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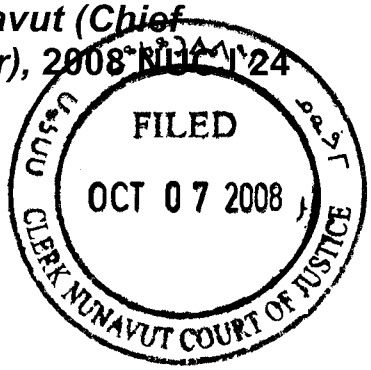
NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation: ***Anawak v. Nunavut (Chief Electoral Officer), 2008 NUCJ 24***



Date of Judgment (YMD): 20081007
File Number: 08-08-597CVC
Registry: Iqaluit

Appellant: **Jack Anawak**

-and-

Respondent: **Nunavut (Chief Electoral Officer)**

Before: The Honourable Mr. Justice E. Johnson

Counsel (Appellant): Steven L. Cooper
Counsel (Respondent): Patrick Orr

Location Heard: Iqaluit, Nunavut
Date Heard: October 3, 2008
Matters: *Nunavut Elections Act,* S. Nu. 2002, c. 17, ss. 1, 2, 4, 7, 11(1) and 75.1.

REASONS FOR JUDGEMENT

(NOTE: This document may have been edited for publication)

I. INTRODUCTION

[1] The appellant wishes to be a candidate in the constituency of Akulliq in the general election taking place in Nunavut on October 27, 2008. The respondent rejected his application to be a candidate because he was not a resident in Nunavut for 12 consecutive months prior to the date of the election. He appeals to this Court under a right of appeal granted by s. 75.1(5) of the *Nunavut Elections Act,* S. Nu. 2002, c. 17 (the "*Act*").

II. ISSUES

[2] There are four issues in this appeal. The first issue is the evidence that I should consider. The second issue is whether the appellant was late in filing his appeal. The third issue is the standard of review of the decision of the respondent. The final issue is whether I should allow the appeal or dismiss it.

[3] There is also a possible *Charter* argument depending on the ruling in this judgement. The Court has set October 14 for that argument if it is necessary.

A. Record of evidence

[4] The respondent argues the Court should not consider the supplementary affidavit filed by the appellant. Her counsel submits the application was an appeal and argues I should only consider the information that was before her when she delivered her decision. That information is her written decision and the documentation the appellant provided when the respondent questioned his residency. The appellant attached the decision of the respondent as an exhibit to his first affidavit. The respondent attached the documentation referred to in the decision as an exhibit to her reply affidavit.

[5] The appellant argues there was an incomplete record because the respondent failed to provide his Declaration of Candidacy. His counsel argues that I should consider all the evidence filed.

[6] There was some information provided by both counsel during argument to explain the absence of the Declaration of Candidacy that was inconclusive.

[7] I considered a similar issue in *Mahe (c.o.b. Kamotiq Inn Restaurant) v. Nunavut (Liquor Licensing Board),* 2006 NUCJ 23, [2006] Nu.J. No. 25. In that case the applicant filed an application for a judicial review as well as a statutory appeal because of doubt about the proper procedure. The respondent Board argued I should only consider the evidence that the Board considered. I dismissed the judicial review because the appellant had statutory appeal and the application proceeded as an appeal.

[8] I adopted the expansive view of McIntyre J. in *Daku v. Saskatchewan (Agriculture and Food Lands Appeal Board),* 1998 CanLII 13481, [1998] S.J. No. 139 (Q.B.), on the record I should consider in a statutory appeal. McIntyre J:

> "[39] The within appeal process is the statutory appeal on questions of law. As noted earlier, there is a broad right of appeal on questions of law and there is no issue of curial deference. The statute does not dictate what material should form the record to be placed before the court but rather it is left to the court's discretion. While the Board is not required by statute or common law to record its proceedings it has done so and a transcript could be provided
>
> ...
>
> [42] Where the court is hearing a statutory appeal as opposed to an application for judicial review, and absent statutory requirements, the Supreme Court of Canada in *Montreal (City)* [*Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, 1997 CanLII 386] has, in my view, adopted a practical approach to the question of what material ought to be before the court. The issue is to be determined by reference to what material is required in order to enable the court to properly dispose of the appeal."

