SUPREME COURT OF YUKON

Citation: *Frost v Blake*,
2021 YKSC 41

Date: 20210805
S.C. No. 21-A0013
Registry: Whitehorse

BETWEEN:

PAULINE FROST

PETITIONER

AND

ANNIE BLAKE AND H. MAXWELL HARVEY,
CHIEF ELECTORAL OFFICER OF THE YUKON TERRITORY

RESPONDENTS

AND

CHRISTOPHER RUSSELL SCHAFER

INTERVENOR

Before Chief Justice S.M. Duncan

Counsel for the petitioner	James R. Tucker and Luke S. Faught
Counsel for the respondent, Annie Blake	Shaunagh Stikeman
Counsel for the respondent, H. Maxwell Harvey, Chief Electoral Officer of the Yukon Territory	Mark E. Wallace
Counsel for the intervenor (written submissions only)	Vincent Larochelle

REASONS FOR DECISION

Introduction

[1] This case requires a balancing of the two main objectives of elections legislation: first, the encouragement of enfranchisement among qualified voters, and second, the

upholding of procedural safeguards that help protect the integrity of the election process and the confidence of the voters. The petitioner says the erroneous interpretation and application of the statutory requirements for residence and the cumulative effect of policy and administrative errors by elections officials are sufficient to support a court declaration that the April 12, 2021 election in the Vuntut Gwitchin electoral district is invalid and the office is vacant.

[2] The question in this case is whether Christopher Schafer, who was incarcerated in the Whitehorse Correctional Centre ("WCC") when he voted in the April 12, 2021 Yukon general election, was entitled to have his vote counted in the electoral district of Vuntut Gwitchin, by virtue of the inter-district special ballot process conducted by Elections Yukon officials. The petitioner must prove on a balance of probabilities that Christopher Schafer's vote was invalid.

Background

[3] This application is brought by Pauline Frost, the petitioner, under s. 356 of the *Elections Act*, RSY 2002, c.63, (the "*Act*") challenging the election results in the electoral district of Vuntut Gwitchin. It is the most northern electoral district in the Yukon and includes the only Yukon fly-in community of Old Crow. With a population of approximately 300, and 206 registered voters, it is the smallest electoral district in the Yukon. There is one polling division.

[4] In the April 2021 election, there were two candidates in Vuntut Gwitchin: Pauline Frost for the Yukon Liberal Party and Annie Blake for the New Democratic Party. They each received 78 votes. This tie vote was confirmed by judicial recount on April 19. As required by the *Act*, a draw was immediately held. Annie Blake's name was drawn and

she was declared elected as the Member of the Legislative Assembly for the Vuntut Gwitchin electoral district.

[5] Pauline Frost initiated this application by way of petition on April 22, 2021 on the ground that the *Act* was not complied with. She initially alleged the votes of two people should not have been counted because they did not meet the residency or identification requirements in the *Act*. At the outset of the hearing, counsel for Pauline Frost advised the Court they were abandoning the ground of the entitlement to vote of Serena Schafer-Scheper. The only vote objected to by the petitioner is that of Christopher Schafer.

[6] Christopher Schafer is 44 years old and a citizen of Vuntut Gwitchin First Nation. He was born and raised in Old Crow. Since approximately 1999, he has been incarcerated in British Columbia or the Yukon, or under a long-term supervision order, or subject to conditions affecting his activities and residence under the *Criminal Code*, RSC, 1985, c C-46. He has returned to Old Crow only once since 1999.

[7] When the writ for the April 2021 Yukon general election was issued on March 12, 2021, Christopher Schafer was incarcerated in the WCC.

[8] Through a process set out in the statute and policy, Christopher Schafer made application for and was issued an inter-district special ballot allowing him to vote in the Vuntut Gwitchin electoral district, while he was in WCC. He submitted the completed special ballot and his vote was counted. He remains in WCC as of the date of hearing this petition.

Summary of Positions of the Parties

[9] The petitioner objects to Christopher Schafer's vote for two main reasons – his failure to establish residency in the Vuntut Gwitchin electoral district; and his failure to provide proper, authorized identification and evidence of residency, leading to an improper issuance and acceptance of an inter-district special ballot by the elections officials.

[10] The petitioner's first argument is that through his conduct, Christopher Schafer has demonstrated an intention to reside in Whitehorse and not Old Crow, and should not have been entitled to vote in the Vuntut Gwitchin electoral district.

[11] The petitioner's second argument challenges the policy of Elections Yukon to determine residence of inmates; and lists specific actions taken by elections officials to show they did not follow the required processes and comply with the *Act* in issuing Christopher Schafer an inter-district special ballot and in failing to reject it as invalid for lack of authorized identification. One of the specific actions of the elections officials was the alleged failure of the chief electoral officer, Maxwell Harvey, to respond appropriately to a letter sent three days before election day from counsel for the Yukon Liberal Party. The letter requested that Christopher Schafer's vote be set aside pending an investigation into whether he was eligible to vote in the Vuntut Gwitchin electoral district.

[12] The petitioner says the cumulative effect of these errors amounted to non-compliance with the *Act* sufficient to result in a declaration that the election in the Vuntut Gwitchin electoral district was invalid and the office is vacant. These actions cannot be

saved by showing good faith or that they did not have a material effect on the election (s. 362(3) of the *Act*).

[13] The respondents Annie Blake and Maxwell Harvey say there is sufficient evidence of Christopher Schafer's intention to be a resident of Old Crow for the purpose of the *Act*. The policy of Elections Yukon to determine residence of inmates is appropriate and does not contradict the *Act*. The respondents deny the election was not conducted in accordance with the *Act*. Even if it was, the Court should not declare the election to be invalid and the office vacant, because there is no evidence that the election was conducted in bad faith and any non-compliance with the *Act* did not materially affect the result – that is, it did not result in Christopher Schafer voting when he should not have.

[14] The intervenor Christopher Schafer notes in his written submissions that the issues in this case, especially the interpretation of residence in the *Act*, need to be resolved in a way that appreciates the reality of incarcerated Indigenous individuals. The concepts of time-including the meaning of permanent and temporary, home, and intention, must be considered in the context of the reality of an individual living under compulsion in a place that is not their choice of residence. For those individuals, correctional institutions, halfway houses, treatment centres and court-ordered living situations are temporary. The intervenor says the policy of Elections Yukon to determine residence for voting by inmates appropriately recognizes these realities.

Brief Conclusion

[15] The petitioner has not established on a balance of probabilities that Christopher Schafer voted in the electoral district of Vuntut Gwitchin when he was not entitled to do

so. He was properly found to be a resident of Old Crow by the returning officer for the purpose of the *Act.* The actions of the elections officials in determining his ability to vote and allowing him to vote did not amount to breaches of procedures in the *Act* designed to establish his entitlement to vote. Even if they did, they were done in good faith and they did not materially affect the result of the election.

Legal Principles

General

[16] A citizen's right to vote is enshrined in s. 3 of the *Canadian Charter of Rights and Freedoms*:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[17] The Supreme Court of Canada decided in *Sauvé v Canada (Chief Electoral Officer),* 2002 SCC 68 that statutory disqualification of incarcerated people from voting was unconstitutional. In that decision the court wrote:

> … The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense (para. 9).

[18] The core legal principles governing elections challenges were expressed by the Supreme Court of Canada in *Opitz v Wrzesnewskyj*, 2012 SCC 55 ("*Opitz*"). They are:

(a) A primary object of elections statutes is to facilitate the ability to vote of qualified people. Any provisions that deny the right to vote must be interpreted restrictively and meet a stringent justification standard. Any

ambiguous provisions must be interpreted in a way that encourages enfranchisement (paras. 35, 37).

(b) Another object of elections statutes is to protect the integrity of the elections process. Procedural safeguards established by legislation serve this purpose:

> … The same procedures that enable entitled voters to cast their ballots also serve the purpose of preventing those not entitled from casting ballots. These safeguards address the potential for fraud, corruption and illegal practices, and the public's perception of the integrity of the electoral process. (See *Henry*, at paras. 305-6). Fair and consistent observance of the statutory safeguards serves to enhance the public's faith and confidence in fair elections and in the government itself, both of which are essential to an effective democracy: [citation omitted] (para. 38).

(c) Procedural safeguards should not be treated as ends in themselves. They should be treated as a means of ensuring that only those who have the right to vote may do so (para. 34).

(d) By striving to improve enfranchisement of voters, the electoral system must necessarily accept some uncertainty and inaccuracy:

> … Election officials are unable to determine with absolute accuracy who is entitled to vote. Poll clerks do not take fingerprints to establish identity. A voter can establish Canadian citizenship verbally, by oath. The goal of accessibility can only be achieved if we are prepared to accept some degree of uncertainty that all who voted were entitled to do so.
>
> The practical realities of election administration are such that imperfections in the conduct of elections are inevitable. … (paras. 45-46).

