Federal Court  Cour fédérale

Date: 20120830

Docket: T-975-11

Citation: 2012 FC 1036

Ottawa, Ontario, August 30, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LOUIS TAYPOTAT

Applicant

and

SHELDON TAYPOTAT, MICHAEL BOB, JANICE MCKAY, IRIS TAYPOTAT AND VERA WASACASE AS CHIEF AND COUNCIL REPRESENTATIVES OF THE KAHKEWISTAHAW FIRST NATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review and an order of *quo warranto* brought by Louis Taypotat (the "Applicant") under sections 18(1) and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Applicant is concerned with events leading up to the election and the election for Chief and Council of Kahkewistahaw First Nation (the "First Nation") on May 13, 2011 (the "Election"). The Respondents consist of the Chief and Councillors of the First Nation since the Election.

[2] For the reasons that follow, I have come to the conclusion that this application for judicial review ought to be dismissed. The *Kahkewistahaw Election Act* (the *Election Act* or *Act*) was validly enacted, and the process whereby the Election was held was fair and in compliance with the *Election Act*.

1. Facts

[3] The Applicant has served as Chief of the First Nation for a total of 27 years during the periods of 1973-1989, 1992-1993 and 1997-2007. In the last election held on May 15, 2009, the Applicant lost the election for Chief to Sheldon Taypotat, his nephew and one of the Respondents, by four votes. This was the final election held at the First Nation under the election rules of the *Indian Act*, RSC 1985, c I-5 (the *Indian Act*).

[4] The Applicant attended a residential school until the age of 14, and was evaluated at a grade 10 level in a test of the General Educational Development (GED). He has been awarded an honourary diploma from the Saskatchewan Indian Institute of Technology.

[5] The Applicant began the process of transitioning from elections under the *Indian Act* to a custom election code when he was Chief of the First Nation. The transition was made according to the "Conversion to Community Election System Policy" (the "Policy") from the Department of Indian Affairs and Northern Development (the "Department"). The Applicant submits that the impetus was driven by a desire to decrease the number of elections and provide stability in the community by increasing the term of office from two to three years.

[6] The first draft of the proposed *Election Act* was prepared in 1998 and included a provision that required "formal education at a post-secondary level or equivalent education/experience" in order for a candidate to be eligible for election to Chief or Council. Later drafts of the *Election Act* removed the "experience" component. The relevant sections of the *Election Act* are as follows:

> Eligibility Requirements
>
> 9.03 A Candidate must:
>
> …
>
> (c) have attained a minimum education level of Grade 12 or an equivalent or higher level of education;
>
> …
>
> Candidate Declaration
>
> 10.01 In order to be accepted as a Candidate in an Election, a person shall declare their intention to run as a Candidate no later than 4:00 p.m., local time, on the tenth (10^{th}) day prior to the Nomination Meeting by providing to the Electoral officer all of the following Declaration Documents:
>
> …
>
> (d) a copy of a certificate evidencing that the person has attained a minimum education level of Grade 12 or an equivalent or higher level of education;
>
> …
>
> Declaration Document Review
>
> 10.04 The Electoral Officer shall, prior to the Nomination Meeting, review each of the Candidate's Declaration Documents to ensure that the person is qualified to run as a Candidate in the Election. If the person is qualified to run as a Candidate in the Election, the Electoral Officer shall certify this fact on the Candidate's Declaration of Candidate's Intent Form. The Electoral Officer shall advise each person that does not meet the requirements to be a Candidate in an Election. The Decision of the Electoral Officer that a person is not

> qualified to run in an Election shall be final and binding and not subject to appeal.

[7] The Membership Committee, established pursuant to the *Kahkewistahaw First Nation Membership Code*, was given the task of developing a draft *Election Act* and advancing the referendum process to determine the desire of the members of the First Nation in regard to the proposed *Election Act*. The Respondents submit that the Membership Committee, charged with developing the *Election Act*, met at least 25 times, prepared at least 17 drafts and consulted with the band council and First Nation members throughout. The Applicant submits that the *Election Act* was discussed at multiple meetings of the Elders of Kahkewistahaw, was rejected by that group in 2007 and has never been accepted since that time. The Respondents dispute that claim, and submit that in any event there was no requirement that the Elders accept the *Election Act* in order for it to be validly enacted.

