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NUNAVUT COURT OF JUSTICE
La Cour de justice du Nunavut

Citation:	***Anawak v. Nunavut (Chief Electoral Officer)*, 2008 NUCJ 26**
Date of Judgment (YMD):	20081005
File Number:	08-08-597CVC
Registry:	Iqaluit
Appellant:	**Jack Anawak**
	-and-
Respondents:	**Nunavut (Chief Electoral Officer), Attorney General of Nunavut**
	-and-
Intervener:	**Speaker of the Legislative Assembly of Nunavut**

Before:	The Honourable Mr. Justice E. Johnson
Counsel (Appellant):	Steven L. Cooper
Counsel (Respondent C.E.O.):	Patrick Orr
Counsel (Respondent A.G.):	Lorraine Land
Counsel (Intervener)	Susan Cooper
Location Heard:	Iqaluit, Nunavut
Date Heard:	October 14, 2008
Matters:	*Canadian Charter of Rights and Freedoms*, ss. 3, 15; *Constitution Act*, 1982, s. 35; *Nunavut Elections Act*, S. Nu. 2002, c. 17, ss. 1, 2, 4, 7, 11(1) and 75.1, as am. by S. Nu. 2005, c. 14, S. Nu. 2007, c. 3.

REASONS FOR JUDGEMENT

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

I. INTRODUCTION

[1] This *Charter* application is the second part of *Anawak v. Nunavut (Chief Electoral Officer)*, 2008 NUCJ 24, [2008] Nu.J. No. 25. In the first judgement I extended the time for filing the appeal and denied it on the merits. Because I set the hearing date for the first part on short notice, all parties agreed to argue this *Charter* application separately on October 14, 2008.

[2] The appellant argues the residency requirements of the *Nunavut Elections Act,* S. Nu. 2002, c. 17, (the *"Act"*) violate his democratic, equality and aboriginal rights under ss. 3, 15 and 35 of the *Charter.*

[3] The appellant served the respondent Attorney General of Nunavut ("A.G.") with notice of this application as required by s. 58(1) of the *Judicature Act,* S.N.W.T. 1998, c. 34, as enacted for Nunavut, pursuant to the *Nunavut Act,* S.C. 1993, c. 28, and appeared through Counsel who participated in argument as of right as provided in s. 58(3). Section 58(4) deems the A.G. to be to be a party to the proceeding on appearance in court.

[4] The appellant also served the Attorney General of Canada, but he did not appear.

[5] I added the Speaker of the Legislative Assembly as an intervener on the consent of all parties.

II. ISSUES

Evidentiary and procedural

[6] The A.G. objected to the short service, the use of an originating notice to start the appeal and the lack of an evidentiary base for the alleged *Charter* breaches.

Substantive

[7] The appellant structured the *Charter* issues by asking the Court to answer seven questions:

> "1. Do the provisions of the *Nunavut Elections Act*, S. Nu. 2002, c.17 which refer to the residence of a voter and therefore the residence of a candidate; that is sections 4, 7 and 11, as presently constituted, contravene section 3 of the *Charter of Rights and Freedoms of the Constitution Act*, 1982, R.S.C. by requiring the applicant to have resided in the Territory for a period of twelve months prior to the calling of an election in order to be entitled to vote, and therefore to be a candidate in the election?
>
> 2. If the answer to the above question is yes, is the contravention of s. 3 demonstrably justified under s. 1 of the *Charter*?
>
> 3. If the impugned legislation is not saved by s. 1 what is the appropriate remedy under s. 24(1) of the *Charter*?
>
> 4. Do the provisions of the *Nunavut Elections Act*, S. Nu. 2002, c.17 which refer to the residence of a voter and therefore the residence of a candidate; that is, sections 4, 7 and 11 as presently constituted, contravene section 15(1) *Charter of Rights and Freedoms of the Constitution Act,* 1982, R.S.C. by discriminating against the applicant on the basis of Inuk residence?
>
> 5. If the answer to the above question is yes, is the s. 15(1) discrimination demonstrably justified under s. 1 of the *Charter*?
>
> 6. If the impugned legislation is not saved by s. 1, what is the appropriate remedy under s. 24(1) of the *Charter*?
>
> 7. Do the provisions of the *Nunavut Elections Act*, S. Nu. 2002, c.17 which refer to the residence of a voter and therefore the residence of a candidate; that is, sections 4, 7 and 11 as presently constituted, contravene section 35(3) of the *Constitution Act*, 1982, R.S.C. by failing to include an Inuk under Article 35 of the Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen (the "NLCA"), as ratified by the *Nunavut Land Claim Agreement Act*, S. C. 1993, c. 29?"

A. Evidentiary and procedural

1. Time

[8] Counsel for the A.G. argues the appellant did not serve the originating notice within the 14 days specified in s. 58 (2) of the *Judicature Act*. The appellant obtained an order shortening the time for service of an originating notice under the *Nunavut Rules of Court*, but the order did not dispense with the notice under s. 58.

[9] While recognizing the demands of a mid-election appeal, Counsel for the A.G. stressed the need for adherence to the time limits to allow for satisfactory preparation.

2. Use of originating notice

[10] Counsel for the A.G. also questions the use of an originating notice to raise a *Charter* issue. As specified in rule 22 of the *Nunavut Rules of Court*, an originating notice is an expedited method of commencing legal action using affidavit evidence where there is no substantial dispute of fact. While it is proper for the appeal procedure under the *Act*, it is inappropriate for the complex analysis needed by the parties when a court considers the constitutional legality of legislation.

3. Lack of evidence

[11] Finally, relying on *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, [1990] 43 C.R.R. 1, Counsel for the A.G. argues the appellant failed to provide enough evidence about the alleged violations to allow a proper assessment of whether *Charter* violations have occurred.

4. Analysis

[12] The process of choosing candidates under the *Act* is different from other jurisdictions in Canada. To be a candidate in other jurisdictions such as the Northwest Territories and the Yukon, the applicant must obtain the signatures of 15 persons who are

resident within the constituency. The person collecting the signatures must declare in writing that all the persons are resident within the constituency. The duty of the Chief Electoral Officer (the "C.E.O.") is administrative in nature and there is no appeal from the decision. As a result, the C.E.O. would usually accept the declaration from the person obtaining the signatures without any further investigation.

