Federal Court  Cour fédérale

Date: 20141121

Docket: T-1656-13

Citation: 2014 FC 1108

Ottawa, Ontario, November 21, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

KELSEY JACKO

Applicant

And

COLD LAKE FIRST NATIONS CHIEF AND COUNCIL

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 for judicial review of the Cold Lake First Nation [CLFN] Appeal Committee's decision [Decision] to remove Kelsey Jacko [Applicant] from his position as a CLFN Councillor due to his ineligibility to run for Council under the CLFN Election Law of March 27, 1986 [Election Law].

II. BACKGROUND

[2] The Applicant is a member of the CLFN. On June 26, 2013, he was nominated as a candidate in the 2013 CLFN election. CLFN Chief and Council members are chosen according to CLFN custom. This custom is found in the Election Law.

[3] As part of the nomination process, the Applicant swore a declaration that he met the eligibility requirements for candidacy. His name appeared on the list of Nominees for Council in the Band Office on June 27, 2013. On July 4, 2013, the Applicant was elected as Councillor.

[4] At an unknown time, the Elections Officer received a complaint that the Applicant was ineligible to run for council because he did not meet the residency requirements of the Election Law. The Appeal Committee held a hearing on July 30, 2013. The Applicant claims that he was not permitted to attend the hearing.

[5] In a letter dated August 7, 2013, the Appeal Committee notified the Applicant that his eligibility for candidacy was being reviewed as a result of the July 30, 2013 hearing and meetings with the Chief Electoral Officer. The Appeal Committee requested the following documents: a copy of a driver's license; an electrical bill, gas bill or phone bill with an address and name; and a letter from the Housing Department confirming the Applicant's residence on reserve. The Applicant was asked to submit the documents by August 9, 2013. He did not respond.

III. DECISION UNDER REVIEW

[6] The Decision and its reasons are found in two letters from the Appeal Committee.

[7] The first letter was sent to the Applicant on August 23, 2013. This letter notified the Applicant that he was ineligible to run for Council due to his failure to respond to the August 7, 2013 request for documents. The letter also said that the Applicant was ineligible to run in the 2013 CLFN by-election.

[8] The second letter was sent to the CLFN Chief and Council on September 9, 2013. This letter stated that the Applicant had been notified that he was removed from Council and that the Appeal Committee had received some documents from the Applicant on September 6, 2013. The letter went on to say that the documents were reviewed but that they were not the documents requested, and the Appeal Committee confirmed its Decision to remove the Applicant.

IV. ISSUES

[9] The Applicant raises a number of issues. Based on his written submissions, I have simplified them as follows:

1. Should the affidavit of the Chair of the Appeal Committee be given any weight in this proceeding?
2. Was the Appeal Committee's Decision outside of its jurisdiction?
3. Did the Appeal Committee err in its interpretation of the Election Law?

4. Does s. 5(C) of the Election Law violate s. 15 of 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*]?

5. Did the Appeal Committee breach the duty of procedural fairness?

V. STANDARD OF REVIEW

[10] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[11] The Applicant submits that the Decision should be reviewed on a standard of correctness. He submits that the Federal Court of Appeal has held that an election appeal committee's interpretation of its election regulations is reviewed on a standard of correctness: *Salt River First Nation #195 (Salt River Indian Band #759) v Martselos*, 2008 FCA 221 at para 32 [*Martselos*]. Procedural fairness issues are also reviewed on a standard of correctness: *Metansinine v Animbiigoo Zaagi'igan Anishinaabek First Nation*, 2011 FC 17 at para 16. Constitutional questions are reviewed on a standard of correctness: *Dunsmuir*, above, at para 58.

[12] The Respondent submits that the Appeal Committee's Decision should be reviewed on a standard of reasonableness. The Appeal Committee is a specialized tribunal tasked with interpreting and applying the Election Law. The Supreme Court has held that the reasonableness standard applies to an administrative tribunal's interpretation of its home statute: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 39.