[8] The Applicant argues that the *Election Act* did not incorporate the role of Elders in determining an eligible candidate, as had previously been the custom of the band for elections held under the *Indian Act* provisions.

[9] Between March 5 and March 18, 2008, the proposed *Election Act* was distributed to the membership of the First Nation, and on July 21, 2008, the band council approved the Notice of Ratification Vote for that Act. On September 6, 2008, the first ratification vote was held but was unsuccessful because of low voter turnout. Out of 984 eligible voters, only 164 ballots were cast, with 120 approving the *Election Act*, and 44 rejecting it.

[10] On March 26, 2009, a second ratification vote was held for the members of the First Nation (the "Second Vote"). Of the 1007 eligible voters, 231 ballots were cast, 190 of which were in favour of adopting the *Election Act*, with 41 opposed and 1 ballot rejected. On May 15, 2009, the Applicant lost the election for Chief.

[11] The Policy allows the adoption of a custom election code by a majority of the electors of the First Nation or if "the community approves them in such other manner as the First Nation and the department may agree upon" (Applicant's Record, vol. II, p. 453). The new Chief sought approval from the Department to have a continuation vote on adopting the *Election Act*, and received approval to do so. On January 22, 2010, a continuation vote (the "Continuation Vote") was held where voters who were eligible to vote in the Second Vote but did not do so could cast ballots. Of the 776 eligible voters, 252 voted in favour of adopting the Act, with 31 voting against and 7 votes were rejected, spoiled or done improperly. When these results are added to the Second Vote, the total number of eligible voters was 1007, of which 483 voted, 409 in favour of adopting the *Act* and 72 opposing it. This participation rate was 22 votes shy of a majority of eligible voters.

[12] The *Election Act* was submitted to the Department on February 26, 2010 and on February 18, 2011, the First Nation was removed from the election provisions of the *Indian Act* in favour of the custom *Election Act*.

[13] The next election was set for May 13, 2011. On February 23, 2011, Corina Rider (the "Elections Officer") was hired by the First Nation to act as the returning officer for the election. On April 2, 2011, the Elections Officer received a list of potential candidates for the election, which

included the Applicant, and reviewed the documents to ensure they were in compliance with section 10.04 of the *Election Act*.

[14] There is no definition of the term "equivalent" found in section 9.03 of the *Election Act*. The Elections Officer discussed Louis Taypotat's honourary diploma with the President of the Saskatchewan Indian Institute of Technology and made note that the honourary diploma was awarded to recognize what Louis Taypotat had done for the community. She also received a written legal opinion on the issue on April 8, 2011.

[15] On April 12, 2011, the Elections Officer notified the Applicant that he was not certified as a qualified candidate because he did not comply with paragraph 10.01(d) of the *Election Act*. The Elections Officer did not provide the Applicant with an opportunity to be heard on his eligibility before the decision was made. The Elections Officer was notified by counsel for the Applicant that if he was found to be ineligible, he would pursue legal action.

[16] On April 13, 2011, a nomination meeting was conducted by the Elections Officer. At the meeting, the Applicant was nominated to run for Chief in the election, but the Elections Officer rejected the nomination based on his ineligibility. As Sheldon Taypotat was the only remaining candidate who possessed the qualifications under the *Election Act*, there was no election held for the position of Chief and he was elected by acclamation to that position.

[17] A petition was initiated which stated that the educational requirement in the *Election Act* did not reflect the custom of the band in relation to elections. The Applicant states that the petition

began prior to the elections, while the Respondents note that it is not dated. The petition was signed by 340 members of the First Nation, although not all who signed this petition were eligible voters at the time of the Second Vote or Continuation Vote.

