Federal Court of Appeal  Cour d'appel fédérale

Date: 20180410

Docket: A-478-16

Citation: 2018 FCA 72

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

BETWEEN:

COLD LAKE FIRST NATIONS

Appellant

and

GEORGE NOEL

Respondent

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] Cold Lake First Nations (CLFN) appeals a decision of Fothergill J. of the Federal Court (2016 FC 1321), allowing George Noel's application for judicial review of a decision of the CLFN Appeal Committee (the Committee) and returning the matter back for redetermination.

[2] In the said decision, the Federal Court concluded that the Committee's decision confirming the exclusion of the respondent's candidacy for Chief was unreasonable, because the evidence was insufficient to demonstrate that the respondent owed more than $3,000.00 to CLFN, and because the Committee did not consider the respondent's response to the protest against his candidacy based on his familial relationship with Bernice Martial, another candidate. In this appeal, CFLN does not contest that the Committee's decision in respect of the respondent's ineligibility based on his familial relationship with another candidate was unreasonable.

[3] For the following reasons, I would dismiss the appeal with costs.

I. CONTEXT

[4] On June 15, 2016, the respondent was nominated to run for Chief of CLFN. Four protests were filed against his candidacy before the CLFN Elections Officer (the Elections Officer), a non-member of CLFN pursuant to subsection 8.D of the *CLFN Election Law* (the Election Law). The protesters alleged, among other things, that the respondent was ineligible because he owed more than $3,000.00 to CLFN (subsection 4.L. of the Election Law).

[5] The only protest relevant to this appeal was filed on June 17, 2016, by Ms. Cecilia Piche. Ms. Piche attached to her protest a copy of what looked like an extract from an electronic ledger containing various entries allegedly showing that the respondent owed $47,125.75 to CLFN. This document is a series of printed screenshots where the respondent's name appears at the top. It includes entries dating from March 1992 to September 2002 such as "advance on wage", "loan

payment" and "loan deduction". The name of the band cannot be found anywhere. The appellant argued before us that at least two of these entries could be understood by a member of CLFN's community, as referring to matters related to CLFN. There is no evidence that anyone informed the Committee in this respect or that the Committee (composed of non-members of the CLFN) was aware of this fact.

[6] The Elections Officer declared the respondent ineligible on the basis of the said document and sent him a letter on June 18, 2016 informing him of his decision. Concomitantly, the Elections Officer also declared ineligible other candidates for Chief and Council. One of these decisions is the object of the appeal in file A-468-16, for which separate reasons have been issued (2018 FCA 73).

[7] Based on evidence filed in the context of the application for judicial review, it appears that the Elections Officer requested on June 17, 2016, the Chief Financial Officer of CLFN to confirm the authenticity and reliability of the ledger but received no such confirmation before rendering his decision. In his written examination, the Elections Officer stated that he "verified the document from Cecilia Piche in the afternoon of June 17, 2016 with Elder Advisors of Cold Lake First Nation" and "[t]hey confirmed the contents of the document" (written examination of Allan Adam, Appeal Book, tab 9 at 178). There is no evidence explaining how these Elders would have been in a position to know or confirm the existence of this debt as of June 2016.

[8] In his June 18, 2016 letter to the respondent, the Elections Officer does not mention that he verified with the Elders the content of the document but rather than he had "been provided

with access to a committee of Elders to advise [him] on the traditional laws of the Cold Lake First Nations people" (my emphasis) (Appeal Book, tab 10 at 182). The same wording was used in the Elections Officer's letter to another excluded candidate in file A-468-16.

[9] The election for Chief was held on June 22, 2016, and for Councillors on June 29, 2016. Within 30 days of the elections, an excluded candidate, like the respondent, can file a protest, also referred to as an appeal from the Elections Officer's decision regarding his or her candidacy (subsections 8.I, 14.A and 14.I of the Election Law). On July 15, 2016, the respondent appealed from the Elections Officer's decision to the Committee.

