Federal Court  Cour fédérale

Date: 20150507

Docket: T-1372-14

Citation: 2015 FC 601

Ottawa, Ontario, May 7, 2015

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

IVAN LEMAIGRE

Applicant

and

CHIEF TEDDY CLARK, IN HIS CAPACITY AS CHIEF OF THE CLEARWATER RIVER DENE NATION, AND LORNA JANVIER, DOREEN MOISE, DELPHINE LEMAIGRE, MILES LEMAIGRE, RAIN PICHE, AND NORBERT MONTGRAND IN THEIR CAPACITY AS MEMBERS OF THE ELECTION ACT COMMITTEE OF THE CLEARWATER RIVER DENE NATION

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of a "decision" by the Election Act Committee (EAC) of the Clearwater River Dene Nation (CRDN) concerning a complaint by Ivan Lemaigre (the Applicant) alleging that Chief Teddy Clark (the Chief) of the CRDN had forfeited his

position as Chief because he had failed to comply with the reserve residency requirements of the *Clearwater River Dene Nation Election Act and Regulation (the Election Act)*.

[2] This case is an unusual one in that it is not entirely clear whether the EAC came to a decision at all, because this six-member committee voted and came to a 3-3 tie as to whether the Chief should be removed. Having carefully considered the matter, I have come to the conclusion that a negative decision was made and that such a decision was reasonable in light of the evidence before this Court.

I. Facts

[3] The CRDN is an Indian band within the meaning of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] that holds three parcels of reserve land (#221, 222 & 223) in northwestern Saskatchewan. The CRDN had a total registered population of 1893 members in 2014, of which 1115 do not live on the CRDN reserves. Reserve #222, also known as the Village of Clearwater River, is considered the main reserve and houses the band administration offices. Most of the on reserve members of the CRDN reside on Reserve #222. Many of the off-reserve members live a 10-minute drive away in the neighbouring Village of La Loche. Reserve #223 is located approximately 110 km south of Reserve #222; no members of the CRDN permanently reside on that reserve.

[4] The CRDN has always chosen its leadership according to custom, and is not subject to an order under subsection 74(1) of the *Indian Act*. To facilitate the selection of Chief and Council, the CRDN has codified their band customs into a document currently titled the *Clearwater River*

Dene Nation Election Act and Regulation (the *Election Act*), and band elections have been conducted according to that *Act* or its earlier versions, at least since the early 1990s.

[5] Prior to 1997, the *Election Act* contained a provision that required a Chief who did not reside on reserve to move onto the reserve within 6 months, and obliged the Council to provide him with adequate housing. It seems that the objective of this provision was to ensure that the Chief was accessible to membership, close to the community and aware of their concerns and issues.

[6] In 1997, due to a severe housing shortage on reserve, the provision was modified to its current form, which reads:

> 15. (a) Upon taking office, the newly elected Legislative Council shall do the following:
>
> […]
>
> > (iii) Once Elected, the Chief of the First Nation shall take up residence on the First Nation within six (6) months of the date of the Election, for the remainder of his or her term, provided that adequate housing is available;

The parties agree that "on the First Nation" refers to the main reserve (#222), that is, the Village of Clearwater River.

[7] The consequence for failing to comply with this requirement is provided at subsection 15(c) of the *Election Act*, which reads:

> (c) If a newly elected member of the Legislative Council fails to adhere to Section 15(a) within the timeframes stipulated, he or she

> shall automatically forfeit his or her position to the next candidate with the most votes in the election for that position. If that person is unable or unwilling to accept the position, a By-Election shall be called in accordance with this *Act and Regulations*.

[8] Although the previous version of the *Election Act* contained some references to a committee, the EAC was only created in 2013, when the CRDN membership approved amendments to the *Election Act* on January 24, 2013 that defined the composition and nomination process for the EAC as follows:

> 21. (a) The Election Act Committee shall be comprised of six (6) members of the Clearwater River Dene Community.
>
> (b) The Election Act Committee shall be elected by the Candidates following the Nomination Meeting (2013). Forms to be provided by the Electoral Officer and deposited into a ballot box. These ballots will be counted one (1) hour following the Nomination Meeting.
>
> (c) The terms of reference for the Election Act Committee shall be to monitor and act on the Election Act Regulations where applicable throughout the Term of Council, commencing on July 7, 2013 and ending on July 6, 2017.
>
> (d) No member of the Election Act Committee shall be employed by the Clearwater River Dene Nation or by candidates for Chief or Council.