[18] The Applicant filed this application for judicial review on June 10, 2011 seeking the following remedies: (1) a declaration that paragraphs 9.03(c) and 10.03(d) of the *Election Act* are invalid; (2) a declaration in the nature of *quo warranto* to the effect that the Respondents have no right to hold office; (3) a declaration that a new election be held in accordance with the custom of the First Nation without delay; and (4) costs.

2. Issues

[19] This application for judicial review raises four issues:

a) Did the Applicant exhaust alternative avenues before bringing this application?

b) Was there a broad consensus among the First Nation in favour of the *Election Act*?

c) Was the Applicant treated fairly?

d) Are the impugned provisions discriminatory and contrary to section 15 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 [*Charter*]?

3. Analysis

a) Did the Applicant exhaust alternative avenues before bringing this application?

[20] The Respondents argue that the Applicant did not exhaust the appeal procedures available to him before coming to the Federal Court. Sections 18 and 23 of the *Election Act* provide a mechanism to appeal an election on the basis that there was a violation of that Act, and paragraph 25.01(c) allows amendment of the Act by a petition signed by 100 electors. The Respondents argue that if this review is heard, the Court will step beyond its supervisory jurisdiction over the system.

[21] It is well established that courts will not exercise their discretion on actions or applications where the aggrieved party has an adequate alternative remedy, and has either failed to utilize such a remedy, or failed to exhaust the same. The leading case on the notion of what constitutes an "adequate alternative remedy" is the decision of the Supreme Court in *Harelkin v University of Regina*, [1979] 2 SCR 561. In an often quoted passage, the Supreme Court stated the test to be as follows (at p 588):

> In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.

[22] In the case at bar, sections 18 and 23 of the *Election Act* clearly do not provide an adequate alternative remedy. The grounds for appeal are set out at section 18.02 of the *Election Act*:

> 18.02 Grounds for an Appeal are restricted to the following:
>
> (a) the person declared elected was not qualified to be a Candidate;
>
> (b) there was a violation of this Act in the procedures that where followed that may have affected the results of the Election; or

(c) there was Corrupt Practice in relation to the Election.

[23] The Applicant is challenging the process that led to the adoption of the *Election Act* and, therefore, its validity, as well as the interpretation of that Act (and in particular paragraph 9.03(c)) by the Elections Officer. These arguments far outreach the grounds for appeal found in section 18.02 of the *Act*, as the Applicant is not claiming that the Act was violated. Accordingly, the appeal procedure provided for in the *Election Act* would be of no avail to the Applicant, and cannot be considered an adequate alternative remedy.

b) Was there a broad consensus among the First Nation in favour of the *Election Act*?

[24] There is no dispute between the parties as to the applicable legal principles, to determine whether the *Election Act* was validly adopted. Indeed, counsel for both the Applicant and the Respondents rely on the same jurisprudence in this respect. I shall therefore only briefly summarize these principles.

[25] The *Indian Act* itself does not set out guidelines as to how a band custom is to be identified. The jurisprudence has filled in the gap, and it is now well established that, in order to establish the custom of the band in relation to elections for Chief and Council, it is necessary to show that the alleged custom is supported by a "broad consensus" of the members of the First Nation. This principle was established in *Bigstone v Big Eagle,* [1992] FCJ no 16, 52 FTR 109 (CA), where Justice Strayer stated (at p. 8):

> 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. … 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?

[26] This case has been consistently followed by the Court. After having carefully reviewed the case law on this topic, Justice Martineau expanded on the test in the following words:

> For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule must be firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a "broad consensus" as to its applicability. This would exclude sporadic behaviours which may tentatively arise to remedy certain exceptional difficulties of implementation at a particular moment in time as well as other practices which are clearly understood within the community as being followed on a trial basis. If present, such a "broad consensus" will evidence the will of the community at a given time not to consider the adopted electoral code as having an exhaustive and exclusive character. Its effect will be to exclude from the equation an insignificant number of band members who persistently objected to the adoption of a particular rule governing band elections as a customary one.
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> *Mohawk of Kanesatake v Mohawk of Kanesatake (Council)*, 2003 FCT 115, [2003] 4 FC 1133, at para 36.