[10] Other excluded candidates and a protester also appealed. These appeals were filed shortly before the expiration of the 30-day time limit set out to do so. I note that this may not be the most efficient way to deal with issues arising from a contested nomination as this would mean that new elections may have to be called. Furthermore, the Election Law also provides that the appeals must be finalized within the same 30-day time frame (subsection 14.H). If this is meant to include the Committee's review referred to at subsection 14.G of the Election Law, it is difficult to see how such time frame could be respected. A notice of the public meeting, referred to at subsection 15.C of the Election Law, must be sent. The Committee must then review the evidence filed with the appeals in light of the additional information/documentation obtained during such meeting and consider the merits to reach a decision on every appeal and draft its reasons accordingly. This short time frame may explain why the Committee issued its decision in less than 24 hours after the public meeting provided for at subsection 15.C of the Election Law.

[11] The Committee, composed of three members chosen from a neighbouring community operating under a traditional election system (subsection 15.B of the Election Law), dealt with

several appeals duly filed before it at a public meeting held on August 10, 2016. It is difficult to establish the narrative of the hearing as the Committee kept no minutes and submitted no evidence in that respect. We only have affidavit evidence from Ms. Piche and the respondent as to what took place during the said meeting. Furthermore, the Elections Officer's report to the Committee with respect to this appeal, required under subsection 14.F of the Election Law, is not in the record. At the hearing before us, the appellant's counsel indicated that the Elections Officer simply transmitted copies of the documents he had received. There is no evidence, including the affidavits filed in the context of the judicial review application, indicating that the Elections Officer advised the Committee that he had consulted with three Elders on June 17, 2016, or that the Committee received any documents other than those transmitted by the Elections Officer before the public meeting or when the appeals were under reserve.

[12] In her protest, Ms. Piche does not indicate how she obtained the printed screenshots she attached to her protest. Ms. Piche did not work in a position that would have given her access to CLFN's electronic ledger. Ms. Piche was present at the public hearing; however, the Committee did not ask her any questions regarding how she obtained them and she did not volunteer comments in that respect (affidavit of Cecilia Piche, Appeal Book, tab 6 at 58). The Committee directed the financial administration of CLFN to provide supporting evidence. During this meeting, which ended at 4:45 p.m., CLFN neither responded to this request nor offered any information whatsoever to confirm that Ms. Piche's document was indeed a copy of their electronic ledger.

[13] There is no indication as well that the Committee consulted the Council of Elders or anybody else with respect to the implementation of the traditional law (subsections 1.G and 15.E of the Election Law).

> We only know that the respondent and his counsel made representations and answered all questions from the Committee. We also have uncontested evidence that the respondent took issue with the authenticity of Ms. Piche's document (affidavit of George Noel, Appeal Book, tab 3 at paras. 8-9). Furthermore, to support his view that he did not owe anything to CLFN, the respondent attested that he had run as a candidate in several elections and served as a Councillor of CLFN in the term ending with the June 2016 elections without any question being raised with respect to this alleged outstanding debt. His counsel also made oral alternative arguments about the effect of the time limitation period if this debt had effectively been outstanding since 2002.

[14] The respondent also filed with the Committee a brief report prepared by Mr. Kasali, a Chartered Professional Accountant, which contained the following findings:

> 1. The said document does not have the name of a creditor whom George Noel is allegedly owing more than $3,000.
>
> 2. There is no statement of claims attached to this document showing an outstanding or Past Due debt.
>
> 3. The document is not a financial statement and appears to be fabricated.
>
> (Appeal Book, tab 10 at 199)

[15] There is no evidence as to whether the said accountant was present at the public hearing. His brief report does not explain the basis for his conclusion that the "document […] appears to be fabricated". From the evidence before us, it is likely that the said opinion was based on his review of the document and on the fact that the administration of CLFN did not respond to his enquiry about the authenticity of the document (affidavit of George Noel, Appeal Book, tab 10 at 191).

[16] Just before the end of the meeting, a member of the Committee asked the respondent's counsel whether or not an access to information request had been made in respect of the document provided by Ms. Piche (affidavit of George Noel, Appeal Book, tab 3 at para. 10).

