Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2015 CHRT 19
Date: August 7, 2015
File No.: T1966/4613

Between:

Sharon Tanner

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Gambler First Nation

Respondent

Decision

Member: George E. Ulyatt

Table of Contents

I. The Complaint

[1] Sharon Tanner ("the Complainant" or "Ms. Tanner"), filed a complaint against Gambler First Nation ("the Respondent" or "the Nation"), of which she is a member, on May 22, 2012. She alleges that the Nation has discriminated against her on the basis of race, national or ethnic origin, and/or family status, pursuant to section 5 of the *Canadian Human Rights Act* ("the *CHRA*"), when it created and enforced against her a rule seeking to prevent all persons who are not blood descendants of John Falcon Tanner from running in elections for the positions of Chief or Councillor of the Nation ("the Descent Rule") (Issue 1: The Descent Rule). The Complainant alleges that the Respondent has also discriminated against her in denying her access to a number of services including income assistance, the use of the medical van, snow removal service and in banishing her from Band facilities and activities (Issue 2: Other Differential Treatment).

[2] Lastly, the Complainant alleges that, following the filing of her complaint, the Respondent engaged in retaliatory actions. According to the Complainant, the Respondent terminated her employment as an Economic Development Officer for the Band Council because she had filed a human rights complaint against them (Issue 3: Retaliation).

[3] The Canadian Human Rights Commission (the Commission), determined that an inquiry into the complaint was warranted and referred the complaint to this Tribunal on October 3, 2013.

II. Issue 1: The Descent Rule

A. Relevant Facts

[4] The Complainant is an Aboriginal woman, registered as an "Indian" pursuant to the *Indian Act*, R.S.C. 1985, c. I-5. She was born a member of the Sagkeeng First Nation, also known as the Fort Alexander First Nation, in Manitoba.

[5] In 1981, Ms. Tanner married her late husband, Alex Tanner, who was a member of the Nation. As a consequence of this marriage, pursuant to the provisions of the *Indian Act* in force at the time, Ms. Tanner ceased to be a member of the Sagkeeng First Nation and

became a member of the Nation. Since that time, Ms. Tanner has lived in the Nation. Ms. Tanner's husband passed away in 1985. However, she still lives in the Nation with her daughter, Charlene Tanner, who was born in 1982 and is also a member of the Nation.

[6] Since 1985, membership in the Nation has been governed by section 10 of the *Indian Act*. This section recognizes the ability for a First Nation to assume control over its own membership list by adopting written community membership rules that define who is eligible to be added to the list. The Nation has availed itself of this discretion and has, reportedly, enacted its own membership code. The membership code was not filed into evidence at the hearing before the Tribunal.

[7] Since the mid-1970s, the Nation has also selected its Chief and Council pursuant to its own customary election procedures. It has, since this time, been governed by a Council consisting of one elected Chief, and two elected Councillors.

[8] In 1993, the Nation drafted a document called "1993 Custom Regulations" which sought to formalize this practice. The Custom Regulations required that a candidate seeking office as Chief and/or Councillor be:

> (i) a registered member that ordinarily resides in Gamblers First Nation;
>
> (ii) be 18 years of age or older;
>
> (iii) not have been convicted of an indictable offence within the year leading up to the nomination; and,
>
> (iv) have their nomination moved and seconded in accordance with the 1993 Custom Regulations.

[9] The 1993 Custom Regulations document indicates that it passed a second reading on November 2, 1993 but does not, however, indicate if it ever passed a third reading. The document was also never signed. It is unclear whether the Custom Regulations ever came into force or whether its provisions reflect a broad consensus among the Nation's members concerning customary election practices.

[10] In 2006-2007, the Nation sought to codify its customary election practices, along with a new membership law and constitution. The Chief and Council hired Mr. Larry

Catagas, Governance Advisor and Policy Development Officer with the West Region Tribal Council, as an independent third party to help with the development of an election code and to conduct a referendum so as to allow the Band membership to vote on its adoption. The Nation created three documents, the *Band Custom Election Law* (the Election Law), the *Gambler First Nation Membership Law* (the Membership Law), and the *Gambler First Nation Constitution* (the Gambler Constitution).

[11] Section 4.2 of the Election Law enumerates the eligibility requirements for the positions of Chief and Councillor. It reads as follows:

> A Candidate for Chief or Councillor is a person who is:
>
> a) a member of the Gambler First Nation and a blood descendant of John (Falcon) Tanner signatory to Treaty 4 (1874). See family tree.
>
> b) at least eighteen years of age up as of the date of nominations
>
> c) resident for a continuous period of six months preceding the date of nominations
>
> d) must have a minimum 2 years Leadership of Administrative experience or training
>
> e) has not been convicted for an indictable offence, for three years preceding the date of nominations, and
>
> f) files a police record check clearance within one week after the nomination date, in which failure will result in the nomination being declared void.
>
> g) Candidates must produce all of the above to the Chief Electoral Officer within one week from the date of the nomination.

[12] Section 22 of the Election Law enunciates the terms of its coming into force:

> These regulations come into force the day they are approved by the simple majority of electors as per the referendum process of Gambler First Nation.

[13] On May 17, 2007, a referendum vote took place on the adoption of the Election Law, the Membership Law and the Gambler Constitution. The legitimacy of this

referendum, the adoption of the Election Law, and its purported reflection of the Nation's past customary practices (particularly the practice of limiting candidates for the positions of Chief and Councillors to blood descendants of John (Falcon) Tanner: "the Descent Rule" at section 4.2(a) of the Election Law), are disputed.

[14] However, according to the evidence, on November 5, 2010, Chief G. LeDoux and Councillors Roy Vermette and Ronnie Ducharme signed a one-page document which appears to indicate the official adoption of the 2007 Election Law. This document contained the following text:

> Section 23 Official Adoption
>
> This Custom Election Law is hereby adopted according to the results of the Band Referendum on this in 2007/08 Sworn Under Oath by Larry Catagas this 5th day of November 2010.

[15] On February 29, 2012, the Nation held a nomination meeting for the position of Chief and the positions of Councillors for elections scheduled to take place on or around March 30, 2012. The Complainant was nominated to run for the position of Chief. Mr. Larry Catagas, the Nation's Chief Electoral Officer, informed the Complainant that she was, however, ineligible for the position of Chief as she was not a blood descendant of John (Falcon) Tanner and therefore did not comply with section 4.2(a) of the Election Law. When the 2012 elections were eventually held, David LeDoux was elected Chief, and Councillors Roy Vermette and Ronnie Ducharme were re-elected.

B. Issues

[16] The allegations surrounding the adoption of the Descent Rule and its application by the Respondent to Ms. Tanner raise the following issues:

1. Preliminary Issue: Does the complaint include the positions of Councillors as well as the position of Chief?
2. Ms. Tanner's case of discrimination: does the Descent Rule and its application by the Nation to the Complainant, denying her the right to be a

candidate for the position of Chief, constitute a prima facie case of discrimination?

a. Is ancestry a characteristic protected from discrimination under the *CHRA*?

b. Did Ms. Tanner suffer an adverse impact in the provision of a "service" within the meaning of section 5 of the *CHRA*?

c. Was ancestry a factor in the adverse impact?

3. *Bona fide* justification: If the Complainant establishes a *prima facie* case of discrimination, has the Respondent shown that the practice has a *bona fide* justification?

a. Was the Descent Rule adopted for a purpose or goal that is rationally connected to the function of being Chief or Councillor for the Respondent?

b. Was the Descent Rule adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal?

c. Is the Descent Rule reasonably necessary to accomplish its purpose or goal, in the sense that the Respondent cannot accommodate persons who are not blood descendants of John (Falcon) Tanner without incurring undue hardship?

C. Parties Submissions and Analysis

(i) Preliminary Issue: Does the complaint include the positions of Councillors as well as the position of Chief?

[17] In her complaint, the Complainant alleges that the Respondent discriminated against her when she was prevented from running for Chief of the Nation due to the fact that she was not a blood descendant of John (Falcon) Tanner, pursuant to the Descent Rule. The Respondent objects to the scope of the complaint also extending to the application of the Descent Rule to Councillors.

[18] The Respondent argues that the complaint did not include any references to the position of Councillor and that the Complainant tendered no evidence at the hearing to support the contention that she had applied to be a candidate for Councillor, or that she was denied such an opportunity on the basis of the Descent Rule. The present matter

should, according to the Respondent, be limited to the allegation that the Complainant was prohibited from running for the position of Chief of the Nation.

[19] Despite the Respondent's submissions on this point, there does not appear to be any real contention with regard to the scope of the complaint. The Commission made no submissions in this regard and the Respondent is correct in stating that no evidence was tendered to support the assertion that the Complainant was denied from running for the position of Councillor due to the application of the Descent Rule. In fact, the Complainant does not even make such an allegation. At paragraph 36 of her Statement of Particulars, the Complainant discusses when she alleges that the Descent Rule was enforced against her:

> On February 29th, 2012, the Complainant was nominated to run for Chief. It was after she was nominated that she was told that she did not qualify to run for elected office because she was not a blood descendant of John Falcon Tanner. This was the first that the Complainant had heard that she was disqualified from running.
>
> [Emphasis mine]

[20] Any references to the position of Councillor by either the Commission or the Complainant appear in the context of the wording of the Descent Rule which suggests that it *would* apply to anyone who is not a blood descendant of John (Falcon) Tanner and seeks to run for Chief *or* for Councillor. The Complainant and the Commission have, in this regard, led evidence to suggest that the rule has not, in the past, been applied consistently as there are allegedly former Councillors, including the Complainant, who were allowed to run despite the fact that they were not blood descendants of John (Falcon) Tanner. This argument is one which seeks to challenge the validity of the Descent Rule, and it is open to the Commission and the Complainant to make it. This does not, in my view, affect or alter the scope of the Complaint which pertains to the Respondent's application of the Descent Rule to the Complainant when she sought to run for Chief in the 2012 elections.

(ii) Ms. Tanner's case of discrimination: Does the Descent Rule and its application by the Nation to the Complainant, denying her the right to

be a candidate for the position of Chief, constitute a *prima facie* case of discrimination?

[21] The onus is on the Complainant to establish a *prima facie* case of discrimination. For this, the Complainant must advance a case which, if believed, is sufficient and complete enough to justify a decision in her favour in the absence of an answer by the Respondent (see *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 [*O'Malley*]. More precisely, and in the context of this case, Ms. Tanner must demonstrate that ancestry is a characteristic protected from discrimination under the *CHRA*; that the Nation adversely differentiated against her in the provision of a service; and, that her ancestry was a factor in her being adversely differentiated against in the provision of the service (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33).

[22] For reasons detailed in the following pages, I find the Complainant has made out a *prima facie* case of discrimination.

Is ancestry a characteristic protected from discrimination under the *CHRA*?

[23] The Descent Rule distinguishes between individuals on the basis of their blood relation to John (Falcon) Tanner. The parties have qualified this distinction as one which is founded on a "descent line" or "ancestry". Neither "descent line" nor "ancestry" is specifically listed as a prohibited ground of discrimination under section 3 of the *CHRA*. The resulting question is whether "ancestry" or "descent line" can be said to fall under one of the existing prohibited grounds of discrimination?

