

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

Regarding Candidate Certification of:

APP-08-03

Bernard A. Bouschor

The above referenced matter comes to the Appellate Bench by virtue of the Tribe's election ordinance at 10.121 (4).

Specifically, the Petitioner is seeking a ruling from the Tribal Appellate Court that 10.110 (2) is violative of the Petitioner's rights under the Federal and Tribal Constitution as well as the Indian Civil Rights Act. 10.110 (2) became Tribal Law pursuant to a referendum in which more than 3,700 individual tribal voters supported the language. Approximately 1,700 voters disagreed with the same. It is of no consequence to this court what percentage of the tribal membership the aforementioned voters comprise. It is only of consequence that there was no argument made to the Court to sustain the premise that there were irregularities with the referendum process. The specific language of 10.110 (2) is as follows:

No individual may run for election to office who is currently a Defendant in Chippewa County Circuit Court Case No: 04-7606-CC, in which the Tribe is pursuing civil litigation against the Defendants, including claims involving fraud, breach of lawful authority, breach of fiduciary duties owed to the Tribe, and conversion of over 2.6 Million until such litigation has been finally resolved.

Counsel for the Tribe, James Bias has stipulated to the factual background as stated in the Petitioner's brief. Petitioner filed his pleadings with the Tribal Appellate Court on the afternoon of February 28, 2008. Tribal Code requires that a decision be made within five days of filing. Extraordinary measures were taken by the Court staff to file and disseminate to the Judges information initially filed by the Petitioner and later from the Tribe.

Oral argument was scheduled the next business day, Monday, March 3, 2008 at 6:00 p.m.. Recognizing the complexity of the complaint, the codified time limit that speaks to oral argument was waived upon the court concurring with the motion and stipulation of the parties

Unfortunately, the Tribe did not file a brief, but the parties stipulated that the Tribe's brief could be filed with the Court no later than 5:00 p.m., March 4, 2008. The scope of the brief was limited to those issues raised on oral argument. The Tribe filed its brief at 4:55 p.m., March 4, 2008. Copies were disseminated to the Appellate Judges and the Court Clerk faxed a copy to Petitioner's counsel. Petitioner's counsel then filed a supplemental brief with the Court at 11:45am, March 5, 2008.

The Appellate Bench met to deliberate on several occasions as well as re-listening to portions of the oral argument. Once again, the Tribal Code requires extremely swift action to be taken should a complaint be filed under the election code. The Court's function would have been severely limited but for the action of a very competent court staff. Attorney James Bias argued on behalf of the Tribe and Attorney Paul Shagen represented the Petitioner. This Court is still uncertain as to whether Mr. Bias was representing the election committee or the Tribal Board of Directors. The distinction is important because Mr. Bias and other Tribal counsel had opined to the election committee that 10.110(2) was unconstitutional. This fact was not ignored by the Petitioner's attorney and he made note of the fact several times in his brief. Mr. Bias admitted that he had rendered his opinion to the committee but was present in Court to argue for the Constitutionality of the ordinance from the perspective of the Board of Directors. This duality, frankly, was not lost upon the Appellate Court. It is alarming and borderline unacceptable albeit no prejudice exists that impairs the merits of the arguments set forth. This is best evidenced by the stipulation of the Petitioner waiving any colorable conflict.

The Appellate Court agrees with Mr. Bias that there is a presumption that Tribal government acts lawfully and that its laws are Constitutional. It is the Petitioner's duty to counter that presumption. This generally involves an analysis of the alleged Constitutional deprivation and status of the injured party. Court scrutiny sharpens with the abridgment of rights considered fundamental. In a similar fashion, increased scrutiny develops when the target of governmental activity is in a protected class of citizenry.

Counsel for the Petitioner failed to establish that Mr. Bouschor's candidacy is in a class of rights considered fundamental. The right to vote is a fundamental right whereas the affirmative right to be a candidate is not. The Petitioner failed to the same extent in demonstrating that the Petitioner is a protected class of citizen.

As such, this Court may only invalidate the ordinance in question on the grounds of violating the Equal Protection Clause of the Constitution if the discrimination has no rational basis.

It is a common misapprehension that discrimination in and of itself is always unconstitutional. That is too simple an analysis and is wrong. A government may discriminate or treat citizens differently so long as there is a rational basis for the discrimination.

By way of example, those who are 18-years old may vote in elections and serve their country in the military but cannot consume alcohol according to the law of various states. Those between 18 and 20 are fully vested citizens and yet cannot consume so much as a glass of beer when those who are 21 and older have a perfect right to partake within limits. Whether one agrees with the policy underpinnings of the law or not, the rational for the different treatment is based upon the notion that those under 21 may not be as responsible as

they should be. This opinion could probably list a hundred or so similar examples, but we need not dwell upon the same.

