

Federal Court



Cour fédérale

**Date: 20120928**

**Docket: T-623-12**

**Citation: 2012 FC 1153**

**Ottawa, Ontario, September 28, 2012**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**HENRY JOSEPH**

**Applicant**

**and**

**PARTNER SCHIELKE AND  
YEKOOCHE FIRST NATION**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. OVERVIEW**

[1] The subtext of this judicial review is that the Yekooche First Nation (an Indian Band under the *Indian Act*, RSC, 1985, c I-5, s 2(1)) is a troubled community where the latest elections are a battleground pitting brother against sister and neighbours and families against each other.

[2] The third place finisher, the individual Respondent, in the September 28, 2011 election for Chief used the Recall Rules to oust the validly elected Chief and then won the by-election resulting from the recall – an election in which the recalled Chief, the Applicant, was not entitled to run.

[3] This is a judicial review to declare the Recall Rules invalid and to declare the Applicant to be Chief.

## II. BACKGROUND

[4] The Yekooche First Nation [YFN] operates in accordance with custom election rules and has a custom election code. The Yekooche First Nation Election Code [Election Code] has been in place since July 1999 and has been amended once. YFN also has a Policy and Procedures Manual which is separate from the Election Code.

[5] The Election Code provides that a band council member's position becomes vacant if the person misses three (3) consecutive Council meetings without Council authorization or if the person is convicted and sentenced for an indictable offence.

8.1 A Chief or Councillor's position on the Band Council may become vacant if, while in office:

- a) the Chief or Councillor in [question] misses three (3) consecutive regular Council meetings without authorization from quorum of Council; or
- b) the Chief or Councillor in question is convicted of an [indictable] offence and has been sentenced for that offense.

*Yekooche First Nation Election Code (May 16, 2000)*

[6] The term of office for YFN Chief and councillors is two years.

[7] While the Election Code specifies instances of termination of office, there is nothing that suggests any other form of termination including a recall.

[8] The Election Code does, however, contain a detailed provision for amendment of that Code including a) notice to all Band Members, b) the requirement for one (1) month for Band Members to consider the amendment, and c) a secret vote of the “electors” if anyone challenges a proposed amendment. There are also provisions to put in place administrative rules which were relied on by the Respondents to attempt to legitimize the Recall Rules. The relevant Election Code provision is:

10.1 Any proposed changes to this Code must be presented to the Band Council which shall notify the proposed changes to all Band Members and give them at least one month to consider the proposed changes. Any Band [M]ember who wants to challenge those changes must do so in writing, to the Band Council within the one month period. If a challenge is received, then to take effect, a meeting of the electors must be held and a vote by secret ballot must be taken where a majority of those who vote agree to the proposed changes. Notice of this meeting must be posted in the Band Office and at other prominent places in the community at least one week prior to the meeting. If no challenge is received, then to take effect, the proposed changes must be approved by the Council after the end of the one month period.

10.2 The Chief and Council may approve, by Band Council Resolution, any procedures (including the Oath of Office and procedural rules for meetings of Band Council), forms, and other administrative rules for the better administration of this Code.

*Yekooche First Nation Election Code (May 16, 2000)*

[9] On July 29, 2011 a Band Council Resolution (BCR) was passed enacting the Recall Rules [Rules]. Despite being an amendment to the election regime, these Rules were not written into the Election Code but were incorporated into the YFN Policy and Procedures Manual.

[10] The Recall Rules are set out below but their salient features are that if 40% of those eligible to vote sign a recall petition, the elected official is removed from office and cannot run for elected office for two scheduled election periods – effectively four years.