[24] The Commission's position, also adopted by the Complainant, can be summarized in the following manner: since the grounds of "race", "national or ethnic origin" and "family status" are not defined by the *CHRA*, a broad and liberal interpretation of the *CHRA*, as mandated by the Supreme Court in decisions like *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321and *Insurance Corp. Of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, supports the inclusion of ancestry. The courts have shown a strong desire for uniformity across Canadian human rights statutes and several

provincial human rights statutes have included ancestry as one of their prohibited grounds of discrimination. The Commission relies on the Supreme Court's decision in *University of British Columbia v. Berg*, [1993] 2 SCR 353 [*Berg*] wherein the Court states at para. 372:

> If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.

[25] The Commission argues that interpreting the *CHRA* in a manner that excludes ancestry from the grounds of discrimination would lead to situations where an individual could be discriminated against on the basis of ancestry in some jurisdictions but not in others, and runs contrary to the objectives of the *Act*.

[26] The Respondent, for its part, submits the requirement that a Chief be a blood descendant of John (Falcon) Tanner falls squarely within definition of ancestry, which the Merriam-Webster Dictionary defines as "line of descent". Numerous provinces have, however, explicitly included ancestry as a ground in their respective human rights legislation. The Respondent argues that this suggests that ancestry is, in fact, distinguishable from the grounds of race, national or ethnic origin, as well as family status. To interpret section 3 so broadly as to encompass ancestry would not only trivialize these prohibited grounds, but would also be inconsistent with human rights legislation across the country. A purposive approach to interpreting human rights legislation cannot, according to the Respondent, go so far as to allow reading into the *CHRA* a ground that does not exist.

[27] In essence, the Respondent argues that ancestry falls within the exception to the purposive interpretive approach described in *Berg*, namely that this choice of wording clearly evinces a different purpose on behalf of the provincial legislatures that have adopted this ground. Therefore, to include ancestry in the *CHRA*, which has not adopted this ground, would amount to circumventing Parliament's intent.

[28] As the parties have highlighted in their submissions, the issue which I must now address is whether ancestry, as it exists as a separate ground in provincial human rights legislation (see for example the *Alberta Human Rights Act*, 2000 c A-25.5, the

Saskatchewan Human Rights Code, RRS c S-24.1, the *Ontario Human Rights Code,* RSO 1990, c H.19 the *New Brunswick Human Rights Act*, RSNB 2011, c.171 and the *British Columbia Human Rights Code*, RSBC 1996, c. 210), is nevertheless protected by the grounds of race, national or ethnic origin, and/or family status under to the *CHRA*. In other words, can ancestry or line of descent, be considered to fall within their ambit? For reasons that follow, I answer this question in the affirmative.

[29] A number of legal instruments expressly link the notion of ancestry with that of race. In certain provincial human rights statutes where ancestry is explicitly mentioned, it can be found alongside the grounds of race and colour. Section 9(2) of the *Manitoba Human Rights Code*, which lists the prohibited grounds, includes at paragraph (a): "ancestry, including colour and perceived race". Section 7(a) of the *Yukon Human Rights Act* is also drafted in an identical fashion. At the international level, the *International Convention on the Elimination of all Forms of Racial Discrimination*, 660 U.N.T.S. 195, adopted by the United Nations in 1965 and ratified by Canada in 1970, includes "descent" as part of the definition of "racial discrimination". It defines this type of discrimination as:

> a "distinction, exclusion, restriction or preference" which is "based on race, colour, descent, or national or ethnic origin" and "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms".
>
> [Emphasis mine]

[30] In light of Canada's adhesion to this Convention, Canadian human rights statutes should be interpreted as possessing a similar scope (see Walter S. Tarnopolsky, *Discrimination and the Law* (Toronto: Thomson Reuters, 2004) at 5-9) and militates against the fragmented approach to interpreting ancestry proposed by the Respondent in this case.

[31] Ancestry is also linked to ethnic origin. The meaning of the phrase "ethnic group" was discussed by the House of Lords in *Mandla v. Dowell Lee*, (1993) 1 All E.R. 1062 [*Mandla*]. In that case, the House of Lords found that one of the essential characteristics that a group must possess to constitute an "ethnic group", for the purposes of the legislation at issue in that case, was "either a common geographic origin or descent from a

small number of common ancestors". This Tribunal relied on *Mandla* and its definition of "ethnic group" in *Rivers v. Squamish Indian Band Council*, 1994 CanLII 1217 (CHRT) [*Rivers*], when it came to the conclusion that being of Gitksan or Squamish birth could be regarded as possessing different ethnic or national origins. As such, in my view, ancestry also forms a part of ethnicity.

[32] Finally, ancestry has also been considered to fall within the ambit of the ground of family status. As noted by the Commission, the Tribunal has already recognized that ancestry is included in the ground of family status in *Schaap v. Canadian Armed Forces*, 1988 CanLII 4504 (CHRT) [*Schaap*], rev'd on other grounds (1988), 56 D.L.R. (4th) 105 (Fed. C.A.) (see also *Rivers* at pp.40-41).

[33] In *Schaap* at pages 26-27, the Tribunal relied on Professor Tarnopolsky's analysis of the ground of family status, finding that

> The natural and ordinary meaning of the word "family status" I believe would include the inter- relationship that arises from bonds of marriage, consanguinity, legal adoption and including to use the words of Professor Tarnopolsky, the ancestoral relationship whether legitimate, illegitimate or by adoption as well as the relationships between spouses, siblings, in-laws, uncles or aunts and nephews or nieces, cousins, etc. I have not found any authority which would extend the meaning of "family" beyond the above described types of relationships.

[34] The Respondent draws this Tribunal's attention to the last sentence of this quotation. The Respondent argues that the term "ancestoral relationship", as referred to by the Tribunal in this decision, is limited to the relationships between "spouses, siblings, in-laws, uncles or aunts and nephews or nieces, cousins, etc." and does not extend to an ancestor who died approximately 170 years ago.

[35] With respect, I cannot agree with this interpretation. Indeed, a plain reading of the definition supports a different conclusion. The use of the words "as well as", in between "the ancestoral relationship whether legitimate, illegitimate or by adoption" and the enumerated relationships that follow clearly indicates that "ancestoral relationship" is to be considered *in addition* to the other enumerated relationships and is not limited by them.

Moreover, the use of the term “etc.” at the end of the enumerated relationships indicates that this list is not exhaustive.

[36] The Federal Court of Appeal also recognized that family status could include ancestral relationships in *Canada (Attorney General) v. Mossop*, [1991] 1 F.C. 18 (Fed. C.A.); aff'd [1993] 1 S.C.R. 554. In this decision, Stone J.A. examined the legislative history of the amendment adding "family status" as a prohibited ground of discrimination to the *CHRA* and stated:

> In testifying before a Standing Committee of the House of Commons which was studying the proposed change, the then Minister of Justice pointed to the above-noted mischief and added the following with respect to the "family status" concept proposed for adoption:
>
> > …this concept prohibits discrimination on the basis of relationships arising from marriage, consanguinity or legal adoption. It could include ancestral relationships, whether legitimate, illegitimate or by adoption, as well as relationships between spouses, siblings, in-laws, uncles or aunts, nephews or nieces, cousins, etc. It will be up to the Commission, the Tribunal appoints, and in the final cases, the courts, to ascertain in a given case the meaning to be given to these concepts. [Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Issue No. 114, at page 17. (Appeal Book, Volume 3, at page 326]
>
> In my view, this evidence furnishes a strong indication that it was the intention of Parliament to limit the new prohibited ground of discrimination in a way which did not include discrimination based on sexual orientation.
>
> [Emphasis mine]

[37] What these cases and laws demonstrate is that ancestry, while it has standing as a separate ground in several provincial human rights statues, is a concept, which can also be characterized as forming part of all three of the grounds of race, national or ethnic origin, and family status. In light of this, I find ancestry, whether framed in terms of racial

ancestry, national or ethnic ancestry, or family ancestry, is a characteristic protected from discrimination under the *CHRA*.

[38] In the circumstances of this case, the Nation submits racial ancestry and national or ethnic ancestry are not at issue. Instead, it submits the Descent Rule is focused on whether or not an individual has the specific ancestry of John (Falcon) Tanner. While the Commission argued John (Falcon) Tanner was a White man and, therefore, the Descent Rule creates a distinction based on race, no further evidence or argument was lead to suggest Ms. Tanner is of a different race, nationality or ethnicity from John (Falcon) Tanner. Indeed, race and ethnicity can be, from an anthropological, archaeological and ethnological perspective, complex issues to determine without specific expertise (see for example *Rivers*).

[39] In my view, the context of this case most appropriately fits under the ground of family status. That is, as the Nation argues, the Descent Rule is aimed at the specific identity of a family member/ancestor. The wording of the Descent Rule itself even refers to a "family tree". As the ground of family status encompasses complaints based on the particular identity of a family member (see *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66 at paras. 39-41), I believe this matter should be analyzed as a family status complaint.

Did Ms. Tanner suffer an adverse impact in the provision of a "service" within the meaning of section 5 of the *CHRA*?

[40] Section 5 of the *CHRA* prohibits discrimination in the provision of goods, services, facilities or accommodation customarily available to the public:

> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

[41] There is no dispute that Ms. Tanner was adversely impacted by the application of the Descent Rule found in the Election Law. The Descent Rule disqualified her from being able to pursue a position with the Nation's government. The question is whether the creation and application of the Descent Rule/Election Law is a "service" within the meaning of section 5 of the *CHRA*.

[42] As defined in *Canada (Attorney General) v. Watkin*, 2008 FCA 170 [*Watkin*], a "service", pursuant to section 5 of the *CHRA*, is "…something of benefit being "held out" as services and "offered" to the public…" and which are the result of a process taking place "…in the context of a public relationship…" (*Watkin* at para. 31).

[43] According to the Commission, in determining whether a nominee is eligible to run for the position of Chief or Councillor, through the creation and application of the Election Law, and through the decision-making of its Chief Electoral Officer, the Nation was providing a "service" within the meaning of section 5 of the *CHRA*. The Commission submits the approval of the Chief Electoral Officer confers the benefit of being able to pursue a position that will allow a candidate to contribute to the good governance of their community and which provides a source of income. In addition, the Commission submits that election processes form a critical part of the public relationship between governments and the community that is to be governed.

[44] The Respondent did not provide submissions on this issue or respond to the Commission's arguments.

[45] In my view, a legitimate question could be raised about whether the creation and application of the Election Law is a "service" (see *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13; and, *Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21, aff'd 2015 FC 398). However, the Respondent did not provide submissions on this issue. Therefore, I have no argument or evidence that contradicts the Commission's submissions. As a result, for the purposes of this decision, I accept the position of the Commission that the Nation was engaged in the provision of a service in its creation and application of the Election Law and, specifically, the Descent Rule.

Was ancestry a factor in the adverse impact?

