January 19, 2015

First Nations Community Election Codes and the Charter

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Case Commented On: *Orr v Peerless Trout First Nation*, 2015 ABQB 5

In December Jonnette Watson Hamilton and I wrote a post commenting on *Taypotat v Taypotat,* 2012 FC 1036; rev'd 2013 FCA 192; leave to appeal granted 2013 CanLII 83791 (SCC), a case currently before the Supreme Court which involves the constitutionality of a First Nations election code. A similar case arose in Alberta recently. In *Orr v Peerless Trout First Nation*, 2015 ABQB 5, Master L.A. Smart dismissed a claim by a member of the Peerless Trout First Nation alleging that that Nation's Customary Election Regulations were unconstitutional.

Peerless Trout First Nation (PTFN) is described as "a self-governed First Nation in the Treaty 8 Territory of Northern Alberta" (at para 4). Section 74(1) of the *Indian Act*, RSC1951, c 29 empowers the Minister of Indian Affairs and Northern Development to permit a First Nation to develop its own election code for the purposes of electing the Chief and members of Band Council. The PTFN has adopted an election code, the Customary Election Regulations, the relevant provisions of which are as follows:

> 9.3 Electors Eligible for Nomination
>
> (a) All Electors must be 18 years of age or older.
>
> (b) Any Elector convicted of an unpardonable indictable offence or who is charged with an indictable criminal offence at the time of Nomination is not eligible to be Nominated.
>
> (c) Any Elector who is a Plaintiff in a civil action against the PTFN is not eligible to be Nominated.
>
> (d) Electors employed by the PTFN or a PTFN Business Entity are not eligible to be Nominated.

Master Smart noted that *Taypotat* had decided that First Nation election codes are subject to the *Charter* (2013 FCA 192 at paras 34-42). In *Taypotat*, the Federal Court of Appeal considered the application section of the *Charter*, section 32, which provides that the *Charter* applies "(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament…; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." The Federal Court acknowledged that a First Nation

is "clearly a *sui generis* government entity", yet it "exercises government authority within the sphere of federal jurisdiction under the *Indian Act* and other federal legislation" (*Taypotat* at para 36). The Supreme Court had previously held that First Nations elections are subject to the *Charter* (see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203), and although the *Charter* must be interpreted so as not to "abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" (see section 25 of the *Charter*), there were no aboriginal or treaty rights at issue in *Taypotat* (at paras 37, 42). For these reasons, the *Charter* was found to apply to the First Nations election code at issue in *Taypotat*. Master Smart did not review these reasons in the specific factual context of the PTFN election code, and simply adopted the holding from *Taypotat* that the *Charter* applied.

Orr's argument was that section 9.3(c) of the Customary Election Regulations – which makes any elector who is a plaintiff in a civil action against the PTFN ineligible to be nominated as a candidate for election – violated several sections of the *Charter*. Master Smart dismissed each of these arguments in turn.

Orr's first argument was that section 9.3(c) of the Customary Election Regulations violated section 2(b) of the *Charter*, which protects freedom of expression. The specifics of this argument were not clear, but Master Smart relied (at para 13) on *Baier v Alberta*, [2007] 2 SCR 673, 2007 SCC 31, which decided that although a prohibition against school employees standing for election as school trustees may have limited access to a platform for expression, it did not violate section 2(b) of the *Charter*. Section 2(b) generally protects against government interference with expression rather than providing a positive right to particular methods or locations for expression, and was therefore not engaged here.

Second, Orr argued that section 9.3(c) of the Customary Election Regulations infringed section 2(d) of the *Charter*, which protects freedom of association. Violations of section 2(d) turn on whether "the state [has] precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals?" (at para 14, citing *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016, 2001 SCC 94 at para 16). Noting that Orr had not provided the specifics of this argument either, Justice Smart dismissed the claim on the basis that the restriction on eligibility to stand for election did not interfere with Orr's "ability to establish, belong to [or] maintain an association" (at para 16).

Orr's third argument – that section 9.3(c) of the Customary Election Regulations violated section 3 of the *Charter* – was also dismissed. Section 3 protects democratic rights, but has previously been found to apply only to federal and provincial elections (*Haig v Canada*, [1993] 2 SCR 995, 1993 CanLII 58 (SCC)), and not to band council elections (*Crow v Blood Band*, [1996] FCJ No 119 at para 23). A similar dismissal of section 3 *Charter* arguments occurred in *Taypotat* (at paras 27-29).

More attention was devoted to Orr's fourth argument – that section 9.3(c) of the Customary Election Regulations was discriminatory, contrary to section 15(1) of the *Charter* – perhaps because section 15 was also the focus of *Taypotat*. Master Smart noted that the discrimination argument was successful in *Taypotat* on the grounds that the grade 12 education requirement at issue in that case was found to create an adverse impact on the claimant and others based on age and aboriginality-residence. Age is a ground expressly protected under section 15(1) of the *Charter*, and aboriginality-residence qualifies as an analogous ground pursuant to the Supreme

Court decision in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC). In Orr's case, however, being a plaintiff in a civil action against the PTFN did not relate to any enumerated grounds protected under section 15(1), nor did it constitute an analogous ground, which includes only personal characteristics that are "immutable or changeable only at unacceptable cost to personal identity" (*Corbiere* at p219, cited in *Orr* at para 20). Master Smart also found that the restriction on election eligibility in section 9.3(c) of the Customary Election Regulations was not discriminatory – it did not perpetuate any "pre-existing disadvantage, vulnerability, stereotype or prejudice suffered by the Applicant which might support a finding of discrimination" (at para 22).

Finally, Master Smart dismissed Orr's argument that section 9.3(c) of the Customary Election Regulations infringed the protection of aboriginal and treaty rights under section 35 of the *Constitution Act, 1982,* noting that the argument was without basis (at para 24).

We argued in our post on *Taypotat* that there are some strong arguments that the community election code at issue in that case does infringe section 15(1) of the *Charter*. Even if the Supreme Court upholds the Federal Court of Appeal decision in *Taypotat*, however, the arguments made by Orr under section 15(1) are weak in light of the requirement of proving a distinction based on a protected ground that results in discrimination. Orr's other constitutional arguments were similarly weak, and Master Smart's decision to dismiss the claim was a sound one.