(e) Remedies in elections statutes for the restoration of accuracy, legitimacy, fairness include the ability of electors to challenge the validity of elections

> in court. Courts must not demand perfect certainty or overturn elections lightly, but focus on the integrity of the electoral system (para. 50).

[19] The court in *Opitz* assessed the two approaches arising in the jurisprudence considering elections litigation. The first was the procedural approach in which all votes cast pursuant to an illegal procedure were held to be invalid because the failure to comply with a procedural step towards determining entitlement was considered to affect the result of the election directly. This approach was rejected by the Supreme Court of Canada because it:

> … places a premium on form over substance, and relegates to the back burner the *Charter* right to vote and the enfranchising objective of the Act. It also runs the risk of enlarging the margin of litigation, and is contrary to the principle that elections should not be lightly overturned, especially where neither candidates nor voters have engaged in any wrongdoing. … (para. 56).

The risk of this approach is that an election could be overturned even where the result reflects the will of the electors with the right to vote.

[20] The substantive approach was described in *Opitz* as emphasizing the substantive right of the elector to vote.

> On this approach, a judge should look at the whole of the evidence, with a view to determining whether a person who was not entitled to vote, voted (para. 57).

The substantive approach was adopted by the Supreme Court of Canada.

[21] There are two steps to the substantive approach. First, the petitioner must prove on a balance of probabilities that there was an irregularity, that is, a breach of a statutory provision designed to establish a person's entitlement to vote. Second, the

petitioner must demonstrate that the irregularity affected the result of the election, that is, someone who was not entitled to vote, did vote (paras. 58-59).

[22] Thus, even if a petitioner successfully makes a *prima facie* case that an irregularity occurred, this does not necessarily mean that the votes in issue should be set aside and not counted:

> Under our approach, an applicant who has led evidence from which an irregularity could be found will have met his or her *prima facie* evidentiary burden. At that point, the respondent runs the risk of having the votes in issue set aside, unless he or she can adduce or point to evidence from which it may reasonably be inferred that no irregularity occurred, or that despite that irregularity, the votes in question were nevertheless valid. … (para. 61).

[23] The role of the court after reviewing the evidence is to decide:

> … focusing on substance rather than form, whether the applicant has met his or her burden of establishing on a balance of probabilities that someone who voted was not entitled to do so. If the court is not so satisfied, then the applicant has failed to meet his or her onus (para. 62).

[24] Unlike the *Canada Elections Act*, S.C. 2000, c. 9*,* the *Act* in the Yukon does not use the word “irregularity” in describing a breach of a statutory provision. Instead, it uses the phrase “not conducted in accordance with this Act” (s. 357(1)(b)). This may allow for a broader range of conduct to be challenged. The principles of the substantive approach endorsed by the Supreme Court of Canada, including the two steps set out in *Opitz,* apply to the required analysis in this case: that is, on considering the whole of the evidence, did someone vote who was not entitled to do so.

Statutory provisions relating to election challenge, qualified elector, and residence

[25] An application such as this may be brought by a candidate or an elector in the electoral district where the election is being challenged on one of the following grounds:

(a) the candidate who was declared elected was not qualified to hold office at the time of the election; or

(b) the election was not conducted in accordance with the *Act* (s. 357).

[26] The powers of the Court on hearing such an application include declaring the election invalid and the office vacant (s. 362(2)(d)). However, the Court must not declare an election invalid only because the election was not conducted in accordance with the *Act*, if the Court is satisfied that the election was conducted in good faith and the non-compliance did not materially affect the result of the election – i.e. someone voted who should not have (s. 362(3)).

[27] A qualified voter is one who meets the requirements in s. 3:

(a) be or become resident in the polling division between the issue of the writ (March 12 in this case) and the close of polls on polling day (April 12 in this case);

(b) on polling day, have reached the age of 18 years;

(c) on polling day, be a Canadian citizen;

(d) on polling day, have been resident in the Yukon for the previous 12 months.

[28] Residence is a “person’s true, fixed, permanent home or habitation to which, whenever absent, the person has the intention of returning” (s. 6(1)).

[29] The rules for determining residence are:

> 6(2) …
>
> (a) a person's residence is not lost or changed by the person's temporary absence from the place in which it is established;
>
> (b) a person's residence in the Yukon is lost if the person leaves the Yukon with the intention of residing elsewhere;
>
> (c) the place where a person's family resides is considered to be the person's place of residence but if the person takes up residence or continues to reside at some other place with the intention of remaining there, the person is considered to be resident of that other place;
>
> (d) if a person sleeps in one place and has meals or is employed in another place, the residence of the person is where the person sleeps;
>
> (e) a person may change residence only with the intention of establishing a residence in another place;
>
> (f) a person may have only one residence at a time; and
>
> (g) while a person remains in the Yukon, the person is considered not to have lost a residence established in the Yukon until another is acquired.

I. Residence issue

Is Christopher Schafer a resident of the Vuntut Gwitchin electoral district?

[30] There is no dispute that before 1999 Christopher Schafer was a resident in Old Crow. The issue is whether he has lost that residence after 1999 through his own conduct, resulting in his inability to vote in that electoral district.

[31] The relevant statutory provisions are set out above at paras. 27-29. I will first set out the positions of the parties on this issue in more detail, and then provide my analysis of the law and evidence in this case to support my conclusion.

Positions of Parties on Residence Issue

[32] The petitioner relies on the following facts about Christopher Schafer in support of their argument that he is no longer a resident of Old Crow:

(a) he has not lived in Old Crow since 1999;

(b) he had a three-year on-and-off relationship with a woman in Whitehorse who lives at 39 Rhine Way;

(c) he has his mail delivered to a Whitehorse address;

(d) he has continued to demonstrate a pattern of choosing to reside in Whitehorse by: i) making no attempt to return to Old Crow during his seven or eight days of release from prison without conditions; ii) not applying for bail while currently awaiting trial; and

(e) he has not kept himself informed of any of the political circumstances in Old Crow.

[33] Although temporary absence is not defined in the *Act*, the petitioner argues that Christopher Schafer's absence of 22 years from Old Crow is not temporary. The protection provided by s. 6(2)(a) from loss or change of residence by a temporary absence does not apply. The petitioner argues that loss of residence can occur without intent: the fact of a prolonged absence is sufficient.

[34] The petitioner argues that Christopher Schafer's failure to make arrangements to return to Old Crow before, or on his release without conditions from WCC on three

occasions, along with his ties to the community of Whitehorse through his now ex-girlfriend, and his Whitehorse mailing address show his intention to make Whitehorse his residence, and not Old Crow. The petitioner relies on Christopher Schafer's statement made in sentencing proceedings on March 23, 2020:

> Old Crow will always be Old Crow. I don't think I'll ever live there. I'll visit them, but I wouldn't live there.

[35] The petitioner says one of the purposes of the *Act* is to ensure voters are properly informed of the issues in a particular electoral district through a sufficient connection to the district in which they will vote. This includes passing judgment on an incumbent candidate. Christopher Schafer's absence from the Vuntut Gwitchin electoral district for the last 22 years undermines this purpose if his vote is permitted to count.

[36] The petitioner says the facts here are distinguishable from those in *Olson v Ontario* (1992), 12 CRR (2d) 120 (Ont GD) ("*Olson*"), where the court found that Clifford Olson was still a resident of British Columbia while he was incarcerated in Ontario. He lived in British Columbia before his incarceration and was transferred by Corrections Canada to Kingston Penitentiary in Kingston, Ontario. The court rejected his argument that he had no ties with British Columbia, even though his family was estranged, he had no physical residence there, and he was not physically present there. The court decided he was in Ontario under compulsion and lacked the requisite intent to make Ontario his home.

[37] This case is different, according to the petitioner, because unlike Clifford Olson, who was never released from prison while in Ontario, Christopher Schafer has been released and had the opportunity to return to Old Crow on three occasions but chose not to do so. He is not entitled to rely on the presumption of residence in Old Crow that

was applied to Clifford Olson because he has not been in Whitehorse under compulsion for the entire period in question.

[38] The respondents argue that since 1999, Christopher Schafer has had eight days (revised to seven days during the hearing) on three occasions over the last year in which he was not incarcerated or under release conditions that prevented him from returning to Old Crow. The three occasions were May 13-18, 2020, August 31-September 4, 2020, and January 18-19, 2021.

[39] The respondents point to the evidence of Christopher Schafer, an admitted alcoholic and recovering drug addict, that during those days of unconditional release, he drank heavily. He stayed at the Yukon Inn for three nights, the Arrest Processing Unit at WCC for one night, his cousin's place for one night, and a friend's place for one night.