[46] Seeing as Ms. Tanner was excluded from running for Chief on the sole basis of the application of the Descent Rule – a rule which differentiates on the basis of ancestry, which I have found to be a protected characteristic under the *CHRA* – I find ancestry was a factor in Ms. Tanner's adverse treatment. As a result, I find Ms. Tanner has established a *prima facie* case of discrimination, pursuant to section 5 of the *CHRA*.

(iii) *Bona fide j*ustification: if the Complainant has demonstrated a *prima facie* case of discrimination, has the Respondent shown that the practice has a *bona fide* justification?

[47] Having determined that the Complainant has demonstrated a *prima facie* case of discrimination, the analysis now turns to the Respondent's case. In response to the *prima facie* case, the Respondent can avoid an adverse finding by calling evidence to show its actions were not discriminatory; and/or, by establishing a statutory defence that justifies the discrimination. In this case, pursuant to section 15(1)(g) of the *CHRA*, the Respondent advances that there exists a *bona fide* justification for the creation and application of the Descent Rule. To establish this *bona fide* justification, the Respondent must establish that:

(1) it adopted the Descent Rule for a purpose or goal that is rationally connected to the function of being Chief or Councillor;

(2) it adopted the Descent Rule in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and,

(3) the Descent Rule is reasonably necessary to accomplish its purpose or goal, in the sense that the Respondent cannot accommodate persons who are not blood descendants of John (Falcon) Tanner without incurring undue hardship.

(see *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 at paras. 54-68; and, *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at paras. 20-22)

Was the Descent Rule adopted for a purpose or goal that is rationally connected to the function of being Chief or Councillor?

[48] The Respondent submits that introducing the Election Law is rationally connected to the governance of Gambler First Nation. Eugene Tanner, a member of the Nation, and Larry Catagas both testified that Indian and Northern Affairs Canada ("INAC") specifically recommended that the First Nation enact an election law, along with a constitution and membership code.

[49] According to the Commission, the Respondent's submissions do not explain how the Descent Rule is rationally connected to good governance. Ms. Tanner and other non-blood descendants have been elected as Councillors and contributed to the good governance of the First Nation.

[50] In general, I agree with the Respondent that adopting an Election Law, along with a constitution and membership code, is rationally connected to the good governance of the Nation. However, the general provisions of the Election Law are not the focus of this complaint. Rather, it is the specific requirement of the Descent Rule that is at issue in this matter. In this regard, insufficient evidence was presented to support the assertion that being a blood descendant of John (Falcon) Tanner contributes to the good governance of the Nation. While the Nation has a unique historical connection to John (Falcon) Tanner, which is discussed in more detail later in this decision, I do not find there to be a connection between this history and the "good" governance of the Nation. In fact, as the Commission pointed out, Ms. Tanner and other non-blood descendants have been elected as Councillors and have contributed to the governance of Gambler First Nation.

[51] As a result, I find the Descent Rule is not rationally connected to the function of being Chief or Councillor of the Nation and, therefore, cannot be *bona fide* justified. While this finding alone substantiates the complaint, I will nonetheless address the remainder of the Respondent's arguments.

Was the Descent Rule adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal?

[52] The Respondent submits the Election Law was adopted in good faith. It was voted on by the membership of Gambler First Nation in a referendum and approved by a simple majority. On the other hand, the Complainant and Commission submit the Descent Rule was adopted as a means of specifically excluding Ms. Tanner from the First Nation's governance.

[53] The facts surrounding the development and adoption of the Election Law are disputed and were difficult to ascertain. Witnesses provided contradictory testimonies, and some appeared tainted by underlying tensions stemming from past feuds. Others, like Albert Tanner, the only elder called to testify, were in visibly poor mental health. Much of the documentary evidence was also generally unreliable.

[54] This being said, I found Ms. Tanner was overall a credible witness. She was forthcoming in giving her evidence and did not seem to embellish or appear vindictive. I found her testimony, along with most of the evidence provided by Larry Catagas, the Receiving Officer for the 2007 referendum, the most helpful in ascertaining the facts surrounding the Nation's decision to implement a blood descendancy requirement for the positions of Chief and Council. I note that while I found that Mr. Catagas was an impartial and overall a credible witness, parts of his testimony contradicted his affidavit dated November 5, 2010, three years after the Referendum vote (Exhibit C1, Tab 1), which described the events surrounding the Referendum. The confusion resulting from these contradictions led the parties to inquire into Mr. Catagas' health. He revealed that he had suffered two strokes and two heart attacks in the last four years and had suffered memory loss as a result. As highlighted below, I have awarded little weight to these portions of his evidence.

[55] For reasons that follow, I have concluded that the Respondent did not adopt the Descent Rule in good faith.

2007 Referendum

[56] Mr. Catagas testified that he was retained by the Chief and Council of the Respondent, then composed of Gordon LeDoux, Ron Vermette and Ronnie Ducharme, in

late 2006 and given the mandate to develop the Nation's Membership law, Constitution and the Election Law, as well as act as the Returning Officer for the referendum process which would determine their adoption by the membership. Mr. Catagas stated that he started with a generic set of laws, and then received feedback from the Nation to adapt the content to its needs. Mr. Catagas testified that he organized three or four public consultations with the Band membership during which they discussed, among other items, the Election Law. Sharon and Charlene Tanner both testified that they had no knowledge that these consultations had taken place.

[57] With regard to the Referendum, Mr. Catagas testified that he obtained the list of voting members of Gambler First Nation from INAC and modified the list with the input from the members to determine the eligible voters. Once the final list was prepared, Mr. Catagas mailed the election packages, which included the election ballots, via priority post to the members of the Nation who did not live in the community. Members living in the community were notified of the Referendum by a notice, which was mailed to all whose addresses were known by the Band, and posted in key locations in the community, namely at the Band Office, the Band Hall and at the Health Centre. Members who informed Mr. Catagas that they would not be available on the day of the referendum were provided with election packages for advance voting and could mail their ballot. Return ballots were mailed to Mr. Catagas directly and placed in a locked location.

[58] Sharon and Charlene Tanner both testified that they never saw or received a notice informing them of the Referendum. Sharon Tanner stated that she learned that the Referendum had occurred through speaking with members of the community, many of whom were not happy as they had not known that it was taking place. Mr. Catagas also testified that some members called to tell him that they had not received their Referendum packages. He conceded that since he had not sent the packages by registered mail or courier, there had been no way of tracking those who had and had not received the packages. Mr. Catagas could not recall how many Referendum packages were mailed, or how many were returned. He testified that he believed that there were approximately 75 Band members living outside the community. Mr. Catagas recognized that according to Exhibit R-1, Tab 2, a copy of the voter's list that appeared to have been used by an

individual seated with Mr. Catagas on the day of the Referendum, 32 ballots were mailed in. Eugene Tanner testified that he believed approximately 90 packages were mailed out and that approximately 60 of them were returned.

[59] On May 17, 2007, the day of the Referendum, Mr. Catagas counted the ballots himself, in the presence of other individuals, including Eugene Tanner. Mr. Catagas used the final voter's list he had prepared and tracked the individuals who voted by crossing out their names. According to the voter's list found at Exhibit R-1, Tab 2, out of the 124 eligible voters that were identified at the time of the Referendum, 32 people mailed in their ballots, and 19 people voted in person, for a total of 51 participating voters. Out of these, 29 voted in favour of the Election Law; and 20 voted against it.

[60] According to this voter's list, it would appear that all three documents, the Membership Law, the Constitution and the Election Law, passed with a simple majority, which the Election Law defines as "50 percent plus one of those that participate in a vote". Mr. Catagas testified that the Election Law only required a simple majority vote as a double majority is very difficult to attain due to the challenges associated with getting enough eligible voters to participate: "otherwise, you'd be continuing to do that over and over again without ever getting to the point of rejecting or accepting a certain document": Transcript at p. 594. Mr. Catagas stated that in his experience conducting elections for First Nations, there would usually be a simple majority vote.

[61] Mr. Catagas stated that the voter's list at Exhibit R-1, Tab 2 confused him and that he did not recognize this document. He confirmed that it was not the official tracking list. Contrary to what Exhibit R-1, Tab 2 indicates, Mr. Catagas recalled that only the Election Law passed at this referendum. He testified that in light of this, and due to the fact that all three documents still contained ambiguities, he advised that the Chief and Council go through a review and amendment process and to hold a second referendum. Although Mr. Catagas believed that a second referendum had taken place, during which the Election Law also passed, he could not recall when that would have been. No evidence supporting this referendum was tendered.

[62] The reliability of Exhibit R-1, Tab 2 was further brought into question by the testimony of Harlene Swain, who stated that she had voted in the referendum and yet her name had not been struck out. Moreover, while the list indicates that the total of participating voters amounts to 51, a manual count of the names crossed off on the list adds up to 52. I share the Commission's view that the reliability of this document is problematic. The official tracking list was not part of the evidence before the Tribunal.

[63] Three years after the Referendum, on November 5, 2010, Mr. Catagas swore an Affidavit at the request of Chief David Albert LeDoux. Paragraph 3 of this Affidavit reads:

> "That due to missing records, I have provided on or about this date that Council sign the documents, and hereby confirm their validity. This is done in the hope of putting to rest the contentious issues and that the Government of Gambler First Nation (as represented by Chief Gordon Ledoux, and Councilors Roy Vermette, and Ronnie Ducharme) be recognized and to move forward in their capacities, recognizant of the expectations of the people (membership) through the Election Law and the Constitution; ie regular Band meetings, transparency, redress and complete communication amongst all parties.

[64] In swearing this Affidavit, Mr. Catagas attempted to resolve the contention surrounding the validity of the Nation's Membership Law, Constitution and Election Law. Unfortunately, the document fails to resolve any of these issues and, in fact, further confused matters when Mr. Catagas stated at paragraph 2:

> "That the Band Constitution is a valid document, wherein the advisory role of the Council of Elders is recognized. The Constitution further stipulates the authority of Chief and Council and the people of Gambler First Nation. That the document initially failed its first referendum, due to the requirement of a double majority, but passed the second referendum requiring a simple majority. The exact dates are not known due to missing records at the Gambler Band Office".

[65] Despite this statement, the Constitution contains no reference to a double majority. Only the Election Law refers to achieving a double majority, and only for the purposes of amending the Election Law following its initial adoption. The Election Law defines "double

majority" at section 2(o) as "50% plus 1 of all eligible voters as per the VOTERS' LIST". Mr. Catagas could not explain this discrepancy.

[66] I accept that, according to the Election Law, a simple majority vote, composed of those that participated in the vote, is sufficient for its adoption. I am not however satisfied that the evidence demonstrates that this was obtained. In addition to the questionable reliability of Exhibit R-1, Tab 2, which is the only document indicating the supposed results of the 2007 referendum, the referendum was otherwise fraught with procedural problems which include the lack of proof of service upon members, adequate postings informing the membership of the referendum and lack of records.

Other evidence regarding the adoption of the Descent Rule

[67] Sharon Tanner testified that the first time she heard of a blood descendent requirement for the positions of Chief and Councillors was in 2005-2006, when she started to become more politically active. She alleges that the Descent Rule was brought forward because she represented a threat to the leadership of Gambler First Nation, due to the fact that she benefited from the trust and support of many of the Band members.

