

2011 CarswellNat 611, 2011 FC 307

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Keeper v. Canada (Minister of Indian Affairs & Northern Development)

Nelson Keeper, Applicant and Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs & Northern Development, Chief Martin Owens, Councillor Deon Lam and Deputy Electoral Officer
Ian Keeper, Respondents

Federal Court

Douglas R. Campbell J.

Heard: March 8, 2011

Judgment: March 14, 2011

Docket: T-1252-10

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Counsel: Melissa Burkett, Martin Minuk, for Applicant

Martin Kramer, for Respondent, Chief Martin Owens

Yvette Creft, Lisa Cholosky, for Respondent, Minister of Indian Affairs & Northern Development

Subject: Public

Aboriginal law.

Douglas R. Campbell J.:

1 The present Application concerns an appeal by the Applicant to the Respondent Minister concerning the outcome of the Little Grand Rapids First Nation's election held on July 22, 2009. In the election the Applicant failed in his bid to be elected Chief. The substance of his appeal is that the conduct of the personal Respondents with respect to the election warrants setting aside the election. The Minister's Delegate dismissed the appeal on June 22, 2010. I agree with the Applicant's argument that this decision is not defensible in respect of the law and the facts; as a result, it must be set aside (*Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 47).

2 The following features constitute the disposition of the appeal: sworn allegations made by the Applicant of wrongdoing in respect to the election; assignment by the Minister of an Evaluator to gather evidence for consideration by a decision-maker Delegate of the Minister; appointment of an Investigator by the Evaluator to investigate the allegations; reporting by the Investigator to the Evaluator of the evidence found; reporting by the Evaluator to a decision-making Delegate of the Minister which included all relevant material collected on the

appeal, and, in particular, a draft decision letter for the Delegate's signature; and decision-making by the Delegate, presently under review, represented by the letter supplied by the Evaluator being signed without amendment, and without comment on the record.

3 The critical passage in the decision with respect to the standard of evaluation applied is as follows:

All particulars and documents filed in connection with the notice of appeal have been examined along with the findings of an investigation. On the basis of this examination, the Department of Indian and Northern Affairs Canada is unable to conclude that there was contravention of the *Indian Act* or the *Indian Band Election Regulations* (IBER) that might have affected the results of the election or evidence to support findings of corrupt practice.

[Emphasis added]

(Record of the Respondent the Attorney General of Canada (AG), Vol. 1, p. 194)

4 In my opinion this passage constitutes a fundamental error in law because it applies an incorrect evidentiary standard. The legislative provisions engaged by the appeal and the decision are Sections 12 and 14 of the *Indian Band Election Regulations* C.R.C., c. 952 (the *Regulations*) and s. 79 of the *Indian Act* (R.S., 1985, c. I-5) (the *Act*):

The Regulations

ELECTION APPEALS

12. (1) Within 45 days after an election, a candidate or elector who believes that

(a) there was corrupt practice in connection with the election,

(b) there was a violation of the Act or these Regulations that might have affected the result of the election, or

(c) a person nominated to be a candidate in the election was ineligible to be a candidate, may lodge an appeal by forwarding by registered mail to the Assistant Deputy Minister particulars thereof duly verified by affidavit.

(2) Where an appeal is lodged under subsection (1), the Assistant Deputy Minister shall forward, by registered mail, a copy of the appeal and all supporting documents to the electoral officer and to each candidate in the electoral section in respect of which the appeal was lodged.

(3) Any candidate may, within 14 days of the receipt of the copy of the appeal, forward to the Assistant Deputy Minister by registered mail a written answer to the particulars set out in the appeal together with any supporting documents relating thereto duly verified by affidavit.

(4) All particulars and documents filed in accordance with the provisions of this section shall constitute and form the record.

SOR/85-409, s. 4(E);

SOR/2000-391, s. 11.

[...]