[40] The respondents note that he has consistently stated his intention to return to Old Crow to the presiding judges in the Territorial Court of Yukon and to other authorities, such as parole officers, police officers, and probation officers. For example, before his statutory release date of February 15, 2018, Christopher Schafer told his parole officer he intended to return to Old Crow; and he testified at his peace bond hearing in 2018:

> [M]y goal is to go home and live in the – get connected back with my culture and my way of life and live up in our – live up at our family cabin, 20 miles up the river. … Going back to Old Crow would be […] the best place for me, to go home.

Two Territorial Court judges in their decisions referenced these same intentions of Christopher Schafer to return to Old Crow (*R v Schafer*, 2018 YKTC 18 at paras. 34-36 and *R v Schafer*, 2019 YKTC 41 at paras. 31, 35, 42).

[41] The respondents and the intervenor in his written submissions note that this expressed intention was borne out by his actions in March 2018 and March 2019. Christopher Schafer completed parole and the long-term supervision order on February 15, 2018. On March 2, 2018, he was arrested at the Whitehorse Airport on his way to Old Crow because of an application under s. 810.2 of the *Code* for a peace bond. He was released on bail and required to stay in Whitehorse until the hearing. At the May 10, 2018 peace bond hearing, he was placed on a peace bond with conditions for 24 months requiring him to comply with a nightly curfew and to reside as directed by his bail supervisor. His bail supervisor refused to allow him to reside in Old Crow.

[42] In breach of this condition, Christopher Schafer flew to Old Crow on March 12, 2019. He was arrested at the Old Crow airport and was permitted by the judge on a bail hearing the following day to remain in Old Crow for one more night. Chief Tizya-Tramm of Vuntut Gwitchin First Nation testified at the hearing. Christopher Schafer went with his parents to Goose Camp, a family hunting camp approximately 20 miles upstream of Old Crow on the Porcupine River. The next day he returned to Whitehorse as required by the court order.

[43] The respondent Annie Blake noted Christopher Schafer's evidence that during his brief visit to Old Crow in March 2019, Chief Tizya-Tramm advised him that there was no Vuntut Gwitchin banishment law preventing him from returning to Old Crow. However, the Chief advised Christopher Schafer that he should find some way to make amends with the community before attempting to come back. His sudden return caused distress among some members of the community as they were concerned he still posed

a threat. Christopher Schafer agreed that his return to Old Crow needed to be done properly.

[44] The respondent Annie Blake also argues that *Olson* is not distinguishable from this case. With the exception of seven or eight days, Christopher Schafer has been away from Old Crow in the last 22 years under compulsion. He has not formed the intention to make Whitehorse his residence. His long-standing intention to return to Old Crow is rooted in his identity as a Vuntut Gwitchin citizen, his connection with the land and family members there, and his desire to live a traditional lifestyle as part of his healing process.

Analysis

[45] On review of the law and evidence in this matter, I agree with the respondents that Christopher Schafer's residence for the purpose of the *Act* is Old Crow.

[46] The determination of residency under the *Act* is a fact-based inquiry. The rules for residency focus on the intention of the voter. Some helpful cases provided by counsel are about candidates fulfilling the residency requirements before they can run for office in a province or territory. The cases remain applicable here because those requirements are the same for voters and candidates. The importance of a factual inquiry to determine intention is emphasized. Prolonged absences from home on their own are not sufficient to override a demonstrated intention to return.

[47] In *Fells v Spence*, [1984] NWTR 123, a candidate for an electoral district in Yellowknife had moved in and out of the Northwest Territories for education and work over a period of many years. He moved initially from Ontario to Yellowknife when he was 10 years old, attended boarding school during high school in Saskatchewan, and

attended university in Ontario. While at school, he returned to the Northwest Territories every summer to work. While at university in Kingston, Ontario, he ran unsuccessfully for mayor of Kingston. After university and six months working in Yellowknife, he spent a year travelling around Europe and then returned to the Northwest Territories for work for approximately one year. He then moved to Ottawa for work, but returned frequently to the Northwest Territories and kept many of his belongings in his parents' or sister's home there. He maintained a Northwest Territories driver's licence and filed income tax returns as a resident of Northwest Territories. He testified that his intention was always to return to Yellowknife, and he was involved in managing several political campaigns there. The court found he was a resident of the Northwest Territories because:

> … [N]o matter where he was, [he] was a northerner. … He went out and he always came back (para. 36).

The Northwest Territories was the place to which he intended to return when away – that was his home and residence (para. 41).

[48] Similarly, in *Tenold v Chapman* (1981), 9 Sask R 278 (Sask QB), the candidacy of Ralph Goodale in a provincial election was challenged on the basis of his residency. Ralph Goodale was born and raised near Wilcox, Saskatchewan. Shortly after qualifying as a lawyer in 1973, he began working for the Minister of Justice in Ottawa. He became a Member of Parliament for a Saskatchewan riding in 1974, until he was defeated in the 1979 federal election. He returned to his parents' home in Saskatchewan but soon left to pursue employment with a Senator in Ottawa. He ran again as a candidate in Saskatchewan in the 1980 federal election, was defeated, and returned to Ottawa to work for another Senator. Later in 1980 he tried unsuccessfully to be elected in the Saskatchewan provincial election. The court found after considering all of the facts that

from 1979 onwards Ralph Goodale was not a visitor to Saskatchewan. He was active in politics and periodically accepted temporary employment with Ottawa politicians to stay in the political picture. The court said he did not choose Ottawa for his residence, other than to work there for political purposes. His strong connection to Saskatchewan, combined with the absence of evidence that he intended to make Ottawa his residence, was sufficient for the court to find he was a Saskatchewan resident, even in the face of his work in Ottawa for almost seven years, and his rental of an apartment in Ottawa where he kept half of his clothing and personal effects, his Ontario health insurance coverage, his Ontario automobile licence registration.

[49] In *Re: an Election in St. John's South, Newfoundland* (1959), 22 DLR (2d) 288 (NLSC), for four years preceding the election, the candidate, who was born and raised in St. John's, Newfoundland, had been moving between United States Air Force bases inside and outside of Canada, as a civilian employee of the United States Air Force. The year before the election, he travelled to Europe for four months, spent six months in Ottawa working for the Air Force, and two months immediately preceding the election returned to St. John's, Newfoundland, where he lived in hotels. The court found that he was resident in Newfoundland for those 12 months preceding the election, as required by the statute, because he testified he had always intended to return to his hometown. The court held that this was a factual determination that turned on his intent about residence, again in the context of an almost four-year absence.

[50] Here, the facts supporting Christopher Schafer's residence in Old Crow are similar to and even stronger than those in the precedents cited above. He has consistently expressed his intention to return to Old Crow. His one statement at the

sentencing hearing in 2019 that he would not return to Old Crow to live is outweighed by the numerous other statements he made to the contrary, to various third parties in the justice system, and in his affidavits filed for this application. He remains a citizen of Vuntut Gwitchin First Nation, and through his First Nation identity has ties to the land in the traditional territory. The petitioner does not argue that the Vuntut Gwitchin First Nation has a banishment law, preventing him from returning. He did return to Old Crow, in breach of his conditions in March 2019. He has expressed a plan to live a traditional lifestyle at Goose Camp, his grandfather's hunting camp, with the support of his parents and daughter in Old Crow, in the hope that it will help him heal from his addiction issues. He calls and considers Old Crow home.

[51] Unlike the petitioner, I find this case is similar to the decision in *Olson*. Christopher Schafer has not established the intention to make anywhere other than Old Crow his residence. He has been outside of Old Crow since 1999 under compulsion. His move to Whitehorse (and British Columbia) was made without the requisite intent to make a permanent home there.

> A person physically present in a particular location by reason of legal or physical compulsion is in a different situation from a person who can freely choose where to live and the jurisprudence has recognized this difference (*Olson* at para. 16).

In such cases, a presumption exists that residence at the time of incarceration continues (*Olson* at para. 26). Applying this presumption in this case supports Old Crow as his residence as he lived there before his incarceration in 1999.

[52] The fact that Christopher Schafer did not leave Whitehorse during those seven or eight days he was released without any conditions limiting his movements is insufficient

evidence to show that he had the intention of making Whitehorse his residence. It is unrealistic to expect anyone to organize themselves immediately upon release from prison within a few days to fly to the remote community of Old Crow to start a new life. Christopher Schafer's particular circumstances made it even more difficult. He is a vulnerable individual with addiction issues. His primary supports, his immediate family members, are in Old Crow, not Whitehorse. He knew based on the negative reaction of some people in Old Crow to his surprise return in 2019, he would have to make amends with the community before returning. This would involve meetings, apologies, his commitment to healing and his clear communication of future living arrangements. All of this would take time to organize and would also require him to be in a healthy state.