[13] Issues two and three concern the Appeal Committee's jurisdiction and interpretation of the Election Law. I note that in *Fort McKay First Nation v Orr*, 2012 FCA 269 at paras 9-12, the Federal Court of Appeal revisited its ruling on the standard of review in *Martselos*, above. In light of developments in standard of review jurisprudence, the Federal Court of Appeal said that the interpretation of an election law was better characterized as a matter of legislative interpretation than one of true jurisdiction. The Court reviewed the committee's interpretation of its election law on a standard of reasonableness. This Court has subsequently applied the reasonableness standard when reviewing an election committee's interpretation of its election law: see *Ferguson v Lavallee*, 2014 FC 569 at paras 62-64; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 23; *Yellowdirt v Alexander First Nation Election Appeal Board*, 2013 FC 26 at para 12. Accordingly, issues two and three will be reviewed on a standard of reasonableness.

[14] Issue five is a matter of procedural fairness and will be reviewed on a standard of correctness: *C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 53.

[15] The first and fourth issues raise questions of law for the Court to determine and no standard of review applies.

[16] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[17] The following provisions of the Election Law are applicable in this proceeding:

> **1. DEFINITIONS**
>
> […]
>
> C. CANDIDATE: At a nomination meeting, an elector of the Cold Lake First Nation can allow their name to stand for election of the Chief or Councillor.
>
> […]
>
> I. ELECTOR: An elector shall be of twenty-one (21) years of age with a sound mind who has been resident on the Cold Lake First Nations territory for the last six (6) months immediately prior to the election and a full citizen of the Cold Lake Nation.
>
> […]

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.

[…]

7. NOMINATION MEETINGS

[…]

P. The Elections Officer shall post within three (3) days, the names of those persons wishing to be considered for the positions of Chief and Councillor.

Q. Any protest about a person's eligibility must be done at the nomination meeting. If a person is not present at the nomination meeting and wishes to protest a person's nomination, they must do so within forty-eight (48) hours of the nomination meeting.

R. Any protests after the forty-eight (48) hours are deemed invalid.

S. Within seven (7) days of the nomination meeting, there shall be an election for Chief.

T. Within seven (7) days of the election of the Chief and the nomination meeting for Councillors, there shall be an election for the Council.

U. All decisions of the Elections Officer are final.

[…]

8. ELECTIONS OFFICER

[…]

I. Any appeal to the election must be given within thirty (30) days of the election to the Elections Officer in writing.

J. The Elections Officer shall pass the appeal to the appeal committee for their consideration.

[…]

14. APPEALS

A. Any protest for the election of the Chief and Council must be made within thirty (30) days of the election.

B. The protest must be in writing and submitted to the Elections Officer.

C. All protests must outline the reasons for the appeal based upon the traditional election law of the Cold Lake First Nation.

D. A signed affidavit must accompany the letter of protest.

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.

G. All appeals shall be final at the completion of the review by the committee.

H. All appeals shall be finalized within thirty (30) days following the elections.

I. Any appeals made after the thirty (30) days have expired shall be null and void.

J. A person must be on the electors list prior to submitting an appeal.

15. APPEAL COMMITTEE

A. The Appeal Committee shall respect and follow the Cold Lake First Nations Election Law.

[…]

VII. ARGUMENT

A. *Applicant*

(1) Chair of the Appeal Committee's Affidavit

[18] The Applicant asks the Court to place little or no weight on Mr. Makokis' affidavit. Mr. Makokis was the Chair of the Appeal Committee. A decision-maker cannot improve upon the reasons for his or her decision by filing an affidavit in a judicial review proceeding: *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 45-47; *Simmonds v Canada (Minister of National Revenue)*, 2006 FC 130 at para 22. In *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 41, the Federal Court of Appeal placed no weight on an affidavit from the person who had made the decision that was subject to judicial review.

(2) The Appeal Committee's Jurisdiction

[19] The Applicant argues that the Appeal Committee did not have the jurisdiction to consider the complaint regarding his residency.

[20] The Appeal Committee's authority comes from the Election Law: *Grandbois v Cold Lake First Nation*, 2013 FC 1039 at para 23 [*Grandbois*]. In *Boucher v Fitzpatrick*, 2012 FCA 212 at para 25, the Federal Court of Appeal held that election laws must be interpreted using the principles of statutory interpretation from E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) adopted in *Rizzo & Rizzo Shoes Ltd. Re*, [1998] 1 SCR 27.

