Date: 20080201

Citation: 2008 FC 130

Ottawa, Ontario, February 1, 2008

PRESENT: The Honourable Mr. Justice Phelan

Docket: T-8-07

BETWEEN:

**BRIAN JACKSON, DANIEL NORTHMAN,
ROD NORTH PEIGAN, and JANET POTTS**

Applicants

and

**REBECCA YELLOW WINGS, in her Capacity
as Chief Electoral Officer of the PIIKANI NATION,
and the PIIKANI NATION NO. 436**

Respondents

and

Docket: T-477-07

BETWEEN:

**BRIAN JACKSON, DANIEL NORTHMAN,
ROD NORTH PEIGAN, and JANET POTTS**

Applicants

and

**PIIKANI NATION ELECTION APPEALS BOARD,
and the PIIKANI NATION NO. 436**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a dispute concerning the nomination process for an Indian band election. The Applicants, Brian Jackson, Daniel Northman, Rod North Peigan and Janet Potts challenge both the decision of Rebecca Yellow Wings, the Band's Chief Electoral Officer (CEO) and that of the Piikani Nation Election Appeals Board (Board), both of which concluded that the Applicants were ineligible to stand for election as Band councillors in the Piikani Nation Band council election of January 4, 2007. This dispute was part of an internal conflict concerning Band affairs. The two judicial review applications were heard together.

[2] The background of these proceedings was the application of a traditional Band principle of behaviour (PIIKANISSINI) into the consideration of the Applicants' eligibility to run for office, which resulted in their disqualification for candidacy. The central issues are whether this tradition can be imported into the qualification for candidacy in the election and, if not, what is the appropriate remedy in the circumstances.

II. BACKGROUND

[3] The Piikani Nation is an Indian band in Alberta which elects its Chief and Band council according to its custom rather than according to the provisions of the *Indian Act*. To this end, in

2002, the Piikani Nation implemented the *Piikani Nation Election By-law* and *Regulations* (collectively referred to as the "Election Code").

[4] Three of the four Applicants had been elected as councillors on January 7, 2003 for a four-year term. This was a troubled period of time in the Band's history as detailed later.

[5] In late November 2006, the Chief and council established January 4, 2007 as the date for the next Band council election. The nomination meeting was held on December 14, 2006 and nominations closed at 4:00 p.m. on December 21, 2006.

[6] Rebecca Yellow Wings, as the CEO, was responsible for the preparation of lists of eligible candidates from the nominees and receiving notices from any electors regarding the ineligibility of a nominee. If a notice of ineligibility is received, the CEO must convene a hearing on the issue.

[7] The Applicant Peigan was nominated for the position of Chief and the other Applicants were nominated to run as councillors. An unofficial list of nominees which included the Applicants was publicly posted in early December 2006.

[8] Shortly after the posting of the list, Yellow Wings received two letters on the stationery of the Elders of the Piikani Nation. The first letter referred to the "disgraceful and shameful conduct" of the then-Chief and of the four Applicants. The second letter added another councillor, Peter Yellow Horn, to the same allegations.

[9] The allegations of disgraceful and shameful conduct concerned the mishandling of Piikani Nation funds and the breach of a Trust Agreement. A copy of a Statement of Claim against the named persons was attached to the first letter. The thrust of the complaint is that the conduct dishonoured and brought shame on the Piikani Nation, that the individuals conducted corrupt practices contrary to the principles of PIIKANISSINI and had negatively affected the dignity and integrity of the Piikani Nation. The result is that under tribal custom, as particularly enshrined in the principles of PIIKANISSINI, these individuals were ineligible to be nominated for or hold Band offices.

[10] Yellow Wings conducted a hearing for each of the Applicants to deal with their eligibility for nomination. There was some difficulty contacting all of the Applicants. Three of the Applicants, Peigan, Jackson and Potts, attended at the electoral office to submit their required background checks and the hearings on their eligibility were conducted at the same time. The Applicant Northman did not have a hearing.

[11] Yellow Wings informed the three Applicants who had attended the hearing that their names would be removed from the candidates' list. The basis for the decision was the letter from the Elders and the violation of the principles of PIIKANISSINI.

[12] On December 22, 2006, six of the eleven then-councillors (the four Applicants, the Chief and Peter Yellow Horn) attempted what can only be described as an end-run around the planned

election. At their self-styled “emergency meeting” of Council, they passed a resolution to remove the CEO, her deputy and other assistants, move the planned January 4 election to February 8 and set up a new nomination date.