[53] As Judge Cozens said in *R v Schafer*, 2019 YKTC 41, during the hearing to vary the conditions of Christopher Schafer's peace bond:

> … his rehabilitation may best be effected through living "at home" [Old Crow] where his roots and supports are, however, he will not be allowed to do that, until he has shown that he has been sufficiently rehabilitated. And in the meantime he spends the majority of his time in custody, for being insufficiently rehabilitated to comply with the terms of the Recognizance. And there is the very real possibility that this entire scenario may be repeated in April/May 2020 when the current Recognizance expires.
>
> …
>
> … [Old Crow] is his home, and these are his people. In all likelihood, unless Mr. Schafer reoffends criminally in a significant manner, he will be returning there at some point… [paras. 35, 42]

[54] There is no circumstantial evidence that Christopher Schafer established a physical residence in Whitehorse. His WCC file, according to the evidence of Corrections Officer ("CO") Brendan Neal, notes he is of "no fixed address". Although

some of the informations filed by the RCMP list his address as 39 Rhine Way, he was adamant according to the returning officer David Milne and CO Neal that this was not and has never been his home. His ex-girlfriend lives there and his name was not on the lease. Although he slept there on occasion in the past, he and his girlfriend are estranged and there is a no-contact order between them.

[55] The other address listed on some of the informations is 1213 Centennial Street, Porter Creek. This was a temporary address he used for his peace bond and it was a place to sleep occasionally. His name was not on the lease.

[56] His use of a mailing address in Whitehorse was practical given the remote location of Old Crow. It does not on its own show his intention to reside in Whitehorse.

[57] Other places where Christopher Schafer stayed while released without conditions were clearly temporary – a motel, a friend's place, and the Arrest Processing Unit at WCC.

[58] Counsel for the respondent Annie Blake spoke with Christopher Schafer's criminal defence lawyer to address the petitioner's argument that his failure to apply for bail with a plan to return to Old Crow showed his intention to reside in Whitehorse. Contrary to the petitioner's submissions, the charges on which Christopher Schafer is currently being held place the onus on him to prove to the court that he should be released on bail, not on the Crown to show why he should be detained. Requests by Christopher Schafer to return to Old Crow while on bail or as part of other release conditions have been consistently refused. His criminal defence lawyer advises he intends to apply for bail after evidence is heard at the preliminary inquiry. In these

circumstances, Christopher Schafer's decision not to apply for bail with a plan to return to Old Crow is not an indicia of his intention to make Whitehorse his residence.

[59] The specific rules for residence set out in s. 6(2) of the *Act* [see para. 29 above] all include an element of intention. The petitioner's argument that residence can be "lost" under s. 6(2)(a) by a non-temporary absence that does not require intention ignores s. 6(2)(g). It states "while a person remains in the Yukon, the person is considered not to have lost a residence established in the Yukon until another is acquired." Intention to reside elsewhere in the Yukon and an acquisition of that residence must be shown before residence can be lost. In the absence of evidence of such intention, as the jurisprudence provides, and as s. 6(2)(c) sets out, the default residence is the family home. The place where a person's family resides is considered to be the person's place of residence, unless the person takes up residence or continues to reside somewhere else with the intention of remaining there.

[60] This focus on intention to establish a residence is in keeping with the jurisprudence described above. In those cases, the courts found the person maintained residency at the family home in their hometown despite absences for many years, because they had not demonstrated an intention to establish a residence elsewhere, and had shown an intention to return to their home.

[61] The petitioner's argument that a voter's knowledge of the issues and the incumbent in an electoral district by living there for a period of time is necessary to establish residence under the *Act* for the purpose of voting in that electoral district is diminished by the requirements in s. 3 of the *Act*. It provides that a voter may vote in a particular electoral district if they become resident there at any time before voting, even

the day of the election before the polls close, as long as they can demonstrate the intention to make that new electoral district their residence. While residence in the Yukon to gain knowledge of the issues may form part of the policy behind the 12-month residency in the Yukon qualification in s. 3, this is not part of the residency requirement to vote in a particular electoral district. In any event, there is no evidence one way or the other about the degree of Christopher Schafer's knowledge of the issues or the incumbent in the Vuntut Gwitchin electoral district.

[62] As noted in the intervenor written submissions, the notion of temporary absence in s. 6(2) of the *Act* must be interpreted in the context of the circumstances of an incarcerated Indigenous individual. In the absence of evidence to the contrary, an inmate's presence under compulsion in a correctional institution constitutes a temporary absence from their true home. Further, as noted by counsel for Annie Blake, and as provided in the affidavit evidence from elders in the community (Esau Schafer and Jane Montgomery), the passage of time does not lessen an Indigenous person's connection to the land which forms his identity as a First Nation citizen. An absence of 22 years, in these circumstances, can still be temporary, and in this case, I find that it is.

[63] Christopher Schafer's status as a Vuntut Gwitchin First Nation citizen; his connection with the land in the Vuntut Gwitchin electoral district through his identity as a Vuntut Gwitchin person; his clear intention to return to Old Crow to establish physical residence there and to use the land to help him heal; and an absence of intention to establish residence anywhere else, are all persuasive on the whole of the evidence that his residence for the purpose of the *Act* is Old Crow. Old Crow is his true home to which he has the intention of returning, when absent.

II. Policy inadequacy and administrative errors issue

Was the issuance and acceptance of an inter-district special ballot to Christopher Schafer allowing him to vote in the Vuntut Gwitchin electoral district done in accordance with the Act?

[64] The petitioner has challenged the Elections Yukon policy to determine residence of inmates and has alleged errors in the process used by the returning officer to determine that Christopher Schafer was entitled to vote in the Vuntut Gwitchin electoral district by inter-district special ballot. All but two of these alleged errors relate to the process of determining identification or residence. One of the two other allegations is that the returning officer at WCC failed to notify the returning officer for Vuntut Gwitchin as required by s. 105.02 of the *Act*. The second other allegation is that the chief electoral officer, Maxwell Harvey, failed to investigate or take proper steps when he received the letter from counsel for the Yukon Liberal Party expressing concerns about Christopher Schafer's vote and asking that it be separated and not counted, pending the resolution of the residency issue.

[65] I will first set out the statutory provisions that apply to the arguments raised by the petitioner. Then I will address each of the allegations set out in the supplementary outline of the petitioner at para. 2.

Statutory provisions relating to inter-district special ballots

[66] Special ballot is defined as "… a ballot paper, in prescribed form, on which an elector may write the name of a candidate or of a registered political party" (s. 97(1)).

[67] An elector who is qualified to vote at an election in an electoral district may vote by special ballot instead of voting at an advance poll or at a polling station on polling day. To obtain a special ballot under this section, an elector must apply to the returning

officer for the electoral district during the prescribed time, in person, in writing, by telephone, by email, or through any available online facility, or in a manner prescribed by regulation (s. 98).

[68] An elector in custody in a correctional institution in the Yukon may vote only by special ballot (s. 99.01(3)).

[69] An elector who is qualified to vote in a particular electoral district at a general election may vote in a different district under the inter-district voting section of the *Act* by inter-district special ballot if the elector:

> 105.02(1) …
>
> (a) would be eligible to vote by special ballot under section 98;
>
> (b) reasonably expects that they will be unable to obtain a special ballot from the returning officer for the particular electoral district and return it to the returning officer;
>
> (c) [repealed] [and]
>
> (d) presents authorized identification.

[70] The election officer who receives an elector's application under s. 98 (special ballot) to vote under the inter-district special ballot section (s. 105.02(1)) must:

> 105.02(2) …
>
> (a) notify the returning officer for the particular electoral district in which the elector is qualified to vote; and
>
> (b) if satisfied that the elector is eligible to vote under this section and has not already voted, give the elector a special ballot.
>
> (3) A special ballot given to an elector under this section is deemed to be a special ballot for the

> particular electoral district in which the elector is qualified to vote.

[71] All other provisions of the *Act* relating to special ballots apply to inter-district special ballots (s. 105.02(7)).

[72] An elector who has received a special ballot and wishes it to be counted must, after completing it, return it to the returning officer for the elector's electoral district and include authorized identification of the elector with the completed special ballot (s.104(1)). A special ballot that is returned without authorized identification of the elector is not valid and shall be rejected (s. 104(2)).

Statutory provisions related to authorized identification

[73] Authorized identification is defined in the *Act* as: "... any document, or any combination of documents, in respect of the person that is described in the list published by the chief electoral officer under section 5.01" (s. 1).