[68] Ms. Tanner explained that the Councillors at the time, Gordon LeDoux, who is the brother of Chief David LeDoux, and Donna McGillivray, the Chief's first cousin, were suspected of abusing funds. On November 1, 2006, growing dissatisfaction by the Band membership with their leadership resulted in a march of over 50 members to the Band office, requesting a meeting with the Chief and Council. The Chief and Council refused this request and the members therefore held a meeting of their own during which they adopted a Band resolution ousting Donna McGillivray. Ms. Tanner alleged that the Band resolution was sent to INAC and when, on November 9, 2006, the members conducted a bi-election to find a replacement, INAC sent a representative, Mr. McDougall, to act as Chief Electoral Officer. Ms. Tanner testified that she was elected as Councillor by acclamation. This is supported by the list of Gambler First Nation Chiefs and Councillors from 1885 to 2008 found at Exhibit R-1, Tab 36, which lists Ms. Tanner as Councillor on this date.

[69] When Ms. Tanner presented herself to the Band office the next day, the office was locked. Gordon LeDoux and Ms. McGillivray informed Ms. Tanner that they did not recognize her as Councillor and that Ms. McGillivray was still Councillor of Gambler First Nation. Ms. Tanner was unable to serve as Councillor.

[70] This same day, Gordon LeDoux and Donna McGillivray passed a Band council resolution, denying Ms. Tanner access to the Band office, health office (unless in the case of an emergency), the multipurpose building, and the construction job site. The resolution stated that Ms. Tanner had approached the Band's employees at the job site, with "threats of firing and hiring which is jeopardizing our ability to function as a Band" and that they "feel that in order for us to carry out our duties as leaders of our First Nation, we need to avoid any dissidents that wish to create turmoil and disfunction [sic] here at the workplace": Exhibit R-1, Tab 23. Ms. Tanner testified that the events described in the Band council resolution never happened, and that she was targeted because she was viewed by the Councillors as a "troublemaker".

[71] The community's dissatisfaction with its leadership continued in the years that followed. Ms. Tanner testified that in 2008, Gambler First Nation received 3 million dollars and that over 1 million went missing. On August 9, 2010, the Council of Elders held a meeting with the membership to discuss these issues. According to the minutes of the meeting (Exhibit HRC-1, Tab 4), over 50 people were present. 62 Band members voted for the removal of Chief Gordon LeDoux and Councillor Donna McGillivray and appointed Ms. Tanner as acting Chief and Rose Demontigny as acting Councillor. Ms. Tanner also alleges that the members appointed her, Eugene Tanner and Harlene Swain to go to the Vanguard Credit Union and look into what had happened to the missing funds.

[72] The Respondent has challenged the Complainant's testimony regarding her appointment as acting Chief, suggesting that the signatures that appear on Exhibit HRC-1, Tab 4 are fraudulent. Eugene Tanner and Harlene Swain both testified that Ms. Tanner had not been appointed as acting Chief, but recognized that there had been a petition to remove the Chief and Council from their positions. They claim no one was elected acting Chief at the time and stated they would not have voted for Ms. Tanner as she is not a

blood descendent of John (Falcon) Tanner. However, they did confirm that they accompanied Ms. Tanner to the Vanguard Credit Union on August 10, 2010.

[73] The Complainant has argued that her political involvement is at the root of the decision to implement a blood descendancy requirement. She argues that it is no coincidence that on November 5, 2010, less than three months following the Elders' meeting where she contends that she was appointed acting Chief, Chief Gordon LeDoux requested that Larry Catagas swear an affidavit affirming that:

> I further state with respect to the matter of contentious issue over the Election Law, & Band Constitution and the authorities of Chief & Council, including the authority of the Elders Council;
>
> 1. That I did attend to the Election Law referendum concerning these documents and that it did pass in the fiscal year of 2007-2008.
>
> (Exhibit C-1, Tab 1)

[74] This affirmation by Mr. Catagas was then included in the Election Law at Section 23:

> This Custom Election Law is hereby adopted according to the results of the Band Referendum on this in 2007/08. Sworn Under Oath by Larry Catagas this 5th day of November, 2010.
>
> (Exhibit HRC-1, Tab 7)

[75] The Respondent denies the Complainant's assertion about the adoption of the Election Law. It argues the enactment of the Election Law was recommended by INAC; that the Nation contracted a third party to develop the Election Law, in order to ensure that the election was handled properly; that the third party met with the membership on three or four occasions; and, the third party developed the Election Law based on feedback he had received from the membership as a whole. According to the Respondent, the allegation that the Election Law was developed as a ploy essentially amounts to a suggestion that the retention of a third party developer, the entire consultation process, and the actual

Referendum were all done with the ulterior motive of excluding the Complainant from governance, despite the fact that as of the time of the Referendum, the Complainant had never run for Chief and was prior to the Complainant participating in the rally to remove the Chief and Council in 2006.

[76] Ms. Tanner benefits from the trust and support of many of the members of her community as exemplified by her election as Councillor in 2006 and her appointment to go to the Vanguard Credit Union to look into what had happened to missing Band funds in 2010. In my view, the leadership of the Nation, particularly under Gordon LeDoux when the majority of these events took place, felt threatened by Ms. Tanner's political involvement. The 2006 Band council resolution, issued the day after Ms. Tanner was elected Councillor, is a clear indication of this fear and of a desire to prevent Ms. Tanner from further disrupting their leadership. While I cannot conclusively determine that the primary driving force for the development of the Descent Rule was to prevent her from accessing the leadership, the adoption of the Election Law three years after the initial referendum on the issue casts a long shadow in this regard.

[77] The Respondent was unable to provide a credible explanation as to why it decided, in 2010, to move forward with the adoption of the Election Law. While Eugene Tanner stated that its development was motivated by a deadline set by INAC, Larry Catagas denied such a deadline had been imposed and, despite reference to a letter in this regard, no such documentation was brought forward at the hearing. Moreover, when Larry Catagas was asked why the Election Law was adopted three years after the referendum, he could not provide an explanation. This evidence only further adds to the irregularities and contradicting evidence surrounding the enactment of the Election Law. It also leads me to believe that it is more probable than not that, while the Election Law/Descent Rule may have initially been developed in good faith, its official adoption in 2010 was, at least in part, to prevent Ms. Tanner from running for Chief.

[78] As a result, in addition to my finding that the Descent Rule is not rationally connected to the function of being Chief or Councillor of the Nation, I also find it was not adopted in good faith. I will now address the Respondent's remaining arguments regarding undue hardship.

Is the Descent Rule reasonably necessary, in the sense that the Respondent cannot accommodate persons who are not blood descendants of John (Falcon) Tanner without incurring undue hardship

[79] The Respondent submits that the question of whether the Descent Rule in the Election Law is reasonably necessary raises two issues:

1. The extent of a First Nation's right of self-government and in particular, whether a First Nation's right to self-government includes the right to determine who is eligible to govern the First Nation; and,
2. The operation of section 1.2 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, and the impact of First Nations' legal traditions and customary laws on the interpretation of the *CHRA*

Right to Self-Government

[80] According to the Respondent, a First Nation has an inherent right to self-government and this right is vital (*reasonably necessary*) to the future and self-sufficiency of First Nations. It argues the Government of Canada has pursued a policy approach which includes aboriginal self-government as an inherent right under section 35(1) of the *Constitution Act, 1982*. Furthermore, it notes this policy approach is consistent with articles 3 and 4 of the *United Nations Declaration on the Rights of Indigenous Peoples*. The Respondent submits it is the development of policies and procedures unique to the First Nation that is important to the right of self-government. If a First Nation does not have the right to develop policies in accordance with the First Nation's unique culture, but instead is required to develop internal policies consistent with the existing laws of Canada, then the right to self-government is meaningless. In this regard, the Nation contends policies and processes for elections are especially important because an election of leaders is, by its very nature, an integral part of self-government.

[81] As the Respondent noted in its submissions, an inherent right to self-government has not been recognized as necessarily forming part of section 35(1) of the *Constitution Act, 1982*. In this regard, I note the Supreme Court of Canada stated in *R. v. Pamajewon*,

[1996] 2 SCR 821 at para. 27, that "[a]boriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right". Aside from general policy arguments, the Respondent did not lead evidence to establish that it has a right to self-government based on its specific history and culture.

[82] Furthermore, even if the Nation had established such a right to self-government, that does not necessarily shield its actions from regulation under the laws of Canada, including the *CHRA*. An infringement of the right must first be established pursuant to the test set out in *R. v. Sparrow*, [1990] 1 SCR 1075 at page 1112 [*Sparrow*]. In addition, if an infringement is found, it is subject to justification by the Crown (see *Sparrow* at pp. 1113-1119). No such argument or evidence was brought forward by the Respondent.

[83] As a result, I find the Respondent's argument regarding its right to self-government, and its application to the Nation's *bona fide* justification argument in this case, to be without merit.

Section 1.2 of An Act to amend the *Canadian Human Rights Act*

[84] Section 1.2 of An Act to amend the Canadian Human Rights Act provides:

> 1.2 In relation to a complaint made under the *Canadian Human Rights Act* against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.

[85] The Respondent submits that the requirement in this section to consider First Nations legal traditions and customary laws suggests that culturally specific rationales (i.e. a rationale grounded in a First Nation's customs, traditions, procedures and/or practices) should now be considered in determining whether a discriminatory practice is reasonably necessary. In this regard, the Respondent argues that the evidence in this case

demonstrates that all Chiefs of Gambler First Nation have been blood descendants of John (Falcon) Tanner and that it is reasonably necessary that this tradition be continued.

[86] In determining what application section 1.2 has in this case, the first question to examine is whether Gambler First Nation has a custom or tradition of having blood descendants of John (Falcon) Tanner act as Chief.

[87] "Custom" was defined in *Bigstone v. Big* Eagle, [1992] F.C.J. No. 16 (QL) [*Bigstone*] as including "practices for the choice of a council which are generally acceptable to members of the Band and upon which there is a broad consensus". Where a dispute arises regarding a custom, the onus is upon the party who relies on the custom, in this case the Respondent, to establish its existence, elements, and to demonstrate that it is indeed supported by a broad consensus of the Band members (*Francis v. Mohawk Council of Kanesatake*, [2003] 4 FCR 1133 at paras. 21-24 [*Francis*]; and, see also *McArthur v. Canada (Department of Indian Affairs and Northern Development)*, 1992 CanLII 8090 (Sask. Q.B.)).

[88] In *Bigstone,* Strayer J. (as he then was) found that in examining the validity of a custom or constitution governing the composition and selection of a Band council, the real question is one of *political*, rather than *legal*, legitimacy. It is incumbent upon Courts faced with this issue to answer the question: "is the constitution based on a majority consensus of those who, on the existing evidence, appear to be members of the band?" In so doing, a Court should, however, apply discernable legal criteria.