[13] The Applicants, having failed to file a Statement of Defence in the legal action against them, were noted in default on January 2, 2007. As of the date of this Court’s hearing, no action had been taken to set aside what is, in effect, a judgment against the Applicants as to their “disgraceful and shameful conduct”.

[14] This Court dismissed an injunction to prevent the January 4, 2007 election and the election proceeded as planned without the Applicants as candidates.

[15] The Applicants then appealed the CEO’s decision to the Band council, who then referred it on to the Board. The Board conducted a hearing and upheld the CEO’s decision to strike the Applicants from the candidates’ list.

[16] The Election Code, its interpretation and application and the role of the principles of PIIKANISSINI are central to this case. There are four central features of the Election Code relevant to this judicial review:

1. The preamble status that the Piikani Nation governs itself in accordance with its customs and traditions evolved over time as expressed in its declaration entitled “PIIKANISSINI”.

2. Section 6.02 of the *By-law* outlines the basis upon which a person is ineligible to be nominated or hold office. These grounds relate to conduct ranging from criminal conviction to unapproved resignation. Violation of the principles of PIIKANISSINI is not listed as a ground.

3. A person may be found ineligible to continue to hold office and these grounds include conducting corrupt practices as determined by the principles of PIIKANISSINI and abuse of office such that the conduct negatively affected the dignity and integrity of the Piikani Nation or its Council (s. 10.05.02 of the *By-law*).

4. The Board does not deal with the issue of whether a person is eligible to run for the office of Chief or councillor (s. 20.08 of the *Regulations*).

III. ANALYSIS

[17] The issues in this judicial review involved procedural fairness and the interpretation of the Band's Election Code. Neither the CEO nor the Board possess any particular expertise that the Court does not possess. The issues before the Court deal with jurisdiction and statutory interpretation; the core of a court's work. I adopt Justice Russell's analysis in *Okeymow v. Samson Cree Nation*, 2003 FCT 737, that for these issues, the standard is correctness.

[18] It was accepted -- and even if not accepted, I would have found -- that the Board did not have the authority to deal with the issue of refusal to list a person as eligible to run for office. Whether the process was fair is not relevant, its decision to uphold the CEO's decision is without legal force and effect.

[19] The central issue is whether the CEO could declare the Applicants ineligible to run for office on the grounds of a breach of the principles of PIIKANISSINI and the disgrace and shame their conduct has brought to the Piikani Nation.

[20] The Respondents acknowledge that on a strict interpretation of the Election Code, the grounds for ineligibility do not include either of these grounds. However, the Court is urged to read these grounds in by virtue of the preamble which should be considered as an overarching principle.

[21] While I have some sympathy for the CEO's plight, faced with *prime facie* indication of disreputable conduct and the advice of Elders as to the Applicants' suitability for office, the Election Code cannot be properly read as she would have me do.

[22] The principles of PIIKANISSINI are noble principles. The evidence is that PIIKANISSINI mandates a conduct of loyalty and honesty towards the Piikani Nation. It was also established that as part of both PIIKANISSINI and the customs and traditions of the Piikani Nation, the Elders are a senate and have a governing voice in the community. Their wisdom and direction are to be respected and followed.

[23] It may well be, and the evidence suggests it, that the people believed that the Elders could invoke PIIKANISSINI and declare a person ineligible to stand for election. The Elders who wrote

to the CEO thought so and the CEO thought so. But this conclusion is at odds with the Election Code.

[24] Customs and traditions may evolve but this takes time. It is important to note that the Election Code is a modern document; it was enacted in 2002.

[25] The Piikani Nation in adopting the Code turned its attention specifically to the role of the principles of PIIKANISSINI, the grounds for ineligibility, limited only to certain conduct, and the grounds for removal from office, which included disgraceful conduct and the violation of the principles of PIIKANISSINI. It would be inconsistent with the evidence of intent as to the grounds for ineligibility to read in grounds specifically stated elsewhere. The old Latin phrase "*expressio unius est exclusio alterius*" is perhaps apt here.

[26] It is important to note also that in the case of removal, where this higher standard of conduct is relevant, the procedures are more stringent than that of an ineligibility ruling. The two processes are not so synonymous that the principle flows between them seamlessly.

