Federal Court  Cour fédérale

Date: 20161130

Docket: T-1401-16

Citation: 2016 FC 1320

Ottawa, Ontario, November 30, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MORGAN PERRY

Applicant

And

COLD LAKE FIRST NATIONS CHIEF AND COUNCIL, and ALAN ADAM, ELECTORAL OFFICER FOR COLD LAKE FIRST NATIONS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Morgan Perry has brought an application for judicial review of a Band Council Resolution [BCR] passed by the Cold Lake First Nations [CLFN] Chief and Council on August 18, 2016. The BCR cancelled a new election for members of Council (but not the Chief) that had been ordered by the CLFN Appeal Committee and confirmed by the CLFN Election Officer,

Allan Adam. The CLFN Appeal Committee ordered a new election because of its determination that the existing CLFN Election Law did not comply with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[2] For the reasons that follow, I find that the CLFN Appeal Committee exceeded its jurisdiction by declaring that the CLFN Election Law contravenes the *Charter*, by purporting to amend the CLFN Election Law, and by directing that a new election be held. The BCR passed by the CLFN Chief and Council was therefore reasonable, and the application for judicial review is dismissed.

II. Background

[3] On September 21, 2016, I issued an interlocutory injunction to prohibit the CLFN Election Officer from holding an election for members of the CLFN Council pending the determination of this application for judicial review (*Perry v Cold Lake First Nations*, 2016 FC 1081). In that decision, I summarized the facts giving rise to this dispute as follows:

> [1] On June 22, 2016, an election was held for Chief of the CLFN. On June 29, 2016, an election was held for Council of the CLFN. Mr. Perry contested his removal from the list of candidates for election to the CLFN Council on the ground that he had been improperly excluded based on his residency.
>
> [2] On August 11, 2016, the CLFN Appeal Committee, constituted under the CLFN Election Law, released a report of its decisions regarding several complaints it had received. The Appeal Committee upheld Mr. Perry's complaint. Despite finding no irregularity in the conduct of the election, the Appeal Committee

concluded that the CLFN Election Law was deficient insofar as it excludes certain candidates and voters based on their residency, descendancy, and age.

[3] The Appeal Committee directed the Electoral Officer, Mr. Adam, to hold a new accelerated election for Council, adding Mr. Perry as a candidate. Mr. Adam subsequently informed the CLFN Chief and Council that he intended to carry out the Appeal Committee's direction and hold a new election for Council on August 25, 2016.

[4] On August 18, 2016, the CLFN Chief and Council adopted a Band Council Resolution rejecting the Appeal Committee's direction that a new election be held. Mr. Adam was advised by the CLFN Chief and Council that his duties as Electoral Officer had been fulfilled and his services were no longer required.

[5] On August 22, 2016, Mr. Perry filed an application for judicial review of the decision of CLFN Chief and Council to issue the Band Council Resolution rejecting the Appeal Committee's direction that a new election for Council be held.

III. Decision under Review

[4] The BCR passed by the CLFN Chief and Council on August 18, 2016 (Resolution #030-2016-2017) reads as follows:

1. The Report of the Appeal Committee has been carefully considered and is duly noted by Chief and Council;

2. It is the conclusion of Chief and Council that:

   a. The Appeals Committee acted outside its jurisdiction and without authority in considering certain appeals outside its mandate under the CLFN Election Law;

   b. The Appeal Committee acted outside its jurisdiction and without authority by:

i. purporting to strike down residency requirements, "descendant" requirements, and age requirements under the CLFN Election Law; and,

ii. purporting to order an "accelerated election" for all CLFN Band Council positions, with a pre-fixed nomination list, to be held on August 25, 2016 with advance polls to be held in Edmonton on August 24, 2016;

c. The Appeal Committee has no authority under the CLFN Election Law or otherwise to amend or strike any portions of the CLFN Election Law;

d. Any amendment to the CLFN Election Law is the right and responsibility of CLFN members, pursuant to section 20 of the CLFN Election Law;

3. Accordingly, the conclusions of the Appeal Committee regarding the merits or legality of the CLFN Election Law are respectfully rejected and will not be followed;

4. The Accelerated Election purported to be ordered by the Appeal Committee, without authority to do so, will not be called;

5. The Election Officer is directed to cease preparations for an Accelerated Election and advised that he has not been appointed by Chief and Council, as required under the CLFN Election Law, for the purposes of holding a further election at this time;

6. Chief and Council shall, in consultation with CLFN members, establish a Commission for Electoral Reform (the "Commission").