[9] On June 13, 2013, the election candidates selected six members for the EAC: Rain Piche, Lorna Janvier, Doreen Moise, Miles Lemaigre, Delphine Lemaigre and Norbert Montgrand. It seems that the EAC did not play any particular role in the subsequent election itself, and the Applicant's complaint regarding the Chief's residency was the first decision they had to render.

[10] On June 27, 2013, the CRDN band election took place. Teddy Clark was elected as Chief by 458 votes (58%), and the next runner-up was Ivan Lemaigre, who collected 133 votes (16%). The Chief assumed office on July 7, 2013.

[11] On February 5, 2014, the Applicant's lawyer wrote a letter to the CRDN Chief and Council alleging that the Chief had contravened section 15(a)(iii) of the *Election Act* by not having taken up residence on the reserve within 6 months of being elected, and seeking confirmation that he would be assuming office in accordance with section 15(c) of the *Election Act*. The Chief's counsel responded on February 6, 2014 requesting particulars of the alleged breach. This correspondence was brought to the attention of the EAC, and they wrote to the Chief requesting details of any steps the Chief had taken towards moving on reserve, and noted that they would be discussing this issue at a meeting on February 24, 2014.

[12] By a letter dated February 10, 2014, the Applicant alleged that the following units would have been adequate, available housing: the Nursing Unit, the Teacherage, one of the three modular units brought on reserve in December 2013, and the Chief's camper trailer. A further letter dated February 14, 2014 added 107 Northshore Drive to that list, and alleged that the Chief had failed to commence construction on the site allocated to him at a Council meeting held on August 9, 2013.

[13] Despite a request for adjournment by counsel for the Chief, the February 24, 2014 meeting proceeded with the EAC members, the Chief and his counsel, and the Applicant present. It was decided that the parties would provide submissions and a hearing would be fixed at a later

date. Written argument and affidavit evidence was submitted to the EAC on April 2 and 3, 2014, and a hearing took place on April 5, 2014. The Chief and the Applicant, with their respective counsel, participated at the hearing.

[14] The EAC then deliberated, meeting five or six times, and voting by secret ballot three times. Each time, they came to a 3-3 tie as to whether the Chief's position should be forfeited. On April 7, 2014, Doreen Moise wrote to the parties on behalf of the EAC advising them of the result in the following terms:

> I would like to inform all of the above members that we the committee could not come to our decision. Our voting is tied three on three therefore we are handing it over to the court. Lorna Janvier will notify the two lawyers by email on when they will have a court hearing.

[15] On May 1, 2014, Lorna Janvier wrote to the parties on behalf of the EAC indicating that the sentence "Lorna Janvier will notify the two lawyers by email on when they will have a court hearing" should not have been in the letter, and that it is not in the EAC's capabilities to set up court hearings.

[16] In her affidavit sworn July 9, 2014 in these proceedings, Doreen Moise made the following statement:

> While the EAC was at an impasse a decision was made. Our decision was that as our vote was tied, and a majority of the EAC did not vote in favour of Chief Teddy Clark forfeiting his position as Chief, the status quo remained in place and Teddy Clark was to remain in the position as Chief.

[17] The Chief did in fact remain in position, and on June 4, 2014 the Applicant filed this application for judicial review, seeking the following relief:

> (a) A declaration that the Clearwater River Dene Nation #403 Election Act and Regulations are the applicable law or required procedures governing the matters in question;
>
> (b) A declaration that the Respondent, Chief Teddy Clark, forfeited the position of Chief for Clearwater River Dene Nation on December 28, 2013, pursuant to Section 15(c) of the Clearwater River Dene Election Act and Regulations;
>
> (c) A declaration that the Respondent, Election Act Committee, breached the Clearwater River Dene Custom *Election Act* by failing to monitor and enforce its compliance;
>
> (d) An order in the nature of *mandamus* requiring that the Respondent, Election Act Committee, immediately enforce Section 15(c) of the Clearwater River Dene Election Act and Regulations by declaring Ivan Lemaigre as Chief of the Clearwater River Dene Nation;
>
> […]
>
> (f) Costs of this Application in any event of the cause; and
>
> (g) Such further and other relief as may be required and this Honourable Court may deem just.