[17] The respondent was advised that the decision would be made available around noon the next day. At that time, he received a copy of the Committee's reasons, which dealt with all of the appeals. The portion of these reasons relevant to the present proceedings is brief; it reads as follows:

> 4) George Noel- The outstanding balance owed to the Cold Lake First Nations has been established. A denial is NOT sufficient to overturn the finding. The burden of proof on a balance of probabilities has NOT been rebutted. The monies remain outstanding. If a re-payment plan is established before the next election, this ground cannot be relied on by a 'Protest'
>
> In the secondary ground, No immediate family may run for the same position including brother and sister, as George Noel is the brother of Bernice Martial, this is not allowed 6(c). The appeal is **dismissed**.
>
> (Emphasis in original)

[18] After the respondent filed his application for judicial review before the Federal Court on August 12, 2016, the Elections Officer received on October 7, 2016, from CLFN's current Chief, Ms. Bernice Martial, various documents including handwritten notes and cheque stubs allegedly supporting the information contained in the document filed by Ms. Piche (written examination of Allan Adam, Appeal Book, tab 9 at 178-179). It is not clear if this was provided in answer to the request made on behalf of the Elections Officer on June 17, 2016, or to the direction made by the Committee during the public meeting held on August 10, 2016.

[19] On November 30, 2016, the Federal Court issued its decision. Considering the core issue before us, and the role of this Court on this appeal, I will only briefly summarize its most relevant findings.

[20] The Federal Court found that the applicable standard of review was reasonableness. It then held that the Committee's finding that the respondent owed more than $3,000.00 to CLFN was unreasonable because it was based on insufficient evidence (Federal Court Reasons at para. 24). The Federal Court refused to consider all the documents included in the Certified Tribunal Record (CTR) such as the written notes and cheque stubs, which were meant to support Ms. Piche's document, on the basis that it was not satisfied that these were before the decision maker at the time it issued its decision. Although these appear to have been included in the CTR, presumably because the Chair of the Committee thought them to be relevant, there was no indication of when they were received by the Committee. Relying on *Canada (Attorney General) v. Lacey*, 2008 FCA 242 (*Lacey*), the Federal Court noted that, in any event, the CTR could only be included in the application record by way of an affidavit (Federal Court Reasons at para. 23).

[21] Finally, the Federal Court concluded that the reasons of the Committee in respect of the respondent's ineligibility on the basis of subsection 4.L of the Election Law were insufficient, as they did not address the respondent's expert evidence (Federal Court Reasons at paras. 23-24).

II. ISSUE

[22] As mentioned, the sole issue before this Court is whether the Committee's decision to exclude the respondent's candidacy to run for Chief on the basis of subsection 4.L of the Election Law is unreasonable. The said provision reads as follows:

> **4. ELIGIBILITY FOR CHIEF**
>
> […]
>
> L. Any person who owes the Cold Lake First Nations administration in excess of three thousand dollars ($3000.00) and who has made no attempt to repay the loan shall not be eligible for nomination.
>
> […]

III. ANALYSIS

[23] 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.

[24] In my view, the Federal Court chose the appropriate standard to determine whether, on the evidentiary record before it, it was open to the Committee to conclude as it did. In other words, the question before us is one of fact or at best mixed fact and law. It involves the application of a clear provision of the Election Law to the case of the respondent (*Fort McKay First Nation Chief and Council v. Orr*, 2012 FCA 269 at paras. 10-11; *Johnson v. Tait*, 2015

FCA 247 at para. 28; *Lavallee v. Ferguson*, 2016 FCA 11 at para. 19). More particularly, it requires the determination of whether or not the existence of a debt had been satisfactorily established.

[25] The appellant submits that the Federal Court erred in applying the reasonableness standard because it failed to give the Committee the considerable deference it is entitled to in respect of what it considers a simple finding of fact.

[26] On the one hand, the appellant says that the Federal Court should have considered all the documents included in the CTR as no affidavit was required to enter them into the application record pursuant to recent amendments to Rules 309 and 310 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules). Those documents, as well as the additional affidavits filed in the context of the application (see Memorandum of the Appellant at paras. 61-63 and notes 46-48), confirmed the authenticity and reliability of the document relied upon by Ms. Piche, and were sufficient to support the Committee's conclusion.

