Federal Court  Cour fédérale

Date: 20201125

Docket: T-892-20

Citation: 2020 FC 1065

Ottawa, Ontario, November 25, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

MICHAEL LINKLATER

Applicant

and

THUNDERCHILD FIRST NATION GOVERNMENT, CHERYL THUNDER, JONATHON JIMMY

Respondents

JUDGMENT AND REASONS

[1] Mr. Linklater was elected Headman (or councillor) of the Thunderchild First Nation [Thunderchild] in October 2018. In July 2020, however, the Thunderchild Appeal Tribunal removed him from council, as he had failed to establish his residence on Thunderchild lands after his election, as required by Thunderchild's election laws. In reaching this decision, the Appeal Tribunal dismissed Mr. Linklater's argument that the residency requirement is of no force or effect, as it discriminates between First Nation members based on residence, contrary to section

15 of the *Canadian Charter of Rights and Freedoms* [the Charter]. The Appeal Tribunal held that it had jurisdiction to apply only Thunderchild laws, not Canadian laws such as the Charter.

[2] Mr. Linklater seeks judicial review of the Appeal Tribunal's decision. He argues that the Appeal Tribunal failed to exercise its jurisdiction by declining to rule on the Charter issue. Most importantly, he asks me to decide this issue myself and to declare the residency requirement to be of no force or effect. He also asks me to order the holding of a referendum to repeal or amend the residency requirement.

[3] I am allowing Mr. Linklater's application in part. I agree that the Appeal Tribunal has jurisdiction to review Thunderchild legislation for its compatibility with the Charter. Thunderchild and Canadian law do not exist in complete isolation from each other, as the Appeal Tribunal seems to have assumed. However, I decline to decide the Charter issue myself. In the circumstances of this case, it is preferable to return the matter to the Appeal Tribunal, who will be in a better position to make a decision sensitive to the relevant context, including Cree culture and the specificity of Thunderchild's political institutions. I also decline to order the holding of a referendum, as this would interfere in Thunderchild's political process without any legal basis. As a result, the Appeal Tribunal's decision is quashed with the result that Mr. Linklater was never legally removed from council.

I. Background

[4] This case raises issues that are important for First Nations governance. Since the adoption of the Charter, its application to Indigenous governments has been a controversial issue.

Although the debate often takes place on a philosophical level, the issue of the validity of residency requirements has been one of its main concrete manifestations to this date. Nevertheless, given the context in which this case is brought before me, this judgment will only make a narrow contribution. As I am sending the matter back to the Appeal Tribunal, I will refrain from making general pronouncements regarding the application of the Charter to Indigenous governments and the circumstances in which residency requirements may be contrary to the Charter.

[5] To put my analysis in its proper context, I begin by outlining the relevant features of the Thunderchild Constitution and Election Act. I provide a summary of the debate regarding the validity of residency requirements. I then turn to Mr. Linklater's personal circumstances and the attempt to remove him from council. Lastly, I summarize the Appeal Tribunal's decision, which is the subject of this application for judicial review.

A. *Thunderchild Legal System*

(1) Thunderchild First Nation Constitution

[6] Contrary to other First Nations where the rules regarding the selection of leaders are found in a single document called an "election code," Thunderchild has adopted a more elaborate system, the cornerstone of which is the *Thunderchild First Nation Constitution* [Thunderchild Constitution], adopted by Thunderchild members voting in a referendum on August 12, 2004. It creates a legal and political system based on the rule of law (section 8.02) and constitutional

supremacy (section 8.03). It establishes legislative, executive and judicial branches. It also deals with citizenship, territory and the treaty relationship with Canada.

[7] The legislative power is divided between a power to adopt or amend ordinary legislation and a power to adopt or amend the Constitution. The Constitution itself can only be amended by a referendum in which a majority of citizens vote (section 12.01). Thunderchild laws may be adopted by a simple majority of citizens voting in a referendum (section 8.05). Thus, it is more difficult to change the Constitution than ordinary legislation. Moreover, as the Constitution is hierarchically superior or "paramount" to legislation (section 8.03), legislation that contradicts the Constitution can be declared invalid.