[18] In addition, the Applicant requested the following relief in his memorandum:

> (e) Alternatively, an order in the nature of *mandamus* compelling the Election Act Committee to make a decision, accompanied by clear directions to arrange themselves in such a way where they can render a decision and further accompanied by detailed guidance on the correct interpretation of the law and the application of the facts to the law.
>
> (f) Costs on a full indemnity basis.
>
> (g) Alternatively, costs in an amount to be fixed by the Court.
>
> […]
>
> [Emphasis in original]

II. Issues

[19] The parties have submitted a number of issues to be decided in the context of this application. In my view, the first issue to be determined is whether the EAC's tie vote can be considered a decision within the meaning of the *Federal Courts Act*, RSC 1985, c F-7, as this will affect the jurisdiction of this Court to decide the matter. If the tie vote does indeed amount to a decision, then the following questions must be answered:

- Is the Application out of time?
- What is the applicable standard of review?
- Did the EAC err in finding that no adequate housing was available?

III. Analysis

A. *Is the EAC's tie vote a decision?*

[20] The Applicant's argument for *mandamus* is premised on the assumption that a "decision" was not made by the EAC on April 5, 2014 since the vote was tied 3 members to 3 members. For reasons to be elaborated shortly, this assumption is faulty and cannot hold. I find, however, that even if I were to accept that the EAC failed to make a decision, *mandamus* cannot lie and is not available as a remedy in the present case, as the criteria set out in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 have not been met.

[21] The principal requirements that must be satisfied before *mandamus* will issue have recently been summarized by my colleague Justice Gleason in *Jia v Canada (Minister of Citizenship and Immigration)*, 2014 FC 596, at paras 67 and 68:

> [67] […] The test applicable to determine when an award of *mandamus* is appropriate is well-settled and involves the following factors, as enunciated by the Federal Court of Appeal in *Apotex Inc v Canada (Attorney General)* (1993), [1994] 1 FC 742 [*Apotex*]:
>
> 1. there must be a public legal duty to act;
>
> 2. the duty must be owed to the applicant;
>
> 3. there must be a clear right to performance of that duty;
>
> 4. no other adequate remedy is available to the applicant;
>
> 5. the order sought will be of some practical value or effect;
>
> 6. the court in the exercise of its discretion finds no equitable bar to the relief sought; and
>
> 7. the balance of convenience favours granting *mandamus*.
>
> [68] Where the duty sought to be enforced is discretionary, additional considerations apply, namely that:
>
> 1. in exercising discretion, the decision-maker must not act in a manner which can be characterized as unfair or oppressive or which demonstrates flagrant impropriety or bad faith;
>
> 2. *mandamus* is unavailable if the decision-maker's discretion is characterized as being unqualified, absolute, permissive or unfettered;
>
> 3. in exercise of unfettered discretion, the decision-maker must act upon relevant as opposed to irrelevant considerations;
>
> 4. *mandamus* is unavailable to compel the exercise of fettered discretion in a particular way; and
>
> 5. *mandamus* is only available when the decision-maker's discretion is spent such that the applicant has a vested right to the performance of the duty.

[22] In the case at bar, there are at least two pre-requisites that are not satisfied. First, it appears that the Applicant seeks to compel the EAC to exercise its discretion in a particular way, that is, to declare him as Chief of the CRDN. In paragraph 1(d) of his Notice of Application, the Applicant asks the Court for "an order in the nature of mandamus requiring that the Respondent, Election Act Committee, immediately enforce Section 15(c) of the Clearwater River Dene Election Act & Regulations by declaring Ivan Lemaigre as Chief of the Clearwater River Dene Nation". It is true that in paragraph 99 of his written submissions, the Applicant seeks an alternative and somewhat more open-ended relief, i.e. "an order in the nature of mandamus compelling the Election Act Committee to make a decision, accompanied by clear directions to arrange themselves in such a way where they can render a decision and further accompanied by detailed guidance on the correct interpretation of the law and the application of the facts to the law". At the hearing, however, counsel made it clear that in the Applicant's view, the file should be returned to the EAC for it to enforce subsection 15(c) of the *Election Act* and to declare that the Chief has not fulfilled his obligation to reside on the First Nation within six months of the date of the election.

