Federal Court of Appeal | Cour d'appel fédérale

Date: 20180410

Docket: A-468-16

Citation: 2018 FCA 73

CORAM: **GAUTHIER J.A.**
WEBB J.A.
NEAR J.A.

BETWEEN:

MORGAN PERRY

Appellant

and

COLD LAKE FIRST NATIONS CHIEF AND COUNCIL

Respondents

Heard at Vancouver, British Columbia, on March 14, 2018.

Judgment delivered at Ottawa, Ontario, on April 10, 2018.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Morgan Perry appeals a decision of Fothergill J. of the Federal Court (2016 FC 1320), dismissing his application for judicial review of a decision of the Cold Lake First Nations (CLFN) Chief and Council (the Council). During a Special Band Council Meeting held on August 18, 2016, the Council passed Resolution #030-2016-2017 (the Resolution) cancelling the new election for Councillors ordered by the CLFN Appeal Committee (the Committee) after it

amended the *Cold Lake First Nations Election Law* (The Election Law) and set out the conditions for the new election. The Federal Court concluded that the Resolution was valid as the Committee acted without jurisdiction and that the Council committed no breach of procedural fairness in passing the Resolution as it owed no duty in this respect to the appellant.

[2] For the following reasons, I propose to dismiss the appeal.

I. CONTEXT

[3] On June 22, 2016, the appellant was nominated to run for Councillor of CLFN. Three days later, the CLFN Elections Officer (the Elections Officer, as he is called in the Election Law), having received a complaint regarding this nomination, excluded the appellant from the list of candidates on the basis of the residency criterion set out at subsection 5.C of the Election Law. This provision reads as follows:

> **5. ELIGIBILITY FOR COUNCIL**
>
> […]
>
> C. Must have resided upon the Cold Lake Indian Nation's Reserve 149, 149A and 149B for at least five (5) years prior to being eligible for nomination.
>
> […]

[4] Following the election of Councillors held on June 29, 2016, the appellant, as well as several other potential candidates excluded for a variety of reasons, filed written protests (i.e. appeals) under the Election Law. On August 10, 2016, the Committee held a public meeting in compliance with subsection 15.C of the Election Law. The very next day, it issued its decision

with respect to all the appeals arising from the June 22 and 29, 2016 elections for Chief and Councillors respectively.

[5] In respect of his appeal before the Committee, the appellant's filing consisted of a letter from his legal counsel dated July 21, 2016, a brief affidavit in which he deals with the fact that he was excluded on the basis of his residency outside of the reserves, one of the two letters of protests alleging his ineligibility for not residing on reserve and a handwritten note dated July 25, 2016, responding to this protest (see Appeal Book, tab 7).

[6] In its brief reasons, the Committee noted that the jurisprudence referred to in the letter sent by the appellant's counsel shows that the law has evolved significantly since the adoption of the Election Law in 1986, and it is now unconstitutional to preclude members of a First Nation from voting or running for office for being off-reserve residents. Thus, the Committee amended the Election Law (subsections 1.I, 2.C, 2.D, 5.C, 5.F and 5.G) as follows:

> As such, the Residency Requirements to vote and to run for the position of Councillor are deleted from this date forward. Further, the requirement to be a 'descendant' for the position of Councilor [*sic*] is removed. If a member is on the Band list and is of 18 years (not 21 years) they may seek office.
>
> Further, from this day forward, all members 18 years of age or older may vote in any Cold Lake First Nation [*sic*] Elections as this is the age of majority to vote in Canada.
>
> (Emphasis in original) (Appeal Book, tab 6 at 39)

[7] The Committee also directed the Elections Officer to hold a new election for Councillors on August 25, 2016, and to include in the list of candidates all the nominees for the June 29,

2016, election, as well as five of the appellants whose appeals were upheld on the basis that various provisions of the Election Law were unconstitutional.

[8] The Committee neither dealt with the residency and direct descendancy requirements found in subsections 4.D and 4.E of the Election Law dealing with the eligibility for Chief nor ordered a new election for Chief where all members could vote. One could normally assume that it was because none of the candidates who had raised constitutional issues had been nominated for Chief. However, it appears that the absence of an appeal dealing with a particular constitutional issue did not, in fact, prevent the Committee from ruling on the validity of another provision, for it did strike down subsections 1.I, 2.D and 5.F of the Election Law dealing with the age required for voting and running for Councillor, even though this was not an issue raised by any of the appellants.