[27] The Court is also asked to read in to the Election Code the authority of the Elders to voice opinion and have that opinion followed. The evidence on this point is tenuous. Certainly some Elders (it is unclear if all were involved) thought that they had a role and that the CEO thought that their opinion was binding. There is, however, insufficient evidence of the role of Elders, their

authority, its acceptance and many other issues for this Court to conclude that this authority should be read in.

[28] Therefore, I must find that the CEO's decision declaring the Applicants ineligible for the election was made without proper authority.

IV. REMEDY

[29] The next question is what remedy, if any, should be granted. The Court has a residual discretion not to grant relief even where there has been an error. It is a discretion which should be exercised rarely and carefully. This is one of those circumstances where the broad interests do not justify overturning the CEO's decision and consequently the election.

[30] The Piikani Nation has had a difficult recent history. The allegations made against the Applicants were part of an internal division in the Band. There is little merit in re-opening the wounds.

[31] Moreover, the Applicants do not come before this Court with clean hands. The allegations of improper conduct, their failure to challenge the suit in the Court of Queen's Bench and the default judgment against them speak volumes as to the equity of their position. So does their attempt to do an "end-run" around the process rather than confronting the election process head-on.

[32] Also of particular importance is that there is no evidence that the election did not truly reflect the will of the people. This reflection of the will of the people is of paramount importance when contrasted against the technical flaw in the CEO's decision.

[33] There is no evidence that the Applicants truly lost an opportunity to sit as councillors. In a small band, 600 people petitioned for the removal of the then-Band council (of which the Applicants were members) and to have an election. None of the incumbents who ran in the election were successful. The Applicants seem to have simply lost an opportunity to lose.

[34] There is precedent in this Court's jurisprudence for upholding the results of a flawed election process, although technically, the Applicants have not asked for that relief. Rather, they only sought a quashing of the CEO's decision and the placing of their names on a Nomination List, which no longer exists.

[35] In *Ominayak v. Lubicon Lake Indian Nation*, 2003 FCT 596, Justice Dawson set out the discretionary factors in not issuing an order quashing election results. Although the time period that the council had had been in place in that case longer than in the instant case, the same principles apply. In particular, I have significant concern that unjustified disruption within the Band would occur if a new election were ordered.

[36] Similar results occurred in *Thompson v. Leq'a:mel First Nation*, 2007 FC 707 and in *Sparvier v. Cowesses Indian Band (T.D.),* [1993] 3 F.C. 142.

[37] The Court has authority to fashion the appropriate remedy. The Court should not “read in” wording where the Band can deal with its true intentions more directly. However, to reflect what the evidence of intent is and to prevent confusion in the future, I will make a remedial order.

[38] It was evident that the grounds for removal from office were the same as those used by the CEO for ruling the Applicants ineligible to run in the election. The Piikani Nation will be ordered to amend the *By-law* to incorporate at least paragraph (c) of s. 10.05.02 into s. 6.02 within six (6) months of this judgment or else be required to pay the Applicants’ costs of this matter on a solicitor-client basis.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this judicial review is granted in limited part.
2. the decision of the Chief Electoral Officer will be quashed if the amendments to the *Piikani Nation Election By-Law, 2002* mandated in paragraph 38 are not made.
3. the Piikani Nation No. 436 shall indemnify the Applicants their costs (including disbursements) on a solicitor-client basis.
4. the decision of the Piikani Nation Election Removals Board is quashed.
5. the Piikani Nation No. 436 shall amend the *By-law* to incorporate at least paragraph (c) of s. 10.05.02 into s. 6.02 within six (6) months of this judgment or else be required to pay the Applicants' costs of this matter on a solicitor-client basis.
6. the parties shall bear their own costs except as otherwise provided herein.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-8-07 and T-477-07
STYLE OF CAUSE:	BRIAN JACKSON, DANIEL NORTHMAN, ROD NORTH PEIGAN and JANET POTTS and REBECCA YELLOW WINGS, in her Capacity as Chief Electoral Officer of the PIIKANI NATION, and the PIIKANI NATION NO. 436 and BRIAN JACKSON, DANIEL NORTHMAN, ROD NORTH PEIGAN and JANET POTTS and PIIKANI NATION ELECTION APPEALS BOARD and the PIIKANI NATION NO. 436
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	November 6, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	February 1, 2008

APPEARANCES:

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