[13] The C.E.O. would have a similar administrative role for unqualified candidates such as serving prisoners, sitting members of other legislatures and persons convicted of corrupt offences.

[14] If residency issues arose during the election, the other candidates would contest the validity of the election under other sections of the legislation after the formal results are published.

[15] Nunavut inherited the identical legislation from the Northwest Territories in 1999 that contained the requirement for 15 persons to nominate a candidate. The *Nunavut Elections Act,* passed in 2002, continued to use the same nomination process, but the role of the C.E.O. became more active. Section 75(1) made it compulsory for the C.E.O. to refuse an application where he or she was "aware" that a person was ineligible to be a candidate. The Legislative Assembly amended the *Act* in 2005 adding:

> *"75. (1) A returning officer shall refuse the nomination papers and shall reject the candidacy of a person where the returning officer is aware that*
>
> ...
>
> *(d) the person is ineligible to be a candidate under paragraph 11(2)(a), (b), (c), (d) or (g)."*

[16] These subsections contain all the grounds for rejection except for residency.

[17] The Legislative Assembly gave residency issues special attention when it enacted the 2002 legislation. The 2005 amendment also added s. 75.1, which created a new pre-

election option if the C.E.O. has reason to suspect the residency of a candidate. If the C.E.O. is suspicious, she must immediately notify the candidate and provide the reasons for the suspicions in an approved form. The candidate may then present further comments to the C.E.O. After considering the submissions, the C.E.O. must within two days of the close of nominations deliver a decision on whether the candidate is eligible. If the C.E.O. decides the candidate is not eligible, he or she may appeal by filing an originating notice in this Court within two days after notice of the C.E.O.'s decision. The Court must hear the appeal within 10 days and file a judgement as soon as possible.

[18] A substantial revision in the nominating process came into effect with further amendments to the *Act* in 2007. The amendment removed the need for 15 persons to nominate a candidate. Instead the candidate simply fills out a form declaring that he or she is candidate:

> *"70. (1) Any person eligible to be a candidate may make a written declaration of candidacy in the approved form that he or she intends to be a candidate for a constituency in which an election is to be held."*

[19] The *Act* also contains sections similar to those of the other jurisdictions that allow the C.E.O., another candidate or a voter, to attack the election after formal publication of the results.

[20] The final choice available is s. 225 of the *Act*. This section allows any interested party to make a complaint to the police up to 90 days after the person received the knowledge. The C.E.O. may also ask the police to start an investigation into whether a person has committed an offence under the *Act*. The police then examine the complaint and notify the person they are investigating and advise if they intend to start a prosecution. Alternatively the police may recommend that the Integrity Commissioner offer to use a compliance agreement. If requested, the police and C.E.O. then provide all relevant information to the Integrity Commissioner who may start a process that results in a voluntary compliance agreement.

Among the options available are an apology and the payment of money to other parties.

[21] A s. 225 complaint can occur before, during or after the election. The C.E.O. may become involved if she launches the complaint. If she does not launch it, her only involvement is to provide information to the Integrity Commissioner. However, she has no active role in the decision-making.

[22] This review explains the different ways the C.E.O. handled residency problems during the election. She obtained information from the appellant's family that suggested he resumed residence in Nunavut in February 2008 and was therefore ineligible. She suspected the appellant was ineligible as soon as he declared his candidacy, and s. 75.1(1) obligated her to give the appellant the notice of suspected ineligibility. In another incident during the election, a person complained to the police under s. 225 about the eligibility of a candidate in Iqaluit Centre and the police investigated. The electoral officer in that riding presumably did not have enough information to issue the notice under s. 75.1.

[23] The urgency the appellant faced in exercising his right of appeal resulted from his decision to file his declaration of candidacy on the last day allowed for nominations. There is some flexibility built into the period before the C.E.O. makes the final decision that triggers the time-sensitive appeal process. The C.E.O. must decide on eligibility no later than two days after the close of nominations. The 2007 amendments to the *Act* state the nomination must occur between the date the Commissioner of Nunavut issues the writ, and the 31st day before the election. If the candidate declares his candidacy well before the close of nominations there will be more time to study and exchange information. If the filing occurs nearer to the close of nominations the time is much more limited.

[24] The Commissioner issued the election writ on September 22, 2008, setting the election for October 27. The 31st day before the election was September 26. Because of the timing of the election, candidates had only five days to file the nomination

papers. This no doubt contributed to the smaller number of candidates in this election. As noted in Exhibit B of the supplemental affidavit of the appellant, only 48 candidates declared their candidacy compared to 82 in the last election, and there were no nominations in the South Baffin riding.

[25] In the case at bar, the appellant chose to file his nomination at 10:30 a.m. of the last day and the C.E.O. had until Sunday, September 28, to issue her decision. The appellant provided the C.E.O. with the information discussed in the first judgement of this application later that day, and the C.E.O. provided her decision at 4:27 p.m. This concurrence of events meant the appellant had to file the originating notice on Monday, September 29.

[26] This new proactive role for the C.E.O. under s. 75.1 with tight timelines is problematic in Nunavut because of the lack of timely access to lawyers and the use of the originating notice procedure.

[27] The originating notice rules are not suitable for an expedited appeal during an election. Under the *Rules of Court*, a party must first obtain a date when a judge is available to hear the application, on one of the scheduled monthly civil chambers dates or a special date given by a judge of the Court. If a lawyer is available, he or she cannot file the originating notice until this Court provides a date when a judge will be available. That can be difficult since the Court is short of judges and they are often away from Iqaluit on circuits.

[28] When the judge sets the date, the applicant must serve the application on the other parties at least 10 days before the court date. Obviously the two days notice specified in s. 75.1 conflicts with the *Rules of Court.* Before the appellant can file the originating notice he must obtain an order from a judge shortening the notice period and obtain a hearing date. These requirements suggest a better approach is to have the appellant file a notice of appeal only within the two days and require the Court to set a hearing date within a fixed time.

[29] An originating notice is even more problematic for *Charter* litigation, which is dependent on a slower fact-finding process and the civil and criminal rules of court.