[9] It is also worth reproducing the two passages of the decision in which the Committee explains why it considered that it was entitled to take the steps that it did. First, the Committee interpreted the decision of the Federal Court in *Jacko v. Cold Lake First Nations Chief and Council*, 2014 FC 1108 (*Jacko*), as follows:

> The latter case strongly suggests that [the 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 in original) (Appeal Book, tab 6 at 39)

[10] It added:

> Moreover, Appeals and Judicial Reviews have not moved the 1986 Cold Lake First Nation Election Law forward, nor have weak attempts by expensive law firms yielded any measurable success.

> As such, we as an Election Appeal Committee are 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. The changes are need [*sic*], real and Fair [*sic*] and overdue.
>
> (Emphasis in original) (Appeal Book, tab 6 at 40)

[11] During a Special Band Council Meeting held on August 18, 2016, the Council passed the Resolution cancelling the new election ordered by the Committee. It appears that, after seeking and considering legal advice, the Council concluded as follows:

> […]
>
> a. The [Committee] acted outside its jurisdiction and without authority in considering certain appeals outside its mandate under the CFLN Election Law;
>
> b. The [Committee] had 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 [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;
>
> […]
>
> (Appeal Book, tab 6 at 42-43)

[12] In the Resolution, the Council also directed that it "shall, in consultation with the CLFN members, establish a Commission for Electoral Reform" and that the said Commission would

"draft and propose amendments to the [Election Law] to be presented to the CLFN members" (Appeal Book, tab 6 at 43). There would then be a vote in a community referendum in accordance with section 20 of the CLFN Election law no later than December 31, 2017.

[13] On August 22, 2016, the appellant brought his application for judicial review of the Resolution before the Federal Court. George Noel is the only person who filed an appeal before the Committee that sought judicial review of the Committee's decision dated August 11, 2016. The Federal Court granted the said application. The appeal of this decision (A-478-16) was heard immediately after the hearing of the present appeal and is dealt with in a separate set of reasons (2018 FCA 72).

[14] There is no evidence before us as to what amendments were proposed, if any, by the Commission of Electoral Reform and whether the referendum referred to in the Resolution has taken place.

II. THE FEDERAL COURT DECISIONS DEALING WITH THE ELECTION LAW

[15] Because both parties heavily relied on two previous decisions of the Federal Court involving CLFN, and the Federal Court in the present matter had to consider the said decisions, it is useful to start with a brief discussion of these decisions before summarizing the decision that is the object of this appeal.

[16] In *Grandbois v. Cold Lake First Nations Chief and Council*, 2013 FC 1039 (*Grandbois*), the Committee had "directed that a new election be called, delayed the new election by four

months so that the [Election Law] could be amended, struck certain provisions of the Election Law [for being unconstitutional], and held that all members of the CLFN over the voting age" (presumably 18 years old) "were eligible to vote" (*Grandbois* at paras. 1, 6).

[17] Two years later, Mr. Grandbois filed an application for a *mandamus* to force the Council to hold the new election as directed by the Committee.

[18] The Federal Court (*per* Heneghan J.) concluded that the Committee's power to direct a new election was "limited to an administrative or advisory, that is discretionary, role" (*Grandbois* at para. 25). The Committee having to "respect and follow" the Election Law (subsection 15.A), the Court held that its jurisdiction emanates strictly from the said Election Law. As the Election Law gave it no power other than to "deal" with appeals (subsection 15.C), the criteria for *mandamus* were not met as the Council was under no legal duty to call an election on the conditions set out by the Committee. The application for *mandamus* was dismissed; this dismissal was not based on technicalities or "procedural reasons" as was argued by the appellant and accepted by the Committee in its August 11, 2016, decision. This decision was not appealed.

[19] Read in its proper context, I do not understand paragraph 16 in *Grandbois* as meaning that, when the Committee finally deals with appeals, it is not making a decision in respect of such appeals. Admittedly, this paragraph could have been drafted more clearly. The decision referred to therein can only be the portion of the Committee's decision ordering a new election based on conditions that were not in the Election Law, as this was what was at issue in *Grandbois*. It would make no sense to read section 15 of the Election Law as meaning that the

Committee does not decide appeals properly within its jurisdiction. I need not say more about *Grandbois*, considering that it is not this Court's role to deal with the merits of that decision which, although binding on CLFN, does not bind this Court.