[89] These legal criteria are summarized in *Francis* at paras. 22-24, and 26 (see also *Shotclose v. Stoney First nation*, 2011 FC 750 at para. 69). A custom must include: (1) "practices" for the choices of a council; (2) practices must be "generally acceptable to members of the band"; and (3) practices upon which there is a "broad consensus". "Practices" may be established either through repetitive acts in time, or through a single act, such as with the adoption of an electoral code. For a practice to be "generally acceptable to members of the band", it must reflect "the manifestation of the will of those interested in rules for determining the electoral process of band council membership to be bound by the rule of practice".

[90] What constitutes a “broad consensus” was further defined in *Francis* at paras. 36-37, where Justice Martineau writes:

> For a rule to become custom, the practice pertaining to a particular issue or situation contemplated by that rule **must be firmly established, generalized and followed consistently and conscientiously by a majority of the community**, thus evidencing a "broad consensus" as to its applicability. This would exclude sporadic behaviours which may tentatively arise to remedy certain exceptional difficulties of implementation at a particular moment in time as well as other practices which are clearly understood within the community as being followed on a trial basis. If present, such a "broad consensus" will evidence the will of the community at a given time not to consider the adopted electoral code as having an exhaustive and exclusive character. Its effect will be to exclude from the equation an insignificant number of band members who persistently objected to the adoption of a particular rule governing band elections as a customary one.
>
> In my view, in light of all the abovementioned cases, the real question as to whether a particular band resolution, decision or an adopted electoral code reflects the custom of the band can be framed as follows: is the resolution, decision or code based on a majority consensus of all those who, on the existing evidence, appear to be members of the band, regardless of residency?
>
> [Emphasis mine]

[91] While these cases provide a broad legal framework pursuant to which we can examine the Election Law and its Descent Rule in the case at hand, the determination of whether the Descent Rule “enunciates practices that are generally acceptable to members of the Band and upon which there is broad consensus” remains a very fact-specific inquiry.

[92] In this regard, the Election Law was not Gambler First Nation’s first attempt to codify its election process. Over a decade prior to the Referendum, the Nation drafted the 1993 Custom Regulations with the aim of achieving a similar codification. The rationale for this effort is explained in the document’s preamble:

> The Gambler First Nation historically has functioned quite adequately without written rules and procedures. Within the contemporary society it is

> necessary to record all transactions and to develop rules and procedures in writing for the purposes of law and order. It has been apparent to the Gambler First Nation membership that they too must develop written rules and procedures, especially in view of complex, complexity of issues that arise on a daily basis. It is therefore agreed that the membership adopt the following rules and procedures for the benefit and betterment of Gambler First Nation.

[93] A number of witnesses confirmed the existence of the Custom Regulations, including Sharon Tanner and Larry Catagas and their testimony was not challenged in this regard. The document states that the Custom Regulations passed a first and second reading on October 4 and November 4, 1993. The evidence did not confirm however, whether they had passed a third reading. It is therefore unclear if they were ever adopted.

[94] These Custom Regulations support Sharon Tanner's testimony, where she recognized that Gambler First Nation possessed practices that could be regarded as constituting customary laws or traditions. For example, the Custom Regulations recognized the importance of elders:

> Council of Elders: The Gambler First Nation has recognized and respected the role of elders for their wisdom, spiritual guidance and decisions towards the betterment of Gambler First Nation. The Council of Elders shall be present at all Council meetings.

[95] The Custom Regulations did not, in contrast, contain any reference to a rule limiting the position of Chief to the descendants of John (Falcon) Tanner and Sharon Tanner testified that to her knowledge, there had been no mention of this limitation in the 1980s and 1990s. This view was contradicted by a number of the Respondent's witnesses, who testified that the requirement for the Chief and Council to be part of the John (Falcon) Tanner bloodline had long constituted an essential part of their heritage and identity.

[96] Throughout these proceedings, the Tribunal heard evidence confirming the unique history of John (Falcon) Tanner and its importance to the cultural identity of the Nation. The testimony of Rose LeDoux, the wife of Chief David LeDoux and a non-blood descendant of John (Falcon) Tanner, is worth noting in this regard. Rose LeDoux, Chief

David LeDoux, Roxanne Brass and Eugene Tanner all testified that the richness of their history and the uniqueness of their shared bloodline was a source of pride.

[97] Sharon Tanner did not dispute the importance of the heritage of John (Falcon) Tanner. Her husband, children and grand-children are all his descendants. Ms. Tanner testified that she has spent 30 years in Gambler First Nation community and that she considers it her home. She does however, dispute that this heritage translates to a requirement for Chiefs and Councillors to be blood descendants. I note that when asked whether it was possible for a non-blood descendant to possess the qualities of wisdom, fairness, patience and a solid understanding of the Nation's legal traditions and customary laws, good qualities for the positions of Chief and Council, the Respondent's witnesses all agreed that it was possible.

[98] Furthermore, the evidence presented did not conclusively determine that all of the Nation's Chiefs were blood descendants of John (Falcon) Tanner. Roxanne Brass testified that she believed this was the case "unless one snuck in that I don't know of" and Exhibit R-1, Tab 36, which contains the list of past Chiefs and Councillors possesses a significant gap in time where there is no history at all as to who occupied these positions. Chief David LeDoux and his wife Rose LeDoux testified that experts had published on the history of John (Falcon) Tanner and commented on the uniqueness of the Gambler First Nation but none of these publications were brought forward as evidence. The community's Elders would arguably have been in the best position to provide a historical perspective on the Descent Rule and parties all agreed that they played a key role within the community. However, the only witness who could reasonably be classified as an Elder was Albert Tanner, and he gave no evidence on this point.

[99] The Tribunal is therefore left with the conflicting evidence of the Complainant, who has the longest continued relationship and residency with the Band and the community, and that of Roxanne Brass, who moved to the community in the 1990s, Eugene Tanner, who only recently moved to the community, and David and Rose LeDoux who moved to the community in 2009. I find the Complainant's evidence more persuasive in this regard.

[100] Even if I could make a finding that all of the Nation's past Chiefs were descendants of John (Falcon) Tanner, I do not find that this would be determinative of the existence of a "custom". Of the Nation's 256 members, only 4 or 5 are non-bloodline. In view of this, it would not be surprising that no non-blood descendant served as Chief. In other words, while there may be a practice of having Chiefs that are bloodline, this reality may simply exist due to the demographics of the Nation and does not lead to the conclusion that there is a broad consensus amongst the members of the Band that non-bloodline members are ineligible for this position.

[101] I am further persuaded that the Election Law is not "firmly established, generalized, and followed consistently and conscientiously by a majority of the community" by the fact that it requires that candidates for both the positions of Chief and Councillors be blood descendants of John (Falcon) Tanner. The evidence demonstrated quite clearly that Councillors could be non-bloodline. In addition to Ms. Tanner, whom was appointed to this position in 2006, her mother, Patricia Tanner, as well as Darlene Tanner served as Councillors and neither were blood descendants.

[102] Finally, given the irregularities and contradicting evidence surrounding the 2007 Referendum on the Election Law, I am not convinced that the practice of limiting the position of Chief to descendants of John (Falcon) Tanner benefits from a broad consensus. In this regard, I note only 51 of the approximately 124 eligible voters voted in the election, and of those who voted, only 57% voted in favour of the adoption of the Election Law.

[103] In response, the Respondent relies on the decision in *Lac des Mille Lacs First Nation v. Chapman*, 1998 CanLII 8004 (FC) [*Chapman*], where, despite a 28 percent voter turnout and where approximately 21 percent of the total eligible voters voted in favour of a custom leadership selection code, the Court held that there was a sufficiently broad consensus to conclude that the code constituted a custom. However, in that case, the Court noted the unique situation of the members of that First Nation: out of its 300 members eligible to vote, the location of only approximately 130 of these members was known (*Chapman* at para. 29). Furthermore, the Court noted that there was a pattern of

general voter non-participation in that community, even by known members who were eligible to vote (*Chapman* at para. 29). As a result, the Court found that:

> the participation of 86 voting members which resulted in 73 votes being counted, out of which 64 votes were in favour of the Selection Code and 7 were against with one "no opinion" and one spoiled, constitutes a broad consensus sufficient in these special circumstances to consider the Selection Code to now constitute Band Custom.
>
> (*Chapman* at para. 29)

[104] The vote in *Chapman* resulted in an 87% approval of the selection code. In contrast, the Election Law in this case only received a 57% approval rating and there was low voter turnout. No such special circumstances were brought forward by the Respondent in this case to explain the low voter turnout or the narrow majority adoption of the Election Code. As a result, I believe the *Chapman* case is distinguishable for the circumstances of the present case, where I am not convinced that there is a broad consensus that the Election Law, including the Descent Rule, is a custom of Gambler First Nation.

[105] For all these reasons, I find that the Respondent has not demonstrated that the Descent Rule is a “customary law or legal tradition” as per section 1.2 of *An Act to amend the Canadian Human Rights Act*. As a result of this finding it is not necessary for me to consider whether the application of section 1.2 supports an expanded approach of the undue hardship factors under section 15(2) of the *CHRA*.

[106] The Respondent did not otherwise advance any other arguments of undue hardship. Therefore, it has not satisfied me that the Descent Rule is reasonably necessary.

D. Conclusion on Issue 1: Complaint Substantiated

[107] The Respondent did not provide a *bona fide* justification to the Complainant’s *prima facie* case of discrimination. For the reasons above, I find the Descent Rule is not rationally connected to the function of being Chief or Councillor; was not adopted in good

faith; and, is not reasonably necessary. As a result, the Descent Rule complaint is substantiated.

III. Issue 2: Other Alleged Differential Treatment

[108] The Complainant alleges that the Descent Rule is not the only manifestation of the Respondent's differential treatment towards her due to the fact that she is not a descendant of John (Falcon) Tanner. In April 2011, the Complainant saw her request for income assistance denied and lost her housing allowance as a result (A. Denial of Income Assistance). She also alleges that she was denied the use of the medical van (B. Denial of Use of Medical Van). Finally, she contends that she has been banned from attending the Band Council office, as well as the Band's medical facilities and community center, and excluded from community activities and services (C. Banishment from Band Facilities and Exclusion from Activities and Services).

[109] Prior to examining each of these allegations, it is important to note that the parties' relationship has been fraught for many years. The Tribunal heard evidence of two Band council resolutions that were adopted in March 2000 seeking to remove the Complainant from the community as well as from her position with the Band as a Community Health Representative and as a worker for the Native Alcohol Drug Abuse Program, positions that the Complainant had occupied for 12 years. This was due to a violent altercation that took place involving the Complainant, her daughter and her daughter's boyfriend against other members of the community. In the end, the Complainant was not removed from the community but did lose her positions with the Band. The Complainant was also involved in a dispute with Roxanne Brass, the Chief's sister, in 2004 at a corn festival, and the evidence indicated that tensions existed between the two women, as well as between Ms. Tanner and the LeDoux family. In this context, it was at times difficult to discern whether certain incidents regarding the Complainant arose simply as a result of this ongoing conflict, or whether they were linked to her status as a non-blood descendant of John (Falcon) Tanner.