[21] The Applicant says that ss. 7(Q)-(R) of the Election Law are clear and unequivocal that complaints against a person's eligibility for candidacy must be brought at the nomination meeting or within forty-eight hours of the meeting: Applicant's Record at 37-38.

[22] The Applicant says that it does not matter when the complaint was made because the Elections Officer did not proceed with a complaint. The Elections Officer's decisions regarding nomination complaints are final under s. 7(U) of the Election Law: Applicant's Record at 38. There is nothing in the Election Law that would allow the Election Officer's decision not to proceed with the complaint to be appealed to the Appeal Committee.

[23] Under s. 14, the Election Law provides that the Appeal Committee is responsible for receiving complaints as they relate to "irregularities" in the election process: Applicant's Record at 41. The Applicant argues that the Appeal Committee erred in characterizing the complaint as an "irregularity" under the Election Law. A complaint related to a nomination cannot be an "irregularity" because nominations are dealt with under a separate section of the Election Law which provides that a decision of the Elections Officer is final.

[24] The Applicant also submits that this interpretation is consistent with the purpose of the Election Law and the intention of the law's drafters: "it was the intent of the drafters to establish a process to avoid wasting time and resources, since another election (or by-election as it [sic] the case here) would have to be held if it were later discovered that a candidate did not meet the requirements" (Applicant's Record at 150).

(3) Interpretation of the Election Law

[25] The Applicant says that the Appeal Committee erred by interpreting the Election Law to require that a candidate reside on the reserve for the five years immediately prior to seeking nomination.

[26] The Applicant says that the Election Law's text is precise and unequivocal so the ordinary meaning of the words should dominate the interpretation. This section 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.

[27] The Applicant says that the ordinary meaning provides that a person is eligible to run for Council once they have resided on the CLFN for five years. The Applicant argues that there is no limitation regarding when these five years must occur, or even if they must be sequential.

[28] The Applicant further submits that if the drafters intended s. 5(C) to be interpreted so that the five years must be immediately prior to seeking nomination, the same language that appears in other sections of the Election Law would have been used. The Applicant points to three examples where the drafters provided a limitation on the requisite time period (Applicant's Record at 34-36):

> **2. ELIGIBILITY TO VOTE**
>
> […]
>
> C. Must have been resident within the Cold Lake Indian Nations' Elections Territory for the last six (6) months immediately prior to the nomination meeting.
>
> […]
>
> **4. ELIGIBILITY FOR CHIEF**
>
> […]
>
> K. No person is eligible to run for Chief if they have been convicted of a criminal offence within the last five (5) years.
>
> […]
>
> **5. ELIGIBILITY FOR COUNCIL**
>
> […]
>
> H. No person is eligible to run for Council if they have been convicted of a criminal offence within the last five (5) years.

[29] The Applicant says that the Appeal Committee's interpretation cannot stand when the section is read in the context of the Election Law.

[30] The Applicant also submits that the Appeal Committee's interpretation is contrary to the objectives of the Election Law. He says that these objectives are to "ensure that members of the CLFN have representation from duly elected candidates, to ensure the smooth and orderly operation of an election, to encourage community engagement, as well as encourage maximum participation in band governance" (Applicant's Record at 152).

(4) S. 15 of the *Charter*

[31] The Applicant argues that the Appeal Committee's interpretation of s. 5(C) is unconstitutional as it violates s. 15 of the *Charter* and cannot be saved under s. 1 of the *Charter*.

[32] The determination of whether a law violates s. 15 of the *Charter* is a two-step process (*R v Kapp*, 2008 SCC 41 at paras 17-18):

> (1) Does the impugned law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

In *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 62, the Supreme Court held that "off-reserve band member status" is an analogous ground under s. 15 of the *Charter*.

[33] The Applicant says that the Appeal Committee's interpretation limits eligibility to run for Council to members who live on reserve. This discriminates against off-reserve members by prohibiting them from participating in CLFN governance through serving as Chief or Councillor based on their residence.