[20] In *Jacko*, the Federal Court had to review the validity of another decision of the Committee. In that case, the complaint before the Committee was that an elected candidate did not meet the residency requirement set out in subsection 5.C of the Election Law and had misrepresented this fact in his nomination papers.

[21] The Federal Court (*per* Russell J.) determined that it could not reasonably be said that Mr. Jacko resided on reserve and he had misrepresented this fact in his nomination papers (*Jacko* at para. 62). Thus, the only real issue before the Court was whether the Committee had jurisdiction to remove a Councillor who did not meet eligibility criteria set out in the Election Law. It was not disputed that, once a Councillor is removed, it is for the "Chief and Council" to call for a by-election to fill the vacancy (subsection 18.A of the Election Law). The Federal Court concluded that the Committee had jurisdiction to decide the appeal before it and that the Election Law, as implemented in the traditional practice of CLFN, gave it the power to remove such Councillor. The Federal Court distinguished *Grandbois* on the following basis:

> [75] I note that in *Grandbois*, above, the Court reached a different conclusion regarding the [Committee]'s jurisdiction and powers. Contrary to that case, I have evidence before me that suggests the [Committee]'s jurisdiction is not limited to "an administrative or advisory" role (*Grandbois*, above, at para 26). On cross-examination, the Chair of the [Committee], Mr. Makokis, provided evidence regarding the authority of the [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 [Committee]. The Cold Lake First Nations Chief

> and Council obviously feel that the [Committee] does have this power because they are resisting this application.
>
> (My emphasis)

[22] Once again, the decision in *Jacko* was not appealed.

[23] In my view, these two decisions can be reconciled considering that, in *Grandbois*, the Court mentions very clearly that it had no evidence as to the traditional law or practice with respect to the jurisdiction and powers of the Committee (*Grandbois* at para. 24), and the powers at issue in those two instances were quite distinct.

[24] Turning now to the decision of the Federal Court, which is the object of the present appeal, the Court applied the correctness standard to review the conclusion of the Council that the Committee did not have the jurisdiction or authority for the reasons set out in the Resolution (see para. 11 above). The Federal Court then reviewed *Grandbois* and *Jacko,* as well as the principles and analytical framework set out by the Supreme Court of Canada in *R. v. Conway*, 2010 SCC 22, , to determine when an administrative decision maker has the authority to decide constitutional questions and, if so, what remedies it could grant.

[25] On the basis of the record before it, the Federal Court found that, pursuant to subsection 15.A of the Election Law, the Committee's mandate was limited to respecting and following the Election Law and that the said Election Law set out a specific mechanism to amend it at section 20 (Federal Court reasons at para. 17). It thus found that the Council could validly reject the Committee's directions (Federal Court reasons at para. 23).

[26] The Federal Court also noted that "a determination of the constitutionality of the [Election Law] should not be done lightly, nor without the benefit of proper notice, an adequate evidentiary record, and full argument" (Federal Court reasons at para. 19). It added that, even if the Committee had jurisdiction to consider constitutional questions, its interpretation of *Jacko* was plainly wrong, and the Election Law cannot be read as conferring it the power to amend the Election Law and rewrite it for the purpose of the next election (Federal Court reasons at para. 20).

[27] The Federal Court also dealt with the procedural fairness arguments of the appellant and with the powers of the Council to pass the Resolution. However, as explained in paragraph 29 below, this portion of the decision is not relevant to the determination of this appeal.

III. ISSUES

[28] I understand from the representations made before us at the hearing that the main issue is whether the Committee had jurisdiction to declare provisions of the Election Law unconstitutional and grant the remedies it did in its decision.

[29] At the hearing, the appellant made it clear that should this Court not accept his argument that the Committee had jurisdiction to make the decision that it did on August 11, 2016, he did not wish to pursue his appeal in respect of other issues raised in his Notice of Appeal and his memorandum with respect to procedural fairness and the power of the Council to issue the Resolution.

