

Date: 20071107

Docket: T-716-07

Citation: 2007 FC 1152

Ottawa, Ontario, November 7, 2007

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

**CHIEF PETER BILL AND COUNCILLORS ROMEO THOMAS, FREDERICK
WHITEHEAD, DAVID THOMAS, GILBERT CHAMAKESE, SIDNEY BILL
AND JIMMY BILL**

Applicants

and

DAVID D. THOMAS, WAYNE R. THOMAS AND LORNE SAKEBOW

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] When will this all end? This application for judicial review is the fifth judicial proceeding brought before the Federal Courts,¹ in addition to related Orders² and a proceeding in the Saskatchewan Court of Queen's Bench,³ involving challenges to the results of successive elections of the Pelican Lake Band Council (the "Band Council"), brought before the Pelican Lake Band

¹ 1) *Pelican Lake First Nation v. Canada*, [2000] F.C.J. No. 2078, Campbell J;

2) *Abbott v. Pelican Lake First Nation*, [2003] F.C.J. No. 577, 2003 FCT 340, Tremblay-Lamer J;

3) *Bill v. Pelican Lake Indian Band*, [2006] F.C.J. No. 877, 2006 FC 679, O'Keefe J.

4) *Bill v. Pelican Lake Indian Band*, [2006] F.C.J. No. 1836, 2006 FCA 397, Létourneau J.A.

² 1) *Bill v. Francis Thomas et al.*, T-1262-06, August 16, 2006; O'Reilly J. appeal was heard and

2) *Bill v. David D. Thomas*, T-716-07, May 14, 2007, Martineau J.

³ *Pelican Lake First Nation v. Bill*, [2003] S.J. No. 866, 2003 SKQB 566, Q.B.G. No. 271 of J.C.B., (SKQ.B.), Klebuc J

Appeal Board (the “Appeal Board”), pursuant to the Pelican Lake Band Treaty Six *Election Act* (the “*Election Act*”), since 1999.

[2] Because of the history of this litigation, the Court has tried to bring the parties into a mediation process by the appointment of a mediator by the Chief Justice. This appears to be the way to go since history has shown that whatever this Court and other Courts decide, it will not put an end to the dispute. It was suggested that mediation could identify solutions that could bring into play permanent solutions away from ongoing judicial litigation. The parties tried to find a mode of operation to approach mediation but without success. Therefore, this Court is left with the judicial obligation to render judgment in light of the particulars of this file.

I. Facts

[3] In the present application for judicial review, the applicants were elected Chief and Councillors to the Band Council following an election on March 9, 2007. On March 20, 2007, the respondents brought an appeal of these electoral results to the Appeal Board, on the grounds that there were two *Election Acts*, the misinterpretation of which affected the outcome of the election, contrary to paragraphs 12(1)(a) and 12(1)(c) of the *Election Act*, which provide as follows:

12.(1) Any Candidate at the Election or any Elector who gave or tendered his/her vote at the Election may, within fourteen (14) calendar days of the Poll, appeal the Election if he/she has reasonable and probable grounds for believing that:

- (a) an error or violation of the Election Act was made in the interpretation or application of the Act which might have affected the outcome of the Election;

[. . .]; and or

(c) there was a corrupt practice in contravention of the Election Act.

[4] The Respondents submitted affidavits to support their appeal and requested that the Appeal Board uphold their appeal, set aside the election of March 9, 2007 and call a new election.

[5] The full five-member Appeal Board first met on March 21, 2007 and continued its deliberations on the appeal on March 23, 24, and 26, 2007. The Secretary and Treasurer of the Appeal Board were of the view that the affidavits and other documents in the appeal were insufficient to allow the appeal or hold an Appeal Hearing. They believed that the Appeal Board was proceeding contrary to the *Election Act* and was being pushed into an unnecessary cancellation of the election results because of the personal animosity harboured and displayed by the Chairman, Mr. Harvey Abbott (Chairman Abbott), against the Chief-elect, the applicant, Chief Peter Bill.

[6] A motion was passed at the meeting on March 23, 2007, with three members voting in favour of allowing the appeal and two against. The three members sent notice of the appeal to the applicants by letter dated March 26, 2007.

[7] The three Appeal Board members sent a notice dated March 28, 2007 to all concerned advising that the Appeal Board would hold an Appeal Hearing on April 3, 2007 to deal with the appeal lodged against the election results.