14. Where it appears that

- (a) there was corrupt practice in connection with an election,
- (b) there was a violation of the Act or these Regulations that might have affected the result of an election, or
- (c) a person nominated to be a candidate in an election was ineligible to be a candidate, the Minister shall report to the Governor in Council accordingly.

[Emphasis added]

APPELS À L'ÉGARD DE L'ÉLECTION

12. (1) Si, dans les quarante-cinq jours suivant une élection, un candidat ou un électeur a des motifs raisonnables de croire:

- a) qu'il y a eu manœuvre corruptrice en rapport avec une élection,
 - b) qu'il y a eu violation de la Loi ou du présent règlement qui puisse porter atteinte au résultat d'une élection, ou
 - c) qu'une personne présentée comme candidat à une élection était inéligible, il peut interjeter appel en faisant parvenir au sous-ministre adjoint, par courrier recommandé, les détails de ces motifs au moyen d'un affidavit en bonne et due forme.
- (2) Lorsqu'un appel est interjeté au titre du paragraphe (1), le sous-ministre adjoint fait parvenir, par courrier recommandé, une copie du document introductif d'appel et des pièces à l'appui au président d'élection et à chacun des candidats de la section électorale visée par l'appel.
- (3) Tout candidat peut, dans un délai de 14 jours après réception de la copie de l'appel, envoyer au sous-ministre adjoint, par courrier recommandé, une réponse par écrit aux détails spécifiés dans l'appel, et toutes les pièces s'y rapportant dûment certifiées sous serment.
- (4) Tous les détails et toutes les pièces déposés conformément au présent article constitueront et formeront le dossier.

DORS/85-409, art. 4(A);

DORS/2000-391, art. 11.

14. Lorsqu'il y a lieu de croire

- a) qu'il y a eu manœuvre corruptrice à l'égard d'une élection,
- b) qu'il y a eu violation de la Loi ou du présent règlement qui puisse porter atteinte au résultat d'une

élection, ou

c) qu'une personne présentée comme candidat à une élection était inadmissible à la candidature, le Ministre doit alors faire rapport au gouverneur en conseil.

[Non souligné dans l'original]

The Act

79. The Governor in Council may set aside the election of a chief or councillor of a band on the report of the Minister that he is satisfied that

- (a) there was corrupt practice in connection with the election;
- (b) there was a contravention of this Act that might have affected the result of the election; or
- (c) a person nominated to be a candidate in the election was ineligible to be a candidate.

R.S., c. I-6, s. 79.

[Emphasis added]

79. Le gouverneur en conseil peut rejeter l'élection du chef ou d'un des conseillers d'une bande sur le rapport du ministre où ce dernier se dit convaincu, selon le cas:

- a) qu'il y a eu des manoeuvres frauduleuses à l'égard de cette élection;
- b) qu'il s'est produit une infraction à la présente loi pouvant influencer sur le résultat de l'élection;
- c) qu'une personne présentée comme candidat à l'élection ne possédait pas les qualités requises.

S.R., ch. I-6, art. 79.

[Non souligné dans l'original]

Thus, the legislative provisions place an evidence gathering and reporting responsibility on the Minister, and a final decision-making responsibility on the Governor in Council.

5 It is agreed that the Delegate was required to decide according to the evidentiary standard of proof specified in s. 14 of the *Regulations* which requires only proof of the appearance of wrongdoing under both s. 14(a) and s. 14(b). In my opinion there is no question that the decision is rendered according to the elevated evidentiary standard specified in s. 79 of the *Act* which requires proof of wrongdoing. I reject the argument made by Counsel for the Minister that the words used in the passage are only "unfortunate" and that they should be taken to be an application of s. 14. There is no credible support for this argument. The words speak for themselves; the mistake in law is not defensible.