[27] What constitutes a broad consensus has been described by the courts in various ways. A broad consensus may in appropriate circumstances be discerned from the cumulative effect of a number of events, or it may result from one event such as the adoption of a particular code: *Nekaneet First Nation v Oakes*, 2009 FC 134, [2009] FCJ no 183, at para 39; *McLeod Lake Indian Band v Chingee*, [1998] FCJ no 1185, 153 FTR 257 (FCTD). It is also recognized that the content of the custom of a band may vary from time to time, and from one band to another, according to the will of the band members: see *McLeod Lake Indian Band v Chingee*, [1998] FCJ no 1185, 153 FTR 257 (FCTD) at para 19; *Six Nations Traditional Hereditary Chiefs v Canada (Minister of Indian*

and Northern Affairs), [1991] FCJ no 141, 43 FTR 132 (FCTD); *Mohawk of Kanesatake, supra*, at para 25.

[28] The existence of a band custom must be established by those who assert it. In other words, the onus of proof that the *Election Act* represents the custom of the band in that it is supported by a broad consensus of the membership, rests on the Respondents: *McArthur v Saskatchewan (Registrar, Department of Indian Affairs and Northern Development)*, [1992] SJ no 189, 91 DLR (4th) 666 (Sask QB); *Mohawk of Kanesatake*, *supra*, at para 21.

[29] A number of cases indicate that a majority of First Nation members need not vote in favour of adopting a band custom election code, and that there is no legal requirement that the majority consensus be ascertained in any particular way. Conversely, the fact that a change was supported by a simple majority vote of electors is not necessarily sufficient to change an established custom. As Justice Reed stated in *McLeod Lake Indian Band, supra*, at para 18:

> The question that remains is whether "broad general consensus" equates to a "majority decision of the Band members attending a general meeting of the Band convened with notice". In my view, it may do so, or it may not, depending upon a number of factors. If for example, the general meeting was held in a location or at a time when it was difficult for a number of members to attend, and there was no provision for proxy voting, it may not meet the broad consensus test. If the notice was not adequate in not providing sufficient detail of what was proposed, or was not given sufficiently in advance of the meeting to allow people a realistic opportunity to attend then it would not be.

[30] In a nutshell, the existence of a band custom and whether or not it has been changed with the substantial agreement of the band members will always depend on the circumstances. A few examples taken from the case law will suffice to illustrate that proposition.

[31] In *Lac des Mille Lacs First Nation v Champan*, [1998] FCJ no 752, 149 FTR 227, the Court held that an election code adopted as a result of a vote in which 86 of 300 eligible voters voted, and only 73 voted in favour, constituted a broad consensus. In the unique circumstances of that First Nation, the location of only about 130 voters was known and typically only 45 voters participated in the electoral process. Against this history of general non-participation, the fact that 86 voters voted was actually significant.

[32] In *Awashish v Opitciwan Atikamekw Band Council*, 2007 FC 765, [2007] FCJ no 1021, a new election code was adopted at a public meeting of band members after extensive consultations. The new code was used shortly thereafter in the band's elections without dispute. It was only after the elections were over that some members of the band made complaints, which ultimately led to the suspension of the code and a new election using the previous custom election procedures. The respondents contended that the new election code was never valid because it did not reflect a broad consensus of the band, having not been supported by a majority vote of the electors at a referendum. The Court held that it was not necessary for the Council to proceed by referendum in order to ensure that it had the support of a majority of the public before adopting the Electoral Code (although it may have been preferable), since the Code was adopted at a public assembly after extensive consultation, and the community had acquiesced to its use in the 2005 elections.