[27] On the other hand, the appellant argues that, even if one accepts that the Federal Court was entitled not to consider the additional documentation provided by the financial administration of CLFN because it was provided after August 11, 2016, the document supporting Ms. Piche's protest was sufficient in and of itself to conclude that "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47).

[28] Furthermore, the appellant says that, on the principles set out in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16, the reasons of the Committee, although brief, were sufficient to understand the Committee's reasoning, and could not serve as a basis to find that the decision was unreasonable.

[29] Finally, at the hearing, the appellant submitted that, on the basis of all the evidence before this Court in appeal, it is evident that remitting the matter for redetermination would not serve the interests of justice. In the appellant's view, it is now perfectly clear that the Committee would be bound to conclude the same way as it did, for there is now considerable and non-contradicted evidence that the respondent does owe the $47,125.75 to CFLN. Thus, as suggested by the Committee, the respondent will become eligible only if he makes an arrangement for the repayment of the money owed so as to avoid the application of subsection 4.L of the Election Law, even if this means renouncing the benefit of the time limitation which, in the respondent's counsel's view, would apply if this debt in fact existed.

[30] Although I agree with the appellant that there was no need to include the CTR into the application's record by way of an affidavit and that *Lacey* does not reflect this new rule (*Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 at para. 17), the general principle that judicial review of an administrative decision proceeds on the basis of the record that was before the administrative decision maker at the time of the decision still applies. It is only the documents contained in this record that are relevant pursuant to Rule 317 of the Rules. None of the recognized exceptions to this general principle applies here (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access*

Copyright), 2012 FCA 22 at paras. 18-20; *Chin Quee v. Teamsters Local #938*, 2017 FCA 62 at para. 5).

[31] In this case, I am not satisfied that the documents on which the appellant relies to confirm some of the entries found in the printed screenshots submitted by Ms. Piche were properly before the Committee when it issued its decision on August 11, 2016. It is also clear that they were not in its possession during the public hearing held on August 10, 2016 (see paras. 11-12 above). From the evidence before us, including particularly that of the Elections Officer (see para. 19 above), I can only infer that this additional documentation was provided to the Committee well after August 11, 2016.

[32] I assume that the Committee misunderstood what is relevant pursuant to Rule 317 of the Rules and it believed these documents had to be included in the record. Otherwise, it would be a serious irregularity for an administrative tribunal to add evidence into the CTR, i.e. documents that were not before it at the time of its decision, in order to justify its decision retrospectively.

[33] If I am wrong in this respect, and as mentioned during the hearing, I believe that, in the present circumstances of this case, the failure to provide those documents to the respondent and to give him the opportunity to comment on them before issuing the decision would in any event constitute a breach of procedural fairness.

[34] I also cannot agree that the respondent should have filed evidence contradicting this additional documentation in the context of his application for judicial review, once he became

aware that such documentation existed. It was neither the role of the Federal Court nor of this Court to redetermine the merits of the respondent's appeal before the Committee on the basis of the new evidence put forth by the parties. At the hearing before us, the respondent insisted that he has the right to respond to this additional evidence before the Committee in the context of a redetermination. If this Court were to redetermine the merits, it would deprive him of this opportunity to make submissions and file appropriate evidence in respect of this new evidence.

[35] Turning back to the core issue, was it reasonable to exclude the respondent's candidacy on the basis of the evidence available by the end of the public hearing held on August 10, 2016?

[36] At that time, the evidentiary record did not contain any evidence with respect to the provenance of the printed screenshots and how they were obtained. The Committee is presumed to have considered all the other evidence on file (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.) (QL/Lexis); *Boulos v. Canada (Public Service Alliance)*, 2012 FCA 193 at para. 11); that is that the respondent not only denied owing any money but, as mentioned, that CLFN had also failed to respond to his accountant's attempt to confirm the authenticity and reliability of Ms. Piche's document. The financial administration of CLFN had also failed to confirm to the Committee that it considered that the respondent owed the amount reflected in Ms. Piche's document. In fact, the said financial administration had not even confirmed that the said document was a true copy of CLFN's electronic ledger.