1. Any registered Yekooche Band member over 18 years of age (called an “eligible voter”) at the last election can start a petition to recall any elected member of Council by submitting to the Electoral Officer a signed and witnessed statement of 200 words or less detailing why, in the opinion of the applicant, the chief or [councillor] should be recalled. This statement must be submitted along with a non-refundable processing fee of \$25 to the Yekooche Electoral Officer.
2. After receiving the submitted statement and verifying that the applicant is an eligible voter, the Electoral Officer will initiate, within two days, the drafting of a petition to recall an elected official.
3. The applicant will have 20 days to collect signatures of more than 40% of individuals who were eligible to vote in the last Yekooche election. Volunteers when canvassing for signatures may help the applicant and once all the signed petition sheets are submitted, the Electoral Officer has two days to verify that enough eligible voters have signed the petition.
4. If enough valid signatures are on the petition sheets the member of Council being recalled will cease to hold office immediately and a by-election must be called and held within 30 days.
5. Any member of Council who ceases to hold office as a result of the recall process cannot run for an elected position again for a minimum of two scheduled election periods.
6. Any member of Council who is the subject of a recall petition cannot submit a recall petition against any other current member of council.

Yekooche First Nation, Band Council Resolution, July 28, 2011

### III. FACTS

[11] The YFN is located 240 kilometres northwest of Prince George, British Columbia. There are 215 registered members and 149 registered voters.

[12] The Recall Rules passed by the then Band Council in July 2011 were “enacted” at a time when the vast majority of the community was on the land, away from home, engaged in hunting, fishing and gathering.

[13] On September 28, 2011, in the Chief and Council election, Henry Joseph received 37 votes (virtually 50% of the 78 votes cast) while Partner Schielke came third with 17 votes. A voter turnout of 50% is considered a high turnout historically.

[14] The election was immediately challenged on the basis of alleged corrupt election practices engaged in by the Applicant. The Yekooche First Nation Election Appeal Board unanimously dismissed the challenge and on January 11, 2012 Henry Joseph was sworn in as Chief.

[15] Three days later, the Band Chief Electoral Officer received a request for a recall petition in accordance with the Recall Rules.

[16] Miranda Joseph (the surname “Joseph” is extremely common in this Band) spearheaded the petition and obtained 69 signatures which represented over 40% of the registered voters.

[17] On January 20, 2012 the Band Chief Electoral Officer wrote to the YFN confirming receipt of the recall petition, citing the more than 40% support to establish the recall and setting of a by-election 30 days hence.

[18] The Applicant says that he neither received notice of the petition nor of its results nor did he know that the Recall Rules existed. However, he did know that a new election was called but took no steps to challenge the recall or new election process, claiming that he believed the by-election to be invalid.

[19] At the by-election held on February 16, 2012, only two people ran and Partner Schielke won. The Applicant was not a candidate nor more importantly could he have been a candidate in this new election under the Recall Rules. Thereafter Partner Schielke took on the Chief's position.

[20] The Applicant continued to work at the Band office until the RCMP required him to leave on the basis that Partner Schielke was now the Chief.

[21] The genesis of the Recall Rules is curious. Apparently Cynthia Hill, not a member of the Band, who worked in the Band office, decided that the YFN did not have a sufficiently "accountable" governance system and developed the Recall Rules modelled somewhat on the British Columbia recall process, found in the *Recall and Initiative Act*, RSBC 1996, c 398. She persuaded the then Band council to pass the BCR and to enact the Recall Rules under s 10.2 of the Election Code as an administrative rule in the Policy and Procedures Manual.

[22] In the tussle which ensued around the recall, the Applicant locked out Band administrative staff and fired Cynthia Hill. Allegations against the Applicant have been made by the disaffected faction including allegations of misuse of Band funds. A claim to that effect was recently filed in the British Columbia courts.

[23] This judicial review is the challenge to the Recall Rules and of the by-election resulting from the recall.

#### IV. ANALYSIS

[24] The main issue in this judicial review is whether the Recall Rules were properly enacted.

The issues are divided as follows:

- Were the Recall Rules validly enacted under the YFN Election Code as an amendment?
- Are the Recall Rules validly part of the custom election law of the YFN?
- Does the Recall Rules' prohibition against running for office offend s 2(b) of the *Charter* and if so, is it saved by s 1?