IV. THE ELECTION LAW

[30] The most relevant provisions of the Election Law are reproduced below:

> **14. APPEALS**
>
> […]
>
> C. All protests must outline the reasons for the appeal based upon the traditional election law of the Cold Lake First Nations.
>
> […]
>
> E. The proof of the irregularities must be included in the letter and in the signed affidavit.
>
> F. The Elections Officer shall take the letter and the affidavit and submit a report to the appeal committee for their consideration.
>
> […]
>
> H. All appeals shall be finalized within thirty (30) days following the elections.
>
> […]
>
> **15. APPEAL COMMITTEE**
>
> A. The Appeal Committee shall respect and follow the Cold Lake First Nations Election Law.
>
> B. The members of the Appeal Committee shall be composed of a neighbouring First Nation which also operates under a traditional election system.
>
> 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 the 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.

20. AMENDMENTS TO THE ELECTION LAW

A. Any amendment to the Election Law must be posted at the office of the Cold Lake First Nations prior to any public meeting.

B. All amendments must be given to the Chief and Council for their information.

C. The Chief and Council can also from time to time propose amendments.

D. In order to amend the Election Law, there must be seventy (70) percent of the electors in agreement at a public meeting to the amendment prior to its passage.

E. Any amendment which fails to get the necessary approval will die.

F. If the amendment gets the necessary approval, it will be effective immediately.

V. ANALYSIS

[31] The role of this Court in the present appeal is to determine whether the court below identified the appropriate standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 45, citing *Telfer v. Canada Revenue Agency*, 2009 FCA 23 at para. 18). This means that this Court effectively steps into the shoes of the Federal Court.

[32] The parties do not dispute the standard applied by the Federal Court to determine the core issue. The question before the Federal Court and before us is whether the Council could validly conclude that the Committee had no jurisdiction to amend the Election Law and call an election

on the terms that it did. A reviewing court would apply the correctness standard to determine if an enabling statute empowers a decision maker to decide constitutional challenges and determine what remedies it can grant. The same standard should apply to the Council's determination of this same issue with respect to the Committee's jurisdiction (*Canada (Attorney General) v. Public Service Alliance of Canada*, 2011 FCA 257 at para. 33; *Martin v. Canada (Attorney General)*, 2013 FCA 15 at para. 42, leave to appeal to S.C.C. refused, 35281 (June 27, 2013)).

[33] The appellant submits that the Federal Court erred in applying this standard of review because the Committee had jurisdiction to declare provisions of the Election Law that were before it unconstitutional, including more particularly subsection 5.C of the Election Law in the case of the appellant, and to grant the constitutional remedies that it did.

[34] Relying on *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at 13-14 (*Cuddy*), the appellant underlines the "basic principle that an administrative tribunal which has been conferred the power to interpret a law holds a concomitant power to determine whether that law is constitutionally valid" (my emphasis). The Committee having to decide appeals before it by applying a law, namely the Election Law (see section 14), it follows that it also has jurisdiction to decide the constitutionality of the Election Law. The appellant notes that the Federal Court in *Jacko* contradicted *Grandbois* by concluding that the Committee's role is not purely advisory.

[35] The respondents argue that the Committee has no jurisdiction to decide questions of law as the Election Law, properly interpreted, provides that the Committee's mandate is limited to

respecting and following the Election Law when it deals with appeals that must be precisely "based upon the traditional Election Law of the Cold Lake First Nations" (subsections 14.C and 15.A of the Election Law).

[36] Furthermore, the respondents note that the appellant failed to submit any arguments under the analysis set out by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 (*Martin*), which postdates *Cuddy*, and that "the Election Law bears none of the hallmarks required by Martin" (Memorandum of the Respondents at para. 50). The respondents rely on *Grandbois* to say that the Committee's pronouncements made under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter) and calling for a new election on an amended version of the Election Law could not be binding upon the Council (Memorandum of the Respondents at paras. 42-43).

[37] Finally, the respondents say that, even if the Committee had jurisdiction to strike down provisions of the Election Law, it would have been impermissible for it to do so in the absence of a Notice of Constitutional Question, that is required by subsection 57(1) of the *Federal Courts Acts*, R.S.C. 1985, c. F-7, which applies to all "federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*" (*Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at para. 10 (F.C.A.); *Gitxsan Treaty Society v. Hospital Employees Union* (1999), 238 N.R. 73 at para. 5 (F.C.A.)).