[33] Finally, the decision of this Court (affirmed by the Court of Appeal at [2010] FCA 169) in *Nekaneet First Nation*, *supra*, is also instructive. The election of the Applicants as the band council of Nekaneet was based on a band custom passed at the Referendum Vote of the eligible voters of Nekaneet. The Referendum Vote approving the *Nekaneet Constitution* and the *Nekaneet Governance Act* which together formed the Referendum Band Custom, was intended to replace any previous band customs of Nekaneet, and it could only be amended or repealed by a subsequent referendum held in accordance with the Nekaneet Constitution. The election of the respondents as the band council of Nekaneet on the same voting day was based on the Second Band Custom passed by a show of hands at a Nekaneet band meeting called for such purpose.

[34] That band had approximately 418 members, of which 267 were eligible voters at the material time. Of the 267 Nekaneet eligible voters, 136 ballots were cast under the Referendum Vote. Of the 136 ballots cast, 113 voted in favour of the *Nekaneet Constitution* and 21 against, and 114 also voted in favour of the *Nekaneet Governance Act*, and 21 voted against.

[35] Recognizing that there was no requirement that a ratification process of a band custom election system occur or be initiated in any specific way, the Court noted that slightly more than 50% of the band members participated in the ratification vote and that 83% of the eligible voters who participated, voted in favour of the band custom election system. Given that the respondents and their supporters refused to participate in the referendum process, the Court was of the view that the turnout was remarkably high and that the result shows a clear endorsement of the new regime as a custom of the Nekaneet First Nation (at para 61).

[36] It is against the backdrop of these legal principles that I must now determine whether the Respondents have met all of the criteria to establish a broad consensus of the members of the First Nation in favour of the *Election Act*.

[37] The Applicant submitted that, given that it was necessary to resort to holding a two-part vote over a protracted period of time in the face of an initial failure, broad consensus on adopting the *Election Act* was not demonstrated. The Applicant further argued that many members of the First Nation boycotted the voting as a result of the fact that those who were proposing the *Election Act*, were not respecting the complaints made about the educational requirement. This non-participation, it is contended, was a sign of disagreement as the opposition was not passive.

[38] Having carefully reviewed the evidence on the record, I cannot accede to those arguments. The affidavits and exhibits filed by the Respondents indicate that an extensive process was undertaken to prepare the *Election Act*, consult with First Nation members, explain the *Election Act*, seek input from First Nation members and implement their wishes regarding the education provisions of the *Election Act*. The First Nation was involved in the process of developing and ratifying the *Election Act* on an ongoing basis for 13 years, with much of it under the leadership of Louis Taypotat. An extensive information and ratification process was undertaken, and there was plenty of opportunity for First Nation members to ask questions, receive answers, and understand the *Election Act*. This process was conducted publicly and openly, and the ratification votes were conducted by secret ballot.

[39] The First Nation held referendum votes, even though they are not technically required. In the Second and Continuation Vote, 48% of the eligible voters participated, and the *Election Act* was adopted by a high majority of those who voted (84%). Slightly less than a majority of First Nation members voted, and only 72 First Nation members voted against the *Election Act* in the Second and Continuation Vote. With such a high percentage of voters in favour of the *Election Act*, even an additional 22 votes (the missing number for a participation rate of 50% + 1) against the *Election Act* would not have affected the outcome of the Second Vote and Continuation Vote. Moreover, the Department itself recognized the need to be flexible in accommodating the concept of "broad consensus", since the Department's Policy stipulates that an election code will be considered approved by the community if a majority of electors vote by secret ballot to approve it, or if "the community approves them in such other manner as the First Nation and the department may agree upon". In the present case, an official of the Department encouraged the First Nation to request the Minister to issue an order removing the First Nation from the *Indian Act* election provisions based on the combined results of the Second and Continuation Vote. These factors weigh heavily in favour of finding that there was a broad consensus among members of the First Nation to the *Election Act* and its education provisions.

[40] The Applicant takes issue with the fact that the First Nation chose to conduct the Second Vote in two parts at the suggestion of the Department, being the Second Vote and Continuation Vote. However, the courts have recognized that on some occasions, particularly where a First Nation seeks to establish a contemporary "custom" after a period of years, innovative steps may be required to determine whether or not a broad consensus exists. The integrity of the referendum process was maintained, as the First Nation ensured that only those members who were entitled to

vote in the Second Vote, but did not so vote, were allowed to vote in the Continuation Vote. This is clearly not a basis upon which to declare the *Election Act* invalid.