[8] Legislative power is subject to the limits established in the Constitution. One such limit, which is relevant to this case, is that legislation must comply with certain fundamental rights. In this regard, section 2.01 of the Constitution provides:

> 2.01 Citizens shall, without hindrance, enjoy equality, freedom of worship, culture, conscience, speech, assembly, press, association, and the right to due process subject to reasonable limits founded in a free and democratic society and the cultural values and teachings of the Thunderchild First Nation.

[9] The Thunderchild Constitution also creates the First Nation's executive and judicial branches. Article 6 vests the executive power in the Chief and Councillors, also known as Headmen. (In various documents in evidence, the executive power is also referred to as the "Government.") Article 7 establishes the Appeal Tribunal.

[10] The Constitution sets out only the basic features of the institutions it creates. It envisions that legislation will be adopted to regulate the details of the functioning of these institutions. For example, with respect to the Appeal Tribunal, article 7 is comprised of only five sections. One of them is relevant to this case, as it indicates that the Appeal Tribunal should ideally be composed of persons who are trained in Canadian law and familiar with Cree culture:

> 7.02 An Appeal Tribunal member must be an individual who is in good standing with Thunderchild First Nation, of good character and reputation, educated and experienced in law, independent and impartial, has no criminal record, was at no time disbarred from practicing law, and with preference of appointment given to First Nations persons of Cree ancestry with equal qualification.

(2) Thunderchild First Nation Appeal Tribunal Act

[11] In 2007, pursuant to sections 7.04 and 7.05 of the Constitution, the *Thunderchild First Nation Appeal Tribunal Act* [Appeal Tribunal Act] was adopted by Thunderchild members voting in a referendum. It creates the Thunderchild Appeal Tribunal, provides for the appointment of its members and sets out its general jurisdiction regarding matters falling within the purview of Thunderchild laws, its powers and its procedure. I will examine the Appeal Tribunal's powers more closely later in these reasons.

(3) Thunderchild First Nation Election Act

[12] The *Thunderchild First Nation Election Act* [the Election Act] was first adopted in 1994, before the Constitution was adopted. Section 6.03 of the Constitution maintains the existing Election Act in force.

[13] The Election Act contains a residency requirement for the chief and councillors. The relevant provisions appear to have been amended over the years, possibly in response to this Court's decision in *Wapass v Thunderchild Band Council*, 1997 CanLII 5773 (FC). They now read as follows:

> 3.02 No person who is seeking to be elected under the Act as a Chief or Headman is a candidate for such a position only if such person meets all of the following criteria and is confirmed in writing by the Chief Electoral Officer as being a recognized candidate in an election for either the position of Chief or Headman:
>
> […]
>
> (g) An elected Chief of Headman will reside on Thunderchild First Nation reserve lands or Treaty Land Entitlement lands and no other location. If an elected Chief or Headman is not resident on Thunderchild First Nation reserve lands or Treaty Land Entitlement lands at the time of being elected, such person shall have thirty (30) days following the day of the election to take up residency as required herein;
>
> (h) In the event a non-resident is elected to Council and fails to take up residency on Thunderchild First Nation lands as required in paragraph 3(g) above, such person shall cease to be qualified to remain on Council and the position of such person on Council shall be deemed to become vacant at the expiration of the thirty (30) day period following the election, and a by-election shall be held as soon as practicable thereafter to fill such a position.

B. *The Canadian Charter and Residency Requirements*

[14] Residency requirements such as those found in the Thunderchild Election Act have given rise to recurring controversies. They find their historical origin in sections 75 and 77 of the *Indian Act*, RSC 1985, c I-5, which restricted the right to vote to members of the First Nation who reside on the First Nation's reserve and the eligibility for the office of councillor to members who reside in a specific electoral section of the reserve.