6 In my opinion it is apparent that, as a result of the application of the error in law integrated into the decision-making process by the Evaluator, a failure of defensible fact-finding occurred. In his affidavit which launched the present appeal, the Applicant made wide ranging allegations that call for an investigation under

both s. 14(a) and s. 14(b) of the *Regulations*. As a result, it was incumbent on the Evaluator to carefully evaluate those allegations and all the evidence subsequently collected to determine whether findings are warranted under both s. 14(a) and s. 14(b). However, only two issues became the fact-finding focus resulting in the Delegate's decision: whether votes were bought with alcohol, and whether an elder was influenced during voting.

7 First, with respect to buying votes with alcohol.

8 The Little Grand Rapids First Nation forbids the possession and supplying of alcohol pursuant to a By-Law passed under the authority of s. 85 of the *Indian Act* (Applicant's Record, p. 233). The Applicant's allegations speak to a concern that the election was corrupted because votes were bought with alcohol. The obligation before the Evaluator with respect to this central allegation was to determine whether there was enough evidence to substantiate the *appearance* that this allegation is true on the terms of both s. 14(a) and s. 14(b). However, the Evaluator instructed the Investigator to obtain evidence within a much more limited scope: that is, to only investigate the allegation that Chief Martin Owens and Counsellor Lam, *in fact*, provided alcohol to certain named individuals "in exchange for their votes" (Record of the AG, Vol. 1, p. 77). The Investigator followed the directions given and was unable to provide a conclusive answer to the questions posed, but in the course of the investigation uncovered a wealth of information about the problems with alcohol use in the community, and, most importantly, of the possession and supplying of alcohol in proximity of the election. This evidence is supplied in detail in the Investigator's report to the Evaluator (Record of the AG, Vol. 1, pp. 88 - 96).

9 In addition to supplying cogent evidence implicating Chief Martin Owens and Counsellor Lam in the possible appearance of contraventions of s. 14(a) and 14(b), the Investigator supplied an argument for the acceptance of the evidence as proof that both provisions had been contravened. The argument is in the form of an email answering an inquiry from an INAC official about the results of the investigation and which, it is agreed, was before the Evaluator when the opinion to the Delegate was prepared, and before the Delegate when the decision under review was signed:

Date: 4/16/2010 12:55PM

Subject: Little Grand Rapids

Lynn,

After our phone chat, I re read my report. The following notes might help... IBER Section 14 Where it "appears" that:

a) there was corrupt practice in the connection with an election

Lets just list the hard facts and ignore the rest

1. Deon Lam and his mother imported liquor to the reserve.

Witness Linda McDougall. Very credible, Has hand written notes.

2. Chief Owens held party with liquor

RCMP Report & Chief Owens statement

3. Chief Owens gave/sold liquor to Eugene Keeper

Witness Eugene Keeper

Witness Melba Keeper

Witness Doris Mayham

4. Chief Owens gave liquor to Mother/Client of CFS

Witness Violet Keeper

5. DEO Ian Keeper influenced voter

Witness Violet Keeper

Witness Samantha Bushie

6. Chief Martin Owens delivered beer to Harry T Owens

Witness Verna Keeper

7. Candidate Deon Lam delivered whiskey to band members

Witness Violet Keeper

8. Chief Martin Owens chartered plane to get voters to reserve

Witness Co manager Jerry Shell

I suggest we cannot ignore these facts because some additional witnesses are afraid to speak out and the suspects deny the allegations.

I suggest if this was in any municipality in Canada there would be a long and aggressive investigation to gather sufficient information to support criminal charges under Provincial Election laws. All we need here is to show that corrupt practices "appear" to have taken place.

As the judge in the Peguis case said.... "connect the dots" (My words)

If you brief DoJ and they say it is almost there... let me know what you need.

Bob

(Record of the AG, Vol. 1, pp. 73 - 74)

10 It appears that the Evaluator was alive to the serious problems with respect to the use of alcohol and potential intimidation in proximity to the election. In the report to the Delegate, the Evaluator made the following statements under "General Comments":

While there is a high rate of alcoholism on the reserve, Little Grand Rapids has been a "dry" reserve since

1996.

