral Officer) v. Nelson*, 2014 YKSC 26

Date: 20140520
S.C. No. 14-A0015
Registry: Whitehorse

Between:

THE CHIEF ELECTORAL OFFICER

Petitioner

And

KEVIN NELSON, KATHY McDOUGALL, CHANTELLE BROWN, MIKE TUCK, LOIS JOE, TRAVIS JOHNNIE, TERI-LEE ISAAC, REBECCA ROBERTS and GEORGINA GILL

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Debra L. Fendrick	Counsel for the Petitioner
Kathy McDougall	Appearing on own behalf
Mike Tuck	Appearing on own behalf
Lois Joe	Appearing on own behalf
Teri-Lee Isaac	Appearing on own behalf
Georgina Gill	Appearing on own behalf

REASONS FOR JUDGMENT

[1] This is an application by the Chief Electoral Officer of the Yukon for directions from this Court with respect to a school council election for the Eliza Van Bibber School in Pelly Crossing, held on May 5, 2014. In that election, nine candidates competed for six positions on the school council. There is no dispute that there was an irregularity in the election which affected the outcome. For the reasons which follow, this means the

election must be annulled. The only real issue discussed at the hearing of the application was whether there should be an entirely new election or whether the procedure for breaking a tie between two or more candidates, set out in s. 33(3) of the *School Council Election Regulations*, O.I.C. 1990/142, (the "*Regulations*") under the *Education Act*, R.S.Y. 2002, c. 61, could be used as between the sixth and seventh placed candidates.

[2] Although it is somewhat unusual for the Chief Electoral Officer to be the applicant in this type of situation, she does so because, under s. 84 of the *Education Act*, she exercises general direction and supervision over the administrative conduct of school council elections and ensures fairness, impartiality and compliance with the election provisions in the *Act*.

[3] The respondents are the nine candidates. All were served with the petition and the two supporting affidavits. Six of the nine attended the hearing and five of the six made submissions. None were opposed to the application, although some differed on whether there should be a new election.

[4] Because time is of the essence in this matter, I allowed the hearing to proceed on short notice to the respondents.

[5] The facts in this matter are set out in the respective affidavits of Brenda McCain-Armour, the Chief Electoral Officer (Acting), and Jean Van Bibber, who was the Returning Officer for the election. None of the facts are disputed.

[6] Nominations for the election closed on April 24, 2014. The nine respondents were nominated for the six positions on the school council. This was the first election for school council in Pelly Crossing since 1991. All other elections have been by acclamation.

[7] On election day, May 5, 2014, a total of 106 votes were cast. This was a significant voter turnout, as I am informed that the total population in Pelly Crossing is just over 330 people. It would appear that the election was hotly contested. The atmosphere in and around the polling station during the voting was highly charged. At one point, the RCMP attended to speak with the Returning Officer.

[8] After the polls opened, an individual (person #1) approached the Returning Officer and advised her that he wanted to vote on behalf of another person who could not attend the polling station to vote. Person #1 indicated that they had a signed paper from the other person indicating their voting choices. The Returning Officer declined to read the note, to preserve voter secrecy, but was shown the signature of the author of the note. The Returning Officer then quickly consulted s. 24 of the *Regulations* and determined that person #1 could mark the absent person's ballot, providing he gave an "Oath of a Friend or Relative", in Form 8 of the *Regulations*. Person #1 was then given two ballots, one for himself and one for the absent person. He voted and returned two ballots to the Deputy Returning Officer. The foils of the ballots were removed and the ballots were deposited in the ballot box.

[9] Sometime later, another individual (person #2) approached the polling station and asked to vote on behalf of their spouse, who could not attend at the poll. Again, the Returning Officer decided to repeat the procedure under s. 24 of the *Regulations,* obtaining a Form 8 Oath from person #2 and providing him or her with two ballots. After voting, person #2 returned the ballots to the Deputy Returning Officer, who pulled off the foils and deposited them into the ballot box.

[10] On the following day, May 6, 2014, the Chief Electoral Officer received a telephone call from an individual in Pelly Crossing asking if a person could vote by proxy at the school council election. She advised the individual that there were no provisions for proxy voting in such elections. The Chief Electoral Officer also contacted the Returning Officer to inquire whether there had been any voting by individuals on behalf of other voters. It was then that the Returning Officer disclosed the procedure she had allowed for persons #1 and #2, using the Oath in Form 8 of the *Regulations*. The Chief Electoral Officer informed the Returning Officer that the Form 8 procedure only allows the friend or relative to assist a voter in the polling booth if the voter has a problem with marking their ballot.

[11] Section 24 reads:

> "24.(1) An elector who requires assistance to mark a ballot paper may request that a friend or relative mark the elector's ballot paper.
>
> (2) The friend or relative shall
>
> (a) take the oath in Form 8 annexed hereto to keep secret the elector's choices, and
>
> (b) accompany the elector into the polling booth.
>
> (3) The poll clerk shall enter in the poll book across from the elector's name the name of the friend or relative and the phrase "oath of friend or relative."

[12] The Returning Officer now realizes that she was in error in relying on s. 24 of the *Regulations*, but at all times was acting in good faith and to the best of her understanding

of the election process. She is not related to or friends with either person #1 or person #2. Her error was an administrative mistake.

[13] The Statement of Votes indicates that there was a two vote difference between the candidate elected for the sixth position on school council and the unsuccessful seventh-ranked candidate, who received the next highest number of votes.