[8] The two members opposed to the appeal did not participate in the March 28, 2007 deliberations nor did they attend the Appeal Hearing on April 3, 2007 even though they did receive that notice like everyone else concerned. The two members did not resign from the Appeal Board. Rather they decided to protest the manner in which the Chairman Abbott seemed determined to proceed to overturn the election results, in spite of the lack of sufficient evidence to uphold the appeal. As a result they decided not to attend the Appeal Hearing on April 3, 2007.

[9] In addition to boycotting the Appeal Hearing on April 3, 2007, the two estranged Appeal Board members put up a poster in the Band store stating as follows:

NOTICE

Re: The Pelican Lake General Election 2007-10-17

An appeal has been received by the appeal board and call for the desire to proceed to a hearing.

The hearing is **NOT** by unanimous decision and is denied to proceed to the next level by the Secretary and Treasurer of the appeal board members.

[10] On April 7, 2007, the Appeal Board rendered its decision, which was signed only by the three remaining Appeal Board members. The Appeal Board found as follows:

- a. The March 9, 2007 Band Council election began with a “revised” *Election Act*, to which several changes were made contrary to section 16 of the *Election Act* that sets out how changes are to be made to the *Election Act*;
- b. A considerable number of Band members were excluded from participating in the nomination procedure and Band members’ rights to nominate their candidate choice(s) were violated;

- c. The March 9, 2007 general election was not conducted according to law because unlike the “revised” *Election Act*, the official *Election Act* bears the initials VC on the bottom right hand corner of the Act;
- d. All the candidates were nominated according to the “revised” Act. When the Chief Electoral Officer (CEO) was informed of the error, he switched to the official *Election Act* and proceeded to the selection of the five members of the Appeal Board;
- e. If all electors were entitled to nominate their candidate, the slate of candidates would have been higher and the election results may not have been the same. A number of electors were excluded from nominating candidates as evidenced by the appeal documents and supporting affidavits.

[11] In upholding the appeal, the Appeal Board called for a new election within twenty-one (21) days pursuant to paragraph 12(6)(c) of the *Election Act*. Subsection 12 (6) is reproduced below to highlight the three options available to the Appeal Board:

12(6) The Appeal Board shall within seven (7) days of holding an Appeal Hearing make one of the following decisions:

- (a) deny the Appeal on the grounds that the evidence presented did not indicate an infraction of the Act and so advise the Band and the Complainant;
- (b) uphold the Appeal but allow the Election to stand, on the ground that the infraction would not reasonably be seen to have affected the results of the Election; or

- (c) uphold the Appeal and call for a new Election within twenty-one (21) days of the determination of the Appeal for all or some of the positions which were contested, giving clear instruction such that the reason for the original Appeal is corrected. There shall be no new or additional nominations beyond the slate that ran in the Election or By-election that is the subject of Appeal.

[12] The applicants filed a motion seeking a stay of the Appeal Board's decision pending the outcome of the present judicial review application. On May 14, 2007, Mr. Justice Luc Martineau granted the stay and suspended the effect of the Appeal Board's decision of April 7, 2007, thereby maintaining the status quo of the March 9, 2007 election results, pending the outcome of this application.

II. Preliminary Observations of the Court

[13] The applicants have raised six issues while the respondents have identified an additional five questions in this application for judicial review. A careful parsing and weighing of these eleven questions reveal that at the heart of the contention between the parties, indeed the source of electoral instability that has plagued the Band Council since the turn of the Century lies in the very Pelican Lake Band *Election Act* itself.

[14] The Federal Court of Appeal highlighted this sorry state of affairs in *Bill v. Pelican Lake Indian Band*, [2006] F.C.J. No. 1836, when Mr. Justice Gilles Létourneau stated at paragraph 12:

12 This is an unsatisfactory and very costly state of affairs for all participants, including the judicial system, which undermines and compromises the integrity of the election process of the Pelican Lake First Nation. The members of the Band are entitled to elect their representatives and be governed by duly elected representatives. In light of the past and present history, it is obvious that, unless there is an intervention of a third party to take over the election process and ensure its integrity, the situation is most likely to repeat itself.

[15] The situation repeats itself in this matter before the Court and will continue ad infinitum if something is not done about it now. The Court recognizes the successive re-elections of Chief Peter Bill, in five Band Council elections, each of which has known the same litigious fate. Indeed the evidence and the jurisprudence show that Chief Bill has been constantly re-elected since 1999. (Applicants' Record, Affidavit of Chief Bill, paragraph 3) The last election showed a voter turn-out of 87%, one of the best showing ever. (See Respondent's Record, page 99). The democratic will expressed by the results of the elections, clearly indicates that the band members have constantly chosen Chief Bill as their leader since 1999.