This Court may not strike down the ordinance in question unless it is shown there is no rational basis for its treatment of Mr. Bouschor and others yet involved in a law suit seeking the return of approximately 2.6 million dollars which has yet to be adjudicated as final (Res judicata does not apply at this time).

Perhaps the basis for disagreement can be traced to the concept of fiduciary duty and elected Tribal Office. During oral argument, the Court questioned Mr. Shagen as to his thoughts regarding the fiduciary duty owed by elected officials to the Tribe. Mr. Shagen responded by indicating he did not think a “corporate concept” like fiduciary obligation is applicable to elected Tribal officials. The Bench believes this is the crux of the matter. One need only view the language which was approved and disseminated to the members of the Tribe when they voted upon resolution number 2005-202. The third paragraph in the resolution stated plainly the Tribe’s motives:

Whereas it is inherent in the position of the Chairman and Director that each owes certain fiduciary responsibilities to the Tribe including duties of care and loyalty. (emphasis added)

While the Court does not doubt that in the context of the referendum there were many instances of political rhetoric, the bare fact is the Tribe stated its rationale. There was concern with fiduciary responsibility tainted by inevitable personal conflict arising from a 2.6 million dollar claim creating the potential for personal exposure. It is noted by this that Bench Mr. Bouschor is not under any criminal indictment nor has there been an adjudication on the merits of the case filed in Chippewa County Circuit Court number 04-7606-CC.

This Court finds that the Tribe was attempting to have elected officials who would not be personally conflicted. That is rational. Whether or not this Court would take a similar

position is not relevant. The point is that Tribal voters decided for themselves that this was an appropriate restriction. The Court also notes that the restriction is conditioned upon the Chippewa County case not being resolved. The parties would not be in their respective positions today if the law suit were resolved.

This Court will not supplant its political judgment for that which was plainly stated, rationally based and, ultimately, approved by the Tribal voters themselves. This is not anything akin to “tyranny of the majority” but rather an attempt to avoid the dilution of fiduciary duty by inevitable conflict with self-interest. In fact, the proposal and approval of resolution 2006-114 can be seen as another example of the Tribe attempting to refine lawful expectation from its elected officials who serve on the Board of Directors and are also employed by the Tribe. Once again it is not for this Court to determine the wisdom of such action but rather to discern if there is a rational basis for the treatment of its elected officials.

Counsel for the Petitioner cites the situation created by the suit filed by Kandra Robbins against the Tribe as being inconsistent with the case at bar. The situations are easily distinguishable because Ms. Robbins is not running for office.


The Court does not believe Mr. Bouschor is without remedy. He and others are free to seek repeal of 10.110 (2) either by action from the Board of Directors or a vote of its Tribal members. This Court fully recognizes there may be many that would support such action. There are many that credit Mr. Bouschor to the Tribe’s success over the 17-years he served as Chairman however, that is a matter for the ballot box and not the Court docket. This Court does and will not operate in the realm of the political. That is the exclusive purview of its elected officials and membership. If one is to give meaning to the concept that the Tribe is to be a Nation of laws and not men, this must be so. Personal feelings stemming from political gratitude or animosity shall not come from this Bench.

It is ORDERED and ADJUDGED that 10.110 (2) is constitutional on its face and as applied.

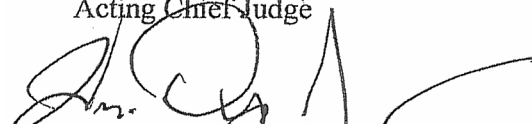
It is further ORDERED and ADJUDGED that the rights of the Petitioner have not been abridged in contravention the Equal Protection Clause.

It is further ORDERED and ADJUDGED that the Petition in this matter is denied.

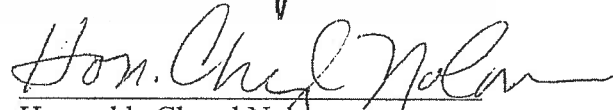
Dated: 3-8-08


Honorable Michael Bryce Winnick
Acting Chief Judge

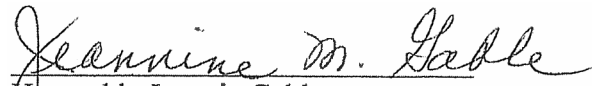
Dated: 3/6/08


Honorable Wm. Dyke Justin
Tribal Appellate Court Judge

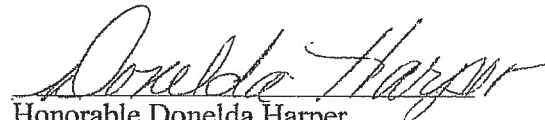
Dated: 3-7-08


Honorable Cheryl Nolan
Tribal Appellate Court Judge

Dated: 3/7/08


Honorable Jeannie Gable
Tribal Appellate Court Judge

Dated: 3/7/08


Honorable Donelda Harper
Tribal Appellate Court Judge