[74] The authority to create a list of allowable identification is s. 5.01. The list may include any document of any kind; may categorize documents in any manner; and may treat any combination of documents as equivalent to any other document or combination (s. 5.01(2)). The chief electoral officer is required to invite submissions from the public and from each registered political party, each member of the Legislative Assembly who is not a member of any party caucus, the Information and Privacy Commissioner and anyone else considered relevant, about the kinds of identification electors should be able to use for the purposes of the *Act*. After considering the submissions and with the approval of the Members' Services Board (an all-party Standing Committee responsible for all matters of financial and administrative policy affecting the Legislative Assembly) the chief electoral officer is required to publish on its

internet website a list of the kinds of identification that an elector may or must use. The list must be reviewed and updated in this same manner within six months after the return to the writ for each general election (s. 5.01(1)(2)).

[75] The chief electoral officer may institute alternative means by which electors who lack all the kinds of identification in the published list may identify themselves for the purposes of the *Act* (s. 5.01(3)). If alternative means are instituted, all statutory provisions referring to authorized identification apply to those alternative means, subject to any necessary modifications (s. 5.01(4)).

Statutory powers of chief electoral officer

[76] The chief electoral officer has the power to exercise general direction and supervision over the administrative conduct of elections and enforce on the part of all election officers fairness, impartiality and compliance with the provisions of the *Act*. If the chief electoral officer is of the opinion that the provisions of the *Act* are ineffective, as a result of any mistake, miscalculation, emergency or unusual or unforeseen circumstances, the chief electoral officer may extend the time for doing any act; increase the number of elections officers or polling stations; or otherwise adapt any of the provisions of the *Act* to the extent the chief electoral officer considers necessary to ensure the execution of the intent of the *Act* (s. 14).

[77] The *Act* contains offences applicable to voters and elections officials. It is an offence for anyone to swear a false declaration; or to make a statement they know is false in any form, certificate, statement, report or other document (s. 336(1)).

[78] Every election officer who fails or refuses to comply with any provision of the *Act* is guilty of an offence, unless they establish that the failure or refusal was committed in

good faith, that it was reasonable and that the officer had no intention of affecting the result of the election, permitting anyone to vote who the officer did not genuinely believe was qualified to vote, or preventing anyone from voting who the officer did not genuinely believe was not qualified to vote (s. 349).

Analysis

Did the policy guidelines of Elections Yukon to determine residence of WCC inmates satisfy requirements for special ballots? (2c of supplementary outline of petitioner)

[79] The *Act* is silent about how residence of inmates in WCC is determined for the purpose of voting. Elections Yukon has therefore introduced policy guidelines that mirror s. 251(2) of the *Canada Elections Act*. Many inmates serve their prison time in correctional institutions located in jurisdictions far away from their residence before incarceration. For good policy reasons, the *Canada Elections Act*, like elections statutes in other jurisdictions, has a process to determine the residency of each inmate for the purpose of voting. To require or allow them all to vote in the jurisdiction in which they are incarcerated not only disrespects the ties of the elector to the community with which they identify, but it could also have a disproportionate effect on the outcome of the election in the electoral district where the correctional institution is located.

[80] The policy guidelines established by Elections Yukon for determining the residence of an inmate set out questions for the inmate. The first place the inmate knows the civic and mailing address is the place where they are deemed to reside. The questions are:

(a) what was the inmate’s last residence before incarceration; or

(b) what was the residence of the spouse, common-law partner, relative or dependent of the elector; or of a relative of his or her spouse or common-law partner or a person with whom the elector would live if not incarcerated; or

(c) what was the place of his or her arrest; or

(d) what was the last court where the elector was convicted and sentenced?

[81] The petitioner argues these policy guidelines do not comply with the *Act* because they contain no requirement for the elector to provide identification or declaration, or for the returning officer to notify the returning officer in the electoral district where the elector plans to vote.

[82] The chief electoral officer in response attested that residence is to be determined by election officials in the registration process through identification of the elector, the address provided by the elector, and a signed declaration by the elector that the information is correct.

[83] The policy guidelines are not a substitute for the statutory requirements. They provide a mechanism for the returning officer to obtain the information about residence required by the statute. The questions are consistent with the jurisprudence (presumption of residence before incarceration – *Olson*) and the statute. They are to be read and implemented in combination with the statutory requirements for provision of identification and declaration, and for notification of the returning officer. They are not inconsistent with the *Act*.

[84] I find that the policy guidelines employed by Elections Yukon to determine residence of inmates are appropriate and do not contradict the statute.

Did the returning officer fail to follow the Elections Yukon policy for determining residence of inmates? (2d of supplementary outline of petitioner)

[85] The petitioner argues the returning officer David Milne who attended WCC did not implement the Elections Yukon policy properly because he did not obtain from Christopher Schafer his civic and mailing addresses before deciding he could vote in the Vuntut Gwitchin electoral district. The policy guidelines provide that the first of the questions asked to which the inmate knows a civic and mailing address is their deemed residence. In this case, the address provided by Christopher Schafer on the application form was neither a civic nor a mailing address.

[86] The evidence about determining Christopher Schafer's residence and address was provided by David Milne, CO Neal and Christopher Schafer.

[87] David Milne stated that Christopher Schafer did not give a clear response when asked where he lived. He mentioned a residence on Rhine Way in Whitehorse but was adamant he did not live there. When David Milne then asked where his home was, he said Old Crow.

[88] CO Neal's report, written on May 4 and May 9, 2021, more than one month after the interview, contained similar information: when Christopher Schafer was asked whether he had a Whitehorse address he said he did but that Old Crow was his home, his address was Old Crow, he did not live in Whitehorse permanently and he wanted to vote in Old Crow. CO Neal noted Christopher Schafer's address on the WCC inmate list was "no fixed address."

[89] Christopher Schafer attested that he told David Milne he had no fixed address before being incarcerated. He said that 39 Rhine Way was the home of his ex-girlfriend and he slept there from time to time, but he never considered it to be his home, he was

never on the lease, nor did he receive mail there. Old Crow, where his parents and daughter lived, was his true home and he intended to return there.

[90] The evidence is consistent that when asked where his home was, Christopher Schafer answered Old Crow. He identified some of his family members who lived in Old Crow and these names were confirmed from the Elections Yukon database of registered electors (Voter View). Based on this information, David Milne concluded Christopher Schafer could vote in the Vuntut Gwitchin electoral district.

[91] Christopher Schafer was not a previously registered voter. His name was not in Voter View. He completed a registration form special ballot application. The application was from WCC for an inter-district special ballot for the Vuntut Gwitchin electoral district. The civic address noted on the application form was “Old Crow, Y0B 1N0,” without a house number or box number. Along with this address, the application contained his full name, date of birth, gender, identification by attestation, and a declaration certifying he was a qualified voter.

[92] When David Milne decided Christopher Schafer could vote in the Vuntut Gwitchin electoral district, he had already checked the voter registry through Voter View and confirmed with Christopher Schafer the names of his family members who were listed as resident in Old Crow. The information provided by Christopher Schafer matched the information in Voter View.

[93] The address provided on Christopher Schafer’s application, completed immediately after he answered the questions from David Milne and CO Neal, was consistent with his answers and with the information in Voter View. It was sufficient to comply with the intention of the policy guidelines and the *Act*.

[94] The adequacy of a civic or mailing address needs to be considered in context. Here, consistent affidavit evidence about addresses in Old Crow was provided by Christopher Schafer's parents and other members of the community. Some, but not all, of the houses in Old Crow have numbers. For those that do, including the house of Christopher Schafer's parents, numbers were introduced approximately 15 years ago, after Christopher Schafer left Old Crow. Given the small population of Old Crow, the absence of civic addresses that exist in larger communities or cities is an unsurprising reality. The unusual fact of Christopher Schafer's absence from the community for 22 years explains why he did not know the number of his parents' house, as it did not exist when he left. He and his parents attested that their regular communication is by phone. Further, while the provision of a post office box number may have completed the mailing address, an address consisting of Old Crow and the postal code in such a small community is reasonable.

[95] The reality of the small population in the electoral district of Vuntut Gwitchin, combined with the verification of residential information of family members provided by Christopher Schafer through Voter View, makes David Milne's decision not a failure to implement the policy guidelines to determine inmate residence. His decision that Christopher Schafer could vote in the electoral district of Vuntut Gwitchin before he received a full civic and mailing address, and his acceptance of the partial address on the application form was appropriate in the context of Old Crow and Christopher Schafer's circumstances. This did not constitute a breach of any statutory provision. To decide otherwise would be to place a premium on form over substance, in the context of

enfranchisement of a voter, an approach specifically rejected by the Supreme Court of Canada.