[23] The EAC clearly had the discretion to decide whether or not adequate housing was available to the Chief, both during the relevant six month period and at the time of its decision on April 5, 2014. There is no specific duty, pursuant to paragraph 15(a)(iii) of the *Election Act*, for the EAC to act in any particular way. As a result, an order of *mandamus* cannot be granted, as it is clearly established that *mandamus* cannot compel the exercise of discretion to obtain a specific result: *Kahlon v Canada (Minister of Employment and Immigration)*, [1986] 3 FC 386 (FCA), at para 3; *Canada (Chief Electoral Officer) v Callaghan*, 2011 FCA 74, at para 126; *Rocky*

Mountain Ecosystem Coalition v Canada (National Energy Board), [1999] FCJ No 1223(QL), at para 38. The only exception to that rule is when the discretion has been exercised in a manner that is unfair, oppressive or demonstrates flagrant impropriety or bad faith. There has been no such allegation in the present case. The parties were clearly able to provide written documentation as evidence and make any oral submissions they wished to make to the EAC prior to the EAC considering the matter and making a decision.

[24] If, on the other hand, the matter is returned to the EAC without any instruction as to how it should be decided, then his application for *mandamus* would conflict with another pre-requisite for such an order, namely that it should be of some practical value or effect. As previously mentioned, the EAC heard the evidence and submissions from counsel and, after at least three rounds of discussion and voting by secret ballot, were unable to break the tie vote. In those circumstances, it is highly unlikely that a further vote would lead to a different result. If anything, the protracted dispute between the parties and the legal proceeding will have only hardened the members' respective views. An order for *mandamus* would therefore be of no avail.

[25] Be that as it may, I am satisfied that a decision has been made by the EAC and that a tie vote is in fact a negative decision. I acknowledge that the EAC itself equivocated on this issue, Doreen Moise first stating in her April 7, 2014 letter to the parties that the EAC could not come to a decision, and then affirming in her July 9, 2014 affidavit that the EAC ruled in support of the status quo as the majority did not vote in favour of the Chief forfeiting his position as Chief. It is for this Court, and not for a member (or even a co-chairperson) of the EAC to determine the legal effect of the vote taken by that committee on April 7, 2014.

[26] Although the *Election Act* provides significant details on election procedures, notably providing for run-off elections in the case of a tie between two candidates (s 13(p)(iv)), it gives very little indication of how the EAC should function. Section 21 of the *Election Act* simply provides for the creation of a six-member committee tasked with monitoring and acting on the *Election Act* throughout the 2013 Council's 4 year term. The *Election Act* does contemplate the EAC rendering decisions; section 19(c) provides that a member of the CRDN may initiate a motion to suspend a Chief or Councillor by making an initial request to the EAC, which "shall consider whether sufficient particulars and facts exist to consider the request for the suspension". If the EAC determines that sufficient particulars and facts exist to consider a request for suspension, the matter is referred to the Chief and Council, who then vote on the motion for suspension. The *Election Act* therefore contemplates this six-member panel considering submissions and reaching a decision, but does not explicitly state how decisions are to be reached.

[27] Majority rule is a well-established principle in most western political democracies, where elections and referendums are decided according to that principle. It is also the rule most commonly used in legislatures and other deliberative bodies; a motion or a bill will therefore be adopted if it carries 50% + 1 of the members present. According to *Robert's Rules of Order Newly Revised*, a widely used parliamentary authority in the English speaking world, it is the default rule to be followed unless a super majoritarian rule has been explicitly prescribed:

> Majority Vote – the Basic Requirement
>
> As stated on page 4, the basic requirement for approval of an action or choice by a deliberative assembly, except where a rule provides otherwise, is a majority vote. The word majority means 'more than half'; [...].

> [Henry M. Roberts III, William J. Evans, Daniel H Honemann and Thomas J. Balch, *Robert's Rules of Order Newly Revised*, 10th ed (Cambridge, MA: Perseus Publishing, 2000) at 387 [*Robert's Rules*]].