[37] This is somewhat troubling as it should have been easy to print a true copy of CLFN's electronic ledger and provide it to the Committee as soon as it requested it. The financial

administration should have been ready to provide this information on August 10, 2016, given that the Elections Officer had already requested such a confirmation on June 17, 2016. The appellant provided no explanation in that respect.

[38] Having considered the reasons in the context of the evidentiary record before the Committee, I can only assume that the Committee put some weight on the fact that the respondent had not made an access to information request after his accountant failed to obtain some confirmation from CLFN's financial management. It also gave no weight to the respondent's denial of the debt, even if it appeared supported by the fact that he did run as a candidate in prior elections and even served as a Councillor just before the 2016 elections. On the other hand, it appears to have accepted the document relied upon by Ms. Piche as sufficiently reliable to establish the debt of the respondent on a balance of probability, even though there was no evidence that it was indeed a true copy of CLFN's electronic ledger.

[39] Although the task of this Court or of the Federal Court is not to substitute its own evaluation of the weight of the evidence before an administrative decision maker, there are limits to the deference owed to such decision maker's assessment of the evidence. Even taking into account that the decision maker can relax the rules of evidence (*Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105 at 1112), the limits to deference have been exceeded in this case.

[40] As mentioned, the members of the panel are not members of CLFN's community. There is no indication that they had any particular specialized knowledge that would enable them to assess the authenticity of the document produced by Ms. Piche. In fact, there would be no reason to direct the financial administration of CLFN to provide them with this information if it was

readily apparent that this document was a true copy of CLFN's electronic ledger. The Election Law clearly grants the Committee the power to ask any member of CLFN to make comments regarding the dispute under appeal or the traditional law of CLFN (subsection 15.E). The Committee did not, however, question Ms. Piche and issued its decision despite CLFN's failure to confirm that the document was a true copy of their ledger, and thus reliable as such. There is no evidence before us that the Committee sought to clarify some obvious issues. For example, how can one reconcile the fact that CLFN's electronic ledger would clearly reflect a debt of more than $47,000.00 with the fact that CLFN would not deduct this debt from the money earned by the respondent as Councillor? How does it make sense that nobody would have sought to implement subsection 4.L or 5.I of the Election Law if this debt had been outstanding for so many years?

[41] Brief reasons are sufficient to enable a reviewing court to perform its task – if the Court is able to find in the record of the decision maker some justification for the conclusion it reached.

[42] In this case, the Court cannot simply assume that the decision maker, which is not composed of members of CLFN, somehow knew how Ms. Piche obtained the document she relied upon. It also cannot presume that the Committee had some plausible explanation for the fact that the respondent had run in several elections and even recently served as Councillor while being in contravention of subsection 4.L or 5.I of the Election Law.

[43] In the absence of any evidence before me as to what other information or knowledge was available to the Committee, it would be pure speculation to conclude that it was open to the

Committee to confirm the respondent's ineligibility. This illustrates how important reasons are when a complete record of the information or documentation at the disposal of a decision maker is not available to the reviewing court.

[44] I conclude that the Federal Court properly applied the reasonableness standard to the decision of the Committee in concluding it was outside the range of defensible outcomes and thus unreasonable.

[45] As for the remedy, the Federal Court has already ordered that the appeal in respect of the protest based on the respondent's familial relationship with Bernice Martial be remitted to the Committee for redetermination. I cannot exclude the possibility that the appellant might be able to prove that whatever debt existed has been paid. It is thus best to ensure that the respondent is given the opportunity to also respond to the additional documentation that is now available to the Committee in respect of Ms. Piche's protest. Therefore, I propose to remit also the appeal pertaining to subsection 4.L of the Election Law to the Committee.

IV. CONCLUSION

[46] I propose that the appeal be dismissed with costs in the amount of $3,000.00, all-inclusive, as agreed by the parties.

"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-1343-16

DOCKET:	A-478-16
STYLE OF CAUSE:	COLD LAKE FIRST NATIONS v. GEORGE NOEL
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 14, 2018
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	WEBB J.A. NEAR J.A.
DATED:	APRIL 10, 2018

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