A. Denial of Income Assistance

(i) Relevant Facts

[110] On April 1, 2011, Ms. Tanner submitted an application for income assistance to the Social Assistance Administrator, Terry Tanner. Ms. Tanner testified that Terry Tanner filled out the form for her and that she signed the application. She indicated that she was the only resident living in her home. At line 205, after the question "Is the applicant eligible to receive assistance?", Terry Tanner put an "X" beside the "Yes". Ms. Tanner stated that she expected that she would be receiving income assistance. She had previously been receiving income assistance since approximately 2001.

[111] In April 2011, sometime after Ms. Tanner submitted her application, Terry Tanner contacted Ms. Tanner and informed her that she did not qualify for income assistance. Terry Tanner did not provide a reason for the refusal.

[112] On June 10, 2011, Ms. Tanner once again completed an application for income assistance with the help of Terry Tanner. On the recommendation of Terry Tanner, the Complainant indicated that she possessed a car valued at $17,000. Furthermore, despite the Complainant's affirmation that her friend, Fernand Barthelette, did not reside with her, Terry Tanner informed her that he needed to include the income information of anyone who was in her house. For this reason, the form included Mr. Barthelette's monthly income.

[113] In a letter entitled "Rejection Letter", dated July 5, 2011, Terry Tanner, in his capacity as Income Assistance Administrator, stated that Ms. Tanner did not qualify for income assistance at this time for the following reason:

> "Fern Barthelette receives $1000.00 old age pension which, will cover your (Sharon Tanner) cost of Basic needs, Diet, Rend & User fees. IA will cover for hydro when it exceeds the amount of your (Sharon Tanner) basic needs".

[114] Ms. Tanner testified that she never received this letter and that the first time that she saw it was in preparation for the Tribunal hearing. She testified that all of her conversations with Terry Tanner were verbal. Ms. Tanner found out that she did not qualify

for income assistance when, at some point during this period, it was being given out and Terry Tanner told her daughter, Charlene, that she did not qualify.

[115] Ms. Tanner alleged that shortly thereafter, she had a conversation with former Chief Gordon LeDoux about the fact that she was being denied income assistance. Ms. Tanner testified that Gordon LeDoux responded with words to the effect of "Well, why don't you go back to Sagkeeng where you come from? You'll get Social Assistance there": Transcript at p. 85.

[116] Ms. Tanner also spoke to Chief David LeDoux, who told her to call INAC. Ms. Tanner testified that she did call INAC but that nothing was ever done. Ms. Tanner re-applied once again for income assistance on September 25, 2013 and listed Mr. Barthelette as her spouse, again under the advice of Terry Tanner. At the time of the hearing, Ms. Tanner had still not received any income assistance. She testified that she was being financially supported by her daughter Charlene.

(ii) Parties Submissions and Analysis

[117] The parties provided extensive testimony and submissions regarding the issue of whether the Complainant was in a common-law relationship with Mr. Barthelette. The Complainant argues that she had never shared anything more than a friendship with Mr. Barthelette, whom she has known since her college years and that she was, in fact, in a relationship with another man during a part of this period. The only reason that Ms. Tanner added Mr. Barthelette as a resident of her home and later as her spouse in her income assistance applications is because Terry Tanner advised her to do so. The Complainant testified that Mr. Barthelette stayed with her a few times a year, during the Christmas season and in the spring to help her with her garden. Ms. Tanner estimated that he stayed with her for a total of approximately three months a year. She denied calling him her "old man" and stated that he did not provide her with any financial assistance.

[118] The Complainant also argues that the Tribunal should draw an adverse inference from the fact that Terry Tanner was not called to testify. The Respondent's witness, Charles Baptiste, a Social Advisor for the West Region Tribunal Council who was called to

speak to the issue of the eligibility for income assistance, never had any contact with the Complainant and did not deal with her applications for income assistance.

[119] The Respondent argues that the evidence supports the conclusion that the Complainant was in conjugal relationship with Mr. Barthelette and that in these circumstances, as Mr. Baptiste testified, they are considered by INAC to be legally married for the purpose of income assistance eligibility. Moreover, given the fact that INAC conducted an investigation and determined that there were no problems with the way that the Complainant's case was handled, the Respondent submits that the evidence supports a finding that the Complainant was properly denied income assistance. The Respondent highlights that regardless of the validity of this decision, the denial of her application was not in any way linked to the fact that she is not a descendant of John (Falcon) Tanner and therefore, cannot be said to be discriminatory.

[120] Mr. Baptiste testified that, in examining the Complainant's First Nation Tenant Profile Form, wherein she lists Mr. Barthelette as a resident of her household; the Complainant's and Mr. Barthelette's Manitoba Health Registration Cards, which have the same mailing address; as well as her June 10, 2011 application for income assistance, which list Mr. Barthelette's pension as part of her "unearned income", she would not qualify for income assistance. This is due to the fact that this evidence would lead Mr. Baptiste to conclude that the Complainant and Mr. Barthelette were in a common law relationship and since Mr. Barthelette receives an old age pension, Ms. Tanner would not qualify for social assistance.

[121] On cross-examination, Complainant Counsel asked the witness to comment on a document produced by INAC as part of its "Income Assistance Policy and Procedures" entitled "Checklist 3: Dependency Relationships". The document states that the checklist contains

> "factors that may indicate an applicant is living with another person as either a common-law or same-sex partner. It is not mandatory to use, but income assistance administrators and their staff may find it useful in administering the Income Assistance Program in a fair and objective manner".

It further states that “Financial interdependence is the most important factor. Evidence of two of these three factors must be present to establish a common-law union”. In addition to the financial interdependence factor, which can be established by affirming the existence of one or many of the sub-factors listed, the other determining factors are “Family Interdependence” and “Place of Residence”.

[122] Mr. Baptiste maintained that he had knowledge of these factors and that on its face, the application and related documents would lead the worker to conclude the existence of a common-law relationship between Ms. Tanner and Mr. Barthelette. Mr. Baptiste noted that he did not personally know either Ms. Tanner or Mr. Barthelette.

[123] Ms. Tanner testified that Mr. Barthelette was a friend who occasionally came to stay with her, and who provided her with no financial assistance. Roxanne Brass contradicted the fact that Mr. Barthelette was just a friend of Ms. Tanner’s and testified that she had heard Ms. Tanner refer to him as her old man and that Charlene referred to him as her mother’s boyfriend.

[124] Ms. Tanner indicated that the only reason that she listed Mr. Barthelette as a resident of her household and later as her spouse was because Terry Tanner advised that she do so. Her testimony is unchallenged in this regard, as Terry Tanner, despite the fact that he was on the witness list, did not testify.

[125] However, as highlighted by the Respondent, the issue here is not whether Ms. Tanner was appropriately denied income assistance, or even whether she was in a common-law relationship with Mr. Barthelette, but whether Terry Tanner’s advice to her in completing her income assistance application was influenced by the fact that she is a non-blood descendant of John (Falcon) Tanner; or, as submitted by the Complainant, on the basis of her family status.

[126] Therein lies the weakness of the Complainant’s position. While Terry Tanner’s advice may indeed have resulted in the denial of the Complainant’s social assistance application, the evidence does not indicate that his advice was in any way linked to the Complainant’s status as a non-descendant of John (Falcon) Tanner; or, that his advice was even wrong. The evidence indicates that there is a legitimate dispute over whether

Ms. Tanner was in a common-law relationship with Mr. Barthelette. However, it is not for the Tribunal to determine the Complainant's relationship status. Rather, the Tribunal must determine whether there was a discriminatory practice. In this regard, there was insufficient evidence to establish that ancestry was a factor in Terry Tanner's advice to the Complainant or the ultimate denial of her social assistance application. Overall, on a balance of probabilities, I conclude that the Complainant has failed to demonstrate that the Respondent's actions leading to the denial of her social assistance application were in any way discriminatory.

B. Denial of Use of Medical Van

[127] In February 2012, the Complainant was diagnosed with cancer and later, the prognosis was that it was terminal cancer. The Complainant testified that she sought the use of the Nation's medical van for trips to medical appointments and was advised it was booked or otherwise unavailable.

[128] The Complainant's daughter, Charlene Tanner, testified that other individuals had told her she could not use the van, but further testified that this did not come from the Chief or Councillors directly. She added that she drove her mother to different medical appointments on 79 occasions, at approximately $40.00 per trip, for a total of $3,160.00. Counsel for the Complainant submitted that the action of denying the medical van was a callous disregard for the Complainant.

[129] Chief David LeDoux testified that any member of the Nation could use the medical van and use is not limited to being a blood descendant.

[130] Aside for stating she was denied use of the medical van, and that this was callous, Ms. Tanner's allegations here do not demonstrate that a prohibited ground of discrimination was a factor in her being denied the use of the medical van, whether based on ancestry or otherwise. Nor was there evidence to refute the lack of availability of the medical van. For these reasons, I find the complainant has not established a *prima facie* case for this aspect of her complaint.

C. Banishment from Band Facilities and Exclusion from Activities and Services

[131] The Complainant alleges the Nation has tried to banish her from the community and denied her various services offered to other Band members, including garden supplies, home improvements, snow removal and lawn cutting.

[132] With regard to banishment, two Band council resolutions were at issue. One dated March 2, 2000 provides:

> Whereas, the on-reserve membership of Gamblers First Nation are taking a stand against violence in the community.
>
> Whereas, the membership will not tolerate the gang-like actions against the members, especially the elderly here on Gamblers First Nation Reserve.
>
> Whereas, the membership are in agreement to take action so that we can live at home without fear.
>
> Be It Resolved that, the majority of the Gamblers First Nation membership are removing you, Sharon J. Tanner, Treaty #2940017602, from residency here on Gamblers First Nation.
>
> Be It Resolved that, the majority of the Band Membership living on reserve and of legal voting are, are in agreement to have you, Sharon J. Tanner, removed permanently from Gamblers First Nation Reserve.

[133] The other resolution dated March 3, 2000 provides:

> Whereas, the on-reserve membership of Gamblers First Nation are taking a stand against violence in the community.
>
> Whereas, the membership will not tolerate the gang-like actions against the members, especially the elderly here on Gamblers First Nation Reserve.

> Whereas, as your job is to help people in need by way of health positions as CHR and NNADAP jobs.
>
> Be It Resolved that, the majority of the Band Members living on-reserve and of legal voting age, are in agreement to release you Sharon J. Tanner from your CHR job and your NNADAP job.

[134] The Respondent submits these Band council resolutions were a result of the Complainant's violent actions and are unrelated to the Complainant's status as a non-blood descendant of John (Falcon) Tanner. They were entered into four days after the Complainant was involved in the violent incident with other Band members. Given the timing of the Band council resolutions and the specific references to "violence" and "gang-like actions", the Respondent submits the evidence supports a finding that the Complainant's banishment was as a result of her violence and is unrelated to her status as a non-blood descendant.

[135] The evidence indicated that the Band council resolutions in 2000 were indeed in response to a violent incident involving the Complainant. Furthermore, the evidence disclosed that over the years Ms. Tanner was not the only individual who was banished from the Nation. Even blood descendants had been banished. Overall, the Complainant did not demonstrate that her ancestry was a factor in this treatment.