7. The Commission shall continue to advance the process of review, amendment and reform of the CLFN Election Law, through full consultation with, and input from, Elders and CLFN members generally, in a manner that is consistent with the Denesuline Language, traditions and customs of CLFN.

8. The Commission shall draft and propose amendments to the CLFN Election Law to be presented to CLFN members (the "Proposed Amendments").

9. In accordance with section 20 of the CLFN Election Law, CLFN members shall vote in a community referendum on whether to incorporate the Proposed Amendments into the CLFN Election Law no later than December 31, 2017.

IV. Issues

[5] This application for judicial review raises the following issues:

A. What is the standard of review?

B. Did the CLFN Appeal Committee have jurisdiction to decide *Charte*r questions and grant *Charter* remedies?

C. Did the CLFN Chief and Council have jurisdiction to pass the BCR?

D. Was the passing of the BCR procedurally fair?

V. Analysis

A. *What is the standard of review?*

[6] The decision of the CLFN Chief and Counsel to pass the BCR is subject to review by this Court against the standard of reasonableness (*Crawler v Wesley First Nation*, 2016 FC 385 at para 18 [*Crawler*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51-53). However, the decision of the CLFN Chief and Council to pass the BCR was premised on its assessment that the CLFN Appeal Committee exceeded its jurisdiction by declaring the CLFN Election Law to be unconstitutional. This issue concerns the proper interpretation of the CLFN Election Law, and is subject to review against the standard of correctness (*Salt River First Nation #195 (Salt River*

Indian Band #759) v Martselos, 2008 FCA 221 at para 32; *Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796 at para 45).

[7] Questions of procedural fairness are subject to review against the standard of correctness (*Crawler* at para 19; *Desnomie v Peepeekisis First Nation*, 2007 FC 426 at para 11; *Weekusk v Wapass*, 2014 FC 845 at para 10; *Parenteau v Badger*, 2016 FC 535 at para 36 [*Parenteau*]).

B. *Did the CLFN Appeal Committee have jurisdiction to decide Charter questions and grant Charter remedies?*

[8] In *Grandbois v Cold Lake First Nation*, 2013 FC 1039 [*Grandbois*], Mr. Grandbois sought an order in the nature of *mandamus* to compel the CLFN Chief and Council to comply with a decision of the CLFN Appeal Committee. As in this case, the CLFN Appeal Committee declared that the CLFN Election Law was unconstitutional. The Appeal Committee further declared that all members of the CLFN of voting age were eligible to vote and run for office, and that a new election must be held, but only after the Election Law had been amended. Justice Heneghan found that the application for judicial review involved "an examination of the scope of the [Appeal] Committee's decision-making authority and the effect of the decision that it made in this case" (at para 13). She provided the following analysis of the power of the Appeal Committee (at paras 14-15):

> [14] The power of the Appeal Committee derives from the Election Law of May 27, 2010. Clause 15 of that Law addresses the "Appeals Committee". Sections (A), (C) and (E) of that Law are relevant to the present application and provide as follows:

> A. The Appeal Committee shall respect and follow the Cold Lake First Nations Election Law.
>
> […]
>
> C. The Appeal Committee shall deal with the appeals at a public meeting of the electors of the Cold Lake First Nations.
>
> […]
>
> E. The Appeal Committee can ask any person from Cold Lake First Nations to make comments upon the appeal and to have a clear position on the traditional laws of the Cold Lake First Nations people.

[15] Clause 14 deals with appeals in general. Sub-clauses (A), (C) and (G) are relevant and provide as follows:

> A. Any protest for the election of the Chief and Council must be made within thirty (30) days of the election.
>
> […]
>
> C. All protests must outline the reasons for the appeal based upon the traditional election law of the Cold Lake First Nations.
>
> […]
>
> G. All appeals shall be final at the completion of the review by the committee.