[34] The Applicant also says that the Election Law cannot be upheld under s.1 of the *Charter* because prohibiting non-resident band members from participating in band governance cannot pass the minimal impairment requirement.

[35] The Applicant also points to cases in which this Court and the Federal Court of Appeal have declared on-reserve residency requirements to run for Council unconstitutional: *Joseph v Dzawada'enuxw (Tsawataineuk) First Nation*, 2013 FC 974 at para 92; *Thompson v Leq'á:mel First Nation*, 2007 FC 707 at para 25; *Canada (Attorney General) v Esquega*, 2008 FCA 182 at para 8.

[36] The Applicant also submits that the Appeal Committee was required to determine the constitutionality of the provision of the Election Law on its own motion. The Appeal Committee has already found that the exclusion of non-resident band members on the voters list is unconstitutional and is not saved by s. 1 of the *Charter*: *Grandbois*, above, at para 5.

(5) Procedural Fairness

[37] The Applicant submits that a duty of procedural fairness is incumbent on every public authority making an administrative decision affecting the rights, privileges or interests of an individual: *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 38 [*Mavi*]. The content of the duty of procedural fairness is assessed contextually in every circumstance: *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 669; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 837; *Mavi*, above, at para 39.

[38] The Applicant says that the Appeal Committee failed to follow the procedure set out in s.14 of the Election Law and committed the following procedural errors (Applicant's Record at 156):

a. A signed sworn Affidavit never accompanied the Complaint;

b. No proof was ever given by the complainant. In fact, his letter states that his beliefs were based on what he had heard in the community;

c. There is no evidence of a report ever having been prepared by the Elections Officer;

d. To this day, the Applicant does not know who the complainant is. Nor has this information been provided by the Appeal Committee in their appeal materials;

e. The Applicant did not attend at the Hearing; and

f. There is no record of the Hearing itself.

B. *Respondent*

(1) Chair of the Appeal Committee's Affidavit

[39] The Respondent submits that Mr. Makokis's affidavit does not offer evidence to supplement or improve upon the Appeal Committee's Decision. The Respondent says that the affidavit only responds to the Applicant's allegation that the Appeal Committee denied him the opportunity to be heard and to make submissions in relation to his residency.

(2) Appeal Committee's Interpretation

[40] The Respondent submits that the Appeal Committee reasonably interpreted s. 5(C) to require that candidates have a current residence on reserve at the time of nomination. On cross-examination of his affidavit, the Applicant said that he also understood that the Election Law

requires that a candidate reside on the reserve at the time of his or her nomination (Applicant's Record at 77-78).

(3) Section 15 of the *Charter*

[41] The Respondent argues that the Court should decline to consider the Applicant's *Charter* arguments. The Applicant raised this argument for the first time in his Memorandum of Fact and Law. The Respondent would be prejudiced if the Court was to consider this argument without providing the Respondent the opportunity to make a full defence.

[42] The Respondent also says that the Applicant has not pointed to any evidence and is asking the Court to decide the constitutionality of the Election Law in a factual vacuum. The Supreme Court has directed that "Charter decisions should not and must not be made in a factual vacuum": *MacKay v Manitoba*, [1989] 2 SCR 357 at 361.

[43] The Applicant's reliance on cases in which other election codes have been held to be unconstitutional does not establish that this Election Law is unconstitutional. Further, the Appeal Committee's decision regarding the constitutionality of the on-reserve requirement for eligibility of voters was overturned on judicial review: *Grandbois*, above.

[44] The Applicant has not put forward any evidence showing a violation of s. 15 of the *Charter*.

(4) Remedies

[45] The Respondent asks the Court to refrain from granting any relief that was not in the Applicant's application.

[46] The Applicant's Notice of Application sought an order declaring that there had been a breach of procedural fairness and that the Appeal Committee erred in law. The Respondent says that a declaration of this type would result in the Appeal Committee's Decision being *void ab initio*. This is materially different from the *certiorari* order reinstating the Applicant that he seeks in his Memorandum of Fact and Law.