[136] With regard to the services of garden supplies, home improvements, snow removal and lawn cutting, the Complainant did not establish that she was treated differently from other members of the community, let alone that her ancestry was a factor in any adverse treatment. Chief LeDoux responded to these allegations and indicated that INAC only provides funding to clear main roads and houses with water tanks; members are responsible for cutting their own lawns; garden supplies are provided to all members who request them; and, home improvements have been provided to the Complainant's home. As a result, this aspect of the complaint is also dismissed.

IV. Issue 3: Retaliation

[137] In addition to alleging the Respondent discriminated against her in its application of the Descent Rule, the Complainant alleges the Respondent retaliated against her for the filing of her complaint, contrary to section 14.1 of the *CHRA*. Section 14.1 reads:

> 14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[138] To establish a breach of this section, as is the case with other discriminatory practices, the Complainant must demonstrate a *prima facie* case. Applying the *Moore* test in the context of retaliation, the Complainant must present sufficient evidence to justify that her human rights complaint was a factor in any adverse treatment she suffered following the filing of her complaint. The Tribunal has previously recognized a complainant's perception of retaliation, as long as it is reasonable, may constitute sufficient evidence in this regard (see *Wong v. Royal Bank of Canada*, 2001 CanLII 8499 (CHRT) at paras. 218-223 [*Wong*]). As is the case for other discriminatory practices, there is also no requirement for the Complainant to establish any intent to retaliate on the part of the Respondent to establish a *prima facie* case (see *Wong* at paras. 221-222; and, *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2015 CHRT 14 at paras. 3-27). If a *prima facie* case of retaliation is established, the Tribunal will consider whether, on the basis of the evidence presented by both parties, it is more probable than not that retaliation has occurred.

[139] It is with this legal framework in mind that I examine the allegations of retaliation in the present case.

A. Summary of the Relevant Facts

[140] On June 26, 2012, a little over one month after the filing of the complaint, the Complainant applied to the position of Economic Development Officer for Gambler First Nation and was invited to an interview. On July 4, 2012, Ms. Tanner was verbally informed

by Councillor Ron Ducharme that she had been hired for the position. The contract, although it was never drafted, was to run until the end of the fiscal year (March 29, 2013), subject to renewal for future years. Ms. Tanner was to start work on July 9, 2012, with a wage of $12 per hour for 80 hours on a bi-weekly basis.

[141] Two days later, on July 6, 2012, the Chief and Council received a copy of Ms. Tanner's human rights complaint.

[142] In a letter dated July 9, 2012, drafted by the Chief's wife Rose LeDoux and signed by the Chief, the Chief informed Ms. Tanner that she had been awarded the position of Economic Development Officer on the condition that she agree to withdraw her human rights complaint. The letter reads:

> Dear Ms Tanner,
>
> You have been awarded the position of Economic Development Officer for Gambler First Nation with a start date of July 9, 2012; conditional on releasing Gambler First Nation, Chief David LeDoux and Councilor Roy Vermette of any action against them in the complaint you submitted to the Canadian Human Rights Commission. Discussion of this matter was held with Councilor Ronnie Ducharme, Councilor Roy Vermette, Financial Manager Harlene Swain and Chief David LeDoux on July 6, 2012.
>
> Mr. Harold Cochrane, Lawyer will be drawing up a letter of release to this effect.
>
> The position of Economic Development Officer is a contractual position and is subject to renewal on a yearly basis. Your position for this fiscal year will run from July 9, 2012 till March 29, 2013 and [sic] eight (8) month period. You will be on probation for the first three (3) months; job description pending.
>
> Sincerely,
>
> Chief David LeDoux

[143] Following the receipt of this letter, Sharon Tanner met with Chief LeDoux, Rose LeDoux, and Harlene Swain. During this meeting, Rose LeDoux presented Ms. Tanner

with copies of a Release and Waiver of Independent Legal Advice. Chief LeDoux informed Ms. Tanner that she could still keep her job if she signed the documents. She refused on the basis that Councillors Roy Vermette and Ron Ducharme were absent and therefore, that the meeting did not have quorum.

[144] Ms. Tanner was nevertheless awarded the position. She performed in this capacity for a period of three months, during which she worked primarily on a proposal for the Home Adaptations for Senior Independence (HASI) program, which provides for the funding of minor home adaptations to allow seniors to remain in their homes and live independently. She also alleges that, upon the Chief's request, she worked on a project to build a skating rink as well as on a few other projects for individuals who wished to return to school or those like Doreen Mitchell, who were looking for work.

[145] In August, Ms. Tanner was informed that it was not appropriate for Harlene Swain, as Financial Manager, to share an office with her and since there were no other working spaces at the Band office, Ms. Tanner set up her office at home with the help of Councillors Roy Vermette and Ron Ducharme. She worked from home until she was terminated

[146] On September 24, 2012, Harlene Swain sent a letter to the Complainant, on behalf of the Chief, requesting that she attend a meeting on October 1st to evaluate her performance as the end of her probationary period was up. The letter also requested that Ms. Tanner bring her "Monthly Activity Reports, Funding Reports and copies of Submitted Proposals".

[147] Ms. Tanner testified that, upon its receipt, she showed the letter to Councillors Roy Vermette and Ron Ducharme. Neither of them had any knowledge of this meeting and expressed that they were satisfied with her work. The Councillors allegedly told the Complainant that since the two of them constituted a quorum, which was all that was necessary for the Band council to render a decision, she did not have to attend the meeting. Ms. Tanner did not attend the meeting.

[148] On October 2, 2012, the Complainant received a letter from Gambler First Nation, signed by Harlene Swain. The letter stated that, in light of the fact that the Complainant did

not attend her evaluation, attend regular staff meetings as required, or submit her monthly activity reports, spending reports and copies of submitted proposals, it would be recommended that her employment be terminated. The letter stated that a Band meeting would be held for this purpose at the Gambler First Nation Band office at 10:00 a.m. on October 9, 2012. The Complainant once again discussed the letter with Councillors Roy Vermette and Ron Ducharme, who had not received a copy of the letter nor possessed prior knowledge of the meeting. They assured Ms. Tanner that the Chief needed a quorum to make such a decision.

[149] On October 9, 2012, the Chief held a Band meeting to discuss, amongst other things, the termination of Ms. Tanner's employment. Ms. Tanner did not attend this meeting, however Ms. Tanner's daughter, Charlene Tanner, was present, and when the termination was discussed, spoke in her defense. Councillor Roy Vermette was also in attendance.

[150] In a letter dated October 9, 2012, Chief David LeDoux informed the Complainant: "As you are on probation, as you did not attend your evaluation you are here by terminated from your position". The Complainant testified that she showed the letter to the Councillors and that they expressed to her that they had no knowledge of it and that the Chief had taken this decision in the absence of a quorum.

[151] On November 13, 2012, the Complainant filed a complaint under the Canada Labour Code. Despite the fact that her employment was allegedly terminated for cause, Ms. Tanner subsequently received $5,672.00 and an additional $1,221.12 as holiday pay and pay in lieu of notice.

B. Parties' Submissions and Analysis

[152] The Respondent has taken the position that the decision to terminate the Complainant was based on her performance. Ashley Smith, the daughter of Chief David LeDoux and a volunteer on the housing committee during this period, testified that a HASI proposal essentially consists of completing a checklist and takes approximately one hour to complete. The Respondent argues that this evidence contradicts the Complainant's

testimony that she worked on this proposal for the majority of her three months of employment and supports the decision to terminate her employment. Moreover, according to Chief LeDoux, the HASI Program is a Canada Mortgage and Housing Corporation Program and falls under the housing portfolio, for which Ronnie Ducharme is responsible and is not part of the Economic Development Officer responsibilities. The Complainant's failure to perform the duties of Economic Development Officer, combined with her failure to attend her performance evaluation and provide her monthly activity reports, funding reports and copies of her submitted proposals, formed the basis for her dismissal.

[153] Ms. Tanner testified that her work on the HASI proposal involved much more than completing a checklist. She stated that once the funding came through, she had to bring in the carpenters to do the renovation work and have the work evaluated to ensure it had been done correctly. Ms. Tanner claimed that she received instructions from Cindy McCabe from the West Region Tribal Council as well as from the Councillors, to whom she reported, and that all were satisfied with her work. Her decision not to attend the performance evaluation and subsequent meetings was founded on her conversations with the Councillors and the apparent lack of quorum. The Complainant refutes the Respondent's position that she was properly terminated due to her lack of performance, and argues that the fact that she received pay in lieu of notice as well as holiday pay, contradicts the Respondent's submission that she was fired for cause.

[154] There is no question that the parameters of the Complainant's employment with Gambler First Nation as the Economic Development Officer were ill-defined. No contract was drafted and the Complainant never received a job description. Ms. Tanner received instructions from Cindy McCabe, as well as from the Councillors, and testified that she had little contact with the Chief during this period. In this context, it is difficult to accept the Chief's contention that she erred in working on the HASI Program as it allegedly fell outside of her responsibilities. It is also difficult to accept that Ms. Tanner's failure to provide the requested Monthly Activity and Funding Reports supports the decision to terminate her employment when the Chief could not remember whether or not Ms. Tanner had been informed that the completion of the reports were a part of her job: Transcript at pp. 752-753.

[155] Having said this, parts of Ms. Tanner's testimony regarding the work she performed were contradictory and lacked credibility. At one point, Ms. Tanner expressed that she had interpreted the decision that she could not share Harlene Swain's office as the termination of her employment: "I didn't have an office to work at. I was more or less fired already" (Transcript at p. 134). It was not clear if, at this point, she really continued to work from home: "I didn't have time to work on the other one [other proposal than the HASI proposal]. Like I said I was removed from my office. So this was the only one I got completed" (Transcript at p. 134). Ms. Tanner stated that the Councillors, to whom she reported, were satisfied with her performance. This is perhaps unsurprising as the only house approved pursuant to the HASI proposal on which she worked during this period was the home of Councillor Roy Vermette. Roy Vermette has since deceased and while Ronnie Ducharme produced an affidavit which supports the Complainant's submission that her dismissal did not have "quorum", he did not testify at the hearing.

[156] The issue of the existence of a "quorum", as a requirement for the Band's decision-making is at the root of much of the contention surrounding these events. Ms. Tanner testified at numerous occasions that she did not recognize the Chief's decisions due to the fact that they were made without the knowledge and consent of the Councillors, and therefore without a "quorum" or majority. According to his affidavit, this view appears to be supported by Councillor Ronnie Ducharme. Chief David LeDoux also testified to the fact that both Councillors believed that they had "quorum":

> MR. TOUET: Can you discuss the governance in the first year when Ronnie and Roy were both involved?
>
> MR. LEDOUX: They basically did not like the way that I tried to make it fair for everybody on Gambler. They always said they had quorum which means two out of the three elected officials have the say I guess, final say.

[157] Chief David LeDoux expressed that he had a different view on the necessity of a quorum:

> MR. TOUET: Okay. What do you understand quorum to be necessary for?