[9] Justice Heneghan concluded that the CLFN Appeal Committee was authorized only to "deal" with appeals "at a public meeting" (at para 16). She found that the CLFN Election Law did not "authorize the Committee to make a decision. The Appeal Committee is directed to "respect and follow" the CLFN Election Law but no specific remedies are identified, for implementation after an appeal." She contrasted the CLFN Election Law with the election laws of other First Nations which provided greater clarity regarding the scope of an appeal committee's powers (at para 22). Justice Heneghan concluded with the following observation:

> [23] In my opinion, having regard to the broad language of the Election Law, the role of the Election Committee is limited to respecting and following the Election Law and to identifying the traditional laws of the CLFN.
>
> [24] There is no evidence in the record about those traditional laws and the relationship, if any, with the Election Law and the role of the Election Committee.

[10] The CLFN Chief and Council take the position that this case is virtually indistinguishable from *Grandbois*, and should be decided accordingly. I agree.

[11] Mr. Perry relies on *Jacko v Cold Lake First Nation*, 2014 FC 1108 [*Jacko*], where Mr. Jacko sought judicial review of the CLFN Appeal Committee's decision to remove him from his position as a CLFN Councillor. The Appeal Committee found that Mr. Jacko was ineligible to run for Council under the CLFN Election Law because he did not live on reserve. Justice Russell made the following preliminary observation about the governing provisions of the CLFN Election Law:

> [50] There is no obvious and clear answer to the central issue raised by this application. […] The Election Law that is supposed to govern this situation is unclear and difficult to apply, and there is a lack of evidence on some key issues. The Court is left to do the best it can on a very unsatisfactory record.

[12] Justice Russell identified the central issue in *Jacko* as "whether the Appeals Committee had the jurisdiction to remove him in the way that it did" (at para 64). He continued as follows:

> [73] This is one of the areas where there is a lack of evidence. In my view, there is nothing before me to suggest that the Election Law does not permit this way of proceeding, or that it is not the way that the Election Law has been consistently interpreted in practice. The fact that someone can be kept off the ballot for ineligibility by the Elections Officer at the nomination stage does not mean that an appeal based upon ineligibility cannot be made to the Appeal Committee following the election.
>
> [74] Respecting and following the Election Law does not mean that there is only one possible interpretation of that law, and I cannot say, on the evidence before me, that the Appeal Committee unreasonably interpreted the Election Law and assumed jurisdiction to deal with the complaint against the Applicant in the way that it did.
>
> [75] I note that in *Grandbois*, above, the Court reached a different conclusion regarding the Appeal Committee's jurisdiction and powers. Contrary to that case, I have evidence before me that suggests the Appeal Committee's jurisdiction is not limited to "an administrative or advisory" role (*Grandbois*, above, at para 26). On cross-examination, the Chair of the Appeal Committee, Mr. Makokis, provided evidence regarding the authority of the Appeal Committee based on the Election Law and the CLFN's traditional practice (Applicant's Record at 132-134). I have no evidence from the Applicant to rebut Mr. Makokis' evidence regarding the traditional jurisdiction and powers of the CLFN Appeal Committee. The Cold Lake First Nations Chief and Council obviously feel that the Appeal Committee does have this power because they are resisting this application.

> [76] As a consequence, I cannot say that the Applicant has established a reviewable error and I must dismiss the application.

[13] In *Jacko*, there was no dispute that the CLFN Appeal Committee had the power to consider an appeal concerning Mr. Jacko's eligibility to run for Council. The Appeal Committee concluded that he was not. The central question in *Jacko* was whether, given this conclusion, the Appeal Committee could order that Mr. Jacko be removed from his position. Justice Russell found, based on the evidence before him, that there was nothing to suggest that the Election Law did not permit this way of proceeding, or that it was not the way that the Election Law had been consistently interpreted in practice.

[14] This case is different. The central issue here is whether the CLFN Appeal Committee had the power to decide whether the CLFN Election Law complied with the *Charter*, and to grant *Charter* remedies.