##### A. *Standard of Review*

[25] The case turns on the interpretation of the Election Code and on the existence of YFN customary law which may be used to inform the Election Code. In *Jackson v Piikani Nation*, 2008 FC 130, I held that the standard of review for jurisdiction and statutory interpretation is at the core of the Court's work and therefore the standard is correctness. Likewise in respect to whether these Recall Rules reflect custom and were validly incorporated, the standard must be correctness. Neither party has disputed the standard of review.

B. *Validity of Enactment*

[26] The first concern of the Court is whether the Recall Rules were validly enacted pursuant to the appropriate provision in the Election Code. To suggest, as the Respondents have, that the Recall Rules are administrative rules, and therefore may be added to the Election Code under s 10.2, is without merit. The Recall Rules fundamentally alter the Election Code depriving a duly elected person (and their supporters) of the right to hold office and to even seek that office for two election periods.

[27] The Applicant pointed out in argument that the effect of the Recall Rules is to potentially frustrate the wishes of the majority. In a close race, 40% of voters could frustrate the will of the majority by removing the duly elected person and then putting the person “on ice” by preventing that person from running again in a subsequent by-election and in the next election.

[28] In my view, at the very least, this change to the governance process must be enacted under the amendment provisions of s 10.1 of the Election Code. A recall seriously affects the whole structure of the Band’s election process. It is not merely a matter of administrative detail as contemplated by s 10.2.

[29] The fact that there was no s 10.1 amendment is obvious from the fact that the Recall Rules were placed in the Policy and Procedures Manual as administrative rules and not in a revised Election Code.



[30] The Respondents also say that in any event s 10.1 was followed because (a) Band Councillors were instructed to talk to Band members who were on the land; and (b) the Recall Rules were available for review and comment at a Band Annual General Meeting in October 2011. At no time was there any objection which would have triggered a vote on the amendments.

[31] Despite the Respondents' position, there is little, to no, evidence to substantiate the argument that, as required by s 10.1, "all Band members" were notified. All Band members must mean all Band members eligible to vote – 149 people. There is little evidence that the Councillors spoke to any, much less all, eligible Band members while they were out on the land.

[32] In respect of the Annual General Meeting, there is no evidence that there was notice of the Recall Rules being considered at the meeting. The Respondents did not even produce the formal Notice of Annual General Meeting or any agenda indicating that the Recall Rules were available for review.

[33] It is even unclear when the "one month" period to consider the Recall Rules commenced.

[34] The requirement for notice and a period to consider a change to the Election Code is not some technical picayune provision. Those requirements are substantial, leading potentially to a vote on whether the amendment should be adopted. The will of the Band, as represented by the Code, must be respected and it was not.

C. *Recall Rules as Customary Law*

[35] The test for what constitutes custom law is well described in *Bigstone v Big Eagle*, 52 FTR 109, 1992 CarswellNat 721 (FC) at paragraph 20:

Unless otherwise defined in respect of a particular band, “custom” must I think include practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus. With a newly reestablished band whose circumstances are vastly different (e.g. the majority not being resident on the reserve) from those of the band dissolved some 90 years earlier, it is not surprising that innovative measures would have to be taken to establish a contemporary “custom”. The real question as to the validity of the new constitution then seems to be one of political, not legal, legitimacy: is the constitution based on a majority consensus of those who, on the existing evidence, appear to be members of the Band? This is a question which a court should not seek to answer in the absence of some discernable legal criteria which it can apply. While there might be some other basis for judicial supervision if there were clear evidence of fraud or other acts on the part of the defendants which could clearly not be authorized by the *Indian Act*, there is no evidence of any such activities before me.

[36] It is recognized that customs are not fixed in time and may evolve in response to changed circumstances (*McLeod Lake Indian Band v Chingee*, 153 FTR 257, 1998 CarswellNat 1629 (FC)). However, that does not mean that custom blows with the current wind or that custom is *ad hocery*.

[37] The overriding consideration for the Court is whether what is advanced represents the genuine will of the band members broadly considered. Technical irregularities may be forgiven if a Court is satisfied that the will of the people is reflected. It is for the Band to determine how it wishes to govern itself.