Was the Letter of Attestation sufficient evidence of residence and identification? (ss. 2a, b, e, f(i), (ii), and h of supplementary outline of petitioner)

[96] There are two types of concerns raised by the petitioner about identification and residence. The first is that the letter of attestation completed by CO Neal, one of the documents used for identification and residence of Christopher Schafer, was insufficient and inadequate to establish either identification or residence. The petitioner argues that the letter of attestation is not a reliable method of determining residence of an elector; and it is inadequate on its own to fulfill the requirements for authorized identification. Another piece of identification is required.

[97] The second concern is about the improper actions of the returning officer, David Milne, resulting from the inadequate identification. The petitioner says the returning officer should not have issued or accepted Christopher Schafer's inter-district special ballot because he did not provide authorized identification required by s. 104 of the *Act*.

Letter of attestation reliable to determine residence and sufficient on its own for authorized identification (ss. 2a, b, f(i) and (ii))

[98] As noted above, the source of the chief electoral officer's ability to create a list of allowable identification, including a letter of attestation, is s. 5.01 of the *Act*. The list that was created after receiving submissions as required, and approval by the Members' Services Board in 2017 had four options for identification.

[99] Option 1 is government issued identification with examples set out in Section A such as a driver's licence or health card, containing the elector's name and current residential or mailing address.

[100] Option 2 allows for two pieces of identification satisfactory to the chief electoral officer, both of which must show the elector's name and one of which must show the elector's current residential or mailing address. Section B lists more than 45 types of documents, including a camping permit, a credit or debit card, a library card, a utility bill, lease agreement.

[101] At the end of the list of documents in Option 2, Section B, attestations are referenced. It is helpful to provide the precise wording:

> ATTESTATIONS OF IDENTITY AND ORDINARY RESIDENCE ARE AVAILABLE FOR ELECTORS WHO MAY BE UNABLE TO PROVIDE OTHER TYPES OF IDENTIFICATION, INCLUDING:
>
> - Care Centre Electors (issued by an authorized representative of a care centre)
> - Electors Without a Fixed Address (issued by an authorized representative of a facility that provides accommodation, meals or other services to the elector)
> - Hospitalized Electors (issued by an authorized representative of a hospital)
> - Incarcerated Electors (issued by an authorized representative of a correctional institution)
> - Tenant Electors (issued by an authorized representative of a property manager or owner)

[102] Option 3 allows an elector who is unable to provide authorized identification to appoint a vouching elector whose name appears on the list of electors for the electoral district.

[103] Option 4 allows an elector who is unable to provide authorized identification and does not appoint a vouching elector, to vote after completing a signed declaration of their name, current address and eligibility to vote.

[104] All of these options apply to electors voting by special ballot.

[105] There were two versions of this list submitted in evidence. One version did not include Option 4. I accept the evidence of Maxwell Harvey that the version appended as Exhibit A to his second affidavit is the complete version that was approved in 2017, including Option 4.

[106] The petitioner argues that the letter of attestation is unreliable for several reasons:

(a) there is no definition of "authorized representative" for each of the locations;

(b) it is not clear how that authorized representative would be able to verify or have knowledge of the residence of the proposed elector;

(c) the form itself contains no words amounting to an attestation, declaration or certification as to the identity or residence of anyone;

(d) section 5.01(2) of the *Act* refers to documents that already exist, not documents such as an attestation form created by or under the direction of the chief electoral officer; and

(e) as a result the letter of attestation is more properly a document under s. 5.01(3), an alternative means by which an elector may identify themselves for the purpose of the *Act*, and it is not a reliable for this purpose.

[107] The list of authorized identification approved by the Members' Services Board under s. 5.01 must be interpreted in the context of the objectives of the *Act* and the jurisprudence. As noted above, the two main purposes of elections statutes are to enfranchise all persons entitled to vote and to allow them to express their democratic

preferences, and to establish procedural safeguards to address the potential for fraud and illegal practices. The procedural safeguards, while important, must always be viewed as a means of ensuring those who have the right to vote may do so. That is the end served by the safeguards; they are not ends in themselves.

[108] The list of authorized identification "may include **any** document of **any** kind" [emphasis added]. The requirement of the chief electoral officer to consult on and update the list after each election provides a mechanism for ongoing responsiveness to the changing needs of the population.

[109] This section and the breadth of options available in the list and in the statute are consistent with an enfranchising approach, emphasizing the prevention of a barrier to voting due to a lack of documentation. As noted by Maxwell Harvey, his discussions with community leaders in support of his efforts to promote voter registration revealed challenges of registering certain electors. For example, those with no fixed address, living in temporary accommodation, in recreational vehicles, trailers or sheds, or on couches, can be missed during enumeration. Often obtaining identification or addresses can be challenging. Maxwell Harvey attested there were over 29,100 registered electors for the 2021 election, an increase from the 2016 election in which there were 24,688 registered electors. In his view there are likely several thousand more eligible electors who are not registered. The broad range of documents permitted by the list, including attestations, and the ability of the chief electoral officer to institute alternative means by which electors may identify themselves, assists more eligible voters to be registered.

[110] The failure to define authorized representative at a hospital, care home, prison or shelter and their potential lack of knowledge about an eligible elector's residence or

identity must again be considered in the context of the objective of enfranchisement in elections statutes and the wording of section 5.01. As stated by Maxwell Harvey, the elections system depends to a certain degree on the electors to be truthful, and typically this is not an issue. The attestation of an authorized representative may be based on some independent knowledge of the elector but can be based entirely on information provided by that elector to the authorized representative. Presumably if the authorized representative doubted the veracity of the information provided they would not sign the attestation, as this would put their personal integrity and their integrity at their place of employment at risk.

[111] This is an example of the balancing between the objective of enfranchising qualified electors and protecting the integrity of the democratic process. It allows people to vote, for example, who may be in hospital without their identification or proof of residence and in a different jurisdiction than their own electoral district. It allows inmates who are without identification to vote. It allows homeless people to vote. It allows people who are dependent in long term care homes to vote. The assistance of support workers in each of these situations provides a safeguard against fraud or dishonesty without creating a barrier towards enfranchisement. As noted in *Opitz*, a certain degree of uncertainty and inaccuracy is tolerated by the electoral system, in order to achieve the overriding goal of accessibility for eligible voters.

[112] Similarly, the absence of wording on the attestation form that may be construed as a declaration or certification does not nullify it for this purpose. The absence of formal wording does not negate its substantive effect.

[113] The inclusion of the document “attestation of identity and ordinary residence” on the approved list under s. 5.01 is consistent with the broad wording in that section – “any document of any kind”. This wording does not restrict allowable documents to pre-existing documents. Nor does it preclude the creation of a new document such as an attestation form by the chief electoral officer.

[114] The letter of attestation is not, as the petitioner suggests, more properly a document under s. 5.01(3); that is, an alternative means by which electors who lack all kinds of identification referred to in the list may identify themselves. A letter of attestation involves the signature of a third party in some kind of institutional setting or business relationship (landlord/tenant). An alternative means of identification under s. 5.01(3) is used where no third party or objective documentation is available to provide any information about the elector.

[115] The petitioner also argues that a letter of attestation must be submitted along with another piece of identification in order to satisfy the authorized identification definition. This argument is based on the location in which the reference to letter of attestation appears on the list. The petitioner says because it appears under Option 2, Section B, which states at the outset that two pieces of identification from the many documents in the list are necessary to constitute authorized identification, the letter of attestation on its own is not sufficient.

[116] The petitioner’s interpretation of the list of authorized identification to mean that a letter of attestation is only one of two documents required misunderstands the list and its purpose. The purpose of an attestation is clearly stated on the list itself – it is to be used when a proposed voter is unable to produce any of the many other types of

documents listed in Option 2. It is a substitute for those documents. Its placement on the list underneath the documents in Option 2 is not enough to support the interpretation that alone it is insufficient. Its placement there is convenient for the reader because it represents an alternative to the other documents listed in Option 2, Section B.

[117] Turning to the facts of this case, the petitioner says that the reliability problem of the attestation is illustrated by CO Neal's affidavit evidence that he was not attesting to Christopher Schafer's residence, but only his identification. The petitioner did not express concern about CO Neal's ability to identify Christopher Schafer, based on his employment duties at WCC. There was no suggestion that CO Neal did not know Christopher Schafer or had any doubt about identifying him. David Milne testified in his affidavit that his understanding from WCC was that CO Neal would be attesting to the residence of Christopher Schafer. This was supported by WCC providing CO Neal with a list of the inmate electors' addresses from their files, which included "no fixed address" for Christopher Schafer. CO Neal did not therefore have actual knowledge of Christopher Schafer's residence in Old Crow, even though he did sign the attestation of residency.

[118] Christopher Schafer's residence was determined through the questioning process undertaken by David Milne, using the policy guidelines described above. It was confirmed by Christopher Schafer's completion of two declarations – one in the application for inter-district special ballot, and one on the envelope for the special ballot. These declarations provided his name, his address of Old Crow, his qualifications to vote under s. 3 of the *Act*, and his signature.