[28] With respect to tie votes, *Robert's Rules* notes that "on a tie vote, a motion requiring a majority vote for adoption is lost, since a tie is not a majority" (*Robert's Rules*, at 392).

[29] This principle is widely followed in municipal councils. In *Ostrensky v Crowsnest Pass (Municipality) Development Appeal Board*, [1996] AJ No 98 (Alta CA) [*Ostrensky*], a decision cited by counsel for the Chief, the council of the municipality had only appointed four of the mandated five members to the Municipal Development Appeal Board. On an appeal of a development permit, the Board rendered the following decision:

> Two members of the D.A.B. were in favour of granting the appeal and two members were in favour of denying the appeal. As a result, the appeal was lost on a tie vote and the decision of the Municipal Planning Commission stands.
>
> *Ostrensky*, at para 2.

[30] The Alberta Court of Appeal upheld the Municipal Development Appeal Board's determination, finding that the Board had validly rendered a negative decision, and "in doing so, they simply were applying what most Canadians understand to be the idea of majority rule: if a proposal does not attract majority support, it fails" (*Ostrensky*, at para 6). This approach is typical in municipal law, where motions that do not obtain a majority of councillor votes will normally fail: *Campeau Corp v Calgary (City)*, [1978] AJ No 707, at para 24; *Atkins v Calgary (City)*, [1994] AJ No 53, at para 8; *Waste Management of Canada Corp v Thorhild No 7 (County)*, 2008 ABQB 762, at para 17. In *Ostrensky*, the Court of Appeal went on to reprimand

the municipal council, stressing that the problem was "the extreme lack of wisdom" in appointing a four person tribunal to decide anything.

[31] The simple majority rule is not the only approach to decision-making. Besides situations where a unanimous decision or a special majority is explicitly required (see, for example, *Procedure for Amending Constitution of Canada*, Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11), a number of federal statutes provide different ways to settle a tie vote. For example, the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, provides that the chair of a meeting of the creditors shall have a second vote in the case of a tie (s 105(3)). Similar provisions are found in the *Canada Shipping Act*, SC 2001, c 26, s 27(5) (Marine Technical Review Board); *Canada Payments Act*, RSC 1985, c C-21, s 15(3) (Canadian Payments Association); *Copyright Act*, RSC 1985, c C-42, s 66.5(2) (Copyright Board). In the *Bankruptcy and Insolvency Act*, a tie vote at a meeting of inspectors may also be broken either by seeking the opinion of an absent inspector or by the trustee (s 117(2)). *Robert's Rules* also provides that the chairperson or presiding officer of a meeting may cast a vote to break the tie, provided they have not already voted as a member (*Robert's Rules*, at 392-393).

[32] Of course, one could object that the general principles of majoritarian democracy do not sit well in an aboriginal context, where the prevalent tradition (at least among many First Nations) is to rule by consensus: see *Kahente Horn-Miller*, "What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke's Community Decision Making Process" (2013) 18 *Rev Const Stud* 111 at 115; John Borrows, *Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada* (Ottawa: Law Commission of Canada, 2006), online:

http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf at 47; Kaitlin S. Hoffman, *Valuing Tradition: Governance, Culture Match and the BC Treaty Process*, 2014, online: http://summit.sfu.ca/item/14012 at 19. This is particularly apposite where a First Nation continues to select its leadership based on its own custom. In such a case, the principles applicable to the interpretation of these customs should be derived first and foremost from that First Nation's own law and customs, instead of borrowing blindly from the principles and the jurisprudence applicable to decision-making in legislative assemblies or municipal councils.

[33] Indeed, it is well accepted that in the context of a custom band election dispute, the Court must attempt to ascertain that custom based on the evidence before it of practices that are "generally acceptable to members of the band" and upon which there is "broad consensus": see *Francis v Mohawk Council of Kanesatake,* 2003 FCT 115, at paras 20-38. Similarly, the principles of procedural fairness applicable to custom band elections must respect relevant band customs: *Bruno v Samson Cree Nation*, 2006 FCA 249, at para 21.