[38] In its August 11, 2016 decision, the Committee does not analyze the Election Law to determine if it has jurisdiction to decide constitutional challenges and to make the amendments that it did to the Election Law, as noted at paragraphs 9 and 10 above. The Committee simply relied on its interpretation of *Jacko* and on the frustration arising from the lack of amendments in 2016.

[39] I agree with the Federal Court that the Committee misconstrued *Jacko* as the said decision did not deal at all with the power of the Committee to determine constitutional issues and it certainly did not suggest that the Committee had a "duty to enact Election Law" and "make law" (see para. 9 above). Furthermore, taking matters into one's own hands "out of frustration" (see para. 10 above) is not either a sound basis for making sweeping statements of invalidity and changes to the Election Law, and for subsequently ordering a new election on one's amended version of the said Election Law.

[40] In *Martin*, the Supreme Court stated that if an administrative tribunal has an explicit or implied jurisdiction to decide questions of law, it is presumed that it also has jurisdiction over constitutional questions, as "all legal decisions [must] take into account the supreme law of the land" (at paras. 34-35). However, this presumption can "be rebutted by an explicit withdrawal of authority to decide constitutional questions or by a clear implication to the same effect, arising from the statute itself" (*Martin* at para. 42. See also at para. 43 *in fine*).

[41] Here, neither the *Indian Act*, R.S.C. 1985, c. I-6 (and its other related statutes or regulations) (*Indian Act*), nor the Election Law provide for an explicit jurisdiction. The Supreme

Court identified some relevant factors to determine whether an administrative tribunal has an implied jurisdiction to decide questions of law:

> 1. the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively;
>
> 2. the interaction of the tribunal in question with other elements of the administrative system;
>
> 3. whether the tribunal is adjudicative in nature; and
>
> 4. practical considerations, including the tribunal's capacity to consider questions of law.
>
> (Martin at paras. 41, 48)

[42] The adjudicative nature of a tribunal is usually the most determinant factor. In that sense, this Court held that "administrative tribunals performing adjudicative functions […] normally have explicit or implied authority to decide all questions of law" (*Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223 at para. 51. See also *Amos v. Canada (Attorney General)*, 2011 FCA 38 at para. 26 and Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Thomson Reuters, 2016) at 40.3(a)-40.3(b)).

[43] As mentioned earlier, when the Committee decides appeals properly filed before it, it performs, in my view, an adjudicative function. In fact, during oral arguments, the respondent conceded that the Committee performs an adjudicative function. As such, the Committee's decision-making should normally be right-based and not political and policy-driven. The process set out in the Election Law, which calls for written protests (i.e. appeals) supported by an affidavit and appropriate documentation, is adequate for adjudicating rights (subsections 14.D, 14.E and 14.F of the Election Law). Oral arguments can be submitted at a public oral hearing

(subsection 15.C of the Election Law), where additional information can be sought and provided to the Committee (subsection 15.E of the Election Law). The panel is independent being formed of members of a neighbouring community (subsection 15.B of the Election Law).

[44] Although I agree with the respondent that most of the appeals simply involve factual determination, there is no doubt that in applying the Election Law, the Committee may be called upon to determine some ancillary legal issues; for example, in applying subsection 5.I, it may be called upon to apply contract law and even legal concepts such as set-off. Also, as noted in the previous decisions of the Federal Court, the Election Law is not particularly well drafted and may often require interpretation, which itself is a question of law. The appellant pointed to the concept of "residency" which may require legal consideration. Even the apparently simple provision at issue in the other appeal involving CLFN (A-478-16) may require considering the language of subsection 6.C in the context of its purpose. If the purpose was to avoid having more than one family member on the Council, why would it apply to two candidates running only for the position of Chief? The Committee is empowered with this jurisdiction, even though the Election Law does not require any legal expertise from the members of the Committee and, in practice, it may be difficult for the Committee to deal with such issues in the short time line provided for in the Election Law (see 2018 FCA 72 at para. 10).

[45] Thus, in my view, the presumption that the Committee also has jurisdiction over constitutional questions is in play. However, I also am of the view that the said presumption is rebutted by a clear implication arising from the provisions of the Election Law itself.