[16] But more importantly, I am not unmoved by the tremendous cost the perpetual state of limbo the *Election Act* exacts on the good governance of the day-to-day affairs of the Pelican Lake Band and especially the havoc it reeks on the harmony of the members of the Band, including the detrimental effects on the Band's youths, as a sampling of the spontaneous testimonials that were offered from the floor at the Appeal Hearing on April 3, 2007 (Respondent's Record, pages 116-118) demonstrate below:

- (Band member Walter Abbott) [. . .] -The band has been stuck in appeals for too many years and nothing is getting done for people because the band is continually going to Court. (Clapping)
- (Elder Edward Chamabese) -Thanks all that have attended. Where are we heading in terms of appeals? Even our children at the schools are being affected by this. Even though I did not get in the last time I ran, I never tried to appeal. The three people who appealed are only being used. Where is it going to end? Let's try to understand one another. When is it going to stop? The band is too split! I was happy when I had my feast and saw my relatives but the appeals continually going on.
- (Elder Leslie Bill) Cree -Does not like that the White man has come here and messed us up. Even our present leadership does not look at all the people the same. [. . .] I'm so tired of this! Whiteman gave us this *Election Act* but the leadership does not follow it when decisions don't go in their (leadership) favour.
- (Elder Liz Whitehead) -I'm an elder but I don't think of myself too high. I deal with young children at schools. Why do we not understand that these appeals are doing so much damage to our band? I'm so sick and tired of these appeals.
- (Elder/Senator Jacob Bill) Cree – Why was there an election act? Why we don't even follow the Act? Why was it made when it is not followed? We would not have appeals if the election Act was followed to begin with. The law was broke! That is a serious charge, that happened with the two (2) Election Acts (2007 election). Who made the other Election Act (revised copy)? Where did it come from? Only way is to go back and deal with what happened. Had enough of this, it has to be dealt with properly! (clapping)

[17] Enough is enough! So say the elders of the Band, and so says this Court. Either the *Election Act* is amended and followed or it is repealed and the Band adopts its traditional methods of governance to ensure peace and harmony in the running of the Band's affairs. The Court is mindful that this is an unorthodox manner in which to proceed on a judicial review application, however, the circumstances are so untenable that in order to avoid a repetition of the enigmatic situation which confronted Justice O'Keefe and the Federal Court of Appeal, above, the Court uses its discretion as a last resort and invokes the General Principle of interpretation provided in Rule 3 of the *Federal Courts Rules*, S.O.R./98-106, to ensure the most expeditious and least expensive determination of the present proceeding on its merits. Rule 3 states as follows:

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

3. Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[18] As a result, the Court concludes that in order to address the fundamental issues and the merits of this case, it finds that the *Election Act* in its present state leads to absurd and calamitous outcomes for the People of the Pelican Lake Band not to mention the economy of justice. As such, it ought either to be abolished and replaced by the Traditional Band Custom for running its affairs in peace and respect. In the alternative, and in all manner of the circumstances, the reform of the *Election Act* should be given high priority by the Band Council and its Band members, with all changes made according to the provisions set out in section 16 of the *Election Act*. This amending formula provides as follows:

16. Any changes or additions to this Act will require written notice of the proposed changes to be mailed out to all households on the Pelican Lake Band Reserve three (3) months prior to their adoption. Anyone having reason to challenge those changes must do so in writing to the Pelican Lake Band; Attention: Chief and Council within the three (3) month period. If a challenge is received, then a duly called meeting of the Pelican Lake Band Electors must be held and a vote must be taken where a majority of those present agree to the change. If no challenge is received then the changes may be approved by the Chief and Council by Band Council Resolution [BCR].

III. Issue

[19] Having identified the underlying source of the problem in the preceding paragraphs, the single issue on the merit of the case is as follows:

Did the Pelican Lake Band Appeal Board err in fact or in law in its assessment of the appeal deposed by the respondents in finding that there were grounds to conduct an Appeal Hearing and overturn the election results of March 9, 2007?