[30] The *Criminal Procedure Rules* require the accused to provide 30 days notice of a *Charter* challenge to the Attorney General of Canada or Nunavut.

[31] Litigants may also start civil *Charter* challenges to legislation under the *Rules of Court*. The plaintiff usually starts the litigation by filing a statement of claim seeking a declaration of invalidity of the legislation naming the territorial, provincial or federal attorney general as a defendant. Where the attorney general is not a defendant, the plaintiff must give the 14 days notice under the *Judicature Act*. The attorney general then becomes a party and the civil fact-finding slowly unfolds to develop the factual foundation necessary for the *Charter* analysis before the Court hears argument.

[32] In the case at bar the appellant chose to raise the *Charter* argument in the originating notice and served the A.G. the next day. He could have waited for the Court to issue the first judgement to start a new action. If he had taken this approach the necessary evidentiary base would have been available, but the Court would have delayed the judgement until a much longer time into the future.

[33] After inquiry by the Court, Counsel for the A.G. withdrew her objection about the short notice. Her main concern was that use of the originating notice procedure was inadequate to provide a proper evidential base for the *Charter* arguments under s. 15 and 35. She suggested the Court adjourn the application to allow the parties more time to develop the evidence.

[34] Counsel for the appellant recognized that he would like to take the time to present more evidence and supported the adjournment idea. However he would not agree to an adjournment unless the C.E.O. delayed the by-election date until after the Court delivered the judgement on the *Charter* issues.

[35] Counsel for the C.E.O. pointed out that the C.E.O. could not schedule the by-election until the Court delivered its judgement as set out in s. 75.1(9):

> *"(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."*

[36] Counsel for the C.E.O. supported adjournment of the *Charter* application provided the other Counsel agreed the first judgement constituted rendering a decision so the C.E.O. could then schedule the by-election.

[37] When Counsel for the appellant indicated he would not agree the first judgement satisfied s. 75.1(9), I ruled that I would continue with the hearing because of my concern about the delay in the electoral process. I told Counsel for the appellant that he could apply for a stay of proceedings if necessary after I filed the judgement.

B. Substantive

1. Do the provisions of the *Nunavut Elections Act*, which refer to the residence of a voter and therefore the residence of a candidate; that is s. 4, 7 and 11, contravene s. 3 of the *Charter* by requiring the applicant to have resided in the territory for a period of twelve months prior to the calling of an election in order to be entitled to vote, and therefore to be a candidate in the election?

[38] All parties agree the 12-month residency requirement constitutes a *prima facie* breach of s. 3 of the *Charter*. However, Counsel for the C.E.O. did not concede the statutory requirement that a voter merely reside in Nunavut breaches s. 3.

2. If the answer to the above question is yes, is the contravention of s. 3 demonstrably justified under s. 1 of the *Charter*?

(i) Arguments

[39] All parties rely on the tests from *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321. They are as follows:

(a) The onus of proving on a balance of probabilities that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.

(b) To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom."

(c) Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test." There are three important components of a proportionality test. First, the measures adopted must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance."

Appellant

[40] Counsel for the appellant acknowledges the case law on the right to vote is not absolute and may be subject to residency requirements. See *Storey v. Zazelenchuk* (1984), 12 C.R.R. 261, [1984] S.J. No. 800 (C.A.), *Scott v. British Columbia (A.G.)* (1986), 26 C.R.R. 120, [1986] B.C.J. No. 1578 (S.C.), *Reference Re Yukon Election Residency Requirements* (1986), 22 C.R.R. 193, [1986] Y.J. No. 14 (C.A.), [*Yukon Reference*], *Arnold v. Ontario (A.G.)* (1987), 31 C.R.R. 187, [1987] O.J. No. 889 (H.C.).

[41] He recognizes the Court of Appeal for the Yukon Territory in *Yukon Reference* upheld a 12-month residency requirement. The Court held the three principal pressing and substantial objectives of the Yukon legislation justified the residency requirement in the territory. However, he questioned the applicability of the reasoning in that case to the Nunavut legislation because of the different historical and social context of each territory and the different objectives of the legislation.

[42] Counsel argues the Legislative Assembly adopted the 12-month residency from the Northwest Territories without debate. While recognizing the progressive nature of the *Act,* Counsel argues the threshold to vote is too high. He describes the residency rules of the *Act* as the most restrictive in Canada. Although Nunavut is one of five jurisdictions with a 12-month residency requirement, the legislation does not follow other jurisdictions in adopting the principle of ordinary residence.

[43] He submits the 12-month residency requirement is not reasonable because of the unique challenges facing Nunavut, a geographically large territory with a small population. As noted in an article attached to the supplementary affidavit of the appellant, there has been some difficulty in attracting candidates to run in the election: "Candidates hard to come by in Nunavut territorial election" *Canadian Press* (29 September 2008). Counsel for the appellant urges the Court to adopt Maddison J.'s reasoning in *Hedstrom v. Yukon Territory (Commissioner)* (1985), 16 C.R.R. 37, [1985] Y.J. No. 65 (S.C.). He notes the Yukon tradition against requiring a sophisticated test to qualify as

a voter and the suitability of the ordinary residence test used in the federal legislation.

[44] Counsel suggests the Nunavut residency rules are more restrictive than those in the *Canada Elections Act*. To qualify to vote under the federal legislation a voter must be ordinarily resident in the constitutiency on the date of the enumeration. Once a voter gains ordinary residence he cannot lose it until he gains a new one. As a result the appellant qualified to vote in the recent federal election but did not qualify to vote in the Nunavut election. The appellant would also not qualify to vote in Ontario.

[45] Counsel submits the 12-month residency requirement does not fulfill the objectives of the *Act* because it:

(a) does not encourage participation by every voter;
(b) does not minimize barriers for potential candidates; and
(c) does not incorporate flexibility into the process considering the unique circumstances of Nunavut.

[46] Counsel argues the Legislative Assembly could have achieved the objectives of the *Act* using a much lower residency requirement or the ordinary residence approach. As a result the legislation fails the *Oakes* test of minimal impairment and proportionality.

Respondent C.E.O.

[47] While conceding the 12-month residency requirement constitutes a *prima facie* breach of s. 3, Counsel for the respondent argues that mere residency does not.