[9] Section 75.1(5) of the *Act* simply provides the appeal is to proceed by originating notice within two days of the decision of the Chief Electoral Officer. The only direction given to the Court about the record is s. 75.1(7) which states:

> *"Subject to this Act, the Rules of the Nunavut Court of Justice and the practice and procedure of the court apply to the application with such modifications as the circumstances require."*

[10] I am satisfied that all the evidence filed is relevant and that I can consider it particularly given the dispute about the missing document. There is nothing in the *Act* specifying the content of the record and I once again apply the expansive view of the record I adopted in *Mahe*.

B. Late filing of appeal

[11] The appellant admits the originating notice was one day late and that he should have filed it on Monday, September 29, being the first day the court registry was open to file documents.

[12] The appellant relies on *Kerr v. Robert Mathew Investments Inc.*, 2008 ABCA 193, [2008] A.J. No. 551, to argue this Court has the discretion to extend the time for filing. In that case, Ritter J.A. discussed the requirements for an extension of time under r. 548 of the *Alberta Rules of Court* stating:

> "[2] The parties agree the test for leave is the four part test set out in *Cairns v. Cairns* (1931), 26 Alta. L.R. 69, [1931] 4 D.L.R. 819 at 826-27 (S.C.A.D.), which requires that the applicant demonstrate the following:
>
> - that there was a *bona fide* intention to appeal while the right to appeal existed, and that there was some special circumstance that would excuse or justify the failure to appeal;
> - an explanation for the delay and that the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the judgment, having regard to the position of both parties;
> - that the appellant has not taken the benefits of the judgment from which appeal is sought; and

- that the appeal would have a reasonable chance of success if allowed to proceed."

[13] Relying on the equivalent rule in the *Nunavut Rules of Court*, the appellant argues that he satisfied all parts of the test. His counsel submits that I ought exercise my discretion and extend the time for the filing of the appeal.

[14] Counsel for the respondent argues I cannot use the *Nunavut Rules of Court* to extend a statutory time limit imposed in the legislation. He argues I have to find the authority to extend the time in the *Act*. Since the *Act* is silent there is no authority to extend the time.

[15] Although the respondent's counsel did not cite any case law in support of his argument, I am well aware of the general rule. De Weerdt J. summarized the principle in *Tuktoyaktuk Enterprises Ltd. (Receivers of) v. Northwest Territories (Labour Standards Board),* [1987] N.W.T.R. 268, [1987] N.W.T.J. No. 87 (S.C.), at 269-270:

> "The 30-day period mentioned in s. 39.6(4) is of course not a "time appointed by these Rules". Is it then a time "appointed by ... any rules relating to time ... for ... taking any proceeding"? The provisions of s. 39.6(4) relate in part to time, but it is only in a very general sense that they can be described as "rules", since they clearly fall outside the scope of the Rules of Court or similar rules governing matters before the court or a judge of the court pursuant to s. 24 of the Judicature Act, R.O.N.W.T. 1974, c. J-1.
>
> The Regulations Act, R.O.N.W.T. 1974, c. R-4, defines the terms "regulation" [s. 1(f)] and "statutory instrument" [s. 1(h)] to include rules governing the practice and procedure in proceedings before the court. It seems plain that a "rule", in the sense of R. 508, is a form of subordinate legislation enacted pursuant to an Act of the Legislative Assembly. As such, it is something other and less than a provision in such an Act. In other words, nothing in R. 508 applies to the provisions of the Labour Standards Act so as to modify or alter them in any way. There is nothing in s. 24 of the Judicature Act that would give R. 508 the scope or effect to override s. 39.6(4) of the Labour Standards Act. On the contrary, s. 24(1) of the Judicature Act makes the Rules of Court "Subject to this and any other Act"."