IV. Analysis

Standard of Review

[20] The fundamental legal issue before this Court pertains to the proper exercise of jurisdiction by the Appeal Board to allow the appeal, proceed to an Appeal Hearing and overturn the election results contrary to the provisions of the *Election Act*. Questions of jurisdiction traditionally can only be reviewed on a standard of correctness. The decision of the Appeal Board is *ultra vires* and therefore cannot stand if the applicants can demonstrate on a balance of probability that the Appeal Board acted in a manner that fell outside the four corners of the *Election Act*.

[21] In order to find in favour of the respondents, I must be satisfied that the Appeal Board was correct and had jurisdiction to proceed in the manner in which the evidence indicates that it did.

Did the Pelican Lake Band Appeal Board err in fact or in law in its assessment of the appeal deposed by the respondents in finding that there were grounds to conduct an Appeal Hearing and overturn the election results of March 9, 2007?

[22] The Court finds that the Appeal Board was correct to receive the appeal and consider the supporting affidavits, provided by the appellants (the Respondents) based on the provisions of the *Election Act*. However, based on all the evidence before it, the Court concludes that the Appeal Board did not respect the *Election Act* and denied the applicants procedural fairness in its proceedings and this for the four reasons discussed below.

[23] First, while notice of the appeal was sent to the applicants, the notice did not contain the grounds for the appeal. This is contrary to the *Election Act* and served to deprive the applicants the opportunity to prepare a full answer and defence to the allegations of the appeal. In addition, the Appeal Board did not send the notice of appeal by registered mail as is required by subsection 12(4) of the *Election Act*, which provides as follows:

If the Appeal Board decides to proceed with an Appeal Hearing, the Hearing shall be held within fourteen (14) days of receiving the complaint and the Band. All proper parties shall be given notice of the date, time and place of the Appeal Hearing and the grounds for appeal by registered mail.

[24] Second, the *Election Act* specifically requires that the Appeal Hearing be based on *viva voce* evidence from the applicants. This was not done at the Appeal Hearing on April 3, 2007. The three appellants (the respondents) did not testify at the Appeal Hearing. Rather, their evidence was presented in the form of affidavits that were read at the Appeal Hearing. In so doing, the Appeal Board not only sheltered the applicants from being cross examined by counsel for the respondents (the applicants) but also breached subsection 12(5) of the *Election Act*. The relevant passages provide as follows:

At the Appeal Hearing, the Appellant(s) shall present his/her case.
All proper Respondents are entitled to make full answer and defence.
The Appellant(s) shall then have an opportunity for rebuttal. [. . .]
The Appeal Board shall hear any and all relevant evidence brought
forth by the Appellants and/or Respondents.

[25] Third, the decision to grant the appeal and to order a new election with a new slate of candidates is irregular. Where an election is ordered by an Appeal Board, it is to be based on the original slate of candidates. Paragraph 12(6) (c), clearly states, among other things that “[. . .] There shall be no new or additional nominations beyond the slate that ran in the Election or By-election that is the subject of Appeal.” This is not what the Appeal Board did. It opened up the campaign to additional candidates who were not on the list of candidates for the election of March 9, 2007 that is subject of appeal.

[26] Fourth and finally, the affidavits of the two panellists show that Chairman Abbott was biased toward Chief Bill. This evidence is not contradicted. By his words and actions, Chairman Abbott demonstrated that he was prejudiced toward Chief Bill, such that he was prepared to proceed with the Appeal Board meetings without giving proper notice to the two panel members, the treasurer and the secretary who disagreed with his behaviour. The evidence shows that Chairman Abbott made disparaging remarks regarding Chief Bill. This behaviour undermined the imperative set out in the *Election Act* that the Appeal Board be composed not simply of five members but of five impartial members. To the ordinary observer, this apparent bias clouded Chairman Abbott's judgment and may have influenced the other members of the Appeal Board in the decision arrived at.

[27] While the Court is of the view that the Appeal Board was correct to identify that there was an irregularity in the general election in that there were two versions of the *Election Act*, the Court is satisfied however that when this irregularity was drawn to the attention of the Chief Electoral Officer, steps were taken immediately to correct the error. In fact the question was put to an immediate vote and the Band members present at the nomination meeting of February 23, 2007 voted in favour of the *Election Act* and not the "revised" Act that was used from the outset and up to that point of the meeting.