[48] Counsel for the C.E.O. submits that this Court should adopt the thinking of the Court in *Yukon Reference* that distinguished provincial and territorial elections from federal elections and upheld the need for a geographic connection.

[49] Counsel submits the appellant failed to provide evidence of residence by providing his current residence and civic address in Nunavut. The evidence suggests an address in Ottawa and hearsay evidence that he moved back to Nunavut. This evidence qualifies the appellant to vote and be a candidate in Ontario. Being unable to vote in Nunavut is irrelevant. The rights given under s. 3 do not include the right to vote and be a candidate in more than one territory or province at a time.

[50] However, Counsel argues if the requirement of mere residency is a breach of s. 3, that breach is saved by s. 1 for the same reasons that are relevant to the 12-month requirement.

[51] Counsel submits the appellant founds his argument on a misunderstanding of the underlying philosophy of the *Act*. He suggests the Legislative Assembly intended to set a higher threshold on residence but to eliminate barriers found in other jurisdictions once through the threshold. For example, other jurisdictions require residence in the constituency to be a candidate, but the *Act* only requires residency in Nunavut. Once a person satisfies the residence requirement, he can run anywhere in Nunavut. To prevent parachuting of candidates, there must be some residency requirement.

[52] Counsel relies on the *Yukon Reference* case to justify the 12-month residency requirement under s. 1 of the *Charter,* and urges the Court to follow it. The Assemblies of all three territories have justified the use of the 12-month residency by incorporating it into their legislation. He disputes the allegation of the appellant's Counsel that two other jurisdictions also use a 12-month residency. His review showed that Canada, Ontario and Newfoundland use ordinary residence, while the remainder use a six-month requirement.

[53] Counsel argues the objectives of the *Act* are substantially the same as those recognized by the Court in *Yukon Reference* and urges this Court to come to the same conclusion. He argues the Court of Appeal in *Yukon Reference* overruled Maddison J. in *Hedstrom*.

[54] Counsel agrees with and relies on the submissions of the A.G. on the Nunavut population and mobility issues relevant to voting and candidacy as a valid objective of the *Act*.

[55] Counsel relies on *Yukon Reference* on the rational connection between the objective and the means used to meet it.

[56] Counsel does not accept the appellant's articulation of the purpose and objectives in s. 1 of the *Act* as enabling the appellant to vote and be a candidate. The main purpose of the *Act* is to benefit residents of Nunavut and therefore excluded the appellant because he was not a resident. The *Act* also meets the objectives of ss. 1(2)(h) and (i) by creating a flexible definition of residency and voting opportunities for residents of Nunavut that the C.E.O. evaluates after each election.

[57] Referring to reports of the Standing Committee *Ajautiit* and *Hansard*, Counsel argues the appellant was wrong about the lack of debate on the 12-month residency requirement.

[58] Counsel urges this Court to follow the non-intrusive approach approved by the Supreme Court of Canada in *Harvey v. New Brunswick (A.G.)*, [1996] 2 S.C.R. 876, 37 C.R.R. (2d) 189, in not second-guessing the legislature. The Legislative Assembly defined residency to adapt to the living circumstances of Nunavummiut by including sections that allow prisoners and homeless people to vote.

[59] Finally, Counsel for the C.E.O. argues the 12-month residency requirement is proportional to the objective of ensuring, preserving and protecting the integrity of the electoral process. It ensures that voters and candidates do not parachute into Nunavut and that they inform themselves and care about issues in their constituency.

Respondent A.G.

[60] Counsel for the A.G. adopts many of the arguments of the C.E.O. on the applicability of *Yukon Reference* and the objectives of the *Act*. She provides transcripts of *Hansard* and

reports of the Standing Committee *Ajautiit* to prove the debate of the *Act*. In particular she notes the discussion by the members of the Assembly on the concern about the impact of the influx of transient workers on local politics.

[61] Counsel provides statistical evidence to prove Nunavut has a highly transient population similar to the Yukon. Relying on Statistics Canada data, the A.G. notes the Canadian territories share unique human and physical qualities. All three territories have adopted the 12-month residency requirement upheld in *Yukon Reference* because they all have large numbers of transient workers. Counsel also notes the comment of the Court in *Yukon Reference* that in the 1982 Yukon election, candidates in seven of the 16 ridings won by margins of 30 votes or less. She provides information from *Report to the Legislative Assembly of Nunavut by the Chief Electoral Officer* (Rankin Inlet: Elections Nunavut, 2004) that shows voters in the 2004 election elected seven candidates by a margin of less than 100 votes.

[62] Counsel directs the Court to the October 2000 recommendation of the Standing Committee *Ajauqtiit,* which the Legislative Assembly adopted on November 27, 2001. The Committee stated the 12-month residency requirement was an attempt to ensure awareness by the voters about local issues.

[63] Counsel urges the Court to adopt Bayda C.J.'s reasoning in *Storey* on the legality of a residency requirement in meeting a pressing and substantial legislative objective.

[64] Relying on *Arnold,* Counsel urges the Court not to substitute judicial opinions for legislative ones when deciding the residency requirement.

[65] Counsel for the A.G. disagrees that *Oakes* requires minimal impairment of the right. *Harvey* and *RJR-MacDonald Inc. v. Canada (A.G.),* [1995] 3 S.C.R. 199, 31 C.R.R. (2d) 189, require the government to show the measure imposed was the least intrusive considering both the legislative objective and the infringed right.

[66] Relying on para. 57 of *Haig v. Canada,* [1993] 2 S.C.R. 995, 16 C.R.R. (2d) 193, Counsel argues there is no need for all jurisdictions to adopt the same residency requirements. The Court should respect the choice of the Assembly.

Intervener Speaker of the Legislative Assembly

[67] Counsel for the intervener supports the arguments of the respondents.

(ii) Analysis

Residency requirement

[68] I agree with the general comments of Bayda C.J. in *Storey* that residency requirements are a reasonable requirement to vote in the provinces and territories:

> "[126] Moreover a period of advance residence may be required having regard for the nature and content of a vote. While its most basic purpose is to elect, within a constituency, a representative to the Legislative Assembly, it is not confined to that. And even though it is basically prospective in nature--the Assembly is being elected to govern for a period ahead--a vote has, in practice, a decidedly retrospective aspect of it: it often constitutes a means of passing judgment upon the performance, during their preceding terms of office, of the incumbent member as well as the government. And since today's political issues are many in number, diverse in nature and increasingly complex (and often local) it is not unreasonable to require a person to be resident in the province for a period of some months before being entitled to vote."