[14] In *Ta'an Kwäch'än Council (Re)*, 2006 YKSC 62, at para. 24, Veale J. confirmed that this Court has inherent jurisdiction to deal with matters of elections where there is no legislation which otherwise applies.

[15] In the case at bar, although there are provisions in the *Education Act* and the *Regulations* regarding school council elections, there are no provisions on the procedure to be followed in the event of an election irregularity. Therefore, I must look to common law principles in this regard. These were referred to by Veale J. in *Ta'an Kwäch'än Council*, at paras. 17 to 20:

> "17 Generally speaking, courts deal with cases that involve challenges to past election results based on irregularities that occurred in the election process. Typically these challenges are based upon the ineligibility of candidates, the ineligibility of electors, or irregularities in the marking or counting of ballots. Courts are called upon to review the electoral process to determine whether the outcome should be confirmed or set aside.
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> 18 Most challenges to election outcomes arise under statutes that set out the principles for controverting elections.
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> 19 However, in the case of *Beamish* v. *Miltenberger*, [1997] N.W.T.J. No. 19 at paragraphs 30 - 31, Vertes J. found that the common law principles still existed so long as they were not clearly intended to be changed by the applicable election statute. Assuming this to be the case, the common law principles that apply to electors are summarized at paragraph 31 of *Beamish* by a quote from Lord Denning in *Morgan* v. *Simpson*, [1974] 3 All E.R. 722 (C.A.) at page 728:

> "(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not ... (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election ... (3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result - then the election is vitiated."
>
> 20 The general common law principle is that the will of the people as expressed in an election will not be set aside unless the irregularity or non-compliance with election law or practice is such that the outcome would have been materially affected. Obviously any irregularity affects the election process in some way. Unless it materially affects the validity of the election results, courts will not set aside the decision of the voters.

[16] In order to determine whether the results of this election have been materially affected by the irregularity regarding the two “Form 8” voters, I am to have regard to the “magic number” test. This was referred to in *Opitz v. Wrzesnewskyj*, 2012 SCC 55, at paras. 71 to 73:

> “71 To date, the only approach taken by Canadian courts in assessing contested election applications has been the “magic number” test referred to in *O'Brien* (p. 93). On this test, the election must be annulled if the rejected votes are equal to or outnumber the winner's plurality (*Blanchard*, at p. 320).
>
> 72 The "magic number" test is simple. However, it inherently favours the challenger. It assumes that all of the rejected votes were cast for the successful candidate. In reality, this is highly improbable. However, no alternative test has been developed. No evidence has been presented in this case to support any form of statistical test that would be reliable and that would not compromise the secrecy of the ballot.
>
> 73 Accordingly, for the purposes of this application, we would utilize the magic number test. The election should be annulled

> when the number of rejected votes is equal to or greater than the successful candidate's margin of victory. However, we do not rule out the possibility that another, more realistic method for assessing contested election applications might be adopted by a court in a future case."

[17] In the case at bar, the two votes cast by persons #1 and #2 for the absent individuals must be rejected because they were not cast in accordance with the provisions in the *Education Act* or the *Regulations*. Quite simply, this legislation only allows in-person voting (albeit with the assistance of a friend or relative) or mail-in voting (the latter being found in s. 99 of the *Education Act* and ss.14 and 15 of the *Regulations*). Therefore, the two votes must be rejected as invalid. Rejecting the votes affects the result of the election in the sense that it changes the vote count: *Opitz*, at para. 59. Further, since the two rejected votes equal the sixth candidate's margin of victory over the seventh unsuccessful candidate, under the magic number test the election must be vitiated and annulled.

[18] There was some interesting discussion at the hearing about whether this Court would have jurisdiction to treat the result of the rejection of the two votes as effectively creating a tie between the sixth and seventh ranked candidates. If that were possible, then s. 33(3) of the *Regulations* might be used to decide between the two candidates "by the drawing of lots". On further reflection, I am satisfied that the procedure in s. 33(3) is not available in these circumstances. It seems to me that as the legal effect of the irregularity makes the election a nullity, it does so for all of the candidates and not simply for the two ranked sixth and seventh. Further, s. 33(3) of the *Regulations* only applies in the context of a recount where there is an equal number of votes for two or more

candidates in what is presumed to be a valid election. Here I have determined the election to be invalid.

[19] *Opitz* suggests that courts must not overturn elections lightly, because doing so disenfranchises not only those persons whose votes were rejected, but every elector who voted. At para. 48, the Supreme Court noted this and other potential disadvantages to vitiating an election by quoting from Professor Stephen F. Huefner, in "Remedying Election Wrongs" (2007), 44 Harv. J. on Legis. at 265, at pp. 295-96:

> "48 It should be remembered that annulling an election would disenfranchise not only those persons whose votes were disqualified, but every elector who voted in the riding. That voters will have the opportunity to vote in a by-election is not a perfect answer, as Professor Steven F. Huefner writes:
>
> > ... a new election can never be run on a clean slate, but will always be colored by the perceived outcome of the election it superseded. New elections may also be an inconvenience for the voters, and almost certainly will mean that a different set of voters, with different information, will be deciding the election. Moreover, there can be no guarantee that the new election will itself be free from additional problems, including fraud. In the long term, rerunning elections might lead to disillusionment or apathy, even if in the short term they excite interest in the particular contest. Frequent new elections also would undercut democratic stability by calling into question the security and efficiency of the voting mechanics…."

[20] While I bear these concerns in mind, I nevertheless conclude that I have no alternative but to order a new election for the school council of the Eliza Van Bibber School.

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Gower J.