[16] De Weerdt J. went on to state at 270 that this reasoning was consistent with the case law:

> "This analysis is consistent with the widely-recognized view that a court cannot extend times fixed by statute: *Fredericks v. R.* (1979), 11 C.P.C. 120 (Ct. Martial App. Ct.); *B.P. Exploration Can. Ltd. v. Hagerman* (1978), 6 Alta. L.R. (2d) 100 (Dist. Ct.); *Jordan v. Sask. Securities Comm.* (1968), 64 W.W.R. 121 (Sask. C.A.); *Re Milstein and Ont. College of Pharmacy* (1976), 13 O.R. (2d) 700, 72 D.L.R. (3d) 201 (Div. Ct.); *Re Chamandy and Nat. Trust Co.*, [1934] O.W.N. 151 (C.A.); *Shaunavon Butchers Ltd. v. Burness*, 24 Sask. L.R. 399, [1930] 1 W.W.R. 760, [1930] 3 D.L.R. 656 (C.A.); *Re MacDonald's Estate*, 23 Sask. L.R. 237, [1929] 1 W.W.R. 193 at 195, [1929] 2 D.L.R. 265 (sub nom. *MacDonald v. MacDonald*) (C.A.). And see *Stringer v. Nyman*, [1956] O.W.N. 182, 1 D.L.R. (2d) 474 (C.A.)."

[17] I find this analysis is persuasive since the wording of the r. 508 is almost identical with Nunavut r. 713, as set out below:

> *Nunavut Rules of Court*
>
> "*713. (1) The Court may enlarge or abridge the time appointed by these rules or fixed by an order for doing any act or taking any proceeding on such terms as the Court considers just, unless there is an express provision in the rule or order that this rule does not apply.*"
>
> *Supreme Court Rules of the Northwest Territories*, as repealed
>
> *"508.(1) Unless there is an express provision that this Rule does not apply, the court may enlarge or abridge the time appointed by these Rules or any rules relating to time or fixed by any order for doing any act or taking any proceeding upon such terms as may be just."*

[18] However, there is some appellate authority supporting the exercise of judicial discretion if there is some step needed to perfect the notice of appeal. If the court is able to characterize the step as procedural rather than substantive, it can exercise its discretion to extend the time. In *K.C. v. College of Physical Therapists of Alberta*, 1998 ABCA 213, [1998] A.J. No. 99, the appellant was a physical therapist who had disciplinary proceedings brought against him for various matters. The discipline committee found him guilty of professional misconduct

under the legislation regulating the profession. Section 64 of the *Physical Therapy Profession Act*, S.A. 1984, c. P-7.5, provided for an appeal to the Court of Appeal. It required the appellant to serve the notice of appeal within 30 days of the date when he served the decision on the appellant. Section 65 stated:

> "*65(2) The procedure in an appeal shall be the same, with the necessary changes, as that provided in the Rules of Court for appeals from a judgment of a judge of the Court of Queen's Bench to the Court of Appeal.*"

[19] The appellant filed his notice of appeal within the prescribed 30 days, but because of a mistake, his lawyer failed to serve it on time. He sought leave to extend the period of time set out in s. 64(2) and the committee denied his appeal. He appealed that decision to the Court of Appeal.

[20] The appellant argued that s. 64(1) conferred an absolute right of appeal. Section 64(2) then set out the procedural steps for the appeal, including time limits for service of documents. The appellant submitted the reference to the *Rules of Court*, authorizing the court to extend the time limits for filing and serving a notice of appeal in the usual manner.

[21] The respondent argued the right to appeal was conditional on the appellant meeting the time limits.

[22] Conrad J.A. applied the earlier Court of Appeal reasoning of *Re Wolski* (1983), 52 A.R. 390, [1983] A.J. No. 142, and held that where the provision was ambiguous, the court should interpret in favour of the provision being procedural. She adopted the following words of Kerans J.A. in *Re Wolski*:

> "[6] … It is at best one for the finding of ambiguity. But, if the meaning is not clear, the resolution of the question turns on the object of the legislation. I see nothing in the object of this legislation which would support the view that the period for appeal should be treated as of such importance that the court cannot, when justice requires, relieve against it."