[34] That being said, I have not been presented with any evidence of such consensus based decision-making processes amongst the Dene, let alone within the CRDN community. On the other hand, it is most helpful and relevant to note that the CRDN's Legislative Council is normally composed of six members as well – one Chief and five Councillors (s 3(a) of the *Election Act*). The *Clearwater River Dene Nation Regulations Governing the Terms and Conditions for the Offices of Chief and Council* lays out in detail the procedure for decision-making at meetings of the Chief and Council, and provides that "[a]ll matters shall be determined by a majority of votes and, in the event of a tie vote, the motion shall be deemed to be defeated"

(s 14(m)). I would also note that the CRDN has generally adopted procedures that resemble typical majoritarian rule principles, conducting elections based on a first-past-the-post voting system. The EAC itself chose to make its decision by having members vote by secret ballot, without the affected parties, a procedure that does not square well with the cooperative character of consensus-based processes (see Horn-Miller, cited above, at 116-118 for a comparison of the *Robert's Rules* model and consensus-based processes), and is much more indicative of a process based on majority rule. These factors militate in favour of applying the simple majority rule applicable to the CRDN Legislative Council to the EAC. As a result, the April 7, 2014 tie vote must be interpreted as a negative decision; a majority vote was required by the EAC to effectively determine that adequate housing was available, and such a vote was not reached by the EAC.

B. *Is the Application out of time?*

[35] As a preliminary issue, the Chief argues in his written submissions that the application was made out of time, as the decision contested was communicated to the parties on April 7, 2014, while the application was brought on June 4, 2014, beyond the 30-day limitation period under subsection 18.1(2) of the *Federal Courts Act*. As the Applicant has not brought a motion for an extension of time, the Chief submits that the application should be dismissed on that ground.

[36] There is no doubt that the application was filed beyond the usual 30-day limit applicable to judicial review of decisions and orders. However, the Applicant's main contention in his application is that the April 7, 2014 letter is not a decision at all. The 30-day time limit under

subsection 18.1(2) does not apply to actions of a federal board that is not a decision or order, although such an application may be dismissed for unreasonable delay: *Canadian Association of the Deaf v Canada*, 2006 FC 971, at paras 72-73; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, at 76-80. Since the issue as to whether the EAC's letter constitutes a decision raised a serious issue on this application, and there was no unreasonable delay in bringing the application, I am of the view that the failure to bring the application within the 30-day time limit should not be fatal. Indeed, counsel for the Respondent did not forcefully advocate that preliminary argument at the hearing.

[37] To the extent that the Applicant was seeking relief in the nature of *mandamus*, moreover, no time limit applies pursuant to section 18 of the *Federal Courts Act*. Since such relief was conceivably the gist of the Applicant's application, he should not be barred from bringing it more than 30 days after receiving the April 7, 2014 letter.

C. *What is the applicable standard of review?*

[38] The Federal Courts have typically applied the general principles regarding standard of review to bodies created under custom in the context of customary band elections: see, *inter alia*, *Felix v Sturgeon Lake First Nation*, 2014 FC 911, at paras 34-36; *Fort McKay First Nation v Orr*, 2012 FCA 269, at paras 8-12 [*Fort McKay*]; *Lewis v Gitxaala First Nation*, 2015 FC 204, at paras 9-16. The factors to be considered in determining the standard of review include the presence of a privative clause, the purpose of the tribunal as determined by interpreting its enabling legislation, the nature of the question at issue, the decision-maker's expertise and

whether the issue involves interpretation of its "home statute": *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 51-64 [*Dunsmuir*].

[39] The *Election Act* does not include an explicit privative clause. As for the purpose of the EAC, it is, according to subsection 21(c), to "monitor and act on the Election Act Regulations where applicable throughout the Term of Council". On cross-examination, Doreen Moise of the EAC testified that Gordon Alger of the Meadow Lake Tribal Council had recommended to the CRDN membership that they create an EAC so as to avoid hassle and conflict over elections (Applicant's Record, vol 2, pp 307-308). In the circumstances, I do not think the *Election Act* provisions demonstrate any particular intention to shield the EAC's acts from judicial review, although they imply an intention to resolve election disputes within the community in a more practical way.