[38] The Respondents' dilemma is that it cannot establish that there was or is a custom of recall. The genesis of the Recall Rules was not rooted in the enshrinement of a band custom; it was a modification of the BC legislation based on a perceived inadequacy in the existing Band governance.

[39] The affidavits filed in this proceeding are replete with references to seeing the Recall Rules for the first time as a result of these proceedings and to expressions of no prior knowledge that the YFN had recall rules or even opportunity to consider such rules (see Affidavits of Henry Joseph, Brenda Joseph, Matthew Joseph, William Joseph, Bessie Joseph, Sandra Beausejour and Carol Beausejour).

[40] Even the Respondents' affiants confirm that the Recall Rules had to be explained to them. None expressed the view that recall had been a part of Band custom except one affiant. In that single incident, the affiant had a vague memory that a chief had been recalled in the past but there were no specifics nor corroboration. As evidence it is of little persuasive value.

[41] There is no broad consensus that recall was a part of Band custom. This fact is evident from the nature and content of the affidavits filed by both sides.

[42] Where an election code substantially addresses issues of misconduct, removal, suspension or other such matters, it is said that the code "covers the field" of removal and cannot be supplemented by evidence of other practices. The Respondents argue that the existing Election Code does not

“cover the field” with respect to removal from office. They argue that therefore there is room for customary practices of the Band to develop a recall regime not written in the custom Election Code.

[43] The Respondents are correct that the current removal provisions (failure to attend meetings/conviction of indictable offence) do not “cover the field” for loss of elected position. The removal provision is sparse. It does not cover other areas of disqualification often seen in election codes. Moreover, there is no evidence that the Band considered these other areas and rejected them. Absent such evidence, the Court concludes that the Band did not purport to “cover the field” for removal.

[44] However, even with that limited removal provision, the Respondents’ argument that a modern custom can arise, to alter the Election Code provision, cannot be sustained. Such an argument flies in the face of the notion of a “custom” and in the face of the amendment provisions of the Election Code.

[45] The Election Code provision on amendments is well developed. It best reflects the will of the Band where changes to the electoral process are to be implemented.

[46] There is insufficient evidence of a Band custom of recall in the past and there is insufficient evidence that there is a broad consensus that one has developed as the Respondents have suggested.

V. CONCLUSIONS

[47] Therefore, there is no valid written recall provision nor is there a YFN custom of recall that is unwritten in the Election Code. The Recall Rules were never validly enacted and the customary practice has not been established in evidence.

[48] It is unnecessary and undesirable to address the *Charter* arguments given the Court's conclusions on the validity of the Recall Rules. The prohibition against a person running for two consecutive elections is moot.

[49] The ongoing dispute as to Henry Joseph's actions while Chief can be left to other legal processes.

[50] The Court will issue a declaration that:

- the Recall Rules are invalid;
- any recall of Henry Joseph is unlawful and of no force and effect;
- the by-election of February 16, 2012 is unlawful and of no force and effect;
- Henry Joseph is to be reinstated as Chief of the Yekooche First Nation with the effective date of January 11, 2012; and
- the Band is to advise Aboriginal Affairs and Northern Development Canada forthwith of the re-instatement of Chief Joseph.

[51] The Applicant's costs are to be paid by the Respondents who are liable jointly and severally for such costs.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. the Recall Rules are invalid;
2. any recall of Henry Joseph is unlawful and of no force and effect;
3. the by-election of February 16, 2012 is unlawful and of no force and effect;
4. Henry Joseph is to be reinstated as Chief of the Yekooche First Nation; and
5. the Band is to advise Aboriginal Affairs and Northern Development Canada forthwith of the re-instatement of Chief Henry Joseph.

“Michael L. Phelan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-623-12

**STYLE OF CAUSE:** HENRY JOSEPH  
and  
PARTNER SCHIELKE AND  
YEKOOOCHE FIRST NATION

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** September 18, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Phelan J.

**DATED:** September 28, 2012

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