[15] In *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*], the Supreme Court of Canada decided that section 77 was contrary to section 15 of the Charter. Section 15 guarantees "the right to the equal protection and equal benefit of the law without discrimination." In *Corbiere*, the Court decided that "aboriginality-residence," or the fact that an Indigenous person lives on or off a reserve, is a prohibited ground of discrimination. Thus, section 77 of the *Indian Act* was contrary to section 15 of the Charter, because it denied the right to vote to First Nation members who resided off reserve. Moreover, although section 1 of the Charter allows for "reasonable limits prescribed by law" to the rights it guarantees, the Court held that section 77 was not such a reasonable limit, because Parliament, in adopting section 77, did not attempt to strike a reasonable balance between the rights and interests of members residing on and off the reserve. The Court left open the possibility that legislation striking such a reasonable balance could be valid: *Corbiere*, at paragraph 21.

[16] Many First Nations have opted out of the election provisions of the *Indian Act* and adopted their own election legislation, often described as "custom" even where it is not based on historical traditions: *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paragraphs 9–14, [2018] 4 FCR 467 [*Pastion*]. Since *Corbiere*, this Court has rendered a number of decisions invalidating provisions of election laws setting out various forms of residency requirements: *Clifton v Hartley Bay Indian Band*, 2005 FC 1030, [2006] 2 FCR 24; *Thompson v Leq'á:mel First Nation*, 2007 FC 707; *Joseph v Dzawada'enuxw First Nation (Tsawataineuk)*, 2013 FC 974; *Cardinal v Bigstone Cree Nation*, 2018 FC 822, [2019] 1 FCR 3 [*Cardinal*]. In *Clark v Abegweit First Nation Band Council*, 2019 FC 721 [*Clark*], my colleague Justice Paul Favel held that a residency requirement was invalid with respect to councillors, but valid with respect to the chief.

More recently, in *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 [*Vuntut Gwitchin*], Chief Justice Veale of the Yukon Supreme Court held a residency requirement to be valid, because section 25 of the Charter protects certain rights of the Indigenous peoples from derogation or abrogation by Charter rights, such as the right to equality.

C. *Mr. Linklater's Situation*

[17] On October 18, 2018, Thunderchild held elections for the positions of Chief and Headmen. Mr. Linklater was elected Headman. Mr. Linklater admits that he resides in Saskatoon, not on Thunderchild lands. After the election, Mr. Linklater did not establish his residence on Thunderchild lands, as required by section 3.02(g) of the Election Act.

[18] Some time after the election, Ms. Thunder, who is a Thunderchild citizen, made a request to the Thunderchild Government to remove Mr. Linklater from council, because he had not established his residence on Thunderchild lands. The Government denied that request, because it considered it had no power to remove a Headman. Moreover, it asserted that the residency requirement was contrary to the Charter and thus invalid, based on this Court's decisions in *Cardinal* and *Clark*.

[19] The Thunderchild Government then proposed amendments to the Election Act and submitted them to a referendum. The evidence contains little information as to the referendum process. At the hearing, counsel for Mr. Linklater told me that the proposal was for the complete repeal of the residency requirement, and that there were other amendments to the Election Act

that were bundled in the same referendum question. On October 25, 2019, the proposed amendments were defeated.

[20] In December 2019 and January 2020, respectively, Mr. Jimmy and Ms. Thunder, who are Thunderchild citizens, applied to the Appeal Tribunal to remove Mr. Linklater from council, as he failed to comply with section 3.02(g) of the Thunderchild Election Act.

D. *Decision of the Appeal Tribunal*

[21] Before the Appeal Tribunal, Mr. Linklater did not contend that he was resident on Thunderchild lands. Rather, he submitted that the residency requirement found in section 3.02(g) and (h) of the Election Act was contrary to section 15 of the Charter, insofar as it pertains to Headmen.

[22] In its written submissions to the Appeal Tribunal, the Thunderchild Government argued that subsections 3.02(g) and (h) of the Election Act breach section 15 of the Charter and invoked the *Cardinal* and *Clark* decisions in support of that position. It also explained that there is currently a housing shortage on Thunderchild lands, with more than 400 members on the waiting list for a home.