[40] Whether adequate housing was available on reserve for the Chief between July 2013 and January 2014 is an issue of mixed fact and law that involved making factual determinations and deciding whether the housing units discussed could be considered adequate and available during the relevant period. The EAC has not claimed any particular expertise in law or housing, but emphasizes that it is composed of band members that are knowledgeable of the special circumstances of their community and therefore best placed to assess what conditions are adequate in this context. Given the political implications of the decision the EAC was asked to render and the context of customary band election law, these factors militate in favour of deference towards the EAC's determinations. Moreover, there is a presumption that reasonableness is the applicable standard of review on issues pertaining to the interpretation of a

tribunal's home statute: *Public Service Alliance of Canada v Canadian Federal Pilots Assn*, 2009 FCA 223, at para 36; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at para 30; *Fort McKay*, at para 10.

[41] Reasonableness normally requires that the decision exhibit justification, transparency and intelligibility within the decision-making process, and also that the decision be within the range of possible, acceptable outcomes, defensible in fact and law: *Dunsmuir*, at para 47. In the case at bar, no reasons were provided, and it is practically impossible to imply any reasons based on the record. This is possibly the result of the belief apparently held by at least certain members of the EAC that a decision could not be made as the votes ended in stalemate. In those circumstances, the best the Court can do is consider the record that was before the EAC and come to a conclusion as to whether a negative decision would be a reasonable outcome on the facts and the law.

D. *Did the EAC err in finding that no adequate housing was available?*

[42] Counsel for the Applicant argued that the Chief intentionally flouted the residency requirement of paragraph 15(a)(iii) of the *Election Act*. He submitted that the Chief knew, or ought to have known, that he would not have enough time to construct a new house in six months, and that he made no attempt to obtain temporary housing, having never even asked Council or band management whether a unit could be made available for him on a temporary basis so that he could comply with the residency requirement. Since the Chief and Council is the body with the power and discretion to make housing available and allocate it, the failure to inquire shows that the Chief had no intention of complying with the residency requirement. The

Applicant also notes that nothing in the residency requirement stipulates that the Chief's family must move with him, and so he could have moved on his own and occupied one of the small units available on a temporary basis. The Applicant therefore contends that adequate housing was available, and that the Chief therefore forfeited his position as of January 7, 2014 at the latest.

[43] As all parties have mentioned, the CRDN faces a severe housing shortage on reserve, with approximately 200 families awaiting allocation of a house on reserve. In this difficult context, the Chief and Council chose to allocate funds and a number of homes that became available to families that faced severe difficulties in their current homes (mold, flooding). In these circumstances, I do not think it is fair to expect, nor does the Applicant seriously contend, that the three modular homes allocated to the families of Doyle Fontaine, Dustin Janvier and Trevor Herman, or the house on Lakeshore Drive allocated to Carmen Lemaigre and Derek Sylvestre, should have been allocated instead to the Chief. Moreover, the evidence is that these modular homes were not adequate in size to house the Chief's family of seven.

[44] Although the Nursing Unit and the Teacherage appear to have been temporarily vacant during the six month period, it was reasonable to conclude that these units were not adequate or available in the circumstances. The evidence is that these units were clearly too small to house a family of seven, and are reserved for nursing and teaching staff respectively. Although I agree with the Applicant that the *Election Act* does not require that the entire family follow the Chief on reserve, and that the Chief could have sought temporary housing on his own, it is a reasonable interpretation of that *Act* to consider a home inadequate if it cannot house the Chief's family. I

fail to see how requiring the Chief to live separately from his wife and family for several months, when he does not otherwise live far from the reserve and is easily accessible to community members that wish to speak with him, is necessary to achieve the purposes of the *Election Act*. Furthermore, the evidence demonstrates that the Teacherage is in need of repairs, and that these units have only ever been occupied by non-nursing or teaching staff in emergency situations.

[45] The evidence is slightly less compelling regarding Karen Fontaine and Thomas Montgrand's units following their eviction. If the units were considered to be abandoned, it is unclear why Mr. Montgrand's unit would be considered unavailable because he failed to vacate it. However, it seems that he continued to occupy that unit well into January 2014, and so the Chief could not have moved his family there in the circumstances. Regarding Karen Fontaine's house, it was allocated to Ellen Haineault, who was living in cramped conditions with a large family in her two-bedroom house. As discussed above, it was reasonable to consider Ellen Haineault's small house inadequate for the Chief. Overall, it seems to me that the Chief and Council should be given some latitude in assessing the priorities for allocation of housing units, and it was reasonable to consider the units inadequate or unavailable in the circumstances.