[47] The Respondent submits that the Applicant is attempting to amend his claim without bringing a motion as required under Rule 75(1) of the *Federal Court Rules*, SOR/98-105. The Respondent says that had the motion been brought, the Respondent would have been able to bring evidence showing the prejudice it would suffer as a result of this amendment.

[48] The Respondent asks the Court to limit its intervention to a declaration with respect to procedural fairness or the interpretation of the Election Law which would allow the Applicant to run for Council in future elections without compromising decisions made by the current Chief and Council or causing inconvenience to third parties.

[49] The Respondent also submits that the Court does not have the jurisdiction to award the damages that the Applicant seeks on a judicial review: *Al-Mhamad v Canada (Radio-Television and Telecommunications Commission)*, 2003 FCA 45 at para 3.

VIII. ANALYSIS

A. *Introduction*

[50] There is no obvious and clear answer to the central issue raised by this application. This is because the Applicant appears to have run in the election for Council knowing that his eligibility for doing so required him to be a resident of the CLFN reserve, and knowing that he was not a resident. 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.

B. *New Grounds*

[51] The Applicant raises new grounds and arguments in his Memorandum of Fact and Law that go beyond the grounds stated in his application. The Respondent objects to these new *Charter* grounds and alleges prejudice and ambush. The Respondent says that the Court is being asked to determine the constitutionality of the Election Law in a factual vacuum.

[52] *Republic of Cyprus (Commerce and Industry) v International Cheese Council of Canada*, 2011 FCA 201 teaches that an applicant may not raise an argument not set out in its notice of application and that, in order to raise a new ground, an applicant has to file a motion to amend its

notice of application. This will allow for a debate as to the relevance of the amendment and, if necessary, the consideration of measures required to prevent either party from suffering prejudice.

[53] At the hearing of this matter, the Court offered the Applicant the opportunity to pursue and discuss an adjournment so that he could amend his materials to include the new grounds referred to in his Memorandum of Fact and Law. The Applicant elected not to pursue an amendment and asked that the hearing continue on the basis of his original grounds.

C. *Affidavit of Mr. Makokis*

[54] The primary purpose of the affidavit of Mr. Makokis is to describe the procedure that was followed in dealing with the Applicant in response to the Applicant's allegations of procedural unfairness. As such it is appropriately before the Court. The Decision itself is contained in separate documentation.

D. *Procedural Unfairness*

[55] The Applicant alleges procedural unfairness on the following grounds (Applicant's Record at 156):

> a. A signed sworn Affidavit never accompanied the Complaint;
>
> b. No proof was ever given by the complainant. In fact, his letter states that his beliefs were based on what he had heard in the community;
>
> c. There is no evidence of a report ever having been prepared by the Elections Officer;

d. To this day, the Applicant does not know who the complainant is. Nor has this information been provided by the Appeal Committee in their appeal materials;

e. The Applicant did not attend at the Hearing; and

f. There is no record of the Hearing itself.

[56] A review of the record reveals that, although the Election Law was not followed to the letter, the Applicant was informed both orally and in writing that his election as a Councillor was being questioned because his residency was in doubt, and he was asked to provide specific documentation to show that he was a resident on the CLFN reserve and was eligible for run for Council. The Applicant did not provide this documentation or establish in any other way that he was a resident. The Applicant also chose not to, or at least made no effort to, attend the Appeal Hearing. The Applicant gave evidence under cross-examination that, at the time of the election, he was fully aware that he needed to be a resident before he could run for, or be elected to, Council (Applicant's Record at 77-78). In the general circumstances of this case, although the Election Law may not have been strictly followed, I find that the Applicant was made fully aware of the case he had to meet and what the Appeal Committee required him to do (i.e. produce his driver's license; an electrical bill, gas bill or phone bill; and a letter from the Housing Department to establish his residency) and he was given a reasonable opportunity to present his case on this issue. By the time the Decision was made to remove him from Council, the Applicant had been made fully aware of the residency problem and had been informed of what the Appeal Committee needed to establish his residency. The Applicant failed to respond to the request for information or to establish that he was a resident at the time of the election even though he knew that residency was a pre-requisite for running in the election. This is the basis for the Decision. I cannot say that what happened was procedurally unfair. The proof of the

irregularity was not provided to the Appeal Committee in accordance with the Election Law. But the Appeal Committee chose to deal with the problem by simply asking the Applicant to provide specific common documentation that would establish residency one way or the other. I cannot see how the Applicant was prejudiced by this approach when he knew that residency was a requirement.