[69] The use of residence alone as a requirement to vote is not a breach of the s. 3 rights of the appellant. As stated in *Yukon Reference* at 196:

> "There is a rational basis for installing a residency qualifying system which now exists in every province in Canada. Manifestly, in a federal system, when people move from one province to another, it is reasonable for the provincial authorities to demand that persons taking up residence show some connection with the province or territory before deciding upon local matters."

[70] The respondents and intervener admit the 12-month residency requirement is a *prima facie* breach and the key issue is whether the A.G. can justify its use under s. 1.

Are the legislative objectives of sufficient importance to warrant overriding a constitutionally protected right or freedom?

[71] The *Yukon Reference* judgement is persuasive on the issues in the case at bar. The Court of Appeal in that case implicitly overturned *Hedstrom* and I decline to follow it.

[72] The Court of Appeal described the objectives of the legislation in *Yukon Reference* at 196:

> "(i) assurance of the integrity of the electoral process;
> (ii) assurance that the voters are properly informed of the issues in any election; and
> (ii) assurance that voters have a sufficient connection with the Territory."

[73] In contrast, the relevant objectives stated in ss. 1(1) and (2) of the *Act* are:

> *"1. (1) The purpose of this Act is to establish a regime for the election of members of the Legislative Assembly that promotes the meaningful exercise of the democratic rights and freedoms of the residents of Nunavut and the equality of opportunity to participate in determining the outcome of elections and the formation of the government.*
> *(2) To achieve its purpose, this Act revises and consolidates the legislation respecting elections on the basis of the following principles:*
> *(a) the electoral system should encourage participation by every voter in Nunavut and help make it easy for every voter to vote if they wish to, taking into consideration the unique circumstances in Nunavut;*
> *(b) the rules governing elections should minimize barriers for potential candidates;*
> ...
> *(h) the rules governing elections should incorporate flexibility to address unique circumstances in Nunavut as they arise, be they geographic, demographic, linguistic, or otherwise, in addition to new technologies ..."*

[74] There is merit to the argument of the C.E.O. that these objectives are directed at residents of Nunavut rather than citizens who may be domiciled there. Once the residency is achieved, the objectives are satisfied.

[75] While these objectives seem different from those described by the Court of Appeal for the Yukon Territory, I am satisfied that I am not restricted to these subsections. The *Act* contains many provisions that do not plainly state objectives but which nevertheless reflect the legislative objectives of s. 1 as revealed in the debate of the Legislative Assembly when enacting the legislation. The appellant is correct when he asserts the Legislative Assembly imported the legislation from the Northwest Territories without debate. However, he fails to note the Assembly fully debated the new 2002 legislation that replaced the imported legislation from the Northwest Territories.

[76] The A.G. filed the recommendations of a Standing Committee of the Assembly and transcripts of *Hansard* to provide the extra evidence of the objectives of the Assembly. I take judicial notice of the following evidence provided by the A.G. about the legislative process leading to the passage of the *Act* on the authority of *RJR-MacDonald*.

[77] Recommendations 25 and 26 of the Standing Committee *Ajauqtiit* in *Review of the Report of the Chief Electoral Officer of Nunavut: Election of the First Legislative Assembly of Nunavut – 1999 : A New Beginning*, (Iqaluit, 2000) state at 22:

> "Recommendation #25: That eligibility to vote in Nunavut continue to require one year of residency <u>in Nunavut</u> in the new *Elections Act* and that Nunavut residents who move to a new community at any time in the year prior to an election should be able to vote in that community.
>
> Recommendation #26: That students who are resident in another community for purposes of continuing their education should be able to claim a temporary absence and continue to be on the voters' list in their home community, if they wish." [Emphasis in original.]

[78] In the debate on the Standing Committee *Ajauqtiit* report in the Legislative Assembly in 2000, Members Alakannuark and Arvaluk recommended the elections legislation continue to require a one-year residency. Nunavut *Hansard*, (26 October 2000) at 179, 186.

[79] The 2001 Standing Committee *Ajauqtiit's* report to the Committee of the Whole on selecting the new Chief Electoral Officer accepted recommendations 25 and 26 on residency requirements: Nunavut *Hansard*, (27 November 2001) at 21.

[80] During the 2002 debate in the Committee of the Whole on the *Act,* expert witness Patrick Orr testified about the residency clauses. He explained the objectives of preserving the integrity of the electoral process and the community connection: Nunavut *Hansard*, (30 October 2002) at 1367.

[81] During the 2005 debate in the Legislative Assembly, Members Peterson and Aglukkaq asked further questions about the residency issues. Expert witness Orr again offered to review the residency clauses, but the Committee of the Whole declined the offer: Nunavut *Hansard*, (26 April 2005) at 2328.

[82] During the 2002 Committee of the Whole debate on the *Act,* the members discussed similar concerns as those described by the Court in the *Yukon Reference* on the influx of transient workers. Mr. Orr explained how the residency requirement preserved the integrity of the electoral process by removing a large part of the seasonal worker population from the group of eligible voters: Nunavut *Hansard*, (30 October 2002) at 1367.

[83] The A.G. also filed Statistics Canada information from the 2006 Census that proves Nunavut has a transient population. The territorial population base is dynamic with a large percentage of the population entering and exiting the territory for work purposes in any given year: Statistics Canada, *Population 5 years and over by mobility status, by province and territory (2006 Census),* (Ottawa, 2007). These changes can have a major impact in many constituencies with a few voters. Allowing short-term residents full electoral participation rights with no residency

requirements would lessen the confidence of Nunavummiut in an electoral system designed to promote and protect the meaningful exercise of democratic rights of northern residents.

[84] In October 2000, the Standing Committee *Ajauqtiit* expressed concern that new residents have some appreciation of the issues affecting Nunavummiut and their candidates in their electoral district. The Standing Committee advised the Assembly that a one-year residence in Nunavut was a proper time for becoming an informed voter. As noted above, recommendation 25 of the Committee recommended the one-year residence requirement.