The allegation that Chief Martin Owens and/or his supporters provided alcohol to electors in exchange for their votes was also submitted in the previous election held in 2007. The investigation in both instances was undertaken by Norton Security Consulting Inc. (Bob Norton). The investigator reports that there is no doubt that alcohol was distributed by Martin Owens and his supporters during the election, but individuals refuse to provide the investigator with a statement for fear of losing their jobs and/or for their physical safety.

In his appeal, Nelson Keeper states that "on or about July 19, 2009 a campaign party was held (by Martin Owens) a couple of weeks prior to election day for the sole purpose of bribing people with alcohol".

The Elections Unit contacted the RCMP about alcohol being provided to individuals at this party, and in a written statement the RCMP confirm that "police received a report of a large party at the Owens Store where liquor was readily available. Police....observed a number of intoxicated individuals drinking liquor in and around the store. Chief Martin Owens was present and took ownership of the liquor. Chief Martin Owens indicated a meeting had just finished and he was in the process of having everyone leave."

While the RCMP confirmed that there was a pre-election campaign party, the RCMP was unable to confirm that alcohol was exchanged for votes. In response to the circulated appeal, Chief Martin Owens stated in his affidavit that the gathering was a birthday party in his honour and included a copy of his status card which confirmed his date of birth as being July 17, 1965.

On March 22, 2010, the investigator asked the RCMP why Chief Martin Owens was not charged for being in possession of liquor at the party. The RCMP reported that the local detachment was advised not to charge Chief Martin Owens from a higher authority with the RCMP in Winnipeg.

On April 1, 2010, Chief Martin Owens was interviewed by the investigator in the presence of the chief's lawyer, Martin Kramer. When asked about the above mentioned party held at Owens Store, the chief denied taking ownership of the liquor, and as such, Chief Martin Owens claimed the police report was incorrect.

(Record of the AG, Vol. 1, pp. 187 - 188)

11 Given this evidence the Evaluator was certainly required to decide whether there was an appearance of wrongdoing under s. 14(a) and s.14 (b). However, the Evaluator failed to meet this primary obligation. The outcome of the decision-making on this issue which appears in the decision signed by the Delegate is a focus on whether, in fact, alcohol was exchanged for votes:

The allegations that candidate for Chief Martin Owens and candidate for Councilor Deon Lam provided alcohol to numerous electors (Kevin Eaglestick, Edson Eaglestick, Colin Keeper, Rudy Keeper, Emily Keeper, David Green, Betty Jane Owens and Gordie Owens) In exchange for their votes could not be substantiated by the investigator. All of the electors named in the appeal denied the claim and stated the allegations were false as they did not accept alcohol in exchange for their vote. Due to a lack of evidence, the allegations are therefore dismissed.

(Record of the AG, Vol. 1, p. 195)

12 What I find concerning is that, in reaching this conclusion, the Evaluator appears to be blind to the im-

port of the evidence that both Martin Owens and Deon Lam were in flagrant breach of the dry reserve By-Law, and that this evidence arises in close proximity to the election. The question that was before the Evaluator was: does the evidence support a finding that it *appears* that alcohol was used to affect the result of the election? It did not get answered.

13 Second, influencing an elder during voting.

14 The Evaluator requested the Investigator to "investigate the allegation that Deputy Electoral Officer Ian Keeper influenced elderly voters by advising them which candidate to vote for" (Record of the AG, Vol. 1, p. 77). Section 15(2) of the *Indian Band Regulations* stipulates that "no person shall interfere or attempt to interfere with a voter when marking his ballot paper or obtain or attempt to obtain at the polling place information as to how a voter is about to vote or has voted" (Record of the AG, Vol. 1, p. 185).