E. *The Central Issue*

[57] In my view, the only compelling issues raised by the Applicant are that the Appeal Committee erred in its interpretation of the Election Law and that removing him from Council was beyond the Committee's powers.

[58] The Applicant says the Decision was based upon s. 5(C) of the Election Law. The complaint was that the Applicant had not been a resident of the reserve for six months preceding the election (Applicant's Record at 28). This appears to be based upon ss. 1(C) and 1(I) of the Election Law:

> **1. DEFINITIONS**
>
> […]
>
> C. CANDIDATE: At a nomination meeting, an elector of the Cold Lake First Nation can allow their name to stand for election of the Chief or Councillor.
>
> […]
>
> I. ELECTOR: An elector shall be of twenty-one (21) years of age with a sound mind who has been resident on the Cold Lake First Nations territory for the last six (6) months immediately prior to the election and a full citizen of the Cold Lake Nation.
>
> […]

[59] On cross-examination of his affidavit, the Chair of the Appeal Committee suggests that the irregularity was that the Applicant had not been a resident of the reserve for the five years preceding the election (Applicant's Record at 128-129). This appears to be based upon s. 5(C) of the Election Law:

> **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.

[60] This provision is produced in the nomination forms sworn by the Applicant.

[61] Notwithstanding these provisions, the Appeal Committee's letter to the Applicant of August 7, 2013 merely asked him to provide proof of eligibility and residency in the form of specific documentation. Regardless of whether the Appeal Committee sought to establish a six-month or five-year residency, the letter simply asked the Applicant to prove that he was eligible as a resident. The Applicant failed to respond and he failed to establish that he was a resident of the CLFN reserve for any period of time, even though he says he knew that he could not run in the election unless he was a resident.

[62] The background documentation on the file, and the cross-examination evidence given by the Applicant, suggest to me that, although the Applicant may consider the reserve to be home, it cannot reasonably be said that he was a resident of the reserve at the material time, irrespective of any length of residency that may be required by the Election Law. I believe the Applicant knew this because he misrepresented in his nomination papers that he was a resident of the

reserve. The Applicant had lived in Edmonton for the past sixteen or seventeen years, and had been employed in Edmonton for the past six or seven years. He says that, following his success in the election, he quit his job in Edmonton and moved back to the reserve. In addition, he falsely represented in his nomination papers that 912 CLFN was his "permanent residential address." This was his uncle's address and the Applicant had only stayed there from time to time. In fact, a Band Council Resolution had been passed prohibiting him from staying at his uncle's home.

[63] All of this leads me to conclude that the Applicant must have known that his residency was in doubt when he accepted the nomination, and he has clearly admitted that he knew the CLFN Election Law requires residency to run for Council. The Applicant cannot shield himself from these facts by citing the formalities of the Election Law.

[64] In my view, then, the only issue that the Court needs to consider is whether the Appeals Committee had the jurisdiction to remove him in the way that it did.

[65] The Applicant's argument is, essentially, that the Election Law only allows eligibility to be challenged as part of the nomination process. Section 7 provides as follows:

> **7. NOMINATION MEETING**
>
> […]
>
> P. The Elections Officer shall post within three (3) days, the names of those persons wishing to be considered for the positions of Chief and Councillor.
>
> Q. Any protest about a person's eligibility must be done at the nomination meeting. If a person is not present at the nomination meeting and wishes to protest a person's nomination, they must to so within forty-eight (48) hours of the nomination meeting.

R. Any protests after the forty-eight (48) hours are deemed invalid.

S. Within seven (7) days of the nomination meeting, there shall be an election for Chief.

T. Within seven (7) days of the election of the Chief and the nomination meeting for Councillors, there shall be an election for the Council.