[85] The Standing Committee also remarked that Nunavummiut who appeared before the Committee believed voters should have some appreciation of the issues affecting them and the candidates. The Committee agreed and as noted above recommended inclusion of the one-year residency requirement in the new territorial election legislation.

[86] All three territories are consistent in using a 12-month residency requirement for voting. They are the only jurisdictions that use the 12-month limit. Canada, Ontario and Newfoundland have an ordinary residency requirement and the remaining provinces use a 6-month residency requirement.

[87] I am satisfied the Legislative Assembly considered the objectives it wanted and decided the 12-month residency requirement and other rules achieved the legislative election objectives suitable for the territory.

[88] These objectives are similar to those described by the Court of Appeal for the Yukon Territory in *Yukon Reference*. That Court held the government had justified its objectives were of sufficient importance to place limited residency limits on the right of a person to vote or run as a candidate. I now turn to consider whether the A.G. has also justified the residency requirements of the *Act* under s. 1.

Rational connection

[89] Counsel for the A.G. admits the duty imposed by *Harvey* and *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211, 4 C.C.R. (2d) 193. The A.G. must show how the means adopted logically further the legitimate and important goals of the Nunavut Legislative Assembly. The A.G. must satisfy the Court there is a rational connection between the means employed in ss. 4, 7 and 11 of the *Act* and the objectives. She suggests that the 12-month residence requirement in Nunavut ensures that individuals cannot "parachute" into the jurisdiction and elect the representative who will be responsible for answering to local issues. The residency requirement allows the voter to become enlightened with the issues that are of unique local concern and allows residents the opportunity to gain confidence in the integrity and responsiveness of a potential candidate.

[90] I agree there is a rational connection between the objectives and means employed.

Minimal impairment

[91] The second step is to show minimal impairment by satisfying the Court the measures used are the least intrusive considering both the legislative objective and the infringed right. Counsel for the A.G. filed information from the 2006 Census that proved the migrant populations of Ontario and Quebec were 1% of their respective populations. On the other hand, the migrant population of the three territories was between 10% and 17%. The *Report to the Legislative Assembly of Nunavut by the Chief Electoral Officer* (Rankin Inlet: Elections Nunavut, 2004) also proves that Nunavut has the same issue as the Yukon with small margins of victory in many ridings. In the 2004 election, voters elected seven candidates by a margin of less than 50 votes and 11 candidates by a margin of less than 100 votes.

[92] Counsel for the A.G. suggests the Assembly was sensitive to the uniqueness of Nunavummiut who must leave the territory for education or work by including s. 4, which provides that residence continues despite physical absences. She also filed

information from *Hansard* about the discussions in the Committee of the Whole on the meaning of temporary absence. The evidence of the expert witness satisfies me the Assembly created flexibility in the sections to ensure minimal impairment.

[93] There is no requirement to set up the same residency requirement as other jurisdictions. As noted in *Haig,* the demands of the North, such as the high number of migratory workers, may justify a host of rules different from other jurisdictions. Ordinary residence is absent in the Nunavut residency rules and may slightly raise the threshold to eligibility. The definitions of ordinary residence vary and many definitions use wording that is close to that used in the *Act*. However, the possibly higher threshold is more than compensated by the much more flexible voting and eligibility rules. In Nunavut you can lose your residency, but to re-establish it you simply have to move back and provide the C.E.O. with a civic address.

[94] I am satisfied there is minimal impairment of the right.

Proportionality

[95] The last issue to consider is whether the effects of ss. 4, 7 and 11 are proportionate to the objectives of the legislation.

[96] I agree the restraint imposed by the legislation on the right to vote or to run as a candidate is for a short time. This period and the provision for temporary absences are proportionate to the legislative objective of achieving effective representation and ensuring the integrity of the legislative process.

(iii) Conclusion

[97] The C.E.O. and A.G. have satisfied me that the limits placed on the appellant's right to vote under s. 3 and be a candidate are reasonable and demonstrably justified in a free and democratic society.

3. Do the provisions of the *Nunavut Elections Act*, which refer to the residence of a voter and therefore the residence of a candidate; that is, s. 4, 7 and 11, contravene s. 15(1) of the *Charter* by discriminating against the applicant on the basis of Inuk residence?

(i) Arguments

Appellant

[98] The appellant relies on *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 61 C.R.R. (2d) 189, to argue the legislation discriminates against him because he is a not a resident of Nunavut. He submits that, as an Inuk, his exclusion from voting in the traditional territory of the Inuit because he did not reside there for the 12-month period before the election is an analogous ground under s. 15 of the *Charter*.

[99] The appellant equates his alleged discrimination to the finding in *Corbiere*. If aboriginal residence in the form of reserve band member status constitutes a ground of discrimination analogous to the enumerated grounds, then Inuit residence should also constitute an analogous ground. There is no reason to distinguish between the disadvantage based on stereotyping and social prejudice in the Indian community from that of the Inuit community.

[100] The appellant argues the facts of this case prove the discrimination against him. The appellant does not fall into the average Canadian category but is part of the unique and complex group of aboriginal people in Canada. He argues that being an Inuk with strong ties to the traditional lands of the Inuit entitles him to the same recognition of his unique and complex situation.

[101] Using the words of *Corbiere* the appellant argues the Court should examine the legislative, historical and the social context of his Inuit status. The examination will satisfy the Court the appellant has an inherent interest in governing Nunavut that the Court should protect.

Respondent C.E.O.

[102] The respondent argues the residency provisions of the *Act* do not infringe s. 15(1) and do not discriminate against the appellant. As held in *Haig, Siemens v. Manitoba (A.G.),* [2003] 1 S.C.R. 6, 102 C.R.R. (2d) 345, and *R. v. Turpin,* [1989] 1 S.C.R. 1296, 39 C.R.R. 306, place of residence is not an enumerated ground.

[103] *Corbiere* and other cases dealing with the right of an Indian to participate in elections under the *Indian Act* are not relevant to this application. Those cases deal with the rights of a member of an aboriginal group to participate in their aboriginal government. The Legislative Assembly of Nunavut is a public government. It is not a band council under the *Indian Act* and it is not an aboriginal government.