[41] As for the suggestion that the low turnout rate was evidence of dissent rather than acquiescence, the Applicant has not provided any evidence to that effect. It would appear, instead, that the participation levels of the Second and Continuation Vote simply show the apathy of the voters. This is borne out by the historical rates of voter participation, which indicate that the turnout for the votes on the *Election Act* were actually above normal. In 2001, 2007 and 2009, respectively 44%, 40% and 43% of the eligible voters of the First Nation voted in the election for the position of Chief. While the total number of eligible voters in 1999, 2003 and 2005 are not available, the number of First Nation members who did vote for the position of Chief in those years indicate a relatively stable level of member participation in First Nation elections, as is the case for many municipal elections throughout the country.

[42] The Applicant also submitted that a number of violations to the Community Ratification Voting Guidelines (Applicant's Record, vol. I, p. 171) occurred, particularly with respect to the January 22, 2010 Continuation Vote. These irregularities are minor in nature and have not been shown to have affected the results of either the Second or Continuation Vote. As the Court indicated in *Nekaneet First Nation, supra*, it is not always necessary to strictly construe the provisions of an election code, and a vote will generally not be determined invalid as a result of irregularities, unless such irregularities would have materially affected the results of the vote. There is no evidence before me that the alleged violations reach that threshold.

[43] Finally, the Applicant suggests that the petition signed by 340 First Nation members discloses a lack of consensus for the educational requirements of the *Election Act*. As was the case in *Nekaneet*, *supra*, the Applicant has provided no evidence that would allow this Court to gauge the significance or legitimacy of the petition as an indicator of a consensus. Moreover, there seems to be only 72 members who can credibly be considered to have opposed the *Election Act* in the petition. According to the affidavit sworn by Vera Wasacase, Councillor for the First Nation and Chairperson for the Membership Committee, it would appear that of the 340 persons who signed the petition, 12 of them were under the age of 18 years as of May 13, 2011 (the date of the Election), 28 others were either under the age of 18 years at the time of the Second Vote and the Continuation Vote or were not members of the First Nation, and 105 of them did not even bother to vote in either the Second Vote or the Continuation Vote. This leaves 195 First Nation members on the petition who did vote in the Second Vote or the Continuation Vote and who were of the age of 18 at the time of the Second Vote, the Continuation Vote and the Election. Since 72 First Nation members in total voted "no" in the Second Vote and Continuation Vote, this means that 123 First Nation members must have voted 'yes' in the Second Vote or in the Continuation Vote, and later signed the petition. In these circumstances, it is difficult to give much weight to the petition.

[44] In light of the foregoing, I am of the view that the *Election Act* was adopted by a broad consensus of the members of the First Nation.

c) Was the Applicant treated fairly?

[45] The Applicant challenges the decision of the Elections Officer to disqualify him on the basis of paragraph 9.03(c), on the ground that she did not examine the basis upon which the honourary

certificates are granted and gave insufficient consideration to the fact that they were meant to recognize accomplishment. As the certificate was granted to the Applicant by an educational authority to worthy individuals who incorporate qualities they wish to foster in their students, counsel argued that it is the equivalent of formal education. Moreover, the Applicant argued that it was unfair not to be given any opportunity to be heard by the Elections Officer in relation to the eligibility issue.

[46] The appropriate standard of review on the substantive issue raised by the Applicant is that of reasonableness. The Elections Officer derived her authority from the *Election Act*, and was interpreting her "home statute" when deciding whether the honourary certificate is equivalent to an education level of Grade 12. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, the majority stated that the appropriate standard of review will be correctness only where the nature of the question of statutory interpretation is "not only…of central importance to the legal system but also outside the adjudicator's specialized area of expertise" (at para 46). The majority summarized recent case law at paragraph 30 and noted that the appropriate standard will ordinarily be reasonableness where the decision-makers are interpreting their home statute. The inclusion of a strong privative clause in the *Election Act* is an additional strong indicator that deference is owed to the decision-maker.