[23] Section 75.1 of the *Act* states:

> *"Notice of suspected ineligibility*
> *75.1. (1) If the returning officer or the Chief Electoral Officer has reason to suspect that the candidacy of a person should be rejected on grounds other than those listed in subsection 75(1), he or she shall immediately notify the prospective candidate of the suspicion and the reasons for it in the approved form.*
>
> *Notice to Chief Electoral Officer*
> *(2) A returning officer must also send a copy of any notice he or she makes under subsection (1) to the Chief Electoral Officer at the same time.*
>
> *Time for submission*
> *(3) The prospective candidate must make any submissions to the Chief Electoral Officer immediately on being notified of the suspicion of being ineligible.*
>
> *Decision of Chief Electoral Officer*
> *(4) The Chief Electoral Officer shall, after considering any submissions on behalf of the prospective candidate and no later than 2 days after the close of nominations, make a decision on whether the person is ineligible and his or her candidacy is to be rejected.*
>
> *Appeal of Chief Electoral Officer's decision*
> *(5) Despite section 216, any party aggrieved by the decision of the Chief Electoral Officer under subsection (4) may, by originating notice within 2 days after being notified of the decision, appeal the decision to the court.*
>
> *Hearing of appeal*
> *(6) A judge shall hear any appeal from the Chief Electoral Officer's decision no later than 10 days after the day the court is seized with the appeal application and shall render a decision as soon as possible.*
>
> *Practice and procedure*
> *(7) Subject to this Act, the Rules of the Nunavut Court of Justice and the practice and procedure of the court apply to the application with such modifications as the circumstances require.*
>
> *Cancellation of election*
> *(8) If an appeal is made under subsection (5), the Chief Electoral Officer shall cancel the election in that constituency.*

New election
(9) After the judge hearing the appeal renders a decision,
(a) the Chief Electoral Officer shall fix a new election day and issue a writ for a new election; and
(b) the new election shall be conducted in the usual manner."

[24] Subsection (5) does not require any preliminary steps. The appellant must commence the litigation by filing the originating notice two days after the respondent serves the decision on him. The time limit is unusually short given the logistics of filing documents in a large territory with a very small resident bar.

[25] However, I understand a short time limit is necessary because of the short time frames between the issuing of the writs of election and the date of the election.

[26] I am satisfied the lack of rules on the appeal procedure is the reason for including subsection 7. It includes reference to the *Rules of the Nunavut Court of Justice* and the practice and procedure of the Court and finishes with the words "*as the circumstances require*". The intention of the legislature was to leave discretion to this Court to settle procedural issues under the rules of the Court and established case law, provided there was nothing to the contrary in the *Act*.

[27] The *Act* is silent and falls into the ambiguity discussed by Kerans J.A. in *Wolski*.

[28] I conclude that I have the discretion to extend the time and now consider the requirements of *Kerr*. The respondent admits the appellant has satisfied the first and third requirements described in *Kerr*. However, her counsel argues there was no explanation for the delay. He also says the actions of the appellant will cause prejudice to the respondent and other candidates because the respondent will have to cancel the election.

[29] I scheduled the hearing of the appeal quickly because of conflicting court duties next week, and the parties received 24-hours notice. Counsel for the respondent was late in raising the limitation argument depriving the appellant of the ability to

provide more evidence on the reasons for the delay. The explanation provided by the appellant's counsel in court satisfies me that both he and the appellant acted as quickly as possible under the circumstances. It was unfortunate the respondent chose to serve the appellant on a Friday, depriving him of the benefit of the weekend. His counsel was also traveling outside of Nunavut, and could not file the motion without the leave of the Court.

[30] Subsection 8 of the *Act* requires the respondent to cancel the election if the Court allows the appeal. She argues the cancellation will interfere with the electoral process and cause prejudice to the other candidates. The appellant argues that if the respondent acts quickly, she can schedule a by-election to coincide with the general election. In the meantime, the other candidates can continue campaigning.

[31] I am satisfied the prejudice will be minimal and that justice requires the Court to relieve against the missed time period.

C. Standard of review

[32] The appellant relies on *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46, and the four factors of the pragmatic and functional approach. He argues that I should give less deference to the decision of the respondent because there is no privative clause in the legislation and she has no specialized expertise. Counsel for the appellant argues that these factors, as well as the issues of fact and law I must consider, combined with the purpose of the *Act*, suggest the standard of review should be correctness.

[33] The respondent's counsel argues the respondent did have special expertise because she was the official who was responsible for designing the *Act*, and has been managing it for many years.

[34] The recent Supreme Court of Canada decision of *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190, has reduced the standards of review to either correctness or reasonableness.

[35] I am satisfied the standard of review is correctness.