[23] Ms. Thunder made written submissions to the Appeal Tribunal. With respect to the question at issue before this Court, she stated that “References made to court cases in Canada in other First Nations regarding residency are attempts to diminish that inherent right that all Thunderchild First Nation citizens share.” According to her, the critical fact is that on several

occasions, Thunderchild citizens voted to retain the residency requirement. She also noted that Mr. Linklater was elected on the promise that he would establish his residence on Thunderchild lands and that there are options for him to do so besides housing provided by the First Nation.

[24] The Appeal Tribunal issued its decision on July 13, 2020. It refused to strike down section 3.02(g) and (h). The gist of the Appeal Tribunal's reasoning is found in the following paragraph:

> Our jurisdiction is clearly set out in section 5 of the Thunderchild First Nation Appeal Tribunal Act. To paraphrase, this Appeal Tribunal has been given jurisdiction to strike legislation that is in violation of the Thunderchild Constitution or make decisions regarding the application of Thunderchild legislation but our jurisdiction does not include the ability to strike out legislation that has been interpreted as being in violation of the Canadian Charter of Rights of Freedoms by the Canadian judicial system. We have been appointed under and are bound by Thunderchild legislation.

[25] The Appeal Tribunal then found that Mr. Linklater did not take up residency on Thunderchild lands within 30 days of the election. Thus, it removed him from council, declared his position vacant and ordered the holding of a by-election to fill his seat.

[26] The Appeal Tribunal also dismissed other claims made by Mr. Jimmy and Ms. Thunder, which are not relevant to the present application for judicial review.

[27] In closing, the Appeal Tribunal made the following observation:

> While we cannot issue an order to amend legislation we would urge the members of the Thunderchild First Nation to revisit the residency requirement contained within the Thunderchild First Nation Election Act.

[28] Mr. Linklater applied for judicial review of the Appeal Tribunal's decision. He also brought a motion to stay the order that a by-election take place. My colleague Justice Nicholas McHaffie granted that motion: *Linklater v Thunderchild First Nation*, 2020 FC 899.

II. Analysis

[29] Mr. Linklater asks this Court to find that the Appeal Tribunal has jurisdiction to decide whether the residency requirement is contrary to the Charter. He also asks the Court itself to make that decision on judicial review or, in other words, to declare the residency requirement invalid. Lastly, Mr. Linklater seeks an order that a referendum be held to amend the Election Act, and to "set parameters" for that referendum.

[30] I agree with Mr. Linklater that the Appeal Tribunal has jurisdiction to apply the Charter. Given this finding, however, the proper remedy is to return the matter to the Appeal Tribunal so that it can decide whether the residency requirement is contrary to the Charter or, as I will explain, contrary to the Thunderchild Constitution. Moreover, I cannot order the holding of a referendum.

A. *Jurisdiction of the Appeal Tribunal*

[31] The first issue that I must consider is whether the Appeal Tribunal erred in deciding that it did not have jurisdiction over the Charter issue. This, in fact, raises two separate questions: whether the Charter applies to Indigenous legislation such as the Election Act and, if so, who has jurisdiction to decide the issue. These constitutional questions are reviewed on a standard of

correctness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 55–56 [*Vavilov*]; *Perry v Cold Lake First Nations*, 2018 FCA 73 at paragraph 32 [*Perry*].