[46] The Applicant has emphasized the fact that the Chief never explicitly asked the Council or band management whether temporary housing could be made available to him so that he could comply with the residency requirement. In the Applicant's view, the Chief demonstrated a lack of intention to comply with the requirement and therefore forfeits his position. I find, however, that it was not necessary for the Chief to explicitly enquire about temporary housing as he had been allocated a lot for construction.

[47] The evidence of the Chief is that he made every effort to construct his new home by the six month deadline but encountered numerous unforeseen delays (in getting the equipment to clear the area of trees and brush, in having power hooked up on the lot, and in financing the construction). Both the Chief and Walter Hainault, the Band Manager, confirmed that home construction in the north is typically a long, drawn-out process due to remoteness, lack of labour, weather, etc.

[48] Moreover, the primary consideration is not what the Chief did or did not do or intended to do, but whether or not there was adequate housing available. The *Election Act* does not contain a definition of "adequate" housing, and a determination of what constitutes "adequate" housing is by necessity a subjective matter to be decided on an individual basis. Such a determination is best left to the EAC. The EAC members are members of the community and live in the community. They have an intimate knowledge of the history, nature, conditions and spirit of the community at the CRDN. They know what is liveable and what is not, based on their experience gained from living in the community. Their assessment should not be lightly put aside.

[49] The Applicant argues that allocation of housing is within the Chief and Council's discretion and that funds could have been made available, if the Chief had so requested, to bring an additional modular home on reserve. The evidence is conflicting as to whether such funds would have been available. Overall, it was reasonable for the EAC to adopt Walter Hainault's testimony to the effect that such funds were not readily available, that they required a loan to cover the expenses related to the modular homes they did bring in for the families living in

homes with mold and/or flooding issues. In any event, it is not this Court's role to delve into the band's finances and second guess their decisions regarding the allocation of their painfully small housing budget. Furthermore, it would stretch the meaning of the *Election Act* residency requirement to say that housing is considered "available" because the band may have some funds that it could allocate to construct or purchase a house for the Chief.

[50] In summary, I find that a negative decision was a reasonable outcome in light of the record before the EAC.

[51] Having come to that conclusion, I see no need to rule on the alleged violation of section 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*] on the basis of on reserve/off reserve status. A determination of that issue is not necessary for the resolution of the matter before the Court, and judicial restraint is therefore the best course of action.

[52] Moreover, this constitutional argument was put to the EAC by the Chief but was not addressed either by the Applicant or, eventually, by the EAC. There is no evidence before this Court that would be of assistance in determining, should it find that a requirement for an elected chief to take up residence on the First Nation infringes *prima facie* subsection 15(1) of the *Charter*, whether such an infringement is a reasonable limit of that right pursuant to section 1 of the same *Charter*. A decision of such magnitude should only be made on the basis of a complete record and full submissions, and with the CRDN being afforded an opportunity to submit evidence in support of the *Election Act* and its impugned provision.

IV. Conclusion

[53] For all of the foregoing reasons, this application for judicial review and *mandamus* is dismissed, with costs payable to the Respondents.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review and *mandamus* is dismissed, with costs payable to the Respondents. The style of cause shall be amended so as to designate Chief Teddy Clark in his capacity as Chief of the Clearwater River Dene Nation and not in his personal capacity.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1372-14
STYLE OF CAUSE:	IVAN LEMAIGRE v CHIEF TEDDY CLARK, IN HIS CAPACITY AS CHIEF OF THE CLEARWATER RIVER DENE NATION, AND LORNA JANVIER, DOREEN MOISE, DELPHINE LEMAIGRE, MILES LEMAIGRE, RAIN PICHE, AND NORBERT MONTGRAND IN THEIR CAPACITY AS MEMBERS OF THE ELECTION ACT COMMITTEE OF THE CLEARWATER RIVER DENE NATION
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
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JUDGMENT AND REASONS:	DE MONTIGNY J.
DATED:	MAY 7, 2015

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