D. Correctness of decision

(a) Facts

[36] The appellant relied on his affidavit evidence to argue the respondent erred in finding that he was not a resident of Nunavut since October 27, 2007.

[37] As noted in paragraph 14 of his first affidavit, the appellant considers himself to be a permanent resident of Nunavut even when he is working outside the territory. He has been in and out of the territory all his 58 years for education and work. This included two terms as a Member of Parliament between 1988 and 1997, when he was often out of the territory.

[38] After serving as the Interim Commissioner of Nunavut in 1997 and 1998, the appellant was elected to the Legislative Assembly of Nunavut and served in the Cabinet until 2003.

[39] In 2003, the Government of Canada appointed the appellant as the Ambassador for Circumpolar Affairs. His duties in that position from 2003 until 2006 required travel out of Nunavut and Canada. His employer required that he establish another residence in Ottawa. He often traveled to foreign countries to promote issues of importance to the Arctic.

[40] After his term as Ambassador ended in late 2006, the appellant decided to further his education. He applied for and received financial support from the Financial Assistance for Nunavut Students (FANS) program offered by the Adult Learning and Post Secondary Services Division of the Department of Education of the Government of Nunavut.

[41] To qualify for support, the appellant had to satisfy a residency requirement similar to the residency requirement under the *Nunavut Elections Act*.

[42] The appellant started his studies for a Business Administration Diploma course in Ottawa in January 2007, and he completed the course in January 2008.

[43] The appellant returned to Nunavut to run as a candidate in the Nunavut Tunngavik Inc. elections. He was in Nunavut from January to March 2007, and was eligible to vote in the election.

[44] The longest period of absence of the appellant from Nunavut in his life was two months.

[45] The appellant owns property in Ottawa through his corporation that is leased to the Government of Nunavut. He also owns real estate in Iqaluit, Rankin Inlet and Repulse Bay, and has several vehicles, a boat, furniture and personal effects in the territory.

[46] The appellant has operated a business in Nunavut since 1984.

[47] The appellant maintained a mailing address in Rankin Inlet when he was a Member of Parliament and Ambassador. He currently has a mailing address in Iqaluit.

[48] The Government of Canada required the appellant to change his health care from Nunavut to Ontario during his term as Ambassador.

[49] The appellant has a valid Nunavut driver's licence and had one in Ontario when working as Ambassador.

[50] The appellant's wife now lives in Iqaluit and works at the YMCA.

[51] The appellant has always maintained bank accounts in Nunavut and has a street named after him in the Apex area of Iqaluit.

(b) Arguments

(i) Appellant

[52] Counsel for the appellant submits that I should adopt the broader more flexible definition of residency found in cases such as *Yanchuk v. Krochak,* [1999] S.J. No. 380, 1999 CanLII 12713 (Q.B.) and *Fells v. Spence,* [1984] N.W.T.R. 123, [1984] N.W.T.J. No. 22 (S.C.). He argues there is no precise definition of the word "residence." It is flexible and should be interpreted in a manner that will give effect to the intention of the Legislative Assembly.

[53] Counsel for the appellant also argues I should apply s. 10 of the *Interpretation Act*, R.S.N.W.T. 1988, c. I-8, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28, and take a fair, large and liberal interpretation to the residency requirements of the *Nunavut Elections Act.*

[54] Some of the indicia of residence discussed in these cases are the following:

(a) the degree to which a person organizes their life in the place in question;
(b) tie or connection to the area;
(c) where one sleeps or eats or works;
(d) where one files their income tax.
(e) where the driver's licence was issued;
(f) the jurisdiction issuing health care cards; and
(g) the location of bank accounts.

[55] Counsel for the appellant argues that the appellant's evidence satisfies many of these indicia of residency and that I should use them to find he was a resident of Nunavut.

[56] Alternatively, counsel for the appellant argues that I should consider following the approach of courts when considering residency in tax law, in cases such as *Boucher v. R.,* [2002] T.C.J. No. 359, 2002 CanLII 889, and *Bérubé v. R.,* [2000] T.C.J. No. 415, 2000 CanLII 453. In these cases, dwelling place,

location of personal property, social ties, economic ties, medical coverage, driver's licence, vehicle registration, and mailing address were considered. The appellant's evidence satisfies many of these tests because he has always owned real estate in Nunavut, and has substantial personal property, bank accounts, vehicles, and a mailing address. If I applied these tests, the appellant would be considered a resident.