[32] In *Taypotat v Taypotat*, 2013 FCA 192 [*Taypotat*], the Federal Court of Appeal held that the Charter applies to "custom" election laws adopted by First Nations. On behalf of the Court, Justice Robert Mainville provided the following explanations:

> [38] As noted above, many government actions affecting the lives of aboriginal peoples living on reserve result from decisions of the band Councils acting under the *Indian Act*, under other federal legislation or pursuant to government programs. As citizens of Canada, aboriginal peoples are as much entitled to the protections and benefits of the rights and freedoms set out in the *Charter* as all other citizens. This includes protection for aboriginal peoples from violations to these rights and freedoms by their own governments acting pursuant to federal legislation and in matters falling in the sphere of federal jurisdiction.
>
> [39] Moreover, the rights and freedoms set out in the *Charter* would be ineffectual if the Council members could be selected in a manner contrary to the *Charter*. I have no doubt that if a First Nation adopted a community election code restricting eligibility to public office to the male members of the community, such a code would be struck down pursuant to section 15 of the *Charter*. To decide otherwise would be to create a jurisdictional ghetto in which aboriginal peoples would be entitled to lesser fundamental constitutional rights and freedoms than those available to and recognized for all other Canadian citizens.

[33] On appeal from that judgment, the Supreme Court of Canada did not contradict what Justice Mainville said in the Federal Court of Appeal regarding the applicability of the Charter: *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548. Thus, the Federal Court of Appeal's decision in *Taypotat* is binding authority to the effect that the Charter applies to First Nation election legislation, such as Thunderchild's Election Act.

[34] That brings us to the question of who has jurisdiction to apply the Charter to the Election Act. Again, a decision of the Federal Court of Appeal gives highly relevant indications. In *Perry*, at paragraph 45, the Court stated that a First Nation election appeal tribunal is presumed to have jurisdiction to deal with constitutional questions. In other words, an election appeal tribunal can deal with constitutional issues, unless there is a specific exclusion in its enabling legislation. This holding is in line with decisions of the Supreme Court of Canada recognizing such jurisdiction to administrative tribunals: *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504 [*Martin*]. In *Fort McKay First Nation v Laurent*, 2009 FCA 235, at paragraphs 57–67 [*Laurent*], the Federal Court of Appeal reached the same conclusion and found that an "election arbitrator" had the power to decide constitutional questions. See also *Awashish v Conseil des Atikamekw d'Opitciwan*, 2019 FC 1131 at paragraphs 41–42; *McKenzie v Ambroise*, 2020 FC 340.

[35] In this case, the presumption is not rebutted. The Thunderchild Constitution is based on the rule of law (section 8.02) and gives the Appeal Tribunal a prominent role in this regard. Section 2.01 of the Appeal Tribunal Act gives the Appeal Tribunal jurisdiction over "all matters within Thunderchild First Nation Territory and Thunderchild First Nation jurisdiction and determined in accordance with the Constitution or any legislation of Thunderchild First Nation." Sections 5.01, 5.02 and 5.03 grant broad powers to the Appeal Tribunal, including the power to invalidate Thunderchild laws that are contrary to the Thunderchild Constitution. Moreover, section 5.04c) provides that the Appeal Tribunal may "determine any question of law that arises during an Application." In *Martin*, at paragraph 40, the Supreme Court of Canada stated that an explicit grant of this kind includes the power to decide whether legislation is contrary to the

Charter. Lastly, when the Appeal Tribunal Act intends to withhold jurisdiction over certain matters, it says so explicitly, such as with respect to damages awards (section 5.08) and sacred ceremonies and sacred traditions (section 5.09).

[36] Thus, applying binding precedent from the Federal Court of Appeal, I conclude that the Appeal Tribunal has jurisdiction to decide that certain provisions of the Thunderchild Election Law are contrary to the Charter and thus invalid. Where it reaches such a conclusion, the Appeal Tribunal must "disregard the provision on constitutional grounds and rule on the applicant's claim as if the impugned provision were not in force:" *Martin*, at paragraph 33.

[37] The Appeal Tribunal, however, takes a different view of its jurisdiction. In the passage quoted above, it seeks to set Thunderchild law apart from Canadian law, so that its jurisdiction would pertain only to the former, not the latter. If I understand the Appeal Tribunal's logic correctly, the Election Act would not have been adopted "under federal legislation," as the Federal Court of Appeal said in *Taypotat*, at paragraph 38; it would rather be "an act of self-government," as the same Court said a few years later in *Perry*, at paragraph 46. Thunderchild laws would not derive their authority from Canadian law: see, for example, *Kennedy v Carry the Kettle First Nation*, 2020 SKCA 32 at paragraph 7. Their source of legitimacy would be separate. Legal theorists would say that they have a different rule of recognition or *Grundnorm*.