[47] As for the alleged breach of procedural fairness raised by Mr. Taypotat, it is trite law that the applicable standard of review is that of correctness: (*Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour),* 2003 SCC 29, [2003] 1 SCR 539 at paras 100-104; *Sketchley v*

Canada (Attorney General), 2005 FCA 404, [2005] 3 FCR 392 at para 111). If there is such a breach, this Court will therefore intervene.

[48] I agree with the Respondents that the plain meaning of the education provisions in the *Election Act*, and in particular the use of the word "equivalency", indicate that the intention of the provisions is to ensure that a candidate has either a Grade 12 education, a level of education that is of the same level as a Grade 12 education, or a level of education that is higher than a Grade 12 education. Mr. Taypotat clearly does not have a diploma showing that he has a Grade 12 education, although he managed to obtain a Grade 10 level in a GED test. As for the honourary diploma that he presented to the Elections Officer, it appears that it was based on Mr. Taypotat's commitment to his community and the experience that he had in business and government services for his community. While this is most certainly commendable, it is clearly not the equivalent of formal education. That such a diploma is not in keeping with the spirit of the *Election Act* is further evidenced by the legislative history of that Act. As previously mentioned, the First Nation initially included "experience" as an alternative to formal educational requirements, but subsequently removed "experience" as an eligibility criteria for the position of Chief of the First Nation. This change suggests that "experience" alone, or any recognition thereof, does not meet the requirements of the education provisions.

[49] While the Court acknowledges Mr. Taypotat's predicament and understands that obtaining a Grade 12 education was obviously more difficult for someone who attended residential school, this does not make the Elections Officer's decision unreasonable. She could most certainly come to the decision that Mr. Taypotat did not qualify as a candidate, based on her own interpretation of

paragraphs 9.03(c) and 10.01(d) of the *Election Act* and on the legal opinion that was provided to her.

[50] As for the Applicant's argument that the Elections Officer had a duty to provide him with an opportunity to be heard with respect to his eligibility to stand for election, it is confusingly intertwined with his standard of review analysis and is far from compelling. His submission appears to be, essentially, that he was owed the opportunity to make representations because of the dramatic consequences of the decision made by the Elections Officer.

[51] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court determined that an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved. The Court added that the duty of fairness is flexible and variable and will depend on the context of the particular statute and the rights affected. The importance of the decision to the individual affected is no doubt a factor to be considered. However, the other factors identified by the Court do not favour the Applicant. First, the process provided for and the nature of the decision-making body (i.e. the Elections Officer) does not resemble judicial decision-making. Second, there is no appeal procedure although judicial review is always available. Third, the Applicant could not have a legitimate expectation that he would be entitled to a hearing. Fourth, the *Election Act* does not prescribe any specific procedure and leaves it to the Elections Officer, who has expertise in that matter. In light of these factors, I fail to see how the duty to act fairly could be interpreted as requiring an oral hearing, before the Elections Officer can determine the eligibility of a candidate.

[52] Moreover, the Applicant was not prevented from making his case and had two opportunities to submit all documentation relevant to the eligibility criteria to the Elections Officer. He could have provided such information with the rest of the Declaration Documents that he filed in accordance with section 10.01 of the *Election Act*, or he could have made additional submissions with respect to the issue in the April 12, 2011 letter from his lawyer. The Applicant or his lawyer must have known that section 10.04 of the *Election Act* provided no appeal process from a decision of the Elections Officer. Accordingly, the Applicant should have provided the Elections Officer with all relevant information at the appropriate time when he had the opportunity to do so.

[53] In light of the foregoing, I am of the view that the Elections Officer did not err when she ruled that the Applicant was ineligible and could not run for the position of Chief. I also find that there has been no breach of the duty of fairness in coming to that decision.

d) Are the impugned provisions discriminatory and contrary to section 15 of the *Charter*?