[119] Declarations are provided for in Option 4 of the list of authorized identification prepared pursuant to s. 5.01 of the *Act.* Ss. 241-248 of the *Act* also refer to declarations. They are in a prescribed form for the purpose of identification and qualification of the voter. This is in keeping with the principle of maximizing accessibility to the vote. It is a last resort, to be used when no other documentation can be produced. As noted by the court in *Cusimano v Toronto (City)*, 2012 ONCA 907 at para. 54, quoting Dambrot J. in *Cusimano v Toronto (City)*, 2011 ONSC 7271 at para. 102:

> [R]elying on the declarations of voters that they are entitled to vote reinforces enfranchisement of our citizens and guards against disenfranchisement.

[120] The procedural safeguards against fraud or dishonesty when declarations are provided includes the offence sections: s. 336 of the *Act* makes it an offence to make a false declaration, and s. 335 of the *Act* makes it an offence to vote while knowingly not qualified to vote, or to apply to be included in a list of electors for a polling division without being resident in it. There is no evidence in this case of any basis to support prosecution under these sections.

[121] Not every fact situation can be addressed specifically by statute, the list of documents for authorized identification, and the policy guidelines. Flexibility is required to ensure the intent of the *Act* is fulfilled.

[122] As noted in *Opitz* at para. 37, quoting from the ancient but still relevant case of *Cawley v Branchflower* (1884), 1 BCR (Pt II) 35 (SC) at p. 37:

> The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with … **It looks to realities, not technicalities or mere formalities,** unless where forms are by law, especially criminal law, essential, or affect the subject-matter under dispute [emphasis added]

[123] And further in *Re Lincoln Election* (1876), 2 OAR 316 (Ont CA) at p. 323, the court stated:

> … The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise…

[124] The reality of Christopher Schafer's situation is that there is no suggestion that he is not who he says he is, or that he does not have strong ties to Old Crow – through his previous residence, his Vuntut Gwitchin First Nation citizenship and identity, and his family connections. There is no evidence of fraud, corruption or dishonesty. The concerns raised by the petitioner are procedural formalities, and these cannot override the realities in such a way as to deny Christopher Schafer the right to vote.

[125] The petitioner has said their position is not to deny Christopher Schafer the right to vote. They oppose his right to vote in the Vuntut Gwitchin electoral district but say he could vote in another electoral district. When asked during oral argument which electoral district was more suitable for him, counsel's answer was not clear. Alternatives suggested were "Whitehorse" without further specification, or WCC (i.e. Takhini-Kopper King).

[126] In contrast, counsel for both respondents noted that there was no other electoral district in which Christopher Schafer's intention to reside had been established on the evidence. The policy behind and jurisprudence under elections statutes are clear that the correctional institution where an inmate serves a sentence is not a residence for voting purposes.

[127] The letter of attestation of residence in this case signed by CO Neal who later stated he was not attesting to Christopher Schafer's residence was not a perfect document, given the apparent misunderstanding of CO Neal of its purpose. Similarly, the two declarations of identity and residence provided by Christopher Schafer are not the best evidence in a technical and formal sense, although they are fully authorized by the *Act.*

[128] Perfection and complete accuracy are not expected or required in the determination of a person's entitlement to vote. What is important is that the integrity of the electoral system is maintained. The procedural safeguards against dishonesty and fraud are the offence sections, the ability to bring applications such as this one and objections by scrutineers when the votes are being counted. There is no evidence here that Christopher Schafer engaged in any wrongdoing in providing the information that he did about his identity and residence. The actions of the elections officials in accepting the documents they did were in keeping with the primary purpose of elections statutes: to enfranchise qualified voters.

Issuance and acceptance of inter-district special ballot without authorized identification (s. 2e, and h)

[129] Christopher Schafer was qualified to vote in that he was over 18 years of age, a Canadian citizen, and resident in the Yukon for the previous 12 months. He was also properly found to be resident in the electoral district of Vuntut Gwitchin by the retuning officer. He was eligible for an inter-district special ballot because, as an inmate, the *Act* requires him to vote by special ballot; as an inmate in Whitehorse he could not have reasonably expected to receive a special ballot from Vuntut Gwitchin electoral district;

and he presented authorized identification in the form of attestation and the declarations.

[130] The above analysis answers the petitioner's concern about the returning officer issuing and accepting Christopher Schafer's inter-district special ballot. I have accepted that the returning officer interview of Christopher Schafer in the presence of and with the assistance of CO Neal, the Voter View verification of the Schafer family members' residence, the attestation of CO Neal as to his identity, and the declarations of Christopher Schafer were sufficient proof of his identification and residence. This conclusion is arrived at after a review of all the evidence, and an interpretation of the statutory requirements and their implementation in a way that facilitates enfranchisement of the voter. The returning officer David Milne did not err in issuing and accepting Christopher Schafer's inter-district special ballot on the basis of the documents and other information he provided.

Was notice of the issuance of the special ballot provided as required to the Vuntut Gwitchin returning officer? (s. 2g of the supplementary outline of petitioner)

[131] The question of whether notice, as required by statute, was provided by David Milne to the Vuntut Gwitchin returning officer necessitates an analysis of the statute and the current means of sharing information among elections officials in various electoral districts.

[132] Subsection 105.02(2) of the *Act* states that the elections official receiving an elector's application for special ballot must notify the returning officer in the electoral district in which the elector is qualified to vote, and if satisfied the elector is eligible to vote by inter-district special ballot and has not already voted, give the elector a special

ballot. The petitioner says this notification is a pre-condition to issuing a special ballot because of its purpose and how it appears in the statute. Notification is required to ensure the elector has not already voted and is eligible to vote. In effect, on the petitioner's interpretation, the returning officer in the other electoral district has an approval function.

[133] The respondent Maxwell Harvey disagrees that notification is a pre-condition to the issuance of a special ballot. The purpose of the notification is information sharing about the voter and the location of their vote, not to obtain approval. It is the returning officer's role to determine if the voter is eligible – they do not seek approval from another returning officer for that purpose. Once that is determined, the returning officer has no authority to refuse registration of the voter.

[134] Through Voter View, information entered into the database about registrations, special ballot monitoring and tracking, elector tracking and updates is immediately available to all elections officials in the Yukon. All returning officers have access to live elector information about the 29,100 registered voters, including who was registered in their district and if they had voted at an advance poll or by special ballot.

[135] In this case, David Milne knew from Voter View that Christopher Schafer was not a registered voter because his name was not in the database. From this information, it was clear he could not have already voted, as registration is a condition. Once his eligibility to vote was determined through the interview and his declaration on the application for an inter-district special ballot, and the ballot was issued to him, this information was immediately entered into Voter View. Even if the special ballot were not completed and returned, the voter is deemed to have voted and is not entitled to receive

another ballot. Unlike the process before Voter View, where notification to officials in other electoral districts could only be done by email or phone, the database entry was real-time and immediately accessible by all elections officials. The integrity of the electoral system is upheld and maintained through the procedural safeguard of Voter View which, among other things, prevents a voter from attempting to vote more than once.

[136] I agree with the respondent Maxwell Harvey that the notification requirement is not a pre-requisite to the issuance of a special ballot. There is no requirement to provide notice before issuing the ballot, since the purpose of the notification is for information sharing, not approval by another returning officer. Once the eligibility determination is made, the returning officer must register the voter and issue the ballot. In this case there was no concern that Christopher Schafer was voting more than once as he was not a registered voter before making application for inter-district special ballot to David Milne on April 1, 2021. Notification was achieved through Voter View.

Was the response by Maxwell Harvey to the April 9 letter from Yukon Liberal Party counsel appropriate? (s. 2i of the supplementary outline of the petitioner)

[137] The final argument to be addressed is whether Maxwell Harvey took appropriate steps after receiving the letter from Kyle Carruthers, legal counsel to the Yukon Liberal Party, on April 9, 2021, requesting Christopher Schafer's ballot be separated and not counted pending an investigation into and resolution of the matter of his residence in the Vuntut Gwitchin electoral district. The issue raised is the extent of the authority of the chief electoral officer to set aside a cast ballot and make necessary inquiries or take further steps such as commencing an investigation before the election because of a potential voting offence under s. 335 of the *Act*.

[138] The chief electoral officer is an independent officer of the Yukon legislative assembly responsible for all matters pertaining to the management of general elections and by-elections for members of the legislative assembly and of trustees of school boards and members of school councils. The chief electoral officer reports to the legislative assembly or the Members' Services Board. The chief electoral officer's duties are guided by s. 3 of the *Charter*.