[15] In *Grandbois*, Justice Heneghan was persuaded that the CLFN Appeal Committee did not have the power to declare that the CLFN Election law violates the *Charter* or to grant *Charter* remedies:

> [17] The Respondents argue that the jurisdiction of the Appeal Committee is limited to the areas over which the CLFN assigned it authority, through the Election Law. In this regard, the Respondents rely on the decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 at paragraphs 55 and 60.
>
> [18] The Respondents also rely on the decision in *R. v. Conway*, [2010] 1 S.C.R. 765 at paragraphs 81-82 where the Supreme Court of Canada held that if a tribunal has explicit or implied jurisdiction

> to determine questions of law, it can consider and apply the *Charter*, including *Charter* remedies, unless it is clearly shown that the legislation intended to exclude the *Charter* from the tribunal's jurisdiction.
>
> [19] In my opinion, the arguments advanced by the Respondents as to the lack of jurisdiction of the Appeal Committee to grant the remedies that it did and to order a new election are more persuasive than the submissions advanced by the Applicant.

[16] In *R v Conway*, [2010] 1 SCR 765, the Supreme Court of Canada provided the following analytical framework for determining whether an administrative tribunal has the power to grant *Charter* remedies:

> [81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.
>
> [82] Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin* [*R v 974649 Ontario Inc*, 2001 SCC 81]).

[17] Based on the evidence before me, I am satisfied that the CLFN Election Law does not confer upon the CLFN Appeal Committee a jurisdiction to decide questions of law. Its mandate is only to "respect and follow the Cold Lake First Nations Election Law". Furthermore, the *Charter* remedies granted by the Appeal Committee in this case, namely declaring the CLFN Election Law to be unconstitutional and purporting to amend the law, cannot be reconciled with the applicable legislative scheme. The CLFN Election Law itself provides for a mechanism to amend the Election Law, and requires a referendum confirming the approval of 70% of the electors.

[18] When the CLFN Chief and Council passed the BCR in this case, it simultaneously issued a statement in which it acknowledged that the CLFN Election Law should be "reviewed, amended, and reformed". The Chief and Council also stated that "it is the right and responsibility of the CLFN Members to review, amend, and reform our Election Law. No one else has the right to do this for us". The Chief and Council announced the establishment of a Commission for Electoral Reform "to advance the process of review, amendment, and reform of the Election Law with our Elders and community members in a manner that is consistent with our Denesuline Language, traditions, and customs of the Cold Lake First Nations."

[19] I agree with the CLFN Chief and Council that a determination of the constitutionality of the CLFN Election Law should not be made lightly, nor without the benefit of proper notice, an adequate evidentiary record, and full argument. When courts have found a First Nation's election law to violate s 15(1) of the *Charter* in a manner that cannot be justified by s 1, they have typically stayed declarations of unconstitutionality to enable the community to remedy the

breach in accordance with its own laws and traditions (*Esquega v Canada (Attorney General)*, 2008 FCA 182 at para 11; *Thompson v Leq'á:mel First Nation*, 2007 FC 707 at para 25; *Cameron v Canada (Minister of Indian Affairs and Northern Development)*, 2012 FC 579 at paras 72–73 and 104).

[20] Even if the CLFN Appeal Committee had jurisdiction to decide *Charter* questions, and made its decision following a consideration of legal arguments based on a proper evidentiary record (none of which occurred here), the appropriate remedy would have been to suspend its declaration for a reasonable period of time to enable the CLFN to fashion a solution in keeping with its own laws and traditions. Instead, the Appeal Committee found that this Court's decision in *Jacko* "strongly suggests that the Cold Lake First Nation Election Appeals Committee has the jurisdiction and authority and even the duty to enact the Election Law and rule or make law which is consistent with the *Charter* specifically as it relates to Fairness and Equality" [emphasis original]. This interpretation of *Jacko* is plainly wrong. The Appeal Committee's mandate to "respect and follow" the CLFN Election Law cannot be read as conferring upon the Appeal Committee a power to amend the law or enact a new one. Nor does *Jacko* suggest that it might.

C. *Did the CLFN Chief and Council have jurisdiction to enact the BCR?*

[21] According to Mr. Perry, band councils may enact resolutions only for the purposes specified in ss 81, 83 and 85.1 of the *Indian Act*, RSC 1985, c I-5, or as explicitly authorized by the CLFN Election Law. He says that these powers do not include the authority to overturn a decision of the CLFN Appeal Committee. He argues that "the Appeal Committee is bound by the

Constitution and the Appeal Committee's decision on the appeal is final", citing s 14(G) of the CLFN Election Law.