[38] Let us assume, for the sake of argument, that this is true and that Thunderchild law and Canadian law are two separate legal systems. These two legal systems, however, do not exist in complete isolation from each other. Despite their differences, they share certain common values

and principles. There are also many contact points between them. By contact points, I mean situations where one legal system recognizes a rule or outcome created by the other system. These common values and contact points lead me to conclude that the Appeal Tribunal must have jurisdiction to strike down Thunderchild legislation incompatible with the Charter.

[39] One common value is highly relevant to the issue—the protection of fundamental rights. As I noted above, section 2.01 of the Thunderchild Constitution guarantees a number of rights, including the right to equality, which is at the root of Mr. Linklater's claim. Indeed, the Thunderchild Constitution is not the only Indigenous constitution protecting fundamental rights: see, for instance, *Taypotat*, at paragraph 42. Like the Canadian constitution, the Thunderchild constitution guarantees these rights by empowering an independent judiciary to enforce the constitution. This, in fact, is a component of the rule of law on which both constitutions are based: see the preamble of the Charter and section 8.02 of the Thunderchild constitution.

[40] Some of the contact points between Thunderchild and Canadian law are highlighted by the Thunderchild Constitution itself. Article 5 acknowledges the relationship Treaty 6 established between Thunderchild and the Crown. Section 5.04 refers to the Crown's fiduciary responsibility towards Thunderchild citizens. Many other contact points are found in legislation. For instance, the eligibility requirements set forth in section 3.02 of the Election Act include the lack of a criminal record and the fact that a candidate is not an employee and does not have a contract with the First Nation. These concepts—criminal offence, employment relationship and contract—are all concepts of Canadian law. Likewise, section 3.02 of the Appeal Tribunal Act requires Appeal

Tribunal members to be members of a Canadian law society and refers to the concepts of employment, contract and criminal record.

[41] One contact point is directly relevant to the matter at hand. The Constitution and Election Act intend to create a governance system that will be recognized by other orders of government in Canada. Indeed, the federal government considers that the Thunderchild First Nation is a "band" under the *Indian Act*. As I explained in *Pastion*, the *Indian Act* recognizes Indigenous laws regarding governance through the concept of "band custom." In this regard, section 2.01 of the Election Act states that the Act and related provisions constitute Thunderchild's "band custom." Likewise, section 2.02 of the Appeal Tribunal Act states that the Act, insofar as it relates to elections, "shall be regarded as part of … the Band Custom." The use of this concept, which would otherwise be unnecessary, evinces an intention to establish a contact point between Thunderchild and Canadian law with respect to governance.

[42] When it set up that system, Thunderchild must have known that Canadian law would recognize its governance system on condition that the latter is compatible with the Charter—taking into account sections 1 and 25, as I mention below. It also knew that the decisions of the Appeal Tribunal would be subject to judicial review in this Court.

[43] One must presume that Thunderchild intended to create a governance system that would be effectively recognized pursuant to federal legislation. This suggests that it wanted its governance system to comply with the Charter. Thus, to ensure recognition, the Appeal

Tribunal's power to "determine any question of law," in section 5.04c) of its enabling legislation, must include questions of Canadian law, in particular Charter issues.

[44] When it concluded that it could apply Thunderchild law only, the Appeal Tribunal assumed a degree of separation between Thunderchild and Canadian law that is simply not supported by Thunderchild's own constitutional and legislative texts. Moreover, it divested itself of the opportunity of making the initial decision on an issue that will likely arise at a later stage. Yet, decision-making is an aspect of self-government that cannot be discounted.