[139] The reasons for the request in the letter from Kyle Carruthers were: Christopher Schafer was lawfully banished from the community of Old Crow several decades ago and was prohibited from entering the community; Christopher Schafer indicated his residence was Old Crow without further particulars (the Yukon Liberal Party was aware of this because Voter View allows each political party to access the voter registration list on a daily basis); and a March 17, 2018 CBC article reported he was residing in Whitehorse and was subject to restrictions on his movement.

[140] The petitioner argues that Maxwell Harvey failed to exercise his powers under s. 14 of the *Act* to adapt its provisions to the extent he considered necessary to ensure the execution and intent of the *Act*. The petitioner alleges that he erred by doing nothing in response to the letter, including failing to note it as an objection to the ballot cast. As a result he failed to ensure the execution and intent of the *Act*.

[141] The respondent Maxwell Harvey testified by affidavit to the following steps he took after receiving the letter:

(a) he acknowledged its receipt to counsel for the Yukon Liberal Party;

(b) he did a preliminary review which involved forwarding the letter to the Assistant Chief Electoral Officer, reading the CBC March 17, 2018 article,

reviewing the election offences sections of the *Act,* and considering next steps;

(c) he concluded after his preliminary review that it was not a simple or straightforward matter and would require a preliminary investigation before determining whether or not to hire an outside investigator;

(d) he concluded that this matter would take time to resolve and could not be accomplished before election day, which was three days away.

[142] Before Maxwell Harvey started a preliminary investigation, Pauline Frost filed this petition on April 22, 2021, three days after the drawing of lots resulted in Annie Blake's election.

[143] It is unfortunate that the preliminary steps and conclusions, and plans for next steps described by Maxwell Harvey in his evidence for this hearing were not communicated to Kyle Carruthers. Although this may not have satisfied the petitioner, it would have been respectful and transparent for Maxwell Harvey to have responded in more detail.

[144] However, there was no legal obligation on Maxwell Harvey to do anything more than he did. There is no legal authority for him to separate and not count a cast ballot pending the outcome of an investigation. If he had done this and the result of the investigation was that there was no breach of the *Act*, an elector would have been inappropriately denied their vote.

[145] In fact, the letter from Kyle Carruthers stating that Christopher Schafer had been banished from Old Crow and therefore not entitled to vote in that electoral district was inaccurate. Chief Tizya-Tramm confirmed to Christopher Schafer that the Vuntut

Gwitchin First Nation has no banishment law and he was not legally prohibited by the First Nation from returning to Old Crow. Counsel for the petitioner conceded at the hearing they were not pursuing the banishment law argument. The chief electoral officer's setting aside of Christopher Schafer's ballot on the basis of the acceptance of this allegation at face value would have been an error, leading to an improper disenfranchisement of Christopher Schafer, and may have contributed to a loss of public confidence in the electoral system.

[146] Appropriately, the mechanism set out in the statute once the chief electoral officer is made aware of a potential problem with a ballot is for the chief electoral officer to make any necessary inquiries (which could include retaining a preliminary investigator and then requesting the RCMP to investigate, as they have done in the past) and then to assist, intervene or cause proceedings to be taken for the punishment of an offence (s. 350). Another remedy is for a candidate or elector to bring an application under s. 356, such as this one. A further available remedy is for scrutineers at the counting of ballots to make an objection to the ballot, for decision by the returning officer, under s. 262 of the *Act.* There is no legal authority for the chief electoral officer to note an objection to a ballot, nor was this requested in the letter from Kyle Carruthers.

[147] The expectation that Christopher Schafer's ballot be separated and not counted before the election was unrealistic, given the complexity of the issues raised in the letter. As has been seen through the evidence and argument in this application, resolving this matter requires extensive inquiries. This was impossible in the context of the large amount of work to be done by the chief electoral officer three days before the election. The chief electoral officer took appropriate action by continuing to have the

ballot counted, while at the same time taking the first steps towards the investigation. There was no legal obligation on him to do more at that stage. Further actions by him were pre-empted by this petition.

Conclusion on policy inadequacy and administrative errors issue

[148] To conclude on this second issue of inadequate policy guidelines and administrative errors committed by elections officials, I disagree with the petitioner's position that these were errors that breached the statute, either on their own or when their cumulative effect is considered. I am mindful of the Supreme Court of Canada statement that "courts cannot demand perfect certainty. Rather, courts must be concerned with the integrity of the electoral system" (*Opitz*, at para. 50).

[149] The elections officials did conduct the election in accordance with the *Act* by applying the appropriate policy guidelines to determine Christopher Schafer's residency and by issuing and accepting his inter-district special ballot based on his identification through the declarations and the attestation. The realities of the situation are that Christopher Schafer is who he says he is and has no residence other than Old Crow for the purpose of voting. A declaration that the election was invalid and the office vacant based on the inability of Christopher Schafer to vote in the Vuntut Gwitchin electoral district would be a denial of his right to vote. Such an outcome would be a triumph of formality and process over substance, an approach that is prohibited by the Supreme Court of Canada jurisprudence.

Good faith conduct of election and material effect of non-compliance on election result

[150] I do not need to determine whether the election was conducted in good faith and whether the non-compliance with the *Act* did not materially affect the result of the

election under s. 362(3), because I have found that the election was conducted in accordance with the *Act*.

[151] However, if I am wrong in this conclusion, I find that the election was conducted in good faith. The test of bad faith as set out in the decision of *McCullock Finney c Barreau (Quebec)*, 2004 SCC 36, is not met in this instance. Bad faith is described as including intentional fault, abuse of power, serious carelessness or recklessness (paras. 39 and 40). The facts in that case were egregious. The Executive of Law Society continued to allow a lawyer to practise law after he had been found to be incompetent by the Professional Inspection Committee of the Law Society as a result of three offences between 1981 and 1987. In 1993, more complaints against the lawyer were received and in 1994 charges against him were brought by the Law Society. Four years later, in 1998, he was found guilty of 17 counts and was disbarred for five years, retroactive to 1994. He was continuing to practise during this time, from 1994-1998. The court held that the Law Society's attitude in ignoring the urgency of the situation and failing to protect the public from this lawyer revealed a serious carelessness, negligence and lack of diligence, and negligence amounting to bad faith.

[152] Here, the allegations made against the elections officials were in the nature of procedural oversights and not deliberate acts of negligence, serious carelessness, or lack of diligence that contravened their official duties and statutory obligations. Even if I had found that the *Act* was not complied with, there is insufficient evidence to demonstrate an absence of good faith.

[153] I also find that if there were non-compliance with the *Act*, the election results were not materially affected. There was no argument that Christopher Schafer was not

a qualified voter. The evidence supports his residence for the purpose of the *Act* in the Vuntut Gwitchin electoral district. This was not a situation where someone voted who was not entitled to vote in that electoral district.

Conclusion

[154] The Supreme Court of Canada said in *Opitz* at para. 44:

> …our electoral system must balance several interrelated and sometimes conflicting values. Those values include certainty, accuracy, fairness, accessibility, voter anonymity, promptness, finality, legitimacy, efficiency and cost. **But the central value is the *Charter*-protected right to vote.** [emphasis added].

[155] The tension involved in striking the right balance among these values is apparent in this case. The petitioner's argument is that the process here lacked certainty, accuracy, or legitimacy. The respondents argue the actions of the elections officials promoted accessibility, fairness and the right to vote.

[156] In conclusion, on considering the whole of the evidence, and applying the substantive approach to determining whether there was a statutory breach that affected the result of the election, I am not satisfied that the petitioner has established on a balance of probabilities that Christopher Schafer voted in the electoral district of Vuntut Gwitchin when he was not entitled to do so.

[157] The evidence of all of Christopher Schafer's ties to Old Crow supports his intention to reside there. There is insufficient evidence of his intention to reside elsewhere. His absence from Old Crow is temporary, because it has been under compulsion for the vast majority of the last 22 years, and the presumption of continuation of his residence at the time of incarceration applies, in addition to the other evidence of his intention to return to his home of Old Crow.

[158] The impugned actions of the elections officials did not amount to a breach of any statutory provisions. Their conduct was consistent with the object of elections statutes, including the *Act,* to enable entitled voters to cast their ballots, and to encourage enfranchisement. While the returning officer's interpretation of an acceptable address and identification was broad, and not conducive to full certainty or accuracy, this interpretation did not offend the statute, nor did it affect the integrity of the electoral process. There was no evidence of any fraud or dishonesty by Christopher Schafer, in relation to his eligibility to vote, identity or residence. As noted by the Supreme Court of Canada in *Opitz,* at para 45, "the system strives to achieve accessibility for all voters..". The actions of the officials in this case were consistent with this purpose and consistent with upholding the *Charter*-protected right to vote.

[159] As a result, the application is dismissed.

[160] Costs may be spoken to in case management if necessary.

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DUNCAN C.J.