[57] Counsel for the appellant notes the comments of L'Heureux-Dubé J. at para. 38 of *Haig v. Canada (Chief Electoral Officer),* [1993] 2 S.C.R. 995, 105 D.L.R. (4th) 577, on the complexity of adjudicating cases about residency.

[58] Finally, counsel for the appellant argues the appellant's evidence satisfies the temporary absence parts of the *Act*, because he was away from Nunavut for work or education, and intended to return.

(ii) Respondent

[59] Counsel for the respondent argues that ss. 4 and 7 of the *Act* require the Court to determine the issue of residence on all the facts of the case and the provisions of s. 4. That section requires proof the appellant resided in Nunavut in the 12 months immediately preceding the election date. If the facts do not assist in making that determination, I should ignore them.

[60] The respondent's counsel reviewed the evidence submitted to the respondent by the appellant and argued her decision was correct. The evidence she reviewed was attached as exhibits to her reply affidavit. The first document was Exhibit 2 of the respondent's affidavit. This was the information from FANS, a document proving he received funding in 2007. He qualified for funding because he satisfied another government department that he was a resident for the previous year. However, that does not prove he had a residence in Nunavut from October 2007 to the present.

[61] The second document the respondent considered (Exhibit 3) was an email that indicated that the appellant was president of Kivalliq Consulting and had some real property in Repulse Bay that was leased to the Government of Nunavut. This document does not assist the appellant in satisfying the requirements of the *Act* because he was not living in the house.

[62] The third document was a letter from the Canada Revenue Agency dated August 19, 2008 dealing with unrelated tax issues, but which was addressed to the appellant at his Ottawa address. This proves the appellant was still receiving mail in Ottawa in August 2008, and that he was a resident of Ontario for tax purposes on December 31, 2007.

[63] The final evidence the respondent considered was information she received from the stepdaughter and stepson of the appellant on November 25, 2007 and May 30, 2008. The conversation with the stepdaughter revealed the appellant was still living in Ottawa in November 2007. The stepson said the appellant had moved back to Nunavut in February 2008.

[64] Counsel for the respondent argues the respondent correctly decided that this evidence was insufficient to prove the residency of the appellant as required by s. 7.

[65] As indicated in *Foothills No. 31 (Municipal District) v. Jones,* [1990] A.J. No. 487, 107 A.R. 213 (Q.B.), a candidate is required to maintain a residence in the area where the vote will be cast. The respondent's counsel submits the new evidence relied on by the appellant still does not prove that he had a residence in Nunavut from October 27, 2007 to the present time. To the contrary, paragraph 3 of the second affidavit tacitly admits that the appellant did not have a residence in Nunavut in 2007 and 2008 because he was traveling back for visits.

[66] Counsel for the respondent argues the new evidence submitted by the appellant still does not indicate where the appellant lives and there is no street address or house number provided. The appellant provided no evidence to answer the following questions:

(a) Where do he and his wife live now?
(b) What is his civic address now?
(c) When did he and his wife move to Nunavut?
(d) When did he move his furniture into that house?
(e) What community is he living in now?
(f) Did he not file a tax return as a resident of Ontario in December 2007?
(g) What was his telephone number before he moved back to Nunavut?
(h) Where did his wife work while he was in Ottawa?
(i) Where were his doctor and dentist during the relevant period?
(j) Did he and his wife receive their mail in Ottawa?

[67] Instead of answering these relevant questions about his residence after October 27, 2007, the appellant provided a lengthy and interesting social history of his life in Nunavut.

[68] Counsel for the respondent submits that the appellant was really arguing that he was domiciled in Nunavut. That concept was similar to the tests of habitual residence or ordinary residence found in cases such as *Fells*. However, it is not the test specified in the *Act*.

[69] Counsel for the respondent submits that the evidence of the respondent does not satisfy the ordinary residence test as interpreted in *Smith v. Levy* (1985), 69 N.S.R. (2d) 124, [1985] N.S.J. No. 243 (S.C. (T.D.)).