[45] At first glance, it may seem odd to ask the courts of one legal system to take into account the rules of another legal system. In today's interconnected world, however, this is commonplace. Indeed, this may be necessary to ensure harmonious recognition between legal systems. To give only one example, without suggesting that the circumstances are equivalent, national courts of European Union member states must ensure that the rules of their own legal system are compatible with European Union law: see, for example, *R v Secretary of State for Transport, ex parte Factortame Ltd*, European Court of Justice, case C-213/89, 19 June 1990.

[46] In any event, one wonders why the Appeal Tribunal, once it had declined to rule on the Charter issue, did not proceed to decide whether the residency requirement is compatible with the guarantee of equality found in section 2.01 of the Thunderchild Constitution. It may be that Mr. Linklater did not properly raise the issue. Before this Court, Mr. Linklater suggested that section 2.01 referentially incorporates the Charter into Thunderchild law. One may also read the provision as protecting fundamental rights independently of the Charter. It is not necessary for

me to choose between these two interpretations of section 2.01. It is enough to say that when it decides the matter anew, the Appeal Tribunal may wish to address this issue.

[47] Thus, the Appeal Tribunal has jurisdiction to hear Mr. Linklater's claim that sections 3.02(g) and (h) of the Election Act are of no force or effect, as they are contrary to the Charter. As it failed to address this issue, its decision to remove Mr. Linklater from council must be quashed.

B. *Validity of the Residency Requirement*

[48] When the Court quashes a decision, the usual remedy is to send the matter back to the administrative decision-maker: *Vavilov*, at paragraphs 139–142. In doing so, the Court acknowledges that under the applicable legal framework, the primary responsibility for making the decision is ascribed to someone else.

[49] Nevertheless, Mr. Linklater is asking me to rule now on the validity of the residency requirement. He argues that the Federal Court has the expertise for doing so. Moreover, its decision would solve the matter once and for all and set a precedent for other First Nations who are grappling with similar problems.

[50] I decline to do so, for four interrelated reasons.

[51] First, the principle of self-government requires, at the very least, that the decision-maker to whom Thunderchild entrusted the responsibility to apply its laws should be given the

opportunity to make the initial decision; see, by analogy, *Gadwa v Joly*, 2018 FC 568 at paragraph 71 [*Gadwa*]; *Pastion*, at paragraphs 21–23. Beyond expertise, this is a matter of respect for the choice made by the competent legislative authority.

[52] Second, Mr. Linklater's application is unopposed. Before the Appeal Tribunal, the Thunderchild Government supported Mr. Linklater's position, but it declined to make submissions before this Court. The two Thunderchild citizens who initiated the complaint, Ms. Thunder and Mr. Jimmy, have chosen not to appear in this Court, even though they had made submissions to the Appeal Tribunal seeking to uphold the validity of the residency requirement. As a result, no one spoke on behalf of the Thunderchild electors who initially adopted the residency requirement and who recently refused to repeal it. In particular, I have not heard arguments to the effect that the residency requirement would be justified pursuant to section 1 of the Charter (as in *Clark*) or immune from Charter review pursuant to section 25 (as in *Vuntut Gwitchin*). Yet, courts rely on the adversarial process to ensure that their decisions are the product of a careful weighing of all available arguments. They are hesitant to rule on constitutional issues where both sides have not been fully argued: *Schachter v Canada*, [1992] 2 SCR 679 at 695; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paragraphs 18–19.

[53] Third, I do not have the benefit of the reasons that the Appeal Tribunal could have provided regarding the validity of the residency requirement. Such reasons would have included factual findings, which are particularly relevant to the justification analysis pursuant to section 1 of the Charter: *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paragraphs 48–56, [2013]

3 SCR 1101. Moreover, as the Appeal Tribunal is composed of lawyers familiar with Cree culture, its decision on the merits of the Charter issue would have provided useful insights as to the application of the Charter in an Indigenous context, including the potential application of section 25: see, for an overview of the issue, David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights*, Vancouver: UBC Press, 2012.