[104] The appellant has the full capacity to vote and be a candidate in the elections of Nunavut Tunngavik Incorporated under article 35 of the Nunavut Land Claims Agreement (the "NLCA"). He exercised this right by recently running as a candidate for election to that body. He has all the rights to participate in his aboriginal land claim organization, unlike the plaintiffs in *Corbiere*.

[105] The respondent C.E.O. suggests the appellant has not satisfied the evidentiary base needed for the analysis of the legislative, historical and social analysis of the alleged discrimination.

Respondent A.G.

[106] Counsel for the A.G. argues the appellant's failure to provide a factual foundation is fatal to the application. In *MacKay v. Manitoba,* the appellants challenged the constitutionality of sections of the *Manitoba Election Finances Act*. It provided for the payment a portion of the campaign expenses of those candidates and parties who received a fixed proportion of the votes in the provincial election from public funds. The legislation provided those parties and candidates who received more than 10 percent of the votes cast in an electoral division could file a

certificate with the C.E.O. That officer then calculated the total expenses allowed by the legislation, reviewed the total expenses incurred and fixed the eligible repayment. When the Minister of Finance received a certificate from the C.E.O. on the amount owing, he paid it out of the consolidated fund.

[107] The trial judge held the legislation in question did not infringe the guarantee of freedom of expression set out in s. 2(b) of the *Charter: MacKay v. Manitoba*, [1985] M.J. No. 337, 19 D.L.R. (4th) 185 (Q.B.). The majority of the Court of Appeal was of the same view. The minority found there was infringement that was not saved by s. 1 of the *Charter*: *MacKay v. Manitoba* (1985), 23 C.R.R. 8, [1985] M.J. No. 164.

[108] In the Supreme Court of Canada, the Manitoba A.G. did not criticize the lack of factual foundation because it wanted a decision on the merits. However, the intervener Attorneys General of Canada, Ontario and Quebec raised the issue and Cory J. stated at 361-362:

> "*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel."

[109] Relying on *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 60 C.R.R. (2d) 1, the A.G. notes that all laws make distinctions between categories and groups but not all distinctions violate the protection of equality rights of s. 15. A s. 15 analysis requires the Court to assess whether the government has justified the distinction and whether it violates the human dignity of the claimant. To carry out the discrimination analysis of the law, the Court must answer three questions. First, is there differential treatment between the claimant and others? Second, is the differential treatment based

on enumerated or analogous grounds? Third, is the differential treatment discriminatory?

[110] As held in *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, 36 C.R.R. 193, to answer the first question the applicant must first prove the proper comparator group. The Court can only evaluate daims of discrimination "by comparison with the condition of others in the social and political setting in which the question arises." As held in *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357, a person asking for equal treatment does so by reference to others with whom he or she can invite comparison. A claim will fail if the claimant is unable to identify a comparator group. The proper comparator group is the one that mirrors the characteristics of the claimant relevant to the benefit sought, except the statutory definition includes a personal characteristic that is offensive to the *Charter*.

[111] The appellant's selection of the comparator group is critical to a s. 15(1) analysis. It is not a threshold issue the appellant can put aside when he decides on the comparator group. Rather, his selection of a comparator group informs each step in the s. 15 analysis "on the basis of the comparison."

[112] The arguments advanced by the appellant provide no analysis or evidence about the comparator group he compares himself to in proving the discrimination has occurred. The lack of any analysis or evidence of a comparator group is fatal to his argument as without it the Court cannot make a proper s. 15(1) analysis of whether discrimination has in fact occurred.

[113] Assuming the Court finds the lack of a comparator group is not fatal, the A.G. suggests the comparator group that resembles the appellant is anyone who has resided in Nunavut for at least 12 successive months. Using this comparator group, the A.G. argues there is no discrimination as this group is not a historically disadvantaged one that suffers discrimination including devaluing of personal dignity compared to the comparator group.

[114] If the claimant establishes a distinction between the claimant and the comparator group, the next step is for the Court to decide whether the claimant has proved the distinction was on an enumerated or analogous ground.

[115] As held in the Supreme Court of Canada decisions of *Haig*, *Siemens* and *Turpin*, residence is not an enumerated ground under s. 15.

[116] The A.G. argues that *Corbiere* is distinguishable. It does not stand for general recognition of residency as an analogous ground for aboriginal people without a comparison with others who are members of the same aboriginal group. The basis for identification of the analogous ground in *Corbiere* was both existing Indian band membership and residence.

[117] The impact of band council decisions on their rights as band members concerned the claimants in *Corbiere*. Band council decisions affected them because as members of the band they were co-owners of band assets, their reserve was their collective land base and the council represented them in negotiations with government including about land surrenders. The band council also managed the collectively owned aboriginal lands and represented them in discussions and negotiations with other aboriginal organizations and the public-at-large. The Government of Nunavut is not a band council and the citizens of Nunavut are not band council members. *Corbiere* is clearly not applicable to this case.

[118] Finally the appellant fails to distinguish his voting and candidacy rights under the NLCA and the political body created under the NLCA that represents the interests of all Nunavummiut regardless of whether they are beneficiaries or not. There is no analogous ground between residency rights for election of members of public government and existing *Charter* enumerated and analogous grounds including aboriginality-residence.

[119] The third part of the *Law* test requires the appellant to prove with a sufficient evidentiary basis the law in question negatively affected his human dignity. He must not only show that he is

receiving unequal treatment and differential treatment before the law but also that the legislative impact of the law is discriminatory. The appellant fails to present evidence on pre-existing advantage, correspondence between the grounds and the claimant's needs and abilities, ameliorative purposes or effects and the nature and scope of the interest affected by the impugned law.

[120] If the appellant satisfies all the other requirements, he has failed to provide a sufficient evidentiary basis for a finding of the fact of a harmful effect on his human dignity.

Intervener Speaker of the Legislative Assembly

[121] The intervener supports the arguments of the respondent and the A.G.