[22] The CLFN Chief and Council respond that this is an "impoverished and antiquated" view of the powers that may be exercised by a band council. The CLFN Chief and Council rely upon this Court's decision in *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536, where Justice Mandamin found at paragraph 34 that "[t]he capacity of [a First Nation] to make laws concerning matters of leadership and governance are not derived from the *Indian Act* or other statutory power. Rather it is a result of the exercise of the First Nation's aboriginal right to make its own laws concerning governance."

[23] Nothing turns on this point. Given that the CLFN Appeal Committee was without jurisdiction to decide *Charter* questions or to grant *Charter* remedies, the CLFN Chief and Council could have chosen a less formal means of rejecting the Appeal Committee's conclusion that the CLFN Election Law was unconstitutional and its claim to have amended the law. Or, as in *Grandbois*, it could have done nothing beyond instructing Mr. Adam not to proceed with a new election.

[24] The CLFN's passing of a BCR promoted the interests of transparency and accountability within the community, and also underscored the gravity of the situation. I can find no fault with the decision of the CLFN Chief and Council to proceed in this manner.

D. *Was the enactment of the BCR procedurally fair?*

[25] Mr. Perry argues that his right to procedural fairness was breached because he received no notice of the Council meeting on August 18, 2016 that preceded the adoption of the BCR. He says he was entitled to know the case against him, and to be given an opportunity to be heard (citing *Parenteau* at para 49).

[26] The CLFN Chief and Council respond that by passing the BCR, Council was "exercising a policy or legislative function pursuant to its governance authority and ensuring compliance with the Election Law's amendment process." They argue that Council was not engaged in "a review of the Appeal Committee's decision", nor was it "making an administrative decision that directly engaged Mr. Perry's rights or interests" and accordingly, no duty of procedural fairness arose (citing *Canadian Assn of Regulated Importers v Canada (Attorney General)*, [1994] 2 FCR 247 at para 18 (CA); *Martineau v Matsqui Institution Disciplinary Board*, [1980] 1 SCR 602 at 628; *Authorson v Canada (Attorney General)*, 2003 SCC 39).

[27] I agree with the CLFN Chief and Council that passing a BCR in these circumstances was an exercise of the Council's policy or legislative function, and no duty of procedural fairness was owed to Mr. Perry. Furthermore, the decision of the CLFN Appeal Committee did not confer any right on Mr. Perry personally. Its purported amendment of the CLFN Election Law, which was made without authority, affected the interests of a great many people. Some were identified by the Appeal Committee, but most were not.

[28] In *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at paragraph 24, the Supreme Court of Canada held that the existence of a duty of procedural fairness depends on a consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. None of these factors suggest that the CLFN Chief and Council owed a duty of procedural fairness to Mr. Perry when it rejected the CLFN Appeal Committee's declaration that the CLFN Election Law did not comply with the *Charter*.

VI. Conclusion

[29] The CLFN Appeal Committee exceeded its jurisdiction by declaring the CLFN Election Law to be unconstitutional, by purporting to amend the Election Law, and by directing that a new election be held. The BCR passed by the CLFN Chief and Council to cancel the new election was therefore reasonable.

[30] Mr. Perry notes that questions concerning the constitutionality of the CLFN Election Law have existed since at least 2010. The CLFN's election results were challenged in this Court in 2010 and again in 2013. On both occasions, the Court was left with the impression that review and reform of the Election Law were imminent. Still the Election Law remains unchanged.

[31] The CLFN Appeal Committee stated that it was "asked out of frustration and inaction to move the 30 year old, out-dated document into the future, using *Charter* and Federal Court decisions to buttress the need for change." If the present reform initiative fails to produce results, then the CLFN Chief and Council may be faced with an action before a court of competent

jurisdiction to settle the matter once and for all. It is in the interests of the CLFN Chief and Council, and all members of the CLFN community, to support the work of the recently-established Electoral Reform Commission, and to ensure that its efforts bear fruit.

[32] The application for judicial review is dismissed. If the parties are unable to agree on costs, they may make written submissions to the Court, not exceeding three pages, within 14 days of the date of this Judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

If the parties are unable to agree on costs, they may make written submissions to the Court, not exceeding three pages, within 14 days of the date of this Judgment.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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