[54] Counsel for the Applicant alleges that paragraphs 9.03(c) and 10.01(d) of the *Election Act* are discriminatory and contrary to section 15 of the *Charter* because they impose a differential treatment based on one or more enumerated analogous grounds. While the grounds on which an electoral officer may refuse to certify a candidate for election are not explicitly based on enumerated grounds, it is alleged that educational attainment is analogous to race and age. Indeed, requiring a Grade 12 education would perpetuate a disadvantage and stereotype, because education in aboriginal communities is less formalistic and would disproportionately affect older band members and residential school survivors.

[55] It is trite law that not every distinction or differentiation in treatment will infringe the equality guarantee of section 15 of the *Charter*. As the Supreme Court stated in *Law Society British Columbia v Andrews*, [1989] 1 SCR 143, it is only those distinctions that are discriminatory in their intent or their effect that will run afoul of that constitutional guarantee. This was expressed most clearly by Justice McIntyre in the following excerpt (at para 37):

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limit access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[56] The various grounds of discrimination expressly listed in subsection 15(1) reflect the most common and most obvious bases of discrimination. However, these are not the only grounds upon which discrimination may be found. In her majority reasons elaborating on this issue, Justice Wilson explained (at p 152) that a ground may qualify as analogous to those listed in subsection 15(1) if persons characterized by the trait in question are, among other things, "lacking in political power", "vulnerable to having their interests overlooked and their rights to equal concern and respect violated", and "vulnerable to becoming a disadvantaged group" on the basis of that trait.

[57] In *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, [1999] SCJ no 12, the Supreme Court added that four contextual factors can be looked at to determine whether legislation is discriminatory. One of those factors, probably the most compelling according

to the Court, is pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group. As the Court stated (at para 64):

> One consideration which the Court has frequently referred to with respect to the issue of pre-existing disadvantage is the role of stereotypes. A stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess. In my view, probably the most prevalent reason that a given legislative provision may be found to infringe s. 15(1) is that it reflects and reinforces existing inaccurate understandings of the merits, capabilities and worth of a particular person or group within Canadian society, resulting in further stigmatization of that person or the members of the group or otherwise in their unfair treatment. This view accords with the emphasis placed by this Court ever since Andrews, supra, upon the role of s. 15(1) in overcoming prejudicial stereotypes in society.

[58] With these considerations in mind, can it be said that the level of education is analogous to one of the enumerated grounds in subsection 15(1)? The Applicant has submitted no evidence to that effect. On the face of it, educational level is not beyond an individual's control. In fact, Justice Wilson all but eliminated level of education as an analogous ground when she stated in *Andrews*, *supra*, at para 49:

> A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights.

[59] Accordingly, given that the education provisions clearly distinguish between First Nation members on the basis of merit and capacities, they are unlikely to be indicators of discrimination, since they deal with personal attributes rather than characteristics based on association with a group. Educational upgrading opportunities are available, enabling the Applicant to change the characteristic which causes him to be ineligible to run for the position of Chief. The Applicant has

received a GED equivalent to a grade 10 education, and no submissions were made as to why he could not further upgrade his education. While it is obviously more difficult as one grows older to obtain a higher educational level, it does not rise to the level of the immutable characteristics such as those listed in subsection 15(1) of the *Charter*.

[60] Once again, there is no mention of race or age related criteria in paragraphs 9.03(c) and 10.01(d), and those sections do not discriminate, either directly or indirectly, on the basis of these characteristics. In the absence of any evidence to the contrary, it cannot be said that the educational level requirement is a proxy for these characteristics or that it perpetuates a stereotype or a disadvantage of a particular group of persons.

[61] As a result, there is no need to consider whether the impugned provisions of the *Election Act* are justified under section 1 of the *Charter*. The education provisions of the *Election Act* do not discriminate on the basis of race or age, and the level of education is not an analogous ground to either race or age. There is, therefore, no infringement of subsection 15(1) of the *Charter*.

4. Conclusion

[62] For all of the foregoing reasons, this application for judicial review must be dismissed, with costs payable to the Respondents.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with costs payable to the Respondents.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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