[70] Counsel for respondent argues the income tax tests are directed toward a different purpose, namely to allow the Crown to continue to tax people who sever their connection to Canada.

[71] Counsel for the respondent argues that s. 4(2) should be interpreted as being an absence of short duration. The four years when the appellant was acting as Ambassador does not meet the intent of the section. Similarly, an absence of four years is not a temporary absence under s. 4(3).

[72] Counsel for the respondent notes that s. 4(5) provides that if the voter leaves the place of residence with the intention of residing elsewhere, the voter loses residence. The actions of the appellant indicate he set up a new residence in Ottawa. He moved his wife and furniture into a house and lived there for four years. His intention to one day return to Nunavut does not displace his past intention to move and reside in Ottawa.

[73] In conclusion, the respondent argues that the appellant established a new residence in Ottawa. He failed to prove that he re-established a new residence in Nunavut 12 months prior to the election. The 12-month residency requirement was included by the Legislative Assembly to make it clear that simple residence alone is not enough. A voter and a candidate must actually live in Nunavut for 12 months prior to the election day. The appellant returned to Nunavut in 2008 and therefore did not satisfy the section.

(c) Analysis

[74] As set out in s. 11(1) of the *Act,* for a person to qualify as a candidate in an election he or she must be entitled to vote:

> *"11. (1) Every person has a right to be a candidate in an election if, on election day, the person is qualified to vote".*

[75] The requirements to vote are set out in s. 7 as follows:

> *"7. (1) Every person has a right to vote in an election if, on election day, the person is or would be*
> *(a) a citizen of Canada;*
> *(b) at least 18 years of age; and*
> *(c) a resident in Nunavut for a consecutive period of at least 12 months"*

[76] If challenged a candidate must satisfy the Chief Electoral Officer that he or she was a resident of Nunavut for a period of 12 consecutive months before the date of the election.

[77] The appellant provided some information to the Chief Electoral Officer and she made her decision. The appellant appealed to this Court. In considering an appeal like the one before me, I would usually consider only the evidence that was before the respondent. However, I have considered all the additional evidence out of fairness to the appellant. He had a short time limit to produce the evidence, and it would be unfair to restrict the evidence because of the unrealistically short time frame specified in the *Act*.

[78] The question I must answer is whether the Appellant has provided sufficient evidence to establish he was a resident in Nunavut on October 27, 2007.

[79] The broadest and most liberal idea connecting a person to a jurisdiction is that of domicile. In determining the issue of domicile, courts consider place of birth as well as emotional and cultural connections. The evidence of the appellant satisfies the legal definition of domicile and that domicile is Nunavut. However, it is residence and not domicile that is at the heart of the residence rules in the *Act*. Although the appellant deposed that he has always considered himself to be a permanent resident of Nunavut, he still has to satisfy the rules of residency set out in the *Act* to qualify to be a candidate.

[80] Because of the lack of precision inherent in domicile, legislatures have narrowed the voting requirements to the idea of residence. As noted by Cory J. at para. 117 of *Haig,* the original right to vote was tied to property ownership. A person owning property in several ridings could vote in each of them. Residency requirements were aimed at preventing plural voting by banning owners from voting in more than one riding. It was designed to facilitate the attainment of the principle of one person, one vote, and courts were cautioned not to readily deprive a person of any right to vote.

[81] The early cases liberally interpreted the residency requirement to protect anyone who was temporarily absent but who nonetheless wished to be sworn in as a voter. The principle of enfranchisement was ultimately reflected in the definitions of

residency in the *Canada Elections Act,* R.S.C., 1985, c. E-2. The general residency rule was expressed in s. 55(2). It provided the ordinary residence of a voter "*shall be determined by reference to all the facts of the case*". In *Haig,* Cory J. reproduced subsections 3 and 4 of that legislation and commented on the general thinking behind them at 1053-1054:

> "Subsection 3 uses the word "generally" and subs. 4 uses the word "usually". By the use of these words, it can be seen that the framers of the legislation expected that there would be exceptions to the usual residency rule. Human existence itself is transitory. The residence of human beings is even more so. It is seldom that a Canadian can now be referred to as "a lifetime resident of such and such a district". Ours is now a highly mobile society whose members will frequently move about the country. This mobility does not mean that the right to vote should be considered any less important than it was in earlier times. Indeed if a modern democracy is to function effectively the right is even more precious than before. Our whole concept of residency must be more flexible than ever before. It follows that the term "ordinarily resident" in an enfranchising statute should be interpreted broadly in the context of today's mobile society and in the light of the vital importance of the right to vote."

