



ABORIGINAL PEOPLES

ELECTIONS

Judicial review of Thunderchild First Nation Appeal Tribunal decision removing applicant from elected position of Headman (or councillor) — Applicant failing to establish his residence on Thunderchild lands after his election — Admitting residing in Saskatoon — Thunderchild citizens applying to Appeal Tribunal to remove applicant from council, as applicant failing to comply with *Thunderchild First Nation Election Act* (Election Act), s. 3.02(g) — Applicant, Thunderchild Government submitting that residency requirement found in s. 3.02(g),(h) contrary to *Canadian Charter of Rights and Freedoms*, s. 15 insofar as pertaining to Headmen — Appeal Tribunal refusing to strike down s. 3.02(g),(h)— Stating its jurisdiction not including ability to strike out legislation interpreted as being in violation of Charter — Whether Appeal Tribunal having jurisdiction to decide if residency requirement contrary to Charter — Appeal Tribunal having jurisdiction to hear applicant's claim that s. 3.02(g),(h) of no force or effect — Questions raised as to whether Charter applying to Indigenous legislation such as Election Act; if so, who has jurisdiction to decide issue — Federal Court of Appeal's decision in *Taypotat v. Kahkewistahaw First Nation*, 2013 FCA 192 binding authority to effect Charter applying to First Nation election legislation, such as Election Act — First Nation election appeal tribunal presumed to have jurisdiction to deal with constitutional questions unless specific exclusion in its enabling legislation — This presumption not rebutted in present case — Thunderchild Constitution giving Appeal Tribunal prominent role in this regard — Thus, Appeal Tribunal having jurisdiction to decide that certain provisions of Election Law contrary to Charter, invalid — Thunderchild, Canadian laws separate legal systems, sharing certain common values, principles, contact points — One contact point directly relevant to matter at hand creation of governance system in Thunderchild Constitution, Election Act recognized by other orders of government in Canada — Use of concept "band custom" in Election Act, Appeal Tribunal Act evincing intention to establish contact point between Thunderchild, Canadian law with respect to governance — One must presume that Thunderchild intended to create governance system effectively recognized pursuant to federal legislation — This suggesting that it wanted its governance system to comply with Charter — Thus, to ensure recognition, Appeal Tribunal's power to "determine any question of law," in Appeal Tribunal Act, s. 5.04c) must include questions of Canadian law, in particular Charter issues — Appeal Tribunal assuming degree of separation between Thunderchild, Canadian law not supported by Thunderchild's own constitutional, legislative texts — Commonplace today to ask courts of one legal system to take into account rules of another legal system — Decision quashed, matter remanded to Appeal Tribunal for redetermination — Application allowed in part.

LINKLATER V. THUNDERCHILD FIRST NATION (T-892-20, 2020 FC 1065, Grammond J., reasons for judgment dated November 25, 2020, 23 pp.)