(ii) Analysis

[122] There is merit to all the arguments of the respondents. The *Corbiere* reasoning is not applicable to the case at bar. That case concerns discrimination against band members who did not live on the reserve. Nunavut is not a reserve but a territory with a constitutional status within Canada. See *Canada (A.G.) v. Nunavut Tunngavik Inc.*, [2008] Nu.J. No. 13. The Government of Canada created the territory because of article 4.1.1 of the NLCA:

> "The Government of Canada will recommend to Parliament, as a government measure, legislation to establish, within a defined time period, a new Nunavut Territory, with its own Legislative Assembly and public government, separate from the Government of the remainder of the Northwest Territories."

[123] Within Nunavut, Nunavut Tunngavik Incorporated owns and controls a body of land for all Inuit beneficiaries and has its own constitution and voting regime as described in the NLCA. There is also a public government created by the *Nunavut Act,* S.C. 1993, c. 28, that represents the interests of both Inuit and non-Inuit residents of Nunavut. The appellant has failed to

distinguish his voting rights and candidacy rights under both. The legislation does not discriminate against the appellant because he cannot vote in the election for the public government. Simply being an Inuk domiciled in Nunavut does not give him the right to vote in a public government election regardless of the rules.

[124] The appellant fails to identify a comparator group that mirrors the characteristics of the appellant. As stated in *Hodge,* this is fatal to the application:

> "[17] The identification and function of the "comparator group" in applying s. 15(1) of the *Charter* was encapsulated by Iacobucci J. in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 62, as follows:
>
> > ... there are three basic stages to establishing a breach of s. 15. Briefly, the Court must find (i) differential treatment, (ii) on the basis of an enumerated or analogous ground, (iii) which conflicts with the purpose of s. 15(1) and, thus, amounts to substantive discrimination. Each of these inquiries proceeds on the basis of a comparison with another relevant group or groups, and locating the relevant comparison groups requires an examination of the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context. [Emphasis added.]
>
> It is worth repeating that the selection of the comparator group is not a threshold issue that, once decided, can be put aside. On the contrary, each step in the s. 15(1) analysis proceeds "on the basis of a comparison". Indeed in many of the decided cases, the characteristics of the "comparator group" are only developed as the analysis proceeds, especially when considering the "contextual factors" relevant at the third stage, i.e., whether discrimination, as opposed to just a "distinction", has been established."

[125] I agree the proper comparator group is "persons who have resided in Nunavut for at least twelve months." However, this comparator group is not a historically disadvantaged group that suffers discrimination compared to the comparator group. The Supreme Court of Canada has held in *Haig, Siemens* and *Turpin* that residence is not an enumerated ground.

[126] Residence is not an analogous ground because *Corbiere* is not applicable.

[127] Finally the appellant has failed to prove with evidence the law in question negatively affected his dignity.

(iii) Conclusion

[128] I conclude there was no breach of s. 15.

4. Do the provisions of the *Nunavut Elections Act*, which refer to the residence of a voter and therefore the residence of a candidate; that is, s. 4, 7 and 11, contravene s. 35(3) of the *Constitution Act*, 1982, by failing to include an Inuk under Article 35 of the Agreement Between the Inuit of the Nunavut Settlement area and Her Majesty the Queen (the "Nunavut Land Claim Agreement"), as ratified by the *Nunavut Land Claim Agreement Act*, S. C. 1993, c. 29?

(i) Arguments

Appellant

[129] The appellant argues the residency rules under the *Act* conflict with sections of the NLCA that provide voting rights to any Inuit beneficiary. He argues the Assembly's limit of his voting rights infringes s. 35(3).

Respondents and Intervener

[130] The respondents and intervener both rely on article 4.1.3 of the NLCA to argue that s. 35 does not apply to the *Act*. Voting rights for Inuit beneficiaries in NLCA matters is not contingent with voting rights in the public government of Nunavut.

[131] The A.G. also argues the appellant has failed to provide the following as established in *R. v. Sparrow,* [1990] 1 S.C.R. 1075, 3 C.N.L.R. 160, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14, *R. v. Badger,* [1996] 1 S.C.R. 771, 2 C.N.L.R. 77, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69, [2005] 3 S.C.R. 388:

(a) evidence of an existing aboriginal right;
(b) evidence of the continuity of that right over time;
(c) evidence of the precise nature of the aboriginal or treaty right claimed;
(d) evidence of a *prima facie* infringement of the right; and
(e) evidence of the integral significance of the right to Inuit society.

(ii) Analysis

[132] Section 35 of the *Constitution Act, 1982* states:

> *"35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*
>
> *Definition of "aboriginal peoples of Canada"*
>
> *(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.*
>
> *Land claims agreements*
>
> *(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired."*

[133] Section 35 protects aboriginal rights existing in 1982 that have not been extinguished, as held in *Sparrow* at 1091:

> "The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982.* A number of courts have taken the position that "existing"' means being in actuality in 1982."

[134] Section 35 protects Inuit rights flowing from the NLCA against inconsistent actions or legislation of the governments of Canada or Nunavut. Neither can infringe the rights granted by the NLCA. However, to prove a s. 35 right, the appellant must comply with the requirements of *Sparrow* and *Delgamuukw*. There is no evidence before me that voting in a public government is an Inuit right that has existed over time and is of integral significance to Inuit society.

[135] The appellant is again confusing his rights to vote and participate in the institutions arising out of the NLCA and the right to vote and be a candidate in the Legislative Assembly of Nunavut. The NLCA vests in Inuit beneficiaries the right to vote, be a candidate and receive the financial dividends flowing from the agreement. The Government of Canada also agreed to create a new territory for the benefit of all residents of Nunavut. While the NLCA is a land claims agreement within s. 35, the public government flowing from it is not. As stated in article 4.1.3 of the NLCA:

> "Neither the said political accord nor any legislation enacted pursuant to the political accord shall accompany or form part of this Agreement or any legislation ratifying this Agreement. Neither the said political accord nor anything in the legislation enacted pursuant to the political accord is intended to be a land claims agreement or treaty right within the meaning of Section 35 of the *Constitution Act, 1982*."

(iii) Conclusion

[136] I conclude there was no breach of s. 35.

[137] The application is dismissed with costs to be spoken to if necessary.

Dated at the City of Iqaluit this 5th day of November, 2008

Mr. Justice Earl D. Johnson
Nunavut Court of Justice