[54] Fourth, because of the manner in which the proceeding unfolded, there is little evidence in the record. Yet, evidence is crucial to the determination of several questions at issue, in particular with respect to justification pursuant to section 1 of the Charter. In the *Vuntut Gwitchin* case, for example, extensive evidence was before the Court. Mr. Linklater, in contrast, argues the case mainly based on precedents from this Court. This could lead to a situation similar to the one described by the Federal Court of Appeal in *Laurent*, at paragraph 68:

> It would be unfortunate if the important constitutional questions raised by Mr. Laurent fell to be determined on the basis of the failure of Mr. Laurent to meet the onus of proving a constitutional breach, or the failure of Fort McKay First Nation to meet the onus of justifying any breach that may be found.

[55] I understand Mr. Linklater's desire for a quick resolution of the dispute. Indeed, most applicants for judicial review would like this Court to make a decision itself instead of sending the matter back. Admittedly, this would save time and resources, but the autonomy of administrative decision-makers would be subverted: *Vavilov*, at paragraphs 140–141. I also understand Mr. Linklater's assertion that a decision of this Court would have a precedential value benefitting First Nations across Canada. However, as mentioned above, there are already a number of precedents from this Court. I am far from certain that a decision rendered in the procedural context that I just outlined would make a useful addition to the existing case law.

C. *Remedies*

[56] Because it did not assess the constitutional validity of the provisions of the Election Act it was applying, the Appeal Tribunal failed to exercise its jurisdiction. Its decision must be quashed. This means that it must hear and decide the matter anew, if Ms. Thunder or Mr. Jimmy wish to pursue the matter. In the meantime, as its decision to remove Mr. Linklater from council is invalid, this means that Mr. Linklater remains a Headman and has never been validly removed from council. While I cannot order the payment of damages on an application for judicial review, it logically follows that Mr. Linklater is entitled to receive his salary from the date of the decision of the Appeal Tribunal.

[57] Mr. Linklater also asked me to order the holding of a referendum pursuant to sections 8.05 and 8.06 of the Thunderchild Constitution proposing the amendment or repeal of the residency requirement. At the hearing, Mr. Linklater also asked me to set "goalposts," in effect setting out a range of acceptable options that could be put to Thunderchild electors.

[58] I decline to order the holding of a referendum. It may well be preferable to settle the issue of the residency requirement by political instead of judicial means. However, this Court does not have a general power to call elections or referenda in First Nations: *Gadwa*, at paragraph 70; *Thomas v One Arrow First Nation*, 2019 FC 1663 at paragraph 32. Section 8.06 of the Thunderchild Constitution entrusts the responsibility of "formulat[ing] the question to be put to the eligible voters" to the Council, not to this Court. Amending the Thunderchild Constitution is a political process. Of course, any amendment must comply with constitutional constraints

identified by the Appeal Tribunal or this Court. Beyond that, however, the initiative remains with elected representatives of the First Nation. This Court's role is not to set "goalposts" nor to define a range of constitutionally valid options.

III. Disposition

[59] For the foregoing reasons, the application for judicial review will be allowed in part. The decision of the Appeal Tribunal is quashed and the matter is remanded to the Appeal Tribunal for redetermination. Mr. Linklater's removal from council is invalid.

[60] The parties asked me to defer the issue of costs. Accordingly, the parties will have 30 days from the date of this judgment to make additional submissions in this regard.

JUDGMENT in T-892-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part.
2. The decision of the Thunderchild First Nation Appeal Tribunal dated July 13, 2020 is quashed.
3. The matter is remanded to the Thunderchild First Nation Appeal Tribunal for redetermination in accordance with these reasons.
4. The parties will file their submissions as to costs, not to exceed 10 pages, within 30 days of the issuance of this judgment.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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JUDGMENT AND REASONS:	GRAMMOND J.
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APPEARANCES:

Jeff Howe	FOR THE APPLICANT
Dusty Ernewein	FOR THE RESPONDENT (THUNDERCHILD FIRST NATION GOVERNMENT)

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