U. All decisions of the Elections Officer are final.

[66] The appeals section of the Election Law reads as follows (s. 14):

14. APPEALS

A. Any protest for the election of the Chief and Council must be made within thirty (30) days of the election.

B. The protest must be in writing and submitted to the Elections Officer.

C. All protests must outline the reasons for the appeal based upon the traditional election law of the Cold Lake First Nations.

D. A signed affidavit must accompany the letter of protest.

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.

G. All appeals shall be final at the completion of the review by the committee.

H. All appeals shall be finalized within thirty (30) days following the elections.

I. Any appeals made after the thirty (30) days have expired shall be null and void.

J. A person must be on the electors list prior to submitting an appeal.

[67] The Election Law also says that "[t]he Appeal Committee shall respect and follow the Cold Lake First Nations Election Law" (s. 15 (A)).

[68] The Applicant's argument is that the "irregularities" dealt with by the Appeal Committee cannot include a residency irregularity because residency disqualification is confined to the nomination process. If this were the case, it would mean that someone who is not eligible for reasons of residence to run in an election could be voted onto Council (as appears to have happened in this case) and he or she could not be disqualified by the Appeal Committee. Such an interpretation would allow someone who has, for example, sworn false nomination papers and who has not been challenged as part of the nomination process to be elected to Council without further challenge.

[69] There is no definition of "irregularity" in the Election Law. However, on the face of it, the word would appear to mean "[a]ny protest for the election" which are the words used in s. 14(A). There is no definition of "protest" and, in my view, nothing in the Election Law to suggest that a protest could not be made to the Appeal Committee based upon eligibility.

[70] It is true that a "protest about a person's eligibility must be done at the nomination meeting" or "within forty-eight (48) hours of the nomination meeting" (s. 7 (Q)), and that "[a]ny protests after the forty-eight (48) hours are deemed invalid" (s. 7(R)). But the jurisdictional scope of this provision is not clear. It could mean, as the Applicant says, that if eligibility is not successfully challenged as part of the nomination process, it cannot be challenged later as part of the appeal process. Or it could mean that any protest about a candidate's eligibility to run in the

election that arises *during the nomination process* must be dealt with at the nomination meeting, or within 48 hours of that meeting. If eligibility is not successfully challenged at that time then the nominees will go forward to the election. This does not lead to the conclusion that an ineligible person who has survived the nominations process cannot be dealt with later by way of an appeal. One can readily think of situations where residency may be problematic and cannot, practically speaking, be dealt with quickly as part of the nomination process. This could occur, for example, where false nomination papers are sworn and this goes undetected until after the election. Section 7 of the Election law deals with protests about "a person's nomination." This may well involve eligibility considerations but it only refers to the nomination process.

[71] The Election Law stipulates that "[a]ny appeal to the election must be given within thirty (30) days of the election to the Elections Officer in writing" [emphasis added] (s. 8(I)), and that the "Elections Officer shall pass the appeal to the appeal committee for their consideration" (s. 8(J)). There is nothing here, in my view, that excludes appeals based on eligibility that have not been detected and dealt with as part of the nomination process.

[72] In the present case, the Elections Officer treated the complaint against the Applicant as an appeal and, together with a compendium of other complaints, it went to the Appeal Committee.

[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.

[77] This does not mean that the Applicant has behaved unreasonably in making this application. The Election Law is highly ambiguous and is in dire need of clarification and amendment. For example, the import of ss. 1(C), 1(I) and 5(C) is not clear to me. Does eligibility require six months or five years, and when does the five years have to run? In the present case, the Appeal Committee simply asked for proof of eligibility and residency, so does the Election Law merely require residency at the time of the election? And given the *Charter* challenges that could have been pursued in this case through an amended application, is residency on the CLFN reserve regarded as a legitimate pre-requisite to run for Chief or Council? These ambiguities mean that candidates might, not unreasonably, read the Election Law in the way that the Applicant has. It is unfair to candidates to place them in this position. The Respondent should not continue to use a highly ambiguous Election Law that could lead candidates into difficult positions. For this reason, I refuse to award costs to either party.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed without costs to either party.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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