[82] The Legislative Assembly could have adopted the idea of ordinary residency but did not and instead included the detailed rules of s. 4. As a result, the cases relied on by the appellant are of limited assistance.

[83] Although the *Interpretation Act* requires a fair, large and liberal interpretation it cannot contradict the clear words of the *Nunavut Elections Act*. The *Act* contains some detailed, unique and specific rules for deciding residency.

[84] The Legislative Assembly incorporated some of the ideas of ordinary residency in the *Canada Elections Act* into s. 4 of the *Act*. A key feature is that the residence of a person revolves around a fixed physical place where he carries on the daily activities of life. Section 4(2) states the residence of a voter is the place of the voter's home or dwelling to which when absent he intends to return. If a person is not physically present in the home occasionally, he does not cease to be a resident as long as he intends to return to that home. Examples would be trips of

short duration such as a vacation or an absence for medical treatment.

[85] Sections 4(3) and 4(4) envisage longer absences by using the words "*temporary absence*". I reach that conclusion because these words are coloured by the words "*including the pursuit of education or employment*". If a voter is away at school or for employment he does not lose his residence if he intends to return to that home. Section 4(4) recognizes that this type of longer absence could result in more than one residence because the voter may or may not take his family with him. The voter can choose to vote in the place where his home was when he left, or from another home where his family resides. An example of this would be a person who leaves one community in Nunavut to attend school or to work in a mine. If he takes his family with him, he can vote in the temporary residence or in the original residence.

[86] However, s. 4(5) provides that if the voter leaves the original residence for longer periods and intends to establish a more permanent residence elsewhere, he loses his residence status in the place where his original dwelling was located.

[87] Finally, s. 4(6) provides the voter only acquires a new residence after leaving the original one if his family resides with him or if he establishes a new permanent residence.

[88] The appellant was a resident of Nunavut from 1999 to 2003, when he left for Ottawa to start his ambassadorial duties. He admits that he then established a residence in Ottawa and lived in it until at least the end of 2006 when his employment ended. There is no evidence that he maintained the original residence or intended to return to it. This is consistent with the length of his stay in Ottawa. I find it difficult to interpret the four-year stay in that city as a temporary absence. I conclude that the appellant established a new permanent residence in Ottawa. As provided in s. 4(5) of the *Act,* he lost his resident status in Nunavut.

[89] To again qualify to vote, the appellant had to establish a new residence in Nunavut before October 27, 2007. The evidence satisfies me that he did not do so within the necessary time limit. The appellant maintained the Ottawa residence after the end of his employment in 2006 and visited Nunavut occasionally for family and political reasons in 2007 and 2008. The appellant did not present any evidence that proved he had re-established another residence in Nunavut. Owning other real estate or personal property, or operating a business is not establishing a residence. Residency requires physical presence and the activities that occur in a household. At the very least the appellant should have been able to provide a civic address or house number where he and his family now live and when they started living there. The only evidence of residence is the hearsay provided by his stepchildren. That evidence indicates that he returned to Nunavut in February 2008.

[90] The appellant also applied for and received FANS funding in 2007 to attend school. However, it is unclear what evidence was provided to FANS to satisfy their residency requirement. The fact that he satisfied the FANS residency requirement does not mean he is also a resident for voting purposes. To the extent that it might be indicia of residence, it would have been for the 2006 year.

[91] The final information indicating the lack of a new residence in Nunavut stems from the information that the appellant was still a resident of Ontario for tax purposes on December 31, 2007 and was receiving mail in Ottawa in August of 2008.

III. CONCLUSION

[92] Considering all the evidence, I am satisfied that the respondent did not err in disqualifying the appellant as a candidate and I deny the appeal.

[93] Costs may be spoken to at the conclusion of the *Charter* argument.

Dated at the City of Iqaluit this 7th day of October, 2008

Mr. Justice Earl D. Johnson
Nunavut Court of Justice