[46] The adoption of the Election Law is an act of self-government of the members of CLFN. It establishes fundamental principles of its governance. However, the Committee is not composed of members of CLFN (subsection 15.B). Its jurisdiction is narrowly defined as it can only consider appeals "based upon the traditional Election Law" (subsection 14.C) and, in considering such appeals, it "shall respect and follow" the said Law (subsection 15.A). To respect and follow the Election Law is what is required; to disrespect and not follow it as is sometimes required in Charter cases is the antithesis of this.

[47] These express limits are reinforced by the fact that the Election Law also expressly provides who can amend it. It cannot be amended without the approval of "seventy (70) percent of the electors […] at a public meeting" (subsection 20.D). Further, if the Election Law was somehow amended otherwise, such amendment could not survive without the approval of the percentage of electors referred to above (subsection 20.E). Such a high standard of approval by the members is inconsistent with the possibility of permitting non-members sitting on the Committee to strike out and redraft the Election Law.

[48] Obviously, the fact that the presumption is rebutted and the Committee does not have jurisdiction to deal with constitutional challenges does not leave the members of CLFN without a remedy. The constitutional validity of the Election Law is still subject to the oversight of competent courts of law.

[49] In light of the foregoing, the Federal Court did not err in its application of the standard of review when it concluded that the Council correctly determined that the Committee did not have the jurisdiction to decide as it did.

[50] There is therefore no need to determine if a Notice of Constitutional Question was required before the matter could be dealt with by the Committee. I will only mention that, in response to the respondents' alternative argument that subsection 57(1) of the *Federal Courts Act* was applicable, the appellant argued that the Election Law is not "an Act of Parliament" or a "regulation made under such an Act" within the meaning of that provision.

[51] Although there are decisions stating that the Charter applies to customary election laws adopted by First Nations following the revocation of a declaration made under section 74 of the *Indian Act* (see Appeal Book at 84), this was never the subject of an in-depth analysis. It appears to have been accepted that such customary laws were akin to regulations under the *Indian Act* (see for example *Clifton v. Benton*, 2005 FC 1030 at paras. 16, 45; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 3). As this issue was not fully argued before us, it is better to leave this task to a panel which will have the benefit of detailed submissions.

[52] Also, the issue of whether or not subsection 5.C of the Election Law is constitutionally valid can have no impact on the validity of the decision of the Council that is the only subject of this application for judicial review. As such, the Council's decision is based on the lack of jurisdiction of the Committee to decide as it did and not on the merits of the Committee's

decision *per se*. This is why the Federal Court has not erred, in my view, by not addressing this issue.

[53] Before concluding, I ought to add that sections 75 and 77 of the *Indian Act*, which limited the right of off-reserve members of a First Nation to vote and run for office, have been declared unconstitutional (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; and *Esquega v. Canada (Attorney General)*, 2008 FCA 182).

[54] Before us, the Council has not taken the position that the provisions of the Election Law, which were clearly inspired by those sections of the *Indian Act* as they existed in 1986, should not be amended. On the contrary, it has taken active steps to do so. There is no need for a further declaration by a court as to the constitutionality of those provisions.

[55] When a First Nation chooses to be subject to its own customary law, it becomes the responsibility of all its members to ensure that it is not frozen in time. Because amendments require a broad consensus, it is often a lengthy process but, like all important matters, it must ultimately be resolved. Many steps have been taken, but more action is required here. Members of CLFN who expressed their frustration before the Committee with the lack of result should follow the clear path set out in section 20 of the Election Law to ensure that amendments are indeed proposed and adopted.

VI. CONCLUSION

[56] I propose that the appeal be dismissed. Since the parties agreed that no costs should be awarded whether the appeal is allowed or dismissed, I would not award costs.

"Johanne Gauthier"
J.A.

“I agree
Wyman W. Webb J.A.”

“I agree
D.G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE FOTHERGILL DATED NOVEMBER 30, 2016 NO. T-1401-16

DOCKET:	A-468-16
STYLE OF CAUSE:	MORGAN PERRY v. COLD LAKE FIRST NATIONS CHIEF AND COUNCIL
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	WEBB J.A. NEAR J.A.
DATED:	APRIL 10, 2018

APPEARANCES:

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Maxime Faille Paul Seaman	FOR THE RESPONDENTS

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