[28] The Court is also cognizant of the fact that the respondents filed twelve affidavits, some of which contained petitions signed by 127 Band members who allege, among other things, that they were not allowed to nominate candidates of their choice, which may have increased the number of candidates and thus the outcome of the election. However, on cross examination, the affiants could not affirm that they were denied the opportunity to put forward their candidate of choice. As a matter of fact, except for Mr. David D. Thomas, all the Respondents and their affiants admitted that they never tried to nominate anyone. Mr. Thomas did make one nomination, which was accepted. Furthermore, they all admitted being able to vote and no one could identify one band member who was wrongfully prohibited from running as a candidate. The evidence also shows that the proper *Election Act* was followed for the appointments of the members of the Appeal Board.

[29] The Court finds that the Board for the four reasons mentioned above, did not act judicially and violated the principles of procedural fairness. Because of the special circumstances of this litigation, (see more specifically paragraphs 15, 16, 28, 31 and following of the present decision), I also make the following observation. In spite of the serious allegations of procedural irregularities with the conduct of the election, there is insufficient evidence to suggest that the outcome of the election would have been altered such that granting the appeal and calling for a new election were warranted.

[30] As a result, the Court finds that the Appeal Board misapplied the *Election Act* in its decision. Based on the evidence, it would have been correct for the Appeal Board to apply paragraph 12(6)(b) rather than paragraph 12(6)(c) of the *Election Act*, which states as follows:

12(6) The Appeal Board shall within seven (7) days of holding an Appeal Hearing make one of the following decisions:

[. . .]

b) uphold the Appeal but allow the Election to stand, on the ground that the infraction would not reasonably be seen to have affected the results of the Election; or

V. Obiter

[31] In the normal course of a judicial review, the reviewing Court would have the option to return the matter to a differently and properly constituted Appeal Board to re-determine the matter. However, the *Election Act* makes no provision for such a possibility, as my colleague Mr. Justice John O’Keefe concluded in *Bill v. Pelican Lake Indian Band*, [2006] F.C.J. No. 877, 2006 FC 679, and which was affirmed by Mr. Justice Létourneau on appeal, as cited above. Mr. Justice O’Keefe stated at paragraph 59:

59 The matter cannot be referred to a differently constituted Appeal Board as there is no provision to constitute another Appeal Board. Subsection 11(1) of the Act requires the Appeal Board to be appointed as follows:

- 11(1) An Appeal Board shall be appointed by the membership at the Nomination Meeting immediately after the close of nominations has been announced by the Chief Electoral Officer or his/her designate.

[32] I also add that the Court’s finding of apparent bias makes it impossible to return the matter to the Appeal Board as it was constituted after the March 2007 election. What can a Court do in such a situation?

[33] This exceptional situation calls for exceptional measures. To put an end to this vicious cycle and allow the democratic will of Band members to run its course, this Court therefore allows the appeal. In *obiter* therefore, the Court is of the studied opinion that the applicants should take all means possible to correct the present situation. The Pelican Lake Band Council, under the direction of the applicants, Chief Peter Bill and Councillors Romeo Thomas, Frederick Whitehead, David Thomas, Gilbert Chamakese, Sidney Bill and Jimmy Bill, elected for a three year term on March 9, 2007, are encouraged to take the decision of the electoral process back to the people according to Band custom, and decide how best the Band will be governed pursuant to the amendments deemed to be in the best interests of the Band and its people.

[34] In so doing, the Court would encourage the Band Council to turn its mind to the people within six (6) months of these reasons, and using the amending formula provided under section 16 of the *Election Act* put in place clear, fair and just procedures to assure that the democratic will of the Band members is respected and allowed to run its course and effectively stop the revolving door of judicial proceedings.

VI. Conclusion

[35] Having found that there was insufficient evidence to warrant the granting of the appeal and in light of the numerous irregularities of the Appeal Board, the appeal shall therefore be allowed and the decision of the Appeal Board, dated April 7, 2007 is declared null and void.

[36] The parties requested costs. Since the outcome is in favour of the applicants, costs are awarded against the respondents in a lump sum amount of \$900.00 or the equivalent of the bond money of \$300 each that was required from each respondent when they filed the appeal to the Appeal Board.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

1. The appeal is allowed and the decision of the Pelican Lake Band Appeal Board dated April 7, 2007 is set aside;
2. Costs in the amount of \$900 are awarded against the respondents, to be repartitioned equally among and against each of the three respondents.

“Simon Noël”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-716-07

STYLE OF CAUSE: **CHIEF PETER BILL ET AL v. COUNCILLORS
ROMEO THOMAS ET AL**

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: October 18, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** The Honourable Mr. Justice Simon Noël

DATED: November 7, 2007

APPEARANCES:

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Ms. Brenda V. McLeod FOR THE RESPONDENTS
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