> MR. LEDOUX: Quorum would be something that needs to be dealt with that affects the membership. For instance removal of Chief-in-Council, you need more than a quorum, you've got to have whatever the conviction, whatever. My idea back then was getting the membership involved and making decisions. I don't really like the idea of being run by a Chief or a councillor making my decisions for me, so, I tried to bring the membership in and deal with the issues through the membership. They [Roy Vermette and Ronnie Ducharme] didn't like that at all, not one bit.
>
> […]
>
> MR. TOUET: Your understanding of quorum. Is quorum necessary for day-to-day decisions?
>
> MR. LEDOUX: No, we have our policies and procedures in place. Our administration policy, conduct policy, confidentiality and that was already voted on. It's up to the staff to deal with the employees as our policies and procedures.
>
> MR. TOUET: So for calling meetings with staff, would quorum be necessary for something like that?
>
> MR. LEDOUX: No.
>
> Transcript at pp. 695-696, 700-701

[158] Chief David LeDoux testified that he did not "have the same ideas as a lot of our past administration or Chief-in-Council": Transcript at p. 688-689, which includes Councillors Roy Vermette and Ronnie Ducharme. According to the minutes of the October 9, 2012, Band meeting led by Chief LeDoux, the same meeting where the decision to terminate Ms. Tanner's employment was made, Ronnie Ducharme was stripped of his signing rights and his portfolio, and his honorarium was given to Roy Vermette. The tension among the members of the Band council became evident in Chief LeDoux's testimony and the contention regarding the necessity for a quorum is only further evidence of this. In light of the existence of this conflict, it is difficult to hold Ms. Tanner, as an employee of the Band, responsible for following the directions of the two Councillors rather

than the Chief's, who appeared to know little of the work completed by Ms. Tanner and testified that he had not read the proposal she had given him.

[159] Nevertheless, the question at hand is not whether Ms. Tanner was appropriately fired for cause but rather, if her filing of a human rights complaint against the Respondent was a factor in the decision to terminate her employment. The Respondent's letter, informing Ms. Tanner that her employment with the Band was conditional upon her signing a release relating to her human rights complaint looms large in this regard. The Respondent has admitted this fact:

> MR. TOUET: We've heard evidence that Ms. Tanner was asked to sign a release relating to her Human Rights complaint?
>
> MR. LEDOUX: Yes, at that time we were dealing with complaints for the other ones I had dismissed so the lawyer Cochrane I think, Sonny Cochrane advised that it's not good to hire somebody who has a complaint against you, so, let's see if we can get that out of the way. I don't know what other company would hire somebody that has a complaint against them. So that's the reason.

The letter also formed part of the evidentiary record.

[160] While the Complainant was awarded the position, despite the fact that she refused to sign the release, the Respondent's initial response to hiring Ms. Tanner is troubling and in and of itself, constitutes quite clearly a *threat* of retaliation, contrary to section 14.1. I agree with the Commission that this response also provides a lens through which the Tribunal should examine the question of why Ms. Tanner was subsequently terminated. The human rights complaint may not have been the only factor in the decision to terminate Ms. Tanner, but the letter, combined with the Chief's subsequent lack of involvement regarding Ms. Tanner's work as the Economic Development Officer and the weakness of a number of the reasons explaining the termination, makes it difficult to believe that it was not *one of the factors* which informed this decision. Therefore, I find that the termination constitutes retaliation and is in violation of section 14.1 of the *CHRA*.

V. Order

[161] Having found the Descent Rule and retaliation complaints to be substantiated, I may make an order against Gambler First Nation pursuant to section 53(2) of the *CHRA*. The aim in making an order under subsection 53(2) is not to punish the person found to have engaged in the discriminatory practice, but to eliminate - as much as possible - the discriminatory effects of the practice (see *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

[162] The Complainant requests compensation for pain and suffering pursuant to section 53(2)(e); special compensation pursuant to section 53(3); and, compensation for lost wages, pursuant to section 53(2)(c), for the termination of her Economic Development Officer position. In addition, the Commission requests that the Nation stop declaring election candidates ineligible based on the Descent Rule and review its Election Law to remove references to the Descent Rule. The Commission asks that this review be completed within one year of the date of the Tribunal's decision.

A. Cease and desist order

[163] Section 53(2)(a) of the *CHRA* provides the Tribunal with the authority to order:

> that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future

[164] In this regard, the Commission requests the following orders from the Tribunal:

(a) That the Nation cease and desist from declaring candidates for office ineligible based on the Descent Rule.

(b) That the Nation review its current written customary election code and take such steps as may be necessary to remove references to the Descent Rule from that written customary election code.

(c) That the steps described in paragraph (b) above be completed within one year of the date of the Tribunal's decision.

[165] Given my finding that the application of the Descent Rule is discriminatory, I find the Commission's request for an order under section 53(2)(a) of the *CHRA* to be necessary to prevent the discrimination that Ms. Tanner endured from occurring again in the future. I therefore order the Respondent to cease applying the Descent Rule and to review is Election Law to remove references to the Descent Rule. The review of the Election Law should be completed within one year of this decision, subject to my order at paragraph 180 below.

B. Compensation for pain and suffering

[166] The Complainant seeks up to $20,000 in compensation for pain and suffering as a result of each of the discriminatory practices. This is the maximum amount of compensation the Tribunal can award under paragraph 53(2)(e) of the *CHRA*. The Tribunal only awards the maximum amount in the most egregious of circumstances: where the extent and duration of the complainant's suffering as a result of the discriminatory practice warrants the full amount.

[167] With respect to the Complainant's inability to run for Chief, the Respondent submits the Complainant presented no evidence as to the likelihood of the Complainant being elected Chief of the First Nation. It notes that there were five other candidates for Chief in the 2012 election. It adds that the term of office is for a period of eight months at an annual salary of approximately $20,000, which equates to $13,333 over the eight month period. Assuming the Complainant had an equal chance as any other candidate in the election, the Respondent submits her share of the Chief's salary for 2012 would be $2,666.66. In the Respondent's view, this is the maximum amount of damages that the Complainant should be entitled to for pain and suffering related to taking away her opportunity to be a

candidate for the position of Chief. With regard to retaliation, the Respondent submits the Complainant has failed to establish that she is entitled to compensation for losing her job as Economic Development Officer.

[168] Ms. Tanner has been an activist in her community for many years, trying to bring about order and good government. She is a respected member of the Nation as indicated by her nomination for Councillor and Chief on different occasions, as well as being appointed to examine the Nation's finances. She indicated that her exclusion from the leadership of the Nation, based on the Descent Rule, and after more than 30 years of living as a member of the community, made her feel alienated, sad, isolated and embarrassed. Pain she continues to feel to this day. Taking this all into account, I believe an award of $12,500 is appropriate for the pain and suffering the Complainant endured as a result of the application of the Descent Rule. The Respondent's submissions regarding the Chief's salary and loss of opportunity are not relevant to assessing the Complainant's pain and suffering. They more appropriately relate to an award for wage loss, which the Complainant did not claim in the relation to the Descent Rule complaint.

[169] Similarly, the circumstances surrounding the retaliation complaint further contributed to the Complainant's degradation within the community. She was not permitted to work at the Band Council Office and her work ethic was publicly and unmeritoriously criticized by the Chief at a Band Council meeting. This was hurtful and embarrassing for the Complainant. Therefore, I award $2,500 as compensation for the pain and suffering the Complainant endured as a result of the retaliation by the Respondent.

C. Special compensation

[170] The Complainant seeks up to $20,000 as compensation from the Respondent for having engaged in retaliation wilfully or recklessly, pursuant to section 53(3) of the *CHRA*. The Commission believes an award under this section for the Descent Rule complaint is also in order.

[171] In *Canada (Attorney General) v. Johnstone*, 2013 FC 113, aff'd 2014 FCA 110, at paragraph 154, the Federal Court stated the following with regard to section 53(3):

> This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the Act is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.

[172] Again, as $20,000 is the maximum amount that can be awarded under section 53(3) of the *CHRA*, the maximum award should be reserved for the very worst cases.

[173] With regard to the Descent Rule, the Respondent submits the First Nation did not enact the Election Law with disregard to the consequences. It was developed by Larry Catagas with input from members of Gambler First Nation and was put to a vote of the members in a Referendum and received approval by a majority of electors. Again, with regard to retaliation, the Respondent submits the Complainant has failed to establish that she is entitled to compensation for losing her job as Economic Development Officer.

[174] On the Descent Rule complaint, I found the Respondent was unable to provide a credible explanation as to why it decided, in 2010, to move forward with the adoption of the Election Law. This was three years after the initial referendum on the issue, which I noted had many irregularities, and around a time where Ms. Tanner was expressing interest in being a part of the leadership of the Nation. This led me to find that it is more probable than not that the Election Law was adopted in 2010, at least in part, to prevent Ms. Tanner from running for Chief. That said, I cannot conclusively say that the Respondent's actions were intentionally discriminatory. However, based on the circumstances, I am satisfied that the Respondent showed disregard and indifference towards the Complainant. Therefore, I award $10,000 as special compensation for the Descent Rule complaint.

[175] With regard to the retaliation complaint, I find the Respondent's actions strike at the core of the protection against retaliation found at section 14.1 of the *CHRA*. Making the Economic Development Officer job offer conditional on withdrawing her human rights was a blatant threat of retaliation. While the Respondent did not act on this threat, and the Complainant ultimately received the job, the initial threat, combined with the weakness of a number of the reasons explaining the termination, led me to find that Ms. Tanner's human rights complaint was at least one factor that drove the decision to terminate her contract. In

my view, this evidence indicates that there was some element of deliberateness and planning in the Respondent's decision to terminate the Complainant's contract as an Economic Development Officer, which merits a higher range award for special compensation. Accordingly, I award $15,000 as special compensation for the retaliation complaint.

D. Compensation for lost wages

[176] Pursuant to section 53(2)(c), the Complainant seeks $10,328 for unpaid wages as a result of the termination of her Economic Development Officer position.

[177] The $10,328 in lost wages sought by the Complainant is based on the term of her contract (8 months) minus pay she has already received ($5,672.00 in wages and $1,221.12 as holiday pay and pay in lieu of notice). Having found the Respondent retaliated against the Complainant in terminating her contract as an Economic Development Officer, I order the claim for $10,328 in unpaid wages.

E. Retention of jurisdiction

[178] The Commission requests the Tribunal to retain jurisdiction and remain seized of this matter until the parties confirm that the remedies ordered above have been implemented. In the event the parties disagree regarding the interpretation or implementation of any relief ordered, the Commission asks the Tribunal to receive evidence, hear additional arguments and/or make additional orders.

[179] There may be practical issues with reviewing the Nation's written customary election code within one year, as ordered above. To ensure this aspect of my order is implemented effectively and reasonably for all parties, I will retain jurisdiction over this aspect of the order until the parties confirm that it has been implemented.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
August 7, 2015

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1966/4613

Style of Cause: Sharon Tanner v. Gambler First Nation

Decision of the Tribunal Dated: August 7, 2015

Date and Place of Hearing: July 14 to 17, 2014

Russell, Manitoba

Appearances:

Norman H. Sims, Q.C., for the Complainant

John Unrau and Jonathan Bujeau, for the Canadian Human Rights Commission

Adam R. Touet, for the Respondent