15 The Investigator found cogent evidence of the appearance of a breach of this provision at the polling station on election day by the Respondent Deputy Returning Officer Ian Keeper: a witness overheard a conversation between Mr. Keeper and an elder in which Mr. Keeper stated that the elder should vote for Martin Owens rather than the Applicant; the elder's granddaughter confirmed that the elder told her of this conversation after leaving the polling station; when questioned by the Investigator the elder said that everything was "ok with her voting on Polling Day and she did not want to get involved"; and Mr. Keeper denied the allegation (Record of the AG, Vol.1, p. 85). This evidence is mentioned by the Investigator in the email argument quoted above.

16 In my opinion, to properly evaluate this evidence, the Evaluator would have to ask the following question: should the evidence of the witness to the conversation in question be disregarded, or given no weight, simply because the elder did not want to "get involved" in the investigation. In addition, the hearsay evidence of the granddaughter to the elder's confirmation of the conversation would also require careful evaluation. It is well recognized in law that it is acceptable to rely on hearsay evidence if it is necessary to do so and the evidence is reliable. In my opinion, given the persuasive evidence of intimidation in the present case, a strong argument can be made that both criteria are met. Another question should have been addressed in choosing between the word of the witness and the elder, and that of Mr. Keeper: why would the witness and the elder not be telling the truth? Again it must be emphasised that it is only the appearance of influencing that is required to substantiate a finding under s. 14(2). This difficult, but necessary, evaluation was not conducted by the Evaluator. Instead the allegation was dismissed by the Delegate with the statement that "based on the fact that the allegation was not confirmed by [the Elder], there is a lack of credible evidence to substantiate the allegation that the Deputy Electoral Officer *influenced* voters. As such, the allegation is dismissed" (Record of the AG, Vol. 1, p. 194).

17 In the present case, the Evaluator apparently chose to apply a practice of reporting only on the basis of evidence of wrongdoing coming from persons directly involved in the circumstances of the wrongdoing, and who are willing to cooperate as a witness, well knowing the Investigator found that such witnesses could not be expected to come forward due to threat of intimidation. This practice is not only remarkably unfair to right-minded people living on the Little Grand Rapids First Nation, but is unrealistic in the prevailing context. In the present case, the wealth of evidence coming from observer witnesses to wrongdoing was required to be evaluated. In addition, compelling circumstantial evidence was required to be considered (see *Hudson v. Canada (Minister of Indian Affairs & Northern Development)*, 2007 FC 203, paras. 85 and 86).

18 The closing to the Evaluator's report to the Delegate reads as follows:

An investigation has been undertaken to investigate the allegations of widespread vote buying for the past two elections. It is highly regrettable that individuals are unable to substantiate these allegations for fear of losing their jobs and/or their personal safety.

To reduce or eliminate the availability of alcohol to buy votes prior to the next general election, suggestion is made that Headquarters and Regional departmental staff meet with the RCMP (Superintendent, Selkirk Detachment and local detachment office on Little Grand Rapids), the Manitoba Liquor Control Board, the Department of Transportation (i.e. flights to/from LGR) and the Assembly of Manitoba Chiefs in order to develop a common strategy.

Recommendation

We recommend that the appeal be dismissed and that you sign the enclosed letters to the Regional Director General of the Manitoba Region and all of the candidates accordingly. The results of the election, held on July 22, 2009, should be allowed to stand.

(Record of the AG, Vol. 1, p.188)

There was a responsibility to act on the evidence presented in the Investigator's report. What I find to be regrettable is that the Evaluator and the Delegate failed to reasonably address the reality of the serious election problems faced by the People of the Little Grand Rapids First Nation.

Order

THIS COURT ORDERS that

The decision is set aside and the appeal is referred back to the Minister for re-determination on the following direction: the re-determination be conducted according to the correct standard of evidence evaluation and on the complete existing evidentiary record.

I award costs of the present Application in favour of the Applicant to be fully paid by the Minister.

END OF DOCUMENT